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Political Sovereignty in
Native American Community Development:
Implications for Tribal Planning Strategies

by

Nicholas Christos Zaferatos

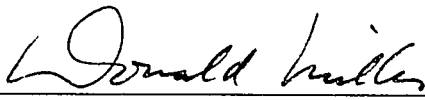
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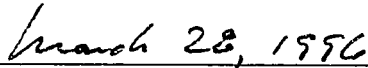
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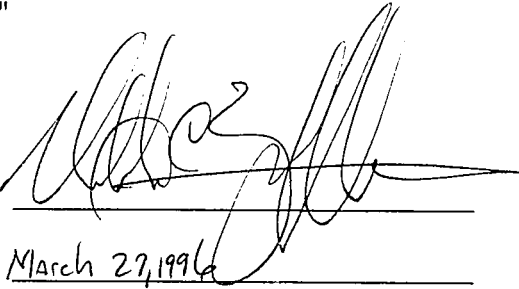
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Doctoral Dissertation

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A handwritten signature in black ink, appearing to be 'W. H. Z. J. L.', written over a horizontal line.

Date

March 27, 1996

University of Washington

Abstract

Political Sovereignty in
Native American Community Development:
Implications for Tribal Planning Strategies

by Nicholas Christos Zaferatos

Chairperson of the Supervisory Committee:
Professor Donald Miller

The Graduate School
Interdisciplinary Program for the Ph.D. in
Urban Design and Planning

American Indian tribes possess sovereign powers of self-government over their internal affairs and over their self-reserved territories in order to support their continued existence. Despite federal efforts that sought to assimilate American Indian societies, their sovereignty, and their territories, reservations continue to exist. The powers of tribal governments, particularly with respect to the exercise of territorial jurisdiction, are not clearly understood. The contemporary development of the Native American political community continues to be affected by federal Indian public policy, jurisdictional conflicts in state-tribal relations, and incorporation processes by the U.S. political economy.

This study explores the evolution of tribal governance to understand the problems facing tribes in advancing their community goals through reservation development. It will examine the context of the Indian planning situation with a practical aim of formulating approaches from the fields of planning and community development to guide decision-making to interact with, and overcome, independent variables that obstruct the attainment of tribal goals. This inquiry further provides a broad understanding of the nature of tribal community development as an exercise of political sovereignty.

The research contributes new knowledge about the problems encountered in tribal community development and argues that tribal participation in regional decision-making through the exercise of political action is a necessary component of tribal planning. The research is guided by fundamental questions that arise from historical experiences to construct several analytical models for interpreting current events in tribal planning. This conceptual analysis provides a basis to evaluate the suitability of alternative tribal planning responses. This research fosters greater understanding of historical opposition confronting tribal communities, identifies the conditions that are necessary to overcome those conflicts, and adapts planning strategies in order to aid the advancement of tribal community development.

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In my career search for an understanding of the meaning of "community", these friends welcomed me and imparted their special gift of kinship. They helped me to form a new understanding of community through a perspective that spans more than 30 centuries and through wisdoms carried forth from time immemorial. The depth of character of Native peoples and their communities is evident through their endurance of continuous struggle and their remarkable survival. Yet it is these communities that continue to offer the olive branch, or, more appropriately, the cedar bough.

I wish also to express my deep appreciation to Donald Miller, who, as chair of my Supervisory Committee, provided insightful guidance and encouragement throughout my research studies, and to the members of the Reading Committee, Gary Pivo and Dick Winchell.

My enthusiasm in pursuing the doctorate was driven by a personal interest to further my knowledge and proficiency in this extremely complex field of planning practice.

In my understanding of Indian Country, little importance is placed on class distinction, where diminutive, if any, separation is thought to exist between the elected council chief and the "cousin" who sets skiff nets in the estuary. Both individuals are understood to be equally vital parts of the fabric of the tribal community. I can imagine no further acts of aggression against these communities that could fragment their spirits. And it is indeed a paradox that, as our American society now begins to emphasize the importance of community sustainability, we are yet to fully appreciate the important contributions that can be learned from our

nation's first "civilized" societies.

This work is intended to aid tribal communities to further discern the complex obstacles that our dominant society has unilaterally imposed upon theirs to hasten their self-determined development. It is my hope that this project can provide some usefulness in uncovering the confusion created by our past federal Indian policy and to help fulfill the goals of our national Self-Determination Indian policy.

It is also my intention that this study be useful to future community planners who, in the course of their public service, may have an opportunity to interact with tribal communities. If I may so advise: Understand clearly and be conscious of our complex U.S. Indian history, and endeavor in your public service to prevent the possibility of any reoccurrence of wrongful acts.

DEDICATION

I extend my appreciation to the four very important woman in my life. To my wife, Cynthia, because she has so fully supported the professional career commitments that I have been dedicated to. To my daughter, Tamara, because she has shared with me during these years a concurrent commitment to academic achievement and a deep concern for the betterment of the human condition. To my mother, Peggy, because she has always stressed to me the importance of academic pursuit. And to my sister, Olga Karras, because of her continued encouragement in undertaking this project.

Above all, I wish to dedicate this endeavor to the memory of my father, Christos Nicholas Zaferatos, who immigrated to the United States with the dream of providing greater opportunities for his children. I can now feel a certain accomplishment in having attained what I believe were his hopes for my academic and intellectual success.

CHAPTER 1

INTRODUCTION AND RESEARCH METHODOLOGY

Overview of Problem and Research

Planning, in its simplest definition, is concerned with ways of imagining a desired future and selecting means to attain that future. American planning seeks, at its most ambitious undertaking, to improve the social and economic conditions of each and every member of the national community. The practical implications that result from our particular forms of political, social and economic institutions, however, have rendered that undertaking largely impossible. Recognition in recent decades of the American society's inherent plurality has led to the consideration of the particular needs of distinct social groups previously under-represented in American planning practice. This research aims to broaden our understanding and to promote planning's effectiveness in improving conditions of a particularly under-represented segment of the American community -- the Native American Indian tribe.

Native American Indian tribes have been subjected to various states of crisis since their earliest contact with western civilization. Treaty-making separated Indian people by removing native communities to isolated reservation territories, thereby allowing the progressive development of the vacated lands. For over a century and a half tribes have coped with a shifting federal Indian policy that has diminished their ability to exercise self-governance over their societies and over the territories reserved to sustain those societies. The tribal pursuit of self-governance became further complicated by obstacles that presented themselves throughout its historic contact with American society. The attainment of tribal self-determination, or the ability to govern territorial and socio-political affairs, is considered to be conditional to overcoming those obstacles. These circumstances are also thought to contribute to a reservation condition characterized as politically and economically underdeveloped. An understanding of the nature of those factors obstructing tribal authority illuminates planning's ability to devise strategies that advance the attainment of self-determination objectives.

Indian tribes, as distinct political entities, derive their governmental powers for determining their collective welfare from three basic sources: treaty rights, federally conveyed delegations of authority, and retained inherent sovereignty. As fully sovereign political entities prior to entering treaties, the tribes retained autonomous decision-making over their affairs. The treaties served both to limit their inherent sovereignty and, among other things, to confer specified rights and powers. The federal history of post-treaty relations, however, has been inconsistent and cyclical in the treatment of tribes as governments, as evidenced during the recent federal Termination era that sought the abrogation of treaties, removal of reservation status, and assimilation of Indians into mainstream society. Since 1970, the enactment of the federal Self-Determination policy pledged a federal commitment to strengthen tribal self-governance and lessen federal control over tribal governmental affairs, which, in the past "have stifled local decision-making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency" (House Joint Resolution 459, P.L. 97-445). Self-Determination, as first set forth in the 1970 Presidential Indian Policy, was authorized under Public Law 93-638 to reaffirm tribal rights and authorities. Self-determination policy promotes Indian self-governance by affirming the right of tribes to decide their collective future. The dependent-sovereign polity of tribes is a fundamental quality that distinguishes tribes from all other American communities. These recent developments in federal Indian public policy present new opportunities for examining planning's role in furthering tribal community development goal attainment.

Introduction and Focus of Research

This research examines the evolving context of tribal sovereignty through an exploration of the historical impediments that created a complex situation to diminish tribal self-governance and fostered the encroachment of non-tribal interests in tribal affairs. The effects of these historic processes of the U.S. political economy's expansion into tribal affairs is expressed in the concept of "incorporation." Further, the political economy's incorporation of the tribal territory

is exercised primarily through resistance to and denial of tribal authority, often supplanting tribal reservation jurisdiction with state and local authority. Representing the independent variables to tribal self-determination, the exercise of state political subjugation has led to a history of complex litigation, both nationally and, of particular concern to this research, within Washington State.¹

The research posits that tribal initiated interactions with the forces of those independent variables constitutes a necessary condition to overcome obstacles faced in tribal community development and to advance tribal interests. Further, it is argued that the greater the degree of reservation incorporation, the greater the necessity exists to overcome those forces. Conversely, it is also inferred that in situations where tribal incorporation is weakest, external obstacles that threaten tribal development are likewise diminished.

To facilitate the ability of tribes to advance their own community development, the historic events that caused the disruption to tribal control over their territorial affairs need to be better understood and reconciled. Furthermore, the nature of the intervening interests requires understanding in order that the obstacles may become identified as an integral component of the tribal planning process. The central premise of this research is that the preservation of the tribal political community, when faced with the conditions of external political interference, necessitates tribal intervention through the exercise of informed planning actions. Further, the methods of tribal intervention are contingent upon both the particular circumstances presented by the independent variables, and the ability of a tribe to effectively exercise its political authority.

Research Argument and Parameters

¹While the 1974 United States v. Washington decision settled the question of allocation of salmon fisheries, it did not address the allocation of shellfish. After twenty years, the recent shellfish decision serves to illustrate the lengthy delays that litigation often involves. On December 20, 1994, the U.S. Federal District Court (Seattle) presented its ruling in United States v. Washington, Subproceeding no. 89-3. Viewed as a continuation in the implementation of the Boldt decision, the decision has been appealed to the Ninth Circuit Court of Appeal.

This research is organized around a series of investigations to establish understanding about the contemporary conditions that prevent the fullest advancement of tribal development. In a sequence of chapters, the research demonstrates that, in order for tribes to overcome external forces influencing the outcome of their social and economic development, affirmative interventions emanating from their own political authority are required. This argument presumes that tribes first possess sufficient enumerated powers of self-government from which they can exercise intercession. To the extent that the absolute powers of the once autonomous tribes have been diminished, an examination of the history of Indian public policy provides an explanation of the processes that led to the decline of tribal dominance over their territories and, simultaneously, enabled non-tribal interests to emerge and exert their own authority over tribal affairs. These situations combine to create a modern context, or a tribal planning situation, that tribal governments now operate within. Hence, the exercise of tribal sovereignty is dependent upon overcoming historic impediments that have created conflicts between the growing plurality of interests within the Indian territory. The strengthening and exercise of tribal political self-government, and the evaluation of approaches suitable to resolving these conflicts, are examined in the application of explanatory theory and from models in the planning and community development literature. Further, an examination of experiences in intergovernmental conflict resolution illustrates the long-term benefits derived from negotiated solutions over the persistence of conflict. The application of case study analysis examines the effectiveness of several tribal interventionary strategies that are directed to reverse its incorporation to regain control over its own development.

Two important subject areas serve as the general framework for investigation: 1) the assessment of the tribal planning situation as influenced by federal public policy and the political economy of the larger society; and 2) the evaluation of the planning and community development literature to inform approaches in tribal planning and community development.

Political Economy Obstacles - The persistence of outside political

interventions that confront tribal authority are viewed in terms of a dialectical relationship between tribal interests and, particularly, those interests of the state and local governments. The nature of this political conflict is explored through historic analysis. Public Indian policy and federal case law decisions describe the causal events that shape the tribal setting. An examination of differing philosophical ideologies distinct to the prevalent American society and to tribal cultures is necessary for understanding differences that underlie each community's articulation of goals and to identify further variables arising from cultural dissonance that contribute to social conflict. The effects of the historic processes of expansion by the U.S. political economy into tribal affairs, expressed in the concepts of incorporation and alienation, are examined through established theories to provide understanding about the structural relationship of the tribal situation embedded within the larger political economy. The research examines the validity of these models through descriptive and case study analyses to explain the conditions occurring in the tribal situation.

Alternative Community Development Models - Upon examining the nature of the tribal planning situation and the behavior of its independent variables, the research describes and evaluates alternative community development models useful in addressing the dynamic situation to which tribal planning must respond. Criteria are established in the research to describe the salient components of tribal self-determination. An analytical model containing the independent variables is then constructed to depict the forms of obstacles that confront tribal planning and to provide a logical framework for evaluating alternative approaches to conflict resolution.

Particular attention focuses on current innovations in public policy that serve to strengthen tribal governance and to promote more equitable forms of political relations between tribal and non-tribal governments. An analysis is conducted that describes the causal effects resulting from the shift in Washington State public policy from adversity to cooperation. This research element explores developments in state-tribal policy relations through the analysis of case study experiences,

including the principles supporting "Comprehensive Cooperative Resource Management" fundamental to the current era in Washington State resource policy development.² Viewed as examples of "mediating structures",³ this portion of the research links an understanding of the experiences of cooperative dispute resolution to building meaningful intergovernmental relations with tribes.

Statement of the Research Problem and Initial Hypothesis

The modern development of the tribal political community continues to be affected by federal Indian policies and jurisdictional conflicts in state relations.⁴ The central research concern is the identification of variables that act to interfere in tribal affairs. The factors that impede tribal community development are comprised of independent forces that are external to the tribes, initially identified through exploratory investigation.

As a beginning hypothesis, the reaffirmation of federal self-determination policy in recent years suggests that an important evolution is occurring in the status of tribal sovereignty. These changes have enabled the tribes to exercise dormant powers of self-government to exert greater control over the development of their reservation communities, historically usurped by non-tribal governments, and to expand their influence over proprietary economic resources.⁵ With the inevitability

²Included in this analysis is the Timber Fish and Wildlife Agreement, the Chelan Water Resources Agreement, the Growth Management Act, and other policy approaches used to facilitate cooperative dialogue.

³Mediating Structures refers to mechanisms available to foster communications towards the resolution of conflict, as discussed by Russell L. Ackoff in People Centered Development: Contributions towards Theory and Planning Frameworks, (Korten, Klaus, ed., 1984).

⁴It is obvious from Washington State's litigation history that a significant degree of jurisdictional conflict exists, and the chronic economic and social conditions encountered by tribal communities suggest that Indian community development continues to be problematic.

⁵Proprietary and economic right refers to off-reservation and on-reservation ownership rights, inclusive of water rights, fish, and shellfish harvest rights, fisheries

of expanded tribal authority gained through supportive federal policy, advancement in tribal community development activities, and the maturation of the tribal government's capacity to exercise effective powers, the likelihood for continued conflict with competing non-tribal interests remains high. Tribes, then, are confronted with the challenge of overcoming those external interferences that pose obstacles to their own development.

Statement of Hypothesis:

Tribal self-determination cannot successfully occur in complete isolation from a surrounding political economy that expands its interests by supplanting tribal interests. Tribal intervention that confronts these pre-emptive authorities and restores non-coercive forms of political relations, therefore, represents a prerequisite condition for overcoming historic conflict necessary to advance tribal goals.

Several conditions will be demonstrated in this study to support the statement of the hypothesis:

1. The development of tribal governments has been influenced in part by conflicting economic, social, and political interests originating externally and separate from the tribal communities;
2. The process for strengthening tribal self-determination benefits by understanding the historic development, motives, and interests of the external interests that operate in tribal affairs;
3. Because the external interests of the U.S. political economy have been institutionalized and tend to resist change, improvements in relations between tribal and non-tribal communities are dependent upon efforts by tribes that transform the nature of these relations;
4. A successful strategy advancing tribal community development requires a capacity to respond to the non-tribal interests that resist and challenge tribal governance;
5. A tribe's intervention to countering forces by independent variables is represented as a two step process. First, a tribe's interest is formally asserted in a manner often conveyed as a conflict approach. Second, the resulting conflict is then subject to resolution through the

habitat protection rights, and cultural resources protection rights.

employment of collaborative means.

The hypothesis reflects a distinct dualism that exists in the tribal planning situation. A dialectic exists between the continued isolation of the tribe from its regional surroundings and its ability to intervene in that region without causing, however, a cooptation of its sovereignty. The research will demonstrate that successful tribal influence over these independent variables occurs within a process that contains the approaches of confrontation, to directly challenge the unilateral actions that infringe upon tribal affairs, and the approaches of negotiation, mediation, and cooperation, intended to institutionalize mutual resolution of the conflict through improved intergovernmental relations. Hence, tribal strategies directed to overcome intrusion by external interests tend to employ both the conflict and cooperative approaches to reverse the incorporation of the tribal community.

Major Research Questions of Concern

Prior to examining the validity of this research hypothesis, the nature of the complex situation that tribal planning operates within, especially as shaped by unilateral historical events, must first be understood. This inquiry further requires a broad understanding of the nature of tribal community development itself as an exercise of political sovereignty. Several important questions of concern are stated to guide the study's methodological construction:

1. In what manner have historical federal events diminished tribal inherent sovereignty and its ability to determine its own development?
2. In what manner have these events introduced the presence of the political economy as an intervening force in tribal affairs?
3. What is known from the theoretical literature to explain the causes of the underdeveloped conditions of Indian communities?
4. What is the importance of a tribe's ability to exercise control over its territory in the understanding of tribes as sovereign governments?
5. Can a general framework be devised to describe the boundaries of tribal political sovereignty, the goals of self-determination, and the range of activities that comprise the field of tribal community

development?

6. Can models from planning and community development theory be applied to help inform an approach that overcomes obstacles in the tribal planning situation and concurrently serves the emancipatory goals of tribal self-determination?
7. Can subjugating and conflictive tribal relations with state and local governments be overcome by increased tribal participation in regional governmental relations?⁶

The Research Methodology

Research Design

This study is intended to expand understanding of a demanding social problem -- namely, the conditions that prevent the fullest development of tribal communities -- and to provide guidance to support remedial action. The goals of the research are to offer knowledge that can be useful for the elimination or alleviation of conditions obstructing tribal community development. Miller (1991:76) describes a three-step process guiding applied social science research. The first step provides an "exploration of the social setting of the problems, the factors involved, and the criteria that may be used to appraise the problem." The second step involves the description and diagnostic evaluation of those factors. Finally, the third step calls for the relationships among factors to be ascertained.

This study examines the phenomenon of the tribal planning situation with a practical aim of evaluating approaches from planning to guide decision-making in attaining self-determination goals. The study inquires into the nature of interaction between tribes and non-tribal governments to expand our understanding of the tribal planning situation, as more broadly stated in the interaction with the political economy. The research design contains seven operational stages:

1. To examine the fundamental research questions, which reflect a range

⁶Regional relations is a term used to describe a condition of increased and meaningful tribal participation in local or regional governmental affairs where such participation has historically been excluded or limited.

of complex social issues arising from the historical experience of tribes under a series of public policy initiatives;

2. To describe, through historical analysis, the tribal political status, the context of tribal self-determination, and the necessity for tribal territorial authority;
3. To assess concepts and approaches derived from the theoretical literature of planning and social action concerned with ways of overcoming social conflict;
4. To construct an analytical framework of the independent variables that interfere in tribal affairs, to stimulate thinking about the nature of the tribal political community situation, along a variety of analytical dimensions;
5. To evaluate the range of alternative means for overcoming conflict between tribes and other institutions through an analysis of experiences in the Washington State and the Swinomish Tribal case study. Case study findings will inform a generalizable framework for tribal community development and identify means for the reconciliation of conflict situations within tribal planning;
6. To integrate the research findings into several typologies⁷ and models to aid in identifying structural conflict conditions of tribal community development; and
7. To integrate the findings into a simplified and operational planning model that informs tribal decision-making about potential conflict situations, and to advance self-determination.

Selltiz (1976:90) identifies four major purposes in research design that are each useful to this study: 1) to gain familiarity with and insights into a phenomenon; 2) to portray accurately the characteristics of a particular situation; 3) to determine the frequency with which something occurs or its association with something else; and 4) to test a hypothesis of a causal relationship between variables.

Formulative or exploratory studies serve the first purpose, which is to

⁷Babbie (1973:273) recognizes the value of typology in summarizing the "intersection of independent variables of two or more dimensions".

discover ideas and insight, where flexibility in research design is needed to permit consideration of many different aspects of a phenomenon. Exploratory studies are useful in formulating a problem for more precise investigation, or for developing a future hypothesis and to increase the investigator's familiarity with the phenomenon under investigation. Early portions of the literature survey rely on exploratory techniques; however, the research problem requires more precise inquiry. The second and third purposes concern methods that minimize bias and maximize reliability of the evidence collected. Descriptive studies are primary methods that meet these objectives.

In the analysis of causal hypotheses, "the explanatory survey represents a set of techniques in which causal inferences are drawn from non-experimental data. There is no manipulation of independent variables or control over assignment of subjects" (Selltiz 1976:44). Rather, variables are investigated as they exist in the natural setting. Kish (1959) points out that such studies lack the exactness and clarity of laboratory experiments, but offer value in their breadth and external validity. In many cases, complex phenomena contain causal patterns that have many factors. When no single independent variable can be identified in such instances, a search for classes of events or characteristics from the past that relate to the phenomena serve to represent the factors. In causal analysis, Selltiz (1976:44) observes that "the dependent variable is the variable we are most interested in. It is dependent on other variables that precede it in a theoretical sense for the characteristics it assumes." In causal hypotheses, independent variables are causes, dependent variables are effects. The research treats the tribal political community and its intrinsic attributes as the dependent variable. External variables that affect tribal development are treated as the independent variables.

The case study represents a descriptive and explanatory approach to understanding the dynamics occurring in a given social situation, where the researcher seeks to collect and examine as many data as possible regarding the subject of his study. A case study seeks the most comprehensive possible description of a community to determine logical interrelations of its various

components. This approach to social research differs from other methods in terms of scientific objectives. "Whereas most research aims directly at generalized understanding, the case study is directed initially at the comprehensive understanding of a single, idiosyncratic case. Whereas most research attempts to limit the number of variables considered, the case study seeks to maximize them" (Babbie 1973:36). Ultimately, the researcher executing the case study seeks insights that will have a more generalized applicability beyond the single case under study. Further, the case study is a common research design used in qualitative analysis, which employs a number of descriptive techniques, for the systematic examination of past and present conditions. The use of multiple techniques and data sets in case study analysis also contributes to the comprehensiveness of the analysis.⁸

Content analysis is also recognized as a useful method for public policy examination. As a quasi-experimental design, the method is useful in studies where the concepts and sources of data are not readily adaptable to measurement or where control of variables is difficult, either because they are not complete or because their causes are not easily understood. Bracken (1981) describes content analysis as "a useful framework to cope with the diversity of policy material . . . especially appropriate in a situation in which there are difficulties in identifying and disentangling the variables for study and the way in which they act upon each other." Certain aspects of the research entail the systematic examination of government documents on Indian policy and legal case history. Content analysis provides a technique for the systematic examination of these materials. Nachmias and Nachmias (1987) identify two interactive processes in content analysis to analyze and characterize the research variables: the identification of its key characteristics, and the application of rules for determining and recording these characteristics into categories developed in the research. The rules used in this study are the observance of the variable in the literature survey and case study analysis.

⁸According to Baldassare (1986), "validity, generalizability, replicability and relevance are increased by use of several analytical techniques in case study."

The application of these rules provides objectivity and enables different researchers to obtain the same results from the data.

Logiohistory provides an effective method for studying complex phenomena by constructing conceptual categories that can explain the variables under examination in terms of their relationship to the situation. These categories are drawn through theoretical approximation by examining existing theories of explanation about parts of the phenomena and their intervention. This method begins by establishing basic categories that constitute an explanatory framework that is likely to be logically valid in examining the variables of the situation. In the process of defining a framework, explanatory propositions about the situation are formulated. The logiohistorical method is useful to this research to construct the analytical models incorporating explanations concerning the political economy's intervention, in general, to the tribal situation. Applied historiography, as a related historical methodological approach, emphasizes the linkages to past and present events and is useful in situating the social conditions of the present in terms, and as a consequence, of past events.⁹

Selected Research Methods

The research methodology consists of several principal methods that include: empirical research through historical descriptive analysis; content analysis of public policy and case law; survey analysis; and empirical research through descriptive case study. Historical analysis is the principal methodology used throughout the dissertation to construct a history of the sequence of events contributing to the current tribal situation. Historical inquiry and public policy research employ the research methods of historiography, logiohistory, and content analysis. Historical analysis is used to identify and uncover issues and circumstances that have arisen from past events relying, in part, on explanatory theories identified in the literature

⁹Stearns (1984:122) observes that "by relating present phenomenon to past events, the research gains a sense of direction, and to reconstruct the past accurately and without bias in order to ascertain, document, interpret their influences or to check the tenability of a hypothesis."

review.

Content analysis is used in the review of both policy and case law history to provide a systematic examination of a variety of pertinent material. The methodology is also appropriate for making observations and in investigating questions on the effects of public policy, and provides a structure for observing identifiable patterns among the policies. Indian public policy is examined through a simple time-series study of policy development over a 150-year period. Policy content analysis assists in identifying progressive patterns of change that occurred in federal Indian public policy over time, and correlates these events to the conditions observed in the tribal situation.

The case study is a preferred research method for examining contemporary social problems and public policy events. The case study employs empirical inquiry to explore a "contemporary phenomenon within its real-life context" by examining the distinctive setting, relying upon multiple sources of evidence to provide for the verification of the research's theoretical propositions (Yin 1994:13). The case study methodology provides a comprehensive and systematic process for the analysis of the historical, developmental, and present status of the tribal planning situation. The case study employs the research methodology of comparative and historical analyses to observe the evolution of change in the tribal situation. The purpose of the case study is to apply, illustrate, and further investigate the hypothesis advanced and the concepts examined in the theoretical portion of the dissertation.

This case study examines the approaches employed by western Washington tribes and local governments to eliminate jurisdictional conflict and to stimulate tribal community development, and establishes the demographic and land tenure data for correlation to propositional statements arising from the research. The case study is applied to examine the variables confronting a tribe's particular experiences and demonstrates the effectiveness of employing inter-governmental cooperative techniques as a strategy of its community development process. The development of a typology of independent variables and the analytical model depicting the scope of tribal planning activities is informed in part by the case study's empiricism. The

case study provides a basis for demonstrating the validity of the hypothesis proposed by demonstrating the gains achieved in the Swinomish Tribe's experience of employing an interventionist strategy in regional governmental affairs as an integral element of its planning approach, hence, advancing the hypothesis towards the development of a theory of tribal community development.

Case Study Design

Yin (1994:20) identifies the five components in case study research as the study's questions, its propositions, its units of analysis, the logic linking data to the propositions, and the criteria for interpreting the findings. The Swinomish case study provides a concrete situation to examine several questions guiding this research, notably: given the historic processes of incorporation that contributed to the conditions of a diminished tribal authority over its territory, what actions proved effective to reverse incorporation processes and foster increased self-governance to advance tribal goals? The proposition tested is grounded in the research hypothesis that advances the necessity for increased tribal interaction within its exogenous planning situation to affect favorable outcomes.

The case study design relies on comparative analysis of several case experiences to test the proposition. In a time-series analysis, the case study examines the outcomes of tribal intervention under three distinct community development approaches: 1) tribal isolation from events that became initiated and controlled by non-tribal governments, positing that non-intervening approaches facilitate the encroachment of external jurisdictions in tribal affairs; 2) the conflict approach that asserts tribal interests by challenging the validity of external authority; and 3) the negotiated-cooperative approach where the tribe's intervention in external actions provides a stimulus for advancing new forms of intergovernmental relations that contribute to utilitarian cooperation and foster the advancement of tribal goals. Several examples of tribal policy intervention are examined in four separate "case events" to ascertain how those outcomes benefitted tribal interests, constituting a linkage between the case study evidence and the proposition advanced in the research hypothesis.

Data Collection Methodology and Outcomes

The literature review provides for a historical overview of previous research, documents, and theoretic literature on tribal community development, and establishes a context for study in this field. Further, the analyses and correlations based on the literature provide a framework for applying historical findings to characterize the dynamic situation of tribal communities. The research tools consist of descriptive and comparative analyses to identify and compare theories for explanatory value to the tribal situation. Several classification frameworks are developed to contribute to the understanding of tribal community development. Classification provides a link between observation and more rigorous analysis of dependency relationships. The typologies and frameworks provided in this research project are based on a classification of the types of problems arising from the historical context of Indian policy.

The review and analysis of the literature provides contextual material suitable to the descriptive and analytical needs¹⁰ of the investigation. The research will first characterize the setting of the tribal political community by identifying and examining the status of tribal sovereignty and the various forms of non-tribal interests that intervene in tribal affairs. The identification of the variances in cultural values between tribal and non-tribal groups are also considered to suggest a potential disparity between each community's articulation of desired futures, as represented in that community's goals and actions. Secondly, the research will provide a comparative evaluation of approaches to overcome obstacles that resist the implementation of tribal community development. The inquiry will particularly emphasize the historical actions affecting tribal access and control over its territorial

¹⁰Good and Scates (1954) in their research on methodologies used in the study of social sciences observed that "The line between simple description and analysis is not a sharp one, and as a matter of fact it is not a very strong one, for analysis is a form of description. And conversely, description of any kind is to some extent analytical, in that it deals with particular aspects and not with vague, amorphous generalities."

resources.

A literature survey, drawing primarily from community development and political economy literature, examines plausible explanations to the causes that contribute to the underdeveloped state of tribal communities based upon relations between tribes and the general U.S. political economy. The objective of this portion of the research is to identify useful models to explain the particular circumstances of the tribal planning situation. The analysis of the literature will be applied to emphasize the importance of the dynamics occurring in the tribal planning situation and to expand understanding about the nature of tribal planning.

Sources of Information

The literature assembled for review was collected after an extensive search in bibliographies and indices. Topical searches on the major chapter topics made use of professional journal indices, published bibliographies, and searches in library collections. Books, government publications, reports and memoranda, law library collections and bibliographies, academic journals, and other professional publications were major sources of information. Specific sources of data and information used are cited throughout the text and referenced in the bibliography. Topical data were collected from a number of principal sources that include: general literature review on political economy, planning, and community development theory; federal legislative policy and judicial case law history; State of Washington legislative and executive policy history, compacts and agreements with tribes, census data, interviews, and secondary-source surveys.

Collection of the case study evidence was accomplished through several sources and include: 1) documentation of tribal correspondence, intergovernmental agreements, administrative records, formal studies and plans, and newspaper articles; 2) archival records and historic correspondence on tribal legislative matters; 3) interviews with tribal leaders and key staff policy advisors; and 4) through direct and participant-observation, where the researcher utilizes his past knowledge as a principal advisor to the tribal government in formulating community development approaches examined in the case study. The distinctive advantage of this latter data

collection approach is recognized by Yin (1994:108) as beneficial for accessing data and "surmising viewpoints and reactive tendencies to case study experiences to provide an accurate portrayal of the situational phenomenon, often unavailable or inaccessible to outside observers." Potential problems of bias are overcome through the use of multiple case studies that span a period predating the observer's personal participation, and the reliance on historical documentation.

Methodological Rigor

The process of building an analytical framework depicting the tribal planning situation relies on a series of historically based empirical observations as uncovered throughout the research. These inquiries support a series of theoretical propositions that are formulated in the development of the research chapters. Methodological rigor was maintained by adapting the procedures of demonstration in analyzing the historical data.

It is important to emphasize from the outset that the research is not intended to construct a formal theory of tribal community development. Castells (1983:xix) observes that, in the social sciences, whose historical and experimental character is quite unlike formal sciences, the crucial test of a theory is its adequacy, rather than its coherence. Castells (1983:340) suggests that social science research should not be intended as a "general epistemological position."¹¹ The empirical case study is not intended to advance formal theory from the research hypothesis. Rather, the case study provides for the demonstration of the adequacy of the research hypothesis

¹¹Castells (1983:339) observes: "This cautious strategy is the result of a serious effort to rectify theoretical formalism that has flawed social sciences in general. As a reaction against short sighted empiricism that forbade human thought to go beyond those situations that were measurable by rudimentary statistical tools, a series of theoretical attempts have been made in recent years to construct a system of categories and propositions from which research could recode observations in a helpful, cumulative form. Yet all efforts (from functionalism to structuralism) ended up in constructing a series of formal models that were as sophisticated as they were irrelevant. Their application in research led to a painful recording of observed experience, in which the conceptual frameworks added nothing to the understanding of that experience."

as supported by the research findings.

Yin (1994:33) identified four criteria for validating the case study method: its construct validity; its internal validity; its external validity; and its reliability. The case study's construct is valid because it relies on the use of multiple sources of empirical observations based on the tribe's community development experiences as its evidence. The study's internal validity is demonstrated through the technique of pattern-matching to establish a causal relationship that links the different tribal intervention approaches to influence the independent variables under investigation.

External validity is established through the application of the empirical evidence beyond the immediate case study to correlate the study's experiences to the research hypothesis. The case study findings are applied to a generalized framework to depict the causal relationship between the tribal situation and the outcome of its interaction with independent variables. The generalizations are then further applied to an operational planning model in the concluding research chapter to encourage the replication of its procedures in other tribal contexts. Finally, reliability of the case study is achieved by documenting the procedures of data collection enabling its replication. The case study protocol relies primarily on documented evidence of public policy records, correspondence, agreements, and other public records to comprise the case study's data base.

Contributions

This research contributes to the understanding of the status of historical opposition confronting tribal communities, identifies the conditions that are necessary to overcome those identified tensions, and adapts planning methodologies in order to promote tribal self-determination in community development. In contrast to past assimilation policies that presupposed state subjugation in the relationship with tribes, new forms of relations are evaluated that overcome the dominance of one political system, or one set of social values, over that of another.

Several analytical models are constructed from the research findings that can be used to better understand the dynamics of the tribal planning situation to aid, as an historically based learning tool, tribal decision-making. The research contributes

new knowledge about the problems facing tribal community development from exogenous sources, and examines the theoretical literature for explanations and approaches to the resolution of these conflicts. Because no existing body of theory has been developed that adequately addresses these questions, the research constructs its own framework for interpreting the research observations. The analytical framework representing the independent variables of the tribal planning situation provides a basis to assess the suitability of alternative responses. The operational planning model that is advanced acknowledges the dynamics present in tribal planning and serves an emancipatory purpose in advancing tribal self-determination.

Assumptions and Limitations

The research is designed to consider the causal effects of factors that influence tribal community development, particularly those factors affecting tribal communities in the Seattle metropolitan region. The research attempts to make observations and findings that are generally applicable to tribes in the State of Washington,¹² as well as other locations, although this broader application is not intended as a primary outcome of the research. The research focuses primarily on external independent variables that constrain tribal community development. Other influencing variables, including obstacles to tribal advancement arising internally from within the tribal political community itself are discussed, but they are beyond the scope of this research.

As a final note, research dealing with Indian and non-Indian relations face the risk of over generalization. The Indian population throughout the United States is recognized as being extremely diverse culturally, locationally, and politically.

¹²Tribes within the state provide a practical focus for this research. These tribes are often subject to a uniform state Indian policy of concern to this project. Sixteen of the state's twenty-six tribes within proximity of the metropolitan I-5 corridor are the focus of investigation because they share similarities regarding population and reservation size, land tenure status, treaty periods, reservation locations within Seattle's urbanizing region, off-reservation fishing and shellfish and related Phase II (**Boldt** decision) rights, and other common characteristics that the research will consider.

Generalizing about Indians and tribal communities risks making unjust inferences about their individually unique and complex situations. This research seeks to explore only a portion of an extremely complex social topic by referring specifically to the reservation-based portion of the Indian population, rather than, for example, the urban Indian situation, and is concerned primarily with the political aspects of the tribal sovereignty.

Overview of the Chapters

Chapter 2 commences the historical inquiry of tribal and non-tribal relations through a description of the two integral components that comprise an Indian tribe: the basis for its political sovereignty and its cultural attributes. The chapter covers the major developments in federal Indian public policy, examines the factors that have diminished tribal sovereignty, and provides an overview of the Indian legal doctrines. Because a community's social preferences underlie the formulation of its goals, conflicts often arise from the values dissonance between it and different cultural communities. These conflicts are examined as a contributing source of tensions in relations between tribal and non-tribal groups.

Chapter 3 examines the tribal political economy through the application of explanatory theories to broaden our understanding of the tribal situation. These investigations support the development of an analytical framework for characterizing the tribal situation. The causes contributing to conditions of tribal underdevelopment are critically examined through dependency and other explanatory theories, and approaches are reviewed to establish a causal relationship between outside forces and the tribal situation. The concept of alienation is introduced to further explain the processes that diminish tribal sovereignty. Incorporation theory is applied to the tribal situation to explain the conditions of underdevelopment and the processes that pre-empted tribal authority through the intrusion of state jurisdiction. Finally, genealogical research is introduced as an approach to understanding the subjugating nature of tribal and non-tribal relations.

Chapter 4 establishes the status of tribal sovereignty through an examination of the federal trust responsibility, and reviews the extent of general powers that are

understood to comprise tribal political authority. The importance of territorial control as a necessary condition to the attainment of tribal self-determination is also critically evaluated. The analysis emphasizes a review of post-1970 self-determination policy and related legislation, as well as pertinent federal case law. Chapter 4 concludes with an analysis of the pattern of federal policy and summarizes the implications of major court rulings affecting tribal territorial control to establish the basis defining a tribe's authority to guide the development of the reservation community.

Chapter 5 summarizes a number of research findings by structuring a framework of the range of independent variables that challenge tribal community development. The identification of the variables influencing the tribal planning situation informs the selection of suitable planning actions. Analytical models are constructed to account for the effects of the independent variables on the tribal situation.

Chapter 6 reviews the community development and planning theory literature, and evaluates, in particular, social learning and contingent planning approaches as suitable models for advancing tribal community development. This forms the groundwork for the development of the tribal planning guidance model. The chapter also provides a succinct definition of tribal self-determination for use in tribal community development. The evolution of tribal planning is illustrated in a table that relates different planning approaches to the historic periods in federal Indian policy.

Chapter 7 contains a set of descriptive survey data from selected western Washington State area tribes to examine the demographic and land tenure indicators that link the causes of tribal political and territorial incorporation to historic public policy actions. The emerging political influence of tribes in Washington State since 1975 is then examined through a series of public policy initiatives that encourage conflict resolution through direct tribal participation in natural resource policy

making and management.¹³ This chapter contrasts the emerging role of tribes as effective participants in intergovernmental relations with previous relations characterized as imbalanced, and provides a typology to summarize the range of contemporary conflict issues pending in the state-tribal relationship. This section also describes the process for institutionalizing improved relations with state and local governments as an approach to furthering tribal objectives. The precedent for encouraging negotiated solutions through communicative dialogue in Washington State are examined as a path to the long sought reconciliation of conflict posed by the forces of the larger political economy.

Chapter 8 provides the case study that confirms the research hypothesis by examining the recent experiences of one tribe that applied strategies to counter non-tribal governmental interferences in its affairs. Tribal community development is defined, which definition includes a range of activities and supporting legislative authority in a model representing the scope of tribal planning. The chapter concludes with an analysis of the case research findings that relates the reversal of incorporation processes to the tribal interventions.

Chapter 9 concludes this study by summarizing the findings concerning the several research questions and the hypothesis guiding the study's investigation, and discusses future research needs in this field. The final section also presents an operational planning model to guide decision-making in tribal community development. The model is based on the contingent planning approach that is designed to anticipate the occurrence of conflict in the future tribal planning situation.

¹³Tribes have embarked on an era of partnership in what has been referred to as the "new politics of natural resources policy" (Friadenberg, 1990), resulting from the Phase II Boldt decision. The emergence of the tribes in their new found role will be evaluated as an element to the changes occurring in tribal political development, and their goals for increased control over proprietary resources, located both on- and off-reservations.

CHAPTER 2

AN HISTORICAL OVERVIEW OF FEDERAL INDIAN PUBLIC POLICY

The Evolution of the Tribal Political Community

"A basic premise of federal Indian law is the right of Indian self government, which stems from the principle that tribal powers are not delegated but rather are inherent sovereign powers that have never been extinguished."¹⁴

Introduction

This chapter introduces the reader to the concept of tribal sovereignty by describing the two integral components that comprise an Indian tribe: the context of the tribal political community, and the context of its cultural attributes. The first section defines the conditions constituting the tribal political community and examines its evolution subject to the historic development of federal Indian policy. This discussion provides explanation through descriptive analysis of the factors that have diminished tribal sovereignty and its ability to determine its own development. The tribal cultural community is described in the second section to establish the distinct normative structures comprising the modern Indian ethnic identity. The chapter concludes with a discussion about the necessity for effective dialogue that communicates the cultural meanings of tribal self-determination in order to enable more effective relations to develop between tribal and non-tribal communities.

The term "Indian tribe" has a number of meanings. Ethnologists define a tribe as a group of Indians¹⁵ sharing a common heritage and a distinct language. At the most basic level, "A tribe is considered a group of Indians that is recognized as constituting a distinct and historically continuous political entity for some

¹⁴42 U.S.C. Sec. 1474.

¹⁵The term "Indian" can be defined in both an ethnological (racial) or a legal sense. Ethnologists classify a person as being Indian, as a distinct race of people, only when that person has greater than 1/2 Indian blood quantum. Federal laws define an Indian as anyone of Indian descent and may specify a minimum blood quantum to be considered as an Indian for purposes of those laws. Still other federal laws define an Indian as anyone who has been accepted as a member of a "federally recognized" Indian tribe, pursuant to the tribe's eligibility requirements for enrollment.

governmental purpose" (Canby 1988:3). Recognition depends on the express purpose for which the status of Indian tribe is asserted.

A tribe is normally recognized to exist by the federal government if Congress or the President ". . . has historically created a reservation for the tribe and the U.S. has had some continuing political relationship with the tribe" (Cohen 1942:6). The Department of the Interior requires federal recognition as a prerequisite for a tribe's entitlement to federal Indian services. Federal recognition may be derived from a treaty, statute, or executive or administrative order based on a previous relationship with the tribe as a distinct political entity. These events constitute the existence of a special relationship between the federal government and the tribe in question. To qualify for federal recognition, a tribe must satisfy the following five requirements as established by the Department of the Interior¹⁶:

- (1) The group can be identified by historical evidence, either written or oral;
- (2) Its members are descendants of an Indian tribe that inhabited a specific area and there are members who continue to inhabit a specific area in a community viewed as American Indian and distinct from other populations in that area;
- (3) The Indian group has maintained governmental authority over its membership and was an autonomous entity throughout history until the present;
- (4) The group membership is composed principally of persons who are not members of any other tribe; and
- (5) The tribe has not been the subject of congressional legislation expressly terminating its relationship with the federal government.

Denial of federal recognition does not necessarily disqualify Indian people from participating in federal Indian programs. Indians can still enforce a treaty that their ancestors entered into with the United States even though the federal

¹⁶In 1978, the Department of the Interior published criteria (in 25 CFR Part 83) for the acknowledgement of the existence of tribes not previously recognized.

government refuses to recognize the continued existence of that tribe.¹⁷ Tribes often were defined by their political identity. When several distinct ethnological tribes were placed within the same reservation, they often were given or took on a single political identity. Conversely, single ethnological tribes that were dispersed to different reservations acquired separate political identities. Although the terms "nation", "tribes", and "band" have often been used interchangeably in treaties and statutes, a treaty tribe may no longer possess its original form of self-governing authority if its governmental structure has been altered under Congresses' plenary powers.

Indian tribes derive their governmental powers for determining their collective welfare from three basic sources; treaty rights, federally conveyed rights, and retained inherent sovereignty. As sovereign political entities prior to the treaties, the tribes exercised full autonomy of choice in decision-making. The treaties served both to limit sovereignty and affirm specific rights and powers. The federal history of post-treaty relations, however, has been inconsistent in the treatment of tribes as legitimate governments, as evidenced as recently as the early 1950's to 1960's termination era. Since 1970, the enactment of the federal Self-Determination policy and subsequent legislation have again reaffirmed tribal rights and authorities. Self-Determination policy promotes Indian self-governance by affirming and supporting the right of tribes to decide their collective future. The dependent-sovereign political nature of tribes is a fundamental quality that, among other characteristics, distinguishes tribes from other American cultural communities.

There were estimated to be over 400 independent tribal communities prior to the arrival of Europeans (Pevar 1992). By the year 1900 the combination of war and disease reduced a population of over 1 million Indians to less than 300,000.

¹⁷The 9th Circuit Court found "the failure of the federal government to recognize a particular group of Indians as a tribe cannot deprive that group of vested treaty rights. The group must have maintained itself as a distinct community identifiable to the group named in the treaty". (U.S. v. Washington, 641 F. 2d. 1368. 9th Cir. 1981, Cert. denied, 454 U.S. 1143, 1982).

Since 1900, the Indian population has increased to 1.5 million (U.S. Census 1990). Currently, 510 Indian tribes are federally recognized, including 200 village groups in Alaska.¹⁸ The number of Indian reservations (including reservations, pueblos, rancharas, and communities) total 278. Many reservations contain a high percentage of land owned and occupied by non-Indians. Approximately 140 reservations have an entirely tribally-owned landbase. Indian reservations¹⁹ in the United States cover 56.2 million acres. Reservations vary dramatically in size, ranging from the 15.4 million acre Navajo Indian reservation to the Golden Hill Indian reservation in Connecticut containing one-quarter of one acre (Pevar 1992).

Indians have the lowest life expectancy of any group in the United States. American Indian life expectancy is only two-thirds that of the non-Indian population. Indians also suffer from a high rate of unemployment, and fall below the national average of income, quality of housing, and education.²⁰ Indians continue to be the most impoverished and economically deprived segment of our population.

Pevar (1992) observes that the major social and economic problems facing Indians today are a result of the complex and confusing pattern of laws, especially federal laws, that have dominated Indian life. While federal laws are intended to benefit the welfare of Indians, they have paradoxically caused both political and economic dilemmas. While Indians and tribes continue to seek self improvement, their economic survival and social welfare continues to depend largely upon

¹⁸U.S. Department of the Interior (1991). "American Indians Today", Deputy Commission of Indian Affairs. Bureau of Indian Affairs: Washington, D.C.

¹⁹"Indian Reservation" defines the area of land set aside by the federal government for the use, possession, and benefit of an Indian tribe or group of Indians. Most reservations were created through Congressional Act, a federal treaty, presidential order, or other act of Congress. All land areas contained within the exterior boundaries of an Indian Reservation are also referred to as "Indian Country".

²⁰U.S. Census (1990). "Selected Population Characteristics for American Indian and Alaska Native Areas. Summary Population and Housing Characteristics." U.S. Bureau of the Census: Washington, D.C.

assistance from the federal government. The conditions of tribal communities today, then, is intrinsically linked to 200 years of federal Indian policy and regulation.

To understand the present situation facing Indians and tribal political communities, an understanding of the historical events leading to their current political status is essential. Past federal Indian policy inconsistencies have shifted dramatically between two prevailing and opposing public policy positions. One prevailing position regarded the tribal communities as an enduring political entity with a protected territory. The other prevailing position sought the decline or elimination of tribes, the removal of their territories from trust protection, and the assimilation of their members into the larger, non-Indian society. These two contradictory positions in Indian affairs have continually emerged to shape legislation, court decisions, and the federal administration of Indian affairs. These policy shifts have occurred abruptly over time and have been disruptive to the tribes' social and political cohesiveness. The following describes the major periods of federal Indian policy since early contact. Table 2.1 summarizes the effects of the major federal Indian policy periods on the tribal political community.

Table 2.1
Effects of Federal Indian Policy

U.S. POLICY EVENT	PERIOD	EFFECT OF POLICY ON INDIAN TERRITORY
Independence Period	1492-1787	Isolationism; Recognition of Tribal Self-Governance and Autonomy
Early Period Agreements	1787-1828	Introduction of trade relations
Relocation Period	1828-1887	Treat Making; Reservation of Tribal Lands as exclusive Indian Territories
Allotment and Assimilation Era	1887-1934	Introduction of Private Land Ownership; Subdivision of communally held lands; procedure for trust to fee conversion of Indian lands; Immigration of non-Indians to Indian reservations
Indian Reorganization Period	1934-1953	Reconstitution of Indian Territory and Tribal Self-Governance

(Table 2.1 con't.)

Termination Era	1953-1968	Disbanding political authority of certain tribes; Foreclosure of tribal territories and full assimilation into U.S. political economy
Self-determination Era	1968-	Reconstitution of Tribal Territory; Affirmation of Tribal Sovereignty and Self-Governance
Self-Governance Period	1990-	Further promotion of Tribal Self-Governance through treatment as State delegation of Interior and other federal agency program responsibility.

Overview of Federal Indian Policy Periods

The Tribal Independence Period: 1492-1787

Prior to, and immediately following contact with non-Indian society, each tribe exerted autonomy over its own territory and conducted its affairs subject to its own form of government, cultural values, and language. Treaties and agreements were made between the early settlers and neighboring tribes, and goods were exchanged both for non-Indians to acquire title to Indian lands and to foster friendship. As these early settlements grew, however, conflicts began to emerge over control of the land.

Early Agreements with Tribal Sovereigns: 1787-1828

During the 17th century, both British and Spanish colonies began negotiating treaties with Indian tribes, thereby according tribes a sovereign status similar to their relations with the colonial governments (AILTP 1988). The British Crown's relationship with Indian tribes constituted a formalized relationship that treated the tribes as foreign states. Britain and its colonies entered into treaties with a number of tribes. As the colonists encroached upon Indian territories, an imminent threat of conflict became apparent. The Crown increasingly assumed the role of protector of the tribes from the colonialist encroachment. As a result, during the colonial revolution against Britain, many tribes aligned themselves with the Crown (Pevar 1990).

To avoid Indian conflict that was feared would be disruptive to colonial settlement after Independence, the U.S. Constitution clarified the federal government's role with respect to its future relationship with the tribes. Congress was granted constitutional powers to regulate commerce with the tribes, and the

President was authorized to enter into treaties with the consent of the Senate.²¹ The U.S. government regarded Indian tribes as having a status similar to that of a foreign nation, and efforts were made to solidify their political allegiance. The Northwest Ordinance of 1787,²² ratified by Congress in 1789, declared "the utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent."

The First Congress established the basis of Indian policy with the passage of the Trade and Intercourse Acts between 1790 and 1834.²³ The purpose of these Acts was to physically separate Indians from non-Indians and to subject the interaction of these groups to federal control. The Acts established the first boundaries of Indian Country,²⁴ and served to protect Indian interests in a number of ways: non-Indians were prohibited from acquiring Indian lands or from settling or entering upon those lands for purposes of hunting or grazing; trading with Indians was controlled through federal licensing and regulation; and crimes and takings by non-Indians against Indians were prohibited under federal laws that provided for federal compensation to injured Indians. The Trade and Intercourse Acts did not interfere with the commerce between Indians, which was deferred to the tribes. These protections, however, were often ignored; the federal government overlooked the forcible, illegal taking of title to Indian lands which continued throughout this period.

The Relocation Period: 1828-1887

Federal Indian policy shifted in 1828 when Andrew Jackson announced the

²¹U.S. Constitution, Article I, sec 8, cl. 3; Article II, sec. 2, cl. 2.

²²Act of August 7, 1789, 1 Stat. 50.

²³1 Stat. 137, 1790; and 4 Stat. 729, 1834.

²⁴"Indian Country" refers to all lands under the supervision of the U.S. government that has been set aside for the use and benefit by Indians. Indian Country incorporates Indian reservation lands as well as other lands existing outside Indian reservations under federal jurisdiction which is dedicated for Indian use. The term was first used by Congress in 1790 (18 U.S.C. sec. 1151) to describe the territory controlled by Indians.

federal goal of the removal of eastern Indian tribes to the west. This relocation or "removal" policy became the "dominant federal Indian policy of the 19th century" (Deloria 1985:242). In 1830, Congress passed the Indian Removal Act that authorized the president to negotiate with eastern tribes for their relocation to areas west of the Mississippi River. Many tribes that were previously granted permanent reservations in Arkansas, Kansas, Iowa, Illinois, Missouri, and Wisconsin, were forced to move to the Oklahoma Indian Territory. The federal intention of reservation relocation was to relocate Indians out of the settlement territories and require them to cede most of their previously occupied lands in exchange for a reservation of smaller territories. Concurrently, with the discovery of gold in California in 1848 and increased non-Indian settlement, western tribes similarly were subjected to the removal policies.

Congress enacted a number of laws during the mid-nineteenth century that sought to increase federal control over Indians and promote their assimilation into non-Indian society. The emphasis of these laws and subsequent programs was placed on educating and "civilizing" Indian youth. By 1887, over 200 Indian schools were established by the federal government that prohibited Indian youth from speaking their native languages and practicing their social and religious traditions.

A century following Congress' passage of the Northwest Ordinance of 1787 acknowledging the sovereign integrity of Indian tribes, Congress sought to diminish the status of tribal sovereignty. In 1871 Congress ended the practice of treaty-making with tribes²⁵ and abandoned its treatment of tribes as independent nations. Thereafter, federal interaction with tribes occurred through the passage of statutes that, unlike treaties, did not require tribal consent. Existing treaties, however, would continue to remain intact. Reservations created after 1871 were established through statute or by executive order. The intent of the reservation was to separate Indian and non-Indian, while concurrently encouraging the cultural assimilation of Indians into the American mainstream through the introduction of western religion and reservation

²⁵16 Stat. 544, 566, codified as 25 U.S.C. sec. 71.

schools.

Parallel to the emerging policy of Indian removal, the Supreme Court was formulating its own Indian legal doctrines that would influence Indian law for the following century and a half. The shaping of both federal Indian law and policy was influenced by three Supreme Court opinions written by Chief Justice John Marshall. Collectively referred to as the "Marshall Trilogy", the decisions included Johnson v. McIntosh (1823), Cherokee Nation v. Georgia (1831), and Worcester v. Georgia (1832). In the first of these major decisions relating to a tribe's legal and historic relationship to the land,²⁶ the court recognized the right of Indians to their land notwithstanding the United States' right to grant land occupied by Indians subject to that Indian right of occupancy. The doctrine of "Indian Title" became one of the most controversial doctrines in Indian law.

The court considered in Johnson v. McIntosh whether a non-Indian, who had purchased land from an Indian tribe, had indeed obtained valid title, as the purchaser could only acquire that interest which the tribe itself could legally sell. The Supreme Court held that the purchaser did not acquire valid title since the land was no longer owned by the tribe. The court ruled that by virtue of Europe's "discovery and conquest" of the North American continent, the U.S. government had become the owner of all the land within the United States. The court went on to rule that the Indians retained a "right of occupancy" of their ancestral homelands, a right that was superior to all claims other than those of the federal government. The federal government could extinguish this "Indian Title"²⁷ at will, but, until it did so, the Indians had the right to remain on their original homelands (Pevar 1992:20). The court thereby established four principles²⁸ of Indian title:

²⁶see Johnson v. McIntosh, 21 U.S., (8 Wheat.) 543, 1823.

²⁷Indian Title is also referred to as "Aboriginal Title" or "Indian Right of Occupancy".

²⁸The doctrine of Indian Title continues to serve as an important tribal protection. Federal courts have recognized that tribes can eject persons, including

- (1) The federal government acquired ownership of all land within the United States by discovery and conquest;
- (2) Indians retain a perpetual right to live on their ancestral homelands until Congress decides to take this land for other purposes;
- (3) Indian Title is a possessory interest, and Indians have a right to possess the ancestral homelands but not to own them unless Congress gives the Indians title to them; and
- (4) Indian Title cannot be sold by the Indians or bought by anyone else without authorization from the federal government.

Between 1828 and 1830 the state of Georgia enacted a series of laws that divided the Cherokee tribal territory among several counties, extended state law into the Cherokee territory, invalidated Cherokee law, and made it a criminal offense for the Cherokees to act in a governmental capacity. The Cherokees brought suit in the Supreme Court in Cherokee Nation v. Georgia.²⁹ The ability of the Cherokee tribe to bring suit was based on its "foreign state" status within the meaning of Article III, Section 2 of the U.S. Constitution defining judicial power. Chief Marshall determined that the tribe had demonstrated that it was a "state" and "a distinct political society separate from others, capable of managing its own affairs, and governing itself", as the treaties between the tribe and the United States government had so recognized. However, Marshall determined that the tribe could not constitute a "foreign" state³⁰:

Though the Indians are acknowledged to have an unquestionable, and, heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy,

state and local officials, from lands claimed under Indian Title, even when the non-Indian "owners" of those lands could trace their title back 150 years, during which time Indians did not occupy the territory.

²⁹30 U.S. 1, 1831

³⁰30 U.S. (5 Pet.) at 17.

be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.

Marshall had established the judicial basis supporting the future protection of tribal sovereignty by recognizing the status of tribes as "domestic dependent nations." This characterization of tribes as "wards" of the federal government provided a doctrinal basis for the protection of tribes by the federal government and reaffirmed the tribal right to self-government. In a subsequent appeal case to Worcester v. Georgia³¹ the court found that the treaties, along with the Trade and Intercourse Acts, "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, . . . in which the laws of Georgia can have no force."

Marshall's ruling in Worcester established the foundations of jurisdictional law that excluded a state's power over Indian affairs. The ruling, however, did not alter the administration's policies of removal; virtually all of the tribes located east of the Mississippi River were relocated to western regions.

The Allotment and Assimilation Period: 1887 - 1934

During the decade following 1870, two contrary public opinions emerged with respect to the conditions of Indians and their reservations. Sympathetic views towards Indians raised moral and social concern about the impoverished conditions most Indians faced on the reservations. Adversarial views objected to large reservation territories that prohibited non-Indian settlement. The two disparate viewpoints brought forth what both legal historians and the tribes consider to be the most disastrous period of Indian legislation in U.S. history, the General Allotment Act of 1887,³² also known as the Dawes Act. Initial support for passage of the Act

³¹31 U.S. (6 Pet.) 515 (1882) at 557.

³²24 Stat. 388, as amended, 25 U.S.C. Sec. 332-58.

reflected a growing sentiment towards improving Indian conditions. Canby (1992) observes that public opinion generally supported the view that, if Indians were provided the opportunity to cultivate their privately owned plots of land, they would eventually assimilate into American society as productive farmers. The tribal governments were viewed as obstacles to the ability of individual Indians to assimilate and, hence, succeed within American society.

The effect of the Act, however, was to diminish the role of tribal governments, abolish Indian reservations, and force Indians to adopt the agrarian and private property values central to non-Indian society. Congress divided communally held tribal lands into separate "trust allotments",³³ transferring to each eligible tribal member a trust title right to an individual parcel, and provided for the disposition of surplus parcels to non-Indians. Generally, allotments of 160 acres were made to each family head and 80 acres distributed to other individuals. Title to the allotted land remained in the U.S. in trust for a period of 25 years, after which time it was to be conveyed to the Indian allottee in fee title, free of encumbrances. It was the Congressional intent that Indians be protected from state taxation during this transitional period to Indian private ownership. The Act also conveyed U.S. citizenship to Indians upon receiving allotments and subjected Indians to state criminal and civil law.³⁴ The Act authorized the Secretary of the Interior to negotiate with the tribes for the disposition of excess lands remaining after allotments to provide for non-Indian settlement on those surplus lands.

The Act was imposed upon the tribes without the consent of the tribes or the

³³"Trust Allotments" refers to federal land that has been set aside for the exclusive use by an Indian, who is called the "allottee". A restricted allotment consists of land requiring federal approval before it can be sold, leased, mortgaged, or encumbered.

³⁴In 1924, Congress passed a statute conferring citizenship to most Indians born within the United States (8 U.S.C.A. Sec. 1401 (b)), completing the process of granting citizenship to Indians, and the additional complicating effect of subjecting Indians as citizens of the states where they resided.

individual Indians affected. The immediate effect of the Act was a rapid decline in the amount of Indian held land, reduced from 138 million acres in 1887 to 48 million acres in 1934 (Pevar 1992). A large percentage of the original land base was sold to non-Indians as tribal surplus. The balance was subsequently sold by the allottees when, after the 25-year trust period expired, their lands became burdened by state taxation. The Allotment Act subjected allotted lands to state intestacy laws and created a highly fractionated ownership pattern that made difficult the use and management of the land. With the transfer of ownership from Indian trust to fee allotments, many reservations became checkerboard configurations of Indian and non-Indian ownership.

While the objective of separating Indians from their lands was largely successful, the effect of the policy of Indian assimilation was later viewed as disastrous as most Indians did not wish to abandon their communal societies and adopt western values. Since most of the reservation landbase was unsuitable for small scale agriculture and represented a form of economic production alien to Indians, many impoverished Indians either voluntarily sold their land parcels to white settlers or lost their land in foreclosure, unable to pay state imposed real estate taxes. Tribal governments and their isolated communities became disrupted by the sudden presence of increasing non-Indian populations within the reservations and by the significant shrinkage of the tribal community's territorial homeland.

The legacy of the General Allotment Act framed the destruction of Indian culture and continues to present the major source of problems in contemporary tribal efforts to strengthen self government, maintain social cohesiveness, and achieve economic betterment.

The Indian Reorganization Period: 1934-1953

A major reversal of federal Indian policy was introduced in the early 1930's, resulting in part to the diminished demand by non-Indians for Indian lands and resources during the great depression. Public opinion at the time favored a radical

new policy. The Meriam Report of 1928³⁵ documented the failures of the federal Indian policy during the Allotment Period, and provided a new direction supporting a reversal of federal policy. In 1934, John Collier, Commissioner of Indian Affairs and a firm supporter of Indian reform, declared a new federal position towards tribes³⁶:

No interference with Indian religious life or expression will hereafter be tolerated. The cultural history of Indians is in all respects to be considered equal to that of any non-Indian group.

In June 1934, Congress passed the Indian Reorganization Act³⁷ (IRA), also known as the Wheeler-Howard Act. The express purpose of the IRA was to "rehabilitate the Indians' economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."³⁸ The IRA was founded on the principal that the indefinite existence of tribes was both likely and morally just. The Act sought to protect the remaining tribal territories and to assist in establishing a more effective governing structure to promote their self-governance.

The Act formally ended the practice of allotment of tribal lands to individual Indians, and authorized the Secretary of the Interior to add additional lands to existing reservations, to create new reservations for landless tribes, and to restore tribal ownership to any land that had been removed as surplus under the General Allotment Act and not sold to non-Indians. The Act also extended the trust period for allotments still remaining in trust. To strengthen self-governance, the Act authorized tribes to organize and adopt constitutions and by-laws subject to the ratification by the tribal membership and subsequent approval by the Secretary. Tribes were authorized to retain their own legal counsel, however, only after approval by the Secretary. The Act established a \$10 million revolving credit fund to incorporated tribes, and

³⁵Institute for Government Research (1928). The Problem of Indian Administration. Washington, D.C.

³⁶Annual Report (1934). Commissioner of Indian Affairs, p. 90.

³⁷25 U.S.C.A. Sec 461, et. seq.

³⁸H.R. Rep. no. 1804, 73d Cong. 2d sess., p. 6 (1934).

required the Secretary of the Interior to provide Indian hiring preference within the Bureau of Indian Affairs in order that "Indians may influence the formulation and administration of federal Indian policy."

Passage of the Act resulted in the increase of Indian landholdings by over 2 million acres between 1935 and 1953 and accompanying reservation improvements in health facilities, irrigation works, housing, schools, and roads. While the Act was effective in reversing the further erosion of tribal territories, provisions for encouraging tribal adoption of governing structures were less successful. The constitutional model of government encouraged by the Act was based on the U.S. Constitutional model, and was found unsuitable to the needs of many tribes. Approximately one half of the tribes hence rejected reorganization under the Act and chose to retain their inherent form of self-government.³⁹ The Act's significance remains in its support of tribal self-governance. Tribes that incorporated under the Indian Reorganization Act adopted standardized charters providing for the tribes to engage in economic activities within a corporate framework.⁴⁰

The Termination Period: 1953-1968

Congress abruptly abandoned its policy supporting tribal self-governance in the 1950's and also ended its commitment to improving the Indian economic condition. A new policy direction emerged that sought the collapse of cohesive tribal unity. The Congress sought to terminate the federal trust relationship and those associated benefits and services provided to Indian tribes, and to force the dissolution of their

³⁹The provisions of the IRA provided that tribes could vote not to be governed by its provisions and many tribes rejected the application of the Act. These tribes retained their aboriginal form of self government and their governing actions are generally not subject to Secretarial approvals. While some non-IRA tribes operate similarly to IRA governments, others continue to operate under unwritten customary laws.

⁴⁰Corporate powers were conferred to the chartered tribal corporations, however, many powers, including the pledging of tribal assets, remained subject to Secretarial approval. The corporate power subjecting the entity to law suits continues to concern many tribes that are cautious in waiving their sovereign immunity.

reservations.

In 1953 Congress adopted House Resolution 108 establishing the policy of termination by pronouncing its objective of "making Indians subject to the same laws and entitled to the same privileges and responsibilities as other citizens of the United States, and to end their status as wards of the United States."⁴¹ Under the policy, several tribes were terminated by statute that ended their special relationship with the federal government and fully subjected them to state laws. Further, their lands were converted to private ownership and often sold to non-Indians. While Congress expressed a purpose to "free" the Indians from burdensome federal control, the results were considered largely tragic. Concurrent with Congress's goal of termination, the Bureau of Indian Affairs encouraged Indians to relocate from the reservation, with monetary incentives provided under the Interior Department's Indian Relocation programs. These programs offered grants to Indians seeking employment in urban areas. However, unemployed reservation Indians relocated to target cities became part of the urban poor and suffered the additional social trauma associated with cultural dislocation.

In 1953, Congress furthered the termination policy with passage of Public Law 280.⁴² The statute extended state civil jurisdiction to Indian Country in five states, and conferred full criminal and partial civil jurisdiction over Indian reservations.⁴³ The law also consented to the assumption of jurisdiction by any other state that elected to assume such jurisdiction by either statute or by a state constitutional amendment. Consent of the concerned tribes was not required. Public Law 280 reversed the division of jurisdiction among the federal government, the states, and the

⁴¹H. Cong. Res. 108, 83rd Cong. 1st Session. 67 Stat. B132 (1953).

⁴²67 Stat. 588 (1953), as amended, 18 U.S.C.A. Section 1161-62, 25 U.S.C.A. Sec. 1321-22, 28 U.S.C.A. Sec. 1360.

⁴³The law transferred state jurisdiction to all Indian country within the five states of Nebraska; Wisconsin; California; Oregon, except the Warm Springs Reservation; and Minnesota, except the Red Lake Reservation.

tribes in those states where it applied, and had the effect of diminishing tribal authority.

State governments, which historically resisted the notion of tribal sovereignty within their territorial limits, had long sought to gain control over Indian resources and Indian people. Since Public Law 280 transferred powers and responsibilities from the federal government to the respective states, an anomaly was created in which tribal governance oversight was granted to the historic adversary of tribal interests. However, assumption of Public Law 280 jurisdiction by the states did not entirely extinguish the federal trust relationship. The Act disclaimed any grant to the states over the powers to tax Indian properties held in federal trust, or the assumption of treaty rights held in hunting or fishing.

In a later court challenge, in Bryan v. Itasca County,⁴⁴ the law was held to have not conveyed to the states general regulatory power in Indian Country. Public Law 280 represented only a partial step towards termination by eroding certain immunity from state powers previously enjoyed by the tribes. The state obligation under Public Law 280 was eventually ignored by the states because the delegation of authority required substantial enforcement responsibilities without the ability to generate a compensating tax revenue. The tribes viewed Public Law 280 unfavorably and objected strenuously to any reversion of federal powers to the states absent their expressed consent.

Tribal Self-Determination Period: 1968 to present

In 1958, the Senate Committee on Interior and Insular Affairs, seeking to reverse the loss of Indian lands to non-Indian ownership, persuaded the Secretary of the Interior to declare a moratorium on the further sale of Indian land pending an evaluation of the extent of Indian land losses. The study found that the loss of approximately 2.6 million acres of Indian land occurred between 1948 - 1950, and an additional approximately 1.8 million acres transferred to non-Indian ownership during the then current four-year period between 1953-1957. The results of the evaluation

⁴⁴Bryan v. Itasca County, 426 U.S. 376, 1976.

recognized the "potentially disastrous" effects of termination land policies and hastened Congress's disillusionment with termination policies.⁴⁵

By the 1960's, the termination policy was widely recognized as a failed policy. One of the earliest formal repudiations of termination occurred on September 18, 1958, when Interior Secretary Seaton called for the end of "coercive termination" in a radio address. Seaton⁴⁶ advocated against the further termination of Indian tribes unless:

Such tribe or group has clearly demonstrated first, that it understands the path under which such a program would go forward, and second, that the tribe or group affected concurs in and supports the plan proposed . . . To me it would be incredible, even criminal, to send an Indian tribe out in the streets of American life until and unless the educational level of that tribe was one which was equal to the responsibilities which it was shouldering.

In 1968, in an effort to repudiate the assimilationist policy, Congress passed the Indian Civil Rights Act.⁴⁷ The Act imposed upon the tribes the requirements of the Bill of Rights and constitutional restraints in their governmental actions, as similarly imposed upon the states by the 14th amendment. Through statute, the Indian Civil Rights Act imposed the requirements for the protection of free speech, free exercise of religion, and due process and equal protection under the law. The Act's passage presumed the continued existence of tribal governments in contrast to the preceding terminationist policy. The Act amended Public Law 280 to prohibit any further state assumption of civil and criminal jurisdiction in Indian Country without the express approval of the tribes,⁴⁸ and provided for state retrocession from such

⁴⁵Chairman of the Senate Committee on Interior and Insular Affairs, 85th Cong., 20 Sess, Memorandum: Indian Land Transactions XVII.

⁴⁶From Seaton's broadcast address, KCLS radio, Flagstaff, Ariz., quoted in 105 Cong. Rec. 3103, 1959.

⁴⁷82 Stat. 77, 25 U.S.C.A. Section 1301, et. seq.

⁴⁸25 U.S.C.A. section 1321-22, 1326.

jurisdiction. In the 1960's presidential election campaign, John F. Kennedy stated⁴⁹ that, if elected,:

There would be no change in treaty or contractual relationships without tribal consent and there would be protection of the Indian land base, credit assistance, and encouragement of tribal planning for economic development.

President Kennedy's later appointment of Stewart Udall as Secretary of the Interior created a commissioned special task force to address Indian affairs. The task force recommended a shift in policy from termination of the federal trust relationship to the development of human and natural resources on Indian reservations. Kennedy also sought to include Indians within his "new frontier" social and economic programs which led to expanded BIA services in education, vocational training, housing, and community development. The idea of self-determination gained further support during President Johnson's administration by including Indians within the "Great Society" legislation.⁵⁰ In 1966, President Johnson appointed the first Native American to the post of Commissioner of Indian Affairs. Under Robert Bennett's leadership, tribes were encouraged to contract with the BIA to administer on-reservation federal Indian programs.⁵¹

⁴⁹S. Rep. no. 994, 87th Cong. 1st Sess., part I, at 801, 1961.

⁵⁰In President Johnson's 1968 Indian policy speech entitled "Special Message to the Congress on the Problems of the American Indian: the Forgotten American" (1968, Pub. Papers, Part I, at 335), he proposed "a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stressed self determination; a goal that erases old attitudes of paternalism and promotes partnership and self help. An opportunity to remain in their homelands, if they choose, without surrendering their dignity; an opportunity to move to towns and cities of America, if they choose, equipped with the skills to live in equality and dignity."

⁵¹Tribes were included in many legislative programs under the "War on Poverty" years in the 1960's. In 1961, the Department of Housing and Urban Development (HUD) extended eligibility for public housing assistance to Indian reservations. HUD established tribal housing authorities to operate low rental and mutual help housing projects. In addition to the BIA and Indian Health Services, the Office of

In 1968, President Nixon commissioned a report on the state of Indian Affairs with recommendations for the future. The "Joseph Report"⁵² contained recommendations based on the "Indians' own expressed desires and proposals for solutions to their needs", and encouraged a policy of Indian self-determination. The newly accepted goals of Indian control over both planning and administration of Indian programs represented the cornerstone of Nixon's Special Message to Congress of July 8, 1970,⁵³ wherein he formally pronounced the new federal Indian policy. Nixon criticized past policies towards Indians and praised the "Indian's history of creativity and survival despite overwhelming obstacles." He called for the rejection of the extremes of termination and paternalism:

Termination, because it ignored the moral and legal obligations involved in the special relationship between tribes and the federal government, and paternalism, because it resulted in the erosion of Indian initiative and morale.

Urging Congress to pass a resolution expressly repudiating the termination policy in House Concurrent Resolution 108, he further advocated new legislation to empower Indian communities to assume control of their programs and their political affairs.⁵⁴ In 1970, President Nixon furthered the federal government's recognition of the failure of termination by formally repudiating the policy.⁵⁵ The new self-

Economic Opportunity provided broad services to Indians and reservations during the 1960's.

⁵²A. Josephy (1968). "Red Power".

⁵³Richard M. Nixon (1970). Published Papers, 564.

⁵⁴President Nixon expressly denounced the termination policy in 1970 and stated: "This, then, must be the goal of any new national policy towards Indian People: to strengthen the Indian sense of autonomy without threatening his sense of community" (Message from the President of the United States., 1970, "Recommendations for Indian Policy". Washington, D.C. Government Printing Office).

⁵⁵see 116 Cong. Rec. 23258.

determination Indian Policy statement reinstated the trust relationship between the federal government and the tribes, and encouraged further Congressional legislation to provide for greater tribal self government.

The Indian Self-Determination and Education Assistance Act of 1975,⁵⁶ recognized as the pivotal centerpiece legislation supporting Indian self-government since the IRA, provided the instrument that allowed tribes directly to administer within their reservations the federal government's Indian programs. The Self-determination Act has been described by Gethches (1979:110) as "perhaps the most important recent Indian legislation. It reflects a fundamental philosophical change concerning the administration of Indian affairs: that tribal programs should be funded by the federal government. But the programs should be planned and administered by the tribes themselves; and federal 'domination' should end."

In 1983 President Reagan reaffirmed the federal government's policy of promoting tribal self-determination and echoed President Nixon's reversal of the termination policy⁵⁷:

This administration intends to restore tribal governments to their rightful place along governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

The self-determination policy is premised on the ideal that tribes constitute legitimate basic governmental units, and it sought to strengthen their self-governance. The self-determination policy sought to promote the exercise of inherent sovereign powers possessed by the tribes through a number of fundamental approaches, the most important being the repudiation of termination (Cohen 1982). The civil rights movement of the 1960's propelled changes in public opinion towards Indian affairs, and the new federal Indian policies were consistent with the emerging national support

⁵⁶Public Law no. 93-638, codified as 25 U.S.C. Secs. 450f, et. seq., and in sections of 5, 25, 42, and 50 U.S.C.

⁵⁷Presidential Statement on Indian Policy. Weekly Comp. Pres. Doc. 98. January 24, 1983.

for minority equity.

Reconstituting the Tribal Territory

The development of the tribal economic base was an important objective during the Indian Reorganization Act period. During the 1970's, Congress again returned to a policy of reservation development with a greater emphasis on direct tribal participation.

As an important element of the development of their territories, many tribes sought the reconstitution of their fragmented land base through Congressional legislation to settle claims involving title to aboriginal lands. The composition of tribal territory was nationally affected by the Indian Land Claims Commission that offered a limited time period for tribes to file their claims to the taking of their aboriginal lands. In 1991, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), representing a major settlement by Alaska natives seeking to restore their aboriginal land claims. The Act extinguished all claims based on aboriginal right, title, use, or occupancy of land or water areas in Alaska in return for the transfer of \$462,500,000 of general treasury funds into a separate Alaska Native Fund.⁵⁸ Alaska was divided into 12 geographic regions, each containing a regional corporation, and village corporations were established for eligible native villages. The regional corporation supervised the distribution of funds to village corporations and to individual member stockholders. The Act also distributed over 40 million acres of land to the corporations.

Earlier, in 1978, Congress enacted the Rhode Island Indian Claims Settlement Act, concluding the first negotiated settlement of land claims made by a group of eastern tribes. The Act made available approximately 900 acres each of state and private land to a state-chartered, Indian-controlled corporation authorized to manage the settlement lands, and appropriated \$3.5 million to purchase the private settlement lands. In return, the tribe consented to extinguish its land claims within Rhode Island

⁵⁸An additional fund of up to \$500,000,000 was to be deposited into the fund from mineral royalties.

and all potential damages based on those claims. As in the Alaska Native Claims Settlement Act, Congress expressed a preference in restructuring tribal governmental status with a tribal corporate structure that served to further diminish the inherent sovereignty of the tribes.

The Tribal Cultural Community

This section examines the characteristics that describe the social value systems depictive, generally, of Indian societies. The author cautiously notes that broad differences exist between historic Indian cultural value systems and those recognized today, as well as variances between different cultural groups and norms contained within individual groups. Further, the generalizations chosen to be depicted reflect observations from previous anthropological work conducted primarily in the Coast Salish region of the northwestern United States. Nevertheless, this discussion aims to establish that the fundamental belief systems that have been observed to underlie modern Indian societies are distinct from, and often conflict with, the norms and social values of the dominant non-Indian society.

At the very foundation of the expression of a community's development goals are the consensual belief systems that reflect the collective community. This research seeks to uncover the dialectic tensions that exist in relations between tribal communities and the general U.S. political economy. Many of these tensions are manifested in cultural goal conflicts between these communities, especially relating to the use of land and natural resources (LeVine 1972). For example, northwest tribal communities have recently stressed a prioritization of instream flow regulations in water resource allocation policy that safeguards fisheries habitats. This priority, however, conflicts with the state's consideration of other non-tribal priorities for water allocation among competing user groups. According to the tribal view, past water allocation policies for such other competing uses have directly resulted in diminished fisheries resources. Recent tribal interventions through fisheries and water rights litigation (American Friends Service Committee 1970) represent attempts to protect Indian proprietary treaty rights by demanding greater consideration of the fisheries resources. Such confrontations represent both a proprietary economic

interest as well as a cultural preference to sustain a fishery resource that has, above and beyond its commodity value, a sustenance importance highly valued in Indian culture and traditional belief systems.

Ethnic Groups

An important distinction between cultures and ethnic groups was described by Barth (1969), who recognized that, while ethnic groups are the bearers of cultures, they are not limited to cultural groups. Barth observed that ethnic groups are created when groups of people of common origin and background ascribe to themselves a common identity. Members of these groups define their social boundaries by adhering to specific cultural traditions. "Anthropologists have historically focused attention on the differences between cultures, their historic boundaries, and their connections, but have not until recently investigated the constitution of ethnic groups and the nature of the boundaries between them" (Roberts 1975:5). Viewing Indian communities in terms of their ethnic development provides a fuller understanding about their ability to survive and adapt to new social circumstances, rather than merely describing their loss of aboriginal culture. In order to understand contemporary tribal community development, it is helpful to possess an historic understanding of their adaptation through their ethnic organization and their response to contact and continued interaction with non-Indian influences. The distinction between understanding tribal communities as ethnic communities as opposed to cultural communities is further advanced by anthropologists (Collins 1974, Amoss 1972) in their observance of the processes of cultural disintegration, or the loss of aboriginal cultures, creative acculturation,⁵⁹ and bi-culturation (Swinomish 1994).

Definition of an Ethnic Community

⁵⁹Roberts' analysis of ethnic evolution relies on a number of anthropological approaches including the "ethnic stratification" and the "long term transformations" of systems of ethnic stratifications (Barth 1969); and the phyletic process of fusion, or the merging of ethnic groups (Paden 1970). Approaches by LeVine and Campbell (1972) on ethnocentrism further contribute to an explanation of how ethnicity and group boundaries have undergone theoretical evolution over time.

Roberts (1975:8) describes an ethnic group as "the largest operating socio-political unit in an area that is recognized by the people themselves as something they belong to by virtue of where they live and what their origin is", and depicts the ethnic community as containing twelve central characteristics:

1. It is an "operating socio-political unit" containing a membership and a system of polity. This is distinguished from an ethno-linguistic category, which may not function as a community except with respect to sharing a language and other cultural features. The organization itself defines the function of its members engaged in a common activity.
2. It is a "coordinate unit" recognized by its members and given a name or a label. This distinguishes it from a culture or society. The boundary of an ethnic group is not always distinguished by a territorial borderline, but by the distinction made by the membership regarding the group's composition.
3. Members of an ethnic group distinguish themselves from other groups by their active participation in group activities and/or by a number of diacritica that help reinforce a sense of group identity. The diacritica may be cultural features or places of residence, peculiar features of the home environment or history, possession of cultural objects or specialized knowledge.
4. An ethnic group is an "original group", whose members share a common geographic or spiritual "home" and a common genealogical origin. Given survival over a long enough time, an ethnic group will contain members of all ages and both sexes.
5. The size of ethnic units may vary from as small as the extended family to an entire village.
6. Ethnic groups may experience frequent mobility among its membership. Some are exogamous. Their boundaries are usually maintained despite the flow of individuals across them. It has been argued that change of ethnic identity may require an individual to undergo a process of incorporation. Empirical findings by Roberts (1975) and others (Paden 1970) reveal this may be difficult and require years or generations of effort in changing cultural values.
7. Ethnic groups may be fragile and subject to recurrent dissolution and reconstitution in new personnel with new names, the smallest groups

being the most unstable.

8. The more mobile or fluid their elements, the less ethnic groups develop sharp or profound cultural differences from one another.
9. Over a period of time, ethnic units may undergo transformations by taking in new members or redefining their boundaries. This may be accomplished through the process of cultural fusion, where two or more groups join to share a common identity, or the process of cultural fission, or the splitting of a single group.
10. Ethnic units may be found in sets of increasing inclusiveness, especially when fusion of several small coordinate units is occurring.
11. Ethnic units usually interact with each other.
12. Relationships between ethnic groups take many different forms.

Value Differences Between Ethnic Groups

Notwithstanding the experience of acculturation and the acceptance of many non-Indian values, important value differences prevail that contribute to the maintenance of an Indian ethnic identity. Northwest coastal tribal communities, like other Indian communities, continue to place a high value on family and community life (Washington 1971). Tending towards a lifetime residency within their reservations, members of tribal reservation communities are generally characterized as less likely to relocate from their reservation communities than members of non-Indian communities. Tribal community members tend also to avoid isolation in urban areas, preferring to retain close associations with their well-developed familial community. Service to the community continues to be a common value emphasized by the community members; similarly, non-Indian values of individual achievement for material and financial gains are often replaced by cooperation. Roberts (1975:338) observes that in many Coast Salish Indian communities "generosity brings more esteem than display of items of personal wealth, especially generosity in giving food and meals to large groups. Face to face contacts are highly valued over impersonal communication in writing." Northwest coastal tribes also show a greater reverence for spiritual knowledge gained through transcendental experiences than do non-Indians

(Collins 1974). Even those members who may no longer participate in traditional religious activities and, instead, practice western forms of religion continue to acknowledge a strong personal association with traditional religion.

Indian people have objected to the assumption that the loss of native cultures is either inevitable or desirable. Many view acculturation⁶⁰ as something undesirable, and equate the acculturation process to "de-culturation", or the loss of a culture. Acculturation, which was thought to contribute to a long-standing American cultural "melting pot" ideal, has given way recently to a preferential notion of a plurality in American society, a notion that retains strong associations with its cultural diversification.

Bi-culturation is a concept that has emerged to promote the diversity in a society's culture by providing a positive model for cultural identity. Bi-culturation refers to a process of dual cultural competence. This occurs when an original culture is positively valued and actively maintained while concurrently achieving a competency in a mainstream or dominant culture. A bi-cultural community retains its original cultural traditions, identity, beliefs, and set of values while learning to cope constructively within a mainstream society. "This ability to balance both traditions reflects psychological and emotional maturity; it is indicative of good mental health" (Swinomish 1991:109).

Indian views towards their land and natural resources distinctly differ from predominant non-Indian views. Indians tend to view their land holdings, whether held in individual trust allotments or as community owned trust lands, as a collective rather than a private financial asset (Ackerman 1980). This personal view is considered holistic as it integrates a religious value regarding the land as sacred. Land holdings are rarely sold for financial gain. Rather, many tribal communities emphasize the

⁶⁰The anthropological meaning of the term "acculturation" originally referred to the process of interaction between members of two different cultures, resulting in increasing familiarity and exposure to the foreign culture, the exchange of ideas, goods and technology, and consequent change in each culture. In the acculturation process, one culture usually dominates over the other culture.

reacquisition of reservation lands previously sold out of trust ownership. In addition, the land is fundamentally understood as a permanent territorial homeland coupling the cultural continuity of the community to its polity (Ackerman 1981). The Indian land base, hence, is viewed as a social and political ecosystem that connects the community to its historical past.

The Suppression of Indian Religion and Traditions

Early Anglo contact with Indian communities often resulted in misunderstanding about Indian traditions and evoked ethnocentric assumptions about the superiority of non-Indian culture (LeVine 1972). A presumption of cultural dominance over Indian values eventually led to the persecution of Indian religious practices. Early settlers rarely sought to understand Indian religion (Collins 1974), instead projecting their own fears upon Indians by misinterpreting native practices as forms of devil worship, ignorance, or black magic. A lack of understanding of Indian religious traditions resulted in similar rejection of tribal cultures in general:

Most non-Indian cultures have little appreciation for the multiplicity and subtle complexity of Indian spiritual systems. Indian spirituality pervades many aspects of Indian culture. For thousands of years it has provided Indian people with a deeply spiritual outlook on life. These spiritual practices embody a deep contemplation of nature and the meaning of life and death and provide a set of socially constructive values by which Indian people traditionally conduct their lives (Swinomish 1991:30).

The earliest settlers in the northwest viewed Indian people as a primitive and ignorant culture, judging their values and religious beliefs as heathen. They relied upon their own technological superiority and ethnocentrism to persuade Indian people that "god was on their side". While many Indians publicly converted to western religions, most continued to participate in traditional religious practice. Non-Indian society eventually used institutional mechanisms, including the passage of laws prohibiting Indian religious practices, to disrupt tribal cultural cohesion. Cultural assimilation was further compounded by removing Indian children from their families to government operated boarding schools, or placing them in non-Indian foster and adoptive homes (Washington 1971). During the late 1800's it was declared illegal for

Indians to practice any aspect of traditional religion, spiritual dances, or healing practices. Courts of "Indian Offenses" were established to punish those practicing traditional beliefs. Indians were fined and imprisoned for possessing traditional spiritual regalia or participating in a traditional dance. The institutional mechanisms employed by the federal government sought the humiliation of Indian people who were encouraged to reject their traditional ways as primitive and evil.

As a result of persecution, Indians were forced to practice traditional Indian spiritualism in secrecy (Roberts 1975). The suppression of Indian religion eventually led to a diminished knowledge of valuable Indian tradition. Indians who preserved spiritual knowledge became extremely reluctant to reveal what they knew, and would often deny any association of that knowledge as a form of self, and community, preservation. Another significant effect of religious persecution was the loss of traditional medical and healing knowledge. Indian cultures have historically regarded their spiritual well being as an inseparable part of their physical, emotional, and social well being. Indian people have long practiced traditional methods of treating physical and spiritual illnesses through spiritual healing practices. The efforts resulting in disruption of the practice of traditional Indian religion directly caused the disruption of Indian healing systems.

The persecution of traditional Indian religious practices led to the formation in the northwest of the Indian Shaker Church. The Shaker Church combined Christian beliefs with traditional Indian beliefs, including the retention of Indian healing traditions. The Shaker Church offered Indians a way of adapting to the prevailing Christian beliefs while preserving a strong sense of Indian identity and cultural independence. Similar forms of "Indian Christianity" developed in other regions of the U.S. While the legal practice of persecution of traditional religion was abated following passage of the Indian Reorganization Act of 1934, prohibition of the practice was not formally repudiated until passage of the Indian Freedom of Religion

Act of 1978.⁶¹ However, by the mid 1900's disruption to Indian cultures had already occurred. Many Indians had become ashamed of their Indian ways or had lost confidence in their traditions. Others had learned to cope with persecution by either denying their association with traditions or privately retaining their experiences from non-Indian contact.⁶²

Ethnic Fusion

The process of assimilating cultural values and behaviors between ethnic groups was depicted as a process of ethnic fusion (Roberts 1975), and may include four distinct processes affecting the territorial boundaries of the ethnic group: boundary maintenance, fission, fusion, and intrusion.⁶³ Throughout the northwest tribal region, Roberts (1975:16) observed ethnic fusion as a prominent process affecting the identity of ethnic tribal groups. Fusion by semi-autonomous ethnic groups occurred prior to and during the treaty-making period, which grouped bands of tribes together under different treaties and reserved common territories for their relocation. Seven distinct ethnic groups from the Skagit region entered into the treaty of Point Elliot as signators.⁶⁴ Article I of the treaty provided for the ceding of the

⁶¹Indian Freedom of Religion Act. 92 Stat. 469 (1978) Codified in part 42 U.S.C. sec. 1996.

⁶²In 1987, the Church Council of Greater Seattle wrote a formal letter of apology to all Indian people, admitting the past insensitivity of Christian churches and pledging future support for, and defense of, Indian religious freedom (The Seattle Archdiocese, Letter to Northwest Tribes, 1987).

⁶³Boundary maintenance refers to the definition of ethnic identity unique from other groups. Fission refers to the splitting of a single ethnic unit into several parts and each subsequent part assuming a new ethnic identity. Fusion represents the merging of a group of ethnic units to form a new ethnic identify. Intrusion represents the migration of a new group into an ethnic community and fundamentally changing the identity of the original group.

⁶⁴These groups were the Skagit, Kikialus, Sah-ku-meh-hu, Me-sek-wi-guilse, Noo-qua-cha-mish, Swinamish, and Noo-wha-ah. Four other bands were indirectly represented or were protesting non-signators: Co-ba-ah-bish, Samish, Sba-le-och, and Mis-skai-whwa.

Indian land territories comprising an area extending from Tacoma to the Canadian border (see Figure 7.1). Article II reserved four tracts of land as exclusive Indian territory, and the Indians consented to relocate to these reservations within a one-year period following U.S. Senate ratification of the treaty. The process of ethnic fusion initiated by the treaties resulted in the modern formation of the northwest tribal communities upon designated reservation territories. The process of fusion experienced by the formerly independent groups are described by Roberts (1975:398):

1. The individual members of the ethnic group established a collective identity.
2. The frequency of their collective interaction resulted in increased ethnic cohesiveness over time.
3. Members of different ethnic groups established functional economic and political links with neighboring groups and established common genealogical histories.
4. Value congruence strengthened in part as a reaction to the introduction of foreign and threatening values represented by non-Indian settlers in the northwest.
5. Members of the newly expanded ethnic group identified a shared ethnic status and worked to improve the common control over their shared assets and their ranking in relation to other ethnic groups.
6. Ethnic fusion was facilitated when commonly recognized leaders emphasized their ethnic identity, service to the community, and the adoption of future-oriented goals towards group achievement.
7. The formation of a common reservation homeland territory fostered the early identity for the fused ethnic group.
8. The subsequent reorganization of their government further fostered cohesiveness of the ethnic group as a political community.

Community Values and Values Dissonance

The term "culture" refers to the underlying belief systems of a society as reflected in its general lifestyles and supported as a collective set of social norms and ideals. Many contemporary Indian lifestyles can be characterized as having a strong

sense of family orientation, common exchange and reciprocity among tribal members, and a shared collective experience, including historic social prejudice. Tribal societies continue to emphasize large community gatherings and shared meals that foster their cultural cohesiveness and exclusivity, which extend to other Indian societies through frequent travel within cultural circuits (Amoss 1972, Collins 1974). The persistent presence of alcohol abuse and the effects of repeated tragic deaths and losses continue to bind the community, which relies on healing processes primarily from within the community (Swinomish 1991). Many Indians continue to maintain functionally separate social and economic lifestyles apart from non-Indian cultures, often avoiding all forms of exchange with non-Indian society. Historic non-Indian prejudice has contributed to a strong Indian sense of distrust toward non-Indian society:

The history of persecution, prejudice, death, destruction of families and loss of language, and other important aspects of Indian culture forms a backdrop to Indian life which affects people's viewpoints, opportunities, and actions. Yet, Indian communities have retained their cultures in spite of historic influences because it [sic] has maintained within its community constructive and resilient responses to loss and misfortune (Swinomish 1991:167).

While adapting to non-Indian work standards, many Indian people continue to prefer a lifestyle that is based on seasonal work patterns. In Coast Salish cultures, the winter season continues to emphasize a commitment to spiritual values, inner strength, and sharing with family relations (Collins 1974). The summer season is devoted to work, primarily in commercial fishing. "While a receptive or even fatalistic life view may be intrinsic to some Indian cultures, poverty, alcoholism, and social alienation are not. While many Indian people face severe economic and social conditions, these conditions must not be confused with Indian culture" (Ibid:168). It has been widely recognized by Indian communities that the path to a more secure identity and improvement of their collective well being is integrally linked to the maintenance of their Indian culture. Further, the role of the tribal governance structure is increasingly relied upon by the membership to provide necessary protection from continued external disruptions to the community's social

cohesiveness.

Ten important behavioral characteristics depicting fundamental differences in tribal community values and attitudes serve as a framework of the variances in cultural patterns between dominant European-American viewpoints and those of native Americans. Since social values and attitudes provide the foundation for supporting the articulation of a community's development goals, a comparison of the contrasting prevalent social characteristics that may contribute to the potential for values dissonance between the Indian and non-Indian community is presented in Table 2.2 (Washington 1990). Although represented as an over-generalization of each viewpoint, the comparison, nonetheless, helps to emphasize the general social preferences that have been observed for each respective group.

Table 2.2
A Comparison of
Values, Attitudes and Behavioral Attributes

AMERICAN INDIAN VIEWPOINT:	EUROPEAN-AMERICAN VIEWPOINT:
<u>Cooperation</u> Cooperation is highly valued in the tribal community, rooted in past necessity for family and community survival. Because of strong feelings of group solidarity, competition within the group is rare. There is security in being a member of the group, and in not being singled out and placed in a position above the group. The sense of cooperation is so significant in many tribal communities that democracy is practiced as consent by direct participatory consensus rather than by majority or representative rule.	Competition is highly valued. Competing with one's peers to prove oneself better is often strongly reinforced. Competitive achievement is a necessity to personal advancement and success.
<u>Importance of Group Cohesiveness</u> Emphasis is placed on group cohesiveness and the importance of harmony within the group. Most Indians have a low ego level and tend to strive for anonymity. They stress the importance of personal orientation in the group rather than individual task orientation. The needs of the group are considered over those of the individual.	The concept of rugged individualism is encouraged. The needs of the individual are often considered over those of the group.

AMERICAN INDIAN VIEWPOINT:	EUROPEAN-AMERICAN VIEWPOINT:
<u>Patience</u> Having the patience to wait quietly is considered a good quality. Evidence of this value is reflected in Indian works of art, such as beadwork, quiltwork, or sandpainting.	One is taught not to allow "grass to grow under one's feet." It is considered important to act quickly and with haste.
<u>Modesty</u> The value of modesty is emphasized even when one does well and attains achievements. Boasting and loud behavior that attract attention to oneself are discouraged.	It is an acceptable practice to draw attention to one's accomplishments.
<u>Individual Autonomy</u> Value is placed on respect for an individual's dignity and personal autonomy. Indian people possess a strong desire to avoid controlling the behavior of others and they are taught not to interfere in the affairs of others. Children are afforded the same respect as adults. Indian parents generally practice non-interference regarding their child's vocation. Indians tend to dislike the domineering disrespect of an individual's right and avoid volunteering advice until requested.	It is acceptable to involve oneself aggressively in the affairs of others. Advice is freely given. Most non-Indian parents become involved in and influence their child's choice of careers.
<u>Placidity</u> Placidity is valued as the ability to remain quiet and still as silence is viewed as a comfortable state. Most Indians display few nervous mannerisms. To avoid embarrassment of oneself or others, feelings of discomfort are frequently masked in silence. When ill at ease, Indians observe in silence, while inwardly determining what is expected of them. Indians are generally slow to demonstrate signs of anger or other strong emotions.	Action is valued over inaction. The person who gets things done rapidly and moves on to the next task is admired. Silence causes discomfort. When ill at ease, verbal activity increases as do bodily movements. Emotional reactions are almost immediately visible.
<u>Savings</u> Indians traditionally haven't seen the value in amassing large quantities of goods, such as savings accounts or life insurance policies. This attitude reflects a past when nature's bounty provided for one's needs.	Saving is a means of achieving increased status. One is taught to forego present use of time and money for greater satisfaction anticipated at a later date. One is encouraged to place extra income in property investments and savings accounts. An individual who has learned the quality of "thrift" is admired and emulated.

(Table 2.2 con't.)

AMERICAN INDIAN VIEWPOINT:	EUROPEAN-AMERICAN VIEWPOINT:
<u>Sharing</u> Generosity and sharing are greatly valued. Most Indians freely exchange property and food. The respected person is not one with large savings, but rather one who gives generously. Individual ownership of material property exists, but is sublimated. Avarice is strongly discouraged. <u>Materialism</u> Acquiring material goods merely for the sake of ownership and status is not as important as being respected in the community. The person who tried to accumulate goods was often viewed with suspicion or fear. Vestiges of this value are still seen among Indians today who share what little they have, at times to their own detriment. A "give-away", at which blankets, shawls, and numerous other items, including money, are publicly given away to honor others, is still a common occurrence. Because of this traditional outlook, Indians tend not to be status conscious in terms of material goods. Upward social mobility within the dominant non-Indian society is not actively sought.	The value of sharing is recognized, but not strongly promoted. While the concept of sharing is advanced, it may come into conflict with the value of individual ownership, which seems to be all important. Generally, success is measured by the amount of accumulated material goods. Acquiring material goods for the sake of ownership and status is encouraged.
<u>Work Ethic</u> The Puritan work ethic is foreign to most Indians. In the past, with nature providing for the community's needs, there was little need to work just for the sake of working. Since material accumulation was not important, one worked to meet an immediate, concrete need. Habituation to a rigid work schedule was traditionally not in the Indian system.	The Puritan work ethic, extolling the value of work for work's sake, is admired and encouraged.

A distinctive set of cultural values has been described from a case study of the Swinomish Indian Tribal Community and are reflective of many Coast Salish tribal communities as well as others throughout the nation (Amoss 1972, Collins 1974, Washington 1971). These values reflect a strong emphasis on several primary social attributes: the importance of respectfulness, informality and social

involvement, social status, inter-family relations, community cohesiveness, community decision-making, non-self assertion and non-interference, and attitudes towards time. The following describes these attributes (Swinomish 1991:170) more fully:

Respectfulness - respect towards others is of major importance in tribal life. Norms for social politeness and respect may be represented in subtle and complex ways often difficult for non-Indians to understand. Coast Salish people understand respect in terms of "knowing one's proper place in the social structure and that of other persons" (Roberts 1975:170). Elders are especially recognized prior to others within the community. Views towards respect are also reflected in recognition of individual differences and the importance placed in individual experiences. Judgement of others is replaced with a quality of tolerance for individual differences where it is considered disrespectful to interfere with others' behavior and preferences.

Informality and Social Involvement - An important social value shared by many Indian communities is the informality in social interaction that removes social status differences. Indian people may perceive formality, rigid time schedules, professional jargon, and western fashion as means for establishing a separate social status at the expense of others, which are held contrary to Indian norms. Casual dress dominates within reservation communities. Informality serves to convey a concept of respect and social equality.

Social Status - Social status often determines an individual's self esteem, and personal and family respect and social recognition are often valued over popularity. In addition, public shame often is feared over illness, poverty, or other personal misfortunes. The social status of the Indian family, especially through ancestral lineages, contributes to the individual's social position within the community, and the behavior of an individual is viewed as a reflection on the entire family. Acts of generosity and traditional knowledge of the community and its member families are held in high regard in determining social status. As community historians, tribal elders are looked upon as advisors to the social history of the community.

Inter-family Relations - Many tribal communities contain several family groups that retain prestigious social and political influence within the community. An individual member's political and social ambitions may be influenced by family loyalties, obligations, and conflicts. The tribal extended family tends to form a social nucleus within many Indian societies where relations with other families are cautious not to offend other families, particularly those of higher social standing. Avoidance of disrespect between families is stressed to elude inter-family rivalries that may extend for

generations and become disruptive to the cohesiveness of the entire community.

Community Cohesiveness - Community gatherings of member families continue to represent an important tradition among Indian communities. The values placed in community sharing solidify the cultural sense of the entire community. Hospitality is a highly valued tradition, and a value extended by an entire community when hosting other communities. Opening one's home and giving gifts to guests continue to be regarded as culturally significant. Indian people often refer to this form of personal sharing as "Indian insurance". Reciprocal exchange and community support guarantee that families will not be abandoned to deal with their own misfortune. People who are generous in helping others often receive more assistance when in need, reflecting the importance of previous acts of generosity.

Community Decision-Making - Indian people generally avoid exercising control over other individuals, and tend to become more tolerant of differences than seek to change those conditions. Many Indian cultures place a greater value on social cooperation over individual decision-making in order to insure a collective and non-disruptive community cohesion. Indian decision-making styles differ from non-Indian styles in a number of distinct ways where decisions are often made by consensus only after family members have come to a mutual agreement rather than by voting (Swinomish 1991:178):

Non-Self Assertion and Non-Interference - Indian people value group cohesiveness over individual achievement and teach their children not to compete against others or stand out among their peer group. Adults may avoid excelling over others for fear of appearing superior, and rarely place themselves or their opinions forward of others. In traditional Indian societies an emphasis is placed on avoiding interference in the affairs of other families as the community reveres each family's right of self-determination. Social norms are reinforced informally in the Indian community through shaming, withdrawal of approval, humor and teasing, which affect the social rank of the individuals and their families.

Attitudes Towards Time - The reference to Indian people operating on "Indian Time" reflects an important cultural difference between most Indian and non-Indian people in their attitudes about punctuality. Scheduling and precise appointments are seen as foreign and destructive to forming meaningful relationships. Indian time refers to the conduct of activities that are adjusted to fit the time availability of its members rather than to a pre-arranged timetable. Indian people tend to exhibit great patience in their faith that problems will be resolved on their own accord. The attitude may result

in delays and may appear conflictive in interfacing with non-Indian situations. The importance of punctuality is often replaced with the importance of participation. Shared social responsibility, especially in times of social crisis, prevails over other matters and often has led to cultural conflicts in non-Indian contact.

Communications Patterns

Many Indian communities retain patterns of communication that are distinct from non-Indian forms. The languages spoken, use of intonations, subtle differences in meanings, physical gestures, facial expressions, use of humor, and the important use of silence each represents a major component of speech and is important in forming the community's system of communication.

Language has enormous cultural meaning for all people. We learn to think and express ourselves in a particular language. Some ideas or feelings may not be translatable between languages. Important cultural information, attitudes, and meanings are embedded in language (Swinomish 1991:186).

Where some native languages have been partially or wholly lost, others have been revived and continue to be spoken, especially among tribal elders. For those communities that have lost their languages, deep sense of loss, sadness, and shame may be experienced (Ibid:187). The consequences of cultural deprivation, which began with historic prohibition of the use of native languages, have had lasting effects on many Indian people. Native languages are also understood as an important link to spiritual connectiveness; the loss of language may be viewed as a severance of one's connection to one's spiritual foundations. Many tribes have stressed the importance of Indian youth learning their native language in order to more fully achieve a sense of community identity, which is not adequately conveyed through use of the English language.

While most Indian people have become fluent in the use of the English language, verbal communication barriers continue to exist in the dialogue between Indian and non-Indian communities. Indian forms of English speech often differ from the form spoken by the non-Indian community. One reason attributed by Roberts (1975) to the differences found in "Indian English" is that the language was

learned as a second language or learned from grandparents whose primary language was native, where differences in accent and rhythm can persist over many generations.

Many Indian groups use terms and phrases that are often misconstrued by non-Indians (Washington 1971), especially those expressions referring to their cultural traditions that are altogether foreign to non-Indian society.⁶⁵ For instance, Indian people may refer to home as "a place where they stay," connoting a different set of values towards the concept of home occupancy from that more commonly understood by the non-Indian community. The notion of "staying" at a home suggests a non-possessory concept in home occupancy that reflects traditional values of sharing shelter with an extended family group. Home ownership, in terms of western concepts of equity accumulation, appreciation, and privacy, continues to remain a largely foreign concept in the Indian community. Understanding the culturally based meaning of such expressions is critical for bridging an understanding between Indian and non-Indian communities.

Indian people often express their cultural meanings by incorporating non-verbal communication as an integral part of their speech patterns. In certain situations, Indian people may tend to maintain long periods of sustained silence in communication that may seem uncomfortable to non-Indians. These silent durations often reflect the Indian people in deep thought about what has been said or exhibiting their respect for the speaker. A common misconception of Indian people by non-Indians is that their silence indicates withdrawal or unfriendliness when, in fact, the intention may be a display of acceptance and respect prior to responding. Listening well and paying close attention when someone is speaking continue to be important values encouraged in Indian society.

Indian speech continues to emphasize patience as a sign of respect. Dialogue

⁶⁵For example, following the death of a family member, an Indian person may express the need to "have some work done on the house", referring to the spiritual practice of removing any lingering spirits or danger from the house (Swinomish 1991:187).

tends to occur by taking turns rather than indulging in interruptive conversation typical of non-Indian dialogue. It is considered impolite to interrupt a speaker, especially elders of the community. Often, long periods of dialogue may take place before direct discussions on specific matters are attempted. Many Indian people accept the fact that sufficient time will be devoted to establishing a broad understanding of both the subject matter and the individual conversationalists before any attempt will be made to arrive at a decision:

Although many Indian people spend quite a bit of time talking with one another, the non-verbal aspects of conversation are often regarded as more important than the words exchanged. Often, much is left unsaid. Many Indian people are highly skilled at reading between the lines: they pick up on nuances of tone, gesture, and glance. Often, Indian people can exchange a great deal of information in a very few words (Swinomish 1991:173).

Misunderstandings may also occur in communications between Indian and non-Indian people when there is misinterpretation of either the language or the silence. Further, Indians may mistake certain body language and physical gestures in non-Indian communication. Non-verbal communication may reflect significant cultural differences between Indian and non-Indian participants in dialogue where often neither is cognizant of the intent of the other, as the following attributes (Ibid:190) of non-verbal communication describe:

Eye Contact - In many Indian cultures, direct eye contact tends to be avoided because it is interpreted as disrespectful, intrusive, or intimidating. As a result of traditional large communal family living arrangements, the protection of one's privacy may contribute to a tendency to avoid direct eye contact. Staring may be viewed as intimidating and impolite behavior. Some Indian people feel uncomfortable with non-Indians who look directly into their eyes while talking. Some Indians may look down or look away from the speaker. This often represents a manner of respect and attentiveness rather than a sign of rudeness or unfriendliness.

Handshakes - Traditional Indian shaking of hands tends to be a much gentler form than non-Indian handshakes, which are assertive in order to convey self assurance and trust. In contrast, many Indians tend toward a gentle touching of hands with the purpose of receiving impressions about the other person's spirit and personality and allowing expression of themselves. It is not intended as an expression of dominance, self confidence, or necessarily a

wish for friendship. Misunderstanding and negative impressions may result from different purposes and styles of such hand greetings.⁶⁶

The handshake can also play an important role in revealing the degree of knowledge and exposure a person has to the other culture. When a non-Indian shakes hands in a non-Indian manner, the Indian person may assume the non-Indian is likely to be unfamiliar with Indian culture. Alternatively, given an Indian form of handgrasp may indicate the non-Indian has some familiarity with and demonstrates a sincere effort to learn about and adapt to Indian ways. Likewise, while many Indian people adapt their handshake style to match non-Indian expectations, it does not necessarily mean that the Indian person is "acculturated", but that he understands what is expected in the non-Indian context and chooses to adjust. The handshake, however, may be representative of mutually incompatible attributes of each culture. The Indian handshake is intended to receive information about the other person, while the non-Indian handshake is intended to convey information about oneself and to establish equality between partners or the dominance of one person.

Social Exchange - Culturally significant social exchanges are manifested through both verbal and non-verbal communications. While many non-Indian gestures serve to reflect approval, agreement, recognition, and gratitude, no specific American gesture demonstrates the important Indian value of demonstrating thanks and giving honor, which continue to be prevalent in the Indian culture. Coast Salish culture conveys honor, recognition, and thanks with an expression reflected by extending both arms forward, palms open and upward-facing, hands held in a natural and receptive position, and moving both arms up and down several times in a graceful gesture.

Expression of Emotion - A common stereotype of Indian people as stoic and unresponsive is largely due to a misunderstanding about the ways in which Indian people show feelings as well as a historic Indian mistrust of non-Indians. Some Indian cultures express feelings more subtly than non-Indians

⁶⁶"Non-Indians may mistakenly consider the Indian handshake to be limp and draw the conclusion that the Indian person is weak, meek, frightened, or not willing to be friends. The Indian person may find the handshake to be aggressive, domineering, disrespectful, and crude. In both cases, these judgements are liable to be inaccurate and may be damaging to any future relationship" (Swinomish 1991:190).

with circumspect and self containment,⁶⁷ and strong outward expressions of feeling are viewed as self-indulgent, a sign of both weakness and self centeredness. Negative feelings in particular may be expressed more subtly by Indian people. This may be because of both social norms, which discourage confrontation, and a long history of accumulated losses and grief. People who have experienced a great deal of trauma or deprivation may be less likely to demonstrate grief at a new loss than those who have rarely faced a severe crisis.⁶⁸

Conclusion

The evolution of federal Indian policy since pre-treaty periods and its effects on the tribal territory have been described in this chapter to demonstrate an abrupt and contradictory pattern that resulted to diminish the stability and development of tribal communities. The consideration of dissonance that occurs in the cultural value systems of Indian and non-Indian communities has also been described to present important implications for the research's concern with the identification of variables that restrict Indian community development. This chapter provides an overview of the behavioral characteristics, based on historical and fundamental values, that have been sustained to constitute the norms of the modern Indian ethnic identity. In the interactions that occur between a tribe and non-tribal groups, the context of those relations must be informed of the underlying community's value systems (Gardner 1980) in order to foster clearer communications and avoid misinterpretation about the intentions of each community. Habermas (1979) also has stressed the importance of recognizing and understanding norms in speech. A communicative

⁶⁷"Many Indian people are careful not to show too much pleasure at their own achievements, for fear of being seen as boasting. Indian people may show anger by withdrawing or by ignoring another person, rather than raising their voices. Some may express sadness only in private" (Swinomish 1991:192).

⁶⁸The Swinomish Mental Health Project (1991:192) observed that "people who grew up in families which were dysfunctional due to alcoholism or violence may have learned to protect themselves by shutting down their feelings. Those not familiar with Indian people may mistake courage, acceptance, or numbness stemming from emotional overload for insensitivity or lack of caring".

discourse seeking to bridge an understanding between the Indian and non-Indian community must deliberately seek to avoid errors in communication, especially in the communicative utterance of speech.⁶⁹ Once it becomes understood that values dissonance is likely to be encountered within inter-community dialogue, efforts can be employed to avoid the presumption about the other community's norms and values. Further, communications that stress mutual understanding of the value-based differences that have historically separated these communities tend to foster a more accurate understanding. As these normative differences are established in a process of communication, then the reconciliation of disparities that are based on cultural differences becomes possible.

As tribal communities exercise territorial authority for the purpose of advancing defined tribal interests, such actions may encounter confrontation when overlaid with a concurrent set of non-Indian social priorities. This especially results when two concurrent and conflicting regulatory schemes are applied over the same geographic region. When such dually imposed policies are discovered to conflict, they tend to form a focus of inter-community tension, as reflected in much of the historic state-tribal litigation over civil jurisdiction and natural resource treaty rights. This situation tends to perpetuate antagonism over jurisdictional considerations rather than to focus on reconciling the substantive differences that underlie the conflicting policies.

Communicative mechanisms are intended to bridge the understanding between the nature and intent of such opposing interactions. While many conflicts between tribal and non-tribal public policy focus primarily on questions of jurisdiction, few efforts have been devoted to the understanding and reconciliation of normative-based conflicts. The ability to foster effective dialogue that communicates

⁶⁹Habermas (1979:29) expresses the idea of communicative competence as "the ability of a speaker oriented to mutual understanding, to embed a well-formed sentence in relation to reality ... To perform the speech act in such a way that it conforms to recognized norms or to accepted self-images (so that the hearer can be in accord with the speaker in shared value orientations)."

the cultural meaning behind a community's goal, then, may lead to new opportunities for cooperation in relations between tribal and non-tribal communities. Later chapters will illustrate recently employed efforts to forge cooperation in natural resource and land use management between tribes and state and local governments. These efforts emphasize a greater understanding about the underlying social preferences of each community to promote mutual understanding, appreciation, and acceptance of cultural plurality before attempting to reconcile public policy differences.

CHAPTER 3

THE TRIBAL POLITICAL ECONOMY

Introduction

The following chapter commences with an examination of several models of community development from Political Economy Theory to explain the causes that contribute to the conditions of underdevelopment⁷⁰ in tribal communities. In evaluating each theory of explanation, the research considers attributes of these models germane to explaining the circumstances of tribal communities, based on their relations with the U.S. political economy. To discern the causal implications in those relations, a review of the theoretical literature provides a foundation for understanding the general conditions that contribute to underdevelopment.

Several models from western philosophy are then examined to explain the historic processes that have diminished tribal sovereignty over their territories. This analysis examines the western concept of alienation, and equates the alienation process with unilateral events imposed by external interests in tribal affairs. This approach is particularly useful to explain how the once isolated tribal land base became subjected to pervasive non-tribal governing authorities, and links the reversal of Indian alienation to the development of non-alienating relations with the U.S. political economy. This analysis supports the research proposition that successful tribal planning necessitates the removal of external interferences in tribal affairs.

The concept of alienation is then further articulated to illustrate its manifestation in the tribal community through the processes of incorporation. Incorporation theory serves to explain the historic interaction between tribes and the political economy. Several Dependency School models are also expanded upon to explain the phenomenon of tribal incorporation, and various forms of responses to incorporation are discussed. The incorporation model is further examined in terms

⁷⁰Frank's (1988) use of the term "underdevelopment" refers to the present economic conditions of disadvantaged communities whose underdevelopment is caused by external causal factors rather than attributed to their own pattern of development.

of dependency relations and illustrated as a phased development process in the "Captive Nation-Internal Colony" model.

In the concluding section, the discussion shifts from its consideration of explanatory models to examine methods for identifying the institutional relations that result in subjugating relations and the alienation of tribal communities. The discussion supports an approach to tribal planning that incorporates critical analysis as a methodology for identifying forms of intergovernmental relations that pose threats to tribal sovereignty. This approach employs Foucault's thesis to link the history of Indian subjugation to a system of institutional relations that result to obstruct tribal self-determination.

The Political Economy of Development and Underdevelopment

The intellectual school of Political Economy theory provides explanations for the disadvantaged conditions faced by underdeveloped nations and communities. Its theories seek to characterize the nature and structure of a community's political and economic relationship to external economies which are viewed as both prevailing and dominant. These theories of explanation rely on an historic perspective to unveil the processes involved in positioning one community as disadvantaged with respect to a predominant trading partner. In the context of this research, these theories are useful also for examining the relationships of tribal economies as systems embedded within the prevailing U.S. political economy. A perspective of this relationship based on historic events provides a framework of inquiry to advance tribal strategies that respond to, and alter, those conditions that prevent the fullest development of the tribal economies.

"Underdevelopment" is described by Baren (1988) as an economic state disrupted from its previous state of self-sufficiency by an external market economy's introduction of the variables of financing, debt, product demand, and labor manipulation. The arrival of sophisticated market economies to previously isolated and independent economies created economic and social disruptions that altered the historic coherence of those formerly self-contained societies. The new market relationship served to displace the self-sufficient economies in order to emphasize

the production of marketable commodities. Their economic future, hence, became increasingly dependent upon outside economic markets, especially as the valuation of their products were to be determined by external price movements. Linkages with larger external markets encouraged the export of raw materials from the undeveloped economy, which resulted in the further dependence upon external capital. Economic assistance in the form of loans and grants followed to promote the increased economic productivity in those economies. However, as its dependency on external funding increased, these capital intensive productivity measures often proved unsuccessful in securing economic gains to the local community, and often contributed to inflation in the local economy. This has tended to contribute to the emergence of social and economic tensions in those underdeveloped countries. Further, external financial assistance often required, as a prerequisite to eligibility, the fulfillment of certain conditions imposed on the recipient community. Baron (1988:107) observes that the technical assistance that accompanies financing encouraged the adoption of policies attractive to the foreign economy, but not necessarily conducive to or ideologically compatible with the economic development of the benefitting countries.

In order for underdeveloped communities to alter their dependency relations on external economies and stimulate their economic and social progress, the political framework of their relationship to the external economic forces has to be modified accordingly. Wilber (1988:110) describes developed countries as "economies which were never under-developed, in that their growth was largely self-generated." Underdeveloped countries, in contrast, are characterized by their economic dependency linked to their relations with developed countries.

The Political Economy Paradigm

Political Economy theory views economic systems, or the production and distribution of economic goods, in relation to and consistent with political and cultural institutions. Political Economy, therefore, is concerned with the incorporation of non-economic considerations of social structures, political systems, and cultural values to its concern for the distribution of income and wealth.

Political Economy theory and economic growth theory (or classical economic theory) represents the two dominant paradigms in the economic development literature. Dillard (1988) describes the origin of economic growth theory with Adam Smith's expression of the classical capitalist ideal,⁷¹ which advocated the dismantling of the state bureaucracy and deferring all economic decisions to the self-regulating private marketplace. Laissez Faire policies of the 19th century actualized Smith's ideals with the encouragement of free trade, sound monetary practices, balanced budgets, and the reduction of governmental social benefits. The Laissez Faire policies in the U.S. were replaced with the New Deal policies of the 1940's. However, the ideals supporting the unrestricted free market again emerged at the forefront of federal economic policy in the early 1980's, and continue to dominate the current national political agenda.

The political economy paradigm challenges the premise of economic growth theory as a limited and static end-goal model and, instead, places greater emphasis on both the nature of the process of economic development and its underlying purpose in serving the well-being of its society. The paradigm stands in contrast to the prevailing free-market economic paradigm by challenging its underlying assumption that economic growth models and their consequent dependency on consumption are "desirable ends that rational and efficient utility-maximizing agents will pursue" (Wilber 1988:1). The two paradigms also differ with respect to their application to economic relations theory between core and periphery economies. Political economy theory posits that a complete view of development must also contain a "theory of underdevelopment" that provides plausible explanations for events contributing to continued conditions of underdevelopment. If development fails to occur within the periphery economy, the model suggests that certain forces are acting upon it to interfere with its independent process. The analysis of obstacles to development within these underdeveloped economies is, then, of central

⁷¹See Adam Smith. Inquiry into the Nature and Causes of the Wealth of Nations. 1776.

interest to political economy theory.

A number of responses have been suggested in the community development literature to promote beneficial outcomes resulting from economic relations between the core and the periphery. The "growth with equity" model represents a collection of approaches that seek to increase the benefits accrued to the periphery economy by demanding an equitable distribution of the benefits resulting from the periphery economy's development. The approach rejects the economic growth model's reliance upon the trickle down effect, which often results in only marginal distributional benefits to periphery economies. The Marxist explanation of underdeveloped offers the alternative view that capitalism entered most underdeveloped economies on an "unequal footing". Rather than promote the growth of small-scale competitive enterprises, it tended instead to transfer to the periphery economies advanced large-scale businesses largely out of scale to the development needs appropriate to the periphery economy.

Dependency theory views the historical development of capitalism as a dualistic process where underdevelopment results as the direct consequence of the process of development in core economies. The resultant situation of dependency creates a relationship where the periphery economy serves the interests and consumptive needs of the core economy. As a result of the imbalance in relations between the core and periphery economies, many periphery nations have recently begun to adopt "non-ethnocentric" models of development. The proposition argued is that the rejection of the western model of development is a necessary prerequisite to protect peripheral development interests. Wiarda (1988) recognizes a growing worldwide movement opposing the forces of global modernization as expressed through the rejection of the basic development models originating from the core world economies, "and a corresponding assertion of non-western, non-ethnocentric and indigenous ones"⁷² (Wiarda 1988:443-452). These reactions to core-initiated

⁷²Wiarda (1973, 1988) suggests that the Iranian revolution of the 1980's illustrates the emergence of Islamic fundamentalism in forming an Islamic model of

development models by periphery nations suggest a growing rejection of the application of western models in non-western settings. Wiarda (ibid:66) identifies five major areas of criticism and rejection of western development models:

1. A general bias and ethnocentrism perceived in western models and its incompatibility with societies of differing cultural and historical patterns. Western political theory is faulted for its almost entirely European focus and its complete lack of attention to other intellectual traditions;
2. The timing, sequence, and stages of development in the west may conflict with the periphery economy's ability and desire to develop. Many third-world nations are sufficiently different that virtually all our western precepts require fundamental reinterpretation when applied thereto;
3. The international context of development is entirely different from what it was a century earlier when most periphery economies relied on outside capital, technology, and markets for their products, which tied them to accepting conditions imposed by international forces;
4. There is a tendency to convert traditional institutions to modernized structures. Western political sociology has assumed that such traditional structures as tribes, castes, and patrimonialist authority must either yield and give way under the impact of modernization, or be overwhelmed by it, with little regard given to the importance of indigenous structures, or to their ability to evolve and adapt to new forms of development;
5. Insofar as Eurocentricism has tended to bias and distort the outside world's view and understanding of periphery societies as lesser societies, western modernization and development theory is thus seen as an imperialist strategy aimed at tying third-world nations into a western development pattern, of keeping them within its sphere of influence, and of denying them the possibility of alternative development patterns.

development in reaction to its dissatisfaction with the imbalanced relations experienced with the core economies. Other reactions include the reevaluation of the Indian caste associations and their role in modernization, and the understanding of African tribalism as traditional and legitimate institutions that, contrary to earlier characterizations as dysfunctional organizations, are now viewed as essential cultural and political foundations upon which to construct new societal structures.

Theories of Underdevelopment

Several important dependency theories of underdevelopment from the school of Political Economy Theory are discussed to establish a context for understanding the historic separation and imbalance in the relations between tribal communities and the broader U.S. political economy. These theories include: Dependency Theory, the Modes of Production, the Theory of Unequal Exchange, World-Systems and Metropolis-Satellite Theory, and Urban Marginality Theory.

Dependency Theory

Dependency theory, as developed by Frank (1988:130), characterizes the nature of relations between developed and underdeveloped economies in terms of a dependency of "capitalist relations", and is further described as a relation of power between these communities. Frank identifies the key attributes of capitalist relations as monopolistic and extractive of the underdeveloped country's resources.

Dependency theorists have also observed a condition of "unequal exchange" as a key feature of the relationship (Amin 1988:157), where the developed economy, referred to as the "core" economy, and the underdeveloped economy, or the "periphery", are depicted as complementary opposites in their economic relations. International financing mechanisms are viewed by dependency theorists as the central controlling instruments that enable trade interaction to primarily benefit the core.⁷³

Dependency Theory was formulated as a reaction to the two prominent economic theories of development: the orthodox neoclassical economic view and the orthodox Marxist view of development. From the Marxist perspective, capitalism

⁷³The International Monetary Fund (IMF) serves to replace customary commodity exchange in promoting third-world development in international financing. Along with the World Bank, the IMF was conceived in 1944 to establish the rules governing international finance. The fund was charged with regulating monetary relations among nations based on the concept that a country would alter its exchange rates only when its balance of payments fell into a state of "functional disequilibrium". Core, or lending countries, were rarely subjected to these rules, and the effect of the monetary exchange mechanism was to insure an acceptable value for the goods received by the core, often at the expense of the producing periphery.

was viewed as a necessary, if regrettable, stage that required the further transcendence through socialism. From the neoclassical standpoint, capitalism represents the desired end-stage of a community's development process and explains the condition of underdevelopment in terms of a country's "dualistic" economy, or an economy comprised of two distinct sectors. One is a traditional and largely self-sufficient sector, while the other a more modern and developing sector. Each economy operates independently of the other. While the modern sector is intertwined in the world capitalist market, the traditional sector retains its precapitalistic mode and is not directly affected by capitalist market relations.

Frank questions the central thesis shared by both of these theories of development that capitalism is a necessary stage in a community's development and also rejects the neoclassical thesis of dualism. He posits instead that, during the era of European capitalist expansion, most world economies became incorporated within the network of capitalist relations. To view the traditional segment of the underdeveloped economy as separate from the capitalist system, Frank maintains, misunderstands their nature and operation: "The expansion of capitalist systems over the past centuries has penetrated even the apparently most isolated sectors of the underdeveloped world" (Amin 1988:132). Frank also rejects a further premise of dualism that presumes that the present conditions of the underdeveloped countries reflect a predevelopment stage of the developed nations. Rather, Frank (1988:25) concludes that the present condition of underdeveloped nations is a product of the historical development of capitalism on a world scale.

The key concept in the dependency model is the nature of the relationship of two trading economies, with one playing a dominant and subjugating role, while the other a dependency role. Historically, the relationship was manifested between a colony and an imperial power that conquered it, and derived material rewards from their resources. In a modern sense, it forms a relationship⁷⁴ between an

⁷⁴These relations have also been depicted as metropolis to satellite, core to periphery, and center to periphery.

underdeveloped country that has formed dependency links through its trade relations with a dominant trading market. Thus, the dependency represents a relation of unequal power and the underlying characteristic of the relationship is that of control. This results in a loss of sovereignty experienced by the underdeveloped nation over its own development, and a diminished material benefit caused by the nature of its dependency. For Frank, dependency is viewed as a form of exploitation. Thus, capitalism is regarded in dependency theory as a system for exercising power over an underdeveloped trading partner. The instrument for maintaining the controlling interest in the relationship is established primarily through market exchange.

Frank's dependency model is based upon the premise that conditions of underdevelopment in the periphery economy are tied to the historical purpose of capitalist exploitation of lesser developed countries. Dependency theory examines core-periphery structures as the primary instrument to extract economic surplus out of its periphery and to channel part of this surplus to the world economy, thus sustaining the underdeveloped conditions of the periphery.

Modes of Production School

The modes of production theory offers an explanation of underdevelopment that deviates from dependency theory's emphasis on external market relations. Instead, the approach argues that, notwithstanding the importance of macro-economic phenomena, the development of a concept of modes of production is important to constructing an understanding of the phenomena of underdevelopment. The modes of production school, then, does not reject dependency theory, but offers an alternative formulation and extension of the dependency theory.

Three basic approaches comprise its construct. The first approach, the "articulation of the modes of production", explains the phenomena of underdevelopment in terms of the relationship among and between capitalist and non-capitalist modes of production operating within underdeveloped economies. A second approach, the "colonial or peripheral modes of production", seeks to develop a concept of underdevelopment based on the modes of production associated with the colonial experiences of the underdeveloped countries. Finally, the focus on

"internationalization of capital" views international development in terms of a presumed dominance of the capitalist mode of production throughout the world economy. As a dominant mode of production, capitalism is viewed as overwhelming all other economic systems, and therefore dominating any other modes of production, especially the previous self-sufficient modes. The transition to capitalism by those other modes occurs as a long and complex process, "such that any society in transition can only be understood in terms of different stages of articulation between the capitalist and non-capitalist modes of production" (Ruccio and Simon 1988:145). A useful concept of the modes of production school is provided by Laclau (1971:24):

In particular, the world capitalist system is not conceived to be a uniform production system, that is, a system with one exclusive mode of production. Rather, it is conceived to be an economic system in which both capitalist and non-capitalist modes of production coexist and which is characterized by the predominance of the capitalist mode of production.

Rey (1975) summarizes the evolutionary process occurring in peripheral economic systems using the concept of articulation. His approach identifies three successive stages of articulation. First, the capitalist mode of production is "imported" into the non-capitalist society and proceeds to reinforce non-capitalist modes of production. Secondly, capitalism takes root and uses the non-capitalist modes of production. Finally, the capitalist mode of production supplants, at some point, all non-capitalist modes of production and non-capitalism disappears. Hence, the modes of production model provides an understanding about the underdevelopment conditions of developing countries in terms of the relations existing between capitalism and non-capitalist modes of production. While the concepts of underdevelopment are based on dependency theory, this approach recognizes the persistence of non-capitalist modes of production as the primary factor in constituting a condition of underdevelopment.

The Theory of Unequal Exchange

The ideas about dependency and underdevelopment are further amplified in an alternative version of dependency theory set forth in the work of Samir Amin

(1988). Amin combines previous notions about the effects of capitalist systems to formulate a theory of "unequal exchange". The relation between the core and the periphery, according to Amin, promotes capitalist development in the core while, concurrently, blocks the progress of development within the periphery. Amin's theory is based on the presumption of a world capitalist system that contains the two fundamental divisions of a core and a periphery, and whose economies are viewed to be functionally and dynamically related. Amin stresses the importance in understanding the internal structure of the periphery countries in order to uncover the conditions that foster the continuation of these relationships. For Amin (1976:16):

Social formations are . . . concrete, organized structures that are marked by a dominant mode of production and the articulation around this of a complex of modes of production that are subordinate to it.

The central thesis of Amin's model views the relationship between the core and the periphery as complementary opposites, created throughout the history of capitalist development by the core. A core and periphery exists, according to Amin, at each of three stages of capitalist development: a merchantlist, a premonopoly-competitive, and a monopoly-imperialist stage of capitalism. The complementary opposite relationship becomes prominent in the third stage when, he observes: "no country of the periphery or semi-periphery is capable of joining the core" (Ruccio and Simon, 1988:159). Amin attributes this condition to the autocentric nature of capitalist development, where "the dynamic of the core is autonomous, that the periphery adjusts to it and the function the periphery fulfills differs from one stage to another" (Amin 1982:169). Amin's view of dependency and the causes of underdevelopment in the periphery are based on his observations that the non-capitalist mode of production is reproduced and that the expansion of the capitalist mode of production is distorted in the periphery. These conditions serve as the basis for the dependency of the periphery on the core because "the periphery does not have the power to control its own development" (Ruccio and Simon, 1988:160).

World-Systems and Metropolis-Satellite Theory

The metropolis-satellite and world-systems theories each relies on Frank's thesis (1969:21-94) of the "development of underdevelopment" to explain the causes contributing to the uneven development of lessor economies. Metropolis-satellite theory's portrayal of Indians in terms of rural poverty, however, is specific to the United States and does not adequately distinguish the uniqueness of American Indians relative to political and economic relations with the core economy. Unlike metropolis-satellite theory that considers the relationship between the two divisions of urban-rural, world system theory maintains that the growth process of global capitalism will cause a division of the world's economies into three divisions: a core, a periphery, and a semi-periphery. Both theories hold the view that uneven development is the result of modern nation-states expanding internationally or locally into undeveloped regions. As modern nation-states expand, they rely upon resources extracted from undeveloped regions to fuel their continued development. This process not only results in an interruption of the natural course and timing of the development of these regions, but also directs their change away from development. Frank's concept of underdevelopment is caused not only by a lack of development in the peripheral economy, but may also be due to unfavorable economic relations, which result in an imbalance of exchange that causes the development of underdevelopment.

Urban Marginality and Social Movements

Similar to the concerns regarding imbalanced global relations expressed in dependency theory, the theory of marginality seeks to explain the imbalanced relations that occur domestically within a single national economy. The theory of marginality attempts to explain conditions of poverty in terms of "urban margins", which result, in part, from social causes and political apathy. Urban marginality theory focuses on the phenomenon of the urban poverty condition as distinguished from rural poverty (Castells 1983:179) by examining the structural inability of both market economy and public policy intervention to provide adequate access to the distribution of a community's economic benefits to alleviate conditions of urban poverty.

In response to recognizable imbalances between the divisions of economic classes, social movements have emerged to react against the economic imbalances contributing to poverty. Unlike Marxist forms of class struggle, social movements act within the realm of public policy to build stronger economic and social communities. Castells (1980, 1983) defines social movements as "social activities which mobilize to react against both economic exploitation and against institutional systems which deny them access to opportunity," in order to stabilize social cohesiveness. Castells (1983:322) identifies four principal processes that promote social change: change within an existing institutional power, also referred to as social reform; change through revolutionary actions; change through social movements; and change through social mobilization and expanded community consciousness. The urban social movement model employs each of these processes except actions involving revolutionary actions. Social movements, according to Castells, do not seek the takeover of political institutions, but, rather, seek to work within the existing status quo of political systems. As re-active agents in social change, these movements seek to overcome identified problems through a structural process to transform the structural hindrances to social problems rather than create a normative vision of society. Social movements are characterized by Castells (1983:328) as "reactive utopias" insofar as they seek to challenge the institutional authorities for a prescribed outcome. Unlike radical and other forms of planning, social movement theory is not considered a normative theory, but, rather, an historical theory.

A Theory of American Indian Dependency

Dependency Theory provides a useful approach to examining the endemic problems persistent in Indian poverty and culture. Focusing on the political and economic underpinnings in ethnic relations, these models have been adapted by Page (1985) and others (Rostow 1960; Portes 1976) to understand the nature of Indian and non-Indian relations and their impact upon the internal conditions of the reservation economy and Indian ethnicity. A second benefit in applying these models to the context of tribal community relations is to suggest alternative

approaches to more effectively address dilemmas that Indians face in their efforts to develop their communities.

Historically, federal Indian policy has been based on the acculturation approach to Indian ethnicity and poverty, which posits that, before white contact, American Indians were backward and undeveloped, and the Indian condition would improve only through a process of full integration into the social and economic mainstream of U.S. society. Acculturation theory is derived from modernization, or "melting pot" theory, which argues the principle that nation building requires a process of integrating formerly diverse social groups into one political economic order and produces a new shared sense of identity. Both acculturation and modernization theories, as applied to Indians through a series of major federal policy actions, have failed to successfully integrate those societies into the mainstream due to the diverse ethnicity of Indian communities, the sustenance of tribal sovereignty, and the continued underdeveloped conditions that Indians continue to face.

The results of a history of exploitation of Indian territories by the U.S. political economy created the political oppression of Indian self-governance depicted as a form of neo-colonial subjugation (Kaplan 1977:180). The mechanisms of political control underlying this relationship were largely instruments of public policy actions and administrative institutions that exercised control over the use of Indian resources held in U.S. trust ownership. Jorgensen argues that the policy history in Indian-federal relations have been applied unilaterally under the guise of "civilizing" reservation Indians for the purpose of facilitating the private economy's access to Indian resources. The most effective public policy actions included the General Allotment Act, which divided the Indian territory and provided the mechanism for the sale of land to non-Indians; the socialization of Indian children through various federal education policies; and the termination policies of the 1950's that hastened the erosion of Indian political control over reservation territories.⁷⁵

As isolated, or at least not-fully integrated members of a core society, Indians

⁷⁵For example, see House Concurrent Resolution 108 of 1953, 63 Stat. B132.

occupy a special position in the U.S. economic class structure. As internal colonies, however, Indian reservations are economically and politically dependent upon the federal government and the broader economy for goods, services and survival. The political economy, in maintaining an ongoing relationship with the Indian community, is represented by a complex mix of economic interests, each of which has particular interests in the development of the Indian territory. They include the federal government, which serves as trustee and manager of the resource base; state and local government, which gain benefits directly through taxation on businesses and personal property improvements on trust and fee reservation lands, and indirectly through taxation of private industry that extracts reservation resources; and the non-Indian private economy that views reservation development as a stimulus to their own economies. The private economy also includes the institutional investment and banking sector as well as individual forms of investment interests. The pervasive role by the U.S. political economy in reservation development is evidenced in the rise of reservation-based industries that are neither owned nor controlled by Indians. The extraction by these industries of primarily raw material or agriculturally based products are intended for productive use outside the reservations.⁷⁶

Jorgensen attributes Indian economic failure largely to the Bureau of Indian Affairs' historic encouragement of tribal dependency upon the political economy to develop Indian resources. Jorgensen, in elaborating on Frank's dependency model of underdevelopment, argues that the lack of development, and hence the slow "acculturation" of Indians, is not due to their inherent characteristics, but to exploitation by the surrounding state which appropriated tribal resources for its own development. Owens (1978:62) warned that if reservation control of development is

⁷⁶Notably absent in the timber rich Indian territories of the northwest are reservation timber manufacturing industries that continue to be located outside the Indian communities. Extractive timber activities provide limited economic benefit on reservations, limited to the activities associated with the extraction of the resources alone. Value added benefits rarely are present on the reservations.

not attained, "energy development will prove the latest and most devastating fiasco of federal Indian policy", and suggests the following prescriptive actions:

1. Tribes must regulate business activities taking place on reservations;
2. Tribes must establish access to financial benefits derived from greater resource utilization through increased taxation, production sharing, and services contracts and hiring clauses;
3. Tribes must develop capabilities to gain managerial control over those resource based enterprises; and
4. Tribes must build a reservation commercial infrastructure within a more diversified and self-sufficient reservation economy.

In portraying the relationship between the reservation economy and the private economy as a "host-parasite" relationship, Wallerstein (1979) argues that opportunities for a tribal-controlled reservation development model grow increasingly unlikely unless such changes occur with the cooperation of the regional economies.

Traditions in Social Theory

This section examines the application of social theory, particularly critical theory as developed by Jurgen Habermas, to inform an understanding about the nature of conflicts encountered in Indian community development. The concepts from these theories are useful for identifying the complex nature of competing non-tribal interests that have had historic interactions with the tribal community. These competing interests, treated in the research as obstacles to the internal and autonomous affairs of tribal self-governance, are discussed in Chapter 5. Social theory provides a useful framework for understanding the ways in which the relations of institutionalized power structures have historically arisen to diminish tribal autonomy. The sources of these controlling interests are external to the tribes and act primarily as extractive mechanisms of the U.S. political economy to derive economic benefit from the tribal territory.

A central goal of social theory is the attainment of full democratic participation in public decision-making. From social theory, two important planning

traditions have emerged to advance emancipatory goals of democratic institutions through planning practice. The traditions of social learning and social mobilization each, as a fundamental undertaking, seek to critically examine the legitimacy of power relations within democratic institutions (Friedmann 1987). In contrast to the tradition of social reform (within which social movements are placed) and Etzioni's culminating work on societal guidance (Etzioni 1968) emphasizing planning's role as an instrument of state power, the doctrines associated with social mobilization tend to view social reform as an inconsequential shifting of coercive power from one illegitimate institution to another (Foucault 1977, 1988). As the two oldest planning traditions, social reform and social mobilization emerged from 18th century philosophical doctrines and establish a dialectic tension within social practice.

Similar to social mobilization, the social learning paradigm is also concerned with overcoming the contradictions between theory and practice and is derived from two main theoretical streams (Friedmann 1987:81). The first is pragmatism, which emphasizes cumulative learning through direct practice. The second stream is derived through Marxist theory and practice, where social learning emphasizes a unity between revolutionary theory and practice. Social learning is a style of planning that seeks to link knowledge to action (Friedmann 1987:81). The four distinguishing attributes of the social learning model include: it is a purposeful activity; it operates through a political strategy; it seeks to construct theories of reality; and it is concerned with social values that guide actions.⁷⁷

A central feature of social learning is that its processes are directed toward changing behavior. This has been described by Dunn (1971:240) as "the evolutionary experiment, a stage in human development where social evolution becomes teleological." In social learning, activities take place within a concept of phenomenology, which assumes a setting containing an ever-changing situation.

⁷⁷Los (1977:85) points out that "by its self-reflexive function and the importance it attributes to uncovering hidden beliefs and assumptions as well as the importance it attributes to social theory," these models in planning theory foster planning's awareness to its social responsibilities.

This involves the actor as an endogenous participant in the situation and relies on a process of social transformation to effect changes to a community's norms and values. Since social learning is precisely concerned with affecting social values, it is considered a normative process (Harvey 1980).

Social mobilization conversely operates within the context of social transformation where its objective is primarily described as emancipatory. These movements have responded to social injustices perceived within capitalist systems by seeking to reverse their influences and controls upon the democratic institution. Friedmann's transactive planning proposition, a derivation of social transformative theory, contrasts to Etzioni's guidance model as it seeks to reform political structures through the mechanisms of social consciousness building. Social mobilization theory draws from a variety of fields including social anarchism and the Marxist literature, the utopian traditions, related concepts in political economy theory, sociopolitical movements, and historical materialism,⁷⁸ each sharing a view that emphasizes the legitimization of institutional power as an exercise of collective action and collective will. Collectively, these paradigms are referred to as "oppositional movements". Social Mobilization, as a typology Friedmann uses to encompass the oppositional movements, serves as a counter-movement to social reform. Social mobilization asserts, as its beginning hypothesis, the primacy of collective action over that of individual action, and strives to initiate social change through the empowerment of collective action. Social mobilization begins with social criticism rather than the statement of goals, and its actions arise from that criticism.⁷⁹

Critical Theory

⁷⁸Adapted from Friedmann's typology of planning theory traditions (1987).

⁷⁹Friedmann (1987:83) observes two forms of politics that dominate the tradition of social mobilization. A "politics of disengagement" reflects the tradition's utopian and anarchistic heritage, and a "politics of confrontation", from its Marxist tradition, views political struggle as necessary to restructure political power structures.

Critical theory of the Frankfurt School is a branch of historical materialism with its ideological roots lying between historical materialism and the radical movements of the non-Marxist left (Friedmann 1987:225). Critical theory's initial approach is to determine whose interests are being served by an action. Habermas argues that "technocracy hides the latent contradictions and conflicts of the capitalist state. Technical decisions are made but the general public is unaware of their political content and of the political forces at work behind the scene" (Benveniste 1989:75). Etzioni further observes that "equity is a prerequisite for the neutralization of power and for the building of authentic, non-coerced consensus and responsiveness" (Etzioni 1968:517).

For Habermas, a general crisis of legitimation occurs when a political system is no longer delivering on its promises of material sufficiency, social equity, or democratic rights. The demystification of unequal power relations requires the use of new forms of communication⁸⁰ as forms of speech which become devoid of deception. "Once true knowledge is available, it can be used to revitalize the political process and result in participation in politics and the building of a genuine consensus" (Benveniste 1989). Critical theory's ultimate objective remains an historically-oriented analysis of contemporary society with the practical intent for "the reconstruction of the critique of capitalist society" (Habermas 1979:xiii). Critical theory is based upon a three-tier research program comprised of a theory of communication, a theory of socialization, and a theory of social evolution. A principal assumption of critical theory is that social evolution is conceived as a bi-dimensional learning process. Its search to form a communication theory is based on the presupposition that communication must be comprehensible, truthful, and "right". Agreement on what constitutes "right", the epistemology of truth, is derived

⁸⁰Habermas imagined an "ideal speech situation", where "claims to validity of what was being asserted would rest on a consensus concerning the intelligibility of the utterance, the truth of its propositional content, the sincerity of the speaker, and the appropriateness of the particular 'speech act' to the situation" (Friedmann 1987:267).

through a general agreement by all participants in the search for consensual understanding.

Friedmann adapts a critical theory approach in presenting a planning model that seeks a dialectic unity between theory and practice within the social mobilization tradition. "Radical planning" is intended to interact within a community for the purpose of "recovering the political community from domination by state and capitalism" (Friedmann 1987:339). Its aim is the structural transformation of capitalism and the achievement of collective self-reliance. Radical planning operates under a "transformative theory", which is informed by the oppositional traditions, is based on practice, and combines an analysis and social vision into a form of political practice. Its theoretical foundations, following historical materialism, includes the evaluation of structural problems in capitalist societies and the critical interpretation of reality to form an image of preferred outcomes based on emancipatory principles.

The ideas of Habermas have also been effectively applied to American planning practice in the work of John Forester (1980). Critical theory provides a practical and phenomenological analysis to understand how power is produced through concrete human actions. Forester suggests that critical theory, in particular the "communications theory of society" as developed by Habermas, has important implications to planning practice (Forester 1980:275). Critical theory provides a way of understanding planning action as communicative action, rather than more narrowly as a purely instrumental means to a particular end. Forester's concern lies in the manner in which planning, as a politically oriented instrument of public policy, can become more effective through modified communicative means. Habermas's communications theory of society in effect treats social and political economic structures as operational communication structures. These relations of power and production not only transmit information, he observes, but they also communicate political and moral meaning. Critical communication theory becomes centrally concerned with overcoming the imbalance associated with institutional mechanisms of power coercion. Habermas seeks to contrast these communicative

mechanisms with a simpler and more direct form of communications based upon mutual understanding and consensus.

The central element of Habermas's critical communicative theory concerns the contradiction between what he describes as "the disabling communicative power inherent in capitalistic, undemocratic institutions" and the collective power of democratic political criticism that relies on mutual understanding and consensus. The importance of Habermas's work is in its ability to adapt the classical Marxian critique of ideology into an analysis of the structurally distorted communication in historical social relations. The foundations to critical theory rely upon the formation of new forms of inclusionary communications within the society at large. Forester further advances the application of critical theory's enabling rules of communications into a communicative strategy to complement planning's technical work, and advocates for a communicative objective in planning that emphasizes open and truthful dialogue. Critical theory's ultimate aim is the historically-oriented analysis of contemporary society with the practical result of reconstructing a critique of capitalist society. The point of Habermas's argument is that legitimization problems arise in developed capitalist societies as the result of a fundamental conflict of their very structure -- a conflict between the social welfare responsibilities of mass democracies and the functional conditions of the capitalist economy. The task is one of balancing a policy of economic stability against a policy of social reform in a world economy.

Critical Theory in Indian Community Development

Critical theory views social and political economic institutions as "operative communicative structures" and advocates the mediation of the resulting conflicts caused by those structures through a form of communication which is undistorted and truthful. The relationship between a community and the political economy external to it has been recognized in both critical theory and dependency theory to encounter goal conflicts. The conflict often requires a community to modify its public policy of local self-determination in order to adjust to the impending dynamic of the external economic process. In order to cope with externally induced

pressures, the community often relies on a policy of reform "meant to compensate for the social costs of capitalist growth" (Habermas 1979:xvii).

Critical theory is useful in examining the context of tribal community development. The approach's commitment to truthful and undistorted communications, practiced as mutual learning, may be a helpful approach to developing effective tribal self-determination strategies. In a pragmatic context, critical theory also provides a constructive methodology for identifying and reconciling the multiple forms of conflict situations faced in tribal community development. The political economy characteristics faced in many tribal communities conform to a dualistic model comprised of an internal and socially cohesive community, and an external political economy that acts upon the tribal community. The cohesive internal social unit contains strong familial associations that tend to support the basic communicative maxims inherent in critical theory where, as described in Chapter 2, the community's ideology tends to be closely affiliated to the philosophical doctrine of collectivism.

In contrast, the external political economy serves a fundamentally different philosophical doctrine. The U.S. political economy, as embedded within its capitalist structure, is associated with the ideological doctrine of individualism and represents the external component to the tribal dualistic paradigm. Hence, a dialectic tension results from the competing, and often conflicting, interests which interact within the tribal community setting. The collectivist philosophy, as prominently symbolized in the "potlatch" of Indian societies, maintains a view towards resource utility as a community-based proprietary asset. The development of those resources are measured against a consensual agreement regarding acceptable change to the collective territory, and also against the consensual agreement regarding the equitable distribution of the net benefit gained by the community.⁸¹

⁸¹As an example, the northwest treaty tribes fishing harvest rights are held as a collective proprietary right. The distribution of the resource (fishing privileges to its members), is determined against the consideration for conservation requirements, reflecting a community goal for the renewability of its resource, and against equity

As an ethnological society, tribes are comprised of a common ethnic heritage, but also possess varying degrees of social diversity. Retaining both proprietary rights to the territory and inherent sovereignty, the tribal community is uniquely positioned to fulfill many of its own needs in re-establishing a productive self-sufficient economic structure. The creation and operation of tribal public corporations exemplify the practice of community development based on the socializing principles of collectivism. Likewise, the political integrity of tribal government is integral within the community where decision-making continues to rely on traditionally based consensus. Leadership councils typically include representation from individual family-clans, constituting a more direct form of representative democracy.

Communicative mechanisms within the Indian community are primarily informal and rely largely on personal dialogue. The community norm presuming truthful communication is both culturally based and practically administered by the nature of extended family structures and closeness of the community. Community members anticipate a lifelong residency within the reservation community, which is viewed as an irreplaceable and permanent "homeland". Hence, the consequences of distorted communications resound within the self-contained community. The social conditions of the internal Indian community, hence, serve to sustain a truthful discourse as imagined by Habermas. The strong cultural bondage fosters both truthful understanding and contributes towards reaching consensual agreement on community values and goals. The consensus process incorporates both the individual's personal quest for truth, often in association with traditional religious practice, and the interface of those self-truths with that of the collective community vision.

Where the internal community remains constituted as a homogenous social unit, the assimilationist policies since the late 1800's have created a plurality of

concerns to individuals and the community. The annual "first harvest" is often dedicated to the tribal elders, a tradition observed over thousands of years.

external interests that act as an overlay in the tribal setting. The reservations often include residents from outside the cultural community, notably non-Indian property owners. As tribal governments seek to fulfill its objectives of self-governance through the exercise of political sovereignty, their exercise of territorial control face resistance from the external community. On certain reservations within Puget Sound where non-Indian residents may out number Indian residents by a ratio of four to one or more, even greater tensions persist in reaction to the tribal exercise of control affecting the interests of non-tribal members. Reservation development is also dependent upon linkages throughout the regional political economy. These linkages relate to the protection of tribal interests in two ways. First, for the protection of off-reservation natural resource treaty rights which lie beyond direct tribal jurisdictional control. Second, through non-tribal regional decision-making that may affect reservation development goals.

The concept of Indian self-determination is concerned precisely with the preservation of the cultural and political integrity of the tribal community through its ability to articulate and affirm a self-directed future. The communication and subsequent acceptance of tribally determined ends by the external political economy, then, becomes dependent upon the external region's willingness to accept political diversity. When tribal institutional ends are acknowledged and accepted within the broader political economy, it is posited that tribes are then more likely to successfully transcend the deterrents of reservation isolationism, tribal political opposition and historically unequal patterns of resource exploitation, and participate in an interactive regional development exchange that results in equitable benefits to the tribal community. In a dependency theory framework, this approach provides a means for altering the formerly imbalanced relations between the core and periphery communities. Critical theory may, hence, assist tribes to identify and overcome the unequal balances in their dialectic relationships through effective communicative mediations.

Alienation and Incorporation of the Indian Political Community

The concept of alienation expresses a state of separateness experienced in

various contexts, ranging from the notion of an individual's self alienation from communities to institutional alienation, whereby social groups become alienated from larger societies. The term also applies to define those Indian territories that have been removed from federal trust ownership and transferred to fee simple title, hence, becoming alienated from federal trust protection and, in particular, from exclusive tribal control. This section argues that the processes that cause the separation of the tribal political community from its own sovereignty, especially as applied over its territorial lands, depicts a form of alienation. The concept, it is also argued, is useful to explain the separation that occurs between the tribal political economy from its former association to its aboriginal form of self-governance.

This section establishes a framework for the development of the concept of Indian alienation, expressed here as a form of institutional and cultural separation from its own capacity for self-maintenance. The framework posits that tribal self-determination is integrally linked to the reinstitution of non-alienating relations between the tribal community, its sovereignty and territory, and its relations to the U.S. political economy. The reinstitution of balanced relations is dependent primarily on the advancement of tribal self-determination through improved relations with external governments. In order for this to occur, two events are needed: 1) the tribe must clearly define and exert its claims of political sovereignty; and 2) the dominant political economy must exhibit an ability to accept cultural and political plurality. An important criteria for achieving successful external relations within the political economy, then, is the condition for strengthening the degree of tribal self-governance exercised by the tribes, and then, as an exercise of that authority, to establish a more balanced system of reciprocity in its relations with non-tribal governments.

Origins of the Concept of Alienation

The concept of alienation emerges from a long and complex history of literary works, beginning with the Bible and furthered in treatises on law, economy, and philosophy that reflect the development of European western philosophy, from slavery to the age of transition to capitalism and socialism (Meszaros 1970:27).

Modern theories of alienation have been shaped by European philosophy, especially the contributions of Feuerback, Hegel, and Marx, as well as by English Political Economy theory. Adam Smith expressed the concept of alienation in relation to the private ownership of property, and forwarded the ideal that "everyone should be able to give and to alienate that which belonged to him" (Smith 1776:342). Hobbes's (1651) contributions to English political economy literature in the notion of "universal saleability", was based on the process that the individual first had to be reified, or converted into a thing or commodity. Thereafter, the individual could be treated as property for the duration of a contract term and became "mastered" by his new owner. This social order, as conceived by Hobbes, implied the supremacy of a master to possess the power to sell, or alienate, his servant, and was based on a view that each individual was engaged in a social contractual arrangement over which he exercised little control. The principal function of Hobbes's social contract was the introduction of a new form of feudal relations that sought to establish the right of certain individuals to assert control over other persons, who were to be treated as objects without will. This was accomplished through the social contract that provided for an individual's self alienation from his rights of personal freedom. Alienation was therefore viewed as the universal extension of saleability through the transformation of property, including individuals, into exchangeable commodities.

Marx's concept of alienation focuses on the individual's primary utility value as a laborer, and depicts man's alienation in a series of four major aspects of his relations: man's alienation from nature, from himself (or his own activity), from his membership in the human species, and from other men. The first aspect in his construct of alienated labor represents the relationship of man, the worker, to the product of his labor. According to Marx, man's relationship to his labor links him to the external world of the objects of nature. The second aspect represents man's relationship to his own labor activity as an alien activity because it brings him satisfaction only by selling the resultant product to others. Marx suggests that it is not the activity of labor that has value, but, rather, the activity of producing a commodity that has a value in its saleability. The third aspect reflects the object of

labor as the objectification of man's relationship to his own community: "it estranges man's own body from him, as it does external nature and his spiritual existence, his human being" (Millian 1959:76). In the fourth aspect, the consequence of man's estrangement from the product of his labor results in his estrangement from his fellow man. By becoming estranged from his means, Marx proposed that man thus becomes separated from his essential human nature. According to Marx, these aspects of man's relations with his activity establishes a dialectic forming the concept of alienation of man from labor.

The manuscripts of 1844 (Ibid, 1959) established the foundation of the Marxian system centering on the concept of alienation. The fundamental elements in Marx's theory of alienation are man, his product of labor, and industry or capital, which together represent productive activity. "Industry" is defined by Marx as both the cause of the growing complexity of human society and the means of asserting the supremacy of man over nature. Marx depicts the relationship between man, labor and industry in the form of a triangular interaction between each constituent part. A dialectical reciprocity exists within each element of the relationship suggesting that man is both the creator of industry and also of its products. The notion of the separation between man, and his autonomous self, and his labor value is characterized in early slavery periods and other forms of subjugated labor. This process reflects a tendency in European tradition to exploit human resources by separating the individual from his free will.

A Concept of Indian Alienation

A corollary is applied to the Indian situation by revising the components in the Marxian "dialectic" relationship among man, capital, and labor. This is accomplished by replacing the "individual" with the collectivity of the tribal community, and labor with the collective assets of the territorial resources. Since Indian labor historically has not been considered a significant resource, the natural resources contained within the Indian territory instead became the primary object of the U.S. political economy's subjugation. In this respect, then, the interests of the political economy have focused on access to and control of Indian natural resource.

The means to accomplish that outcome are associated with the historic development of Indian federal policy, which has encouraged the political economy's access and control over the Indian territory.

The tribal political community, possessing both political sovereignty and proprietary rights, has stood between the political economy's free access to the Indian territory. In addition, the Indian treaties and subsequent federal actions placed the federal government in the role of "trustee" and "protectorate" over those resources. As a trustee, the federal government maintained an important fiduciary role as the steward of the Indian trust resource. This research posits that a corollary exists between the concept in the Marxist dialectic between capital and labor, and the relationship between the interests of the U.S. political economy and the commodity value expressed in the Indian territory. Figure 3.1 illustrates the mechanisms of the U.S. political economy that operate to separate, or alienate, the exclusive and direct control by the tribal community over its territorial resources. The figure illustrates a form of intervention by the political economy representing industry's access to Indian resources. In addition, the federal trust responsibility is also represented as an intervening force.

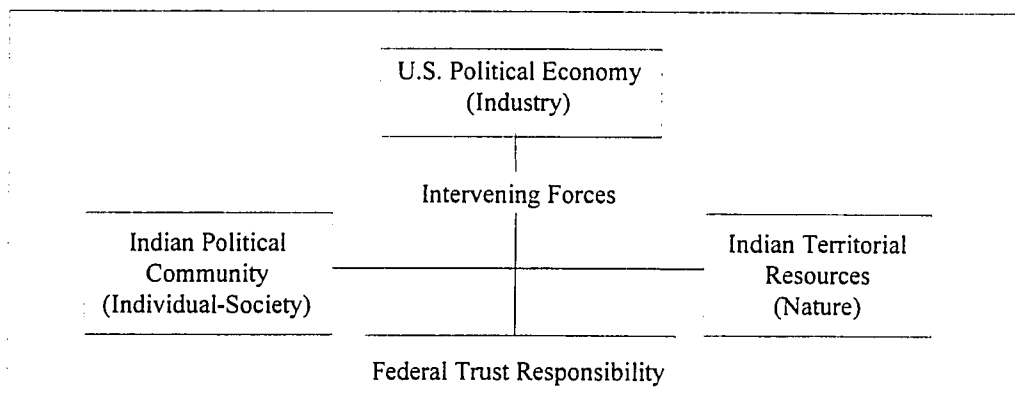


Figure 3.1
Alienation of the Indian Political Community

A fundamental distinction exists between the U.S. political economy's general view of natural resource utilization as an alienable and saleable commodity and the traditional Indian view of the reservation territories as an inalienable homeland,⁸² which is indivisible from the tribal cultural identity. Tribal communities that have been subject to relatively high degrees of intervention by the U.S. political economy are depicted as having become subjected to progressive stages of political alienation. Their inherent political sovereignty, as distinct and autonomous entities, becomes progressively diminished due to causes exerted from external sources. In order for the tribal political community to recover its self-determination, the interventions that serve to alienate the tribes from their former states of autonomy are considered in a framework of historic circumstances and events. The intervening forces that diminished tribal ownership and its ability to regulate reservation activities is observed as a principal obstacle to furthering tribal political development.

The alienation concept is a useful way of developing an understanding about the ways non-Indian interests have caused disruption to the tribal community. The two principal means that cause Indian alienation are identified as those forces that create a separation between the tribal sovereignty and its territory and those forces that diminish the federal trust responsibility for protecting both tribal political and proprietary interests from external interference. By beginning with the proposition that access and control of tribal territorial resources represent a fundamental condition to the definition of tribal sovereignty, a direct relationship is then established equating the forces of alienation to the erosion of tribal sovereignty. Further, these forces, if unabated, serve to retard the development of tribal self-governance. The identification and subsequent removal of intervening forces through direct tribal action is, therefore, a necessary conditions for reversing Indian territorial alienation and fostering the advancement of tribal community development. The forces imposed upon tribal sovereignty and its territory are

⁸²Notwithstanding the allocation of territorial resources necessary to support the economic requirements of the Indian community.

characterized in a typology of intervening forces, as follows:

External Forces - They are external forces in that they are exerted from outside the control of the tribal polity and intended as interventionary;

Historic Forces - These forces represent the aggregate of intervening actions that have taken place over an extended period of time;

Economic Forces - These forces are reflective of external economic interests whose mechanisms operate within the Indian territory for the purpose of extracting Indian resources for the benefit of external interests. These forces are largely represented by the private economy.

Political Forces - These forces are primarily manifested through political means, including executive acts and laws enacted through the plenary powers of the United States Congress. Such actions are furthered by the exercise of intervening powers of state and local governments, imposed directly upon both the Indian territory and the tribal polity. These forces may reflect both the private and public non-Indian interest.

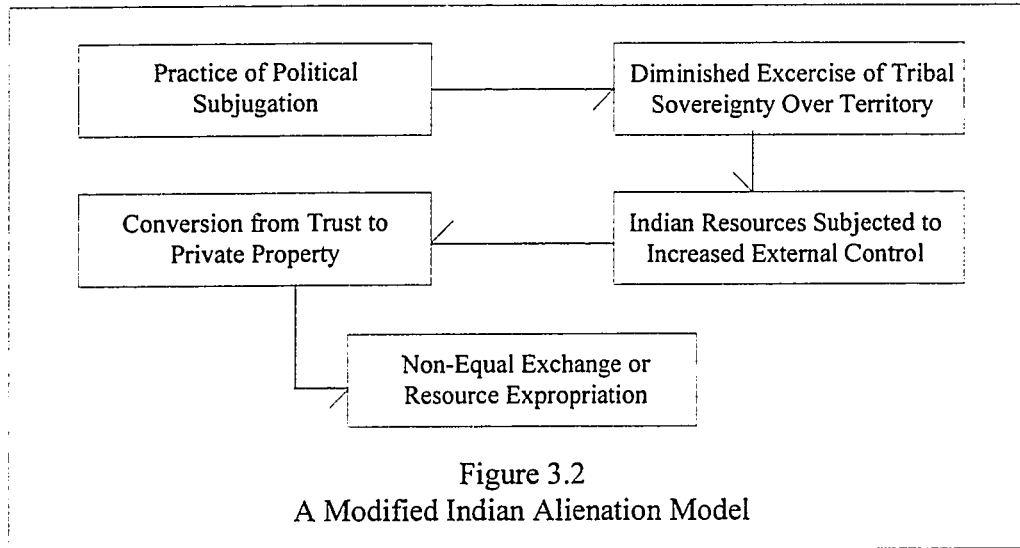
These intervening forces have contributed over time, and to varying degrees, to the alienation of the Indian territory. Further, the creation of state political enclaves within a reservation represents a direct form of state usurpation,⁸³ and results in a progression of further interventions as those entities operate pursuant to the delegation of state political authority, an authority entirely antithetical to the tribal polity. The introduction of state jurisdiction onto the reservations were facilitated by various Acts of Congress (see Chapter 2). A proposition statement is hence proposed as follows:

Tribal territorial alienation is produced through the political subjugation of the reservation territory by non-tribal political and economic interests. Acts of Congress served as the principal mechanism to facilitate interventions by the political economy.

The condition of Indian alienation, then, has served to diminish tribal control over its affairs and continues to threaten the tribal political community's social,

⁸³As an example, the creation of a county sewer district whose boundaries lie entirely within the reservation boundaries creates, in effect, an enclave of state jurisdiction embedded within the tribal political territory.

political and economic security. Tribal territorial resources, hence, represent the principal aspect that becomes alienated from tribal control. The Marxist conception of alienation becomes modified to describe a process model of Indian alienation as illustrated in Figure 3.2.



The objectification of the Indian resource⁸⁴ as a commodity for expropriation replaces Marx's objectification of the individual's possession of labor. The forces constructed to facilitate the expropriation of those resources are represented by the independent variables described. The measure of control over those resources by a tribe's sovereignty is a function of the degree of authority exercised by a tribe in relation to other forces simultaneously exerted by external

⁸⁴While Indian labor has also played a role within the labor pool of the U.S. economy, this value has generally been minor in relation to the value represented in the reservation natural resource base. The proprietary resources of the Indian territory include, primarily, the on-reservation natural resources that were intended for the exclusive tribal benefit subject to tribal management and control. Off reservation resources, including hunting, fishing, cultural, and shellfish harvest rights are proprietary tribal resources which are not subject to exclusive tribal jurisdictional or management control.

forces. Figure 3.3 illustrates a simple pre-alienation representation of the relationship between a tribe and its territorial resources.

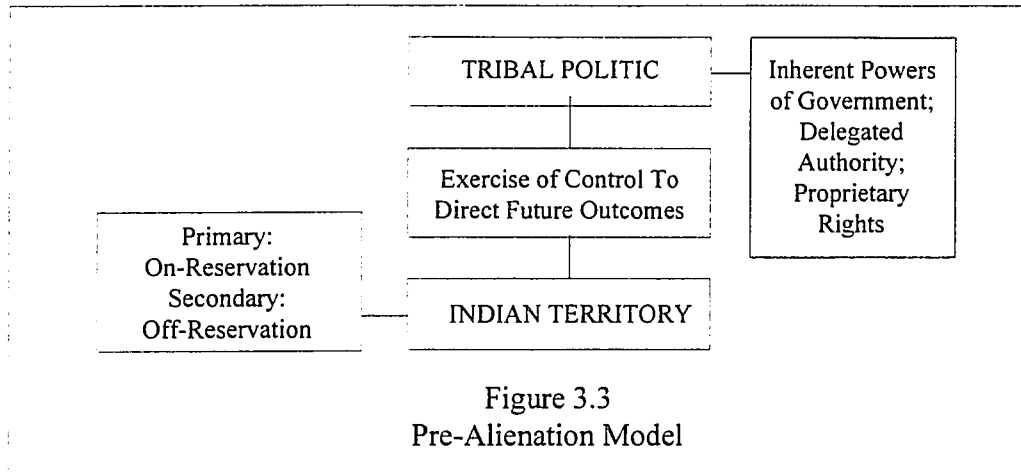
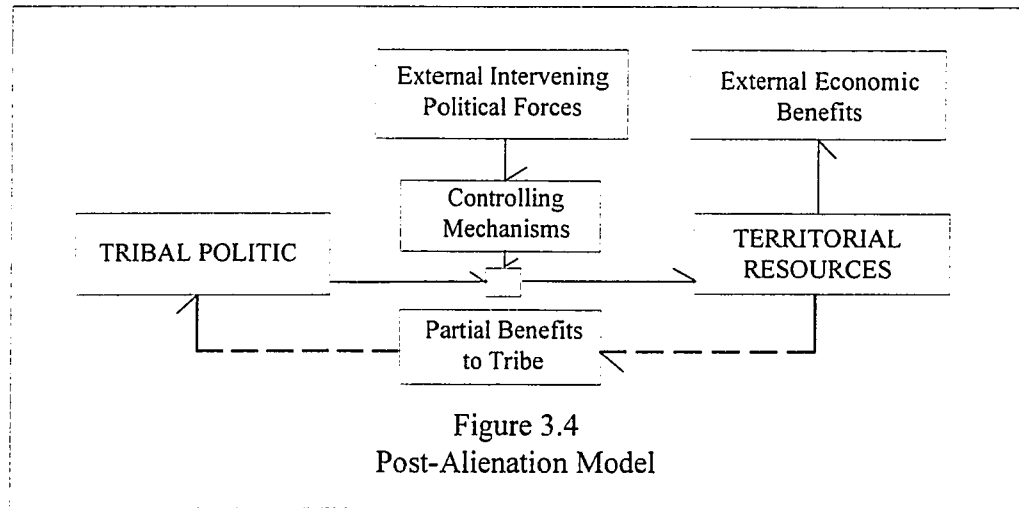


Figure 3.4 depicts a post-alienation representation of tribal and non-tribal competing interests acting concurrently upon the tribal territory. The model illustrates the effects of external political forces that intervene in, and limit the control exerted by the tribal authority. The resultant effect shows a diminished accrued benefit to the tribal community, and an increased benefit accrued to external economic interests. The alienation model illustrates a generalized form of an Indian territorial expropriation process.



Indian Incorporation Theory

Indian incorporation theory provides a framework for explaining the effects of the historic processes of expansion by the U.S. political economy into tribal affairs. The application of an Indian incorporation theory builds on the concept of incorporation developed in World-Systems Theory and Dependency Theory. These theories are useful for conceptualizing the ways in which Indian societies have become incorporated into the U.S. political economy as a result of the process of alienation of tribes from their pre-treaty state of political independence.

Incorporation theory shares a number of assumptions about the nature and objectives of the U.S. political economy with Dependency and World System theory. The first assumption views the modern political economy's expansion as motivated by a drive for capital accumulation. The development of the economy's expansion leads to contact with new economies, which constitutes a peripheral or colonial relationship with the incorporating core economy. The resultant effect from the process of incorporation, according to both Dependency and Incorporation theory, is that it tends to retard the development of the incorporated areas as it produces positive benefits to the core areas.

Prior to treaty relations with tribes, most Indian groups were isolated from the growing, and incorporating, U.S. economy. Rather than incorporating these groups as minority parts of the broader society, they tended instead to force their

removal to the territorial frontiers.⁸⁵ Only after treaty-making occurred, which resulted in the creation of separate and distinct Indian territorial areas, did the nature of contacts with Indian societies begin to constitute a basis for the incorporation by the dominant economy. Jorgensen (1972) provides one of the earliest analysis of Indian dependency. He observed that the lack of development, or underdevelopment, and the accompanying slow rate of acculturation of Indians into the U.S. economy was not due to the isolation of Indians from the incorporating political economy, but, rather, as a direct result of exploitation by the incorporating state. The earliest forms of resource expropriations are linked to the General Allotment Act of 1887, which, in seeking the assimilation of Indian societies into the U.S. political economy, permanently disrupted a formerly cohesive pattern of community ownership to provide for the eventual alienation of the territorial land base. This later resulted in the relocation of non-Indians to the reservations followed by the intervention of state and local assertions of jurisdiction over those alienated lands.

The historic transformation of the political and economic status of tribal communities before and after sustained development occurs is described by Snipp (1986:145, 1990) in terms of two distinct phases of development: Captive Nations and Internal Colonies. Captive Nationhood describes the status of tribes following their subordination to the United States in the 19th century, prior to any organized efforts to develop their natural resources. The process of political subordination occurred in treaty-making periods, which permanently altered the political nature of the tribes and reformed their autonomy under the doctrine of limited tribal sovereignty. The concept of "captive nations" expresses the transition from autonomous government status to a limited structure of the powers of self-government. Although the status of captive nations insures a significant measure of political, albeit bounded, autonomy, it has also resulted in increased tribal

⁸⁵Chapter 2 discussed the implications of the relocation period of U.S. Indian policy which occurred between 1828 and 1887.

dependency upon the federal government. It provided little direct economic benefit and further impoverished Indians by limiting their access to their traditional economic pursuits of hunting, gathering, fishing, and trapping. In relation to the development of natural resources, Snipp observes that the dependence and economic vulnerability cultivated among tribes in their tenure as captive nations paved the way for their emergence as internal colonies.

As internal colonies, Snipp contends that Indian lands became developed primarily for the benefit of the non-Indian economy, exposing tribes to new forms of economic exploitation. This implies a process by which political domination serves as the principal means to economic exploitation. Resource development on Indian lands is the primary mechanism used by the political economy to transform tribal communities from captive nations into internal colonies. The defining threshold introducing the stages of internal colonization begins with the "economic penetration" of Indian territorial resources by outside interests that occurred after the economic positions of the tribes was established during the mid-to-late 19th century. Treaty agreements and the subsequent removal of tribes from ceded territories initiated their restrictions as captive nations. Indian resources and land leasing arrangements began a process whereby the federal government established a centralized control over the conduct of Indian affairs. Leasing facilitated the economic penetration by granting access to Indian resources through the Bureau of Indian Affairs' delegated trust responsibility over the trust resources. Further, as suppliers of raw natural resources, Indian resources served primarily as exporting colonies providing valuable agricultural commodities, forest products, mineral resources, and fisheries products. Both energy resources and land areas⁸⁶ became particularly sought after commodities.

⁸⁶In agricultural leasing alone, by 1960 more than 25% of the six million acres administered by the BIA were leased to non-Indians. To further benefit the U.S. economy's access to Indian resources, Congress liberalized the granting of leases in the 1960's to provide for, on certain reservations, an extended term of up to 99 years.

Countering charges of federal mismanagement of Indian resources, tribes emerged in the 1970's to both critique the BIA's role in the management of Indian resource affairs, and to promote direct and self-management control over these trust resources.⁸⁷ Snipp (1990:10) argues that reservations constitute "captive nations" because their sovereignty is subject to the higher political authority of the United States and their lands constitute "closed enclaves" within the American society. Thus, Snipp describes the captive nations nature of tribes as "subservient territorial groups captured and absorbed in a state of subordination." Snipp observed that the period of transition from captive nation to internal colony occurred primarily during the 1950's when attempts to exploit natural resources were accelerated.⁸⁸

Incorporation theory views the process of incorporation as a continuum, that begins with initial contact and continues to a state of complete absorption. Those tribes that were fully terminated during the federal termination era represent a terminal state of complete absorption.⁸⁹ While dependency theory views the total

⁸⁷The council of Energy Resource Tribes (CERT), was formed in 1975 by 22 energy resource tribes for the purpose of improving Indian control over reservation energy projects. In 1977, CERT contemplated a management services agreement with OPEC for technical assistance in management of its oil reserves. The federal government, concerned with the political implications of an OPEC-sponsored energy development within the U.S., intervened with grant support to develop tribal management capacity and avoid an alliance with OPEC. CERT later advised the Laguna Pueblo of the state of New Mexico to decline a \$191,000 pipeline ROW extension, and settled eventually for a \$1.5 million agreement. In another case, the Atlantic Richfield Company offered the Navajos \$280,000 for a pipeline easement that the BIA routinely approved. CERT urged the Navahos to renegotiate and a lease valued at \$70 million over twenty years was later signed.

⁸⁸The most notable of such expropriations by the U.S. political economy occurred with the removal of energy resource deposits under favorable leasing terms provided by the Bureau of Indian Affairs to major U.S. corporations.

⁸⁹The effect of termination included the dismantling of the self-governance structure of those tribal communities, and the absorption of former trust lands and reservation resources into the U.S. economy. As first recognized in the Merriam Report of 1928, assimilation and termination only served as a taking of tribal political, cultural, and territorial resources while leaving the individual members of

assimilation of both the tribal territory and the social group into the dominant U.S. political economy as the logical end of incorporation, such an assimilation rarely occurred. Few, if any, tribal communities approached a state of full termination, and those that were have since become reinstated. The effects of incorporation ranged significantly between tribes, influenced by the varying degree of attraction to a tribal resource base. Energy resource exploitation, for example, frequently occurred in the larger, energy resource rich Indian territories of the southwest. Other variables influencing incorporation include the proximity of Indian lands to urbanizing regions, including those reservations located in proximity to metropolitan western Washington. In recent decades, the locational attributes of many Puget Sound coastal Indian reservations containing marine waterfront properties created a strong attraction from the real estate economy to intervene in, and gain access to, those real property commodities.

Incorporation theory, as with Dependency theory, understands the flow of influence as asymmetrical. The core areas always exert stronger influence upon the peripheral areas, resulting in the net product and capital flow returning to the core. While it is useful to conceptualize incorporation as a continuum process, where varying conditions and circumstances contribute to the degree of incorporation experienced by each tribal community, it is important to emphasize that the process of incorporation can also be interrupted, altered, reversed, and, under certain circumstances, even eliminated. The reconstruction of the Menominee Tribe illustrates a process of reversal, although the control over such reversal action was dependent largely upon the willingness of the core -- through the exercise of Congressional plenary powers -- to again recognize the tribal government.⁹⁰ Other means for reversing or eliminating incorporation are subject to the ability of the tribal governments to mobilize and exert the necessary influence to direct such

the former tribes in an isolated state of total disintegration.

⁹⁰See "The Menominee Restoration Act of 1973, 25 U.S.C. sec. 903.

outcomes.

In recent studies, Page (1985) and Cornell (1984) observed that the role of external factors in the incorporation process are determined by the wider geopolitical environment within which they occur. The recent Pan-Indian movements are responses by tribal communities to their position as peripheral societies within the U.S. political economy and suggests how the incorporation process itself may have the result of strengthening the development and maintenance of Indian cultural identity. Cornell argues that a crisis in Indian to non-Indian relations in the last quarter-century represents a shifting from unilateral to bilateral administration of Indian affairs. While a shifting towards bilateral administration of Indian affairs relations between tribal governments and the federal government plays an integral part in the current self-determination policy, Cornell (1984) warns that it also may represent an important new phase in increasing incorporation of Indians into the U.S. political economy, where tribes continue to exercise little control over the conditions of their participation. In an effort to strengthen their role in determining the conditions of their own participation, new organized movements have formed to foster the tribal negotiating leverage. In view of new opportunities for tribal community development in such areas as trade, economic development, gaming, and tourism, which intended to foster more stable tribal economies, Cornell suggests that certain tribes have accepted an exchange of increased incorporation for decreased local autonomy as a condition to that participation. Increased participation in the economy requires tribes to comply with the political economy's rules governing economic activity, and hence, may represent a form of cooptation. However, the gains obtained through increased incorporation, especially major economic gains,⁹¹ may serve to eliminate many of the negative effects of incorporation by

⁹¹The Shakopee Indian Tribe of Minnesota and Mashantucket Pequot Indian Tribe of Connecticut have both experienced recent successes in the gaming industry that have dramatically shifted those tribes and their membership from conditions of severe economic poverty to financial independence and increased political influence.

strengthening political governance through newly acquired economic power.

Western Washington tribes desiring to enter into economic development ventures such as gaming are required to proceed in a tenuous process of incorporation because federal gaming legislation requires tribes to enter into agreements with states, in effect forming a co-regulatory control mechanism over reservation activities. While certain tribes, including the Spokane Tribe and the Colville Indian Nation, have resisted any attempt to shift regulatory control over such activities to the state, others have conceded in order to advance their economic priorities. The state-tribal gaming compacts provide for both the co-regulatory control over gaming activities in addition to imposing unilateral limitations on the forms of economic activities tribes are permitted.⁹² In addition, gaming tribes often become further subjected to the market economy's unilateral conditions in their efforts to secure both capital financing and access to specialized technical management expertise necessary to conduct the operation of gaming enterprises.

Responses to Incorporation

A number of responses are identified to alter the process of incorporation, representing alternative forms of tribal actions for redirecting control by the intervening forces of the political economy. Hall (1987) identifies several possible outcomes of incorporation, summarized in Table 3.1, and include: partial or full assimilation or acculturation of the Indian community; pluralistic accommodation; rebellion and conflict; revitalization movements; Reactive Ethnicity, and Tribal

⁹²It has generally been the position of the Washington State Gambling Commission that such limitations on the scope and wagering limitations contained within the compact agreements represent bilateral and acceptable agreements by both parties. Notwithstanding, several Compact-tribes viewed the negotiation process as a form of state-imposed coercion. The Swinomish Tribal Community and other tribes reluctantly entered into Compact Agreements after weighing the costs associated with litigation against the state's unilateral terms requiring both the limitation to the size and scope of gaming activities and co-regulatory over the activity. Nevertheless, the state and a number of gaming tribes agreed in 1994 to enter into a "friendly lawsuit" for purposes of determining the legality of certain forms of gambling devices sought by the tribes but opposed by the state.

sovereignty-building processes.

Table 3.1
Responses to the Concept of Incorporation

Continuum of Incorporation	None	Weak	Moderate	Strong
Impact of Core on Periphery	None	Strong	Stronger	Strongest
Response by Tribal Community to Core	Relative Isolationism	Initial Assimilation and Acculturation	Increased Assimilation and Acculturation	Pluralistic Accommodation; Rebellion; Reactive Ethnicity; Revitalization; Tribal Sovereignty-Building.

Assimilation, or acculturation, has been viewed as a desirable end product of incorporation by the core. History has demonstrated a general failure of past U.S. Indian assimilation policies, which resulted in their repudiation to favor the reinstatement of political self-determination. Nonetheless, varying degrees of partial assimilation have occurred and have been transmitted to modern Indian societies. Further, those assimilated traits play an important role in the rebuilding of the contemporary Indian community.

Pluralistic Accommodation refers to approaches that seek the preservation of political self-determination of tribal governments and the concurrent integration of tribal political economies within the broader political economy. Pluralistic accommodation requires a recognition of the political and cultural plurality of the broader society, allowing for the existence of the quasi-independent enclaves of the tribal political communities. The model may provide for a balanced reciprocity if the relations between the enclave and the core serve the mutual interests of both societies, without the imbalances demonstrated in the core-periphery model. The model's title implies a willingness of the dominant society to "accommodate" the independence of the tribal enclave by balancing a political power-sharing

arrangement similar to the political balance enjoyed among state created jurisdictions. In this respect, a regional nesting is created containing autonomous tribal political enclaves that are connected through mutually beneficial political, social and economic linkages.

Rebellion incorporates a range of responses that seek to challenge the forces of incorporation through tribal initiated conflict responses. The actions by the American Indian Movement during the 1970's represent a rebellious response aimed at undermining the structure of federal Indian agencies rather than merely protesting their function as leading to a more bilateral control over Indian affairs. The significance of such a shift is in the advocacy of an active tribal role in shaping their federal Indian policy destiny. Litigation has been demonstrated as an effective form of conflict response as illustrated in the fisheries litigation cases in the northwest.

Revitalization movements are distinguished from other responses as they tend to represent social movements rather than political movements. This response was a popular response mechanism of many Indian groups during the 1870's post-treaty period through their re-participation in the "Ghost Dance", which Hall (1987:17) describes as a response to "relative or absolute deprivation, to isolationism, to the allotment movements, and to demographic changes." Participation in the Ghost Dance movement implied an attempt to resist assimilation in order to reintegrate the community, increase its solidarity, and enhance its cultural survivability. This movement represented complete isolationism and rejection of the effects of incorporation by minimizing or eliminating relations external to the community.

Tribal Sovereignty-Building represents a response by maximizing the community's control over certain aspects of the incorporation process. These responses are often specific to a form of interaction in the incorporation process, such as with respect to economic trade relations. Hall (1987:20) suggests that the "utility and efficacy of internal resources for resisting and shaping incorporation vary with the intensity of incorporation." Under mild conditions of incorporation where external forces appear minor or gradual, the ability of tribal governments to adapt to external influences may outweigh the need to resist change. When incorporation

becomes more defined and threatening, the community becomes severely interrupted and may result in a formal response to the influences.

Reactive Ethnicity

Reactive ethnicity represents another response by a community to external forces that disrupt tribal control and community cohesiveness. The concept posits that "developmental processes promote the ethnic mobilization of increasing and organizing resource competition along ethnic boundaries" (Page 1985:31). Ethnic development explains recent forms of Indian organizational development as a response to the infringement of the political economy pressures on Indian reservations. These activities include the establishment of supranational organizations such as the National Congress of American Indians, the Northwest Affiliated Tribes, and the National Association of Gaming Tribes. Each of those organizations encourages and provides political forums supporting self-determination movements.

Nagel and Olzak (1982) advocate for a tribal development strategy based on the view that Indian ethnicity should not be sacrificed for economic gain alone. Economic development of Indian owned resources extends the promise that Indian people will become economically self-sustaining, eliminating their poverty and severing dependency on federal assistance. Tribes experiencing economic development under the federal policy of self-determination are in the process of dramatically reshaping their role within the American political economy. However, the process of economic development does not necessarily assure these groups of more beneficial economic conditions because economic development does not always result in less poverty for Indian people, as early experiences on reservations have shown.

Table 3.2
The Continuum of Incorporation and Associated Factors⁹³

Continuum of Incorporation	None	Weak	Moderate	Strong
Market Articulation	None	Weak	Moderate	Strong
Impact of Core on Periphery	None	Strong	Stronger	Strongest
Impact of Periphery on Core	None	Low	Moderate	Significant
Types of Periphery	External Arena	Contact Periphery	Marginal Periphery or Region of Refuge	Full blown Periphery or Dependent Periphery
World-System Terminology		External Arena	Incorporation	Peripheral-ization
Snipp's Terminology		Captive Nation		Internal Colony

Table 3.2 illustrates the incorporation process as it progresses along a continuum from initial contact to full absorption. Motivating the process of incorporation are the needs for expanding trade relations by the core economy, reflected in the table as "market articulation". A weak form of incorporation exists during initial contact between the growing economy and the periphery economy. As its influence grows, the lesser region initiates its association as a "contact periphery". When the area becomes fully incorporated it experiences the full scale of "development of underdevelopment" as a fully dependent peripheral economy, where the net product and capital flows tend toward the core economy. The process of incorporation provides a heuristic framework applicable to Indian community development by providing a useful comparison between Indian community incorporation and incorporation processes occurring worldwide.

⁹³From Thomas D. Hall. "Patterns of Native American Incorporation into State Societies". in Public Policy Impacts on American Indian Economic Development, ed. C. Matthew Snipp. p.25.

Identifying Institutional Power Relations

This final section examines approaches for identifying the forms of intervention imposed by the political economy upon tribal communities, as a necessary element to forming effective planning strategies aimed to lessen interferences to tribal self-determination. Incorporation models explain the process of economic expropriation of the resources of periphery economies through the use of capital accumulation mechanisms controlled by the core. The relationship between the core and periphery has been demonstrated as a process by which the core exerts influence on the periphery through instruments employed as intervening forces. The identification of these instruments of control is essential before responses can be selected and employed. Those strategies, developed as components to an adaptive and contingent planning system, serve to confront and challenge those controlling relations and affect changes in their behavior.⁹⁴

Michael Foucault sets forth a discourse of investigative research that seeks to identify the controlling mechanisms effecting the nature of social relations. "Genealogical work", the structure of Foucault's research, seeks truths and knowledge of control mechanisms by examining its historical context. Foucault searches for truth through an understanding of the relationship between power and knowledge, based on a variant form of critical historical inquiry that focuses on the nature of power relations and their institutions as agents of subjugation. Genealogy, unlike history's general focus on events, seeks to discover the continuity of history and is concerned with the consequences and effects of centralizing powers.⁹⁵

⁹⁴Such strategies may employ a range of responses aimed at promoting changes in social values to foster the acceptance of greater diversity and plurality by regional communities of the self-governing tribal enclaves.

⁹⁵Genealogy seeks to discover the continuity of history, and genealogical analysis is centrally concerned with the consequences and effects of centralizing powers and its links to the institution and functioning of an organizational scientific discourse. Boyer describes Foucault's approach as a critical analysis method and not a scientific method.

Boyer extends Foucault's research approach⁹⁶ to the discourse on planning and suggests that planners should not be too preoccupied in their search for cause and effect. Instead, it is the apparatus of planning itself that requires evaluation of what Foucault has defined as the relationships among a set of distinct elements that include planning's professional discourses, its governmental institutions, administrative procedures, regulatory laws, and moral proclamations. These elements and their shifting relationships, Boyer observes, are revealed in the written record, where planners must search for the "relationship that planning texts create between the knowledge they inscribe and a power that this language programs." Boyer's premise is that once the state intervenes in the affairs of a local community, it does so according to a predetermined disciplinary program.

According to Foucault, the implications of institutional relationships are represented as forms of repressive relationships, where a dominant power forces its rationalization upon others through a process of normalization,⁹⁷ that, in the Indian context, corresponds to practices of assimilation. The general intolerance of the dominant society's "reason" to any other form of "reason" creates what Foucault terms the "disciplined society". In a similar sense, the prevailing U.S. society's generalizations and attitudes directed toward Indians serve as a mechanism for the separation of these groups from the prevailing norm, as a form of imposed social

⁹⁶Foucault's genealogical research begins with investigations of 17th century classical political economy institutions, where the birth of institutional power serves to justify the treatment of the individual as a commodity. Foucault's perspective contrasts with other philosophical discourse taken place ranging from Hobbes through Webber to today's post structuralist theorizing. Hobbes viewed power as a characteristic of possession by the state. Webber's view of power implied an intent towards socially accepted acts and therefore recognized an "ethics of good" must be consistent with the purpose of the state. See also Foucault, Michel. The Birth of the Clinic (1973); The History of Sexuality (1980); Madness and Civilization: A History of Insanity in the Age of Reason (1965); Power/Knowledge: Selected Interviews and Other Writings (1977); Discipline and Punishment: The Birth of The Prison (1979).

⁹⁷"Power of Normalization" refers to the source where norms arise and are applied as a system of control.

exile. The rise of efficiency mechanisms, emerging with the rise in rationality, served to support the repression of individuals and groups through power formulations which, Foucault maintains, were constructed for the primary purposes of serving capital and its related controlling interests.

Bolan (1980) emphasizes the importance of advancing the education of the community as a major aim in community development. As a form of community rebirth, community development seeks to counter civic ignorance and to advance the dual ideological themes of planning: the linking of technical information and public awareness in advancing political pluralism. Foucault envisions a tolerant society where every individual is free to participate in the freedoms afforded within that society, within a discourse "opened up" for the public to view it,⁹⁸ and protected from all subjugating interests. Friedmann (1987) refers also to such a tolerant society as a "social learning community" where no individual is either controlled nor excluded. Such a tolerance encourages a society that would collectively learn and participate in the collective execution of power. It is Foucault's view that the real political task in a society is to criticize the working institutions that appear to be both neutral and truth seeking, and to criticize them in such a manner that forms of repression⁹⁹ will become unmasked and confronted. Foucault holds that subjugated knowledge is the process by which institutions have hidden historical knowledge. Genealogy attempts to tie knowledge together through its own history.

According to Michael (1974), an important challenge facing planning concerns its ability to deal with behavioral aspects in social relations. Michael argues that a major shift needs to occur in society before conscious participation is possible. The emancipatory vision shared by the social action traditions represents the unifying goal to bring about such shifts. Social learning provides a vehicle for

⁹⁸Foucault's definition of a discourse requires as its prerequisite a communication through some form of commonly accessible language. The language provides the vehicle for the transmission of the different forms of logic.

⁹⁹Which Foucault refers to as "political violence".

knowledge-building capacity, critical theory provide a means for understanding the relationship between power and knowledge and their controlling mechanisms, social movements and historical materialism provide an understanding of the history of community struggle, and radical planning provides a structure for social transformation. These traditions each inform planning and make the prospect for reconciling the imbalances that confront periphery societies more comprehensible. These traditions help equip tribal communities to recognize with greater clarity the historic obstacles acting to deny their development. As Foucault so aptly observed "in reality . . . power means relations, a more or less organized, hierarchical, coordinated cluster of power everywhere, yet a power that does not exist" (in Boyer 1987:ix).

Conclusion

An examination into the nature of the tribal political community and its links to the U.S. political economy provides an explanation of the chronic underdeveloped conditions on most Indian reservations. Parallels drawn from Political Economy theory furthers an understanding about the limitations faced by the tribes in their efforts to advance their own community development. Federal interventions have directly and indirectly altered the ownership of, and control over, the natural resources once held exclusively by the tribes. The earliest forms of federal assimilationist intervention have been demonstrated as measures intended to alter the formerly independent tribal political economies and provide for greater access by the U.S. political economy to Indian resources, the primary object of those intervening policies. As the dependency model suggests, any advancement to the conditions of underdevelopment is linked to the community's ability to effect changes to its relations with the controlling core economies. A corollary, then, explains the underdeveloped conditions of tribal economies as resulting from linkages to the U.S. political economy which has provided for the historic expropriation of Indian resources. Further, the process of regaining beneficial tribal outcomes from Indian resource development is linked to the exercise of sufficient autonomous control to enable the tribes to direct their own development. This premise serves as a principle

in the formulation of a tribal self-determination strategy.

Both Dependency Theory and Critical Theory have been demonstrated as appropriate models to portray the conflicts and constraints faced by tribal communities in their search for self-determination. Although developed to explain the structural dependency of macro-economic relations in international development, Dependency Theory establishes an applicable paradigm to express the similarly imbalanced relationship between the internal tribal community and the external U.S. political economy, where the tribal community functions as the periphery economy and the political economy represents the core. As described, the key attributes in the dependency model identify the nature of the dependency on capitalist relations as monopolistic and extractive. The model presumes an underlying condition of imbalance in the flow of equity between the economic communities, with a net outflow from the reservation economy to benefit the growth of the general U.S. political economy.

Critical theory provides an approach useful to understanding the conflicts that occur in the tribal setting by unveiling relations with the political economy as forms of subjugating relations. Critical theory emphasizes the resolution of conflicts arising out of unbalanced relations, also reviewed as mechanisms of power coercion over the tribal communities, through a new form of communication attainable through mutual learning. It seeks to overcome the undemocratic tendencies within capitalist institutions, as Forester (1980) recognizes, through a humanizing process of expanding tolerance for social differences, which is crucial in multi-cultural relationships. This is especially important as tribes attempt to reconcile historic normative intolerances that have led to political obstacles with state and regional political institutions. As Habermas (1973:17) expressed, "reaching an understanding is a normative concept; everyone who speaks a natural language has intuitive knowledge of it and therefore is confident of being able, in principle, to distinguish a true consensus from a false one." Critical Theory may well serve to help Indian communities overcome the pending paradox of a self-determination policy held captive for lack of a mechanism to communicate with the enterprise of the U.S.

political economy.

The conditions contributing to Indian underdevelopment have thus been correlated directly to the development processes of the U.S. political economy. This thesis of Indian underdevelopment refutes earlier theories that asserted that the political, economic, and social conditions of Indians had not improved because the tribal communities remained isolated from assimilation into the U.S. economy. According to Jorgensen (1972:287), the American Indian "is, and has been for over one hundred years, fully integrated into the national political economy." While Jorgensen points to the importance of Indian territorial resources and self-governing authority to contrast Indians from other disenfranchised groups within the U.S. society, he asserts that the impoverished conditions of Indians is directly attributed to the severely restricted access by Indians to their resources, and the utilization of these resources, instead, by the political economy. Modern Indians, Jorgensen (1972:296) correctly observes, are the progeny of the "super exploited Indians of the 19th century" who were forced to relinquish their territory, their self-governance, and their self esteem so that the political economy could grow.

Indian community development must be concerned with the nature and structure of the relations of power that serve as instruments creating, in Foucault's terminology, the subjugation of Indians, and, in terms of dependency theory, the dependent Indian periphery. Indian self-determination, as a political movement, has made important gains since the proclamation of the federal policy in 1970. While the federal policies and actions of the assimilation and termination eras have been formally repudiated, the hidden and sublime controlling mechanisms borne from that period continue to exist and interfere with the goals of Indian self-determination. It is to that end that the research now shifts its attention. Genealogical approaches that link the history of Indian subjugation to current forms of unequal exchange in relations between the tribes and the U.S. political economy may help to reveal the persistent causes of tribal repression. It is those mechanisms that contribute to the continued subjugation of the tribal community that are required to be uncovered and addressed within a systematic program of Indian community development.

CHAPTER 4

THE MODERN CONTEXT OF TRIBAL SOVEREIGNTY

In 1832 Chief Justice Marshall declared that "Indian Tribes were distinct political communities having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."¹⁰⁰

Introduction

The importance of a tribe to exercise control over its territory is argued as being a fundamental and necessary attribute of self-government. This thesis is supported in both federal Indian policy and law, and, as discussed in Chapter 6, within the community development literature. This chapter establishes the status of tribal sovereignty with an examination of the federal trust relationship, the nature of tribal political authority, and, particularly, the civil regulatory authority defining the extent of territorial control that tribes are understood to possess in several important areas. It will also establish the exceptions to their exercise of absolute authority in the areas of land use regulation, environmental protection, and economic development.

The Political Status of Tribal Sovereignty

The unique relationship between the United States and Indian tribes has shaped the evolution of Indian law and the development of the definition of tribal sovereignty. While the relationship may have been first introduced as a means with which to control tribes through subjugation, it is now held that the Indian federal trust relationship is the basis for the federal protection of Indian resources as well as continuing federal aid for the development of those resources. Congress established its special authority over Indian affairs under the Indian Commerce Clause of the Constitution,¹⁰¹ which empowers Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." Together with the power to enter into treaties, this Constitutional Clause forms a basis for broad

¹⁰⁰In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

¹⁰¹U.S. Constitution, Art. I, Sec. 8, Cl. 18.

federal power, which the Supreme Court has interpreted as "plenary" or full authority over the tribes. The concept of a special plenary federal power over Indian affairs has since been established as a cornerstone of Indian law and federal Indian policy. The extent of those plenary powers, however, are limited by the application of the trust doctrine.

Congress's enormous power over the tribes extends to the ability to terminate tribes, although compensation must be paid for lands that were recognized as having belonged to a terminated tribe. Congress may unilaterally abrogate treaties, although the courts have required that Congress express itself clearly before abrogation will be upheld. Further, Congress may revoke regulatory jurisdiction from the tribes and place such power with the federal, or, under special circumstances, with state governments.

The dominance of Congress in the establishment of policy towards the tribes is underscored by the fact that the Supreme Court has never set aside any Act of Congress as being beyond the scope of Congress's power over Indian affairs.¹⁰²

Doctrine of the Federal Trust Responsibility

The Supreme Court in U.S. v. Mitchell¹⁰³ reaffirmed a principal of the "undisputed existence of a general trust relationship between the U.S. and the Indian people." The Supreme Court first recognized the existence of a trust relationship in its earliest decisions interpreting Indian treaties.¹⁰⁴ In almost all of the treaties entered into between 1787 and 1871, Indians ceded their land territories in exchange for promises, including the guarantee of a permanent reservation for the tribes and the federal protection of their safety and well-being. The Supreme Court has held

¹⁰²Western Governor's Association. (1989) Staff Report on State-Tribal Cooperation. n.p.

¹⁰³463 U.S. 206, 225, 1983.

¹⁰⁴See Cherokee Nation v. Georgia, 30 U.S. 1, 1831; Worcester v. Georgia, 31 U.S. 515, 1882.

that such promises establish a special trust relationship. The relationship characterized as that of a ward to his guardian brought with it the continued promise to create "a duty of protection" towards Indians.¹⁰⁵

Subsequent Supreme Court decisions reaffirmed the status of tribes as self-governing entities. These precedent-setting decisions interpreted the treaties and other federal acts as protecting the status of tribes as distinct political communities possessing self-governing authority within their respective territorial boundaries. The Trade and Intercourse Acts prohibited the sale of Indian land without federal consent, thereby establishing tribal territorial rights as trust beneficiaries of the United States. This doctrine of trust over Indian resources extended federal protection of Indian landownership from intrusion by state control and subsequent non-Indian settlement. The trust relationship created federal responsibility over the maintenance of Indian lands and natural resources, and, conversely, for the allotment of Indian lands to tribal members. The administration of the trust responsibility has been extended from the Department of the Interior and the Department of Justice throughout the federal administration because of the proliferation of federal programs affecting Indians and Indian tribes. Since the 1970's, each of these federal agencies has been responsible for establishing its agency's Indian policy with respect to the federal trust relationship.

The basis of this special relationship involves mutual trust: Indians would trust the U.S. government to fulfill the promises it made in exchange for Indian cession of lands. The federal government's obligations to honor this trust relationship and to fulfill its treaty commitments are hence referred to as the trust relationship.¹⁰⁶ In 1977, the American Indian Policy Review Commission

¹⁰⁵In U.S. v. Kagama, 118 U.S. 375, 384. 1886.

¹⁰⁶Pevar (1992:27) observes that "the courts have extended the trust responsibility in three respects: First, federal statutes, agreements and executive orders, can create trust obligations as the treaties also can. Second, the trust obligation may include implied, not just express, commitments. For example, when a treaty promises a tribe it can use its reservation for 'Indian purposes', this

(1977:130) expressed the trust obligation as follows:

The purpose behind the Trust Doctrine is and always has been to ensure the survival and welfare of Indian Tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self government, and also includes those economic and social programs which are necessary to raise the standard of living and social well being of the Indian people to a level comparable to the non-Indian society.

However, federal Indian policy history is a record of the U.S. government's continued failure to observe faithfully its trust commitments to tribes. In spite of the fact that Congress has a responsibility to fulfill this nation's treaty commitments, it has broken nearly all of its Indian treaties. During the 1950's Termination era, Congress abolished over 100 tribal governments.

Origins of Tribal Sovereignty

Tribal sovereignty generally refers to the inherent right or power, which has never been relinquished, to self-govern. In Johnson v. McIntosh,¹⁰⁷ Chief Justice Marshall held that tribes had no power to grant lands to anyone other than the federal government. By establishing limitations on tribal sovereignty, Marshall later emphasized the affirmative governmental power of the tribes. In Cherokee Nation v. Georgia,¹⁰⁸ the court held that tribes qualified as separate "states" and further characterized the tribes as "domestic dependent nations".

For 150 years following the Cherokee cases, no additional limitations on tribal sovereignty were found to further restrict the domestic dependency status of the tribes. However, in Oliphant,¹⁰⁹ the Supreme Court raised the issue of the

obligates the government to protect the Indian's right to hunt and fish on that land. Finally, the trust responsibility imposes an independent obligation upon the federal government to remain loyal to the Indians and to advance their interests, including their interests in self-government."

¹⁰⁷21 U.S. (8 Wheat) 543 (1823).

¹⁰⁸30 U.S. (5 Pet.), 1831.

¹⁰⁹Oliphant v. Suquamish Indian Tribes (435 U.S. 191, 1978).

tribe's power to exercise criminal jurisdiction over non-Indians of the reservation. The tribe, which relied on its inherent sovereignty, argued that no treaty or Act of Congress extinguished its criminal authority over non-Indians. But the Supreme Court held that the exercise of criminal jurisdiction over non-Indians was "inconsistent with the domestic status of the tribes" (Canby 1988:69). By leaving some question about the further judicial limitations on tribal sovereignty, the Oliphant decision posed a potential threat to tribal autonomy. Where it cannot be shown that tribal interests are affected, the court in Montana¹¹⁰ held that a tribe lacked inherent powers to regulate hunting and fishing by non-Indians on non-Indian owned land within a reservation.

Tribes have also been found to have lost their inherent power to regulate liquor sales on reservations,¹¹¹ due to their status as domestic dependent nations. In contrast, the courts in U.S. v. Wheeler¹¹² found that tribes retain the power to prosecute their own members and to tax non-Indians for their activities on the reservation as consistent with their domestic dependent status.¹¹³ Canby (1988:71) provides some useful generalizations summarizing the attributes of tribal sovereignty:

1. Indian tribes possess inherent governmental powers over all internal affairs;
2. The states are precluded from interfering with the tribal exercise of self government; and
3. Congress has plenary power to limit tribal sovereignty.

Tribal governments are not comparable to "local governments", which derive

¹¹⁰Montana v. United States, 450 U.S. 544; 564-65, 1981.

¹¹¹See Rice v. Rehner, 463, U.S. 713, 726, 1983.

¹¹²U.S. v. Wheeler, 435 U.S. 313, 327, 1978.

¹¹³In Washington v. Confederated Tribes of the Colville Indian Reservation, 447, U.S. 134, 152-54, 1980.

their authority from states. The power of a municipality to enact regulations must show that the state has conferred such power to that municipality, as the state is the sovereign body possessing those powers. A tribe, conversely, retains its own sources of governing powers. A tribe's power to levy a tax, for example, is not subject to challenge on the grounds that Congress has not conveyed such powers to the tribe. The tribe, as a sovereign polity, generally needs no authorization from the federal government¹¹⁴ to exercise these powers. However, the exercise of sovereign power has its limitations, which continue to be clarified by the courts.

An important distinction to consider in understanding tribal authority is whether a limitation exists that would prevent the tribe from acting or whether any authority exists that would permit the tribe to act. "As a sovereign, it is free to act unless some federal intrusion has affirmatively modified that sovereignty."¹¹⁵ Tribal sovereignty has also been used to prevent the intrusion of state law and jurisdiction within Indian country. Two consequences result from tribal powers being inherent rather than conferred by the federal government. The provision of the Bill of Rights that restricts the federal government has not been held to apply to the tribes, nor does it violate the fifth amendment provision against double jeopardy for the tribe and the federal government to prosecute a defendant for the same offense. As independent sovereigns they are able to vindicate their public policies.¹¹⁶

Tribal sovereignty has also operated in deterring state jurisdictional intrusion into Indian Country with certain restrictions. The Supreme Court has consistently prohibited state law from applying to Indians in Indian Country. In Williams v.

¹¹⁴Notwithstanding the provisions of the Indian Reorganization Act of 1934 requiring certain tribes to obtain Secretarial approval in certain governmental actions.

¹¹⁵National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 852-53, 1985.

¹¹⁶See U.S. v. Wheeler, 435 U.S. 313, 1978.

Lee,¹¹⁷ a unanimous court ruled that state courts have no jurisdiction over a civil claim by a non-Indian against an Indian for a transaction arising on the Navaho reservation (Canby 1988:73). The court held that state law had application only where "essential tribal relations" were not involved and that "absent governing acts of Congress, the question has always been whether the state action infringes on the right of reservation Indians to make their own laws and be governed by themselves."¹¹⁸ State interference would undermine the tribal court authority over reservation affairs and thereby infringe on the right of Indians to govern themselves. The Supreme Court in McClanahan¹¹⁹ held that state law would only be permitted into Indian Country if two conditions were met: the intrusion would not interfere with tribal self-government and non-Indians were involved. The Supreme Court¹²⁰ also found that the State of New Mexico could not tax the income of an Indian earned on the reservation:

State jurisdiction is preempted by the operation of federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

The ruling in William v. Lee that state law may not interfere with tribal self-government remains in effect today as an independent test to be applied along with pre-emption analysis,¹²¹ but "tribal self government no longer seems to be generously defined to include anything that affects Indian interests" (Canby 1988:74). As a consequence, most cases involving the application of state law in Indian Country are decided on pre-emptive grounds.

The power of the federal executive branch is limited more narrowly by the

¹¹⁷358 U.S. 217 (1959).

¹¹⁸In Williams v. Lee, 358 U.S. at 220, 223.

¹¹⁹McClanahan v. Arizona State Tax Commission (441 U.S. 164, 1973).

¹²⁰New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 224. 1983.

¹²¹Established in New Mexico v. Mescalero Apache.

trust relationship, where the courts have held¹²² executive officials to strict fiduciary standards in their management of Indian trust resources. The courts have also mandated, absent of Congressional authorization, that federal agencies cannot subordinate the interests of Indians to other public purposes.¹²³ The legal representation of Indian interests represents another important aspect of the federal trust responsibility. The United States Attorney is responsible for representing Indians and tribes in all suits "at law and in equity."¹²⁴

The trust relationship was viewed during the early 1900's as a form of transitional protection during a period of the assimilation of Indians into mainstream society. In recent years, however, the trust relationship has become refined as a doctrine that supports progressive federal legislation enacted for the benefit of Indians and tribes, and constitutes a basis for the current federal Indian policy of self-determination. It is now widely acknowledged that the trust relationship has developed into a permanent doctrine of federal Indian policy that serves to guide the future development of both Indian policy and Indian law.

Tribal Political Authority

Indian Tribal governmental powers are understood as inherent powers of a limited sovereignty that have never been extinguished by the tribes. In United States v. Wheeler (1978), the Supreme Court found that tribal governments are "unique aggregations possessing attributes of sovereignty over both their members and their territory. Powers not limited by federal statute, by treaty, by restraints implicit in the protectorate relationship or by inconsistency with their status remain with tribal governments or reservation communities" (AILTP 1988:35). Limits to tribal

¹²²Supreme Court decisions in Seminole Nation v. United States, 316 U.S. 286, 296, 297 (1942) and United States v. Payne, 264 U.S. 446, 448 (1924), have required officials of the United States to maintain "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards" in carrying out their trust responsibility to Indians.

¹²³United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976).

¹²⁴25 U.S.C. sec. 175.

sovereignty have been established to include the power to self-alienate their lands or the power to make treaties with foreign nations. Most tribes, however, retain the inherent sovereign power to fully exercise most forms of civil jurisdiction over non-Indians. Inherent tribal powers of self-government enable tribes to exercise governing authority to the extent not limited by the courts. While the powers of tribal governments cannot be fully identified from specific Congressional delegations, the following identifies the fundamental areas of tribal powers that have been recognized under federal law that represent the necessary range of powers to constitute tribes as autonomous political communities:

Power to Establish a Form of Government - Federal law provides Indian tribes the authority to adopt any form of government appropriate to their practical, cultural, or religious needs. Tribes are not required to adopt forms of government patterned after the United States government since the tribes are not limited by the U.S. Constitution -- "They are not subject to such principles as the separation of powers or the religious establishment clause" (AILTP:1988:36). The most widely accepted form of tribal governmental structure was adopted under the Indian Reorganization Act (IRA), and those tribes exercising self-governance under IRA constitutions are founded not on the delegation of Congressional powers, but, rather, on their inherent powers of sovereignty. The courts have upheld other forms of non-IRA tribal governmental structure as valid.

Power to Determine Membership - A fundamental power of tribal government is the right to determine its membership, which establishes the rights to vote in tribal elections, to hold office, and to receive proprietary interests in tribally held resources. Tribes are also not required, under the Civil Rights Act of 1968, to comply with the concept of equal protection and due process in determining membership.

Police Power - Tribal authority to legislate and enforce civil and criminal laws represents a fundamental power of the tribes' status as autonomous sovereign political communities to exercise authority over their territories. Tribal political authority extends to the power to regulate the conduct of individuals within the

tribe's jurisdiction, to determine domestic rights and relations, to dispose of non-trust property and to establish rules of inheritance, to regulate commercial and business relations, to generate taxation revenues for the operation of essential governmental services, and to administer justice through law enforcement and tribal court systems. As an important element of territorial control, tribal authority to regulate land use through zoning has also been upheld.¹²⁵

Power to Administer Law and Order - Tribes possess broad authority to administer civil and criminal justice in Indian Country, although criminal jurisdiction has been limited statutorily by the Indian Civil Rights Act, and denied in certain applications over non-Indians under the Oliphant v. Suquamish Indian Tribe decision.¹²⁶ The power of tribes to exclude persons from within their territory is understood as an inherent right of sovereignty. The exclusionary power is viewed as a fundamental means to protect their communities against undesirable persons posing threats to their well being. The power to exclude is limited to rights retained by non-members, including the right to access and occupy lands on the reservation owned in fee patent.

Sovereign Immunity - Tribes possess the power to establish governmental and business organizations for the purpose of conducting the affairs of managing tribal resources and assets. Tribally chartered businesses retain exemptions to federal income taxation and immunity from suit unless expressly waived. Indian tribes cannot be sued without their waiver of sovereign immunity, and generally the courts have upheld that business contracts with tribes are alone insufficient to waive sovereign immunity from suit without express congressional approval.

The principle that tribal governments and their agencies possess sovereign

¹²⁵Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982); Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975); Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22, cert. denied, 389 U.S. 1016 (1967).

¹²⁶435 U.S. 191 (1978).

immunity from suit has been established in a number of court rulings.¹²⁷ However, tribes are not deemed to be immune from suits by the federal government.¹²⁸ Certain tribes have formed tribal corporations pursuant to chapter 17 of the Indian Reorganization Act of 1934, which authorizes the Secretary of Interior to issue to the tribes corporate charters conferring certain stated powers to conduct corporate business. Many of those conferred charters included the power to "sue and be sued." Several courts¹²⁹ have interpreted this provision to constitute an authorized waiver of tribal immunity, while other courts¹³⁰ have held the clause in the corporate charter to be insufficient to waive the tribe's general immunity.

Tribal Civil Jurisdiction over non-Indians - Tribal authority to regulate non-Indians on non-Indian lands continues to represent the basis of most conflicts tribes face with state governments and individual non-Indians. An important precedent was established in 1981 by the Supreme Court in Montana v. United States where the court defined a standard test based on an action that threatens or has some direct effect on the "political integrity, the economic security, or the health or welfare" of a tribe. A 1982 decision upheld a broad view of tribal civil authority over non-Indians on non-Indian land under the Montana tribal interest test in a tribal zoning dispute.¹³¹

Although the courts have historically upheld the principle that state law does not apply to Indian affairs in Indian Country without express Congressional consent, the extent of state laws including legislative enactments, judicial jurisdiction, and

¹²⁷See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58. 1978.

¹²⁸U.S. v. Yakima Tribal Court, 806 F. 2d. 853, 861. 9th Cir. 1986., Cert denied, 107, S. Ct. 2461. 1987.

¹²⁹Frontenelle v. Omaha tribe, 430 F. 2d. 143. 8th Cir. 1970.

¹³⁰Atkinson v. Haldane, 569, p. 2d. 151, Alaska. 1977.

¹³¹Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982).

state or local executive authority, have been continually challenged in Indian country. The courts have generally found Congress's broad powers under the Indian Commerce Clause as the constitutional authority that pre-empts the state's exercise of governmental authority in favor of tribal self-government. Unless Congress expresses a clear intent to permit the application of state regulation on a particular Indian activity, state regulation is presumed pre-empted.

Public Law 280, enacted by Congress in 1953, exemplifies such an express delegation by transferring to six states the jurisdictional authority over most crimes and certain civil matters. The law has extended to other states the option of amending its own laws to assert such jurisdiction. Washington State assumed full Public Law 280 jurisdiction over non-Indians on reservations and over Indians on non-trust lands. State jurisdiction was further extended to Indians on trust lands in eight major crimes areas, subject to the express consent of the tribal governments. Public Law 280 was amended in 1968 to require tribal consent to further state jurisdiction by referendum vote of tribal members in all future cases, however no tribes have since consented. The 1968 amendment further permitted states to retrocede criminal or civil jurisdiction acquired under Public Law 280. Public Law 280 specifically excluded the regulation and taxation of trust land and exempted the hunting and fishing rights of Indians.¹³² In Santa Rosa Band v. Kings County,¹³³ the court found that Public Law 280 did not transfer regulatory powers over Indian reservations to the states, hence the power to regulate Indian reservations through zoning and building codes was also found to be excluded.

¹³²Canby (1988:119) finds that for purposes of civil and criminal adjudicatory jurisdiction, some clear rules can be found today. "Where a case involving no Indian parties and does not affect tribal self-government, the state courts do have jurisdiction. When Indians or Indian interests are involved, state power is usually excluded unless federal statutes or treaties confer it." Any such generalizations are subject, however, to many qualifications of the divisions of criminal and civil jurisdiction among the federal government, the tribes, and the states.

¹³³532 F.2d 655 (9th Cir. 1975) cert. denied, 429 U.S. 1038 (1978).

A major criterion establishing the extent of state jurisdiction under Public Law 280 required that, if the general law being extended within Indian Country is determined to be prohibitory, it is then presumed valid under Public Law 280's grant of criminal jurisdiction. In 1987, the Supreme Court established a state "public policy test" to differentiate between a state law that prohibits or regulates an activity in Indian Country.¹³⁴ If the activity is generally permitted by state law, it is determined not to be in violation of the state's public policy, and laws affecting such conduct are presumed to be regulatory only. Public Law 280 also does not extinguish tribal jurisdiction; hence, concurrent jurisdiction may apply with states in those matters applicable under Public Law 280.

Except where Public Law 280 is found to apply, the courts have sought to protect tribal self-government in determining where civil cases can be brought for incidents occurring in Indian Country. Cases arising in Indian Country involving only Indians are considered within the exclusive jurisdiction of tribal courts. The exclusive tribal court jurisdiction applies also to non-Indians who seek to sue Indians for events occurring in Indian Country. A state court has no ability to hear such cases under any circumstances, although the federal courts retain the right to review tribal court rulings for the purposes of establishing the existence of tribal jurisdiction. In Washington v. Confederated Tribes of the Colville Indian Reservation,¹³⁵ the Supreme Court provides guidance as to when tribal powers apply to non-Indians by recognizing that tribal authority is divested only when its exercise is inconsistent with overriding federal interests:

. . . tribal sovereignty is dependent on, and subordinate to, only the federal government, not to the states.

Taxation and Regulation in Indian Country

The federal taxing power is fully effective in Indian Country with regard to

¹³⁴In California v. Cabazon Band of Mission Indians (1987).

¹³⁵447 U.S. 134 (1980).

both Indians and non-Indians. There are certain types of income earned by Indians that Congress has elected not to tax. These sources include income from individually allotted land that remains in trust, and income derived from treaty guaranteed fishing resources.

It has long been held that states do not have the power to exercise taxation of Indian trust lands. This exclusion was mandated by Congress to be included within certain western state constitutions as a condition to their admission into the Union. The primary limitation is that the state may not tax when the subject matter is preempted by federal law. In Washington v. Confederated Tribes of the Colville Reservation in which both the tribe and state had imposed a tax on cigarette sales in tribal shops on the reservation, the Supreme Court found:

There is no direct conflict between the state and tribal (taxing) schemes, since each government is free to impose taxes without ousting the other. Although the taxes can be used for distribution or regulatory purposes, as well as for raising revenue, we see no non-revenue purposes to the tribal taxes at issue in these cases, and, as already noted, we perceive no intent on the part of Congress to authorize the tribes to pre-empt otherwise valid state taxes.

It is therefore concluded that the exercise of a tribal taxing authority does not necessarily invalidate a state tax, regardless if the effect is a double tax burden that places those who deal with the tribes at a distinct disadvantage.

Questions of the authority of the state to regulate within Indian Country are similar to those of a state's taxing powers, and the pre-emption test established in New Mexico v. Mescalero Apache Tribe¹³⁶ is often relied upon by the courts:

State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

Until recently, it was assumed that the states possessed little regulatory powers within Indian Country. When on-reservation conduct involving only Indians is at issue, state law is generally found to be inapplicable, since the state's regulatory

¹³⁶New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334. 1983.

interests are likely to be minor and "the federal interest in encouraging tribal self-government is at its strongest."¹³⁷ The Supreme Court held, in Bryan v. Itasca Country,¹³⁸ that the destruction of tribal governments likely will result "if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments."

Opportunities for state law to apply to tribal members in Indian Country are very limited. Most of the controversy between the states and tribes focuses on regulation of activities by non-Indians on the reservation where the preemption analysis is most often applied. The greater the federal government and the tribes assume control of an activity, the more likely it will be found that the state is deemed pre-empted.

Intergovernmental Relations between Tribes and States

Intergovernmental agreements between tribes and states are recognized as important means with which each government may address conflicts arising from the complexities of past federal policy and laws. Congress authorized intergovernmental agreements initially in the Indian Child Welfare Act of 1978, which provided for the cross-deputization or contract detention of prisoners by commissioning officers of the other jurisdiction as agents under their authority. In the event a tribe lacks criminal jurisdiction over non-Indians, such an agreement provides a tribal police officer, cross-deputized under state and federal law, the authority to arrest a non-Indian committing a crime within the reservation, and to deliver the arrested person to state or federal officials. Civil regulatory agreements have also been executed in a number of areas to promote greater cooperation between state and local governments and the tribal government in the areas of child welfare protection, co-regulation of gaming activities, and land use regulation. Tribes have attained a clear judicial and legislative recognition of their sovereign authorities, possessing a broad spectrum of reserved powers linked to their inherent sovereignty. While the

¹³⁷White Mountain Apache Tribe v. Braker, 448 U.S. 136, 144. 1980.

¹³⁸426 U.S. 373, 1976.

relationships among tribal, state, and local governments continue to remain complex, the promise for resolution of intergovernmental conflicts appears achievable through intergovernmental government-to-government cooperation through negotiated agreements.

Regulatory Control of the Reservation Territory

The ability of tribal governments to exert control over their territories has been historically altered due to shifting federal Indian policies that resulted in the complex composition of non-Indian ownership interests, and the corresponding public opinion demanding greater state jurisdiction to protect those interests. Historic events that originated with the General Allotment Act of 1887 established two irreversible conditions to complicate reservation property interests. The Act introduced individual ownership of the formerly community-owned territories of the reservation, and secondly, it authorized the transfer of trust parcels to non-Indian fee ownership. The Act encouraged settlement onto reservations by non-Indians, constituting a property rights situation no longer limited to tribal interests. As many reservations today exhibit some degree of land ownership fractionalization, a plurality of property rights interests have emerged to present the central obstacle to the tribe's exclusive territorial control. This constitutes the most significant condition to the diminishment of tribal political sovereignty. While it has long been held and recognized that the tribes retain their inherent rights to regulate their territories, the allotment to and the subsequent occupancy by non-Indian fee landowners within reservation boundaries have challenged the exclusive rights of the tribes to exercise their police powers over non-member fee lands (Johnson 1988). This legal challenge raises questions over the extent of tribal authority, and whether state and local zoning laws also have concurrent applicability. The erosion of exclusive regulatory control over the reservation territory, thus, is viewed as a challenge to the tribe's ability to maintain a cohesive political community.

The Allotment Act introduced Indians to the Anglo concept of private land ownership as part of the policy's scheme to incorporate Indians and their resources into the assimilated U.S. political economy. Another important effect introduced by

the Act established a system of land allocation to further remove portions of the reservation lands as "surplus". These surplus lands, available for non-Indian ownership and occupancy, facilitated the process of incorporating reservation resources into the political economy. The resultant Indian reservation comprised a patchwork of land ownership made up of trust lands held by the federal government for the tribes, allotted lands held in trust for individual tribal members, fee land held by non-members, federal public lands, and state and county lands.

During the Allotment Act period, the Supreme Court further diminished tribal powers by permitting federal and state governments to exercise their criminal authority over Indians and the reservation. However, the trend towards erosion of tribal sovereignty was reversed during the late 1960's with the passage of the Self-determination policies that upheld the doctrine that Indians themselves should determine their own future.¹³⁹ Since the policy was adopted, tribal governmental capacity has developed to begin to reconcile much of the land tenure anomalies created by the preceding 80 year policy history.

Recent Supreme Court rulings further limited tribal authority to exercise civil jurisdiction over non-Indians. In Montana v. United States,¹⁴⁰ the court further limited tribal authority of civil jurisdiction over non-Indians by ruling that the Crow Tribe did not have authority to regulate hunting or fishing by non-Indians on non-Indian fee lands within the reservation. A general principal was established in Montana that Indian authority did not extend "beyond what is necessary to protect tribal self-government or to control internal relations" absent of congressional delegation (Goepple 1990:564). The courts decided in Montana that tribes have been divested of their sovereignty to regulate relations between Indians and non-Indians by virtue of their dependent status, and that the exercise of tribal authority beyond what is necessary to defend tribal self-government is inconsistent with the

¹³⁹H.R. Doc. No. 363, 91st Cong., 2d Sess. 1 (1970).

¹⁴⁰450 U.S. 544 (1981).

dependent status of the tribes, without express congressional delegation. However, Montana provides two important and broad exceptions, or tests, to its ruling whereby tribal authority may apply to non-Indians:

1. A tribe is found to retain its authority to regulate the activities of non-members who have entered into consensual relations with the tribe or its members through commercial dealings, contracts, leases, or other arrangements;
2. A tribe also retains its inherent regulatory authority over the conduct of non-Indians on fee lands when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

The scope of the second exception is similar to the traditional scope of authority of the police powers.¹⁴¹ Subsequent lower court decisions after Montana granted tribes authority over non-Indians under the second Montana exception when non-Indian activity was found to threaten the integrity of the tribal community and its resources. The Tenth Circuit Court in Knight v. Shoshone and Arapahoe Tribes¹⁴² upheld tribal zoning authority over non-Indian fee land under the exception that no competing local or county zoning ordinances existed to restrict land use on non-Indian fee lands on the reservation.

The Brendale Decision

The Yakima Tribe brought suit in federal court to prohibit the application of county zoning laws in two areas of the reservation designated by the tribe as "closed" and "open" to development. Through its adopted zoning ordinances of 1970 and 1972, the tribe established five categories of land use districts -- agriculture, residential, commercial, industrial, and restricted. The closed area was restricted to the harvesting of wild crops, grazing, hunting and fishing, and camping

¹⁴¹Police powers is defined as that which "enables the people to prohibit all things inimical to comfort, safety, health, and the welfare of society" (Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530, 536 (1928)).

¹⁴²670 F. 2d. 900 (10th Cir. 1982).

due to its important religious and spiritual significance to the tribe. Construction in this area is limited to only the tribe and the BIA in association with natural resource management activities. Yakima County has regulated land use since 1946 and applies its zoning to only fee lands on the reservation. The county zoning designation for the closed areas is "forested watershed", which permits a range of uses including residential development, campgrounds, lodging, restaurants, and general stores.

Brendale comprises two distinct cases. In the first case, Philip Brendale, a non-member Indian, sought to subdivide his 160-acre fee simple landholding into two parcels for trailer sites and recreational cabins. This land was located within a portion of the Yakima Indian Reservation's "closed area", which contained approximately 3% in fee lands and access to the general public had been restricted since 1972. Brendale's proposed subdivision conformed with Yakima County zoning, but conflicted with the tribe's "closed area" zoning designation.

The second case involved Stanley Wilkinson, a non-Indian fee landowner, seeking the subdivision of a 32-acre parcel into 20 parcels in the area designated by the tribe as "open". Approximately one half of the "open" area is held in fee ownership with prevailing uses in rangeland, agriculture, residential, and commercial uses. Unlike the closed area, non-members are not restricted from this area where the county provides urban services. Most of the fee land lies within the three state-incorporated towns of Toppenish, Wapato, and Harrah, where neither the tribe nor the county regulate land use. The remainder of fee land is largely scattered among the trust lands. 80% of the population within the open area is non-Indian. Tribal zoning of the Wilkenson parcel was agriculture, allowing a minimum lot size of 5 acres. County zoning designated the parcel for "general rural" use, allowing a minimum lot size of 1 acre. Similar to Brendale's petition, the proposed subdivision conformed with county regulation but conflicted with tribal zoning codes.

The Federal District Court held that the tribe had authority to zone non-member fee lands in the closed area, but not in the open area. On appeal, the Ninth

Circuit Court held¹⁴³ that such authority over both the open and closed areas fell within the second Montana exception and, therefore, was permissible. The Court here implicitly equated the existence of inherent tribal sovereignty with the limits of police power.¹⁴⁴ The Ninth Circuit ruling further found that Indian authority to zone the property would advance the goal of "systematic and coordinated planning", and, in considering both county and tribal interests, found that the "strength of tribal interests over the closed area justified exclusive tribal zoning of Brendale's property." The court remanded the case involving Wilkinson's property for the District Court to balance tribal and county interests in zoning non-member fee lands located in the open area. The Ninth Circuit Court held that the tribe's governmental authority is derived implicitly from its status as a dependent sovereign and explicitly from its treaty, and ruled:

Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. If we were to deny the Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning so fundamental to a zoning scheme. This we are unwilling to do.

The United States Supreme Court agreed to hear the case on appeal, and narrowly held that the tribe lacked authority to regulate non-member lands in the "open area". The Brendale decision ruled that the tribe retained authority to zone non-member lands in the closed area of the reservation, but had lost the authority to

¹⁴³Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F. 2d. 529 (9th Cir. 1987).

¹⁴⁴Brendale and the county argued that Public Law 280, as implemented in Washington State by RCW 37.12.010, divested the tribe of authority to regulate non-Indians on fee land on the reservation. The ninth Circuit Court rejected this view, noting that Public Law 280 grants state courts jurisdiction over civil litigation but does not change tribal regulatory authority (Johnson 1988:167).

control such lands in the open area.¹⁴⁵ The court also reaffirmed¹⁴⁶ the tribe's authority to retain exclusive power to regulate Indian trust lands because state authority to regulate such lands has been "preempted by extensive federal policy and legislation."

The court construed Montana's second exception narrowly and concluded that the tribe's authority did not extend over all conduct listed within the exception, but, instead, was dependent upon specific circumstances, and further ruled that a tribe has authority over a proposed land use on non-Indian land only as long as it threatens a tribe. With the absence of such threat, the land use control would revert to the non-Indian local government. Rather than support tribal authority, the ruling allowed the tribe the right to sue to enjoin uses, which would have a "demonstrably serious impact and imperil their political integrity, economic security, or their health and welfare".¹⁴⁷ Justice Stevens, in considering the authority of the tribe to zone non-member lands, found their power has been diminished over time by Acts of Congress, such as the Allotment Act, and the long absence of tribal regulation of non-member lands. Justice Stevens concluded that the tribe has authority to zone Brendale's property in the closed area due to the circumstance that non-members owned very little land in the closed area. Further, by restricting access to the closed area, the tribe has exercised its basic power to exclude, thereby preserving the power to define the essential character of that area. Justice Stevens concluded that the tribe lacked the power to zone non-member land in the open area since nearly 50% of the

¹⁴⁵Basing his dissenting opinion on a broader interpretation of Montana's second exception, Justice Blackmun supported the tribe's right to zone all reservation fee lands as the loss of the long term benefits of comprehensive land management would represent a significant impact on tribal interests to justify tribal authority under the Montana exception. He further rejected the notion of concurrent tribal and county zoning jurisdiction of non-member lands as being unworkable.

¹⁴⁶See also Santa Rosa Band of Indians v. Kings County, 532 F. 2d. 655, 658 (9th Cir., 1975) Cert. Denied, 429 U.S. 1038 (1978).

¹⁴⁷Brendale, 109 S.Ct. at 3008.

open area contained non-member fee lands and because the tribe has not retained its power to determine the essential character of the open space by restricting access to it.¹⁴⁸

The Brendale opinion challenges basic principles of land use planning in supporting uncoordinated and independent regulatory authorities in land use management within the reservation. A fundamental principle of land use planning is that it retains comprehensiveness and prospectiveness. Under Justice White's approach, the county has exclusive jurisdiction over non-member fee lands while the tribe retains authority over tribal lands and the individual allotments held by members of the tribe. Justice White prescribes a means for resolving differences between conflicting land use policies of the two governments only by allowing for a tribal initiated federal nuisance-type cause of action to prevent a proposed development. This approach to conflict resolution is inconsistent with comprehensive, prospective planning. "Essentially, this sets land use planning on reservations back to the pre-Euclid¹⁴⁹ era, when nuisance actions for overtly harmful uses were the primary means of controlling the use of private property" (Goeppeler 1990:425).

The court's support of tribal zoning of fee lands in the closed area was based on the "pristine" environment in which the tribe has maintained that area. This raises an important consideration in tribal planning if its power to zone is found subject to the intensity of development activities on fee properties, suggesting that tribal control is more likely to be affirmed only when a tribe denies development by non-Indian property owners. Tribes may not retain the ability to meaningfully "define the essential character" of an area of the reservation when any change from

¹⁴⁸The court further raised an important concern regarding non-member representation in tribal government by acknowledging that the non-member population constituted 80% of the open area population, of which the majority population could not vote in tribal elections.

¹⁴⁹Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

its current pristine character could result in the eventual loss of control over it. If development within the open area equates to a potential loss of authority to control that area, a paradox is presented in the legal argument. As the tribes advance their reservation economic objectives through resource development, their prosperity may come at the potential diminishment to their inherent tribal government and cultural identity. The Supreme Court's complex decision was summarized by Weaver (1990:1B-17) as follows:

Jurisdiction in the "Open Area":

1. The tribe does not have authority to zone fee land within the open area;
2. The General Allotment Act diminished the treaty reserved power to exclude non-Indians from fee lands on the reservation and the exclusion power no longer serves as a basis for tribal power to zone fee lands in the open area.
3. The court's holding in Montana is followed, finding that the tribe's inherent sovereignty does not include the power to zone the Wilkenson property. Absent of express Congressional delegation, tribal sovereignty beyond that necessary to protect tribal self-government or to control internal relations is inconsistent with the tribes' dependent status.
4. Under Montana, the tribe has a protectable property interest in land use activities on the reservation and must be recognized by the county zoning authority. The impact must be "demonstrably serious" and must "imperil the tribal integrity, economic security, or health and welfare." The tribe may seek protection in federal court after the county has acted.
5. Exercise of Yakima County zoning over non-Indian fee land in the open area does not alone imperil the tribe's interests.

Jurisdiction in the "Closed Areas":

1. The tribe may zone fee land in the closed area.
2. This power is based on the tribe's maintenance of the "essential character" of the area through the exclusion power. The power to zone is incidental to its power to continue to preserve that character.

3. The power to exclude derives from express treaty provisions and its inherent sovereignty.

Hence, Brendale establishes a test for determining the effect of tribal regulatory control over county powers. Under the ruling, direct regulation over non-members' use of fee land on a reservation is dependent upon the following conditions:

1. Whether the activity occurs within a reservation area in which the tribe retains the power to determine the "essential character" of the reservation;
2. Whether the activity to be regulated on fee land "imperils the political integrity, the economic security, or the health or welfare" of the tribe;
3. The manner in which the particular fee land passed out of trust;
4. Whether the particular non-member has entered into a contractual or consensual relationship with the tribe or its members.

A fundamental principle of zoning is that while the value of private property may be affected by certain use restrictions imposed, private landowners receive a reciprocal benefit by being assured of predictable and compatible adjoining land uses. When two governments pursue independent and checkerboard zoning schemes, individual landowners may lose the protection of reciprocal benefits from the restrictions placed on their property. Brendale results in further legal uncertainty as it fails to provide a clear test for determining the extent fee lands on the reservation remain under tribal authority. Rather than a clear standard, courts applying Justice Steven's approach have only a list of factors to weigh to determine where tribes retain authority over non-member lands on the reservation. As the courts continue the process of dividing reservations into dual jurisdictional areas, the concept of tribal cohesiveness risks further diminishment and the search for a unitary doctrine supporting tribal regulatory authority over the tribal territory becomes more difficult and may become subject to local governmental negotiation.

The uncertainty created by Brendale is compounded in Washington State

since the passage of a statewide land use policy promoting interjurisdictional coordination under the Growth Management Act. Brendale promotes an opposing precedent by fragmenting the reservations into zoning checkerboards without offering solutions nor clear recommendations for governmental cooperation between the tribes and local governments. This situation becomes compromised as the Act, while fostering interjurisdictional cooperation in land use management, fails to acknowledge the tribes as participants in a regional planning scheme.

Controlling the Reservation Environment

The enactment of comprehensive federal environmental legislation beginning in the 1970's was intended to protect all lands from air, water, hazardous waste, and solid waste pollution. Notwithstanding the absence of state regulatory jurisdiction in Indian country, Congress instructed the United States Environmental Protection Agency (EPA) to delegate its authority, where eligible, to qualifying states. While the EPA retained the responsibility to protect the reservation's environmental quality, it rarely exercised its obligations. Further, it is well recognized that environmental problems are rarely contained within political boundaries. Industrial and other developments on non-Indian lands adjacent to a reservation pose the potential for reservation air and water quality degradation. Timber practices on upstream riparian lands may threaten both tribal and non-tribal fisheries. Both tribal and non-tribal governments face a shared concern to comply with federal environmental standards, and hence the nature of environmental protection poses important opportunities for coordination between tribes and the state and local governments to comprehensively address common regional environmental quality objectives.

In 1984, the EPA adopted an Indian policy that established the tribe's authority to conduct reservation-wide environmental programs similar to those delegated to the states. Congress later amended most environmental statutes to provide mechanisms for the EPA to fund tribes, as it has assisted the states, to enable them to protect their territories. However, the authority to establish a delegation of program authority to the tribes occurred about two decades following the initial enactment of the legislation. As a result of the exclusion of tribes in the

early period of environmental program development, tribal lands were often ignored and the tribal role in the implementation of federal programs was not well defined as its regulating capacity remained largely undeveloped. The EPA Indian policy statement provided the guidance necessary for the administration of environmental programs on Indian lands. The policy is far reaching, and provides the following components:

1. The EPA will work with tribes on a government-to-government basis;
2. The EPA will recognize tribal governments as the primary authority to implement federal environmental programs on tribal lands;
3. The EPA will take affirmative steps to assist the tribes in assuming regulatory responsibility for reservation lands; and
4. The EPA will encourage cooperation between the tribes and the state and local governments in the implementation of federal environmental programs.

In November, 1985, the EPA adopted its "Interim Strategy" for the implementation of the EPA Indian Policy that recognized that "forcing tribal governments to act through state governments that cannot exercise jurisdiction over Indian tribes is not an effective way of implementing programs overall, and certainly is in opposition to the federal Indian policy." Under federal law, the Indian trust relationship conveys to the federal government the duty to protect Indian resources. To exercise the trust duty, the Secretary of the Department of the Interior has been designated as the federal trustee for Indian tribal resources.¹⁵⁰ The United States Supreme Court has upheld this trust obligation as impressing upon the Secretary a fiduciary duty to Indian tribes.¹⁵¹ Congress has affirmed the treatment of tribes as states under certain environmental programs.

¹⁵⁰Executive Order no. 12580, sec. 5(d), 52 Fed. Reg. 2923, 2926, (January 29, 1987).

¹⁵¹see United States v. Mitchell ("Mitchell II"), 463 U.S. 206, 224; Blue Legs v. BIA, 867 F.2d 1094 (8th cir. 1989).

Sources of Tribal Authority

Tribes derive their power to regulate activities that threaten to degrade tribal lands, waters, and resources from three principal sources. In addition to their proprietary rights in property ownership and their inherent sovereignty over their lands, under federal environmental laws, Congress may also confer environmental protection authority to the tribal governments.

The courts have affirmed common law tribal proprietary, aboriginal and reserved water rights,¹⁵² and held that the creation of Indian reservations necessarily included the implied reservation of a proprietary water right,¹⁵³ without such a reserved water right the reservation land would be of no value. A corollary to the reserved water right is a right to water of undiminished quality. This right of quality protection is derived from the "equitable apportionment doctrine" that imposes a duty on sister states to protect water quality and prevent the diminishment of quality enjoyed by neighboring states (Dubey 1990:4-7). Treaty rights provide an effective means to enable tribes to exercise control over reservation and off-reservation lands. The U.S. Constitution provides that treaties entered into by the United States are the "supreme law of the land", therefore, "treaties give tribes federal authority to directly and indirectly regulate reservation and off-reservation lands" (Dubey 1990:4-4).

Inherent tribal sovereignty provides for the exercise of police powers and civil regulatory controls. Retaining all rights of sovereignty except those rights expressly withdrawn by Congress, tribes possess authority to protect the health, safety, and welfare of the reservation population from threats imposed by environmental pollution. The exercise of the tribe's civil regulatory authority extends to both its members and its territory. Congress reaffirmed the EPA's policy of working on a government-to-government basis with tribes when it amended the

¹⁵²See County of Oneida v. Oneida Indian Nation, 470 U.S. 220.

¹⁵³In United States v. Winters, 207 U.S. 563 (1908).

provisions of the Safe Drinking Water Act in 1986, the Clean Water Act in 1987, and the Comprehensive Environmental Response, Compensation, and Liability Act in 1986, to recognize the EPA's ability to treat tribes as states for the purpose of delegating to tribes responsibility for implementing environmental programs and regulating the reservation environment.

On February 4, 1987, Congress amended the Clean Water Act with the addition of section 518 to direct the EPA to promulgate regulations to treat tribes as states for implementing a variety of Clean Water Act programs.¹⁵⁴ Interim Final Rules were promulgated by the EPA on April 11, 1989 establishing criteria for tribes to qualify for "treatment as a state" under the Clean Water Act. Once qualified, tribes are eligible to participate in and receive funding to develop reservation environmental protection programs. In addition, the EPA also promulgated in 1988 its final rule providing for tribal "treatment as a state" for purposes of administering the Public Water System (PWS) program and the Underground Injection Control (UIC) program under the Safe Drinking Water Act.

Cooperative Mechanisms in Environmental Protection

Agreements between tribes and state governments addressing cooperation in administering environmental programs have begun to emerge in a number of states. The most ambitious of such agreements occurred in Washington State. The Timber, Fish and Wildlife Agreement involves the participation of the tribes, the private timber industry, state agencies, and the environmental community. Addressing the regulation of timber practices on private and state lands to protect tribal and non-tribal fisheries and wildlife habitat concerns, the agreement has served as the

¹⁵⁴Programs included in Section 518 are Title II (Construction Grants), Section 104 (Research, Investigations, and Training), Section 106 (Grants for Pollution Control), Section 303 (Water Quality Inventory), Section 308 (Inspections, Monitoring and Entry), Section 309 (Federal Enforcement), Section 314 (Clean Lakes), Section 402 (National Pollution Discharge Elimination System), and Section 404 (Dredge and Fill Material). Section 518 further directs the Environmental Protection Agency to establish a mechanism to resolve conflicts resulting from differences between state and tribal water quality standards.

foundation to the development of regulations by state agencies. Washington State has also entered into an agreement with the Puyallup Tribe on the implementation of the federal Resource Conservation and Recovery Act on trust and non-trust lands within the reservation. The Colville Tribe entered into an agreement with the state on a cooperative procedure by which water pollution will be regulated within the reservation boundaries. The Swinomish Indian Tribal Community has proposed a tri-lateral agreement between Washington's Department of Ecology and the EPA for cooperation in administering permit activities under the federal National Pollution Discharge Elimination System program that relies upon the technical assistance provided by the state agency to support tribal recommendations on reservation pollution discharge permits. The EPA would retain permit issuance responsibility until such time the tribe enacts its water quality standards to administer the program through EPA delegation.

As the tribes assume greater responsibilities under federal environmental programs, their need to develop technical capabilities also increase. States, having received program development funding assistance from the EPA for over two decades, can provide an important role supporting the development of tribal programs. In return, the states benefit by assisting in the development of tribal environmental programs that expand the consistency of statewide environmental policy and address problems associated with transboundary issues. The protection of reservation environmental quality represents a fundamental requirement to the continued survival of the tribal political community. The importance of preserving the reservation water, land, and air quality is essential to the maintenance of a healthy and vital reservation community. In addition to protecting the resident public health and safety, tribal economic survival is also subject to the maintenance of the territorial environmental quality. Cooperation provided under the EPA Indian policy provides opportunities to strengthen tribal governance over its territory while also fostering cooperative relations with state and local governments.

Taxation and Economic Development

Economic development represents the primary tool for tribes to attain

economic self-sufficiency in order to improve their community productivity, minimize their dependency on external assistance, and alleviate the chronically depressed economic conditions that persist on most Indian reservations. Tribal governments, relying on both inherent governing powers and proprietary resources, seek to attain community betterment by stimulating, managing, and regulating the expansion of the reservation economic base. Past Supreme Court rulings affirmed the tribal power to tax and regulate persons and activities within the tribal territory. The principles of sovereignty provide the legal foundation for tribal action to fulfill reservation community needs through the development of the reservation economy.

The two governmental principles of taxation power and tax immunity combine to provide important tools for structuring a revenue system supporting reservation economic development. In addition to its inherent authority to impose taxation and regulation on economic activity, tribes also possess, as an integral aspect of their sovereignty, significant tax immunities. Tribally owned reservation businesses are exempt from federal income tax and state tax laws generally do not apply to tribal businesses or properties. The development of the reservation economy is largely dependent upon the successful application of these governmental principles (Endreson 1991). In 1982, the Supreme Court held that a tribe had the power to levy a severance tax on a non-member. The court emphasized¹⁵⁵ the territorial component of tribal sovereignty as:

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activity within that jurisdiction.

¹⁵⁵in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983).

The authority to apply tribal taxation insures that economic activity occurring within the reservation will result in measurable benefit to the reservation community while also providing the taxed entity the reciprocal protection necessary to sustain the activity. Tribes, like other forms of government, rely on their ability to raise revenues in order to operate and support essential governmental services.¹⁵⁶ The application of both taxation and tax immunity measures by tribal governments provides a foundation for establishing and sustaining an economic base. These efforts, however, have been frustrated by the intervention of state taxation powers. Tax conflicts between the tribes and states serve to impede progress in tribal community development efforts.

Tax conflicts between tribes and states occur when the state attempts to collect taxes either from non-Indian businesses operating on the reservation or from transactions between tribal or Indian businesses and non-Indians which may involve consumer goods and capital acquisitions. Tax conflicts can impact reservation economic activity in several ways, depending on the nature of the activity being taxed, the kind and rate of the taxes imposed, and the competitiveness of the market in which the taxable activity competes (Endreson 1991:3). To attain their economic development objectives, tribal governments are faced with an urgency to resolve these state interventions in order to attract to the reservation economy capital financing or private sector investment to ensure stability in the economic activity, and to establish reliable tribal tax revenues from taxable activities. Resolution of tribal-state conflicts has come about through both litigation and cooperation.

Litigation has frequently been employed to resolve tax conflicts between the tribes and the states. When these conflicts are litigated, a balancing test is often applied by the courts to determine whether states can tax or regulate non-Indians

¹⁵⁶These services include tribal courts and agencies to enforce tribal laws, the delivery of services to reservation residents and businesses in the provision of fire, police protection and social services, and the development of the reservation infrastructure necessary to promote growth of the reservation economy.

engaged in commerce with Indians. The test¹⁵⁷ balances federal and tribal interests against those of the state, and considers the degree to which each government regulates and provides services to the activity to be taxed. Endreson (1991:5) observes the risks associated with the litigation approach: "Double taxation makes reservation businesses less competitive, or puts them out of business, and discourages future private economic investment in Indian country." Because the balancing test produces seemingly inconsistent results, it has fostered litigation and discouraged reservation economic activity. The use of litigation to resolve tax conflicts may represent a zero-sum gain as one party benefits only if the other loses. Such litigation has also increased tensions between states and tribes, and has resulted in further damage to other areas of tribal-state relations. The limitations, costs, and risks of litigation have led many tribes to explore other options for resolution of tax conflicts, including intergovernmental cooperative agreements.

The process often used to develop cooperative agreements is based upon the government-to-government discussions that enable tribal and state leaders to directly discuss their respective needs for revenue generation, economic development objectives, and the practical, political, and economic concerns that arise from tax conflicts. Cooperative discussions may prove favorable over adversarial approaches as the need for tax revenues is common to all governments. Negotiations on tax agreements have focused on three concerns arising when a tribe and a state seek to tax and regulate the same activity. The first concerns the economic impacts associated with double taxation when both governments impose a similar tax on the same activity. The second concern addresses the regulatory confusion and inefficiency that result when both governments tax and regulate the same activity without regard to the other. The third concern addresses each governments' interest to insure a reasonable competitive balance between its own business entities and

¹⁵⁷See White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

those of the other government.

Congress has considered alternative tax incentives as part of its federal Indian economic development policy to help stimulate investment of private capital to expand reservation economies. Adoption of the Indian Finance Act of 1974 and the Indian Self-determination and Education Assistance Act of 1975 are intended to support self-governing and economically self-sufficient tribal communities. A prevailing view for reversing the trends in reservation underdevelopment is through well planned economic development (Smith 1989), coupled with the recognition that successful development of the economic base is contingent upon concurrent cultural and social development (Cornell 1986). "Development of a self-sustaining economy must include access to affordable private capital, skilled management, sufficiently skilled labor, and markets. The creation of private investment opportunities is a critical component in the development of Indian reservations" (Cornell 1986:vi).

The use of tax incentives has certain benefits to aid in overcoming obstacles to attracting capital to the reservation economy. Three most popular forms of tax incentives for Indian reservations include incentives to encourage employment, incentives to encourage business development on the reservation, and incentives targeting passive investment capital. Incentives attracting passive investments are provided through issuance of tax exempt bonds under the Indian Finance Act of 1974 for the provision of essential governmental functions, such as reservation infrastructure, and private activities. Tax incentives intended to aid in attracting passive capital investment for reservation economic development have been limited, however, under the federal 1987 Omnibus Reconciliation Act. The Act requires the use of private activity bond issues only under very restrictive terms, rendering their utility almost useless.¹⁵⁸ Pending Congressional legislative proposals advance the ability of tribes to use tax exempt privacy bonds under the same conditions as state

¹⁵⁸For example, the Act requires that ninety five percent of the net proceeds of the sale of such bonds must be used for a manufacturing business which is both owned and operated by the tribe on reservations.

and local governments. Even with expanded permitted uses, questions of the usefulness of these bonds to attract passive capital have been raised because the cost of such bonds continues to be determined by capital markets that are subject to market influences and investor perception of risk, which tends to be very high for reservation investments (Trimble 1990:14).

Gaming As A Case Study

Gaming legislation illustrates an example of the expressed Congressional infringement upon tribal governments seeking to establish gaming operations under their inherent governmental authority and is reviewed here to demonstrate Congresses's ability to affect tribal affairs. Congressional action intervening in the tribes' rights to expand their economies through gaming is due in part to the significant interests expressed by the states that impose regulatory restrictions on gaming operations, and by the private gaming industry that perceived Indian gaming as a direct competitive threat to their industry. Federal gaming legislation serves to restrict the types and scope of gaming enterprises conducted by the tribes in what has become in the recent decade the fastest growing area in tribal economic development.

The emphasis on gaming development by the tribes is attributed to a number of important factors. First, gaming enterprises tend to be highly labor intensive with many of the required labor skills developed through local training programs of a relatively short duration. Secondly, profits from gaming operations tend to far exceed profit levels from conventional types of public economic enterprises and are therefore viewed more effective in meeting the chronic revenue needs of most tribal communities. As a public enterprise with limited free market competition, tribal investment in gaming enterprises does not face the high risks associated with the startup of other businesses, and market competition with competitive businesses tends to occur on a regional rather than a local scale. This allows tribes to establish a definitive market share relatively free from market competition, except that of

other tribal gaming enterprises.¹⁵⁹ The limited private competition provides for the tribal enterprises to both maximize their return on investment, produce net profits, and generate greater social benefits such as an increased tribal employment base.

The economic and fiscal impacts of gaming on Indian reservations occur on a number of levels. A survey of 81 Indian gaming enterprises in 1993 (Center for Applied Research, 1993) estimated total gross annual wagering revenues for Class II and Class III gaming as exceeding \$7.5 billion.¹⁶⁰ Indian gaming also contributed to the growing reservation-state economic relationship. A substantial portion of new personal Indian income, whether earned from gaming or from any other tribal enterprise, ultimately enters the state economy through tribal household expenditures. Consumer spending by tribal members and the tribal governments is seldom recognized, but acts as a powerful direct stimulus of job and income growth in non-Indian communities. The National Indian Policy Center (1993:15) estimated that Indians contributed over \$21 million in state sales tax revenues nationwide in 1990. Indians who earn income off the reservation also pay income tax to the state, and all Indian employees pay federal income tax.¹⁶¹

¹⁵⁹In Washington State, class III casino gaming is restricted to tribal operations conducted under a State-Tribal compact agreement. Casino gaming has been established as consistent with state public policy because Washington State had not prohibited class III gaming, regulating these activities as charitable activities. In addition to casino gaming, direct competition to tribal gaming is presented by charitable class II gaming operations, off-track betting, racehorse betting, and the state-controlled lottery.

¹⁶⁰Indian gaming produced gross profits in excess of \$550 million in 1993. Wages and salaries exceeded \$200 million with net profits to the tribes in excess of \$140 million. The survey estimated that 15,900 persons were directly employed by reservation gaming activities nation wide and suggested an additional 22,000 jobs (based on the U.S. Department of Commerce RIMS multiplier series, it is estimated that one gaming job generates on average 1.4 additional jobs in the host economy) are supported by reservation-based gaming.

¹⁶¹With the exception of income generated from treaty trust resources, such as fishing, which are exempt from federal income taxation.

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA),¹⁶² which established the statutory basis for the operation, regulation, and protection of Indian gaming. The Act establishes three distinct classes of gaming. Class III gaming is defined in Section 2703 (8) of the Act to include casino-type games, electronic games, and other forms of gaming that are not classified as Class I or Class II. IGRA allows Class III gaming on Indian lands subject to conformance to a tribal ordinance, and further requires that the activities be conducted under the terms of a tribal-state compact. Tribes wishing to engage in Class III gaming must initiate a request with the state to commence compact negotiations subject to review and approval by the Secretary of the Interior. IGRA requires the state to negotiate "in good faith" with the initiating tribe. If the state does not respond in good faith to the tribal request for compact negotiation, the tribe may commence action against the state in federal District Court.¹⁶³ Of the approximately 145 Indian gaming enterprises in operation nationally, approximately 75 are operating under the provisions of tribal-state compacts, representing 58 tribes in 18 states.

There has been litigation related to the Act in over 20 states and in the District of Columbia. Eleven states have raised state sovereign immunity defenses under both the Eleventh Amendment of the U.S. Constitution or the defense of reserved powers granted to states under the Tenth Amendment. Most of these cases were filed by tribes following the refusal of states to enter into negotiations under the good faith negotiation provision of the Act. Certain cases involved the forms of Class III games sought by the tribes and the wagering limitations sought by the state

¹⁶²25 U.S.C. sec. 2703.

¹⁶³If the District Court finds that the state has failed to negotiate in good faith, the court may order the state and the tribe to conclude a compact within 60 days. If an agreement is not concluded during this period, each party is required to submit its last best offer to a court appointed mediator who may select either the state or the tribal compact version. If the state does not consent to the compact chosen by the mediator, the matter becomes referred to the Secretary of the Interior who prescribes procedures consistent with the selected compact, the District Court findings, the IGRA provisions, and relevant provisions of state law.

on the tribal gaming activity.¹⁶⁴

Conclusion

The exercise of control over the affairs of the reservation territory has been established as fundamental to the sustainability of the tribal political community. The historic diminishment of that control, however, has presented a phenomenon in the tribal planning situation reflecting a continued uncertainty as to the extent of tribal authority. This chapter demonstrates that the tribes clearly possess the power to regulate Indians in Indian Country, and, under certain circumstances, may regulate its members outside of Indian Country when important tribal interests are at issue, such as treaty fishing by its members. In addition, tribes also possess substantial powers to regulate non-Indians engaged in activities in Indian Country that have an effect on Indian interests. Since the 1970's the implementation of the federal self-determination policy laterally throughout the federal system has resulted in the restoration of many powers that had been previously removed. The continued development of the tribal political community benefits further by becoming informed of recent court decisions that delineate the delicate balance of competing interests operating within the tribal planning situation.

Fundamental to formulating effective tribal community development strategies, the courts have clarified in Montana that tribal sovereignty has been narrowed, restricting their regulation of relations with non-Indians by virtue of their dependent status. Further, the courts have established that the exercise of tribal authority beyond what is necessary to defend tribal self-government is inconsistent with the dependent status of the tribes without express congressional delegation. The two important and broad exceptions to its ruling in Montana do, however, establish where tribal authority may apply to non-Indians:

1. A tribe can retain its authority to regulate the activities of non-members who have entered into consensual relations with the tribe or

¹⁶⁴See: Doug Endreson (1993) "A Summary of the Case Law Interpreting the Indian Gaming Regulatory Act", National Indian Policy Center, Washington, D.C.: NIPC.

its members through commercial dealings, contracts, leases, or other arrangements;

2. A tribe also retains its inherent regulatory authority over the conduct of non-Indians on fee lands when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

The second test serves to guide the development of the tribal community by relying on a strategy that responds to threats to the tribal political integrity, its economic security, and the health and welfare of the community. Basing his dissenting opinion on a broader interpretation of Montana's second exception, Justice Blackmun in Brendale acknowledged the tribe's right to zone all reservation fee lands, as the loss of the long-term benefits of comprehensive land management would represent a significant impact on tribal interests to justify tribal authority under the Montana exception. Brendale establishes a test for determining the effect of tribal regulatory control over county powers and its framework should be integral to the formulation of the tribal development strategy. Under the ruling, direct regulation over non-members' use of fee land on a reservation is dependent upon the following conditions:

1. Whether the activity occurs within a reservation area or area of the reservation in which the tribe retains the power to determine the "essential character" of the reservation;
2. Whether the activity to be regulated on fee land "imperils the political integrity, the economic security, or the health or welfare" of the tribe;
3. The manner in which the particular fee land passed out of trust;
4. Whether the particular non-member has entered into a contractual or consensual relationship with the tribe or its members.

Based on these and other landmark rulings,¹⁶⁵ tribes have been able to

¹⁶⁵See also Cardin v. DeLaCruz, 671 F.2d. 363, 9th Cir. 1982), cert denied, 459 U.S. 967 1982); Confederated Tribes and Bands of Yakima Indian Nation v. Whiteside, 828 F. 2d. 529, 9th Cir. 1987.

enforce building, health and safety, environmental protection, and zoning regulations against non-Indian fee owners within the reservation. The evolution of the federal trust responsibility, tribal political authority, and the authority of tribes to govern the tribal territory has been described in this chapter to establish the breadth of self-governance that is understood to exist to support the development of tribal communities.

CHAPTER 5

VARIABLES THAT CONSTRAIN TRIBAL COMMUNITY DEVELOPMENT

For purposes of this research, the concept of obstacle is understood as the constraining variables that behave independently to limit the ability of a tribe to determine developmental outcomes within its reservation territory, and to affect the protection of treaty rights beyond those territorial boundaries. Therefore, constraining variables to Indian community development are defined as interventions that adversely restrict the ability of tribes to effect desired outcomes. The constraining variables identified have emerged throughout the research in investigating the phenomena of the tribal planning situation. The variables are organized in a typology to illustrate their causal effects upon the three attributes of the tribal political community: its sovereignty, its territoriality, and its social cohesiveness.

Within the practice of tribal planning, problems and obstacles are inevitably encountered. This chapter describes these encounters as the constraining variables of the planning situation. The research distinguishes between two types of variables: those that are attributed to endogenous sources (that is, from within the internal structure of the tribal political community), and those variables emanating from sources external to the tribe. While this chapter discusses certain endogenous and, therefore, controllable variables arising from within the tribal organization, the research is primarily concerned with identifying and overcoming conflicts associated with the exogenous variables.

A typology of four major forces generating the external variables in the tribal planning situation were previously identified in Chapter 3 as: external, historic, economic, and political forces. The typology is further refined to present these forces as contributing sources that influence tribal affairs: historical public policy (generated from past federal, state, and local government actions); current public policy (corresponding to each government level); the private institutional economy; and the interests of private individuals. Together, these four sources serve to broadly represent the combined interests of the U.S. political economy. A matrix is

presented in Table 5.1 that creates data cells comprising the typology of the constraining variables. The horizontal axis of the matrix contains the four categories of contributing sources. The vertical axis contains the three major components constituting the endogenous tribal political community: self-governance and sovereignty, territoriality, and social cohesiveness. The two-dimensional matrix illustrates representative forms of constraints, as uncovered in this research, imposed on each component of the tribal political community. This chapter does not attempt to represent all possible sources of constraining variables encountered in tribal community development. Rather, it seeks to identify illustrative types of obstacles within a cogent framework.

Table 5.1
Constraining Variables to Indian Community Development

ATTRIBUTES OF THE POLITICAL COMMUNITY	1 HISTORIC GOVERNMENT POLICY	2 CURRENT GOVERNMENT POLICY	3 PRIVATE INSTITUTIONAL	4 PRIVATE INDIVIDUAL
1 Self-Governance and Sovereignty	1.1 Historic Policy Limiting Tribal Sovereignty; Trust Responsibility; Termination.	1.2 Self- Determination Policy; Economic Self- Sufficiency.	1.3 Reservation Economic Development and Financing;	1.4 Private Opposition to Tribal Self- Governance.
2 Territoriality	2.1 General Allotment Act and Assimilation of Land Base.	2.2 Federal Reinstitution of Tribal Authority in Territorial Affairs.	2.3 Private Ownership and Development of Land & Resources.	2.4 Non-Indian Land Tenure.
3 Social Cohesiveness	3.1 Social Fragmentation and Cultural Assimilation.	3.2 Religious and Cultural Protection;	3.3 Restricted Access to Capital Financing.	3.4 Reservation Cultural Alienation.

The organization of variables identified in Table 5.1 are more fully developed into a framework of causal effects in Table 5.2. The variables to tribal community development and their resulting effects are generalized as the types of conflict

encountered in tribal planning. This typology serves to represent a general framework of obstacles to tribal community development and contributes to the development of a tribal planning model that is constructed from the empirical case study analysis and presented in Chapter 9.

Table 5.2
Effects of Constraining Variables to Indian Community Development

CONSTRAINING VARIABLE	SOURCES OF CONFLICT	EFFECTS OF THE VARIABLE
1.1: Historic Policy Limiting Tribal Sovereignty.	Federal Legislation affecting Tribal sovereignty by limiting inherent authority.	Created diminished Self-Governance and introduced State regulatory authority in Tribal affairs.
1.2: Self-Determination and Economic Self-Sufficiency Policy.	Tribal organizational development.	Restricting the fullest exercise of Tribal Self-Governance Structure and means for resolution of historic conflicts.
1.3: Reservation Economic Development and Financing.	Restricted access to capital markets for Tribal economic development.	Affecting ability of tribes to attain Economic Self-Sufficiency objectives.
1.4: Private Opposition to Tribal Self-Governance.	Individual property rights introduced to reservation.	Disruption and challenge to Tribal political authority; Intervening State powers.
2.1: General Allotment Act and Assimilation of land base.	Alienation of reservation territory.	State usurpation of reservation land and resource control.
2.2: Federal Reinstitution of Tribal Authority in Territorial Affairs.	Checkerboard land tenure and regulatory conflicts with State.	Challenges to Tribal authority over fee lands and complex jurisdictional disputes and concurrent jurisdiction.
2.3: Private Ownership and development of land and Resources.	Incorporation of territorial resources.	Affecting Tribal ability to attain economic and social betterment.

2.4: Non-Indian Land Tenure.	Non-Indian challenge to tribal authority.	Contributing to non-Indian land tenure altering the "essential character" of reservation homeland and reservation social cohesiveness.
3.1: Social Fragmentation and Cultural Assimilation.	Social fragmentation and occupancy by non-Indians.	Diminishment of exclusive territorial tribal use, effects to community cohesiveness, reservation alienation of tribal cultural community.
3.2: Religious and Cultural Protection.	Repatriation of cultural resources.	Reaffirming on- and off-reservation cultural resources protection rights.
3.3: Restricted Access to Capital Financing.	Redlining practices on reservation.	Inability to mortgage trust assets to access capital to improve economic and social conditions.
3.4: Reservation Cultural Alienation.	Alienation and incorporation of reservation.	Effects to Tribal cultural cohesiveness from increasing non-member occupancy.

Discussion of the Constraining Variables

The following section examines the framework of variables in a general discussion, organized under the three attributes of the political community:

Self-Governance and Sovereignty

1.1 Historic Policy Limiting Tribal Sovereignty - The treaties represented the earliest actions that led to the diminishment of tribal sovereignty by imposing limits to that sovereignty along with the reservation of restricted tribal territorial boundaries. Subsequent unilateral action in executive orders further reduced the territorial boundaries that resulted in boundary claims disputes that remain subject to future settlement. The ability of tribal governments to control their territories has been historically obscure due to shifting federal policies and the intrusion of the non-tribal political economy in tribal affairs. This resulted in the complex composition of reservation lands and property rights. Historic events originating with the General Allotment Act of 1887 established the conditions to the current situation comprising reservation property interests. Settlement onto reservations resulted in a land ownership pattern that created a plurality of property rights interests. While it has long been held and recognized that the tribes retain inherent

rights to control their territories, the allotment of the reservation and the subsequent occupancy of non-Indian fee landowners within the reservation boundaries has challenged the tribal exercise of police powers over non-member fee lands.

Conversion of trust lands to fee title, coupled with subsequent assimilation and termination policies, created the complex jurisdictional arrangement consisting of a multiple overlay of federal, tribal, state, and local government interests. Diminishment to tribal self-governance and the accompanying intrusion of the political economy into tribal affairs has posed many complex challenges to a tribe's ability to control its resources for the advancement of their community welfare. Tribal self-sufficiency objectives have been further constrained due to the resulting perception of uncertainty regarding the extent of tribal authority and ensuing conflicts between non-tribal governments, the private economy, and the tribal community.

1.2 Self-Determination Policy and Economic Self-Sufficiency - The current federal policy of self-determination has resulted to reinstitute many of the dormant powers of tribal governments previously diminished by Congressional acts. Further, the fiduciary role of the federal government as trustee over tribal resources has been strengthened through enactment of self-determination legislation and promulgation of regulations. The events reinforcing tribal self-governance have helped to clarify long standing confusion regarding the status of authority in tribal affairs.

Generally, states do not possess jurisdiction over matters involving only Indians on reservations, unless specifically delegated such activity by Congress. States generally possess criminal jurisdiction over non-Indians within reservations. However, tribes also possess civil jurisdiction over non-Indians within the borders of their reservations. In many cases, state, local and tribal governments share concurrent civil jurisdiction over non-Indians on reservations. In cases where the situs, person, and subject matter create concurrent civil jurisdiction, the laws of the state, local, and tribal governments all may have effect. Where these laws conflict, a non-Indian must comply with both laws. Hence, a non-Indian may be required to pay two sets of taxes, as well as license fees, comply with two different land use

regulations, and operate with two sets of civil rights before a non-Indian and Indian court. Concurrent legislative jurisdiction over non-Indian lands and non-Indian persons has resulted in numerous litigation due to the large non-Indian residency¹⁶⁶ within Indian country.

Competitive jurisdiction also exists in a number of areas affecting reservation economic development. Taxation of sales, business activities, severance taxation of mineral resources, non-Indian personal income taxation, and indirect taxation of Indian property are each identified as current areas of controversy (Presidential Commission 1984). Tribes have only recently begun to fully exercise jurisdiction over non-Indians in an effort to strengthen the regulation of economic activities and exercise control over reservation development.

An important factor in the management of tribal territorial resources is the balance between inherent tribal powers and the federal government's fiduciary role,¹⁶⁷ particularly where trust resources, treaties, and explicit statutory regulations are involved. The location of Indian lands on major river systems and regional groundwater aquifers, for example, has created what is likely the most complex legal conflict in contemporary tribal-state jurisdictional relations. Western States have relied on the prior appropriations doctrine to allocate water rights, based on the notion of "first in time, first in right." Under state law, a water user obtains a right senior and superior to all later users if he appropriates the water by diverting water out of a watercourse, or putting it to a beneficial use. Once these conditions are met, the water user has established an appropriation date. In contrast, Indian water rights are defined by federal rather than state law. The landmark Supreme Court decision in Winters v. United States held that sufficient water impliedly was reserved to fulfill the purposes of the reservation. This doctrine of federal reserved

¹⁶⁶Nationally, approximately 50% of all reservation residents are non-Indian.

¹⁶⁷United States v. Mitchell (463 U.S. 206 (1983)) upheld an allottee's claims for damages due to BIA mismanagement of their timber land and recognized the federal fiduciary obligation to Indian natural resources.

rights establishes a vested right whether or not the resource was actually put to use, and enables a tribe to expand its water use over time in response to changing reservation needs.

The Supreme Court has addressed the substantive content of Indian water rights in Arizona v. California, where federal reserved rights on the Colorado River were upheld for Indian reservations established by executive order. The amount of water reserved was sufficient to satisfy the present as well as the future needs of the tribe. The test used was the amount of water necessary to irrigate all the "practicably irrigable acreage" on the reservation. Hence, significant differences exist between the application of state law on federal lands and on Indian reservations. As tribal community development planning proceeds, an explicit distinction between primary and secondary purposes will likely strengthen the tribal water right claim.

As stated in previous chapters, the source of tribal power to regulate activities that may pollute tribal lands, waters, or resources is derived from three principal sources. As land owners, tribes have proprietary rights inherent in their ownership. Second, tribes possess inherent sovereignty over their lands. Third, under federal laws, the federal government may either directly regulate the reservation or may delegate such authority to the tribe. A tribe's sovereignty permits the exercise of governmental police powers and civil regulatory controls. Retaining all aspects of their sovereignty except those specifically withdrawn by Congress or those inconsistent with overriding federal interests, tribes therefore possess adequate sovereign governmental power to protect the health and welfare of the reservation population. In recognizing the power of tribes to assert jurisdiction over their reservations, Congress has specifically provided for the delegation of civil environmental regulatory jurisdiction to tribes. Upon such delegation, the exercise of comparable state civil environmental regulatory jurisdiction over reservation lands is expressly pre-empted. Protection of the reservation environment is a prerequisite to the continued survival of tribal communities. The importance of clean water, air, and land on Indian reservations becomes an integral objective in tribal planning.

Pollution of the reservation environment is not only detrimental to the health and safety of tribes, but also to their economic survival (Dubey 1992).

1.3 Reservation Economic Development and Financing - One of the major limiting variables to promoting the economic security of tribal communities is accessing capital in a timely and cost competitive manner. Risk aversion influences the degree of that access. In determining risk, financial institutions consider several factors, including the rate of return on investment and the provision of adequate security (Presidential Commission 1984:37).

Tribal powers of sovereignty include immunity to suit. While over 130 tribes have Indian Reorganization Act (IRA) corporate charters, which permit them to sue and be sued, tribes remain reluctant to conduct business relations under their corporate charters, preferring instead to conduct business under their retained immunity structure. Suits against a tribal sovereign have only been permitted under expressed tribal or congressional waivers of sovereign immunity where the remedy did not involve tribal property held in federal trust. Sovereign immunity to suit is perceived as a major risk to investors of tribal reservation development since it makes actions by the tribal governments immune from challenge and exposes investment to loss where a tribe decides to deny a claim by raising its immunity.

Tribes experience frustration with the federal trusteeship of its resource assets, as BIA leasing policies and procedures, land services, appraisals, surveying, and delays with required approvals all contribute to increased costs and uncertainty to reservation development. As a result, many tribes are now initiating self-governance to directly manage certain BIA trust services and gain greater control and efficiency over the management of trust resources.

The trust status of tribal revenue and resources constitute a complex framework of regulatory federal control over Indian assets, as authorized by treaties, statutes, regulations, and procedures governing natural resources and trust funds. The trust status of Indian resources is viewed as a major obstacle for purposes of providing available collateral to finance tribal community development. Federal trust title of reservation resources limits the tribe's access to its assets and makes

capital unavailable for direct tribal investment or for collateralization. State financial institutions are usually limited to approved forms of securities for loans. Since Indian property is held in trust and cannot be mortgaged, financial institutions are reluctant to provide loans without federal guarantees. Many tribes are now enacting their own tribal uniform commercial codes in an effort to foster protection to financial institutions. The Indian Tribal Government Tax Status Act of 1982 enables tribes to be treated as states or political subdivisions of states under the provisions of the Internal Revenue Code. The Act enables tribes to issue tax exempt bonds to provide essential governmental services, including reservation infrastructure projects. However, the tribal tax-exemption for industrial development is unclear, and impedes tribal efforts to raise capital for economic development, as it is available to other forms of government.

The federal trust for Indian lands and resources, hence, presents a paradox. Where the trust responsibility serves to protect Indian land and resources from further alienation, regulation or taxation by states and local governments, capital is often difficult to attract as resources held in trust are not subject to foreclosure and state security laws. Problems also arise when the economic goals of the tribal community differ from those of the private economy. Operated as public enterprises, many tribes decapitalize their businesses by redirecting retained earnings to support community services rather than business expansion, reflecting the multiple purposes in tribal community development.

Tribal economic development goals differ in important ways from the U.S. political economy's development goals, reflecting a form of community development that targets the improvement to the reservation-wide social welfare. Tribal enterprises tend to emphasize both employment and profitability goals concurrently, hence often resulting in conflict with the goals of the private investment sector. The relatively short history of tribal government rebuilding following the 1960's federal termination policies has generally been viewed by the private sector as an instability of tribal governments, characterized by high turnover of politically elected officials, factionalism among constituencies, and turnover in key administrative staffing, each

adversely affecting the tribal business development environment (Presidential Commission 1984). Political instability tends to undermine long-term business planning and compromises the development of a sustainable reservation economy.

The reservation economy is further perplexed by intrusive regulations and taxation imposed by state and local governments, resulting in a dual regulatory climate. The extensive presence of governmental involvement in reservation business development creates a hostile environment to the private finance and investment sector. The federal response has been to provide capital grant and loan guarantee assistance. While federal capital programs provide a substitute capital market, the costs associated with excessive federal, state, and local interferences to tribal reservation development efforts continue to hinder tribal development (Ibid p.34).

Tribes can pursue economic development through a number of structures. They can directly establish tribal business ventures and public corporations as business arms of the tribe; permit tribal members and non-Indians to charter private corporations under tribal law; encourage non-Indian businesses chartered under the state laws to conduct activities on their reservations; and regulate and tax individual businesses within reservation boundaries. The appropriate forms of economic development present choices regarding the type and extent of economic development most appropriate to the needs of the tribe. As collective owners, public enterprises assure maximum control and benefit over the activity. Promoting individual member entrepreneurs fosters a private tribal economic base. Private non-Indian activities, or in joint venture association with the tribe, offer a third alternative to stimulate reservation economic growth. The determination of the appropriate approach to enterprise development is also dependent upon the community's social objectives where traditional views tend to advocate subsistence uses over the exploitation and export of land resources. Other views endorse tribal intensive development of tribal natural resources to meet the tribe's urgent requirement for economic improvement. As primary promoters of reservation economic development, tribes often face direct competition from private sector activities. Since the private sector can offer

mortgages on property and other securities, private sectors are often viewed as having a superior advantage that may threaten tribal enterprise success.

The Indian Reorganization Act established the first provision for Indian employment preference in the administration of federal services affecting Indian tribes. The 1977 Consent Decree in Tyndall v. United States¹⁶⁸ extended these hiring preference requirements to the Indian Health Service. The "Buy Indian" and the Indian Self-determination and Education Assistance Acts further created Indian preference in contracting. The Supreme Court in Morton v. Mancari¹⁶⁹ held that Indian preference is based on the unique legal status of Indian tribes as politically recognized entities and therefore did not constitute racial discrimination as it was based on political preference rather than racial preference. Many tribal governments impose their own Indian preference legislation as Tribal Employments Rights Ordinances (TERO) affecting all businesses located within the reservations. The private investment sector, however, often views such preferential laws as a disincentive for investing on reservations. The balance of tribal social needs in employment with investment capital needs require reconciliation to remove barriers to tribal capital accumulation and reservation development.

1.4 Private Opposition to Tribal Self-Governance - While federal self-determination policy sought to strengthen the tribal governmental capacity in conducting reservation affairs, the effects of reservation incorporation and the expanded non-Indian interests in territorial and treaty resources, however, served to inflame many historic tensions between the tribes and local and regional non-Indian interests. A number of organized non-government efforts were formed to challenge tribal governance. Since 1967, non-Indian reservation residents began to react to the renewal of the tribal governmental exercise of its dormant powers. Reactive non-Indian opposition to the rise in tribal authority was particularly targeted to the tribal

¹⁶⁸No. 77-0004 (D.D.C. April 22, 1977).

¹⁶⁹417 U.S. 535, 1974.

powers of taxation and land use regulation.

In the mid-1970's, the Interstate Congress for Equal Rights and Responsibilities (ICERR) was formed by non-Indian property owners on several Indian reservations who perceived growing tribal governments as a threat to their rights and interests. By 1974, following the landmark Boldt decision in Washington State, non-Indian property owners joined forces with off-reservation fishers to launch the anti-Indian movement of the self-determination era. The movement expanded in the early 1980's, seeking popular support for a public initiative to overturn Indian rights. The movement expanded from Washington State into other states to develop a network of groups of property owners, agricultural interests, businesses, and participation from conservative extremist groups. The anti-Indian movement continued to grow over the next decade predominately in rural areas, and each stage in its development increased in political sophistication as Ryser (1992:1) observes:

With its roots in property owner groups on reservations, the anti-Indian movement became a sophisticated movement aimed at the dismemberment of Indian reservations.

The anti-Indian movement also challenged tribal asserted rights to natural resources off-reservation. "Reservation non-Indians became the core organizers of what eventually became a highly structured anti-Indian movement" (Ibid p.4). The United Property Owners of Washington (UPOW) and Protect American's Rights and Resources (FARR) in Wisconsin are currently the principal constituent organizations. The anti-Indian movement grew since 1976 from a half dozen non-Indian property owner groups in two states to over 50 organizations in 1991. The first organized network (ICERR) formed in 1976 to provide a union between on-reservation property owners and non-Indian sport and commercial fishers who opposed tribal treaty protected fishing rights. The movement's influence today continues to remain operational largely in Washington and Wisconsin. Over the 23-year history of the movement, its leaders acknowledge the following political victories:

1. Adoption in the State of Washington of Initiative 456 in 1984, intended to create the public impression that Washington's voters opposed Indian Rights and the continuation of Indian treaties;

2. The U.S. Supreme Court decision that Yakima County could exercise zoning powers within the reservation where non-Indians make up a substantial portion of the reservation population;
3. The number of persons participating in anti-Indian activities was estimated at over 10,000 persons countrywide in 1991, and persons who contributed funds or letters of support to anti-Indian groups was estimated at 35,000 by 1991;
4. A total of 50 local anti-Indian organizations or contacts, 5 coordinating organizations, and 2 national organizations have been created by the movement in Washington, Montana, Minnesota, and Wisconsin by 1991.

At the founding meeting of the ICERR in 1976, its organizers adopted the following goals (Ibid): "All state and local laws shall apply within all reservations; constitutional rights of all Americans shall supersede treaty rights; jurisdiction of tribal governments over non-tribal members shall be prohibited; Indian reservations shall not be enlarged; tribal members should have no right to participate in non-tribal governments unless subject to all laws of non-tribal governments; and the granting of public funds to any people based on race must be prohibited."

The ICERR became known as a civil-rights organization for non-Indians and an organization intent on limiting or eliminating Indian tribes. "The anti-Indian movement's increasing preoccupation with race and racial analysis reflected growing racial tensions in the state of Washington" (Ibid p.16). The formation of the ICERR produced the first post-self-determination phase of the anti-Indian movement. The contemporary movement was comprised of non-Indians who purchased former tribal lands and resources and call upon the federal government to relinquish control of those lands and resources. The resulting annexation threatens to force tribes into even smaller enclaves of the reservation. Table 5.3 illustrates the forms of non-Indian ownership interests in on-reservation resources:

Table 5.3
Forms of On-Reservation, Non-Indian Ownership Interest

Private non-Indian landowners	Purchased land through the U.S. Department of the Interior on Indian reservations.
Private non-Indian Off-Reservation Corporations	Expropriating resources (timber, water, minerals, grazing lands) from the reservations.
Private non-Indian businesses	Providing businesses and services on reservations.

The Interstate Congress promoted the ideology of "white civil rights" and sought the protection of non-Indian property interests on Washington reservations and to overturn the Boldt decision. Then Attorney General Slade Gorton¹⁷⁰ represented Washington State in a number of legal actions against Indian tribes before the U.S. Supreme Court and lost virtually every case, highlighted by U.S. v. Washington. Gorton became a vocal critic of tribes and of federal Indian policy, and argued the United States Constitution did not permit superior rights to any one group, and subsequently coined the reference to Indians as "super citizens" (Ibid). Gorton's condemnation of tribal actions tended to legitimize the growing demand for non-Indian rights on Indian reservations.

By 1983 the ICERR formed a new organization with a declared purpose which sought broader popular support. Salmon-Steelhead Preservation Action for Washington Now (S/SPAWN) carried forth the ICERR's goals with its declared objectives "to promote passage of a public initiative to protect salmon" (Ibid p.22). The 456 Initiative ballot was originally co-authored in 1983 by State Senator Metcalf¹⁷¹ as Initiative Measure no. 84. Since the Washington State legislature earlier rejected a Metcalf proposed bill to subvert treaty rights, the legislation was converted into the initiative that sought to challenge the "special legal status" of Indians, and won passage in 1984. Passage of the initiative proved an empty

¹⁷⁰Slade Gorton won election to the United States Senate in 1992.

¹⁷¹Jack Metcalf won election in 1994 to the Washington State 2nd Congressional District seat in the United States Congress.

victory, however, as state officials chose to ignore the law as the state was not empowered to reverse treaty obligations. Nevertheless, the initiative effectively fueled sentiment against Indians. In 1985, S/SPAWN revised its name to Steelhead/Salmon Protection Association and Wildlife Network, and incorporated as a national, non-profit scientific and public educational foundation, incorporated in Washington State, and released its new objectives:

To promote the organization and establishment of a Presidential Commission to study the effects of federal Indian policies on non-tribal Indians and non-Indian citizens of the U.S. (Ryser 1992:26).

Since its birth in 1983, S/SPAWN was again transformed into a new organization, the United Property Owners of Washington, retaining both the leadership and affiliations of S/SPAWN with on-reservation non-Indian property groups. UPOW organizers focused on organizing opposition in the 1989 lawsuit filed by 16 Washington tribes to define their treaty rights to harvest shellfish outside the reservations, as shellfish harvesting was excluded for later consideration in the Boldt decision. On December 20, 1994, the federal district court released its ruling in United States v. Washington, and decided in favor of the tribes. UPOW was active in supporting the state's appeal to this decision.

Territoriality

2.1 General Allotment Act and Assimilation of Land Base - The General Allotment Act of 1887 sought to break up the commonly held reservation territory into individually owned trust parcels, and eventually to integrate these parcels into state-wide fee title ownership subject to state taxation and control. The Act resulted in a large-scale movement of non-Indian settlement onto the reservations. By the late 1960's it was evident that a largely checkerboard land ownership pattern resulted on many allotted reservations and contributed to the jurisdictional uncertainty with respect to state and tribal authority over these lands. These territories become jurisdictionally splintered as various states began to intrude onto the reservations by imposing state taxation and regulations.

By the 1980's, one half million non-Indians held land title on Indian

reservations and greater than one half of the total Indian population resided off-reservation. Tribes continued to lose their ability to control their treaty-reserved territories as they faced growing and continuous interferences from non-Indian interests. While many non-Indians now reside permanently on Indian reservations, others are absentee landowners. Since the 1960's the reservation non-Indian landowner has emerged to challenge the stability and integrity of the tribal governments. Many non-Indian landowners outright rejected tribal governmental authority on the reservations and pursued political representation from local and state governments. They generally viewed tribal governments as alien due to their inaccessibility to the tribal election process. The growing pressure placed on state governments led to increased confrontation with tribal governments over broad jurisdictional issues, which expanded state powers onto Indian reservations. This represents a defacto annexation of reservation lands. On certain Washington State Indian reservations the non-Indian population exceeds that of the tribal population by as many as 4:1.¹⁷² The resulting competition between Indians and non-Indians for limited reservation resources contributes to conflicts between these reservation groups. In response, tribes have sought to strengthen their capacity of self-government to regulate reservation lands and resources.

2.2 Federal Reinstitution of Tribal Authority in Territorial Affairs - The principle of inherent Indian sovereignty, first acknowledged in Worcester v. Georgia,¹⁷³ recognized Indian nations as "distinct political communities." Recent Supreme Court rulings further limited tribal authority in exercising criminal and civil jurisdiction over non-Indians. The general principle established in Montana is that tribal authority did not extend "beyond what is necessary to protect tribal self government or to control internal relations" absent of congressional delegation (Goeppele 1990:564). However, Montana also established two important exceptions where

¹⁷²Puyallup's non-Indian population exceeds the Indian population by 80 times.

¹⁷³31 U.S. (6 Pet.) 515 (1832).

tribal authority may apply to non-Indians. First, in the event of consensual relations between the tribe and non-Indians, tribal authority is recognized. The second exception acknowledges tribal regulation over the conduct of non-Indians on fee lands when it threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.

Subsequent lower court decisions¹⁷⁴ after Montana granted tribes authority over non-Indians under the second Montana exception when non-Indian activity was found to threaten the integrity of the tribal community and its resources. Justice Blackmun's opinion in Brendale supports the research thesis underlying the necessity of a tribe's regulatory control over all reservation lands since the loss of the long-term benefits of comprehensive land management would represent a significant detriment to tribal interests, and therefore upheld under the Montana exception.

The Brendale opinion challenges these basic principles of land use planning by supporting a principle of uncoordinated and dual regulatory authority in land use management within the reservation planning area. However, a tribal community development strategy should also acknowledge the court's ruling that indirectly supports tribal authority through its right to sue to enjoin actions that would have a "demonstrably serious impact and imperil their political integrity, economic security, or their health and welfare." But this approach to conflict resolution is inconsistent with principles of comprehensive planning. For tribes to retain the ability to meaningfully "define the essential character" of the reservation as an exercise of choosing its desired future, a paradox presented in the Brendale argument that requires reconciliation. A tribal strategy that balances tribal reservation development with meeting its social and economic needs must also consider and provide for the interests of the assimilated non-Indian community within its reservation community development goals. This approach, then, suggests a redefinition of the reservation

¹⁷⁴The Tenth Circuit Court in Knight v. Shoshone and Arapaho Tribes (670 F. 2d. 900 (10th Cir. 1982) upheld tribal zoning authority over non-Indian fee land under the second Montana exception where no competing local or county zoning ordinances existed to restrict land use on non-Indian fee lands on the reservation.

community as a plurality of interests and departs from the Brendale view of the bifurcated community. Indeed, once the courts begin the process of dividing reservations into areas where tribes do and do not retain authority over non-member lands, there is no satisfactory doctrinal line that can either delimit those areas or guarantee consistency in public policy administration. "After Brendale, any kind of unitary doctrine regarding tribal zoning authority over non-member lands appears impossible" (Goeppele 1990:428).

2.3 Private Ownership and Development of Land and Resources - The control over reservation resources is fundamental to a tribe's ability to extract local benefits to support the community's well-being. Private property owners often view the tribe's authority to enact land use and taxing controls restricting economic activity as a threat to their interests. A perception of mistrust toward tribal governments stems from a general unfamiliarity with tribal governance structures and a further concern that tribal political processes are not accessible to non-Indians. When tribal regulation is perceived to restrict the exercise of economic property rights, owners tend to disrupt the political stability of tribal authority by seeking state intervention. Zoning and other police powers remain formidable powers available to tribes to control market forces occurring on the reservation. As an important component to the tribal regulatory strategy, an integrated approach that provides for resources management, the provision of governmental services supported in part by tribal taxation, and the allocation of land supply to sufficiently meet the reasonable needs of the reservation community strengthens its defensibility under federal pre-emption tests. Further, strategies guiding the appropriation of limited reservation resources should establish priorities among various user needs for domestic, industrial, wildlife, and religious purposes, and provide for due process administration to strengthen the tribe's overall regulatory authority.

2.4 Non-Indian Land Tenure - As the non-Indian occupancy of the reservation population continues to increase, the plurality of ownership interests threaten to diminish tribal governance when a tribe can no longer demonstrate the maintenance of the reservation's "essential character." Further, unless the tribe can demonstrate

its continued governance interests throughout the reservation, regardless of ownership type, a court may find that its authority has been supplanted by state interests. Hence, the nature of land tenure, as well as the corresponding tribal capacity to demonstrate its continuing interests throughout the alienated land base, become factors that may determine the extent of tribal and state authority in reservation civil regulatory matters.

Social Cohesion

3.1 Social Fragmentation and Cultural Assimilation - Intercultural relations may result in problems of mutual understanding between the dominant American culture and the Indian culture. Cultural diversity makes it difficult to generalize among tribes in their approach to community development. Values favoring the conservation of resources and equality in the distribution of tribal income, for example, are noteworthy in the Indian economic development literature (Gover 1980, Cornell 1986) and often conflict with development principles prevalent in the U.S. political economy.

Dominant societies have historically sought to impose their own social value systems, socioeconomic and cultural patterns, organizations, and languages on tribal groups. Formerly, this was viewed as an inevitable by-product of development. However, the destruction of weakened societies by stronger ones corresponds to a view of social evolution that threatens the cultural cohesiveness of the tribal community. Experiences from Indian cultures have shown that self-determination regarding cultural values can be combined with self-determination regarding economic development. "Tribal populations cannot continue to be left out of the mainstream of development. As in other areas of self-determination, tribal people should set their own pace and become as fully participatory in economic development as other parts of society" (Presidential Commission 1984:37).

3.2 Religious and Cultural Protection - The protection of Indian spiritual sovereignty, beliefs, religion, languages, and sacred sites are necessary for the preservation and perpetuation of Indian culture. Tribal rights to religious and cultural protection was affirmed in the American Indian Religious Freedom Act of

1978 that explicitly recognized the importance of Indian religious practices. The Act further directed all federal agencies to insure that their policies will not interfere in the free exercise of Indian religious practices. Furthermore, the Native American Graves Protection and Repatriation Act of 1990 provides for the culmination of decades of struggle by Native American tribal governments and people to protect against grave desecration and to repatriate the remains of ancestors to Indian tribes and families. The Act further requires the retrieval of stolen or improperly acquired religious and cultural property back to native owners. While the successful attainment of tribal rights to cultural protection is supported under the federal trust responsibility, it is dependent also upon the cooperation of state and local governments to diligently preserve those off-reservation religious, burial and archeological resources that are located within their jurisdictions.

3.3 Restricted Access to Capital Financing - Financial institutions have historically been reluctant to provide loans to Indian individuals and tribal governments for the financing of housing, infrastructure development, or economic development without a security of federal loan guarantees. An illustration of federal intervention restricting tribes from readily accessing financing for tribal economic development for community-wide benefit is in the current area of gaming development. While the courts have affirmed the inherent tribal right to conduct gaming activities, Congress intervened with passage of the Indian Regulatory Gaming Act of 1988. The Act restricts and further regulates most forms of gaming activities, and, most importantly, requires that an agreement with states must be reached prior to the conduct of certain forms of gaming activities.

Access to capital financing to develop tribal gaming enterprises was severely restricted by the Bureau of Indian Affairs when, under pressure from the private gaming industry, the federal government imposed new restrictions to the federal loan guarantee program,¹⁷⁵ eliminating its use in funding gaming developments.

¹⁷⁵In August, 1993, a Bureau of Indian Affairs policy memorandum stipulated a moratorium of the federal loan guarantee program for financing Indian gaming.

Without access to the loan guarantee program, conventional financing became virtually inaccessible. This placed a burden upon tribes to turn to private sources of capital. The private financing alternative often necessitated quasi-private arrangements by requiring equity "kickers", or a portion of the net revenues from the operations to offset the perceived risk. Tribal alienation from conventional forms of government financing thus created a situation where tribal revenues become shared with private investors. The net effect of the federal loan guarantee moratorium is twofold: it increased the tribal direct cost of accessing capital financing by sharing future revenues with the private sector; and, it delayed the development of tribal gaming operations to reduce competition with the private gaming industry.

Access to capital financing for reservation development continues to be highly hampered as financial lenders and investors often view the tribal political setting as unstable, where laws are subordinate to changes by tribal governments (Cornell 1986). Further, lenders may unfairly perceive tribal courts as biased in failing to protect private property rights of non-Indians by according them due process of law. The perceived uncertainty tends to increase risk, which, as in the case of financing gaming business ventures, often directly increases the cost of financial investment on Indian reservations.

3.4 Reservation Cultural Alienation - Deloria (1984) suggests that decision models for Indian community development need to take into account that the absorptive capacity of tribal populations for development and change may differ from, and require a longer period than other segments of the U.S. society, especially as the concept of time itself differs in fundamental ways in many Indian societies. The often lengthy process of arriving at a consensus so important in tribal decision-making is not well understood by anglo culture. Failure to recognize the time element associated with consensus decision-making is a general failure in

Pressure from Congress, through lobbying efforts, and threat of litigation from the private gaming industry as well as the states promoted federal intervention. Both the states and the industry sought to minimize the proliferation of Indian gaming.

understanding the process of the tribal political culture. In order to deal effectively with cultural plurality and cross-cultural communications, strategies are required to meet the specific circumstances of each tribe. Native American cultural values are rarely held separate from tribal decision-making. The view that humans cannot survive without the natural environment is a widely held value in most Indian value systems. The development of natural resources on Indian-controlled property necessitates a thorough evaluation of the impact such development would have on traditional values. "Until Indians can get a more comprehensive idea of their own regarding the content of their cultures, resolution of conflicts with the larger society will be almost impossible . . . Almost everything that can be recommended in terms of cultural revival and consolidation involves the fundamental problem of determining a contemporary expression of tribal identity. Inevitably, cultural self-government and cultural self-determination must precede their political and economic counterparts if development in these latter areas are to have any substance and significance" (Deloria and Lytle 1984:251-154).

Conclusion

Tribes may overcome the array of constraints to their community development by strengthening their political authority when they establish, under factual conditions, an inclusive definition of the reservation's purpose that incorporates fee land interests along with trust lands. Although Brendale defers final judgement on tribal jurisdiction over fee lands to future court review, it also clearly affirms that tribal sovereignty and jurisdiction exist over fee lands under certain circumstances. While the association of these types of land ownership may not be contingent on contractual or consensual relationships with the tribes, more fundamentally, the association articulates a unified concept for guiding the development of the entire reservation community. The challenge to tribal community development inevitably is concerned with the reconciliation of the constraining variables that act to counter the advancement of tribal goals. The necessity for clarifying tribal control over its territorial resources is fundamental to fulfilling a three-tier definition of tribal self-determination. First, the territory

represents the resource base upon which to build the sustaining economy to guarantee the survivability of the community. Secondly, the cultural community must both be preserved and also reconciled to questions about the appropriate meaning of tribal cultural identity in a changing and complex society. Finally, tribal political sovereignty must come to terms with a history that has inflicted multiple layers of non-tribal interests into the affairs of the tribes.

The course towards reconciliation of those intrinsic elements of the tribal community center upon the ability of tribal relations with the federal, state, and local governments to become stabilized so that a parity in the political balance of institutional interests can be achieved. An approach based on political plurality helps to resolve the longstanding and still difficult problems imposed by the pervasive interests of the political economy in tribal affairs.

CHAPTER 6

THE TRIBAL PLANNING STRATEGY

The ideal symbolized by "E Pluribus Unum", according to Peter Berger (1984:256), "is not a zero sum game. The Unum is not to be achieved at the expense of the Plures". But to the contrary. The concept of "community" presumes that the Unum sustains the Plures.

This chapter reviews the planning and community development literature to establish a foundation for constructing an approach appropriate to Indian community development planning. The approach becomes informed by a number of important theoretical traditions in the planning literature as well as the growing field of community development theory. The various ideological paradigms from these fields, and their distinctive forms and styles of planning, are examined to determine their suitability to the context of tribal planning.

This chapter also provides a framework for representing the goals of tribal community development¹⁷⁶ depicting the conditions observed that comprise the tribal planning situation. The framework is respective of the distinct normative structures of the tribal community, and of its complex history that produced threats to its continued existence. The chapter provides a succinct definition of Indian self-determination as a unified paradigm useful for guiding tribal community development. Six guiding principles are identified that serve as a foundation to tribal community development that respond to the three dimensions comprising the tribal political community: governance, social cohesiveness, and territoriality.

¹⁷⁶Tribal community development is defined to mean "the strategic choices and implementing actions affecting the physical, political, and socio-economic improvements to the tribal (reservation) community." Tribes are characterized as political communities possessing a territorial base, historic continuity, and composed of citizen members, similar to John Friedmann's criteria for the political community (in Planning in the Public Domain, 1987). Etzioni provides a further definition useful in describing the tribal political community in The Active Society (1968): "A societal unit is a community when it has autarkic integrative mechanisms", when the maintenance of its boundaries, inner structure and political organization is provided for by its own processes and is not dependent upon external processes.

The Concept of the Phenomenological Planning Situation

Phenomenology is an emerging field in planning theory that seeks to improve the effectiveness of planning's application by emphasizing the importance of understanding the particular context within which planning occurs. Castells (1980) observed the emergence of new directions in urban and regional research that view the planning situation in terms of social conflict. The value of this work is in its adaptation of the phenomenological approach to better understand the nature, and the often less obvious underlying aspects and meanings of social conflict. This section examines the phenomenological approach to inform an approach to more effectively address real world conflicts faced in the tribal planning situation.

The phenomenological approach is distinguished from phenomenology as a research method which emerged as an alternative approach to positivism and its rejection of hypothesis testing and development of formal theory. Concerned with studies about the dynamic relations of man and environment, the method is based on the view that "all knowledge stems from the world of experiences and cannot be isolated from that world" (Mitchell 1979:20), where behavior is attributed to a larger thematic field of experiences rather than from a singular event that can be subjected to observation and analysis. Phenomenologists seek to understand the essence of the variables common to a given phenomena.

In contrast, the phenomenological approach seeks to contribute to contemporary planning theory building by emphasizing the importance of the local situation that is being planned by integrating the dynamicism of that situation within its planning construct. Bolan (1980) defines the objective of planning practice as "the application of normative structures and codes of society to present a paradigm which becomes norm driven and norm seeking within the planning episode,"¹⁷⁷ which he depicts as turbulent and changeable. The turbulent or shifting situation presents a further dilemma for planning by requiring a constant assessment of the

¹⁷⁷Bolan refers to the situation in which planning occurs as the "planning episode".

changes occurring in the episode.

Bolan suggests joining the structural form of planning theory with the dynamics of the planning episode at the level that the phenomena occur, and offers seven general guidelines supporting a phenomenological approach to planning:

1. A greater emphasis should be placed on concrete situations, or on what is perceived as "reality";
2. Emphasis on language and communications is stressed to ensure a collective understanding of the planning situation;
3. A greater importance is placed in understanding and accepting differences between human existence and people's divergent values;
4. A greater acceptance is placed on ambiguities found within the planning situation;
5. A greater importance is placed in the evaluation of the factors contributing to the dynamic shifts in the situation;
6. Lesser importance is placed on reliance upon technical or methodological processes in the planning situation; and
7. Innovative, creative and learning solutions and outcomes should emerge from practice rather than from an emphasis on the contemplation of planning's actions.

Bolan's prescriptions are useful in the formation of a tribal community development strategy where tribal planning activities are perceived as highly dependent upon situational variables. An important quality in the tribal planning situation is that its situational variables are often difficult to identify or are easily misunderstood. Guided by the phenomenological approach, an Indian community development strategy begins by emphasizing the importance in identifying and interpreting the independent variables acting within its situation. As a planning strategy, the approach incorporates an evaluative procedure to anticipate the likely implications of contemplative actions that are applied to the independent variables within that dynamic situation. Furthermore, if the dynamic of the tribal planning situation is understood to be subject to "normative structures and codes" of a society

that are external to it, the approach, then, anticipates encountering a continuous occurrence of conflict. The tribal planning situation can thus be viewed in terms of a dialectic relationship that positions the advancement of the tribal social condition within a situation that is concurrently confronted by non-tribal normative structures. These confronting normative interests may be represented in various forms, ranging from prejudicial attitudes that challenge Indian values to jurisdictional usurpation of tribal political authority in defense of non-Indian interests present within the Indian situation. These forms of conflicting normative structures represent a dynamicism that interfere with the attainment of tribal community objectives.

A tribal community development strategy, informed by the phenomenological approach, provides a tentative structure for viewing the planning situation's dynamicism as an important variable working counter to tribal interests, and as a process for reconciling its conflict. In this respect, Bolan's prescriptions are modified and adapted to the context of the tribal planning situation:

1. Greater importance on concrete situations - The assessment of the tribal situation must become cognizant of the circumstances that interfere with the attainment of tribal objectives through an understanding of the meaning behind those objectives, and the nature and extent of tribal political sovereignty. The historic events contributing to those circumstances become important to understanding their role within the situation;
2. Greater importance on language and communication - Communication becomes paramount in any situation containing conflicting normative structures in order to clearly express both meanings and context as understood by the participants. Communication provides the means to explain and reconcile variant norms that support dialectic positions.
3. Greater importance on promoting understanding between human existence - When the tribal situation represents the confluence between mainstream values and the Indian community's values, the capacity for identifying values dissonance as a source of conflict becomes paramount if the participants in the situation are to resolve conflict.

The capacity for acceptance of normative plurality,¹⁷⁸ then, becomes an operative goal in the planning strategy.

4. Greater acceptance of ambiguity in the planning situation - Ambiguity is accepted as a condition in the tribal planning situation that presumes the presence of normative conflict, and seeks ways to build tolerance and acceptance of normative differences. Ambiguity, hence, represents the state of anticipation in the tribal planning situation that becomes the object that the tribal strategy seeks to reconcile.
5. Greater importance on the evaluation of the dynamic factors in the situation - Evaluation of the tribal planning situation begins with the identification of the ambiguous assumptions, especially when expressing cultural meaning, and the historically derived circumstances that foster those ambiguities. The evaluation incorporates consideration of responses that are available to overcome the ambiguities.
6. Lessor importance on technical or methodological processes - This guideline is modified to reflect the organizational development stages of each affected tribal community. While the intent of this guideline is to emphasize normative rather than technical considerations, tribal community development strategies may identify the deficiency of technical and methodological capabilities as important elements to resolving the situation's conflict, especially where organizational development may represent a limiting factor to enhancing tribal self-governance.
7. Innovation, creativity, and learning emerge from practice - A greater emphasis is placed on mutual learning by participants within the planning situation to encourage solutions that emerge from the needs of the participants.

The phenomenological approach to planning stresses the importance of communication as a central feature to uncovering the important meaning supporting the behavior and actions of tribal communities. The following section evaluates more fully the communicative aspects of social learning models for adaption to the

¹⁷⁸Normative plurality refers to the capacity of a society to first acknowledge the existence of social values differences within its community, and then to accept those differences as both legitimate and sustaining social attributes that comprise the character of the larger community.

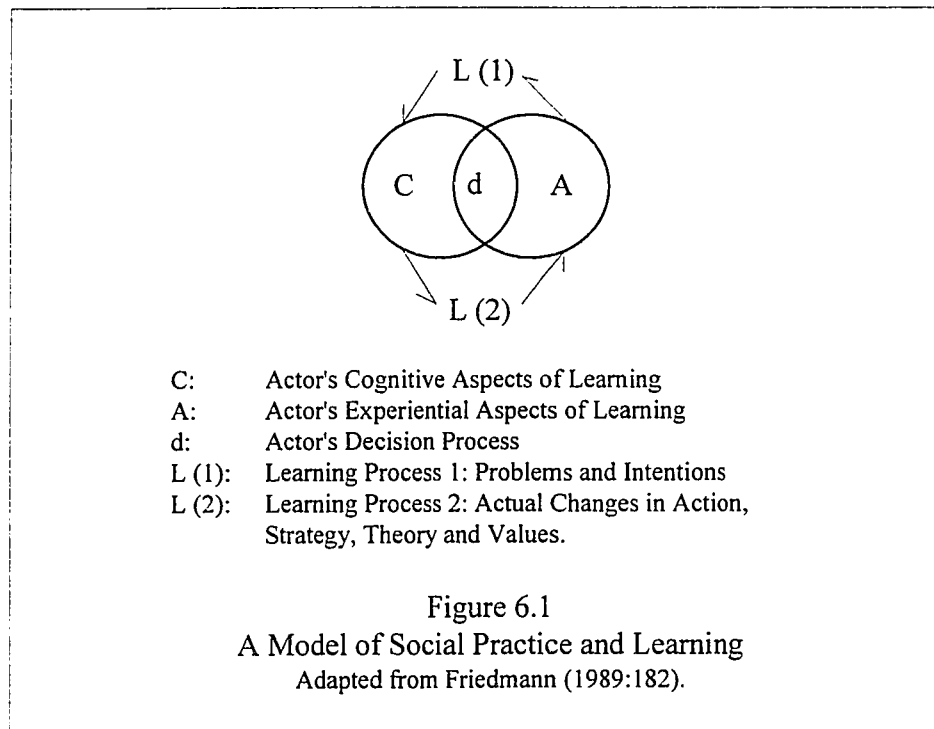
tribal planning situation.

Communication and Social Learning

Several approaches to tribal community development are reviewed in this section to discern those paradigms from the planning theory and community development literature that can respond to the dynamic processes of the tribal planning situation. Dunn (1971) distinguishes between two forms of models in community development, growth models and learning models. In formulating his work in social learning, he describes growth models largely as "mechanistic" models where fixed behavior is presumed and the community development situation relies largely upon exogenous factors. The growth model, according to Dunn (1971:16), has no capacity to modify its own behavioral program. Thus, growth models do not contain the capacity for advancing tribal objectives in a conflictive normative situation where the factors in that situation represent obstacles to tribal goals. In contrast, learning models are described in terms of social organizations whose behavior is subject to continuous reprogramming. The learning model is characterized as a complex social system dependent upon shared information to affect behavioral change in its planning situation. In a social learning model, a community's normative structures become integral to the planning process (Dunn 1971:82) and learned behavior, a product of the exchange of human values and goals by the participants, form a basis for cooperative behavior. Dunn expressed the processes of cooperative behavior as a form of socialization where participants in the planning situation act as endogenous actors to the situation and seek to bring about social transformation to change the obstructing norms and behavior. The key characteristic of socialization with respect to the social learning model is that it is consciously practiced as a purposeful, directed, and goal-oriented communicative process. The socialization process, however, may contain several forms of social relations. Etzioni (1968) describes three distinct forms of social relations as Normative relations, Utilitarian relations, and Coercive relations.

Normative relations tend to contribute to cooperation where participants share an exchange of values and norms to attain common end-goals as an outcome in the

planning process. Utilitarian relations tend towards the avoidance or containment of conflict, and focus instead on achieving complementary interests and mutually defined outcomes. Coercive relations often result in unconstrained conflict when the differing values and goals of the participants are not resolved. The tribal situation has been historically viewed in terms of coercive relation, inevitably a reason explaining its history of litigation. Social learning offers a method for achieving utilitarian relations within the tribal planning situation, with the ultimate objective of attaining normative relations. The social learning paradigm incorporates an understanding of the underlying importance of values and goals in the planning situation and seeks to gain understanding through an analysis of those goals. A tribal community development strategy, hence, becomes informed from the social learning paradigm in its search to uncover those conflicting situations arising from normative differences within the tribal planning episode. Conflict resolution occurs within its process of socialization; however, willingness for cooperative behavior among its participants is first required. Social learning relies upon the hypothesis that the planning situation is a "phenomenologically unique, changing, and dynamic environment" (Dunn 1984:173). Dunn describes the social learning process as teleological, where "participants can establish the process of human development as the goal of the process of social evolution" (Ibid:174). Social evolution becomes teleological when people establish the process of their social development as the goal of their evolution, where both process and goals are open to further transformation. Figure 6.1 illustrates this process.



As a style of planning, social learning seeks to link knowledge to action as a form of social technology,¹⁷⁹ but, unlike growth models, it is not based upon anticipatory decision-making. Friedmann (1987:197) observes that social learning occurs in a setting of social practice comprised of four dynamically interrelated processes:

1. It is pragmatic in its search for discovering a theory of reality;
2. It is concerned with the articulation of relevant social values;
3. It is concerned with political tactics and strategies; and
4. It is concerned with the implementation of practical measures of social action where reality reflects the action's image of the situation.

¹⁷⁹John Dewey was credited for transforming social learning into a "soft technology" within the field of organizational development. Dewey's pragmatic theories focused on ideas demonstrated to be relevant, and influenced the subsequent ideas of Mao Tse Tung, Lewis Mumford, and Edgar S. Dunn.

Growth models are considered to be deterministic and represent an approach "whereby a planning agency operates a program thought to attain its objectives with certainty, and alterations to the implementation program is not anticipated" (Faludi, 1973). The model is effective when a planned action is separated from social action. Korten (1984) observes that its programming approach is appropriate to certain types of community development, where the task and outcomes are "defined, environmentally stable, and cost predictable." As a deterministic model, its ends are assumed and its orientation centers upon the maximization of efficiency of means. Its efficiency especially serves the utilitarian purposes of certain aspects of plan implementation, where the necessity for social interaction is minimal and the action represents an instrumental element of the plan. The model serves both economic and community-based actions, providing that its planned ends, or the perceived normative purpose guiding the action, is embodied within a process mode.¹⁸⁰

The social learning model of planning overcomes uncertainty by adapting changes during its implementation based upon feedback from the plan's environment. Social learning is an approach where "strategic information and feedback impinge directly on action, providing signals that lead to incremental adjustments to its direction and intensity" (Faludi 1973:132). Constituting a phenomenological approach, the process model posits that complete knowledge is not attainable and anticipated feedback is a necessary feature of its self-correcting

¹⁸⁰Faludi (1973) provides a useful decision matrix for assessing the appropriateness of the growth and process (social learning) models, based upon 3 factors that represent determinants and constraints: Image - refers to a fixed perception of the end goal. Where perception contains a firm image, the growth model may be appropriate. However, as the image becomes uncertain, the process approach becomes preferable; Degree of Control - complete control over implementation provides few opportunities for feedback or interruption in implementation. Lack of control requires greater interaction through the process mode; Time Lag - refers to the feedback process from the environment and to the plan's internal ability to make corrections. The greater the time lag, the less frequent internal review of the plans. The more complex the operation, the more internal time lag increases.

strategy.

Etzioni (1968) observes an inherent methodological difficulty in theory construction as theories represent a process where observable data are simplified into abstract components, and then reintegrated on further abstract levels.

Methodological problems often arise from the abstraction that occurs. Etzioni (1968) identifies two levels of abstraction that tend to result: lower and higher order abstractions. These abstractions represent the micro and macro units¹⁸¹ observed from the planning situation. Macro theories tend to generalize broad topical levels of problems at the society level, while micro theories focus on a particular class of problems.

In the planning and decision-making model of mixed scanning, Etzioni provides an alternative to earlier rationalistic and incremental planning models as formulated in the works of Popper, Myerson, Banfield, Dewey, Lindbloom, and others,¹⁸² to overcome their lack of effective normative explanation for the conduct of decision-makers. The incrementalist models are viewed as a descriptive subset of micro or "bit" decisions, but do not adequately address the major, and more important, decisions occurring in the situation's broader context. Mixed scanning is described by Etzioni (1986:270) as:

A hierarchical mode of decision-making that combines higher order, fundamental decision-making with lower order, incremental decisions that work out and/or prepare for the higher order ones.

Scanning refers to the process of searching and processing the relevant factors in decision-making as an efficient way of considering the most relevant

¹⁸¹Etzioni (1968:554) uses the terms "units" to refer to local group interactions or collectivities, and "supra units" to refer to societies.

¹⁸²See K.R. Popper (1975) Objective Knowledge: An Evolutionary Approach, (1972) "Epistemology Without a Knowing Subject"; Edward C. Banfield (1968) The Unheavenly City; John Dewey (1946) The Public and Its Problems: An essay in Political Inquiry; (1963) Liberalism and Social Action; and Charles E. Lindblom (1977) Politics and Markets: The World's Political-Economic Systems; (1965) The Intelligence of Democracy.

decision factors without the exhaustive evaluation of all possible factors. Mixed Scanning addresses problems in incrementalism by differentiating between two types of decisions, contextuating decisions and bit decisions. Contextuating decisions are those categories of decisions that explore major alternatives against defined goals, but exclude consideration of specific details of the implementing measures. Bit decisions, in contrast, are decisions concerning the means of implementation that are often made incrementally, but within the contexts established by the fundamental decisions. In this view, bit decisions overcome problems of rationalistic planning models by the limited range of decisions established by contextual decision processes, representing the guidance mechanism for relating means to goals (Etzioni 1968:286).

The scanning approach is a useful tool in aiding the tribal planning methodology in differentiating between decisions relating to its program implementation and those overarching conditions that contribute to the dialectic tensions within the tribal planning situation. Several models and styles of planning are reviewed in the following section that approach, in different ways, the problems found in the tribal planning situation. These approaches are reviewed in an analysis of strategies suitable to addressing the unique circumstances of the tribal planning situation.

The Major Traditions of Planning Theory

A typology of the various forms of planning are represented by the four major planning traditions, as identified by Friedmann (1987) as Social Reform, Policy Analysis, Social Learning, and Social Mobilization. The two oldest of these traditions, social reform and social mobilization, originated in the early 19th century and establish a dialectic tension within public policy practice.

The social reform tradition represents perhaps the grandest tradition of planning theory under which three great synoptic treatises were produced: Mannheim's Man and Society in Age of Reconstruction¹⁸³; Dahl and Lindblom's

¹⁸³Karl Mannheim (1949) Man and Society in an Age of Reconstruction.

Theory on Politics, Economics and Welfare¹⁸⁴; and Etzioni's Active Society.

Social reform evolved from a series of major philosophical movements beginning with utilitarianism in the 18th century; positivism in the 19th century; pragmatism as formulated by Dewey¹⁸⁵ in the 20th century; and Critical Rationalism as formulated by Popper,¹⁸⁶ also in the 20th century. Social reform has been concerned with planning as a form of societal guidance, advancing the social theories of Auguste Comte,¹⁸⁷ Mannheim,¹⁸⁸ Tugwell,¹⁸⁹ and Etzioni. Etzioni's Active Society (1968) provides the culminating work on planning theory based upon the societal guidance model. Societal guidance represents a form of planning as an instrument of state power. Developed from macro-sociology, the societal guidance model acknowledges the central role of the state and relies principally upon allocative and innovative planning as its model for public policy implementation. Related theories under the social reform tradition include neoclassical and institutional economics, public administration, and organizational development (Friedmann 1987:39).

Social mobilization arises from the interaction of utopian, anarchistic, and

¹⁸⁴Robert A. Dahl and Charles E. Lindblom (1957) Politics, Economics, and Welfare.

¹⁸⁵John Dewey (1938) Logic: The Theory of Inquiry; 1929. The Quest for Certainty: A Study of the Relation of Knowledge and Action.

¹⁸⁶K.R. Popper (1975) Objective Knowledge: An Evolutionary Approach.

¹⁸⁷The social reform tradition in planning originated with the works of Auguste Comte, whose contributions to the science of society was intended as a guide for social progress (Friedmann 1987:12).

¹⁸⁸See Karl Mannheim (1949) Ideology and Utopia, (1949) Man and Society in an Age of Reconstruction, (1951) Freedom, Power and Democratic Planning.

¹⁸⁹See Rexford G. Tugwell (1932) "The Principle of Planning and the Institution of Laissez Faire" American Economic Review 22, no. 1. March.; 1970. A Model Constitution for a United Republics of America. Center for the Study of Democratic Institutions.; 1974. The Emerging Constitution. New York: Harper's Magazine Press.

Marxist theories, whose shared objectives are concerned with emancipatory outcomes. Social mobilization movements provide an alternative to the centralizing model of social reform, represented by the developments in utopianism, social anarchism, and historical materialism, each of which views power in terms of collective actions separate from state control. These social movements serve as responses to perceived injustices occurring from the political economy. Two major historical approaches to the social transformation of society emerged from these movements. Utopian and Anarchists movements sought to link social transformation to self-reliant and independent communities. In the second approach, Historical Materialism sought revolutionary practice to alter the structure of the existing power systems and was instrumentally concerned with changing power structures rather than the reform of existing power structures.

Historical Materialism challenges social reform theory as being substantively and methodologically flawed. Substantively, planning is criticized as only mediating the problems and responding to the partial needs of society. Methodologically, it has been criticized for not accepting risks and adhering to general systems theory. Scott and Roweis (1977) argue "it relies on normative prescriptions, how the world ought to be, instead of upon reality and therefore is unassailable and myopically empty." Historical materialism focuses on the reality of the planning situation and is largely based on social-history, capitalist-power relations, and Marxist concerns for equity. Scott and Roweis suggest planning theory itself does not contribute to, nor produce, planning. Rather, urban conflict makes planning a necessary social activity as a form of social mediation between capital and social needs as a "guardian for social balance" (1977:1105). Scott and Roweis advocate the development of a model of planning embedded within capitalism as the real imperatives of planning are intertwined with conflicts brought upon by the mechanisms of the political economy over the distribution of resources and benefits. Their proposal calls for an historical methodology centrally concerned with the struggle among collective interests, the role of the state, and capitalist interests.

The Frankfurt School of Critical Sociology arose from the tradition of

historical materialism concerned with a critique, grounded in Hegelian and Marxist views, of the cultural manifestations of capitalism (Friedmann 1987:54).

Habermas's major contributions to this field of critical thought are concerned with a "general crisis of legitimization", which argues that the state political system is no longer delivering on its "promises of material sufficiency, social equity or democratic rights" (Friedmann 1987:72).

The style of planning known as advocacy planning emerged during the 1960's to address acute social problems ranging from increased representation of low-income communities in political processes to the goals of the war-on-poverty movement. Paul Davidoff, pioneering the early development in advocacy planning, stressed the role of political choice in planning and analogized an ideal political process to that of due process: "the truth was to be sought in the contentions between interests" (Heskin 1980:58). Davidoff advocated a "moral science" which integrated an analysis of the questions of equity in public decision-making with planning's prevailing emphasis on the analysis of efficiency alternatives.

Advocacy planning evolved to target political systems directly and sought confrontation with existing centers of power. Planning, from advocacy's critical perspective, became "a sophisticated weapon to maintain the existing control under the mask of rationalism, efficiency, and science" (Heskin 1980:59). Davidoff equated the advocacy model as a planning style deeply rooted in politics to advance the empowerment of its citizens. As a form of social movement, advocacy planning seeks compromise in its relations with state powers in order to negotiate favorable gains in equity outcomes. Scott and Roweis (1977), however, challenge advocacy planning's effectiveness due to its inability to directly challenge the center of power in the political economy as advocated in social mobilization approaches.

The conditions supporting advocacy planning are observed in certain situations of tribal planning concerning the advancement of tribal political interests. The advocacy approach serves as an early action mechanism to assert tribal interests in areas where clearly affirmed tribal authorities or rights may not have been established. As a form of preliminary action, then, it may prove to be a useful

strategy when used as a tactic to formalize an intent of intervention pending clarification of the assertion of the tribal claim. In advocating tribal interests, the tactic has proven effective in forcing opposing parties to anticipate the inevitability of possible legal challenge that alone may result in pre-empting further harmful action by external sources.¹⁹⁰

Strategic planning¹⁹¹ represents a systematic process of identifying opportunities and threats in a planning situation's future environment, and for developing strategies based on a community's goals and resource capabilities for operating in that future environment over a relatively long-term (Steiner, 1983). So (1984) describes strategic planning as containing seven essential steps for establishing the "situational audit," the rationale supporting its strategic decisions.¹⁹² The model begins with an "environmental scan", the analysis of external factors that act upon the organization, including its political, social, economic, and technological influences. The environmental scan evaluates independent variables, including trends and factors over which the organization has little control. The process then critically examines the capabilities of the organization in identifying inherent strengths and weaknesses, which represent the

¹⁹⁰Examples of effective advocacy tactics occur in the tribal claim to exclusive jurisdiction in the allocation of reservation groundwater resources, attempted to result in the stay of the state's water rights appropriation pending further discussions of tribal concerns and the legal case history concerning this highly complex matter. As an alternative to the threat of litigation, the Swinomish Tribal Community and the Washington Department of Ecology agreed in 1993 to explore avenues leading to cooperation in management of the reservation resource. While the advocacy approach did not ensure the protection of absolute tribal interests, it demonstrated its effectiveness as an intervening measure.

¹⁹¹Strategic planning's application to public policy emerged in the 1960's from its development as a corporate decision-making tool in the preceding decade.

¹⁹²The seven steps in strategic planning process include: a status assessment, an environmental scan on outside influences, an examination of internal corporate elements, an analysis of the implications of the first three steps, the development of strategic objectives, an implementation plan; and a system of monitoring and feedback.

independent variables in forming the implementation strategy.

Strategic planning is synonymous with rational economic theory's concern for efficiency. The strategic planning process is not "bound" to unforeseen decision impacts, but recognizes the process itself as susceptible to change. In strategic planning, the evaluation of alternatives is not limited to what is expected to occur. Rather, the process is performed within a philosophy of planning for discontinuities in the environment and unforeseen decision impacts. The flexibility ingrained in the strategic plan process recognizes that the process itself is susceptible to change: ". . . the end purpose of strategic planning is not a set of plans but the development of intellectual skills to be continuously employed in the managerial process" (Bloom 1986:256).

Strategic planning articulates a methodological approach to forming action strategies intended to achieve the defined objectives of the organization. The approach features a pragmatic approach to the treatment of variables within the organization's situation that must be addressed and, where posing a threat to its own security, overcome. The approach is well suited to the tribal planning situation insofar as the model's reference to the organization's instincts for survival is consistent to the tribal community's ultimate objective ends. Further, its approach fosters historic continuity as its process of strategic decision-making emphasizes a relationship between current and future situational threats with its history.

Contingent Approaches in Planning

The contingent planning approach provides a structure for evaluating a range of implementation choices based upon the situational factors affecting the outcome of the contemplated action. In the contingent approach, planning goals and the context variables are the two principal dimensions defining the planning situation. The preferred choice of planning strategies is contingent on the characteristics of the situation (Bryson 1979). The approach also considers the behavior of decision-maker as contingent, adding a third dimension to the three-tier model. In the contingent decision situation, preferred strategies and tactics are evaluated as the situation changes in order to increase the likelihood of goal achievement. Hence, the

behavior of the decision-maker is viewed as a responsive feature to the situational assessment. Bryson characterizes the decision actor's response as contingent upon the complexity of the situation's variables. An important quality of the approach, then, is its anticipatory and reactive behavioral tendency.

Contingent planning provides a conceptual construct of the planning process to support the consideration of variables in the context, program goals, and actors prior to selecting an appropriate decision strategy. The implementation of policy, then, calls for an adaptive process of continuous interaction between those making the policy and those making choices through implementation (Alexander 1985). As a decision framework, variables are evaluated in terms of their level of complexity. Variables that have been determined to pose minor resistance may be implemented through direct, instrumental action. Those that exhibit a potential for complexity or resistance in implementation may require a greater degree of implementation measures, including a more complex educative or negotiative component. The contingent approach takes place within the dynamics of the planning situation. While similar in its adaptive quality to mixed scanning, it is distinguished from mixed scanning as it concerns policy implementation rather than policy formulation. As an adaptive element in the planning process, Perloff (1980) observed that "all plans must be contingent, consistent with Dunn's developmental experimentation, as it occurs within variable parameters."

Of particular importance to the tribal situation, the contingent approach is suitable for considering culturally specific variables to the extent that its goals or contextual situation reflect cultural attributes.¹⁹³ The contingent planning approach posits that the appropriate range of choices is contingent on any number of relevant

¹⁹³The process begins by defining the scope of contextual variables making up the planning situation. If the planning goal, for example, sought to improve the economic conditions targeting a disadvantaged segment of a multi-racial community, the contextualizing variables would be articulated to represent the cultural and economic qualities of that situation. The process would attempt to identify future friction points specific to those variables during implementation and, based upon a "reading" of the situation, adapt appropriate strategies for eliminating the friction.

factors, an approach to decision-making based on empirical observations from practice. Bryson and Delbecq (1979) observe that decision-makers appear to behave contingently if given the choice, and change their strategies and tactics as the situation changes to increase the attainment of their goals. Variations occur in adapting a contingent approach where, their research concludes, factors influencing greatest contingent behavior occur in the presence or absence of political difficulty across situations, to a lesser extent by goal difficulties, and to an even lesser extent by technical difficulties. Their findings suggest¹⁹⁴ the apparent primacy of political concerns over technical or goal-related concerns as a cause of change in planning strategy. Alexander (1985) argues that a general theory of planning implementation is impossible since the diversity of contexts, actors, and goals within any given situation require situational consideration. In response to a search for a general framework that considers all possible variables in decision-making, Alexander calls for a conceptualized approach in decision-making (1985:410):

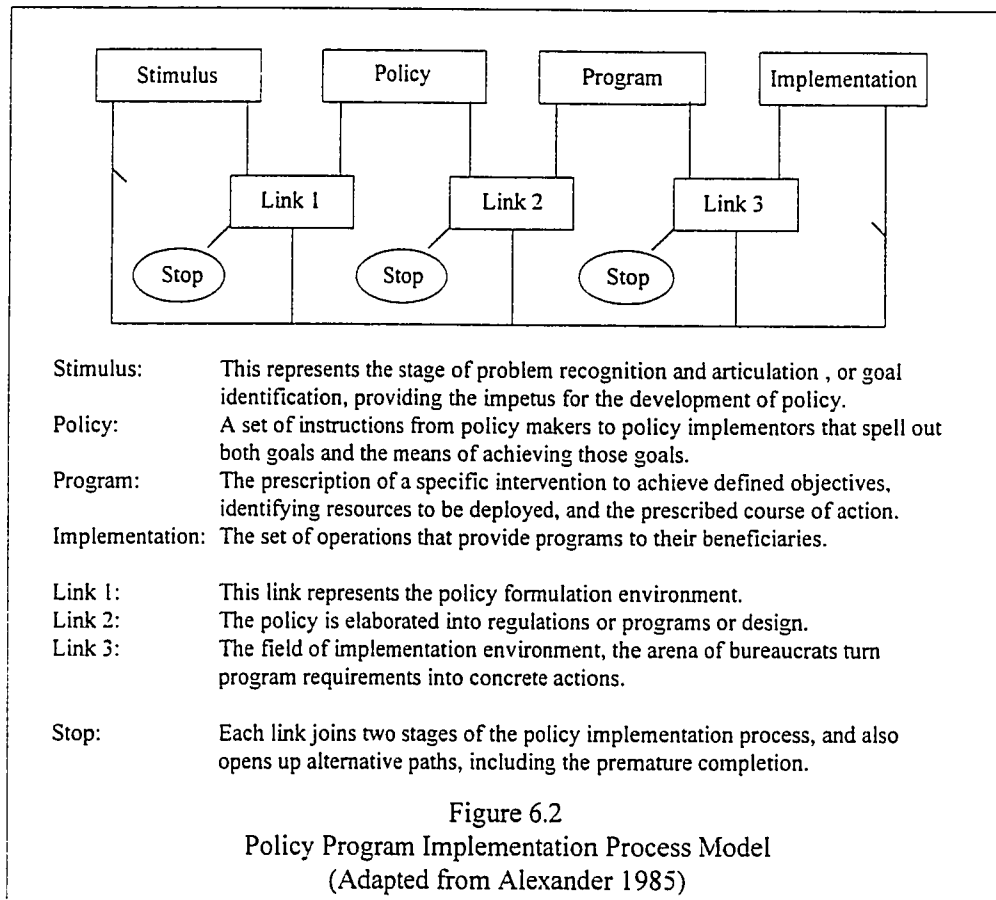
We need a conceptualization of the policy implementation process that is sufficiently abstract to serve as a framework for a contingent theory: only such a theory may account for a diversity of contexts, goals and actors that no general theory could incorporate.

Alexander develops a process model to overcome these dilemmas in support of the advancement of a contingent theory. The Policy-Program-Implementation-Process model, or "PPIP" as depicted in Figure 6.1, conceptualizes the policy implementation process by transforming the intent of action into a continuous interactive process. The process begins with a stimulus, which directs attention to a

¹⁹⁴Behavior fitting the rational school of planning thought was most clearly associated with the easiest of all situations, where the fewest problems exist in the situation. As the situation becomes more complex and difficult, the processes designed by the participants moved further from the strictly rational model. "Besides attending to technical concerns, the planners were politically savvy and emphasized organizational learning. The implication is that in most situations the future isn't "planned" so much as it needs to be negotiated, learned, politicked, hassled, haggled out in a structured, goal-oriented fashion" (Bryson and Delbecq 1979:178).

problem, goal, or issue. Following, the stages linking the intention to the action occur through a process of political mobilization to formulate policy. The policy is elaborated in a third stage to form specific programs that may include legislation, regulation, and projects. The programs become implemented in the final stage. The stages of the PPIP model are continuous as they incorporate the endogenous characteristics and variables of the model with "links", representing the exogenous factors affecting the process. The exogenous factors include contextual, organizational, environmental, and perceptual variables.

The rationale of the model is that each stage of the process will be affected by some characteristics of the preceding stage. Another premise is that progress from each stage of the model is not direct, but is mediated by a variety of factors that may impact the process. The PPIP model shows a sequential process that may be continuous from its beginning as the result of some stimulus, and through its stages of policy development, planning, or program design, to its conclusion in implementation. Each stage is connected to its predecessor by a link that incorporates a complex of interactive factors that mediate the progress, or lack of progress, of the policy implementation process. In the context of planning tribal communities, the contingent construct provides an appropriate approach for selecting action strategies anticipatory and responsive to the dynamics recognized in the tribal planning situation.



Theories in Community Development

The idea of "community" is influenced by two important historical concepts. The classical Greek notion of fellowship connoted the assembly of citizens in a common setting to fulfill the basic needs of their association. Seventeenth-century political philosophy, in the tradition of Hobbes, introduced the utilitarian concept of maximizing collective self-interest through community associations. Hillery and Willis identify the four basic components of a community as consisting of its membership, a place or territory, their membership's social interaction, and their psychological self-identification (Christenson 1989:6). The territorial component of the definition acknowledges that most social interactions occur within a defined

spacial boundary.¹⁹⁵ Social interaction represents the process of communication between community members to identify commonly perceived threats and ways of overcoming such threats. Finally, psychological identification is the quality that ties the individual participant to the community through a common perception of association. A community, then, is initially described as "a group of people who perceive common needs and problems, acquire a sense of identity, and have a common set of objectives" (Roberts 1979:27).

Community development encompasses a wide body of definitions. The term "development" is explained as the capacity defined by what people can do with the resources they have available to them to improve their quality of life and that of their community (Ackoff 1984:195). Development implies improvement, growth, and change, and is concerned with the transition of communities to more advanced social stages (Christenson 1989:9). Therefore, development connotes a desired quality for improvement and the ability to bring that improvement about. Development here is viewed as a product of learning, rather than production. Community development, when viewed as a normative concept, suggests both a concern for the equitable distribution of social benefits and an active participation in decision-making. Newman and Oliver (1967) emphasize an interactive quality of the community as "an organic natural set of relations, a group in which membership is valued as an end in itself, commitment to common purpose and procedure for handling conflict" (Roberts 1979:33). A four-fold typology representing the dynamics of community development is offered by Christenson (1989:12):

1. A process: as a process, community development moves from one condition or state to the next, and involves progressive changes in terms of specific criteria;
2. A method: as the means to an end, it incorporates strategies directed towards goal attainment;

¹⁹⁵However, the importance of territory is noted by others (Blakely 1989:7) as being replaced in some situations by network associations.

3. A program: a methodology stated as a procedure and its contents as a list of activities. Emphasis of this element is placed on activities;
4. A movement: community development is seen as a cause to which people become committed. It is dedicated to progress, as a philosophical and not a scientific concept, since progress must be viewed with reference to values and goals that vary under different political and social systems. It stresses and promotes the idea of community betterment as interpreted by its participants.

There are three major approaches used to advance the objectives of community development. The most prominent approach, the Self-Help approach, holds as an underlying assumption that a community can achieve self-determination within the constraints imposed by the political economy in which the community is embedded. As a community-building strategy, it is directed towards organization, decision-making, problem-solving and increased self-reliance. It represents development of the community as a social process capable of self improvement to bring about locally determined changes. The self-help approach is a strategy that promotes broad democratic participation as a means of empowering local citizens in affairs that most directly affect them. The origins of self-help are both pragmatic and idealistic in that they seek to improve material conditions of life, and to establish the democratic procedures of participation.

The Technical Assistance Approach represents the approach that least relies on public input or participation. The auspices under which technical assistance is provided is centralizing, with its goals often determined outside the affected community. Technical assistance is the only approach that is not inherently developmental in nature.

The third approach is the Conflict or Confrontational Approach. This approach emphasizes social justice considerations and the equitable distribution of a community's resources. Confrontation is a strategy employed in the conflict approach to achieve its goals. An example of the conflict approach is in the Alinsky model, which focuses on polarizing the community need into well defined issues and then helping the community articulate efficient strategies to affect change in the

situation (Alinsky 1972). His agenda called for overtly social democratic ideals as a starting point for a program of social reconstruction (Wilentz:32).

Roberts (1979) identifies two schools of learning that are applicable to developmental processes in community development theory: the Cognitive school and the Stimulus-Response school:

Stimulus-Response is a form of behavioral learning where information is received from outside stimuli, and learning takes place as a response to these stimuli. Stimulus-Response is a form of didactic learning, by which people are expected to react to and be guided by reason and information.

The Cognitive School is largely based on consciousness and forms the basis of social learning. Perceptions are generated by intuitive insights that become integrative within the community.

While a great deal of early community development practice was based on Stimulus-Response learning, community development has increasingly become cognitive based, where learning requires direct participation by the community and seeks to develop the capacity of the individuals who form the community.

Community Development as actively applied in third-world development since the 1920's¹⁹⁶ is increasingly recognizing the importance of assistance programs as part of a holistically perceived learning process, as opposed to external technical assistance, as in bureaucratically mandated blue print designs. "Effective community controlled social organizations serve as essential instruments if the rural poor are to give meaningful expression to their views, mobilize their own resources in self-help action, and enforce their demands on the broader national political and economic system" (Korten 1980). The approach is based not on pre-planning, but, rather, in building the community's capacity for embracing error, learning with and

¹⁹⁶One of the first community development programs was funded under the Ford Foundation, which served as a pilot project in the Etawah District of Uttah Pradesh, India to foster self-help agricultural development. While it was viewed initially as a failed project, its ability to assist in mobilizing grassroots cooperation was later recognized as a considerable outcome and benefit from the community development effort.

from the participants, and building a new knowledge base and institutional capacity through its own actions. In a learning organizational context, emphasis is placed on anticipating and accepting errors likely to occur. While the dominant organizational response tends to be to deny errors, which then results in repeating errors, the learning organization, in contrast, views error as a "vital source of data for making adjustments to achieving a better fit with beneficiary needs" (Korten 1980:498).

As a result, community development approaches emphasize developing new models that provide flexible, sustaining organizations that focus on building capacity within the local communities. These models seek to achieve a high degree of what Korten terms "fit" between program design, beneficiary needs, and the capacities of the assisting organizations. Between its intended beneficiaries and the program, the critical fit to be achieved concerns beneficiary needs and the particular resources and services made to the community as program outputs. Between beneficiaries and the assisting organization, the critical fit relates to the means by which beneficiaries are able to define and communicate their needs and the process by which the organization makes decisions.¹⁹⁷

The Political Community

While conventional community development models may be partially applied to the tribal community context, the models and their definitions of "community" do not adequately address the unique sovereignty traits inherent in the Indian political community. An expanded definition of "political community" more useful in describing tribal communities is provided by Etzioni (1968:554):

¹⁹⁷An operational structure of the social learning model that may have application to the context of tribal planning is the People-Centered Development Model (Korten 1980). The approach looks to the initiative of the community membership as the primary development resource. The material and spiritual well-being of the membership is treated as the "end" that the development process serves. People and their environment are enjoined as the primary endogenous variables. Korten (1980:499) identifies three critical stages in the community development learning approach: learning to be effective, learning to be efficient, and learning to expand.

A societal unit is a community when it has autarkic integrative mechanisms, when the maintenance of its boundaries, inner structure and political organization are provided for by its own processes and not dependent upon external units, supra units, or sub units.

In autarkic communities, the activities of its members are described as meeting the basic functional needs of their community in become functionally self-sufficient. Such communities are similar to the fully autonomous community except that they do not possess self-governing control necessary to qualify them as autonomous. Both forms of communities constitute political communities, which are further distinguished from cultural or social communities. Hence, the political community, as described by Etzioni (1968:554), is characterized as a state, as an administrative-economic unit, and as a point of loyalty.

Friedmann refines this definition by suggesting that the political community must also possess four characteristics: a territorial base; an historical continuity; a composition of citizen members; and participate in an ensemble of communities among which citizenship is shared (Friedmann, 1987). The political community also possesses sufficient coercive power to counter outside forces, and decision-making capabilities to control and allocate its assets. Furthermore, Etzioni emphasizes the important characteristic trait of organizational responsiveness in the internal structure of the political community. Community structures that do not provide mechanisms for participation by its members are said to be alienating. A society is viewed as inauthentic when its relationships and institutions provide the appearance of responsiveness, while its underlying condition remains alienating. Etzioni describes a central characteristic in the inauthentic society as containing inherently unstable political structures where consensus becomes unobtainable. Etzioni's political community seeks to foster community cohesiveness through an interactive dialogue among its membership that authenticates its democratizing principles and prevents the alienation of its internal elements.

Etzioni's premise has important implications to the tribal political community in two distinct ways. First, the tribal articulation of community goals as an

expression and exercise of its inherent sovereignty is responsive to its internal cohesiveness. The prevention of alienation internal to the tribal community directly stabilizes its social cohesiveness, thereby strengthens its political sovereignty. This is a necessary exigency for overcoming external forces that threaten the security of the collective tribal interest. Secondly, the tribal political community may be depicted as a self-contained political enclave within a larger U.S. political economy. As the tribal political community attempts to alter influences emanating from the external community, its effectiveness tends to increase as a reflection of its own internal cohesiveness and community self-determination.

While there have been few community development methodologies specifically developed to guide tribal community planning, components of the major approaches in community development are useful in informing a tribal community development construct. Roberts (1979:94) identifies two applications of community development models to tribal community development: the assimilationism model and the confrontative model. The former, a form of the instrumental economic model, holds little potential in meeting the needs of modern tribal community development based on the history of failed federal Indian assimilationist policies. The confrontative model, popularized during the American Indian Movement and the northwest treaty rights conflicts of the 1970's, resulted in several important measurable outcomes. Both models, however, fail to adequately address the integrative community development issues that continue to face tribal sovereignty and self-determination. An alternative model is necessary, capable of operating interactively, both internally and externally of the tribal community, to address persistent obstacles that tribal planning faces in its service to tribal community development goals.

Community Self-determination

Faludi (1973) describes community self-determination as the capacity of a community to direct its destiny based upon receiving continuous flows of three types of information: information about the world external to the community; information about the past; and information about itself and its own parts. Faludi observes that a

central objective of planning is to foster human growth as a learning process contributing to self-determination and the emancipatory control by the community. In what Faludi refers to as "meta-planning", he stresses the importance of the mechanisms of planning as a consciousness-raising procedure that seeks to direct the pursuit of human growth. "Only where growth is based in consciousness is it truly viewed as deliberate" (Faludi 1973:52). Faludi (1973:xii) proposes an approach to supporting a community's self-determination by emphasizing a decision-centered view of planning. This approach is based on a variation of contingency planning that emphasizes a strategic approach in decision-making. Faludi's approach is pragmatic as it relies on inductive field observation upon which theory building follows based on the experience gained. Structuring an effective tribal community development approach, likewise, begins with historically based empiricism to discern the historic factors that contribute to shaping its planning situation. Decision-making then becomes a process that links the experiences of empirical knowledge to the community's future vision within the context of the practical alternatives in the decision situation.

Friedmann suggests a parallel construct for community self-determination based upon a model of community self-reliance. The model contains four qualifying criteria that serve to strengthen a community's autonomy: the abilities to prioritize its own needs, to formulate its own action strategies, to choose a self-determined set of implementing actions, and to mobilize its resources in order to carry out its actions (Friedmann 1987:376). Senghass (1984) suggests that the first imperative of a self-reliance strategy is the ability of a community to "delink", or break away from controlling linkages that exist external to the community. The condition of many developing world communities is similar to the tribal community in that their ability to exercise self-determination is often restricted by interventional forces centered outside the community. And as Friedmann has suggested, a central purpose that planning serves is to mediate social relations that stand between the self-reliant community and its external forces.

Friedmann (1987:81) identifies the social learning model as an effective

mechanism for increasing local control of a community's internal affairs, based on three characteristics of the social learning model: its emphasis on dialogue, its emphasis on establishing non-hierarchical (and controlling) relations, and its provision for creating tolerance and acceptance of differences between communities. These three characteristics are directly applicable to the construction of the tribal community development model that fosters normative relations with the external community. Dialogue represents the principal mechanism for the mediation of conflict between the tribal community and the surrounding and intervening political economy. Non-hierarchical relations establish a relatively "level playing field" within which the dialogue occurs. Here, the fundamental concepts inherent in the doctrine of sovereignty and the tribal government-to-government relations model become conveyed and established. Developing a capacity for tolerance of differences provides a beginning discourse to reconcile differences between normative community structures.

The process, hence, begins with the broadening of understanding about the underlying and often misunderstood differences perceived by the participants in dialogue, and then proceeds with its major and overarching task of learning to accept political plurality and cultural diversity throughout the broader region containing the tribal community. Friedmann's model of planning defines the purpose in the linkage between knowledge and action¹⁹⁸ as the emancipation and restoration of the autonomous political community from controlling and contrary influences within the political state and the prevailing economy. This definition of community planning is similarly pertinent in addressing the planning situation of the tribal political community.

A Paradigm for Tribal Community Development

The articulation of tribal community goals is intrinsic to the distinct community values of each tribe. Most tribal communities, however, share a

¹⁹⁸Friedmann's definition of planning was earlier defined as "transactive planning". See John Friedmann (1973) Retracking America.

common values base, resulting from the common circumstances of their collective past since reorganization under treaties and from pre-treaty lineages. Modern Indian community goals focus fundamentally on cultural and political survival. These dual goals contrast with popular American goals. The social ideal as embodied in the "American Dream" is based on the two axioms of individual freedom and the belief that hard work will be rewarded with material success. Hence, the contrast between Indian and non-Indian belief systems is reflected in the relationship between Indians, as collective participants within their communities, and the pervasive American ideal which emphasizes the individual as an object of action and independent of the community.

Indians generally do not subscribe to the canons depicted in the American ideal as these ideals are ancillary to a larger set of concerns fostered by the tribal community leadership and its membership. These concerns, forming the basis of a tribal community development agenda, are represented as: the maintenance and protection of sovereignty, its social cohesiveness, and its territorial interests. A social priori is placed in the service to community interests, which responds to the phenomenological experiences by those communities to its historic past and to its concerns for political survivability, as Cornell (1987:63) points out:

This Indian politics has been concerned less with access to the larger society and its material rewards, or with equality of opportunity, than with those phenomena which distinctly separate Indian nations from other groups in American life. It has been a politics of national survival.

During the last fifteen years, reservation community development has become the centerpiece of Indian policy and Indian collective action. The tribal community development agenda, then, is comprised of two important dimensions:

1. The exercise of political autonomy through the community's inherent sovereignty in order to self-preserve its social and cultural cohesiveness; and
2. The development of a sustainable reservation economy that provides for an improved standard of living for the reservation populations.

The Tribal Community Development Typology

Where the American ideal is based upon individual achievement and success, many Native Americans continue to place important emphasis on collective relations. This collectivism extends also to their individual economic behavior. The emphasis of individual behavior is not on accumulation, but rather on sharing (Roberts 1975). Many tribes maintain an almost normative prohibition against the accumulation of excessive wealth with the continued practice, albeit modernized, of the potlatch tradition. This has raised many points of difference with the American ethic. The maintenance of the welfare of its community membership in political, cultural, and economic terms is fundamental and inclusive to the tribal development agenda. Skepticism continues in Indian communities about the institutional orientation of American life, especially the orientation to market criteria as the measure of all values and to the highly individualized and secular politics.

An essential aspect of a community's power is the capacity to imagine alternative futures and to construct ways to bring about conceptions of that desired world. "In this sense Indians have always had power: the capacity and the cultural resources with which to articulate alternative conceptions of reality and alternative visions of the future" (Cornell 1987). The conflict between Indians and the American society has been in large part one of ideological differences. This conflict has been manifested through different conceptions about how the world works, especially concerning the role of the natural environment, of appropriate relationships that an individual holds within that environment, and of the ends that collective human effort should be expended.

What makes the events of recent years particularly important is that Indians have achieved a renewed form of power through their repossession of many aspects of their inherent sovereignty. Since the early 1970's, and as a consequence of Indian political action, the organizing principle of Indian policy has been the restoration of tribal sovereignty and tribal self-determination, an ideal that tribes themselves should make the decisions that affect the outcomes of their communities. The Cabazon and other landmark decisions served as a confirmation of the right and authority of Indian communities to control and transform the future of their

communities, and form the principle of a tribal sovereignty doctrine.

The critical issues facing tribes in the course of charting their desired futures concern the nature of what those visions and dreams may constitute, and their ability to exert sufficient control over their resources to build that future. The question is not whether the American ideal contains room within it for Indians to participate, but, rather, whether the U.S. political economy can tolerate a set of tribal visions different from the American ideal, and to fully afford Indians the opportunity to pursue those visions on their own terms.

Defining Indian Self-determination

In 1975, Congress authorized a comprehensive study to identify issues endemic in the federal-tribal relationship, and, through consultation with the tribes, formulated a set of recommendations for improving the federal trust relationship with tribes. The American Indian Policy Review Commission (AIPRC 1977) report examined a wide variety of Indian policy issues intended to form a foundation for future Indian policy development. "Despite some success in the intervening fifteen years, it has become clear that the AIPRC Final Report did not furnish the blueprint for the future that had been hoped for. Piecemeal changes in Indian policy continue to prevail in the federal government and no comprehensive or broad plan has emerged" (National Indian Policy Center 1992:12). The absence of an organized federal policy initiative continued to frustrate the administration of services to tribes and has hampered the development of self-governance by tribal governments. The AIPRC study was viewed as having failed to adequately address the deeply rooted problems preventing a stable Indian policy. These problems are understood through historic analysis of the inconsistencies of past U.S. Indian policy over a two-hundred-year period. The policy inconsistencies of the past half decade alone have demonstrated the political difficulty in forging a meaningful federal Indian policy.

Since 1975, with the enactment of the Indian Self-determination Act,¹⁹⁹ the federal government has consistently supported a policy of transferring the

¹⁹⁹Public Law 93-638.

administration of federal services through contract agreements directly to the tribes. The program has been widely viewed by the tribes as successful in contributing to the strengthening of the tribal governmental capacity for self-governance. In 1988, in an effort to further the transference of federal program services delivery to the tribes, Congress authorized the "Self-Governance Program", a demonstration program aimed at expediting tribal capacity building. Participating tribes in the demonstration program heralded the program as an effective means for the transference of federal resources to local control, and for maximizing the effectiveness of federal services in Indian country. Since the introduction of the executive Indian Policy of Self-determination in 1970, federal Indian policy has been firmly based on four fundamental principles of Self-determination:

The Federal Trust Responsibility Doctrine - Established earlier in the century by the Supreme Court, this doctrine sets forth the federal government's role in, and responsibility for protecting the tribes and their resources and insulating them from state intervention.

Tribal Self-determination - The policy's 20-year history has formally affirmed the priority of tribal decision-making in Indian affairs over federal interests. Self-determination, in addition to being a philosophical ideal, applies to the mechanisms of the administration of federal services directly by tribal governments.

Indian Reservations as Permanent Tribal Homelands - Federal courts have interpreted the intent of the U.S. reservation policy of reserving lands for Indian tribes as establishing permanent tribal homelands and exclusive tribal governing territories. This principle is now the prevailing law, and supportive of tribal claims to territorial jurisdiction and the control and appropriation of territorial resources.

Recognition of Tribal Sovereignty and Treaty Rights - While tribal sovereignty continues to be subject to the federal government oversight, the political status of tribes as self-governing and sovereign entities was the premise upon which Indian treaties were executed. The basic political status of tribes and their federally defined rights of self-government have been continuously upheld by the Supreme Court.

In the fifteen years since the release of the AIPRC report, federal Indian policy has been consistent in consulting with tribal governments on matters

regarding future Indian policy directions. In 1990, tribal governmental leaders formally presented a set of principles to the U.S. Senate hearings on "Tribal Initiatives for the 1990's." These fundamental principles have been further articulated by Congress, the executive branch, and Indian tribal leaders into four broad goals that serve today as the policy of the United States toward Indian self-determination (National Indian Policy Center 1992:17):

1. The United States has assumed a trust responsibility and shall implement according to the highest fiduciary standards its duty to protect, maintain, and manage Indian lands and related natural resources, including water, fisheries, game and game habitat, as necessary to preserve a permanent homeland for Native people within this nation;
2. Tribal rights of self-government are (a) recognized under the U.S. Constitution and numerous treaties, inter-governmental agreements, statutes and executive orders, (b) have been consistently upheld by the highest courts of the United States, and (c) shall be strengthened and enhanced;
3. The economic self-sufficiency and social well-being of tribal and native communities shall be supported with the objective of achieving parity with the general U.S. population as evidenced by national averages for health and health care, per capita income, and rates of employment and educational achievement; and
4. The unique cultural heritage of tribes, including maintenance of native language proficiency, the practice of traditional ceremonies, and religious and artistic expression, shall be considered an irreplaceable national treasure to be supported and protected.

A coalition of representative tribal leaders formulated the "American Indian and Alaskan Native Tribal-Federal Government-to-Government Policy Proposal" on June 10, 1993 to further strengthen and provide direction for the formulation of federal Indian policy. The policy recommendations provide a concise and comprehensive set of six major principles to guide the future development of United States Indian policy. These principles are identified as follows:

1. Trust Fulfillment - The United States has a trust responsibility to preserve, protect, and enhance the governments of American Indian

and Alaska Natives Tribes. This obligation, including the provision of health, education, social and economic assistance programs, is necessary to assist Tribes in exercising their governmental responsibilities to provide for the social and economic well-being of their members and to preserve Tribal cultural identity and heritage.

2. Government-to-Government Relationship and Tribal Sovereignty - The United States shall continue to respect and protect the Constitutional foundation for the government-to-government relationship with American Indian and Alaska Native Tribes; The United States shall respect and protect the inherent sovereign authority of Indian and Alaska Native Tribal governments and shall support and assist them in exercising broad sovereign Tribal authority; Issues of mutual concern are to be addressed through clear, direct dialogue and communication between affected governments.
3. Culture and Religious Freedom - The United States shall protect, preserve, perpetuate, and enhance American Indian and Alaska Native spiritual sovereignty, cultures, beliefs, religions, traditions, languages, and sacred sites, and insure full access by Indian people to such sacred sites.
4. American Indian Children and Families - The U.S. government shall provide stable assistance to achieve and sustain quality health, education, housing, law enforcement, and other social programs, established for the benefit of American Indian Tribes and continue to protect Indian children and the integrity of Indian families and communities.
5. Tribal Lands and Resources - The United States shall act to protect the permanent rights of Indian Tribes to a tribal land base as well as fishing, hunting, water, gathering, and other resource rights recognized in the Constitution, treaties, agreements, executive orders, and statutes. The United States shall also recognize the primary, regulatory and administrative authority of Tribal governments within Indian Country.
6. Economic Self-Sufficiency - The United States acknowledges and affirms the commitment to take action to encourage and support economic development benefitting Tribes and their members undertaken by tribal enterprises, individual Indian entrepreneurs, businesses and otherwise.

The present federal Indian policy promoting tribal self-government, including

its goals for encouraging tribal self-sufficiency and economic development, is now well established in a number of major pieces of federal legislation. For example, the Indian Finance Act of 1974,²⁰⁰ states:

It is hereby declared to be the policy of Congress ... to help develop and utilize Indian resources both physical and human to a point where the Indians will fully exercise responsibility for the utilization of management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Similar policies are reaffirmed also in the Indian Self-determination and Education Assistance Act of 1975.²⁰¹ This policy was further advanced in 1994 with the enactment of the Tribal Self-Governance Act of 1994,²⁰² which made into permanent legislation the demonstration programs of the Tribal Self-Governance Program. The preamble to the Self-Governance Act, signed into law on October 25, 1994, reaffirms Congress's findings that "the tribal right of self-government flows from the inherent sovereignty of Indian tribes as nations, and the special government-to-government relationship" between the federal government and the tribes. It further acknowledges that the federal bureaucracy itself, "with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs." In order to fulfill its commitment to tribal self-governance, the Act declares its intent to transfer control to tribal governments over decision-making for federal programs, services, functions, and activities to implement the federal policy of government-to-government relations with Indian tribes, and that such transference of control "strengthens the federal policy of Indian self-determination."²⁰³ While the Act provides for the fullest transference of program responsibility directly to the

²⁰⁰25 U.S.C. Sec. 1451, et. seq.

²⁰¹25 U.S.C. sec 450, et. seq.

²⁰²H.R. 4842.

²⁰³H.R. 4842, Title II, Tribal Self-Governance Act of 1994, Section 202 (A) (B).

tribal governments upon their request, the Act continues to acknowledge the continuing trust responsibility of the federal government.²⁰⁴ Finally, the Act authorizes the appropriation of funds necessary to carry out the program. Formalized as law, tribal governments now possess the right to self administer those federal trust programs guaranteed to them in treaties, statutes, and other agreements.

The 1993 "Tribal-Federal Government-to-Government Policy Proposal" represents a comprehensive typology for the creation of a permanent structure of tribal government within the multi-governmental structure of American government. The significance of the policy proposal is its structure for the systematic development of future Indian policy and legislation. As new forms of legislation become enacted, it serves as a framework to ensure its consistency within a broader typology supporting the development of the tribal political community. For example, the 1994 Self-Governance Act serves to further the policy of strengthening tribal governance through the delegation of programmatic functions of the Department of the Interior. The Act therefore provides consistency with the policy and establishes a precedent for the future delegation of other federal agency services through the self-governance mechanism.

The tribal-federal government-to-government policy proposal serves, then, as a framework to define an operational typology to further the federal trust relationship with the tribes. The framework also serves as guidance to other forms of government, notably the states, that further policy-making affecting tribal self-governance should anticipate the resistance from both the tribal and the federal governments should they conflict with the self-governance typology.

Table 6.1 extrapolates the self-governance policy proposal into a model representing the goals of tribal community development. The table incorporates the six guiding policy principles that are contrasted with the three essential dimension

²⁰⁴Section 403(b)(9) prohibits the Secretary of the Interior from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, and other laws.

established in this research to comprise the salient elements of the tribal political community: political sovereignty, cultural cohesiveness, and territoriality.

Table 6.1
A Typology for Tribal Community Development

GUIDING PRINCIPAL	GOVERNANCE AND SOVEREIGNTY	CULTURAL COHESIVENESS	TERRITORIALITY
1. Trust Fulfillment	Tribal Exercise of Government Responsibility; No further abrogation of treaty rights.		Federal protection of Indian resources.
2. Government-to-Government Relationship and Tribal Sovereignty	Federal-Tribal relationship based on sovereignty; Federal protection of tribal sovereignty; Treatment of tribes as distinct governments; Tribal administration of trust programs; Direct dialogue fostering mutual cooperation and consultation with tribes.		Protection of tribal primacy of territorial jurisdiction; Support of tribal criminal and civil authority; Protection of tribal taxation authority and pre-emption of dual taxation.
3. Protection of Culture and Religious Freedom		Federal protection of Indian spiritual sovereignty, cultures, language, traditions, and cultural resources;	
4. American Indian Children and Families	Federal provision of health, education, housing, law enforcement, and other social services.	Protection of children and integrity of families and communities.	

(Table 6.1 con't.)

GUIDING PRINCIPAL	GOVERNANCE AND SOVEREIGNTY	CULTURAL COHESIVENESS	TERRITORIALITY
5. Tribal Lands and Resources			Federal protection of permanent tribal rights to territory and resources, including fisheries, hunting, water rights, and other resource rights.
6. Economic Self-Sufficiency	Federal affirmation to support economic development initiatives for tribal economic self sufficiency		

Evolution in Tribal Community Planning

The evolution of planning in Indian community development has closely paralleled the historical periods in federal Indian policy. Table 6.2 illustrates the events that occurred between the periods known as the pre-reservation and treaty-making era through the current period of tribal self-governance. In the pre-reservation period, community planning occurred in a customary manner, performed as an exercise of absolute sovereignty. Concerns during this early period focused on community sustainability, to deal with the effects of early contact with non-Indian society that resulted in intrusion onto Indian territories, followed by exposure to disease and other violent confrontations. Following the period of confrontation, tribal communities focused on concerns of social and political survival. Between 1850 and about 1870, tribal governments began the process of treaty-making that introduced the concept of limited sovereignty and territoriality. Preoccupied with their relocation and settlement to designated reservation territories, this period of tribal planning is represented as a period of reservation isolationism. The traumatic adjustment to the new reservation surroundings preempted early efforts in developing the reservation community.

Table 6.2
Evolution of Planning Eras in
Indian Community Development

HISTORICAL PERIOD	HISTORICAL EVENTS	TERRITORIAL EFFECTS	PLANNING ACTIVITIES
Pre-1850	Pre-Reservation Period	Territorial Retainage	Self-Governance
1850-1869	Treat Making Era	Reservation Formulation	Isolationism; Social Trauma
1886	Allotment Act	Territorial & Political Fragmentation	Resource Exploitation; Cultural Assimilation; Territorial Incorporation
1934	Indian Reorganization	Reconstruction Period	Political Structural Organization
1950's	Termination	Territorial and Political Termination	Political Survival; Basic Social Planning
1966	Civil Rights and New Deal Program	Governance Reconstruction	Initial Community Planning; Treaty Rights Assertions;
1970's	Self-Determination	Governance Building; Reservation Infrastructure Investment	Mid-Strategic Planning; Treaty Rights, Self-Help, Advocacy, Structural Development
1980's - present	Self-Governance	Territorial Reconstitution; Tribal Proprietary and Regulatory Programs; Regional Coordination and Co-Management	Advanced Strategic Planning; Self-Governance; EPA-Treatment as State; Advanced Economic Development; Cultural and Political Plurality.

The next major period introduced a series of federal policies intended to integrate the reservations into the U.S. political economy. The assimilation process occurred systematically through the subdivision of commonly held reservation lands into individual parcels, the transfer of title to individual Indians, the authorization of title transfer to fee simple, and the eventual transfer of fee simple title lands out of the federal system of trust responsibility. The process represented the initial steps of incorporating the reservation land base, along with other treaty resources, into the

private economy. Little formal planning occurred during this early period of reservation fragmentation to counteract the incorporation process.

In 1934, the Indian Reorganization Act introduced a major shift in the incorporation process by reforming the political organization of many tribal communities and ending the assimilationist practices. With assistance and inducement from the federal government, nearly one half of all tribes authorized new political structures modeled after the U.S. constitutional form of government. Aiding the political reorganization, Congress appropriated funds to these IRA tribes to commence the early period in Indian community development. The major planning events during this time focused primarily on political reconstruction, physical planning for capital infrastructure and public health services, and improvements to Indian housing and other public projects. Economic development was also first introduced with the support of federal initiatives. During the termination era, tribal community development efforts once again retreated into a period of internal retrospect, with community development strategies emphasizing the survival of the tribal political community from the threat of political disassociation, state usurpation of criminal and civil regulatory control, and associated forms of territorial subjugation. This period also witnessed the considerable migration of Indians from the reservations into urban areas.

Tribal governance reconstruction again emerged under a supportive federal policy during the 1960's New Deal era. Organized tribal planning efforts focused on the community's chronic social needs with the introduction of community action programs under the federal Great Society program, which established a central role for tribal governments in the provision of community services. Economic development planning was also reintroduced on many reservations during this period, as tribes first employed technical advisers to structure social delivery programs and compete for further grant funding. This period represents the early stages of modern Indian community development planning based on the technical assistance model that emphasized social reorganization as well as the initial advocacy of treaty rights protection.

The self-determination period introduced to many reservations the beginning of strategic planning. The appropriation of federal funds initiated a variety of planning activities, with emphasis placed on Department of Housing and Urban Development 701 comprehensive planning, as well as reservation economic development planning. By 1970, the Economic Development Administration targeted reservations to help stimulate rural economic development by constructing reservation infrastructure and industrial development districts. The strategy employed by the federal agencies, however, had the affect of furthering the incorporation of the reservation by emphasizing the attraction of private investment to the remote reservations in order both to establish tribal land leasing revenues and to create reservation employment. This period also emphasized the assertion of claims to treaty guaranteed rights, the reconstitution of reservation territories diminished under treaty abrogation and federal termination actions, and the rise in litigation over property title and jurisdictional claims. Depicted as a period of self-help and political rights advocacy, this planning stage addressed the pervasive social and economic conditions of the reservation community, and began a process of community recovery from the damages resulting from termination. Structural development of the political, economic, and physical community progressed with the employment of technical and legal advisers to strengthen tribal planning, institutional, and administrative governance capabilities.

Following the two decades since the introduction of self-determination, many tribal governments have further expanded their strategic planning activities beyond the confines of the reservation boundaries. These strategies are intended to establish relations within the surrounding political region in order to bring about the resolution to long-standing on-reservation conflicts and participate more fully in the protection of off-reservation treaty rights. The Self-Governance program provides a mechanism for the transference of Bureau of Indian Affairs program authority to the tribes, first through demonstration programs and, more recently, in permanent federal legislation. Other federal agencies have also defined their Indian policies to advance tribal governance under the federal trust responsibility. This developmental stage expands reservation community development into the fields of economic development,

regulatory programs, resource management, environmental protection, and federal program administration. The emergence of new forms of economic self-sufficiency models that emphasize a development approach based on tribal community needs and capabilities contrasts with earlier technical assistance models that primarily relied on the private economy to finance, develop, and export reservation resources. This period is further highlighted with considerable advances in clarifying tribal civil regulatory authority over the complex reservation territory, the introduction of intergovernmental cooperation and coordination, and the successful experiences in cooperative management of off-reservation resources reviewed more thoroughly in Chapter 7.

Conclusion

This chapter helps inform a tribal community development approach by adapting a conception of planning intervention that has its roots in a philosophy reflecting the tribal community's historic experiences and its emancipatory objectives. Furthermore, the approach demonstrates a concern for identifying and overcoming the anomalies encountered in its historic relations with the surrounding political economy. Habermas (1979:xvii) advocates that "professional practice links scholarly disciplines to actions. But this practice cannot be divorced from its ontological origins and cannot overlook its interventions at the level of phenomena." The role of tribal planning, as a form of advocacy of the ontological objectives of the Indian community, is concerned with the advancement of tribal community interests through the anticipation of possible friction within its future planning situation. Several models in planning and community development serve to inform the tribal community's understanding of the context within which planning decisions occur and of the approaches that may increase the effectiveness of their implementation.

The phenomenological approach contributes to this end by emphasizing the importance of the local planning situation and integrating the dynamicism of that situation within its general planning construct. The turbulent and shifting Indian planning situation, reflecting its public policy history and resultant clash with non-tribal normative structures, presents a particular dilemma for tribal planning by

requiring a constant assessment of its situation relative to a complex history of adversity. This context is described by Bolan (1980) as the application of a community's normative structures within a planning paradigm which becomes norm driven and norm seeking within the planning situation.

On approaching the question of discovering an appropriate model for the tribal situation, Dunn (1971) suggests caution should be extended in the use of the prevalent growth models as these models generally are not intended to modify decision behavior. While these models may be adapted in the instrumental phase of planning implementation, the dynamicism of the tribal planning situation warrants the use of models adaptive to the uncertainties faced in that situation. The learning models meet these criteria by approaching complex social situations with a capacity to reprogram planning strategies and, simultaneously, venturing to alter those conditions that conflict with its interests through a process of cooperative learning. The pursuit of normative relations in the social learning model contribute to cooperation building when its participants acknowledge common end-goals. These forms of social relations are especially effective when the identified source of conflict to tribal planning is understood to be rooted in cultural and normative misinterpretation. Further, social learning offers an approach for achieving cooperative utilitarian relations effective in overcoming immediate problems, with the ultimate goal of attaining full socialization in order to rise above the coercive relations experienced in past adversarial situations.

The approach employing social learning as a component to the tribal planning model is based on the contingent planning model that emphasizes a strategic approach to decision-making. Faludi's contingent model offers a pragmatic approach that incorporates the conditions of the community's present and past. In the context of advancing tribal community objectives, the contingent construct provides a means for selecting strategies that are both anticipatory and responsive to the dynamics of the tribal planning situation. An effective tribal community development approach, then, begins with historically based empiricism to discern the historic factors that contribute to the shaping of planning situation. Decision-making then follows a process that links the experiences of empirical knowledge with the community's future vision

within the context of considering the practical alternatives in the decision situation. These theoretical constructs are assembled into a tribal planning paradigm in the concluding chapter based on the empirical findings of the case study in Chapter 8.

This chapter also provides a framework for constituting the fundamental typology guiding tribal community development to further illustrates the conditions that comprise the tribal planning situation. The typology is respective of both the distinct normative structures of the tribal community and its complex past that produced threatening influences to its political stability and serves as a working definition of Indian self-determination as a unifying paradigm to guide tribal planning decision making. Six guiding principles are identified in the agenda as a foundation to the tribal planning paradigm that corresponds to the three dimension constituting the essence of the tribal political community: governance, social cohesiveness, and territoriality.

CHAPTER 7

MODELS FOR TRIBAL-STATE MEDIATION

Introduction

This chapter examines several indicators supporting the research argument that attributes the causes of tribal political and territorial alienation to the subjugating influences of the U.S. political economy. The chapter begins with a descriptive analysis of the several forms of tribal government structures and the demographic conditions for tribal communities located within the research study area. The analysis establishes a causal relationship linking a series of historic events to the conditions of tribal incorporation that result to complicate and retard tribal community development. The correlation considers three types of external influences that act upon tribal territories as indicators of tribal incorporation: the conversion ratio of land ownership from federal trust to fee simple title; the occurrence of non-Indian on-reservation residency; and the presence of non-tribal jurisdictional interventions.

The analysis establishes that for those tribal communities that were created following the treaty-making period and after the General Allotment Act, a lesser degree of reservation territorial incorporation occurs. It is consequently argued that those communities will encounter fewer instances of external interferences into their political affairs. In contrast, those territories historically subjected to higher degrees of incorporation are expected to encounter a wider array of intervening variables. The descriptive analysis, hence, begins with the following propositional statement:

The extent of political intervention to tribal self-determination acting upon the tribal territory is contingent upon the degree of incorporation experienced by those territories by the U.S. political economy.

This chapter will then examine the historic development of relations between the State of Washington and the federally recognized tribes located within its borders. The current conflicts between the state and the twenty-six tribal governments can be described as both complex and, in certain cases, associated to decades of continuing litigation. This section provides an overview of the range of current state-tribal issues that are evaluated to depict the state's general interests in challenging a tribal assertion

of authority, representing a political obstacle to tribal self-determination, and suggests approaches to future state-tribal public policy where conflict resolution is balanced against the dual processes of confrontation and cooperation.

This chapter also examines the circumstances that encouraged the developing trend in Washington State for effective dialogue towards cooperation based on the principle of government-to-government relations, as a preferred alternative to resolving conflict in tribal relations. The chapter reviews the nature of mediation as a technique that provides both the rules and organization for the conduct of interaction. Underlying the recent state-tribal emphasis for cooperation in intergovernmental relations is the fundamental recognition of the tribes as sovereign governments. The development of the cooperative model emphasizes the understanding of the three intrinsic elements that constitute the tribal political community: the nature and importance of sovereignty, territoriality, and social cohesiveness. This chapter will also summarize the Washington State experience in attempting to resolve tribal conflicts in historic inter-governmental relations through cooperative agreements, and incorporates the findings from a survey of responses from tribal and county planning department staff to the perceived problems and opportunities associated in tribal-local government relations. The survey suggests ways to encourage greater cooperation in land use planning as an approach to mediating jurisdictional conflict.

Tribal Governments and the Native American Population in Washington State

The 1980 U.S. census recognized 58,160 Indian people residing within the State of Washington. While many Indians reside on one of the twenty-six Indian reservations within the state, the majority of the Indian population resides off reservation, many maintaining strong relations with their associated tribes. The combined population of the twenty-six reservations in 1990 was 96,414.²⁰⁵ Of the total reservation population, 78% of all residents were non-Indians. The urbanized

²⁰⁵United States Census. 1990. Table 17: Washington. The census data refers to residency within a reservation which includes both federally created Indian reservations as well as other trust lands located outside a reservation within the State of Washington.

tribes of western Washington State, the tribes of concern to this research,²⁰⁶ contain reservation populations of 58,216, of which 8,870 or 15% are Indians. Hence, the Puget Sound region contains a significant percentage (85%) of non-Indians who reside within Indian reservations.

Important differences also exist between the political structure of tribes in Washington. Though most were established under federal treaties, others were established under executive order. Some tribes are organized under the provisions of the Indian Reorganization Act of 1934, while others retain their aboriginal form of government. In recent years, several non-recognized tribes have petitioned for federal recognition.

The Stevens Treaties

The case study area extends throughout the Puget Sound region of Washington State to include those lands ceded in the Stevens Treaties,²⁰⁷ under the Treaty of Point Elliot, the Treaty of Medicine Creek, and the Treaty of Point No Point. Figure 7.1 illustrates the ceded territories of western Washington State. Each of the treaties was signed by a group of tribes and bands residing in the ceded territories. The successor tribes of those treaties are each federally recognized.

The Treaty of Point Elliot established eight reservation areas throughout the ceded areas of King, Snohomish, Skagit, Whatcom, San Juan, and the northern portions of Pierce counties. Under the treaty, the reservation territories established

²⁰⁶There are 16 tribal communities which are included in the research case study of western Washington. These tribes are located within the urbanizing Puget Sound corridor and include the Chehalis; Jamestown S'klallam, Lummi, Muckleshoot, Nisqually, Nooksack, Port Gamble, Port Madison, Puyallup, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Swinomish, Tulalip, and Upper Skagit Indian tribes. The ocean tribes, identified as those tribes lying westerly of the Puget Sound urbanizing region, include the Hoh, Lower Elwah, Makah, Ozette, Quileute, and Shoalwater Indian tribes. The eastern Washington tribes include the Colville, Kalispel, Spokane and Yakima Indian tribes.

²⁰⁷The Stevens Treaties included a series of similar treaties negotiated between Washington Territorial Governor Isaac Stevens and area tribes.

include the Muckleshoot, Suquamish, Tulalip, Stillaguamish, Sauk Suiattle, Upper Skagit, Swinomish, Nooksack, and Lummi Indian Reservations. The Treaty of Medicine Creek ceded areas included portions of Pierce, Mason, Thurston, Grays Harbor, and Kitsap counties. The tribal territories created include the Squaxin Island, Nisqually, and Puyallup Indian Reservations. The Treaty of Point No Point ceded portions of Clallam, Jefferson, Kitsap, and Mason counties. The Lower Elwah, Jamestown S’Klallam, Port Gamble S’Klallam, and Skokomish Indian Reservations were created as exclusive tribal territories. Article One of each of the Stevens Treaties contained a provision for land cession from the tribes. As a result of the executed Stevens Treaties in Washington, Idaho, and Montana, approximately 64 million acres of land were relinquished. Table 7.1 summarizes the present reservation land area of the sixteen tribal communities located in the Puget Sound region identified above. The table depicts the total Indian and non-Indian resident population, and the current distribution of trust and fee title lands for each of these territories.

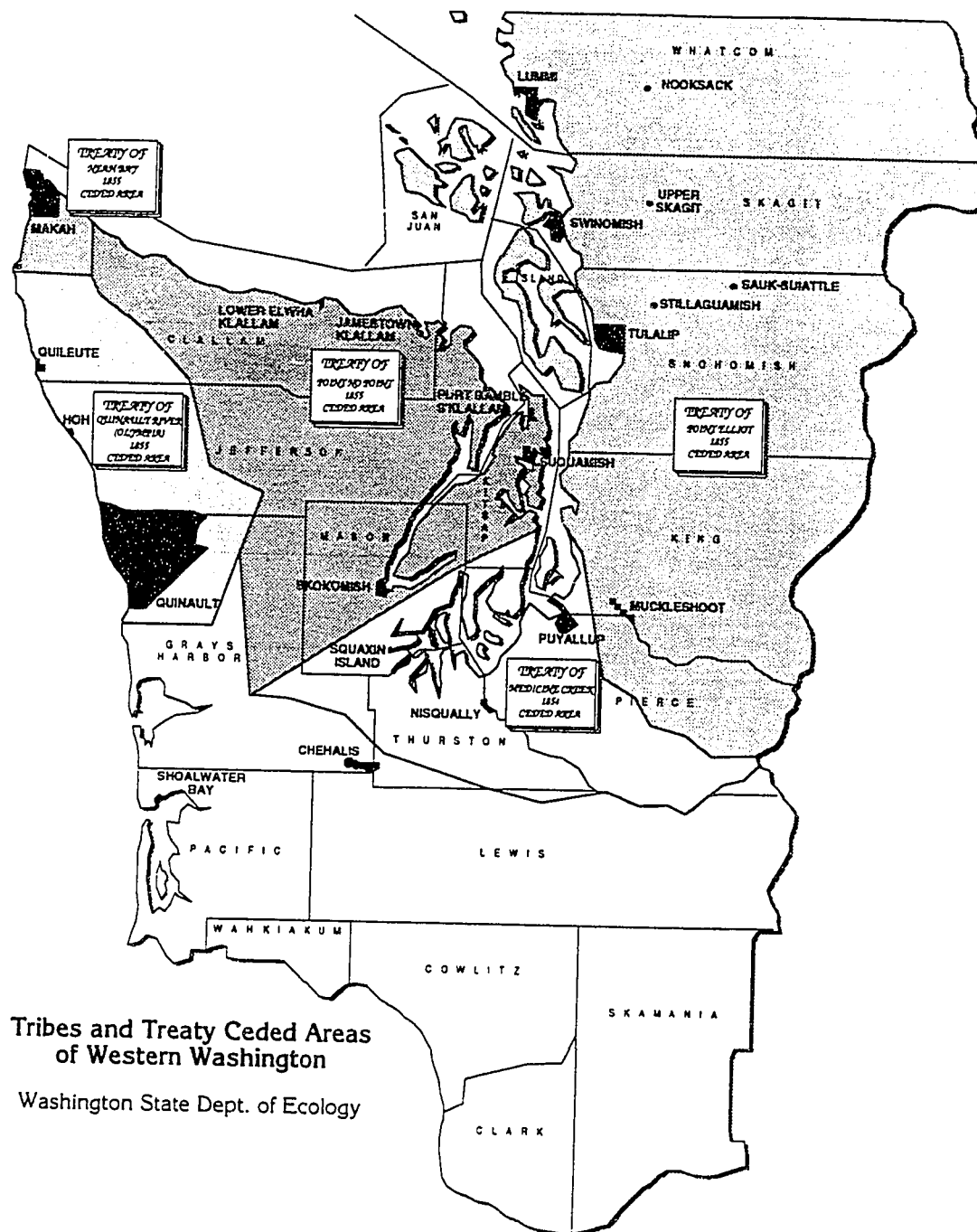


Figure 7.1
 Ceded Territories of Western Washington State

Table 7.1
Puget Sound Area Reservation Territories²⁰⁸

Tribe	Reservation Land Tenure Characteristics			Reservation Resident Population 1990 U.S. Census		
	Total Acres	Fee Land	% Alien	Native Population	Total Population	% Non Indian
Jamestown S'Klallam	210	0	0%	4	22	82%
Lower Elwha	443	0	0%	130	137	5%
Lummi	12,504	5,181	41%	1,594	3,950	60%
Muckleshoot	3,850	2,270	59%	864	3,841	88%
Nisqually	4,700	3,693	78%	365	578	37%
Nooksack	10	0	0%	442	556	21%
Port Gamble S'Klallam	1,341	0	0%	377	552	22%
Puyallup	18,062	17,446	95%	2,122	33,183	93%
Sauk Suiattle	23	0	0%	69	124	45%
Suquamish	8,012	4,449	56%	388	4,834	92%
Skokomish	4,987	1,996	40%	351	614	43%
Squaxin Island	2,175	668	30%	127	157	20%
Stillaguamish	21	0	0%	96	113	15%
Swinomish	7,169	3,317	46%	495	2,282	75%
Tulalip	22,490	11,920	53%	1,204	7,103	83%
Upper Skagit	130	0	0%	162	180	10%
Total	86,127	52,281	60%	8,870	58,216	85%

²⁰⁸ Adapted from (1) 1990 U.S. Census: Selected Population Characteristics for American Indian and Alaska Native areas; (2) Washington State Department of Transportation, "Transportation Guide for Indian Tribal Governments"; (3) "State Jurisdiction on Reservations, Washington State House of Representatives (August 31, 1978), and (4) personal communication with tribes, March, 1995.

Table 7.2
Correlation of Reservation Alienation to Historical Formation
of Puget Sound Reservation Territories

Tribe	Reservation Formation		Alienation Consideration		
	Date Established	Form of Creation ²⁰⁹	Alienated Land	Non-Indian Pop.	Territorial Conflict ²¹⁰
Jamestown S'Klallam	1980's	Recognition	0%	82%	Indirect
Lower Elwha	1968	Recognition	0%	5%	Indirect
Lummi	1855	Treaty-E.O.	41%	60%	Direct
Muckleshoot	1857	Treaty-E.O.	59%	88%	Direct
Nisqually	1857	Treaty-E.O.	78%	37%	Direct
Nooksack	1973	Recognition	0%	21%	Indirect
Port Gamble S'Klallam	1936	Recognition	0%	22%	Indirect
Puyallup	1855	Treaty-E.O.	95%	97%	Direct
Sauk Suiattle	1973	Recognition	0%	45%	Indirect
Suquamish	1855	Treaty-E.O.	56%	92%	Direct
Skokomish	1855	Treaty-E.O.	40%	43%	Direct

²⁰⁹The three forms of reservation creation include the original treaty reservation of tribal territories; the subsequent Executive Order (E.O.) clarification to boundary delineations of these reservations that occurred following the Allotment Act; and through federal recognition occurring after the Indian Reorganization Act of 1934.

²¹⁰Direct conflict includes encroachment by state or local government in land use regulation within the tribal territory. Indirect conflict refers to potential conflict in proprietary, primarily non-territorial, interests including treaty fishing rights.

Squaxin Island	1854	Treaty	30%	20%	Direct
Stillaguamish	1984	Recognition	0%	15%	Indirect
Swinomish	1855	Treaty-E.O.	46%	75%	Direct
Tulalip	1855	Treaty-E.O.	53%	83%	Direct
Upper Skagit	1982	Recognition	0%	10%	Indirect

The sixteen tribes of the Puget Sound region depict varying forms of incorporation as represented in reservation land tenure. Highly incorporated reservations contain fee lands in private, non-Indian ownership, as well as a larger proportion of non-Indian residents within the reservation boundaries. It is important to note a correlation in Table 7.2 between the population ratios of non-Indians on the reservation to the ratio of the reservation's alienated land holdings, indicating that alienated lands provide for increased non-Indian occupancy. A further important corollary is made between the degree of alienation of the Indian territory and its type of reservation formation. The occurrence of alienated lands was documented for all reservations created under treaties and subjected to the provisions of the General Allotment Act. In contrast, territorial alienation was absent in reservations established in the years following the Act. For all surveyed reservations, the presence of land use conflict tends to exist where the alienation of trust territories is present. Table 7.2 depicts the presence of state and local jurisdictional intrusion upon reservation lands.²¹¹ A direct conflict is noted to occur whenever the application of state and/or local government regulatory authority is imposed upon alienated reservation lands. Hence, a propositional statement is advanced:

²¹¹This data was compiled by the researcher in a phone survey conducted in November 1994. Survey inquiry corroborated the application of state or local jurisdiction onto reservation lands. Representatives of the respective tribal planning offices of each tribe were surveyed for their responses.

For reservations established under Congressional treaties and subjected to the General Allotment Act, some degree of territorial alienation is likely to have occurred, increasing the degree of incorporation by the U.S. political economy. The incorporation is manifested first by non-Indian ownership and occupancy of land areas, and secondly by the encroachment upon the reservation by external political forces representing, principally, state jurisdictional interests. Further, in these situations, conflicting land use and resource management policy tend to emerge as a major obstacle to the attainment of tribal sovereignty and self-governance.

While the reservation territories established after the General Allotment Act were precluded from allotment and conversion from trust ownership, it is important to emphasize that these territories are not entirely absent of conflict or free from state and local jurisdictional interference. Each of the case study tribes enjoys treaty fishing, hunting, water, and other proprietary rights whose property interests extend to off-reservation territories controlled by state and local government. Further, activities conducted within non-alienated reservations are also subject to the imposition of state jurisdiction.

Hence, an increasing interest for discovering effective means to mediate conflict between tribes and state and local government in order to reconcile reservation-based territorial issues largely created by the General Allotment Act, as well as off-reservation issues that threaten to diminish proprietary treaty rights, becomes evident. The distinction between these two types of tribal interests is important to emphasize. The former refers to the infringement on the inherent sovereignty of a tribal political community, the latter to a tribe's proprietary treaty right. As will be established in the Swinomish case study in Chapter 8, a tribal approach that advances direct tribal engagement into its external affairs represents an effective interventionary strategy for reversing the usurpation of tribal authority by state and local governments. The engagement, further, is proposed as necessary for fostering a political plurality by jurisdictions located within the affected region. This approach provides a means for establishing utilitarian relations for resolving conflicts and, hence, affords an avenue towards the eventual attainment of improved normative relations.

Indian Public Policy Development in Washington State

This section examines the historic development of relations between the State of Washington and the federally recognized tribes located within its borders. The current conflicts between the State of Washington and the twenty-six tribal governments can be described as both complex and, in certain cases, associated to decades of continuing litigation. Table 7.3 provides an overview of the range of current state-tribal issues that are evaluated and depicts the state's general interests in challenging tribal authority. A review of several approaches to aid the development of future state-tribal public policy, where conflict resolution is achieved through a transition from conflict to negotiated cooperation, is then presented.

The formulation and evolution of the state's Indian public policy depicts a history of contentious relations and conflict since statehood. The state has participated in shaping federal Indian law through its direct or amicus curiae participation in litigation. While some of this past litigation has been involuntary in defense of suit brought against the state or its agencies, other litigation has been initiated by the state. In 1985, the state's approach to resolving conflicts with the tribes was broadened by emphasizing negotiation as an alternative to litigation. This trend towards negotiation evolved further in 1989 when the executive branch of state government proclaimed a new precedent to guiding relations with the state's federally recognized Indian tribes. The precedent sought to reverse one hundred years of hostile relations with tribes by recognizing the legitimacy of tribal sovereignty. The policy went further to establish a formal government-to-government relationship with those tribal governments, consistent with the federal self-determination policy. This approach of cooperative relations with tribes was endorsed in the Centennial Accord, and has resulted in several notable successes in resolving historic conflict. This section describes the nature of the state's history of conflict with tribes and identifies new policy directives supporting their resolution.

Background to the State's Historic Position

The focus of the recent Indian litigation in Washington State has shifted from treaty fishing rights of the 1970's to concerns of tribal land claims, natural resource

management, and the assumption of tribal civil jurisdiction over non-Indians. Tribal civil jurisdiction has occurred primarily in the regulation and appropriation of water resources, the application of tribal taxes, and the enactment of land use controls within the exterior boundaries of the reservations. While disputes continue in other areas of tribal-state relations, including fisheries litigation, these current issues pose new challenges that affect the interests of the state and local governments, as well as to non-Indian on-reservation property owners.

The state's historic response to Indian conflicts has been characterized as a piecemeal approach (Washington Attorney General 1985). During the 1980's, however, the Attorney General established an Indian Litigation Coordinating Committee within the Office of the Attorney General and charged the committee²¹² with the task of establishing a comprehensive approach for assessing conflicts with the tribes. The history of conflict leading to litigation between the state and the tribes was largely due to the confusion about the political status possessed by tribes within the federal system. While tribes possess certain governmental powers, it has historically been the position of the state that such powers are not equivalent to state powers. A unique characteristic of tribal governments that has been pivotal in the conflictive relationship is that non-Indians residing within the boundaries of reservations are not entitled to participate in the election of tribal governments that are empowered to enact tribal laws. The situation becomes particularly acute where, as in the Puget Sound region, non-member residents constitute a majority of the reservation population. It has been the contention of the state (Ibid 1985) that the lack of direct representation in government conflicts within a fundamental principle of the American democratic tradition: the consent of the governed. The unique status differentiating tribal member residents from non-member residents has thus emerged as a major source of conflict between tribes and non-Indian residents and

²¹²The committee was chaired by then Deputy Attorney General Christine Gregoire, who has since served a term as the Director of the Washington Department of Ecology, and, in 1994, successfully won election to the Office of Attorney General.

has resulted in the state's intervention in tribal self-governing affairs. While ballot box participation in general elections is limited to the membership of a tribe, participation in other areas of tribal governance does not preclude a tribal government from appointing non-members to a variety of governmental committees and commissions to foster effective resident participation in the affairs of the reservation environment.

From the perspective of the Attorney General's Office, a major source of conflict is linked to the increasing exercise of tribal governmental authority that changes the status quo in the balance of state-tribal power. Congress has contributed to the confusion throughout history by reversing its Indian policies regarding the nature and extent of tribal sovereignty. The vacillations in federal policy, ranging from termination of tribal political authority to promotion of tribal political reorganization and self-determination, has often left the state reactive to federal policy shifts rather than focusing on the development of a cogent and workable state-tribal policy (Ibid 1985:7). Disputes arising between state and tribal governments have been addressed primarily through the three major approaches of litigation, legislation, and negotiation.

Litigation

The traditional means for tribal-state conflict resolution in Washington State has been through the courts. This approach, however, has been noted to further aggravate the already tentative relationship between the parties. As the Attorney General's Indian Litigation Coordinating Committee report (Ibid 1985) observed, "litigation often breeds additional litigation." The Puyallup "test case" illustrates this anomaly. Filed in the 1960's to settle the fishing rights controversy, the decision of the lower court was appealed on three separate occasions before the United States Supreme Court.²¹³ Rather than ending the controversy, the litigation evolved into

²¹³While that case resolved most of the allocation issues in the 1979 Passenger Fishing Vessel decision, a number of related issues still remain unresolved or in various stages of litigation. See Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977); Washington Game Department v. Puyallup Tribe, 414 U.S. 44 (1973);

the even more complex United States v. Washington²¹⁴ "test case". The emotional and often violent confrontations between the parties' fishers contributed to further cultural tensions between the Indian and the non-Indian community.

Notwithstanding the quarter-century fisheries litigation experience, other litigation has been acknowledged as successful in clarifying long-standing conflicts. The 1970's taxation litigation affirmed that a state's imposition of its taxation on property owned by Indians on trust land was restricted.²¹⁵ This decision was further clarified in 1980 when the Supreme Court affirmed the state's imposition of taxes on non-Indians²¹⁶ within an Indian reservation. These rulings established the necessary legal precedents to clarify questions over state taxation authority over Indians and non-Indians on the reservations.

Federal Legislation

Congress's plenary power provides the power both to delegate and pre-empt the application of state laws over tribes. Once Congress enacts laws, legal challenges are often balanced with the substantive legislative intent to guide the judicial decision. While this approach is effective in resolving state-tribal disputes, three important practical limitations have been observed (Ibid 1985:13). First, Congress is often reluctant to limit either state power or tribal rights without the prior agreement of the affected parties. Secondly, Congressional solutions to problems often do not achieve satisfactory resolution of those problems. Finally, the legislative approach often lacks permanence. The history of tribal-state disputes in

Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

²¹⁴United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert denied, 423 U.S. 1086 (1976).

²¹⁵Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).

²¹⁶The courts also upheld the imposition of Washington's cigarette and sales taxes on non-Indian purchasers of cigarettes from Indian outlets in Washington v. Confederated Tribe of the Colville Indian Reservation (447 U.S. 134 (1980)).

Washington suggests that many of the disputes are a result of shifting federal legislative policy. As the federal self-determination policies of the 1970's sought to reconstitute the political authority of the tribes, the federal government reaffirmed its trust relationship with the tribes and directed all federal agencies to carry out the trust obligation. This resulted in reversing earlier legislation that promoted limited state assumption of authority over Indian affairs.

Negotiation

Dispute resolution through negotiation has recently been identified by both the state and the tribes as the preferable means for reconciliation²¹⁷ of state-tribal conflict to avoid costly litigation and the perpetuation of confrontative relations. While the benefits of negotiation under some circumstances may be suitable to litigation, other circumstances may preclude the parties from accepting compromised outcomes through the negotiated approach.

When disputes arise over the assertion of sovereign control over a resource or territorial area, a compromised solution is often untenable. The state is generally unwilling or prohibited from contracting its sovereign plenary powers. Tribes similarly defend their sovereignty as fundamental to their continued existence as autonomous political communities. In such situations, neither the state nor a tribe may willingly concede its sovereign control over resource ownership or rights to control land where such a concession constitutes a legal precedent leading to the diminishment of its asserted rights.

Negotiation is further complicated when uncertainty exists in interpreting questions of property rights. Such a situation occurred in the Washington fisheries

²¹⁷In Washington State, tribes are considered a "public agency" for purposes of application of the Inter-Local Government Cooperative Act, Revised Code of Washington, Chapter 39.34. That law allows public agencies to enter into agreements for joint or cooperative efforts where necessary to promote "mutual advantage," including the provision of "services and facilities in a manner and pursuant to forms of organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities" (RCW 39.34.010).

litigation. While negotiation resulted in co-management of the fisheries by the state and tribes, this outcome was reached only as a result of the court's order mandating cooperation after it first established a general allocation standard.²¹⁸ Prior to that decision, the opposing, and entrenched, positions of the parties precluded a negotiated settlement involving the allocation of the resource. Hence, litigation directly provided an opportunity for subsequent negotiation of the tribal-state dispute by narrowing the context of the negotiation to the means for managing the allocated resource. The approaches to conflict resolution experienced in Washington State have been summarized by the Attorney General's Office (1985:15) as follows:

Negotiation may work when the problem is limited in scope, does not involve issues of sovereignty, and the area of the law is substantially resolved. Litigation is a sound approach when negotiation is impossible or when negotiations may be fostered with some resolution of threshold legal principles. Finally, legislation may work if it is limited in scope and may be enacted without the creation of loopholes or exceptions which might create clarifying litigation and if such legislation is considered fair so that no subsequent Congress reverses the acts of its predecessor.

Overview of Current Disputes in State-Tribal Relations

Prior to the release of Governor Gardner's historic Indian policy statement of 1989 and the subsequent signing of the Centennial Accord, coordination based on a government-to-government basis between the state and the tribes had been limited. The types of conflicts between the state and the tribes varied widely depending upon the circumstances of an individual tribe and the nature of the dispute. The history of tribal-state legal conflicts reveals a diversity of contexts and issues, and the state has identified varying interests in these situations. One major area of state concern is its proprietary interests -- as in land ownership held by state agencies. When tribal activities impact these proprietary interests, the state may exercise resistance in order to protect the value of the property. The other major area of state interest concerns the uniform application of its laws. The state's broad interests in this category

²¹⁸In Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

include the collection of revenue, the management of the state's natural resources, and the regulation of the conduct of business and individual activities. In applying its laws universally to all citizens residing within its jurisdiction, the state has resisted the demands of tribal governments for recognition as separate and independent sovereigns. In addition, the state also represents parens patriae interests on behalf of its citizens. These interests often require the state to choose between representing the interests of one group over those of another. In some circumstances, the state may not have an explicit interest in how a tribal issue is resolved, only that it be resolved to clarify the uncertainty of the situation.

The state's interests in defending its sovereignty and property rights are represented in seven major categories of issues forming the scope of current disputes in the tribal-state relationship as depicted in Table 7.3. These categories are: tribal claims to ownership of state-claimed lands and tidelands; tribal claims to water resources; environmental regulatory controls; resolution of unresolved issues in fisheries and shellfish rights; assertion of civil jurisdiction by tribes over non-Indians; taxation; and regulation of gaming.

Table 7.3
Overview of State-Tribal Conflict

Current Issue	State's Position
Land Claims	State and private property rights; Disruption of understandings of property title, public rights of way, and easements.
Water Resources	Universal application of laws; Liability associated with granting of rights under common law; Environmental treaty right.
Environmental Controls	Universal application of laws;
Fish and Game	Access across private and state lands; Shellfish resource allocation.
Civil Regulatory	Lack of direct representation in tribal elections; Diminished state regulatory control.

Current Issue	State's Position
Taxation	State tax revenue interests; Concerns of taxation without representation; Precedent for tribal civil jurisdiction over non-Indians.
Gaming	Regulatory Control; Prohibitive/Regulatory test in state's public policy; Revenue Competition; Public Policy Consistency.

Land Claims

Several land claim cases were filed in the past two decades involving claims of tribal ownership to the tidelands adjacent to reservations and to aboriginal land title. The state has expressed the opinion that if these claims are upheld, affected land areas previously thought to be free of Indian title would become encumbered, complicating the current understanding of land title and raising further questions concerning the state's liability in transferring original title to those lands.

Most of the land claims instituted by Washington tribes involve lands underlying "navigable waters", including tidelands. In Montana v. United States,²¹⁹ the Crow Tribe claimed that portions of the Big Horn River located within the Crow Reservation were held in trust for the tribe. The United States Supreme Court rejected the claim, holding that the state owned the river bed, having acquired it under the "Equal Footing Doctrine"²²⁰ upon its admission to the Union in 1889. The court, however, established a general exception to the equal footing doctrine in ruling that when a "public exigency" exists at treaty execution, Congress may depart from its general policy of reserving the ownership of the riverbeds to

²¹⁹Montana v. United States, 450 U.S. at 556-557.

²²⁰The Equal Footing doctrine applies to those states, other than the original thirteen, entering the Union on an "equal footing", with the same rights and powers as the original thirteen. Since the original thirteen states owned the lands beneath navigable waters, subsequent states likewise owned those lands.

future states:

Moreover, even though the establishment of an Indian reservation can be an appropriate public purpose justifying a congressional conveyance of a riverbed, the situation of the Crow Indians at the time of the treaties presented no public exigency which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life. For these reasons, we conclude that title to the bed of the Big Horn River passed to the State of Montana upon its Union, and that the Court of Appeals was in error in holding otherwise.

In three recent cases,²²¹ the Ninth Circuit court held that submerged lands are vested in a tribe rather than the state. In these cases, the court recognized the Indian's historic dependency upon fishing. This dependency proved to be the basis in supporting the tribes' claims, even though the related treaties lacked an expressed intent to convey the submerged lands to tribal ownership.

Several land claims cases are pending or have been recently concluded in the federal courts in Washington.²²² In Swinomish, six difference cases were consolidated, with the United States and the Swinomish Indian Tribal Community as plaintiffs, and the state and various private entities as defendants.²²³ Swinomish

²²¹Confederated Salish and Kootenai Tribes v. Namen (665 F.2d 951 9th Cir. 1982) involved the south end of Flathead Lake in Montana; Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., (713 F.2d 455 9th Cir. 1983, involved the White River in Washington; and Puyallup Indian Tribe v. Port of Tacoma (717 F.2d 1251 9th Cir. 1983), involved part of a river bed of the Puyallup River in Washington.

²²²These cases included the Suquamish Tribe v. Aam (No. C82-1549V W.D. Wash.); United States v. Cascade Natural Gas Corp. (No. C76-550V W.D. Wash.), known as the "Swinomish" case; and United States v. Pend Oreille County Public Utility District No. 1 (No. C-80-116-RMB E.D. Wash.), known as the "Kalispel" case.

²²³Included among the defendants are Burlington Northern, Inc., Cascade Natural Gas, and Transmountain Pipeline Co., all of which have track or pipelines running through tidelands at the north end of the Swinomish reservation, located at the south end of Padilla Bay. Additional defendants include certain individuals who own

reached settlement through successful negotiations between the parties,²²⁴ resulting in a right-of-way lease to the pipeline companies and railroad, and a pending purchase option to all remaining properties adjoining the claimed tribal tideland properties. In the Swinomish case, the willingness of the parties to seek amicable settlement was largely motivated by the tribe's longer term interest in securing the properties in question for its long-term security. The tribe believed²²⁵ that even with a favorable court ruling, such long-term objectives remained tenuous since litigation often results in estranged relations between the parties.

In each of these cases, the state has exercised its proprietary interests in protecting the status quo from disruption in property relationships. Should the United States and the tribes win these cases, ownership of tidelands and submerged lands would alter long-established understandings of title, public rights of way and easements, and access rights to marine waters would be affected. The state's interest in these cases reflects its concern in preserving the status quo in private property ownership rights as those rights were previously granted and protected by the state. Further, a favorable tribal decision raises tremendous liability questions to both the state, which conveyed original title to such lands, and to private title insurance companies that insure the validity of the title free of encumbrance. Similarly, tribal claims to aboriginal and treaty title include claims to lands whose titles have been conveyed by the state to non-tribal ownership interests. These lands included territories claimed and occupied by non-recognized tribes, which were denied treaty reserved territories, and those post-treaty reserved lands subsequently excluded from a reservation by executive order.

interests in farmland at the north end of the reservation.

²²⁴The state voluntarily withdrew its participation in the Swinomish case in 1988 and did not elect to participate in any of the settlement negotiations, which were left between the tribe and the upland property owners.

²²⁵Interview with tribal attorney A. Olson, lead attorney in the litigation. November 15, 1995.

Water Resources

A current focus in state-tribal discourse is on the state's authority for managing the allocation of water rights. At the time reservations were created, the treaties implied sufficient water would be reserved to satisfy the primary purposes for which those lands were dedicated. The priority date of this federally reserved water right is the date when the federal reservation was first established. The quantity of the federally reserved water right, however, has not been determined for the reservations within the state. The United States Supreme Court developed a "reserved rights" doctrine in Winters v. United States,²²⁶ referred to as the "Winters" doctrine. The court held that when the United States reserves lands for special purposes, "it impliedly reserved water in sufficient quantities to satisfy the primary purposes for which the lands were set aside, with priority dating back to the establishment of the federal reservation."²²⁷

Further complicating the water rights dialogue is the tribe's demand to have its proprietary fisheries resources protected from environmental degradation under Phase II of the Boldt decision.²²⁸ Should the courts uphold the tribal claim, its water rights supporting fisheries habitat would also have priority over water rights granted by the state. The history of tribal-state water conflict focuses on two principal issues: the application of the state codes within the boundaries of the Indian reservations; and the applicability of the state adjudication system to Indian reserved water rights.

Application of state water codes within reservations - Washington State has enacted comprehensive codes covering all phases of water resource management.

²²⁶207 U.S. 564 (1908).

²²⁷see Cappaert v. United States, 426 U.S. 128, 138-42 (1976).

²²⁸United States v. Washington (Unites States v. Washington, 506 F.Supp. 187 (W.D. Wash. 1980), en banc appeal dismissed, (9th Cir. No. 91-3111, Dec. 17, 1984).

The surface water code²²⁹ and the groundwater code²³⁰ created permit systems for the right to withdraw and use water to provide certainty in water resource management. These codes also provide for a "general adjudication"²³¹ of existing water rights granted under common law. The state's water code permit system has been applied to waters within Indian reservations since 1917.

The first challenge raised objection to the state's allocation of waters flowing through non-Indian owned lands within the Tulalip Indian Reservation. In 1962, the administrator of the state's code asked the Attorney General to clarify the state's policy. This request was made in response to the tribe's assertion that the state had no authority to approve an application for a water right permit submitted by an applicant within the reservation. In an informal opinion,²³² the Attorney General opined that Washington's water right permit system "allowed a non-Indian to divert waters, located on non-Indian lands within an Indian reservation, if those waters exceeded the amounts needed to satisfy prior rights, including the reserved rights of Indians" (Washington Attorney General. 1985:39). This analysis of the state's jurisdiction was later upheld in Tulalip Tribes of Washington v. Walker.²³³

Several tribes and the United States initiated litigation in the 1970's against individual water users that used water from streams or other watercourses entirely

²²⁹Chapter 90.03 RCW.

²³⁰Chapter 90.44 RCW.

²³¹In RCW 90.03.110-.245; RCW 90.44.220-230.

²³²Also, in 1928, the Attorney General's Office issued a short informal opinion concluding that state water right laws could not be applied within the Colville Indian reservation because of the pre-emptive impact of 25 U.S.C. sec 381 (1982). Letter of February 28, 1928. This opinion, however, has not been followed.

²³³Snohomish Co. Sup. Ct. No. 71421 (Feb. 7, 1963).

within or passing through Indian reservations.²³⁴ The state was both a defendant, as a user of water in these actions, and a party, through its regulatory interests. In these cases, the state asserted its jurisdiction to regulate "surplus" or "excess" waters reserved to the tribe under the "Winters" doctrine. The Ninth Circuit ruled in Colville that the state held no jurisdiction because involved was a situation "where the watershed was entirely within the boundaries of the Colville Indian Reservation and, therefore, under those facts, the state's regulatory jurisdiction was pre-empted." However, in Anderson,²³⁵ the Ninth Circuit held that state water rights may be applied to excess or surplus waters abutting non-Indian lands within an Indian reservation, but the state water rights law does not apply to reservation-restricted streams such as those which arise, flow, and terminate entirely within a reservation.

State Water Rights Adjudications - Having waived its immunity to suit under the McCarran Amendment,²³⁶ the United States has been joined as a defendant in several state general adjudication proceedings. These cases have resulted in quantifying all claims for water rights of the United States, including claims for reserved rights of Indians. These cases have provided a clearer understanding of the complex area of water rights as follows:

1. Washington courts are delegated jurisdiction, as the preferred court, in determining the validity of reserved rights claimed by the United States in a general adjudication for an Indian Tribe or an Indian²³⁷;
2. The United States (as trustee for a tribe) representation in a general adjudication proceeding is binding upon Indian tribes as to the scope

²³⁴ in Colville Confederated Tribes v. Walton (647 F.2d 42 (9th Cir. 1981), aff'g in part and rev'g in part 460 F.Supp. 1320 (E.D. Wash. 1979), cert. denied, 454 U.S. 1092 (1981)); United States v. Anderson (738 F.2d 1358 (9th Cir. 1984)).

²³⁵in United States v. Anderson (736 F.2d 1358 (9th Cir. 1984)).

²³⁶43 U.S.C. sec 666 (1982).

²³⁷In Yakima River System; See also Arizona v. San Carlos Apache Tribe, 1983).

and extent of rights quantified for them in such proceedings²³⁸;

3. The disclaimer provisions of the Washington State Constitution²³⁹ and its related federal "enabling act"²⁴⁰ do not prohibit states from joining the United States, as trustee for an Indian tribe, in a general adjudication proceeding.

Federal Indian reserved rights are established independently from the state water right system and are generally recognized by the state. These rights have an early date of priority since many reservations were created in the 1850's. The Washington Attorney General (1985:43) has acknowledged an important distinction in Indian water rights since:

Unlike state based rights, they are not lost by nonuse. Therefore, many long dormant, and never exercised rights remain existent in the state. While the state accepts these general concepts on the nature of the Indian reserved rights, there remain certain unresolved issues in which the State has taken, or likely will take, positions at odds with those of the tribes, particularly regarding the extent of the rights reserved.

While several courts have affirmed a Winters right for instream uses, including fisheries, the quantification and scope of these rights continued to be unsettled. The question has been advanced in terms of an "environmental treaty right" in the United States v. Washington fisheries litigation. The state has maintained that, while it may be possible to reserve a right for fisheries purposes, that right may be limited by a number of factors. These factors take into account the fact that many fisheries have been destroyed by federal dam construction and the exercise of a fishery instream right might conflict with the exercise of an irrigation right, which also may have been constituted a purpose of the reservation. Therefore, the state has maintained that an instream fishery right must be determined and

²³⁸In re Yakima River System. See also Nevada v. United States, 103 S.Ct. 2906 (1983); Arizona v. California, 460 U.S. 605 (1983).

²³⁹Article 26, section 2.

²⁴⁰25 Stat. 676.

quantified in conjunction with the overall scope and purpose of the reservation. The state's position has thus sought to balance the recognized treaty reserved water rights among the water rights subsequently conveyed to other users under the state's common law. A further complication arises in the transfer of water rights to non-Indian ownership. The ability of a tribe to alter the purposeful use of a reserved right to another use remains problematic. In Walton,²⁴¹ the Ninth Circuit court ruled that "no change to another use may be made until the reserved right is first exercised for the use for which it was reserved."

In recent decades, tribes in Washington have identified the development of comprehensive resource use and environmental protection policies as important components to their self-governance. Tribal water codes enacted on several reservations generally rely on the tribe's inherent sovereign authority for management of the impliedly reserved water rights. These codes expressly deny the validity of state issued permits relating to any excess waters since quantification of the resource has not yet been adjudicated. The question of jurisdiction was challenged by the state on the Yakima Indian Nation in Holly v. Totus,²⁴² where the district court granted the state's motion for summary judgement declaring the tribal codes invalid. The Ninth Circuit court later reversed the lower court,²⁴³ holding that the lower court used insufficient grounds to invalidate the Yakima Water Code.

Environmental Controls

The State of Washington administers comprehensive pollution control programs in the areas of air pollution, water pollution, and hazardous waste

²⁴¹647 F. 2d at 46-49.

²⁴²No. C-78-2-JLQ (E.D. Wash., Sept. 17, 1983).

²⁴³No. 84-3541 (9th Cir. Oct. 22, 1984).

disposal.²⁴⁴ Each relevant federal statute requires a comprehensive federal program unless an approved state program is developed and the subsequent delegation of program responsibility is deferred by the United States Environmental Protection Agency (EPA). In each program, the EPA has excepted Indian land from the state program. Prior to and following the enactment of these federal statutes, the state has administered its state pollution control laws within the boundaries of Indian reservations. At the time of the adoption of the federal-state comprehensive program, EPA acknowledged such state jurisdiction by approving state water quality standards applicable within a reservation and waste discharge permits issued to industries within a reservation. It was not until the late 1970's when questions of state authority were challenged, which led to the formulation of the EPA Indian policy.

The question of environmental control first arose with a challenge to state jurisdiction on the Muckleshoot and Tulalip Indian Reservations. A similar issue was presented to the Ninth Circuit in an original jurisdiction challenge by the state against an EPA regulation that denies state jurisdiction over Indian lands in its hazardous waste program. The state has argued that the hazardous waste program, like other pollution control programs, must be administered by a single agency to avoid a situation of "checkerboard jurisdiction". The Ninth Circuit, on February 6, 1985, issued its landmark decision,²⁴⁵ holding that the state lacked jurisdiction over Indians on Indian lands.

On November 8, 1984, the EPA Administrator William A. Ruckelshaus issued the EPA Indian policy, the first explicit statement of a federal agency supporting its trust responsibilities under the federal self-determination policy. Since 1984, agency programs and several federal statutes have been amended to support

²⁴⁴Chapter 70.94 RCW; Chapter 90.48 RCW; and Chapter 70.105 RCW, respectively.

²⁴⁵State of Washington v. Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985).

tribal self-determination by providing a procedure for the delegation of those programs to the tribes. The core principle of the policy is its commitment to working with federally recognized tribes on a government-to-government basis in order to enhance environmental protection. In carrying out the EPA's responsibilities on Indian reservations, the fundamental objective of the EPA is to protect human health and the environment. "The keynote of this effort will be to give special consideration to tribal interests in making agency policy, and to insure the close involvement of tribal governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective the agency will pursue the following principles":²⁴⁶

1. The agency stands ready to work directly with Indian tribal governments on a one-to-one basis (the "government-to-government" relationship), rather than as subdivisions of other governments;
2. The agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs for reservations, consistent with agency standards and regulations;
3. The agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands;
4. The agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs;
5. The agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever the EPA's actions and/or decisions may affect reservation environments;
6. The agency will encourage cooperation between tribal, state and local governments to resolve environmental problems of mutual concern;
7. The agency will work with other federal agencies that have related

²⁴⁶United States Environmental Protection Agency. 1984. "EPA Policy for the Administration of Environmental Programs on Indian Reservations".

responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations;

8. The agency will strive to assure compliance with environmental statutes and regulations on Indian reservations; and
9. The agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system, and ongoing policy and regulation development processes.

Following clarification of the EPA policy and subsequent provisions in federal environmental legislation, a recent emphasis in tribal governance development has focused on the development of tribal environmental protection programs and legislation. Several tribes have since been designated "treatment as a state", enabling them to proceed with the formulation of reservation environmental protection programs. While it is the intent of many tribal programs to operate independently of state program authority, others have sought cooperative agreements with state programs to foster coordinated environmental protection on a regional basis. These efforts are more fully considered as models of cooperative mechanisms in the section following.

Fish and Game

Washington's fishing dispute involves the two-decade interpretation and implementation of the fishing rights clause contained in the Stevens treaties, which reads: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . ."

The state issued its first opinion on this clause in 1899,²⁴⁷ providing an interpretation that emphasized an equal access, rather than a guarantee to an equal apportionment, of the fishery:

Indians were not discriminated against by the license laws of the state, but they have today all rights that are guaranteed them by the treaty. That is,

²⁴⁷1897-1900 AGO 102, 103 (Nov. 10, 1899).

they have the right to fish at usual and accustomed grounds and stations in common with all citizens of this state. No more, no less.

Confrontations arose during the 1950's and 1960's as Indian fishers engaged in off-reservation net fisheries on traditional freshwater fishing grounds that had become areas prohibited by state law. To resolve the dispute, the Attorney General initiated a "test case"²⁴⁸ against the Puyallup Tribe and its individual members. The Supreme Court ultimately upheld the exercise of some state authority over treaty Indians, in particular the state's authority to regulate fishing where "reasonable and necessary for conservation." However, the test case did not conclude the dispute as the litigation and controversy continued.

The United States filed a declaratory judgement action in 1971 in the United States District Court in the Western District of Washington. The United States argued that the "in common" language mandated the equal division of the harvestable number of salmon and steelhead between Indian and non-Indian fishermen. The intervening tribes claimed an exclusive treaty right to take fish without any restriction. The state alleged that the treaties did not guarantee an equal allocation right, but, rather, provided only for an equal access to the fishery. The District Court in 1974²⁴⁹ construed the fishing clause of the treaties to require an allocation of the fishing resource between treaty Indians and other citizens. The allocation was interpreted for "50 percent plus" of the harvestable resource.²⁵⁰ The District Court, however, rejected the tribe's claim to an unrestricted tribal fishery by reaffirming the state authority to regulate for conservation. The court agreed also to

²⁴⁸Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

²⁴⁹United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).

²⁵⁰The court-ordered division of fish worked as follows: first, the treaty tribes designated a reservation catch; second, the tribes specified the number of salmon and steelhead that they would take for ceremonial and subsistence fisheries; third, and finally, after the reservation, ceremonial and subsistence harvest was subtracted from the total fish available for harvest, the remainder was then divided equally between the treaty Indian fishermen and all other citizens.

retain "continuing jurisdiction" of the case "to grant such further relief as may be found to be appropriate on motion of any party -- and to assure compliance with the judgement entered herein."²⁵¹ Following a number of appeals to the Ninth Circuit Court and the Washington Supreme Court, the United States Supreme Court agreed to review the major issue of construction of the "in common" fishing language in 1978.²⁵²

In 1979, the Supreme Court decided Passenger Fishing Vessel,²⁵³ ruling that the fishing clause required a division of the fishery resource. The allocation previously prescribed was modified to entitle the tribes to less than the "50% plus" formula created by the District Court.²⁵⁴ In addition, 50% of the Indian allocation was construed as a maximum allocation subject to further reduction if a lesser amount provided for a "moderate living for Indians." Since the 1979 opinion, fisheries litigation has been limited to questions about the proper management of the resource, including protection of prescribed spawning escapements. Although litigation in the fisheries area has been highly publicized, the importance of negotiation and cooperation to resolve disputes should be emphasized. The United States District Court in United States v. Washington required a salmon management plan, and established a Fisheries Advisory Board to facilitate the resolution of disputes between the state fishery management agencies and the Indian tribes.

The Environmental Right Dispute - Phase II - In United States v. Washington, the intervenor tribes contended that they not only had a right to

²⁵¹384 F. Supp. at 405.

²⁵²United States v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

²⁵³Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

²⁵⁴Ceremonial and subsistence catch were ordered to be included, and harvests by non-residents of Washington taken from Washington State fish runs will not be included as part of the non-Indian share.

unrestricted fishing, but also a right to have the fishery protected from environmental degradation. This issue was reserved by the district court for later resolution. The tribes sought the court's implementation of an environmental impact process that would be triggered whenever a state agency contemplates a state or a private action that may impact the size or quality of a fish run. In Passenger Fishing Vessel, the district court ruled that such a treaty right exists, but, on appeal, the Ninth Circuit modified and withdrew the district court opinion.²⁵⁵ Since 1984, the environmental right question continues to represent a serious concern to the state and its threat has prompted greater cooperation towards achieving a mediated solution in a variety of habitat protection matters.

Shellfish - While U.S. v. Washington addressed the allocation of the salmon fishery, it did not address the allocation of shellfish. The federal district court²⁵⁶ did, however, provide:

In order to be entitled to exercise off-reservation treaty fishing rights to nonanadromous fish and shellfish, any tribe party to this case shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty entitlement to such nonanadromous fish and shellfish upon which the court may make a preliminary determination as to the tribe's entitlement of such species, pending final determination of tribal treaty-right entitlement to nonanadromous fish and shellfish.

Settlement discussions intended to avoid litigating the shellfish allocation question were entered into by the state, sixteen tribes, and other affected parties in the early 1990's in an attempt to negotiate an acceptable management and allocation plan for the shellfish resource. Unable to reach agreement through the negotiation process, the litigation proceeded in 1994. On December 20, 1994, the Western District Court released its ruling.²⁵⁷ The court confirmed what is viewed as a

²⁵⁵694 F.2d 1374 (9th Cir. 1983).

²⁵⁶459 F.Supp. 1020, 1037 (1978).

²⁵⁷In United States v. Washington, subproceeding no. 89-3.

sweeping tribal victory in ruling that treaty tribes have a right to harvest 50% of the natural production of shellfish. Two controversial elements of the decision concerned tribal access to commercially cultivated shellfish beds, and the tribal right to cross private property to exercise harvest rights. The state had argued that the commercial beds were intended to be excluded from the treaty guarantee of equal access to harvestable areas. The court ruled that while the private harvest of artificial production was not subject to the tribal harvest share, the underlying beds were. Fear that the court would allow tribal access across private properties prompted the involvement of private property interests organized under the United Property Owners of Washington (UPOW).²⁵⁸

The court ordered the parties to negotiate and submit either a jointly agreed upon implementation plan or separate proposals if agreement could not be reached. The Ninth Circuit Court of Appeals will decide the appeal of the Shellfish Decision filed by the Shellfish Growers, a private shellfish industry association. In their appeal, the Growers have asked the Appellate Court to stay the implementation of any co-management plan until their appeal has been argued and a decision is reached, which was agreed to by the court. The Growers have also asked the court to order the United States to pay tribes cash damages for their shellfish treaty rights rather than implement the current decision.

The recent outcome in the long history of natural resources litigation in Washington State again illustrates how the mechanism of litigation often mandates effective state-tribal cooperation in natural resource management. Once the pivotal question regarding the extent of proprietary rights becomes established, attention then shifts to concerns for the resource itself, and to cooperative ways of achieving

²⁵⁸UPOW sought to join the litigation and participated in earlier settlement negotiations seeking to prohibit Indians from gaining rights of access across privately held shoreline properties. The organization's membership was originally comprised of on-reservation non-Indian property owners. The shellfish litigation expanded UPOW membership to include off-reservation coastal property owners not previously engaged in issues involving treaty-claimed rights.

resource sustainability through harvest management practices.

Tribal Civil Regulation of Non-Indians

The application of tribal civil regulatory authority over non-Indians and fee lands located within the exterior boundaries of a reservation has presented ongoing conflict in the state-tribal relationship. Advancement in tribal governmental organizational capacity since 1970 has accelerated the exercise of civil jurisdiction over non-Indians by enactment of laws governing the conduct of businesses on fee land, and the application of zoning and other land use restrictive codes. The tribes have maintained that tribal jurisdiction over non-Indians pre-empts state and local jurisdiction. The state's position has traditionally opposed the assertion of tribal jurisdiction that displaces state regulatory authority.

The United States Supreme Court analyzed tribal-state jurisdictional disputes by applying a "pre-emption" test from McClanahan v. State Tax Comm'n,²⁵⁹ which applied to the application of tribal regulation to its own members. The test has been broadly interpreted to encompass "the right of reservation Indians to make their laws and be ruled by them,"²⁶⁰ and serves to further affirm tribal territorial sovereignty.²⁶¹ The Supreme Court has construed the pre-emption test liberally to favor the federal Indian policy for expansion of tribal jurisdiction in a number of recent opinions.²⁶² However, it has also affirmed concurrent state jurisdiction over certain reservation activities by non-Indians unless expressly pre-empted by federal law. Because of the origins of tribal sovereignty, the pre-emption analysis is based on the principle of balancing the competing state, federal, or tribal interests rather than merely relying on Congressional intent to pre-empt state law. This further

²⁵⁹411 U.S.164 (1973).

²⁶⁰In Williams v. Lee, 358 U.S. 217, 219-20 (1958).

²⁶¹In New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378 (1983).

²⁶²For example, see Rice v. Rehner, 103 S.Ct. 3291 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1982); Montana v. United States, 450 U.S. 544 (1981).

clarification, referred to as the "particularized inquiry" test, provides pre-emption to occur without an express Congressional statement. In addition, the courts have ruled that federal approval of tribal ordinances exercising exclusive jurisdiction does not alone confer a delegation of power by Congress.²⁶³

The "particularized inquiry" test, then, requires the courts to balance the interests of each party. If tribal regulation is consistent with prior federal policy and traditional notions of Indian sovereignty, exclusive application of tribal law may be favored by the courts. The Ninth Circuit Court of Appeals, in Snow v. Quinault Tribe,²⁶⁴ upheld tribal civil jurisdictional authority over non-Indians on their own lands. Conversely, in United States v. Anderson,²⁶⁵ the court ruled that state regulation applied to excess water located on non-Indian lands situated within the Spokane Indian Reservation. As recognized by the Washington Attorney General (1985:95):

The problem in determining the extent of tribal jurisdiction over non-Indians is now one of defining and measuring the tribal interest in exercising jurisdiction over non-Indians. The subjective nature of the "particularized inquiry" test clouds the extent of state or tribal regulatory power. The disposition of the federal courts is important since the cases are now decided through a process in which a federal judge weighs the interests of the tribe in the particular assertion of jurisdiction involved, weighs also any competing interests of state and local government, and then strikes the balance as the judge sees it. On balance, the federal district courts and the Ninth Circuit Court of Appeals have displayed a liberal tendency to uphold such tribal assertions of jurisdiction.

The state's arguments have stressed two principal concerns over the assertion of tribal civil jurisdiction. The first relates to the principle of representation without the right to participate in tribal elections, resulting in non-Indians being subjected to regulation without the benefit of participating in the electoral process. This situation

²⁶³Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 156).

²⁶⁴709 F.2d 1319 (9th Cir. 1983) cert. denied 104 S.Ct. 2655 (1984).

²⁶⁵736 F.2d 1358 (9th Cir. 1984).

has raised objection by non-Indians as a violation of commonly held notions of government regulation subject to meaningful participation in that government.²⁶⁶ Clarification of the extent of tribal and state jurisdiction over the reservation territory continues to be decided on an individual case basis, where the courts have increasingly relied on the "particularized inquiry" test.

The second concern deals with the nature of tribal sovereignty itself, which is not subject to the constitutional restrictions and safeguards common to other forms of government. The Indian Civil Rights Act of 1968,²⁶⁷ however, overcomes many of these concerns by imposing certain statutory restrictions upon tribal governments, including the constitutional guarantees of due process and equal protection. The antagonistic position of the state in challenging virtually every attempt by tribal governments to exercise powers of self-government has contributed to the general distrust in the relationship between these governments.

Taxation

State taxation over property owned by Indians on Indian lands has been the subject of conflict since statehood. The earliest Washington Attorney General opinion issued in 1898 generally recognized that United States laws protect a tribal Indian from taxation, but remained tentative in that position. The state's opinions followed this approach into the 1900's when it began to develop a framework to more fully analyze Indian tax questions.²⁶⁸ In 1906 Attorney General John Atkinson provided a more thorough analysis of the state's opinion in advising that

²⁶⁶This exclusionary condition is similar to the exclusion of aliens residing within the United States who also are excluded from certain citizenship privileges. See also The Bellingham Herald, March 19, 1995, regarding non-Indian resident opposition to tribal authority on the Lummi Indian Reservation.

²⁶⁷Act of April 11, 1968, Pub. L. 90-284, Title II, 82 Stat.77 (codified at 25 U.S.C. sec. 1301-1303 (1983)).

²⁶⁸For example, in 1901 Attorney General Stratton opined that off-reservation personal property belonging to Indians who have severed tribal relations was subject to tax. The opinion emphasized that there was "no law which exempts from taxation" such property (1901-02 AGO 185 (Sept. 6, 1901)).

Indian lands, together with permanent improvements and personal property, are subject to state taxation during the trust period of an allotment. This developed into a position asserting state taxing authority unless expressly pre-empted by federal law or treaty, an approach which the state generally relies upon today.

The state generally followed an approach to Indian tax issues that observed federal Indian policy throughout the first half of the twentieth century. While the Supreme Court's decision in Moe v. Confederated Salish & Kootenai Tribes²⁶⁹ affirmed the exclusion of state taxation of Indian personal property within a reservation, it raised further questions regarding the state's authority to impose a tax on non-Indians within reservations where there exists a tribal tax on the same transaction. This decision also addressed the state's authority to impose a collection requirement on the tribe. These questions were addressed in Washington v. Confederated Tribes of the Colville Indian Reservation.²⁷⁰ The court ruled in favor of the state's right to impose its tax, in addition to the tribe's tax, on non-Indians purchasing cigarettes from an Indian vendor within the reservation.

With the concurrent development of tribal government capability and reservation economies, tribes have increasingly relied upon taxation as a means of raising revenues, which has introduced new forms of conflict between tribal and state taxing systems. The Attorney General's Office has participated as an amicus in several cases asserting that state citizens are immune from the controls of tribal government. In Merrion v. Jicarilla Apache Tribe,²⁷¹ Washington State's amicus argument did not challenge the power of a tribe to impose a tax on non-Indians, since that power was recognized in Colville, but, rather, challenged that this power was based on the concept of inherent tribal sovereignty. In so arguing, the office

²⁶⁹425 U.S. 463 (1976).

²⁷⁰447 U.S. 134 (1980).

²⁷¹455 U.S. 130 (1982).

asserted a broader interest²⁷²:

If this inherent tribal sovereignty argument is accepted, non-members would be subject to the general regulatory power of a tribal government in which they cannot participate. For what is at stake is not just taxing power over non-members, but a broad range of regulatory power including land use controls over non-Indian lands located within a reservation boundary, control over non-Indians fishing and hunting on such lands, and a whole host of other types of regulations.

This interest also was expressed in the amicus brief to the Court in Snow v. Quinault Indian Nation.²⁷³

The interest of the two amici States in this case is two-fold. First, there is the same interest in protecting a large group of the State's citizens from the power of a tribal government in which they cannot participate or even influence the formulation of tribal decisions, and whose actions, even when discriminatory, can only be avoided by giving up their present homes or businesses and moving off the reservation. After *Oliphant*, protection exists in the criminal area. But at least in the Ninth Circuit, little, if any, exists in the civil area. Second, if the decision below stands, we fully expect to be facing claims that tribal assertion of civil jurisdiction over non-Indians on non-Indian land preempt state and local jurisdiction, not only in the area of taxation, but in other areas as well, such as land use, building codes, and regulation of rights to surplus waters. A reversal of the decision below would, we believe, significantly reduce future litigation between the Tribes and the States or their local governments, of which we have had enough already.²⁷⁴

In the Merrion case, the state also argued that adopting the tribe's inherent sovereignty argument would damage the state's proprietary interests in lands within a reservation if a tribe could expel for nonpayment of taxes and had unlimited taxing

²⁷²Brief of State of Washington as Amicus Curiae in Support of Petition for Writ of Certiorari at 3.

²⁷³709 F.2d 1319 (9th Cir. 1983), cert. denied, 104 S.Ct. 2655 (1984).

²⁷⁴Brief of States of Washington and Montana as Amici Curiae in Support of Petition for a Writ of Certiorari at 2-3.

power. On January 14, 1992, the Supreme Court ruled²⁷⁵ that the State of Washington can impose an ad valorem tax on reservation fee patent land pursuant to the Allotment Act and owned by reservation Indians or the tribe itself.

Questions of the state power to tax have been substantially resolved after the Colville case. The major remaining policy issue is the extent to which the state should involve itself in disputes between non-Indians and tribal taxing authorities. The position of the state demonstrates a concern for the imposition of general civil regulatory authority, which extends a great deal further than matters of tax revenues. That concern addresses questions about the control over the use of the tribal territorial land base itself.

Gaming

Indian tribes have expanded their reservation economies through gaming activities during the past decade and a half, resulting in a new arena of state-tribal conflict and a series of complex litigation. The gambling cases rely largely on the distinction in the state gambling statutes between activities that are generally permitted under a "civil/regulatory" test, and activities prohibited under a "criminal/prohibitory" test. Early litigation involved the state's challenge to tribal operation of bingo games. In Hatch, the federal district court concluded that Washington's gaming laws constituted "civil/regulatory" laws. Under such distinction, the ruling concluded that since Washington State's public policy permits certain forms of gambling such as bingo, the states were merely in disagreement with the tribes over the range of restriction imposed on gaming regulations, rather than over the permissibility of the activity.

Congress intervened in tribal gaming activities in 1988 in order to provide a framework by which tribes and states could negotiate agreements governing the conduct of certain types of gaming that might encourage economic development in Indian country. The Indian Gaming Regulatory Act of 1988 (IGRA) established

²⁷⁵In County of Yakima et. al. v. Confederated Tribes and Bands of the Yakima Indian Reservation, nos. 90-408 and 90-577.

three separate classes of gaming. Class I includes traditional gaming activities practiced historically by the tribes that were permitted to continue without any interference by federal or state laws. Class II defines non-parimutual and non-house banking wagering such as bingo and pull tabs, which require compliance with federal laws, but preclude the imposition of state laws. Class III includes all other games, including house betting casino table games and electronic betting devices, such as slot machines. Under the IGRA, tribes are required to negotiate a class III compact with the state, which, as occurred in Washington State, establishes limitations on the scope, number of allowable table games, hours of operation, and wagering limits. An important feature of the legislation is its provision to foster cooperation by both the state and the tribes in regulatory oversight of the gaming activity.

While several compacts have been approved and implemented in Washington State,²⁷⁶ disagreements continue over a number of issues, including the state's prohibitory exclusion of the use of electronic devices.²⁷⁷ As a result, the state and the tribes have mutually agreed to enter into a "friendly" lawsuit to defer to the federal district court for a definitive ruling. Should the court decide in favor of the tribes, the parties, as in the fisheries decision, would concentrate their efforts on co-management of the activity.

State Attorney General's Guidelines to Indian Policy Making

The Washington Attorney General (1985:113-126) issued a framework

²⁷⁶Class III Compacts implemented include the Tulalip, Nooksack, Swinomish, Chahalis, Lummi, Muckleshoot, Upper Skagit, Squaxin Island, Suquamish, and Jamestown S'Klallam Tribes, each having implemented the provisions of the compact through the operation of casinos. In addition, three tribes have negotiated but not implemented compacts, including the Elwah S'Klallam, Port Gamble S'Klallam, and Quileute Tribes.

²⁷⁷On February 28, 1995, the Puyallup, Shalwater Bay, and Spokane Tribes filed an initiative with the Secretary of State's Office proposing that the tribes have an exclusive right to unlimited unregulated casino gaming, including slot machines. The initiative failed passage by the voters in the November 1995 election.

containing a number of factors that state agencies were urged to rely upon when formulating public policy affecting Indians and Indian tribes. These factors are summarized in five categories: 1) historical factors; 2) the varied interests of the parties; 3) the current issues at hand; 4) the willingness and ability of the various parties to litigate; and 5) the willingness and ability of the various parties to negotiate.

History - One important factor responsible in part for the failure throughout history of the state-tribal relationship is the failure of the parties to communicate effectively. A federal judge involved in the Indian fishing cases observed (Washington Attorney General 1985:113) that both parties were responsible for the failure to communicate thereby forcing litigation as the remedy to dispute resolution:

One aspect hindering effective communication is deep distrust and animosity on the part of some citizens, Indian and non-Indian, fueled by misperceptions of the motives of each. For example, some Indian (and non-Indian) citizens of the state have attempted to characterize state legal efforts as motivated solely to deny any special rights to Indians, implying an anti-Indian or even racial basis. On the other hand, some non-Indian citizens have failed to appreciate the cultural and religious significance of certain subjects to Indian citizens. Some citizens have characterized tribal positions as simply attempts to gain special advantages unavailable to non-Indian citizens.

Interests of the Parties - There are several important interests to be considered before successful resolution to the historic conflict in state-tribal relations can occur: the state interests, private non-Indian interests, private Indian interests, tribal interests, and federal interests. The state's interest in any given issue often includes proprietary and jurisdictional interests. To the extent that activities of Indians or assertions of tribes impact these proprietary interests, the state may have an obligation to resist in order to protect the value of the property. As a sovereign entity, the state generally seeks to preserve its governing power. Certain issues that involve the revenue interest of the state in asserting its tax laws are of direct consequence to the state. Other interests center on the universal application of state laws designed to protect the broader public interest, as in consumer protection and environmental laws.

In the fishing litigation, the interests of the non-Indian sport and commercial fishermen have been represented by the state. Through license fees, these fishermen support state fisheries protection and enhancement programs. In phase II of United States v. Washington, the interests of the State's timber, fishing, and tourist industries were also represented. In water rights issues, the agricultural interests joined other interests that were also represented by the state. Private Indian interests are similar to private non-Indian interests except that they often also enjoy special treaty protections, exercised through a member's tribe. These interests are also recognized as a matter of the supremacy of federal law. Tribes have protected treaty interests, but unlike the individuals, they also have sovereign interests, analogous to those of a state. The United States serves as trustee of Indian interests and, through its plenary powers, may define the extent of tribal powers.

Issues - The Attorney General emphasized the important distinctions occurring in state-tribal relations depending on the nature of a particular conflict. An important distinction is recognized between questions of sovereignty and questions of benefit and program administration. Both tribes and the state tend to resist negotiations concerning substantive issues that affect government power, and tend to be more willing to negotiate procedural issues, including the specific delivery of services.

Willingness and Abilities of Parties to Litigate - Congress enacted a law in 1966²⁷⁸ permitting tribes to sue in federal court without limitation to the amount of a claim. The Civil Rights Attorney's Fees Act of 1976 further provided the tribes with the right to obtain attorney's fees if they prevail in certain types of litigation, increasing the willingness and incentive of the tribes to litigate. Tribal immunity from suit also affects the ability of the party to consider litigation as an alternative to

²⁷⁸Act of Oct. 10, 1966, Pub.L.89-635, 80 Stat. 880, (codified at 28 U.S.C. sec. 1362, 1976).

conflict resolution. Unless waived,²⁷⁹ the sovereign immunity doctrine protects a tribe from most forms of suit.

Willingness and Ability of Parties to Negotiate - Negotiation can be a successful approach in conflict resolution when all parties are able and willing to negotiate, particularly when the number of parties and range of issues are limited. Negotiations become complex and difficult when a number of parties and diverse interests are involved. The divided nature of the individual parties presents another problem in negotiation. The United States, represented by several agencies, may represent varied interests. When the State of Washington negotiates an issue, various interests may require attention. The state may also represent several interests as a landowner, a sovereign, and a representation for private individuals.

Hence, the state's recent position has largely been one of balancing the dual approaches of litigation and negotiation (Washington Attorney General 1985:126). While litigation often involves great expense and hastens animosity between the parties, litigation often results in the requirement for effective state-tribal cooperation. The following section examines the effectiveness of recent experiences under the policy that promotes cooperation as the preferred approach to state-tribal conflict resolution. The foundation of that approach requires equal footing between the two governments as established in the 1989 Centennial Accord.

Tribal-State Mediating Structures

Berger (1984:250) describes mediating structures as "those institutions standing between the individual and his private life and the large institutions of public life." Mediating structures are important for fostering resolution of tensions between institutions, and, particularly, in dynamic social situations characterized by social and cultural plurality. Without institutionally reliable processes of mediation, the political order tends to result in conflict. A goal of public policy in a pluralistic

²⁷⁹A waiver of tribal immunity cannot be implied but must be unequivocally expressed. Absent an express waiver of immunity, no suit may be brought against a tribe (Santa Clara Pueblo v. Martinez, 436 U.S. at 58).

society, then, becomes concerned with sustaining as many particularities as possible, in the hope that the broader community will learn to accept the unique and sometimes conflicting differences intrinsic among the individual parts comprising that community.

The search for effective forms of conflict resolution to the historic divisions existing in Indian-non-Indian relations, as alternatives to litigation, begins with the search for ways to form meaningful dialogue between the participants in conflict. The term "mediating structures", as defined by Ackoff (1984), describes those mechanisms that foster communications towards the resolution of conflict. As a way of mediating disputes and differences between the tribal political communities and the interests that lie external to those communities, the commitment to effective dialogue establishes a basis for the development of social learning from those relationships.

The formulation of Washington State's Indian Policy emerged immediately following the federal court mandate for implementation of the landmark Supreme Court decision in U.S. v. Washington. In an attempt to reach agreement for the implementation of the fisheries decision, the court essentially mandated that the state and the tribes cooperate. New forms of dialogue were urged by the court, which launched the parties into a newfound method of dispute resolution to resolve the question of fisheries co-management. The approach used in fisheries co-management formed the basis for cooperation in other areas of public policy management and governmental relations with the tribes. Eventually, the cooperative process became institutionalized through the formal process of agreement making.

Comprehensive Cooperative Resource Management (CCRM)

The dramatic shift in intergovernmental relations between the State of Washington and Indian tribes began in the early 1980's with the application of the principle of cooperation to natural resource management, and has since extended to include several other areas of governmental cooperation. The principle supporting CCRM is the recognition that natural resources cannot be managed in isolation from other resource management approaches. The approach has resulted in institutional

changes affecting the nature of the political, social, and economic relationships between the interests in resource management, including the tribes, state, and federal governments, industry, the environmental community, and the general public.

CCRM has been described as "a living process. It is based on the knowledge that cooperation, not litigation, is the best way to resolve management resource issues" (NWIFC 1991:B189). Emphasis is placed on discovering common ground by the participants of CCRM upon which to build agreement. The process emphasizes a separation between participant group needs from entrenched group positions and needs, problems, and opportunities were collectively identified by participants to form a unified basis for agreement. CCRM was successfully extended to several areas of resource dispute resolution as follows:

Cooperative Fisheries Management - Seeking to redress and implement the provisions of the Stevens Treaties guaranteeing the tribes' reserved rights to fish, U.S. v. Washington established the tribes as co-managers of the resource. Because of the continued resistance by both the state and tribes to overcome adversary positions, the federal court assumed direct management of the fishery resource. In 1984, a tribal-state plan for cooperative management of fisheries in Puget Sound was finally jointly developed and approved by the federal court which effectively replaced the role of the court with the direct participation of the tribes. The successful approach in CCRM was to spread quickly to other areas of state-tribal resource cooperation.

The Pacific Salmon Treaty - CCRM was soon after expanded to include tribal-state negotiations with Canada over the mutual interception of fish stocks. In 1985, through the cooperation of the tribes, the state, sport and commercial fishing groups, federal fisheries agencies, and others, the Pacific Salmon Treaty was established. The Pacific Salmon Commission (PFC) was formed by the United States and Canadian governments to implement the treaty and to provide regulatory recommendations to each country. The Commission is comprised of direct representation by tribal leaders.

Watershed Planning - In 1986, the CCRM approach was extended by the

tribes and the state to the management and enhancement of salmon fisheries using a watershed-by-watershed approach. Watershed planning began through a joint intergovernmental educational effort to involve broad fisheries interests. The process, which included a participant list of over 10,000 individuals, resulted in recommendations for an enhancement program, which received a \$4 million appropriation from the Washington State legislature for the 1987-89 biennium. The enhancement projects sought to resolve key problems identified as contributing to the depressed natural salmon stocks. Subregional planning teams were organized to develop Comprehensive Resource Production and Management Plans (CRPMP's) for each drainage area in an effort to advance the watershed planning approach.

Timber Fish and Wildlife Agreement - No effort has embodied the principles of CCRM more than the 1987 landmark Timber, Fish and Wildlife Agreement²⁸⁰ (TFW). Following over a decade of litigious conflict among timber landowners, tribes, environmental organizations and state natural resource agencies, TFW has been referred to as "a historical New Deal for Washington Forests" (Seattle Times 1986:A22). The agreement introduces an inclusive process for public policy management of state and privately held forest lands. Halbert and Lee (1990) observed that TFW "signals the development of a new institutional culture in natural resources policy. TFW is a way of doing business marked by a willingness among leaders in the public and private sectors to negotiate resource policy disputes. The new cooperators include the Indian tribes, state agencies, natural resource harvesters, and environmental groups" (Halbert and Lee 1990:141). The TFW process represented a major policy shift towards government-to-government cooperation with Washington State Indian tribes in an effort to end the history of state-tribal conflict.

By identifying the central issues of concern to the cooperators in the TFW process, a consensus-based mediation was sought based on the willingness of the

²⁸⁰Timber, Fish and Wildlife Agreement: A Better Future in our Woods and Streams, Final Report. (1987). Forest Regulation and Assistance Division. Olympia, WA.: Washington State Department of Natural Resources.

participants to attempt face-to-face negotiations, which occurred during a six-month period and involved some sixty meetings (TFW 1987:1). The meetings resulted in the TFW Agreement entered into in February 1987 by representatives of 24 separate parties, including treaty tribes, state agencies, the timber industry, environmental groups, and the mediators. The issues identified by the tribes included two primary concerns: the protection of fisheries habitats by extending the tribes' property rights interests under Phase II of the Boldt decision; and the protection of tribal cultural resources from timber harvest practices. The TFW process addressed the former tribal concern through provisions in future regulatory requirements that would include greater access by the tribes to forest practices review and approval procedures. The latter concern was addressed through the formal recognition of the need to protect cultural and archaeological resources in off-reservation areas (Halbert and Lee 1990:142).

The politics supporting the TFW negotiations are described as pluralistic in that the initially deadlocked position of the parties served to equalize the relative power of each party. McFarland (1987) suggests that the TFW process closely resembled aspects of pluralistic theory where the participants represented three distinct sets of actors: a "governmental agency", represented by the Washington State Department of Natural Resources; an economic producer, represented by the timber industry; and "countervailing groups", which expressed opposition to certain goals of the economic producers. The latter group is represented in the TFW process by the tribes, the environmental community, and non-timber state agencies. According to pluralistic theory, controversy tends to result in a sequence of conflicts that then prompts a cycle of reform initiated by the "involvement of high officials." The successes of TFW similarly emerged from a history of litigation and the subsequent responsive intervention by the governor, the state legislature, tribal governmental leaders, and the leadership from the business community. In the cycle of reform, according to pluralist theory, the rising power of countervailing groups enhances the autonomy of the governmental agency. "Before TFW, DNR was widely seen as the handmaiden of the timber companies" (Halbert and Lee

1990:143). As a result of the process, the agency regained an autonomous position balanced by the interests and participation of the countervailing groups. McFarland (1987) correctly observed how the institutionalization of countervailing power in the TFW process provided an effective substitute for judicial conflict.

Sustainable Forestry Roundtable - In the late 1980's, following continued legal challenges to the Washington State Forest Practices Act, the State Department of Natural Resources sought the assistance of tribal governments and other participants of the TFW process to establish a cooperative effort known as the Sustainable Forestry Roundtable. It was intended as an extended TFW process to address issues brought by the Forest Practices Board, local government, and other interest groups in the state. Following 18 months of discussions, a draft legislative and regulatory proposal was developed emphasizing the necessity to ensure direct tribal participation in the implementation of the agreement. The legislature, however, declined to enact the proposal.

Environmental Memorandum of Understanding - To further the commitment of the state and the tribes to cooperative approaches to resource and environmental problem solving, an environmental memorandum of understanding (MOU) was developed in 1989. The MOU outlines the general tribal objectives relating to the enhancement and net gain in the productive capacity of fish and wildlife habitats. The protection and conservation of the productive capacity of habitats, restoration and enhancement of damaged habitats, and appropriate mitigation techniques were identified by the tribes as principal means of achieving this goal. The state's commitment in the MOU acknowledges the sovereignty of the tribes and pledges to work under the government-to-government basis. The approach, based on the principles of CCRM, is another example of the commitment to cooperation for solving intergovernmental resource-based issues in Washington State.

Water Resource Planning: Chelan Agreement - In 1990, a water resources planning retreat was held at Rosario Resort and attended by 175 leaders representing various constituencies in water resources. After three days of initial negotiation, an Interim Team consisting of representatives of seven caucuses was created to outline

a framework for a cooperative water resources planning process to balance the competing statewide interests in water resources. In a following retreat held at Lake Chelan, the Chelan Agreement was produced outlining the basic goals and principles for cooperative water resource planning. The goals incorporated the primary concern of the tribes regarding its long-term policy objective of achieving an overall net gain in the productive capacity of fish and wildlife habitats. The process continues to address the extremely complex issues relating to the allocation of water resources in Washington State. The process provided for demonstration projects involving two watersheds in the state. Although no formal policy or legislation has resulted from the Chelan approach, the participants continue to work within its framework.

Puget Sound Water Quality Management - Treaty tribes are recognized as important participants in the efforts to protect and enhance the water quality of Puget Sound. In recognition of the important interests of the tribes, the Washington State legislature created the Puget Sound Water Quality Authority (PSWQA) in 1985 and designated a seat on the Authority for tribal representation. This assured direct tribal involvement and decision-making in the broad programs and policy recommendations affecting state water quality public policy.

The Centennial Accord

On January 3, 1989, Washington Governor Booth Gardner proclaimed that a government-to-government relationship respecting tribal sovereignty would form the basis of the state's new tribal policy. On August 4, 1989, Governor Gardner and the federally recognized tribes signed the 1989 Centennial Accord outlining the implementation of the government-to-government relationship. Based on the cooperative intergovernmental approach successful in fisheries and natural resources management, the intent of the Accord was to formalize the cooperative relationship and encourage its use in other areas. The resulting new policy establishes a government-to-government relationship to address complex problems under a new philosophy based on mutual respect. Natural resource management, social welfare concerns, economic development, and issues of governmental jurisdictional

cooperation not previously addressed were incorporated into a broad approach under the Accord.

The Accord requires the state and the tribes periodically to "establish goals for improved services and identify the obstacles to the achievement of those goals" (Centennial Accord 1989). The Accord commits both the state and tribal governments to a process of accountability through which issues of mutual concern will be addressed. Progress is assessed annually, while a joint management report chronicles the successes as well as the emerging opportunities presented by the improved relationship. The Accord also requires that each state agency director ". . . will initiate a procedure within his/her agency by which the government-to-government policy will be implemented." It further requires that ". . . each agency will establish a documented plan of accountability and may establish more detailed implementation procedures in subsequent agreements between tribes and the particular agency" (Centennial Accord 1989).

DNR Tribal Policy - Consistent with the Centennial Accord, on January 16, 1991 the Department of Natural Resources issued its independent tribal policy recognizing the sovereign status of the state's federally recognized Indian tribes. The policy commits the department to conducting "relations with Washington tribes as one government to another." Further, the policy establishes a procedure for resolving mutual issues and concerns with the tribes at the lowest organizational level of governmental authority and directs department executives and managers to meet regularly with their respective tribal counterparts for the purposes of discussing issues of mutual concern that require priority attention and staffing by the department. The policy further states that the department is committed to ". . . more fully understand and appreciate the unique values and cultures represented by the tribes and will work toward public understanding of tribal rights and cooperative management" (Washington Department of Natural Resources 1991).

Institutions for Mediation: The NRRC

The Northwest Renewable Resources Center (NRRC) emerged in 1984 to assist various Washington State interests in resolving disputes regarding renewable

resource management. Fraidenburg (1989:211) attributes the popularity of the NRRC mediation process to three reasons:

1. The Washington State business community perceived newly reaffirmed Indian water rights as a threat to their economic interests;
2. A new potential coalition between the Washington environmental community and the tribes was feared as a major intervenor in resource decision-making; and
3. Indian tribes sought opportunities to increase their salmon harvest, which would enable them to acquire greater economic and political self-determination.

Through the coalition of these interests, the NRRC was formed by the tribes and business leaders with the intent "to help resource users, managers, and conservationists resolve disputes over renewable resources" (NRRC 1986), and sought the effective resolution of disputes through the negotiation process. Supporters of the process acknowledged the benefits of cooperation as a preferable alternative to litigation. Referencing the NRRC approach as the "new politics in natural resources," Fraidenburg views the coalition's process of consensus politics as a way of developing public policy. Fraidenburg (1989:212), however, contends:

The rise of negotiated public policy is not new politics at all. The new factor is a major power shift among the players and an important change in the degree of affirmative environmental responsibility being exercised by state government.

The catalyst leading to the creation of the NRRC was Phase II of the Boldt decision (Waldo 1981), which was intended to interpret the fisheries habitat protection responsibilities of the state. The tribes posited that treaty fishing rights, as established in U.S. v. Washington, become meaningless and without value if the habitat supporting fisheries is diminished. The affected treaty tribes have therefore interpreted their fishing rights to extend also to the right of habitat protection. In 1987, Judge Orrick in U.S. v. Washington concurred that government has a "duty to prevent the degradation of the habitat to an extent that will deprive the tribes of their moderate living needs." His decision also prevented the state from subordinating the

tribal fishing right to other purposes.

Following Judge Orrick's conclusion, four principal options were identified by the Northwest Water Resources Committee²⁸¹ as a political strategy for resolving concerns relating to the effect of a Phase II ruling, as outlined by Waldo (1981). The first two options considered judicial action and legislative and congressional intervention, which options were both concluded to be too risky and expensive to pursue. The third option, of maintaining the status quo, risked subjecting future resource questions to the court's further test on impacts to fisheries habitats, and was likewise concluded to be too risky. The fourth and preferred option outlined a comprehensive political strategy containing four stages:

1. The creation of a new arrangement providing for tribal participation in current governmental decision-making;
2. A series of negotiations aimed at resolving specific issues related to natural resource policy, including timber harvest practices and minimum in-stream flows for fisheries protection;
3. The development of fisheries protection and development programs to broaden the responsibility for fisheries enhancement to reduce the potential burden on the business community; and
4. Assurance that governmental fisheries agencies manage salmon harvest to provide a safe margin of allocation to meet the tribe's expectation for increased harvest.

The NRRC was founded on the belief that deadlocks over natural resources policy can be constructively addressed through direct communications between adversaries to facilitate their search for common ground (NRRC 1990). The need for a neutral convener in such deliberations defined the NRRC's principal role.

²⁸¹The Washington state business community formed the Northwest Water Resources Committee as a party in U.S. v. Washington. The recommendations prepared for the committee were contained in the report entitled "U.S. v. Washington, Phase II: Analysis and Recommendations". Report prepared for the Northwest Water Resources Committee. September 1981. Seattle, WA.: Gordon, Thomas, Honeywell, Malanca, Peterson, and O'Hern.

NRRC's formation resulted from the problem solving approach sought by the Northwest Water Resources Committee and the tribes in discussions exploring alternative ways to resolve long-standing natural resources disputes. The NRRC was formed when committee members faced continued disagreement between themselves and the tribes in seeking long-term solutions to resource use.

Unlike traditional forms of mediation, the NRRC was formed as a coalition of members from the business, environmental, and tribal communities to help resolve disputes in the renewable resource arena. By focusing on broad problems and within a process for generating legislative objectives, the NRRC, Fraidenburg asserts, "acts as a body for generating policy." The NRRC's neutral forum was recognized also by the Washington Department of Fisheries when it requested its facilitation in breaking the fisheries management deadlock with the tribes. That dispute had created a litigation free-for-all that threatened to envelop other resource policy issues in an endless, and likely unsatisfactory, series of litigation (NRRC 1990:10).

NRRC Experiences - The first high profile project undertaken by the NRRC dispute resolution approach focused on the management of Indian and non-Indian salmon harvest in the state. As a result of the NRRC mediation, the Washington Department of Fisheries and the treaty tribes now successfully co-manage the state's salmon runs. Under co-management, a conservation responsibility became shared by both the state and the fishing tribes. Another important project of the NRRC, The Long Live the Kings Project, responded to the decline of king, or Chinook salmon, with an approach to construct a series of short-term enhancement projects in an effort to rebuild the degraded runs of wild salmon. The approach focused on building broad consensus about the need for wild salmon enhancement. The strategy employed in the approach was based on undertaking specific demonstration projects with expanded participation to include the general public, and to devise an organizational mechanism to conduct future projects. The successes of these two early projects prompted the NRRC involvement in other environmental policy mediations involving the tribes.

Fraidenburg, in recognizing the NRRC approach as a response by the business community to the rise of tribal influence in water resources and land use issues, associated the increased tribal role in salmon harvest decisions "as a prerequisite for restructuring the setting of environmental policy that dealt with water and land use" (Fraidenburg 1989:235). Fraidenburg argues that the coalition process established through NRRC mediation represents an exclusionary process that concentrates natural resource policy-making power under the aegis of conflict resolution. He further refers to the NRRC as a "new oligopoly" in its process of privatizing policy-making, stating that "it is a mechanism that affords a substantial opportunity for its supporters and participants, who are not accountable to the general electorate, to forge public policy" (1989:236). Fraidenburg concludes "the interest group coalition behind the NRRC and the inherent biases of this 'new politics' circumvents important safeguards of existing public processes. If existing policy development procedures were unsatisfactory, greater privatization has moved the process even further from such safeguards" (Fraidenburg 1989:237).

While Fraidenburg raises legitimate concerns regarding the procedures undertaken in public policy negotiation with respect to public involvement, the cooperative process, nevertheless, provided an important and direct role previously not available to tribal governments to participate in forging public policy. The nature of their participation is directly linked to their recognized proprietary interests in fisheries resources, and the acknowledgement that public policy affecting fisheries habitat bears a direct relationship on those property rights. Relying upon their proprietary rights, however, tribes have concurrently utilized the process of cooperative management to foster a broader recognition of their sovereignty rights as well. This has led to the redefinition of governmental relations with tribal governments in Washington State.

Tribal-Local Government Cooperative Agreements

Extending the principles of intergovernmental cooperation to the local level, several important efforts aimed at establishing cooperative institutional relationships between tribal and local governments have occurred in recent years. The three-year

"Tribes and Counties: Intergovernmental Cooperation Project"²⁸² assisted tribes and county governments in establishing a number of cooperative decision-making and problem-solving processes to address a spectrum of complex jurisdictional issues, ranging from land use and environmental regulation to taxation and service delivery. Table 7.4 summarizes many of the current efforts underway in developing intergovernmental cooperation between local and tribal governments and agencies in Washington State²⁸³ to illustrate a trend that is occurring in intergovernmental dispute resolution through cooperative approaches. It is noted that for those tribes participating in local cooperative negotiations, most contain reservation land tenure alienation suggesting that the motivation for their participation is related to their historic incorporation and the resultant local governments' presence in tribal on-reservation affairs. Other primary interests motivating tribal participation include the protection of off-reservation tribal proprietary fisheries and cultural resources.

Table 7.4
Cooperative Tribal-Local Government Projects
in Washington State since 1980²⁸⁴

PROJECT	TRIBAL-LOCAL PARTICIPANTS	PURPOSE
West Point Secondary Treatment Upgrade Project	Suquamish and Muckleshoot Indian Tribes; Metro	Cooperative effort to identify project impacts, design and implementation of mitigation relating to marine habitat issues.

²⁸²Facilitated as a project by the Northwest Renewable Resources Center, Seattle, WA.

²⁸³Many of these cooperative projects also involved the participation of federal, state, and regional governments, and private and public groups.

²⁸⁴Adapted from Northwest Renewable Resources Center (1992). "A Shortcourse on Tribal-County Intergovernmental Coordination." NRRC Tribes and Counties: Intergovernmental Cooperation Project. Seattle, Wa.

(Table 7.4 con't.)

PROJECT	TRIBAL-LOCAL PARTICIPANTS	PURPOSE
Columbia River Gorge National Scenic Area Management Plan	Yakima Indian Nation, Nez Perce Tribe, Warm Springs Tribe	The Columbia River Gorge Commission charged to protect cultural resources and treaty rights in the Columbia River Gorge National Scenic Area. ²⁸⁵
Puyallup Lands Settlement Agreement	Puyallup Indian Tribe; Port of Tacoma, Pierce County, the Cities of Tacoma, Fife, and Puyallup	The Agreement resolved a long standing land claim by the tribe and established a trust fund for tribal members, environmental enhancement and economic development and training programs.
Snohomish County Aquatic Resource Protection Program	Tulalip Tribes; Snohomish county	Sought to develop wetland and other sensitive area protection measures.
Seattle Water Department Relations with Muckleshoot Indian Tribe	Muckleshoot Indian Tribe, the City of Seattle, and Seattle Water Department	To foster dialogue towards the development of long-term agreements supporting tribal fisheries protection objectives.
Lake Roosevelt Forum	Colville Confederated Tribes and the Spokane Tribe, county, state and federal agencies	To establish a dialogue based on trust and respect for all participant views in seeking common ways to cooperative regional planning in the Lake Roosevelt region.
Whatcom-Lummi Nation Cooperation in Land Use Planning	Lummi Indian Nation; Whatcom County	Formed to initiate discussions for improved cooperation in land use planning, draft MOU guiding a collaborative process was tabled.
Skokomish Tribe-Mason County Government to Government Discussions	Skokomish Indian Tribe; Mason County	MOU executed approving a cooperative government-to-government relationship and seeking to minimize jurisdictional and regulatory conflict.

²⁸⁵On November 17, 1986 President Reagan signed into law an Act creating the 253,500 acre Columbia River Gorge National Scenic Area, providing for retaining the existing rural and scenic characteristics and encouraging compatible growth and development.

(Table 7.4 con't.)

PROJECT	TRIBAL-LOCAL PARTICIPANTS	PURPOSE
Seattle City Light Skagit River Agreement	Upper Skagit, Sauk-Suiattle and Swinomish Indian Tribal Community; Seattle City Light	Agreement serves as a \$100 million mitigation plan as condition to the FERC relicensing of three dams on the Skagit River for fisheries and wildlife protection, recreation, education, erosion control and protection and mitigation of cultural resources.
The Swinomish-Skagit Joint Comprehensive Plan	Swinomish Indian Tribal Community; Skagit County	MOU entered to guide a process for joint land use plan and implementation development. Hailed as a landmark in tribal-county coordination.
Indian Land Tenure and Economic Development Project	Swinomish Indian Tribal Community, Quinault Indian Nation, Skagit County, Clallam County	Facilitated discussions and educational sessions led to the development of two MOU's for tribal-local government cooperation in land use and timber management.
Hood Canal Coordinating Council	Port Gamble S'Klallam and Skokomish Indian Tribes; Kitsap, Mason and Jefferson Counties	Ongoing process of reorganizing policy coordination for protection and restoration of Hood Canal Waterways.

Hinderences to Effective Tribal-Local Government Cooperation

In a 1992 survey of Washington county and tribal planning departments, several important obstacles were observed to impede coordination between tribes and local governments.²⁸⁶ The survey identifies three categories of obstacles that limit effective coordination as: differences in planning approaches, jurisdiction differences, and sovereignty issues. The survey illustrates the widely-held perception regarding

²⁸⁶Doering, K. (1992). "Cooperation and Coordination Between Tribes and Counties in Washington: A Survey of Planning Department Staffs." Seattle, Wa.: Northwest Renewable Resources Center. The survey included all 18 Washington counties which contained Indian reservations and 25 of the 26 federally-recognized tribes.

the differences between tribal decision-making processes and governance structures from those of the counties, and how they often vary between tribes as well. While recognizing the existence of significant cultural differences between tribes and counties, the survey respondents largely supported the research findings that these normative differences needed better understanding in an effort to avoid "the inevitable misunderstandings that will result if these differences are ignored" (Doering 1992:5).

Jurisdiction and sovereignty were identified by the tribal survey respondents as the most important obstacles before further work in intergovernmental coordination can occur. Many county respondents expressed a frustration that tribes are "too focused on sovereignty issues," while tribes stressed the importance of educating counties about tribal culture and history in order that they understand why these sovereignty issues are considered "non-negotiable." Tribes also expressed the expectation that local relationships based on the principle of government-to-government, as established in the Centennial Accord, must replace the view of tribal governments as special interest groups.

The survey also identified an important difference between tribes and counties in their respective interpretation of the Brendale decision.²⁸⁷ Most county respondents interpreted the decision to mean that counties retain jurisdiction over non-Indian owned reservation fee lands. Tribes alternatively have interpreted the decision to mean that jurisdiction remains unclear and must be decided on a reservation-specific basis. County respondents indicated growing pressure from non-Indian constituents on reservations to exert jurisdiction, since non-Indians perceive they have "no say in tribal decisions" (Doering 1992:5).

The survey respondents observed that, while important progress has been demonstrated in local government cooperation in Washington State, misunderstanding and misinformation continue to prevail and contribute to the perception of power inequalities between the governments. Cultural differences affecting both tribal

²⁸⁷Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 109 S. Ct. 2993 (1990).

priorities and decision-making processes, differences in organizational and constitutional structures, and differing staffing and funding levels were each identified as contributing to these perceived problems. Doering (1992:7) compiles a number of recommendations from the survey respondents for overcoming observed obstacles in tribal-county cooperation in land use policy matters:

Regular Meetings between tribal and county planners was identified as the most frequently mentioned suggestion. Regular meetings would help planners stay informed about decisions being made that may impact each other's jurisdiction, and help build trust and mutual understanding.

Education was frequently mentioned in the survey by both tribal and county planners. Some suggested areas for increased education included greater knowledge of county and tribal council structures, tribal culture and history, the proper point of entry into the county or tribe, and a discussion of tribal and county priorities. It was observed that, while one jurisdiction may embrace certain priorities, the other entity may not necessarily share the same priorities.

Agreements, both formal and informal, were recognized as important steps in institutionalizing a tribal-county relationship and encouraging long-term cooperation between the planning programs of each government. Memoranda of Understandings, agreements, and protocols were mentioned as appropriate methods for achieving agreement for cooperative efforts.

Meetings between government elected councils was identified by several respondents as an important step in establishing long-term cooperative relations. Staff relationships are mentioned as being limited without the explicit support by elected officials.

The survey provides an important tool for assessing the experiences and recommendations of planning practitioners, especially as these practitioners are often called upon to suggest methods for overcoming inter-jurisdictional problems. There appeared overwhelming support from both county and tribal planners for increased cooperation and coordination. Virtually every respondent expressed a willingness to encourage greater government-to-government understanding as the means to overcome historic conflict.

Conclusion

The negotiated approach to natural resources conflict resolution between tribes

and the State of Washington necessitated a broader public policy response that opened avenues for tribal participation in many new areas of state-tribal interaction. The experiences depicted illustrate the process of tribal political development that began with the assertions of treaty rights and evolved to utilitarian and cooperative relations for resolving long-standing disputes related to fisheries harvest and habitat protection interests. While these experiences were motivated by interests to protect off-reservation tribal treaty rights within the jurisdiction of the state, the process was expanded under the Comprehensive Cooperative Resource Management model to demonstrate its effectiveness in fostering resolution to on-reservation issues involving the state and local governments. This approach is particularly prevalent to reservations exhibiting high degrees of incorporation as virtually all Puget Sound area tribes containing land alienation have participated in some form of intergovernmental negotiation.

The ensuing dialogue fostered by the negotiated approach encourages the development of social learning among its participants. The examples illustrated in recent cooperative agreements represent a progression in state-tribal organizational development that reached an institutional pinnacle with the Centennial Accord. That agreement formally ended a one-hundred-year period of adversity and conflict with the state's acknowledgment of the political sovereignty of tribal governments. The experiences cited also serve to illustrate the process of institutionalizing the cooperative model through its application, both horizontally, across agencies of state government, and vertically, to local government relations with tribal governments.

In the past decade, the tribes have experienced a radical transformation in their relationship to the state, which appears to offer a promising avenue to overcoming obstacles to their pursuit of self-determination. The new precedent favoring negotiated solutions through expanded and inclusive communicative dialogue may offer the path to the long-sought reconciliation of other forms of historic conflict posed by the external forces of the political economy.

CHAPTER 8

CASE STUDY OF THE SWINOMISH INDIAN TRIBAL COMMUNITY

Introduction and Purpose of Case Study

This chapter provides a case study of the Swinomish Indian Tribal Community to examine, in four separate parts, the nature of external governmental interferences as enabled through "reservation incorporation", the historic processes of the U.S. political economy's expansion into tribal affairs. The analysis tests the research hypothesis to demonstrate that Tribal goal attainment necessitates Tribal political action to overcome obstacles posed by independent variables. The analysis evaluates several approaches employed to intervene in the unilateral forces that operate upon the reservation. Following a descriptive background discussion of the Tribe's particular political, social, and territorial circumstances, a matrix is constructed in Table 8.3 to depict, as a general model, the several sources of external variables that operate within the Swinomish Reservation. The vertical axis of the matrix contains a range of planning activities advancing Tribal objectives. The horizontal axis identifies the sources of external forces as the interests of federal, state, and local governments, previously identified in Chapter 5. A discussion is then presented to review the planning approaches employed by the Tribe to advance its community development objectives through the exercise of political action. Political action is defined as the exercise of Tribal sovereignty to overcome external obstacles. The range of planning activities are then expanded in Table 8.4 to link these activities to the sources of Tribal authority enabling their conduct. The matrix also depicts the forms of obstacles that arise to challenge the Tribe's authority. Several methods are noted for overcoming these obstacles based on the several conflict resolution approaches reviewed in Chapter 7 and from the Tribe's own historic experiences.

Selection of the Case Study Events

Several case study experiences, or events, are included in this investigation to test the research hypothesis, treated as the case study proposition, against actual obstacles experienced by the Swinomish Tribal Community. The four case events were selected to provide a comparative breadth to the investigation's inquiry

concerning the process of the Tribe's political development and to observe the causal links between the exercise of political sovereignty on conditions that were formerly influenced by independent variables. The first two case events examine the process of employing previously dormant tribal powers to regulate land use and water resources. Each study examines the exercise of those powers through confrontational and cooperative approaches to resist the unilateral application of non-tribal government authority. The last two cases examine the application of those approaches to two non-conforming land use developments that pose a threat to Tribal interests. One represents a pre-existing use, the other a current development proposal.

The first case event examines, in two parts, the development of the Tribe's inherent authority to regulate the Reservation territory through zoning powers. The case examines the actions necessitated to overcome federal approval hurdles in order to affirm the Tribe's ability to regulate its land base. The second part examines the Tribe's exercise of regulatory authority by employing the jurisdictional model of "concurrency" as an approach to reversing the state's pre-emptive authority. The second case examines the historic development of the Tribe's ability to regulate water resources on the Reservation. As a prerequisite to support future growth, decisions regarding the availability of water provides, under the State's Growth Management Act within which Skagit County operates, a defacto form of control over land use decisions. The case investigates the Tribe's employment of two concurrent strategies: 1) the assumption of authority over the distribution of water supplies as a means to regaining control over its Reservation, and 2) the reversal of incorporation processes operating on the Reservation. In this case, incorporation is represented by the actions of state and local governments that historically appropriated and distributed the Reservation waters.

The third case event examines the exercise of the emerging Tribal regulatory authority over a subdivision development that was established unilaterally under County authority prior to the enactment of the Tribe's zoning. The "Kwonesum" case illustrates how a pre-existing, non-conforming land use became resolved through direct Tribal intervention that confronted the application of both State and County

jurisdiction. The final case examines the Tribe's ability to influence the outcome of a major development proposal that sought to avoid the Tribe's land use jurisdiction by attempting to comply only with a more favorable County regulatory authority. The magnitude of the project was deemed by the Tribe to be adequately sufficient in scope to uphold, under the Montana exemption, the Tribe's zoning authority if tested in litigation. This case event examines the Tribe's reliance on its utility authority to deny water availability to the project, thereby effectively pre-empting a unilateral land use decision under County authority.

While these case experiences demonstrate the application of tribal political action to confront external forces that interfere in tribal affairs, other approaches may also be employed that avoid confrontation and result in mutually agreeable outcomes. Washington State's gaming policy was described in Chapters 4 and 7 as a form of unilateral intervention that restricts the scope of gaming activities conducted by tribal governments. Rather than confront the State's restrictive regulations, the Swinomish Tribe chose instead to accept those conditions. The outcome of this accommodating approach provided the Tribe with immediate economic and employment benefits derived from its restricted gaming activity and avoided the delays, legal costs, and uncertainties associated with litigation. Under this non-confrontative approach, a compromise solution was deemed preferable over direct confrontation, and the remaining disagreements over certain restrictive conditions imposed by the State were deferred to a later time.²⁸⁸

Overview of the Case Study Design Logic

The four parts of the case study demonstrate the Tribe's ability to influence the outcome of events directed by non-tribal jurisdictions that affect Tribal territorial interests. The case events examined demonstrate the effects of Tribal engagement over externally controlled activities to influence outcomes that are favorable to Tribal

²⁸⁸The Swinomish Tribe and Washington State, in addition to several other Washington gaming tribes, have recently agreed to file a "friendly" lawsuit that requests the federal courts to decide the matter of state policy that prohibits the use of electronic gaming devices in Washington State.

objectives. The case events depict the absence of Tribal authority in the early development of the events, suggesting that the lack of Tribal political jurisdiction facilitated the intrusion of State authority. The cases demonstrate the factors that led to the Tribe's decision to engage the external forces and evaluates how the results contributed to the advancement of its self-governance goals.

The employment of Tribal political action is shown to be dependent upon two conditions: 1) the particular circumstances at hand; and 2) the extent of jurisdictional authority possessed by the Tribe. The former condition reflects the importance that is placed on a particular event to necessitate the Tribal intervention. The latter represents the Tribe's perceived authority to counter the event and effect a favorable outcome. The exercise of Tribal authority, supported by the research inquiry that describes the extent of Tribal powers over its territory, is further contingent upon the legal limitations encountered in applying those powers or through litigation that tests the Tribe's assertion of jurisdiction.

Each case study event demonstrates: 1) the identification of external forces that exert unilateral authority in Tribal affairs; 2) the processes contributing to the Tribe's engagement in the events; 3) the degree to which the outcome of the intervention was perceived to alter the unilateral actions, reverse Reservation incorporation by those forces, and advance Tribal goals; and 4) the degree to which the outcomes were attributable to the Tribal engagement rather than to other external factors. The analysis is conducted in several cross-case study comparisons to demonstrate the effects of the Tribe's exercise of self-government to reverse incorporation processes. The case analysis also demonstrates the employment of several alternative planning strategies, however, the case studies are not intended to demonstrate that one particular strategy is favorable over that of another. Rather, it serves to verify the role of the Tribal intervention as a determining factor to altering unilateral actions imposed upon Tribal affairs. The Tribe's interventions demonstrate the use of techniques that range from conflict to cooperation. In several of the events the conflict approach represented the initial engagement of Tribal political action. The resulting confrontational situation introduced a new factor that necessitated attention.

Resolution of the disputes resulted in three outcomes -- avoidance of the legal challenge, agreement to defer to Tribal authority, and agreement to apply concurrent authorities. The outcomes from each event demonstrate the emergence of the Tribe's role in determining future regional decision-making.

The logic employed in the case studies is the pattern-matching technique based on the comparison of empirically based patterns of effects against a predicted outcome. The research hypothesis advances that direct tribal engagement in its own affairs is necessary to produce desired outcomes and serves as the case study's predicted outcome. "If the patterns coincide, the results can help a case study strengthen its internal validity" (Yin 1994:106). Each of the case events examines different forms of external and unilateral governmental actions that are exerted on Tribal affairs. The case analyses are concerned with the overall pattern of results and the degree to which a pattern matches the predicted outcome. The case studies explore the phenomenon of Tribal intervention into regional decision-making to establish a causal link between the Tribal interaction, as an expression of its application of sovereignty over its territory, and its affect in reducing the independent variable's unilateral influence over those affairs.

By examining several case study events, the analysis has an advantage over a single-case design, by utilizing a replicability of its logic. The analysis strategy, based on the pattern-matching technique, interprets the case study data by building an explanation about the outcomes from each of the case events. Explanation about a phenomena is accomplished by observing causal links between the Tribe's intervening actions and the reactive behavior of the independent variables. Explanation-building occurs when the explanations reflect the case study's theoretical propositions. Yin (1994:111) points out that causal links may reflect critical insights into public policy processes or social science theory that may then lead to contributions in theory building.

The explanation-building process used in this investigation follows a series of iterations: 1) the initial proposition advancing the necessity for tribal political engagement with the independent variables to resist incorporation processes is 2)

compared with the observations in the first case study event, 3) the proposition is then verified, or where necessary modified, based on the observations, and 4) the process is repeated for the other case study observations. Under this technique, the initial explanatory proposition is subject to revision. Each of the case studies involve multiple variables resulting in a variety of possible outcomes. When the initially predicted outcome is observed through each case observation, a strong causal inference is established.

Background to the Swinomish Indian Tribal Community

Members of the modern Swinomish Tribal Community are descendants of the Swinomish, Kikiallus, Samish, and Lower Skagit Tribes. The ancestors of these groups lived in the Skagit River valley and on the coastline and islands around the river's delta. They shared the Coast Salish language. The culture and economy of the inhabitants of the Skagit region were centered around natural resources, including salmon, shellfish, and upland resources. There were a variety of abundant resources in the region, and the aboriginal groups often travelled over long distances to obtain them (Draft Swinomish Comprehensive Plan 1990). During aboriginal times, the most salient units of social organization in the Skagit region were the nuclear and extended family, the household, the winter village community, and groups of loosely affiliated villages (Roberts 1975). The first non-Indians to enter the Skagit region were Spanish, British, and Russian explorers who arrived in the late 1700's. These explorers were received cordially by the people of the Skagit region. When fur traders began to establish permanent residences, conflicts began to arise. The arrival of early settlers introduced smallpox, measles, and tuberculosis, all of which proved devastating to the Indian population: it is estimated that 80-90% of the native population died from these diseases (Roberts 1975). Settlers and miners began moving into the Skagit region in the late 1840's. This marked the beginning of a period of increasing conflict arising over the challenge to Indian rights to both land and natural resources. These tensions eventually led the non-Indians to demand treaties to confine Indians to remote reservations. The Treaty of Point Elliott served that objective by relocating tribes from the Skagit region to the Swinomish

Reservation.

The Swinomish Indian Tribal Community voted to reorganize its structure of government under the provisions of the Indian Reorganization Act of 1934. A Tribal charter, constitution and by-laws were adopted by the Tribal general council and approved by the Secretary of the Interior. The people of the Swinomish Indian Tribal Community have retained many aspects of their traditional culture. The importance of the social community and its members' relationship to it are integral to the Tribe's cultural identity. Many members continue to practice Seowyn, the traditional religious and cultural practices, and fishing continues as a central group activity, providing important points of cultural and economic association. The Tribe has sought to diversify its economy over the past two decades through community and economic development planning (Swinomish Overall Economic Development Plan 1994). The sharp increase in income producing activities over the past decade reflects the growing diversification of the Tribal economic base. The primary non-federal economic assets are marine waterfront lands that are largely leased to non-Indian users, limited scale timber harvest, and an industrial-commercial district located adjacent to a state highway. Continued expansion of the Tribal economic base is intended to provide opportunities for the economic enrichment and individual betterment of future generations.

The Swinomish Indian Reservation occupies the southeastern portion of Fidalgo Island in Skagit County, Wa., set aside by the 1855 Treaty of Point Elliott as a homeland for exclusive Swinomish Tribal Community use and further redefined by Executive Order in 1873. Unresolved questions have emerged challenging the authority of the federal executive branch to subsequently define and reduce the treaty-created reservations. These questions are currently being investigated by the Tribe as part of its land claim litigation to reacquire lands that were excluded from the Reservation by executive order.²⁸⁹

²⁸⁹For example, the Tribe had claimed the southeastern most portion of the Reservation known as McGlynn Island that had been physically disassociated from

One of the important normative differences identified in Chapter 2 between Indian and non-Indian cultures since first contact concerned attitudes towards land and landownership. Where non-Indians generally viewed land as a commodity, and incorporated it within a general system of free enterprise and individual ownership, Native Americans almost uniformly recognized the importance of communal sharing of land. The Allotment Act ignored this cultural conflict by transferring reservation lands from collective Tribal ownership to individual ownership. The allotted lands were held in trust for a period of 25 years, after which time they were eligible for transfer to fee-simple title. The Swinomish Tribal Community was severely disturbed by the results of allotment. Allotments on the Swinomish Indian Reservation were frequently of insufficient size for economic use, often found unproductive for agricultural uses, and conflicted with Indian notions of land utility. Over time, as Indian allottees were granted fee title to their lands, the fee patent allotments were sold to non-Indians to provide cash for poor families or to pay debts (Roberts 1975). The process of reservation land division and alienation occurred over a relatively short period of a few decades to result in the current checkerboard pattern of landownership.

The current land tenure condition is the consequence of the imposition of alien cultural values as manifested in past federal Indian policies. Despite recent social development gains in many areas, the economic conditions on the Reservation continue to be depressed. Consequently, establishing a viable, self-sustaining

the Reservation when a navigable waterway was constructed by the federal government and legally separated by executive order. The State of Washington subsequently granted title to the island's uplands. When the property was placed on the real estate market in the 1980's, the Tribe was successful in blocking sales when it announced its claims to the tidelands, preventing access to the property. A negotiated settlement between the property owners, the Tribe, and the federal government resulted in a special appropriation of federal funds to purchase the property and restore title to federal trust for the benefit of the Tribe. Similarly, settlement in trespass litigation by a railroad and two oil and gas pipelines resulted in negotiated agreement to lease those rights-of-way easements and clarify Tribal ownership of tidelands.

Reservation economy is the primary challenge facing the Swinomish and other tribes, a challenge complicated by a wide variety of historic obstacles. Land tenure patterns emerge as a central cause of inter-jurisdictional conflicts, and have impeded the ability of the Tribe to effectively use and control its land and its natural resources. Regaining that control is viewed by the Tribe as a necessary prerequisite to the advancement of its political and economic interests (Draft Swinomish Comprehensive Plan 1990). Jurisdictional interests operating within the boundaries of the Swinomish Indian Reservation have become highly complex, and include the active presence of the State of Washington and local governments in civil and criminal jurisdictional matters, hunting and fishing regulation, natural resource allocation and management, taxation and gaming regulation, and the regulation of the land base. The inherent right of the Tribe to exercise jurisdiction over these matters has been pre-empted through the intrusion of state and local authority.

Non-Tribal Interests in Reservation Affairs

Water Resources - One of the Reservation's most important natural resource is its surface and groundwater supply. The total groundwater storage capacity is estimated at 6.3 billion cubic feet (Swinomish Water Plan 1990). Under natural conditions the hydrologic system is in a state of dynamic equilibrium. On a long-term basis, inflow to the system is equal to outflow, and there is no change in the amount of water in storage between the land surface, the unsaturated zone, or in the groundwater reservoir. Precipitation is the major source of the Reservation groundwater and of all naturally occurring surfacewater. The Reservation groundwater aquifer is believed to be a sole source aquifer, contained entirely within the exterior boundaries of the Reservation.

The factors that affect the Reservation groundwater quality and quantity include several non-Indian industrial, commercial, agricultural, forestry, and residential developments permitted to locate on the Reservation by county and state, rather than tribal, authorization. These uses include the March Point petrochemical facilities that injected contaminants into deep wells adjacent to the Reservation that pose a threat to the Reservation aquifer; impacts from a former petroleum waste

disposal site located on Reservation fee lands, used between 1960-1970; failing shoreline residential septic systems; crop debris and pesticides from agricultural activities occurring on fee and leased trust lands; extensive timber harvesting and urban conversion practices authorized under state approval; saltwater intrusion into the groundwater aquifer resulting from state approved but largely unrestricted individual well withdrawal²⁹⁰; and state granted groundwater withdrawal rights to several state-created community water associations (Ibid 1990). Groundwater also provides the primary supply source to the Tribal water utility system that today delivers water to a large proportion of the Reservation population, and the Tribe has prioritized the development of a centralized management scheme for the groundwater resource. In the past, the Washington Department of Ecology has appropriated the Reservation groundwater to support, in part, urbanization patterns inconsistent with the Tribe's land use policies. Recently, the Tribal government intervened in the state's unilateral actions in water appropriations by declaring its primacy and sole authority for the regulation and appropriation of all Reservation waters and requiring compliance with Tribal land use policy.

Forestry - 75% of the uplands of the Reservation contain mixed deciduous/coniferous forest. The Swinomish culture and livelihood have historically been linked to the forest and its timber resources. The Coast Salish Indian lifestyle depended heavily on forest products that continue to remain important in many religious and cultural activities. The management of forest practices is identified by the Tribe as crucial for maintaining the cultural integrity and essential character of the Reservation homeland (Draft Swinomish Comprehensive Plan 1990). However, private landownership coupled with the State's pre-emption of Tribal regulation of fee

²⁹⁰The State of Washington's water rights exemption for individual wells withdrawing less than 5,000 gallons per day creates an unregulated system of withdrawal. Further, the state has never instituted hydrologic analysis of the groundwater aquifer to ascertain its capacity to meet the growing withdrawal demands. A Reservation water supply study conducted by the United States Geologic Survey in 1979 identified over 150 wells drawing water without a water right from the Reservation aquifer.

lands has created conflicts between forest practices and land use conversion, and Tribal land use policies. Further, the management of the trust forestry resource had historically been performed by the federal government, which encouraged the harvest of timber resources favoring economic criteria rather than the cultural preferences²⁹¹ favoring sustainability of the resource.

Tidelands & Fisheries - Salmon runs and the Tribe's commercially valuable fishery resources are dependent, in part, on the marine vegetation and water quality on and surrounding the Reservation. The abundance of eelgrass and kelp beds adjacent to the Reservation are important resources for supporting juvenile fish. Surrounding the Reservation are several water bodies important for fish habitat and migration. Diking and drainage to thousands of acres of wetlands both on and off the Reservation for non-Indian cultivation, coupled with waterway diversions serving marine commerce, all contributed to a diminished fishery habitat throughout the region.

Shellfish are important subsistence and commercial resources for the Tribe. Cultivation of shellfish, through aquaculture and enhancement strategies, are planned to provide viable commercial and enhanced subsistence value. Similk Bay and Northern Skagit Bay are traditional Tribal shellfish gathering grounds. Areas with intertidal shellfish enhancement potential include all of the marine waters surrounding the Reservation. Abundant shellfish found on the Reservation are dungeness crab and several clam species. Due to water quality pollution linked to residential development occurring adjacent to the marine waters of the Reservation, most of the productive shellfish areas had been closed to harvesting pending the abatement of point and non-point sources of pollution. In addition, several waterfront fee land property owners have challenged the Tribe's claim of ownership to the Reservation tidelands,

²⁹¹The Tribe surveyed community members in 1986 to identify preferences in the management of the Reservation forestry resource. The survey indicated a strong preference for sustainable forest practices protecting cultural and religious uses of the forest, employing selective harvest over clearcut techniques, and preferring manual release over aerial application of herbicides.

physically preventing Tribal member access to traditional harvest beds on certain Reservation beaches.²⁹² The clarification of title to tideland ownership continues unresolved pending future legal action.

Land Ownership - The General Allotment Act of 1887 divided the Swinomish Indian Reservation into parcels ranging from 40 to 160 acres for individual member ownership. The only lands remaining in collective ownership are the tidelands surrounding the Reservation and an 80-acre parcel containing the traditional Tribal Village, several smaller individual parcels, and two recently acquired larger parcels. The tidelands were never allotted with the division of lands under the Act, remaining in federal trust. The only exception are to tidelands lying in northern Similk Bay that were willingly sold by the Tribe, with Secretarial approval. The allotment system resulted in the transfer of land ownership from Indians to non-Indians, and approximately half of the Reservation has become alienated from Indian ownership. Presently, as noted in Table 8.1 below, landownership on the Reservation includes Tribal community holdings of 275 acres, or 4% of uplands and approximately 2,900 tideland acres. 50% of the land base is owned by individual Tribal members, of which approximately 20% is leased to non-Indians on a long-term basis. Fee-simple, non-Indian owned land on the Reservation accounts for 46% of the total land base. The majority of fee title conversion occurred in the first two decades of the century. Figure 8.1 depicts the checkerboard pattern of landownership by type.

²⁹²On one recent occasion, the Skagit County Sheriff was called to defend a private upland owner's interests in opposition to the presence of Tribal police officers defending the property and treaty rights of Tribal members attempting to harvest shellfish on claimed Tribal tidelands (Swinomish Police Department, 1994 Incident Report).

Table 8.1
Swinomish Indian Reservation Land Area by Type of Ownership

LAND OWNERSHIP TYPE	ACRES	PERCENTAGE
Non Indian Fee Simple	3,317	46.0%
Individual Indian	3,577	50%
Tribal Trust	275	4%
TOTAL UPLAND AREA	7,169	100%
Tidelands	2,900	

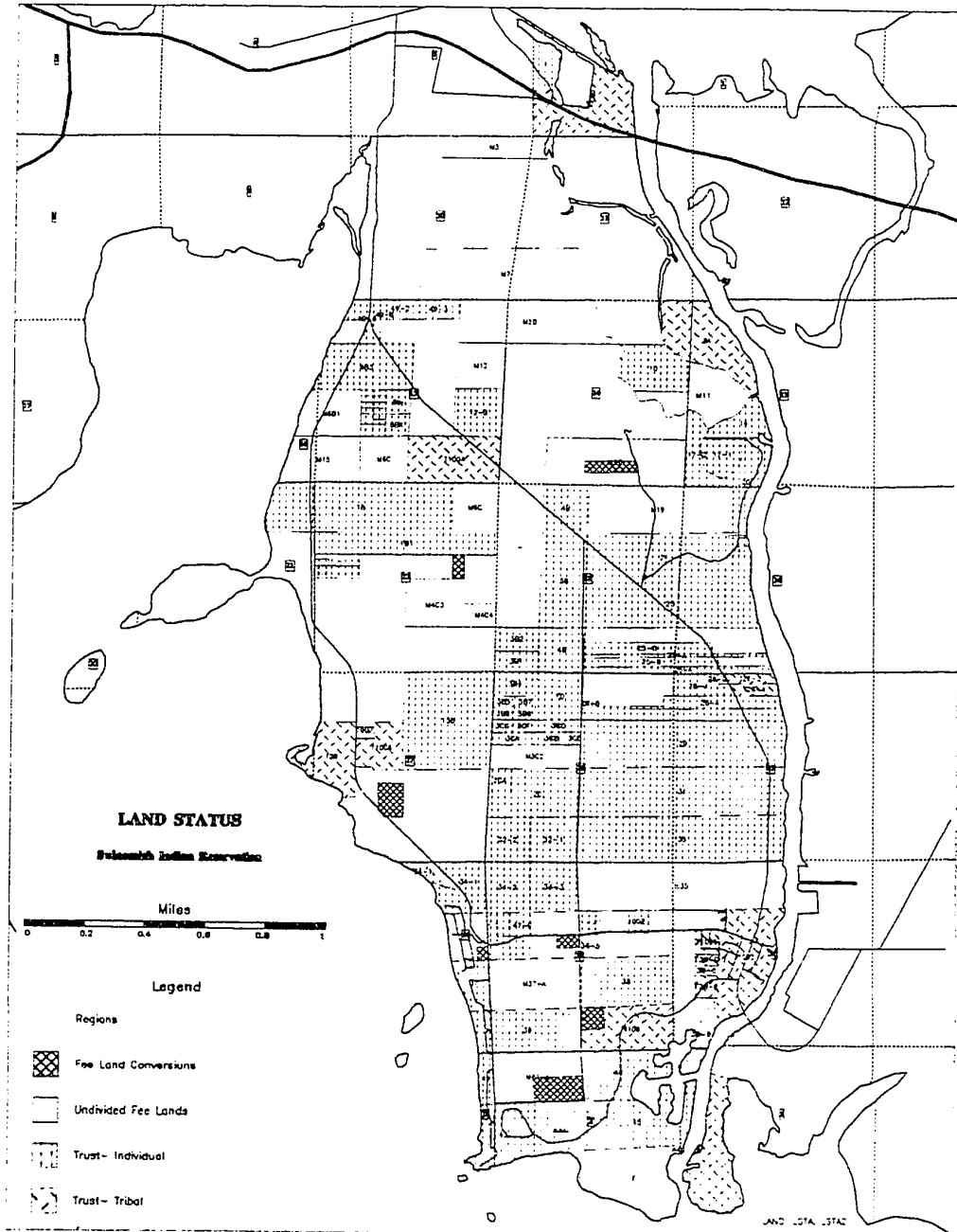


Figure 8.1
Land Tenure on the Swinomish Indian Reservation

Land Use and Population - Land use on the Reservation can be characterized as rural, commercial, forestry and agriculture, and waterfront residential. The only town is the Swinomish Indian Village that has been continuously inhabited for over 2,000 years and today contains the densely populated mixed use urban center of the Reservation. About 75% of the 7,169-acre Reservation, or 5,355 acres, is in active forestry use; agriculture occupies 1,150 acres (16%); residential areas occupy 572 acres (8%); and industrial and commercial uses constitutes about 92 acres (about 1%). The enrollment of Tribal members is estimated to be 665, with 495 of these members living on the Reservation and 170 living off-Reservation (Swinomish Employment Rights Office, 1995 Statistical Report). Table 8.2 provides the Reservation's projected growth by geographic subarea through the year 2020. The Reservation population is projected to grow at a rate of 2 to 3% annually.

Table 8.2
Projected Reservation Population Growth

Planning Subarea	1980	1990	2000	2010	2020
Pull and Be Damned	162	188	298	400	538
District no. 1	233	260	297	358	412
Kiket Beach	84	93	104	117	132
Swinomish Village	425	459	501	553	617
Shelter Bay	740	1,135	1,725	1,925	2,100
TOTAL POPULATION	1,644	2,135	2,925	3,353	3,799

Housing - The Indian population primarily occupies the Swinomish Village with several Indian residences scattered throughout the Reservation. The non-Indian population is concentrated in Shelter Bay, a private residential development largely located on leased trust lands, and along the westshore of the Reservation, located on leased trust and fee lands. Housing is provided by either the private sector or the Swinomish Housing Authority that operates to provide public housing to Indian families. The remaining residences are privately owned and provide housing to both Indians and non-Indians living within the Reservation boundaries. The Sewer

District no. 1 subdivisions of Sneeoosh, Shorewood, Sunnyslope and Reef Point together contain 101 homes on 150 lots. The Kiket Beach subarea consists of 50 residences, mostly beach homes, on 85 lots. The Pull and Be Damned leased land subarea has 125 residences on about 298 leased lots. Shelter Bay contains 508 residences on 935 lots. Altogether, about 875 housing units exist within the Reservation boundaries.

Cultural Resources - Swinomish ancestors have inhabited the Reservation area for more than two millenia. Numerous known archaeological sites are located within the Reservation boundaries, and several historic villages and midden sites have been identified around the Reservation coastline (Onat 1992). Qaliqet, located at the north end of the Swinomish Channel, was a permanent aboriginal village. At the site of the present Swinomish Village was Twiwok, a 2,000-plus year old Indian settlement. Lone Tree Point was the location of a campsite where the Lower Skagits occupied a seasonal village. The southernmost point of Eagles Nest also was a historical campsite. Preservation of these non-renewable cultural resources is important to the Tribe, as the data from these sites serve as an archaeological record of the Swinomish heritage. Deadman and Little Deadman Islands located in Skagit Bay are the sites of historical Indian burial grounds.

Historical sites on the Reservation built since treaty times include the Catholic Church, built in the Swinomish Village in 1868, and the fish trap, acquired and rebuilt in the early 1930's north of Deadman Island and operated until the late 1960's. The fish trap was the last remaining Indian trap permitted to operate in the continental U.S. The Tribe was forced to close its community operated fish trap enterprise during the 1960's, following the decline in salmon migration resulting from the construction of a jetty on the northfork of the Skagit River. The U.S. Army Corps of Engineers navigational improvement project was intended to reduce channel maintenance costs by diverting sediment laden river flows to deeper marine waters. The consequence of the project directly affected Tribal proprietary interests.

Public Services and Utilities - The Swinomish Tribe provides law and order

protection to all Reservation residents. With the passage of the Public Law 280 Retrocession Bill in 1988, additional funds for enforcement activities have provided an expanded Tribal law and order capability to assume civil and limited criminal jurisdiction. State and federal law enforcement agencies also maintain jurisdiction under specified circumstances. Cross-deputization agreements with local law enforcement agencies and the Skagit County Sheriff have been approved to overcome jurisdictional uncertainty and foster effective law enforcement services to all Reservation residents.

Water service is provided to the residents of the Reservation by a number of water supply systems and by individual wells. The Tribal public water system serves the Swinomish Village and the western shore of the Reservation. The Swinomish Utility Authority, established in 1984, extracts groundwater from a Tribal well field. The Utility has a secondary supply source agreement with the City of Anacortes, serving as a supplemental source.²⁹³ The Tribe voluntarily agreed in 1983 to participate in regional water supply planning and coordination as part of its strategy to end the state's historic and unilateral control of the Reservation water supply. The Skagit Coordinated Water Supply Plan (CWSP) now recognizes the Tribe as the sole purveyor for all lands located within the exterior boundaries of the Reservation. The regional water systems of Anacortes and LaConner are each interconnected with the Tribal system, as recommended in the CWSP, that further serves as a coordinating agreement between Skagit County, the State, and each water purveyor in the region. The plan represents an agreement that respects the geographic service area of each water purveyor. Prior to the adoption of the plan,

²⁹³In November 1995, the three tribes of the Skagit River, the City of Anacortes, and the Skagit County Public Utility District met to affirm their commitment to enter an agreement that, among other matters, establishes a minimum instream flow level for protection of fisheries habitat in the Skagit River, and provides 2.8 million gallon per day supply to the Swinomish Utility Authority through the City's water right permit. The tentative agreement and its implementation of minimum stream flows is subject to the approval of the Washington Department of Ecology and State Legislature.

the Swinomish Indian Reservation was divided among the service areas of the City of Anacortes, the Skagit P.U.D., and the Town of LaConner.

The Reservation is served by six community sewer systems and, in areas outside these systems, by individual on-site systems. The Tribal Utility Authority serves the Village area and the westshore, including the discharge flows from the state-created Sewer District No. 1, with treatment at the Town of LaConner's secondary sewage treatment plant. A separate Tribal secondary wastewater treatment plant serves the Tribe's commercial district on the northern portion of the Reservation. The Shelter Bay Community operates a secondary sewage treatment plant, and treated effluent is discharged into the Swinomish Channel. Shelter Bay Community was chartered as a Tribal Sewer District in 1993 following its petition to become integrated within the Tribe's governmental utility structure. The charter resulted to formally end the state's presumptive authority to administer the U.S. Clean Water Act's (CWA) NPDES Program. Permit issuance for the 1994 Shelter Bay plant expansion was conducted under a cooperative agreement that included the Washington State Department of Ecology's provision of technical review and recommendation, the Tribe's review and approval authority,²⁹⁴ and final permit issuance by the USEPA.

The twenty-lot Kwonesum Community, approved in 1977 by Skagit County over Tribal objection, utilizes a community septic tank and drainfield system that is believed to trespass on Tribal tidelands, and currently violates Tribal health code standards. In 1995, the Tribe agreed to retroactively permit the subdivision as a non-conforming land use conditioned upon the conveyance of the water system to the Tribal Utility Authority and further improvements to the wastewater disposal system. The historical developments occurring over the past two decades are more fully examined under the Kwonesum case study. The state-created Skagit County Sewer District no. 1, serving several residential plats that were also approved

²⁹⁴Tribal permit authority was conducted under its Coastal Zone Management Program, the Tribal Environmental Policy Act, and the Tribal Building Code.

unilaterally under County authority, was required to connect with the Tribal utility system under a USEPA compliance order after violating federal CWA water quality standards. Previously, it provided only primary treatment with outfall into Skagit Bay. Following several years of conflict among tribal, state, and federal agencies and the District, an agreement was reached requiring the District to connect to the Tribal utility system and to remove its outfall.²⁹⁵ The Tribe has also requested that the District reorganize as a Tribal Utility District pursuant to its utility laws in order to preclude the State's jurisdictional intrusion within the Reservation. The District, however, continues to resist political affiliation with the Tribe.

Responses to Threats to Tribal Control of Territorial Resources

Competition for Reservation resources and the continued application of County and State jurisdiction over Reservation lands and resources have resulted in frustrating the exercise of Tribal governance. A strategic approach was employed by the Tribe to identify and counter external interventions that pose a challenge to the exercise of Tribal regulatory authority over the Reservation environment. Two categories of interventions were observed: challenges that assert direct control of the management, regulation, and allocation of on-Reservation territorial resources, and threats that diminish treaty resources located off the Reservation.²⁹⁶ Several forms of external governmental interferences were observed to affect the Swinomish Tribe's political authority as represented in Table 8.3. The model illustrates the various sources of pre-emptive authority that are imposed by State and County governments to disrupt the exercise of Tribal governance.

²⁹⁵Although the District has been connected to the Tribe's sewer system since November 1994, the District failed to remove its outfall until January 22, 1996 following a Tribal demand that it immediately disconnect the outfall. The demand followed a Tribal investigation that uncovered a period of over seven consecutive days of illegal discharge into Skagit Bay.

²⁹⁶Through various discussions with the legal staff and the Chairman and governing body of the Swinomish Indian Tribal Community occurring continuously over a period between 1980-1995.

Direct and Intervening Conflict are forms of intervention imposed by these external forces to impede Tribal planning activity, thus resulting in a conflict situation. These interventions include the application of County land use regulations and environmental controls to fee lands, designation of Reservation water supply service areas, approval of public health facilities, and authority over Reservation roads and utilities. The State's interventions include the appropriation of groundwater, issuance of timber harvest permits, application of federal water quality certification, and the creation of state enclaves operating within the Reservation boundaries. Potential for Cooperative Mediation reflects various Swinomish experiences and other approaches discussed in Chapter 7 that form utilitarian relations to reverse the exercise of unilateral actions in Tribal affairs. This technique involves the mutual and cooperating behavior of both the Tribal government and the intervening non-tribal government. This category also pertains to emerging federal policies that provide for the delegation of federal program administration to tribal governments through the federal Self-Governance program and the EPA "Treatment as a State" policy. Historically Induced Conflict indicates a past event that contributed to causing the present conflict situation. This identification emphasizes the importance of historic understanding to aid in resolving the current conflict situation.

Table 8.3
Matrix of Intervening Forces

TRIBAL REGULATORY ACTIVITY	INTERVENING FORCES ACTING IN THE TRIBAL PLANNING SITUATION		
	FEDERAL GOVERNMENT	STATE GOVERNMENT	COUNTY GOVERNMENT
Regulatory Programs	H, M	C, M, H	C, M, H
Resource Management	H, M	C, M, H	C, M, H
Natural Resources Appropriation	H, M	C, H, M	M, H
Environment Protection	H, M	C, M, H	C, M, H
Public Facilities & Utilities	H	C, M, H	C, M, H
Cultural Resources, Off-Reservation	H	C, M, H	C, M, H

- C - Direct and Intervening Conflict that usurp tribal control over the management and allocation of Reservation resources;
M - Potential for Cooperative Mediation between tribal and non-tribal governments;
H - Historically Induced Conflict

Two Approaches To Reservation Planning

The Tribe sought to overcome external interventions in its territorial affairs by expanding its exercise of self-governance to enact sufficient powers to pre-empt state-asserted jurisdiction, and by entering into interlocal cooperative agreements. The first approach was directed to affirm the Tribe's authority to control the delivery of utility services, regulate surface and groundwater resources, manage timber harvesting practices, expand its law enforcement authority, and establish comprehensive land use policy and environmental regulatory programs.²⁹⁷ A

²⁹⁷Several additional regulatory programs include: a Water Resources Protection Ordinance outlining procedures for allocating and regulating the use of on-Reservation water; a draft Groundwater Quality Standards Act regulating the protection of water quality; a petition to designate a petroleum dump site for eligibility under the Superfund Cleanup program for administration by joint

comprehensive plan for the Reservation, adopted in the early 1970's, introduced the earliest modern-day exercise of Tribal control over its resources. The utilization of Reservation resources is dependent upon the Tribe's ability to control decisions affecting the Reservation territory.

As a planning strategy, the Swinomish approach advances Tribal goals through the exercise of political action to direct Reservation development. The Swinomish community development approach consists of a range of planning activities as represented in Table 8.4. First, the approach encompasses comprehensive planning, land use regulation, resource management, environmental protection, public safety, health and welfare protection, and the development of capital facilities and infrastructure to support the orderly development of the Reservation. These activities, similar to those practiced in local government, are supported under the Tribe's inherent police powers, subject to its own constitution. Secondly, the approach encompasses a role for stimulating economic growth. In that role, the Tribe functions as the focal point for directing actions and resources, and assuming risks, to develop the Reservation economy. In this respect, the Tribe provides a financing and entrepreneurial function in lieu of a private Tribal economy to stimulate capital formation in economic development. Thirdly, Swinomish planning is concerned with the preservation of the community's cultural identity. Tribal planning adapts its activities in a manner that advances the community's cultural priorities and preferences. Tribal planning, then, seeks to balance continued Reservation development to advance the welfare of its community while assuring

cooperative agreement; a draft MOU with the Washington Department of Natural Resources for coordinated forest practices management; a cooperative agreement with the Northwest Air Pollution Authority to receive technical assistance in the development of Tribal air quality programs; and cooperation in Skagit County's anti-pollution emergency response program. The Tribe is currently petitioning for delegation of "primacy" under the Clean Water Act in order to assume responsibility for administering federal safe drinking water standards on the Reservation, and the National Pollution Discharge Elimination Systems Permit (NPDES) following the EPA's designation of the Tribe for "Treatment as a State."

that development does not threaten to impede the preservation of the community social fabric.

Following decades of continued jurisdictional challenge to its land use and resource management authority, the Tribe recently sought to reconcile jurisdictional conflicts through a path of cooperative dialogue with State agencies and local governments in Skagit County. Several important inter-local agreements have been executed over the past several years. Each agreement was structured to advance government-to-government relations as a basis for cooperating in regional planning and resource management. Those agreements recognize the cultural priorities as well as the political sovereignty of the Tribe. A regional water supply coordinating agreement provides for cooperation in public water supply delivery and recognizes the Tribe's authority for all Reservation lands. A draft agreement for the administration of the federal National Pollution Discharge Elimination Systems permit between the Washington Department of Ecology and the EPA provides for joining the technical capability of state agencies with the jurisdictional authority of the Tribal and federal governments. Wastewater treatment and water supply agreements with the City of Anacortes and the Town of LaConner provide physical connections of regional utility systems. Finally, a cooperative land use agreement that is intended to resolve conflicts in land use regulation with Skagit County sought to overcome future conflicts in the application of concurrent and conflicting zoning schemes.

The activity of Tribal community development planning operates on a multi-dimensional level representing the three distinct forms of Tribal authority: treaty proprietary rights; inherent sovereignty; and federally delegated authority. Hence, tribes, then, can be understood as possessing governmental authorities similarly exercised at the local, state, and federal levels of government. Table 8.4 provides a model illustrating, albeit not intended as an exhaustive representation, the scope of program activities that constitute Swinomish community development planning. The programs identified in the first column represent major functional areas of government exercised by the Tribe. The activity column identifies illustrative

program activities performed under the major areas of authority. The third column identifies the general source of authority supporting the conduct of the activity. The fourth column indicates the forms of non-tribal jurisdiction that challenge or preempt the exercise of Tribal authority. Finally, the fifth column summarizes forms of conflict dispute resolution employed by the Tribe to resist and overcome the conflicts posed by the independent variables. The model forms a generalized framework to represent the field of tribal planning.

Table 8.4
Scope of Tribal Planning and its Conflict Situation

TRIBAL PLANNING AUTHORITY	PLANNING ACTIVITY	LEGISLATIVE AUTHORITY	JURISDICTION CONCERNS	FORMS OF DISPUTE RESOLUTION
Regulatory	Land Use Planing; Zoning; Environmental Protection; Shoreline Management; Building Codes.	Tribal constitution; Enabling legislation	County Jurisdiction; <u>Brendale</u> decision; <u>Montana</u> test.	MOU for County-Tribal Cooperation; GMA goals foster interlocal coordination.
Public Works and Utilities	Public Water Supply; Wastewater Treatment; Roads Solid Waste.	Tribal Constitution; BIA Self-Governance; EPA Treatment as State and program delegation;	Conflict with expansion of Regional utilities; State utility district enclaves on-reservation	MOU for cooperative regional planning; CWSP's; GMA goals for regional coordination.
Public Facilities and Services	Administrative services; Public Protection; Law and Order; Human Services; Parks and Recreation.	Tribal legislation; Indian Child Welfare Act of 1978; Self-Governance Act of 1994.	Self-governance; Retrocession of Public Law 280;	MOU for coordination of state services, ICW; Cross deputization MOU with local law enforcement agencies.

(Table 8.4 con't.)

TRIBAL PLANNING AUTHORITY	PLANNING ACTIVITY	LEGISLATIVE AUTHORITY	JURISDICTION CONCERNS	FORMS OF DISPUTE RESOLUTION
Environmental Protection	Water Quality Mgt; Groundwater Protection; Hazardous Waste; EPA Program Delegation.	Tribal Constitution; Tribal Environmental legislation; Amendments to Clean Water Act and federal delegation of programs.	EPA v. DOE; EPA Indian policy; State jurisdictional intrusion.	EPA delegation; Inter-tribal coalitions; MOU for cooperation with state in administration.
Resource Management and Planning	<u>On-Reservation:</u> Surface and Groundwater and Air Quality; Forestry; <u>Off-Reservation:</u> Tidelands; Shellfish; Fisheries.	Tribal Resource Legislation; USEPA Indian Policy; Amendments to CWA; Self-determination Act of 1975; Self-Governance Act of 1994; <u>Boldt I & II.</u>	Off-reservation treaty rights protection; State on-reservation jurisdiction; DNR intrusion; DOE water permitting.	TFW; Centennial Accord; Chelan Agreement; Tribal-State MOU.
Water Resources Appropriation	Regulation and Permit Control; Appropriation of Water Rights	Tribal legislation; EPA delegation; Tribal <u>Winters</u> rights; EPA Delegation of Authority.	State jurisdiction of excess waters; <u>Winters</u> Doctrine.	EPA delegation; Federal negotiated settlement process; Tribal-State MOU.
Economy	Access to Financing; Tribal Enterprise; Member Businesses; Leasing; Job Creation.	Tribal Constitution; Tribal Corporate Charter; Finance Act of 1978; IGRA of 1988; Self-Governance Act; BIA trust services.	Redlining the Reservation; Federal collateral restrictions; State taxation; State U.C.C.	Improved access to Bond markets and local financing; Federal regulatory reform; Tax base sharing; Tribal-State Gaming Compacts.
Housing	Public Housing; Rehabilitation.	Tribal housing programs; HUD Indian housing policy; BIA services.	Lender collateral requirements; Redlining practices;	Private housing financing; Trust land collateral; Self help programs.

(Table 8.4 con't.)

TRIBAL PLANNING AUTHORITY	PLANNING ACTIVITY	LEGISLATIVE AUTHORITY	JURISDICTION CONCERNS	FORMS OF DISPUTE RESOLUTION
Cultural Programs	Archaeological Resource Pro- tection; Ceremonial facilities and Sites off- Reservation.	Tribal protection legislation; Indian Civil Rights Act of 1968; American Indian Religious Freedom Act of 1978; NAGPRA.	State, local protection of off- reservation resources; non- Indian residency and Cultural Alienation.	Local-State MOU; TFW; Social Learning; Cultural Plurality.
Real Property Management	Lease Properties Management; Land Acquisition.	Tribal constitution; Self-Governance Act of 1994;	Fee property rights conflict; County jurisdiction; State taxation.	Linkages with private sector; Land title reform; County- Tribal MOU; Tax sharing.
Self-Governance	Assumption of Federal Programs and services.	Self-Governance Act of 1994; USEPA Indian Policy.	Duplication or conflict in services delivery with federal and state programs.	Compact agreements for trust/program delegation; State, local- Tribal MOU.
Inter- Governmental Relations	Federal, State, and Local Agencies; Special Districts; Inter-Tribal relations.	Tribal Constitutional Authority; Enabling Legislation; Federal and State Intergovernment Act.	Clarify basis of government-to- government relations; Resolution to overlap or inconsistent policy.	Centennial Accord; DNR Policy; Local-Tribal government MOU.

An Examination of Tribal Political Engagement with Independent Variables
Affecting the Swinomish Indian Reservation

Prior historic events that resulted in the allotment and alienation of the Swinomish Indian Reservation, coupled with the pre-emptive jurisdiction imposed by State and County governments, create a modern condition that constitutes a high degree of Reservation incorporation. Efforts by the Tribe to reverse the pre-emption of Tribal authority began over a decade and a half ago when interaction was initiated with both the State of Washington and Skagit County. The following examines the

results of the Tribe's efforts to resist the imposition of external forces and reverse the incorporation of the Reservation. The case study examines four distinct "case study events" to illustrate the outcome of Tribal political action that include: 1) the exercise of Tribal land use regulatory authority and development of cooperative approaches to land use policy implementation; 2) conflicts regarding the management and appropriation of Reservation water resources; 3) an examination of the events leading to Tribal acceptance of a pre-existing subdivision permitted unilaterally by Skagit County over Tribal objection; and 4) the intervention in the County's consideration of a development proposal that attempted to circumvent Tribal regulatory jurisdiction in preference to County jurisdiction. The benefits that resulted from Tribal intervention to resist the further incorporation of the Reservation are examined in these cases.

Case 1: Development of the Tribal Land Use Regulatory Authority

In 1855, members of the four Skagit River tribes or bands, among others, entered into the Treaty of Point Elliot,²⁹⁸ and agreed to cede to the United States all claims to their ancestral lands and reserved for themselves "for present use and occupation" the land area of the Swinomish Indian Reservation. Article 2 of the Treaty states in part:

All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said Tribes or bands ...

The Treaty of Point Elliot represented the first form of land use control on the Swinomish Indian Reservation by recognizing the reserved right of the Tribe to control land use and by establishing a U.S. trust status for the reserved Indian lands.²⁹⁹ The General Allotment Act was the first major Act of Congress to interfere with the reserved Tribal right to exclusively regulate land use on the

²⁹⁸12 Stat. 927.

²⁹⁹"An Introduction to the Swinomish Tribal Community Zoning Ordinance." Office of the Tribal Attorney. 1977.

Reservation. The effect of the Act was to alter the formally exclusive status of Reservation lands and obscured the exclusive jurisdiction of the Tribe to control land use.

The Indian Reorganization Act (IRA) of 1934³⁰⁰ repudiated the practice of further allotments of Reservation lands and restored inherent Tribal government powers, including the right to control the use of land within the Tribal territory unless expressly limited by Treaty or federal legislation. In 1972, the Tribe conducted a review of federal legislative and court decisions to ascertain the extent to which the federal government has exercised its plenary powers to provide federal zoning on the Reservation or by transferring this power to the State of Washington and determined that no such actions occurred (Swinomish Attorney 1977:2). The analysis further examined federal legislation conveying to the states the power over Indian reservations. Public Law 280³⁰¹ provided for the assumption of limited power by the states over Indian reservations, including criminal jurisdiction on the Swinomish Reservation and civil jurisdiction in certain enumerated areas. However, zoning and land use planning were not enumerated delegations of power under the scope of Public Law 280.³⁰² The Swinomish legal analysis concluded that the power of the Tribe to control Reservation land use remained fully intact, "unfettered by treaty, direct federal legislation, or federal executive orders." Further, the Indian Civil Rights Act³⁰³ applies elements of constitutional law to the governmental acts of tribes (Ibid:3).

The Swinomish Indian Senate approved a comprehensive land use plan in 1972 to "maintain a quality environment, not succumbing to the short sighted growth

³⁰⁰48 Stat. 984, 25 U.S.C. 461 et. seq.

³⁰¹67 Stat. 588, 68 Stat. 795, 72 Stat. 545, 18 U.S.C. 1162, 28 U.S.C. 1360 (1953).

³⁰²Oliphant v. Schlie, et. al. No. 74-2154 (9th Cir., August 24, 1976).

³⁰³82 Stat. 77, 25 U.S.C. Ch. 15.

and development processes that other areas in the Puget Sound region have bowed to." The Tribe exercised its inherent power by enacting the Swinomish Zoning Ordinance in 1978 to apply to all lands within the exterior boundaries of the Reservation, regardless of ownership type. The stated primary purpose of the Tribe's enacted zoning ordinance is to "provide guidelines and definitions for comprehensive plan implementation and to promote the health, safety and general welfare of tribal community members and others living on Reservation lands."³⁰⁴ The zoning ordinance, hence, meets two important tests as later established in Montana. On the one hand, it applies equal general protection for all residents of the Reservation, regardless of whether they are members of the Tribe or occupy trust or fee lands. On the other hand, it attempts to maintain the "essential character" of the Reservation. Section 2 of the ordinance establishes land use districts and appropriates approximately 70% of the Reservation land area to "forestry and rural" uses. This designation provides for the maintenance of the predominantly forested and rural Reservation character, designates land areas for residential uses that reflect the pre-existing residential use pattern along the shoreline areas, and provides an adequate supply of land to accommodate future residential growth and industrial and commercial development to support future economic activities.

The ordinance provides for outright permitted uses under each land use designation and establishes a review procedure for proposed development projects under a "contract zone" provision when the project is found to present a significant impact. Further, variance procedures entitle property owners to request relief from burdensome regulatory restrictions when demonstrated to "deprive a property owner of rights and privileges enjoyed by other properties under similar zoning classifications."

Although the Tribe has exercised its zoning authority since its enactment in 1978, two obstacles have prevented the full implementation of the code. The first obstacle is presented by Skagit County's exercise of zoning authority over

³⁰⁴Swinomish Zoning Ordinance, Section 1.01. 1978.

Reservation fee lands under delegated powers presumed valid under Washington State's Planning Enabling Act at Chapter 36.70, as amended. The resulting "checkerboard" regulatory scheme has created jurisdictional problems as the Tribe applies its jurisdiction over both fee lands and trust lands. This situation has caused problems due to the concurrent application of conflicting regulations. The second obstacle is presented by the complex federal review that is required in the enactment of Tribal legislation. Formal verification of the federal government's approval of the zoning ordinance was received on September 11, 1984, almost seven years following the Tribe's initial enactment of the code. Because of the provisions in the Swinomish Constitution, the review of certain forms of Tribal legislation by the Secretary of the Interior is required. Table 8.5 outlines the chronology of events leading to the Tribe's enactment of its land use regulation.

Table 8.5
Chronology of Events to Federal Authorization of Swinomish Zoning Ordinance³⁰⁵

DATE	DESCRIPTION OF EVENT
07-14-1976	Letter from Tribal Attorney Wilke transmitting Swinomish Zoning Ordinance as emergency measure pending forthcoming revisions to BIA Superintendent.
08-04-1976	Memorandum from Superintendent to Area Director transmitting ordinance.
12-28-1976	Memorandum from Superintendent to Area Director referring Tribal Senate's request for BIA status report on ordinance review process.
02-01-1977	Memorandum from Area Director to Superintendent refusing to approve the Swinomish Zoning Ordinance as emergency measure and indicating Secretarial approval is necessary if zoning ordinance affected fee-owned lands.
05-02-1977	Letter from Tribal Attorney Wilke to U.S. Solicitor Kuhn formally transmitting enacted Swinomish Zoning Ordinance and requesting expedited approval.

³⁰⁵The federal trustee system for review and approval of tribal legislation involves three levels of Bureau of Indian Affairs agency review: The Superintendent is delegated review and approval authority at the agency level; the Area Director reviews actions of the Superintendent; and the Assistant Secretary for Indian Affairs (formerly Commission of Indian Affairs) reviews actions of the Area Director and Superintendent and is delegated certain approval and rescission authority under the trust responsibility delegated to the Secretary of the Interior.

02-16-1977	Letter from Superintendent to Tribal Chairman indicating that approval under the Tribe's Constitution is to be made by Superintendent and that no official request for approval has been received.
3-4-1977	Letter from Superintendent to Tribal Chairman indicating that approval cannot be granted until an originally signed ordinance is submitted to the BIA.
03-09-1977	Letter from Tribal Attorney Wilke to Superintendent transmitting signed enacted Zoning Ordinance 43, dated 2-1-1977, with effective date of 7-2-1976.
03-09-1977	Memorandum from Superintendent to Area Director forwarding the Swinomish Zoning Ordinance as approved by BIA Agency Superintendent on 2-24-1977.
03-25-1977	Memorandum from Area Director to Acting Commissioner for Indian Affairs transmitting zoning ordinance and indicating approval is required from Secretary rather than a "review" pursuant to Tribal Constitution.
04-20-1977	Memorandum from Commissioner for Indian Affairs to Area Director confirming that ordinance is subject to Secretary approval.
06-1-1977	Swinomish Tribal Community Resolution No. 77-06-447 authorizing temporary withdrawal of zoning ordinance from Secretarial review after receiving notification from BIA of several concerns.
11-3-1977	Swinomish Ordinance 43(A), the Swinomish Environmental Policy Act (TEPA) enacted by the governing body.
11-3-1977	Swinomish Resolution No. 77-11-480 authorizing the resubmission of Swinomish Zoning Ordinance 43 and addendum thereof in Ordinance 43(A) for BIA approval.
11-18-1977	Memorandum from Superintendent to Tribe indicating BIA Tribal Operations review finding that zoning ordinance is "well thought out and concise."
11-18-1977	Memorandum from Superintendent to Area Director transmitting Swinomish Resolution No. 77-11-480 and Swinomish Ordinance 43(A) indicating zoning ordinance is being resubmitted and recommending approval.
11-23-1977	Memorandum from Assistant Area Director to Superintendent acknowledging receipt of resubmitted Ordinance 43 and 43(A), and acknowledging that Swinomish Resolution No. 77-06-447 withdrawing ordinance from Secretarial review was based on the "advice from the Washington D.C. office."
12-07-1977	Swinomish Ordinance No. 43(B) enacted establishing a Land Use Advisory Planning Board.
12-27-1977	Memorandum from Assistant Area Director to Superintendent recommending the Superintendent advise the Tribe to revise zoning ordinance according to Solicitor's suggestions to "remove provisions for criminal penalties and include due process provisions."
01-05-1978	Letter from Superintendent to Tribal Chairman returning Ordinance 43(A), and 43(B) unapproved and suggesting further revisions to ordinance pursuant to solicitor's guidelines.

01-11-1978	Amendments enacted to Swinomish Zoning Ordinance 43A and 43B and submitted for BIA approval. Ordinance was approved by Superintendent and forwarded to Area Director for Secretarial Review and Approval.
01-25-1979	Memorandum from Superintendent to Area Director inquiring about the Secretarial approval process.
02-13-1979	Memorandum from Area Director to Superintendent indicating the ordinance had been transmitted to Washington D.C. on February 28, 1978 and no reply has yet been received.
04-26-1979	Memorandum from Acting Deputy Commissioner to Area Director advising that actions on tribal zoning ordinances would be withheld pending the outcome of the <u>Trans-Canada</u> case involving tribal civil jurisdiction.
12-24-1980	Decision of the 9th Circuit Court of Appeals in <u>Trans-Canada</u> holding that the tribal regulatory action over reservation lands pursuant to approved tribal ordinance is valid was submitted by Tribal Attorney Wilke to Area Director.
03-15-1984	Letter from Superintendent to Area Director enclosing Swinomish Resolution No. 83-2-9 approving a rezone under the Swinomish Zoning Ordinance and requesting status of Swinomish Zoning Ordinance 43 as submitted.
05-16-1984	Memorandum from Superintendent to Area Director attaching 9th Circuit Decision in <u>Trans-Canada</u> in favor of Muckelshoot Tribe
11-26-1984	Memorandum from Assistant Solicitor for Indian Affairs to Area Director declaring that the Swinomish Zoning Ordinance was in effect because rescission action had not occurred by the Secretary within the 90-day review period. Hence, the Superintendents approval of the ordinance in 1978 remains effective.

On July 14, 1976, the Tribe enacted and submitted an "emergency measure" zoning ordinance to the Bureau of Indian Affairs' Agency Office (BIA-Agency) for approval. The cover letter referred to the Ordinance's Section 1.02 Jurisdiction, declaring that the Tribe "has complete control of all lands within the Reservation boundaries and the Tribal community retains the right to zone" all such lands.³⁰⁶ In a memorandum dated December 28, 1976, the BIA Superintendent indicated to the BIA Area Director that the ordinance is "binding until approved" and further indicated the BIA will request the Tribe submit a certified and numbered copy of the zoning ordinance for formal approval. On February 1, 1977, the Area Director

³⁰⁶Correspondence of Peter J. Wilke, Law and Order Administrator, Swinomish Tribe, to John W. Bushman, Acting Superintendent, BIA-Agency. July 14, 1976.

informed the Superintendent that the "emergency measure" zoning ordinance was "not approved and Washington D.C. approval would be required" as the ordinance affected fee lands. This requirement reflected the Tribe's particular Constitutional provision that required Secretarial review of Tribal laws affecting fee land property rights on the Reservation. The Tribe transmitted a revised ordinance to the BIA and requested expedited review on February 9, 1977. The Tribe's Constitution³⁰⁷ provides:

Any resolution or ordinance which, by the terms of this Constitution, is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the reservation who shall, within ten (10) days after its receipt, approve or disapprove the same. If the Superintendent shall approve any resolution or ordinance, it shall there upon be effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior who may, within ninety (90) days from the date of receipt, rescind the said resolution or ordinance for any cause, by notifying the Senate of such decision.

On March 25, 1977, the enacted Zoning Ordinance No. 43 was transmitted to Washington D.C. for Secretary approval. The Washington D.C. office, however, determined on April 22, 1977 that the ordinance required Secretarial approval because the Swinomish Constitution (Article VI, Section 1) further limited the Tribe's powers by making them "subject to any limitations imposed by the states by the Constitution of the United States. Because Interior Solicitor Kuhn has determined that land use restrictions constitute encumbrances against trust lands, federal law requires such encumbrances to be 'approved' by the Secretary, where such approval supersedes the Secretarial review process as required under Article VI, Section 1 (L) of the Swinomish Constitution."³⁰⁸

Based on a memorandum received from the U.S. Solicitor to the Secretary of the Interior regarding the complex status of tribal jurisdiction over non-Indians in

³⁰⁷Article VI, Section 1.

³⁰⁸Memorandum of Leslie N. Gay, Chief, BIA Tribal Relations to Area Director Robert Morrow. April 30, 1977.

civil matters, and at the urging of the BIA, the Tribe enacted Resolution No. 77-06-447 authorizing the temporary withdrawal of the zoning ordinance from further Secretarial review pending the Tribe's review of concerns raised. On November 3, 1977, the Senate then enacted Ordinance 43 (A) entitled the "Swinomish Environmental Policy Act" which amended the zoning ordinance. Among other purposes, Ordinance 43 (A) provides explicit procedures of due process to all persons affected by the ordinance. Ordinance 43 was again authorized for submission to the BIA for approval in Resolution 77-11-480. On December 7, 1977, the Senate then enacted Ordinance 43(B) that established a Land Use Advisory Board. The purpose of the Board was to advise the Planning Commission on the administration of the zoning ordinance and provided for the "appointment of non-member Reservation persons" in order to overcome the Solicitor's concerns that non-Indian residents were not adequately represented in the administration of the land use policy. On December 27, 1977, the Assistant Area Director, in a memorandum to the Superintendent, recommended that the Tribe further revise the zoning ordinance to reflect additional BIA concerns as expressed in the Solicitor's October 13, 1976 memorandum by deleting provisions of criminal penalties and the inclusion of an appeal process that conforms fully with the due process provisions of the 1968 Indian Civil Rights Act.

On January 11, 1978, the Tribe enacted amendments to the Swinomish Zoning Ordinance No. 43(A) and 43(B) to comply with the Solicitor's recommendations. Following a year of inactivity, on January 25, 1979, the Superintendent transmitted a memorandum to the Area Director inquiring about the status of the ordinance approval process and further relayed the Tribe's concern for "immediate Secretarial approval as this ordinance is needed because they cannot control the rapid development of the various projects within the Reservation boundaries." In a memorandum of April 26, 1979 to the Area Director, the Acting Deputy Commissioner of Indian Affairs indicated their "misunderstanding regarding the Tribe's withdrawal of the zoning ordinance from consideration" and further indicated "the Solicitor's Office has advised us that actions on any tribal ordinances

that purports to regulate fee lands should be withheld pending resolution of the Trans-Canada Enterprises, Ltd. v. Muckelshoot Indian Tribe case." It was the intent of the Secretary to withhold actions pending the outcome of the case involving the civil regulatory authority of tribes. It was apparent that the Washington D.C. office was not notified of the resubmission of the ordinance along with the revisions enacted pursuant to the BIA's recommendations. On December 24, 1980, the Ninth Circuit Appeals Court ruled in Trans-Canada that "tribal regulatory actions over all reservation lands is valid and cannot be restrained by federal court order."

On February 7, 1984, the Tribe approved a rezone request of a five acre site from forestry to urban residential to accommodate reservation housing needs³⁰⁹ and transmitted the authorizing resolution to the BIA again requesting a status update on the approval of the Swinomish Zoning Ordinance following the Trans-Canada decision. On May 16, 1984, the Superintendent issued a memorandum to the Area Director requesting a status report on the consideration of the Tribe's zoning ordinance, which had been held in abeyance since 1978. The memo added "since the Swinomish Tribe does not have an approved zoning ordinance and has no means of enforcing zoning regulations within the reservation, we would appreciate your advising this office of the status of the attached Tribal Resolution No. 84-2-9, and what action is necessary to reactivate the Tribe's zoning ordinance." In a confirming reply from the Assistant Solicitor to the Area Director dated November 26, 1984, the Solicitor advised:

Since the ordinance was approved by the Superintendent and not timely rescinded, it is effective . . . even though the ordinance is effective, however, the Tribe may want to consider re-enacting the ordinance and resubmitting it for approval. If the Tribe intends to enforce the ordinance against non-Indians and has reason to expect a legal challenge, it would probably be to the Tribe's advantage to have a substantive review by the Department rather than an approval by inaction.

Subsequent to the seven year effort to clarify the Tribe's ability to enact its

³⁰⁹Resolution No. 84-2-9, approved on February 7, 1984.

land use regulatory powers, rather than follow the recommendations of the Department to resubmit the ordinance again for substantive review and approval, the Tribe elected instead to further exercise its inherent sovereignty. This was accomplished by submitting a Constitutional amendment before the Tribal membership in 1985 to remove the Constitutional provision requiring Secretarial approval for land use legislation enacted by the Tribe. The amendment was approved by the voters and ratified by the Secretary, resulting to remove the requirement for the federal trustee's review and approval of any future enactments and amendments of land use regulations.

Coordination in Regional Planning

The resultant checkerboard land tenure on the Swinomish Indian Reservation has created jurisdictional problems in the application of two separate regulatory schemes, as both the Tribe and the County administer zoning programs that affect Reservation fee lands. Rather than litigate the jurisdictional issue to overcome conflicting land use regulations, the Tribe and the County agreed in 1986 to attempt to resolve the conflict by embarking on a joint planning program. The philosophy guiding the effort sought to overcome inconsistencies through a mutually agreeable land use policy for the Reservation. The effort was also intended to address cooperation in the administration of the separate, but concurrent, land use policies.

Representatives from the Tribe and the County began discussions on issues of mutual concern, acknowledging that historic events had created a situation wherein Indian and non-Indian interests were both present on the Reservation. They further acknowledged that neither government could successfully act unilaterally without incurring objection from the other party and the likelihood for litigation to follow. Both agreed that it would be advantageous to avoid costly litigation by resolving differences under a formal government-to-government relationship. They also recognized that an accommodation would facilitate the development of a longer term working relationship that could help to address other mutual concerns. Following discussions over a six-month period, the Swinomish Indian Senate and Skagit County Board of Commissioners entered into a Memorandum of Understanding

(MOU) in 1987 agreeing to pursue a process leading to the coordination of land use planning and regulatory activities on the Reservation. A comprehensive land use plan would be jointly developed with implementing ordinances and administrative procedures. The plan would be developed on the basis of sound planning principles that incorporated the distinct normative values of the Tribe, with questions of landownership and jurisdiction taking a secondary position. The Tribe and County also affirmed that cooperative problem-solving and consensus decision-making would be their preferred means of reaching joint decisions.

As specified in the MOU, a nine-member Advisory Planning Board comprised of four Tribal appointees, four County appointees, and a neutral facilitator was established to oversee the effort. Before addressing substantive issues, the Board attended a series of educational sessions on federal Indian policy and law; functions of tribal and county government; history of tribal and non-tribal culture to examine respective values and world views; and consensus-based negotiating and cooperative problem solving techniques. This early process served as a form of social learning that was intended to prevent misunderstanding about the parties' individual concerns and to foster a commitment to work towards a utilitarian end. A comprehensive land use plan for the Reservation was developed and forwarded to the Tribal and County Planning Commissions for consideration.³¹⁰ "It is a plan for the future which reflects Indian traditions, protects ancient and hallowed values and maintains a sense of present day reality. It balances the interests of Indian and non-Indian while acknowledging the reservation as an Indian homeland." (Draft Swinomish Comprehensive Plan, 1990). The Swinomish Joint Comprehensive Plan was the first comprehensive planning effort attempted between a tribe and a county in the nation. The process that was followed was based on the willingness of two

³¹⁰Coincidentally, on June 29, 1989, the U.S. Supreme Court issued its decision in Brendale v. Yakima Indian Nation. The decision stated that the county, its jurisdictional authority notwithstanding, must consider the tribal interest in its actions affecting the reservation. The opinion encourages coordination, a course upon which the Swinomish Tribal Community and Skagit County embarked three years earlier.

governments to address the difficult problems of overlapping interests through mutual cooperation rather than through confrontive litigation.

The Swinomish Comprehensive Plan articulates goals and establishes policies to guide the stewardship of the land and resources of the Swinomish Indian Reservation, and outlines a framework for an implementation strategy. Each jurisdiction relies on its own perceived jurisdictional authority, agreeing to defer questions of absolute jurisdiction, when necessary, to a future time. The approach recognizes that successful regional planning is the desired outcome, unobtainable under the application of uncoordinated regulation. The Plan expresses the cultural significance of the Reservation as a homeland: "a finite resource that binds its history, culture, traditions, and identity" (Draft Swinomish Plan 1990). As a finite resource, the Plan acknowledges the irreplaceability of the Reservation homeland, and seeks to insure that future uses and development are both deliberate and responsive to basic community needs.

The coordinated planning approach sought to advance Tribal self-determination through a Reservation plan that supports the inclusion of interests reflecting the non-Indian population. The approach strengthens meeting the criteria as set forth in the second Montana exemption as well as the Brendale test. Although not tested in litigation where such arguments may be advanced, the Tribe's planning approach was cognizant of the importance emphasized in these court rulings for the reasonable consideration of non-Indian property rights interests in regulating the Reservation. Although the process is primarily intended to foster utilitarian relations by accommodating County interests and avoiding impending conflict, it also contributes to altering social behavior through a process of learning about the diverse values that are reflected in both cultural populations. The ultimate goal is the acceptance of cultural and political plurality. While the application of the plural construct remains initially confined to the Reservation community, it nonetheless sets forth a new paradigm for a conception of a unified and cooperating region that is inclusive of self-maintained social and political enclaves.

Case Event Analysis

This case event has demonstrated the exercise of Tribal political action to intervene in the unilateral application of Skagit County's land use authority over fee lands within the Reservation. The case identifies the Tribe's history of eroded authority over its territory as non-tribal interests emerged onto the Reservation to occupy alienated lands. In the absence of a Tribal regulatory authority, the only land use control in place prior to 1978 was that of Skagit County. The enactment of Tribal zoning in 1978 represented the exercise of inherent powers that declared its authority to regulate the Reservation environment. The enactment of those powers was further described to be hindered by the required federal review and approval process. To overcome future hindrances to its self-government, the Tribe voted to amend its Constitution thereby furthering its own independence in enacting dormant powers. In applying its police powers, the Tribe acknowledged problems associated with the dual application of regulations. Rather than confront the authority of County police powers, the Tribe instead sought a process of collaboration. Table 8.6 summarizes the observed outcomes of that approach:

Table 8.6
Effects of Tribal Intervention to Land Use Regulatory Incorporation

TRIBAL ACTION	APPROACH	OUTCOME
Tribal regulatory powers dormant	Isolationism.	County supplants Tribal authority with its application of County regulations.
Tribe enacts Land Use Authority	Self-Help and Confrontational.	Tribal political action caused a condition of regulatory concurrency.
Constitutional Amendment	Self-Help.	Tribal action removes federal review obstacle to future enactment of powers.
Tribe enters MOU with County for Cooperative Planning	Cooperative; Conflict Avoidance.	Defers dispute of jurisdiction and builds mutual interests through cooperation.
Coordinated Plan Process	Cooperative; Pluralistic Accommodation.	Social learning contributes to greater understanding between community interests and fosters utilitarian relations.
Government to Government Relationship	Cooperative.	Fostered a long-term commitment beyond land use to resolve future conflicts through collaborative efforts.

Although Tribal political action did result to overcome federal obstacles delaying or preventing the enactment of its police powers, its exercise of zoning authority did not effect the removal of County authority on the Reservation. Instead, an accommodation occurred that precluded the unilateral application of County authority by creating a concurrency zoning scheme while substantive policy matters were further negotiated in an intergovernmental forum. The case event demonstrates the effect of Tribal political action first by declaring its interest in matters affecting Reservation development, and then by pursuing non-confrontative approaches that accommodated both Tribal and County interests. Since this process has not been fully concluded, a final analysis of its effectiveness to advancing Tribal goals in future Reservation development cannot be fully assessed. However, it is observed that the intervention proved successful in overcoming conditions of incorporation by replacing unilateral County jurisdiction with the Tribe's participation in formulating land use policy that is based on a government-to-government relationship. This approach, then, provides for the advancement of Tribal priorities as manifested in the concurrent application of Tribal goals and policies.

The case illustrates several approaches employed to influence changes in Reservation incorporation. Prior to the Tribal intervention, regulatory jurisdiction was conducted only by the County. As an expression of self-government, the Tribe exercised its dormant powers to confront County authority by declaring its authority to regulate all Reservation lands. The Tribe also exercised self-help to overcome problems encountered internally by removing burdensome Constitutional limitations to enact land use regulations. Seeking to avoid litigating the County's jurisdictional activities, an accommodation was sought to provide for a concurrent regulatory scheme. The cooperative approach, then, was viewed as a preferable tactic over litigation, where Tribal interests could be advanced without the risks and costs associated with litigation.

Case 2: Controlling the Reservation Water Resources

The Swinomish Tribe exercises treaty fishing rights to harvest salmon and

shellfish in the marine waters and tidelands surrounding the Reservation,³¹¹ and possesses unquantified federal reserved water rights (also know as "Winters Rights"³¹²) to Reservation groundwater based on a priority date of January 22, 1855, the date of the Treaty of Point Elliott. Consequently, the Swinomish Tribe has an inherent right to protect both the groundwater and adjacent marine waters from contamination and overuse.

Overuse of groundwater may occur as a result of the application of two separate appropriation schemes: federal Indian water rights and state prior appropriation laws. Indian water rights reserve to the Tribe a paramount right to use as much water as is needed to fulfill the primary purposes for which the land was reserved regardless of the date of actual withdrawal.³¹³ The primary purposes for which the reservation was reserved have been held to include domestic use, agricultural use, the protection of fishery harvests and habitat, and the creation of an

³¹¹Federal treaty fishing rights were reserved to the Swinomish Tribe in the Treaty of Point Elliott. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); 459 F. Supp. 1020, 1039-1041 and 1049 (W.D. Wash. 1978) (Compilation of Major Post Trial Orders, Finding No. 6 describing Swinomish usual and accustomed fishing areas).

³¹²12 Stat. 927 (Ratified March 8, 1859; Proclaimed April 11, 1859); Winters v. United States, 207 U.S. 564 (1908)

³¹³The quantity of the Tribe's Winters rights and the relationship between the Tribal water rights and other water rights are summarized in United States v. Anderson (591 F. Supp. 1 (E.D. Wash. 1982)): "Under State law, appropriative rights ripen through actual diversion of and continued beneficial use of waters from their natural channels. They are, however, subject to loss through non-use. In times of shortage, the prior appropriator's rights are filled before junior holders are permitted to take water. In contrast, Indian Winters rights implicitly reserve to the tribe a paramount right to use as much water which comes in contact with their reservations as is needed to fulfill the primary purposes for which the land was reserved. This is so regardless of whether the water was actually used at the time of the creation of the reservation, and priority of rights relates back to the date of the formation. Winters rights are subject only to private appropriative rights which have vested prior to the establishment of the reservation, and which have not been subsequently lost through abandonment or non-use."

economically self-sufficient homeland. As the need for water to fulfill these purposes increases, additional water can come only from unappropriated waters or the pre-emption of junior water right holders. Under state law, appropriative rights ripen only through actual diversion and are junior to all Tribal water rights.

To protect Reservation groundwater from overuse and to protect landowners with junior water rights who would otherwise be forced to terminate their groundwater use as shortages occur, the Tribe has recently intervened in the unilateral actions of the state, county, and regional water purveyors that had historically appropriated the waters of the Reservation or otherwise declared jurisdiction to determine the means for public water systems delivery throughout the Reservation. The appropriation of Reservation waters, including the unquantified reserved Indian water right, illustrates the condition of Reservation incorporation by the exercise of State and local authority over Tribal authority.

Regulation and Appropriation of the Reservation Waters

On January 15, 1975, Secretary of the Interior Morton issued a memorandum to the Commissioner of Indian Affairs regarding the Bureau of Indian Affairs' ability to regulate the use of water on Indian reservations. Due to pending litigation regarding tribal efforts to enact and exercise water use codes, the Secretary directed the Commissioner to "disapprove any tribal ordinance, resolution, code, or other enactment which purports to regulate the use of water on Indian Reservations . . . pending the ultimate resolution of this matter."³¹⁴ The Secretary believed that adoption of Departmental regulations then under consideration would avoid unnecessary confusion and litigation that would arise with the approval and implementation of tribal water codes.

On March 17, 1977, the Department released its proposed regulations

³¹⁴U.S. Solicitor -- Indian Affairs. "Status of Tribal Water Use and Allocation Codes." November 28, 1994. p. 1.

concerning tribal water codes³¹⁵ that sought to: 1) fulfill the Department's trust responsibility by creating a means to preserve and protect tribal water rights in perpetuity; 2) promote tribal sovereignty; 3) delegate water rules and regulation-making authority to the tribes; and 4) provide for present and future reservation development through the use of the tribes' reserved water rights (Ibid). The regulations provided the guidelines for Secretarial approval of tribal water codes that allocated and regulated the use of tribal reserved waters as well as control over non-Indians if certain due process provisions were incorporated in the code. However, the 1977 proposed regulations failed to be adopted maintaining the moratorium in effect.

In 1980, the Swinomish Indian Senate enacted the Swinomish Interim Water Code.³¹⁶ The resolution declared that the waters of the Reservation were determined to be "essential to the viability of the Reservation as a permanent home and to the economic development of the people of the Swinomish Tribal Community," and asserted the Tribe's sovereign jurisdiction over all waters of the Reservation. Further, the resolution recognized that adequate scientific information identified limited conditions for replenishment to the Reservation groundwater and that "at the present time no effective method exists for managing and protecting the water resources of the Reservation, with the result that overuse of available water resources, lowering of water quality, and loss of other environmental and economic amenities necessary to an acceptable quality of life may occur." The resolution prohibited the further use of Reservation waters pending the development of a comprehensive water resources plan. Due to the continuing Department of Interior

³¹⁵Department of the Interior, Bureau of Indian Affairs, Proposed Rules. "Indian Reservations -- Use of Water," 42 Federal Register 14885. March 17, 1977.

³¹⁶Resolution No. 80-8-748, "The Swinomish Interim Water Code" was enacted on August 12, 1980.

moratorium on approval of water rights laws, the ordinance was not approved.³¹⁷ Table 8.7 provides a chronology of events in the ensuing fifteen year effort by the Tribe to enact its regulatory authority to control the use of Reservation waters.

Table 8.7
Chronology of Events to the Enactment of the Swinomish Water Code

DATE	EVENT
01-15-1975	Secretarial directive for moratorium on tribal water codes.
08-12-1980	Swinomish Senate enacts Interim Water Code, Resolution No. 80-8-748 on August 12, 1980. BIA disapproves due to moratorium.
07-19-1990	Senate enacts Ordinance 73, the Swinomish Water Resources Protection Ordinance on July 19, 1990 Submits for approval.
10-17-1993	Letter from Tribal Chairman to Secretary requesting exception to the 1975 moratorium and approval of Ordinance 73.
03-16-1994	Letter from U.S. Solicitor Leshy to Tribal Chairman indicating exception from moratorium would be imprudent pending a factual report analyzing policy and legal consequences of moratorium.
02-05-1995	Office of the Solicitor issues report "Status of Tribal Water Use and Allocation Codes" dated November 28, 1994.
06-15-1995	Tribal Planning Commission holds public hearing on Ordinance 110.
07-11-1995	Senate enacts Ordinance 110 amending Ordinance 73.

³¹⁷Because the Swinomish Constitution was adopted under the provisions of the Indian Reorganization Act of 1934, the exercise of certain enumerated tribal powers may require Secretarial approval or review. Although the IRA tribal constitutional provisions do not expressly state that enactment of tribal water codes require Secretarial approval, three basic guidelines have been observed by the U.S. Solicitor when determining whether an IRA constitution requires Secretarial approval: 1) the Department retains authority to interpret tribal constitutional provisions requiring Secretarial approval; 2) Secretarial approval must be confined to those provisions of an ordinance that specifically require such approval; and 3) provisions requiring Secretarial "review" are equivalent to the provisions requiring Secretarial "approval". Of the 222 IRA constitutions, the Swinomish constitution is one of only 24 that require Secretarial approval when an ordinance directly affects non-members. Additionally, as indicated in a February 5, 1995 memorandum from the Acting Associate Solicitor of Indian Affairs to the Solicitor, only five tribes located in three states are currently pursuing enactment of a tribal water code requiring Secretarial approval. In Washington State, only the Swinomish and Lummi Tribes are actively pursuing said approval.

07-16-1995	Superintendent refuses to approve Ordinance 110 due to moratorium.
08-23-1995	Letter from U.S. Senator Gorton and Congressman Metcalf to Secretary Babbitt urging rejection of Ordinance 110 declaring tribal authority does not extend to fee property owners.
09-15-1995	Letter from Washington Governor Lowry to Tribal Chairman indicating support and willingness to cooperate in implementing tribal water code.
10-10-1995	Tribe discusses several recommended changes to Ordinance 110 with representatives of Secretary and the U.S. Solicitor.
11-08-1995	Senate enacts Ordinance 113, conditionally amending Ordinance 110.
11-15-1995	Ordinance 113 submitted for approval with additional amendments to address concerns raised by Solicitor and Assistant Secretary.

On July 19, 1990, the Senate enacted Ordinance 73, the "Swinomish Water Resources Protection Ordinance" and submitted the code to the Bureau for review and approval. Following disapproval by the Superintendent because of the Secretarial directive, and after reviewing the proposed BIA guidelines for water code enactment, the code was revised to address concerns raised by the Solicitor's office. In July, 1995, the Senate reauthorized an amended version of the code and submitted the ordinance for Secretarial consideration. On October 10, 1995, Secretary Babbitt, while reaffirming the moratorium on tribal water code approval, indicated his willingness to consider a conditional approval of the Swinomish water code under an exception order. The conditional approval requires, however, that the Tribe agree to further amend the code to consider more fully the interests of non-Indian property rights within the Reservation, as reflected in the minutes from the Tribe's public hearing of July 15, 1995³¹⁸ and other concerns expressed by the Secretary. The revisions provided for grandfathering pre-existing groundwater uses, including individual wells and community systems as granted by the State; the elimination of

³¹⁸The three primary concerns expressed during the public meeting and reported in the July 13, 1995 Skagit Valley Herald and the June 21, 1995 Channel Town Press included the general opposition to Tribal authority over the interests of non-Indian fee land property owners on the Reservation, the lack of non-Indian representation in Tribal government, and concerns regarding the protection of pre-existing water rights granted by the state.

water use fees; a procedure for appealing administrative decisions to the federal government; and a mechanism that provided for non-Indian water users to participate in the implementation of the code. The Tribe agreed to amend the code accordingly and resubmitted Ordinance 113 for approval. On November 12, a delegation of Tribal representatives met in Washington D.C. with the Secretary's representatives to discuss further concerns. Additional amendments were drafted that modified the code's approach to regulating water resources by deleting references to the Tribe's claim to ownership of all waters of the Reservation and, instead, acknowledging any water right as determined by a future federal court. The substantive amendments to the code, then, included five major changes:

Existing Uses. The adopted code provides for "grandfathering" existing uses by Tribal permit subject to regulation if it is demonstrated that the water use was abandoned, that there is a water shortage, or that the operator is wasting water;

Transfer of Water Permits. The code provides for the transfer of water permits provided the transfer does not result in a change in the amount of water uses, in the place of use, or in the location of the diversion;

Permit Fees. Fees have been eliminated for existing uses, and the Senate is authorized to adopt a fee schedule applicable to new uses;

User Representation. An Advisory Board is created with membership determined by users of Reservation waters who own Reservation fee property. Selection of members is by majority vote of area residents;

Due Process Provisions. Protections pursuant to the Indian Civil Rights Act are referenced throughout the code and administrative decisions are appealable to Swinomish Tribal Court and to the Interior Board of Indian Appeals.

The implications of these amendments resulted as an application of the Tribe's inherent police powers rather than as an appropriations instrument through the Tribe's proprietary water rights. Hence, the matter of determining the quantification of the Tribe's reserved right was deferred to a future time. The practical effect of this amendment was to avoid a complex adjudication process relying, instead, on sufficient supplemental off-Reservation water supplies that the

Tribe purchases to meet future Reservation water demands. The amended Ordinance 113 was transmitted to the BIA on November 15, 1995 and is pending Secretarial consideration. If approved, implementation of the water code would represent an important tool in the Tribe's regulatory program for managing the development of lands and resources of the Reservation. In the event the Secretary declines to approve the code, the Tribe may exercise self-help by amending its own constitution, as it did in 1985, to remove the requirement for federal review and approval of the water code. Several discussions occurred with the Washington Department of Ecology³¹⁹ to encourage the State's cooperation rather than their exclusion from the implementation of the code. This approach sought to address potential problems associated with the state's prior issuance of several groundwater withdrawal permits. In addition, land use permits granted under Skagit County regulation, under provisions of the Growth Management Act, now require the demonstration of availability of a water supply. Hence, the enactment of the water code would subject the conduct of County regulatory activities to the Tribe's issuance of water rights to assure a consistency in land use policy based, in part, on the Tribe's determination of water supply availability.

Regional Coordinated Water Supply Planning

Since 1984, Skagit County, the Swinomish Tribe, the City of Anacortes, the Town of LaConner, Skagit County Public Utility District No. 1 and other local water districts have worked cooperatively to develop a comprehensive and integrated water delivery system for Fidalgo Island. Pursuant to the State Water System

³¹⁹A meeting with Washington Department of Ecology was held on June 26, 1995 to review the proposed water code, identify past Ecology water permitting actions and to discuss the interests of the department for Tribal recognition of those actions, and to discuss ways that the two governments may cooperate in advancing the code's goals for insuring the long term sustainability of the resource quality and quantity. Subsequent tele-conference discussions occurred over the following three months to advise Ecology on the Secretarial review process. In September 1995, the Tribe received letters of support for continued cooperation in implementing the code from Governor Lowry and the Director of the Department of Ecology.

Coordination Act,³²⁰ Skagit County designated Fidalgo Island and the water service area of the Town of LaConner as a Critical Water Service Supply Area (CWSSA) in 1982. Although not required under state law, the Swinomish Tribe participated in the development of the Anacortes-Fidalgo Island Coordinated Water System Plan (AF-CWSP), and became a signatory to the AF-CWSP Interlocal Water Utility Future Service Area Agreement in 1984. The Tribe's decision to enter into cooperative negotiations in this process was supported by its desire to reverse the County's historic pre-emptive authority to provide water services on the Reservation, and its readiness to develop a Reservation-wide utility infrastructure under its inherent political jurisdiction. In 1986 the Skagit County Board of Commissioners imposed a moratorium on residential and other construction on Fidalgo Island, including the Reservation fee lands, as a result of the water shortage. Although it is the Tribe's position that the County moratorium is not applicable to lands within the exterior boundaries of the Reservation, the County's action evidenced a serious health problem associated with the lack of sufficient amounts of safe drinking water.³²¹

Following adoption of the water plan, Skagit County expanded the AF-CWSP to include the entire county in the Skagit County Coordinated Water Supply Plan (CWSP). Skagit County, the Swinomish Tribe and the other signatories to the AF-CWSP have worked cooperatively to implement their agreement over the last 11 years. Under the provisions of the water plan, the Swinomish Tribe is the designated water purveyor for all lands within the Swinomish Reservation. Under the agreement, the Tribe accepted the responsibility for providing water to all land uses of the Reservation that conform to Tribal policies.

During the eleven years that have elapsed since the signing of the AF-CWSP, the Swinomish Tribe has formed a Utility Authority and completed a number of

³²⁰Washington Revised Code § 70.116.

³²¹Legislative Findings No. 5, Ordinance 110, Amending Ordinance No. 73. Water Resources Protection Ordinance. Title 15 STC.

phased construction projects. The Tribe enacted Ordinance No. 51 in 1986 creating the Swinomish Utility Commission. The Commission was formed to oversee the construction and development of a water supply system for the delivery of safe drinking water to all residents of the Swinomish Indian Reservation and provides for representation on the Utility Commission by non-member residents of the Reservation, overcoming some of the past objections to a Tribal governance system that normally limits its officers to the Tribal membership. In phase I, two Tribal wells were drilled to provide groundwater to a storage reservoir and water lines were extended to service the more densely populated southern end of the Reservation including the Tribal Village where most of the Tribal residents live. In the second phase, water lines were extended to the western shore (Westshore) of the Reservation servicing fee simple lands. This area was subject to a County building moratorium imposed as a result of water shortage. In the third phase, contracts for the supply of supplemental water from the Skagit River were entered into with the City of Anacortes and a water transmission line was constructed connecting the Anacortes water supply to Tribal reservoirs. The fourth phase extended service to non-tribal homes on the southwest shore of the Reservation located on fee and Indian owned leased land. The Swinomish Utility Department now serves all but a small portion of the Reservation. The extension of water service to the last remaining populated area is planned in the near future.

Case Event Analysis

The engagement by the Tribe in regional water supply planning resulted in the recognition of the Tribe's declared jurisdiction for water service delivery on the Reservation by County, State, and regional water purveyors. The Utility Authority works in tandem with the pending Water Resources Protection Ordinance No. 113 to advance the Tribe's political authority to assure that the future development of the Reservation conforms with the Tribe's land use goals and policies. As an example of the cooperative approach to jurisdictional conflict resolution, the Tribe's effective participation in regional coordinated planning fully reversed the incorporation of the Reservation's public utility services to restore the Tribe's authority over its territorial

affairs.

Table 8.8 illustrates the effects of the Tribal interventions to the incorporation of water delivery and appropriation by State and County governments. Demand for water combined with the Tribe's dormant authority facilitated the exercise of non-Tribal regulation over the Reservation waters. The model illustrates the employment of several political actions that resulted to first resist, and then to reverse these incorporation processes. Tribal political action began with the declaration of exclusive authority to regulate both the delivery of public waters and the appropriation of groundwaters. In enacting its water code, several instances of compromise occurred as the Tribe sought to overcome concerns of the federal government in a legal matter that continues to be surrounded by jurisdictional uncertainty. Several amendments to the ordinance provided an accommodation to federal concerns by basing Tribal jurisdiction on its regulatory authority rather than its exercise of proprietary reserved rights over Reservation waters. This approach avoided confronting the State's position where, for all waters exceeding the reserved right, the State's authority was thought to prevail. This approach also was effective in sidestepping the necessity for a lengthy reserved rights adjudication process. The accommodation approach also served to avoid a potential conflict challenging prior State actions by "grandfathering" pre-existing water rights. The strategy further accommodated State interests by providing an avenue for the direct participation of the State as well as non-member users of Reservation waters in code implementation.

Similarly, the Tribe initiated its control over the delivery of Reservation waters by first declaring its interest as the Reservation water purveyor followed by its participation in the regional water supply plan. Regional governments cooperated by acknowledging the Tribe's authority and responsibility to service the Reservation service area. By participating in regional planning, the Tribe assumes its share of responsibility for furthering the goals of the regional plan, while, concurrently, insuring that future water service adheres to Tribal policies. This process advances Tribal interests by pre-empting the unilateral application of County jurisdiction that

now requires a Tribal determination of water service availability prior to issuing development permits. The effect of the cooperative agreement, then, reverses Reservation incorporation by creating a dependency relationship on Tribal decision-making. Further, the regional water service agreement ended the State's encroachment onto the Reservation by removing from the Reservation the authority previously exercised by non-tribal water purveyors.

Table 8.8
Effects of Tribal Intervention to Reverse Incorporation of Reservation Waters

TRIBAL ACTION	APPROACH	OUTCOME
Tribal powers dormant	Isolationism	Three non-tribal water purveyors assume delivery service authority on Reservation; State exercises water rights appropriations.
Tribe enacts water code	Political Action;	Tribe declares sole authority to manage and appropriate Reservation waters;
	Compromise and Pluralistic Accommodation;	Negotiates amendments to code to accommodate federal, state and local concerns;
	Cooperation	Tribe and State pledge to cooperatively support Tribe's code administration.
Tribe participates in Regional water supply plan	Confrontation;	Tribe declares exclusive jurisdiction for delivery of water on Reservation;
	Cooperation	County, State, and regional governments defer to Tribe as Reservation water purveyor; Reversal of incorporation by removing non-tribal authority from Reservation.

Case 3: The Kwonesum Subdivision Conflict

In 1974, an application for preliminary plat approval was submitted to Skagit County for a 20 lot residential subdivision on fee land within the Swinomish Indian Reservation. The land division required compliance with land use policy and regulation, a water right to supply the community water system, and sewage disposal system approval. The application was approved unilaterally by non-tribal

governments. This case study event examined over 129 documents containing official governmental correspondence and memoranda from the agencies of Skagit County, the Washington Department of Ecology (DOE), the State Department of Health (SDOH), the Swinomish Tribe and other agencies, newspaper articles and documents provided by the project applicant, the Kwonesum Associates. The study examines the sequence of events that occurred over a period of twenty years and the final outcome in resolving the land use conflict between the Tribe and Skagit County. Tribal objections to the proposal involved substantive concerns objecting to the County's presumption of jurisdiction, compliance with Tribal policies, trespass onto Tribal tidelands, public health concerns regarding sewage contamination, and the State's regulation of Reservation waters. Table 8.9 summarizes the chronological events that ended in the resolution to the longstanding conflict.

Table 8.9
Chronology of Events in the Approval of the Kwonesum Plat

DATE	EVENT
07-22-1974	Skagit County Health Department (DOH) reviews Kwonesum Preliminary Plat.
08-02-1974	Notice of Skagit County Planning Commission Hearing on 8-12-74.
08-12-1974	Conceptual approval granted by Skagit Planning Commission.
05-06-1976	Skagit DOH recommendation to deny Plat of Kwonesum for reasons of inadequate sewage disposal and public water source.
06-04-1976	Letter from Skagit DOH to applicant observing insufficient water availability for individual or community wells and recommending water supply from Swinomish Tribe and recommends postponement of final plat review.
06-14-1976	Skagit Planning Commission voted unanimously to approve final plat subject to state and county health department approval.
06-15-1976	Skagit DOH Memorandum to file: Skagit Planning Department indicated planning staff recommendation for the approval of plat was a result of directive from a County Commissioner.
08-05-1976	Skagit DOH Memorandum to file: documenting concerns with inadequate sewage disposal system and water supply.
08-10-1976	Skagit County Board of Commissioners approve final plat pending resolution to sewage disposal and water system design.
02-01-1978	Skagit DOH memorandum opposing design of sewage disposal system.

11-02-1979	Letter from State Department of Licensing to Swinomish Tribe requesting information to any jurisdictional claims over fee lands on the reservation pursuant to Kwonesum Associates' application for registration under the Land Development Act of 1973, RCW 58.19.
02-21-1979	Letter from Tribal Attorney to State Department of Licensing responding with Tribal jurisdictional claims to Reservation fee lands.
02-27-1979	Letter from State Department of Licensing requesting specific description of Tribal permits for disclosure to prospective buyers.
08-06-1979	DOH issues permit for installation of sewage disposal system.
10-31-1979	DOH issues approval of location for community well.
12-13-1979	DOH memo documenting objections received by Tribe regarding trespass onto Tribal tidelands, claim to Reservation groundwaters, hydrologic impacts to Munk's Creek.
05-05-1980	County issues final approval of community sewage disposal system.
08-29-1980	Kwonesum Associates submit application for state water right.
02-11-1981	Letter from Ecology to applicant regarding groundwater application G1-23501, requesting information on ownership and date of conveyance from Indian ownership.
09-26-1986	Letter from State Department of Health to applicant advising that the Kwonesum water system plans and specifications, application active since 1979, has been dropped from further consideration.
01-20-1988	Memorandum to DOH file following meeting with applicant who indicated interest in concluding approval process for water system with state. Memo notes that since the development lies in the Tribe's water service supply area under the 1985 Coordinate Water Systems Plan, the Tribe would have a first right of refusal to provide water.
02-24-1988	Letter from Ecology to DOH transmitting draft Report of Examination to Appropriate Public Waters of the State, that concludes that public groundwater is available for appropriation.
02-29-1988	Letter from Ecology to Tribe requesting that the Tribe advise of any objections and concerns to Report of Examination.
03-16-1988	Letter from Tribe to Ecology indicating that the applicant is subject to the regulatory jurisdiction of the Tribe and has not requested nor been granted Tribal permits to develop project.
05-27-1988	Letter from Tribe to Ecology providing comments and objections to Permit no. G1-23501.
07-15-1989	Letter from Ecology to Tribe requesting Tribe's Water Plan.

08-24-1989	Letter from Tribe to Ecology transmitting Water Plan and Swinomish Interim Water Code, and references Anacortes-Fidalgo Coordinated Water Plan of 1985 that recognizes Tribe as water purveyor for Reservation. Tribe also advises of intent to designate Reservation aquifer as "sole source" under federal Clean Water Act authority.
10-04-1989	Letter from Kwonesum Associates to Tribe formally requesting water service to the Kwonesum plat.
11-03-1989	Letter from Tribe to applicant outlining procedural conditions to be satisfied prior to a decision on water service to Kwonesum.
06-11-1990	Letter from State Department of Health approving the water system for a maximum of 7 connections. Further connections of up to 24 subject to issuance of state water right.
05-22-1992	Ecology issues Report of Examination to Appropriate Groundwater, Kwonesum Associates, No. G1-23501.
06-26-1992	Tribe files Notice of Appeal to Report of Examination.
01-25-1993	Letter to Kwonesum Associates from Tribe advising of failure to obtain necessary Tribal permits for land development at Kwonesum.
01-29-1993	At request of Kwonesum Associates, Tribe mails permit applications.
03-05-1993	Tribe issues stop-work order against Kwonesum development activity.
04-28-1993	Applicant submits application to rezone from forestry to residential and subdivide property to 20 residential lots.
05-14-1993	Letter from Tribe to applicant indicating completeness of application.
07-31-1993	Notice of voluntary dismissal to PCHB No. 92-116.
08-31-1993	Order to Dismiss PCHB No. 92-116.
05-25-1995	Swinomish Planning Commission approves at public hearing the application for non-conforming use and Plat of Kwonesum subject to several technical conditions.

On July 22, 1974, the Skagit County Department of Health (DOH) responded to an application for preliminary plat approval of the Kwonesum subdivision by requesting additional information to determine the adequacy of the project's sewage disposal and water supply systems. The correspondence indicated the State Department of Health would be required to review the community water supply system. The request for supporting information resulted in the postponement of a

public hearing before the Skagit County Planning Commission.³²² On August 2, 1974, a notice of hearing was advertised to consider the preliminary plat of Kwonesum before the Skagit County Planning Commission on August 12, 1974. At the hearing, the Planning Commission granted conceptual approval to the application.

On May 6, 1976, the Skagit County Department of Health issued a recommendation of denial to the Skagit County Planning Commission because the sewage disposal and community water supply systems were determined inadequate. The DOH requested additional information from the Indian Health Service on a groundwater investigation being conducted on the Swinomish Reservation³²³ to ascertain groundwater availability for the project. The IHS indicated preliminary evidence from the USGS groundwater study showed limited water availability and high total coliform counts in groundwater samples from wells in the project's vicinity. On June 4, 1976 the DOH recommended the applicant request water supply service from the Swinomish Tribe and abandon its plan to drill individual wells or a community well. The applicant declined to request Tribal water service. The correspondence also advised that the soil conditions for a community drainfield appeared too porous to treat sewage and posed a threat of contamination into the marine waters of the Swinomish Channel. The DOH recommended to the Skagit County Planning Commission that final plat hearings should be postponed until its public health concerns were satisfied. Disregarding the DOH recommendation, the Planning Commission held a public hearing on June 14, 1976 and unanimously approved the final plat subject to the approval of the State and County Departments of Health. In a memorandum to the County Planning Staff from the DOH dated

³²²Letter from Skagit County Zoning Administrator to applicant dated July 31, 1974.

³²³Final Report No. 79-12 issued in 1979 by the U.S. Geological Survey in conjunction with the Swinomish Indian Tribal Community, titled Water Resources of the Swinomish Indian Reservation, Wa.

June 15, 1996, staff raised an objection that it was not provided an opportunity to present its oral recommendations before the Planning Commission. A DOH memorandum to file documented that the County Zoning Administrator, in a phone conversation to DOH staff, indicated he was "embarrassed that they (the Planning Staff) had to recommend approval of the plat by the Planning Commission. That recommendation came as a result of a verbal directive fifteen minutes before the hearing from a [County Commissioner]."

In an internal DOH memorandum to file, a concern was indicated about the scheduled Commissioner Hearing to consider final plat review, as the DOH was unwilling to approve the sewage disposal system citing the likelihood that bacteria will "surely reach the Channel" where shellfish could be contaminated. The memorandum further acknowledged the likelihood of water shortages based on recent geodetic surveys. The memorandum reported a conversation where a State Department of Health Official stated the opinion that if the "plat is passed over our heads, we were in position [sic] for a lawsuit." On August 10, 1976, the Skagit County Board of Commissioners approved the final plat subject to approval of the sewage disposal and water systems by the State and County health departments. On February 1, 1978, the DOH reversed its earlier position and issued a memorandum to the applicant approving the sewage disposal system design. The Skagit County Department of Health then issued a permit to install a sewage disposal system on August 6, 1979 and approved a location for a community well on October 31, 1979.

A DOH memorandum to file dated December 13, 1979 documented a meeting held with the Swinomish Tribe where the Tribe inquired about the development review process, raised its concerns over the approval of the development, and questioned the County's authority for approving a water system. The Tribe announced that it had only recently become aware that the drainfield was located on Tribal tidelands, and announced its claim to control the groundwaters of the Reservation. Further, the Tribe indicated its concern that surface water flows on Munk's Creek abutting the property may be impacted.

In a letter dated February 21, 1979 to the Washington State Department of

Licensing, the Tribal Attorney responded to a request for information regarding Tribal jurisdictional claims to Reservation fee lands pursuant to the Kwonesum Associate's application for registration of the plat under the state's Land Development Act of 1979. The letter expressed the Tribe's position that state law regarding land development, including RCW 58.19, "is not applicable within the exterior boundaries of the Reservation" and the Tribe administers its own set of laws applicable to all lands and resources of the Reservation, including zoning and land use ordinances. The letter identified the zoning of the Kwonesum site as "forestry" under its code. The correspondence was the first written documentation regarding the Tribe's claim of exclusive jurisdiction, and indicated that the Tribe did not recognize the authority of Skagit County nor the State of Washington.

An application to Washington Department of Ecology was filed on August 29, 1980 for the appropriation of groundwater of 30 gallons per minute (gpm). In reviewing the Water Rights application, Ecology, on February 11, 1981, requested the applicant to provide evidence of property ownership and documentation of conveyance of title from the original Indian ownership. A draft Report of Examination to Appropriate Public Waters of the State of Washington, dated February 22, 1988, was transmitted to the DOH that determined an adequate supply of groundwater was available to appropriate. However, Ecology recommended reducing the quantity of water supply from 30 gpm to 20 gpm with a "maximum annual appropriation of 12.0 acre-feet for the community domestic supply, continuously, for a maximum of 24 single family dwelling units."³²⁴ The report further disclosed that the authorization to make use of Public Waters of the State is subjected to existing rights held by the United States "for the benefit of Indians under treaty or otherwise."

In a letter dated March 16, 1988, the Tribe informed Ecology that the

³²⁴ Although the Kwonesum plat included 20 residential lots, Kwonesum Associates also proposed to provide water service to adjacent properties from the proposed community well.

application for groundwater appropriation is subject to the regulatory jurisdiction of the Tribe and that the Kwonesum development has neither applied for, nor been granted, any permits to subdivide and develop the property. On May 27, 1988, the Tribe provided its comments and objections to the application for appropriation of groundwater from the Swinomish Reservation, and requested Ecology to deny the application. The Tribe's objections were summarized in the following three points:

- 1) The Swinomish Indian Tribal Community has a recognized legal right to regulate water appropriation from within the exterior boundaries of its Reservation, and has begun the implementation of a comprehensive water system for the entire reservation. Kwonesum Associate's independent and uncoordinated actions undermine the Tribe's regulatory authority in this area and adversely impact the goal of the comprehensive water use plan;
- 2) Kwonesum Associate's requested water appropriation may seriously impact stream flow levels in Munk's Creek such that treaty secured fishing rights will be impaired and suffer irreparable harm; and
- 3) Given the factual setting that the groundwater aquifer is entirely within the exterior boundaries of the Swinomish Reservation, the Ninth Circuit Court's ruling in Colville v. Walton is directly applicable and it is unequivocally clear that the state is without regulatory authority to issue a state permit for water appropriation to Kwonesum Associates.

The Tribe's letter was a response to the first formal request for Tribal input into the permit review and decision process during the fourteen-year period since the original preliminary plat was submitted to Skagit County. The Tribe's response represented an affirmative intervention to activities conducted under State jurisdiction by declaring such jurisdiction as invalid, as first affirmed in its February 21, 1979 letter to the State Department of Licensing. The Tribe's letter also reiterated a Ninth Circuit Court of Appeal's ruling³²⁵ that

A Tribe retains the inherent power to 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 health and welfare of the Tribe. This

³²⁵Walton, 647 F. 2d. at 52.

includes conduct that involves the Tribe's water rights.

In a meeting of October 3, 1989 between Ecology, Washington Department of Health and the applicant,³²⁶ an Ecology hydrologist expressed the opinion supporting the Tribe's earlier assertion that the aquifer was fully contained within the Reservation. The State Attorney General expressed his opinion that fee landowners on the Reservation may have a share in the Reservation's water right and asserted the state's right to manage all Reservation waters in excess of the Tribe's reserved allocation.³²⁷ Washington DOH officials also expressed the opinion that the Kwonesum community water system was illegal as it did not comply with the Coordinated Water System Plan.

Pursuant to the CWSP, Ecology and the State Department of Health confirmed that a water right could not be procedurally issued until the process regarding requests for public water service have first been exhausted. Under advisement by the State Department of Health in a letter dated September 21, 1989, the Tribe received the Applicant's letter of request for water service on October 4, 1989 to service the Kwonesum plat. This represented the first instance of recognition of Tribal authority by the applicant.

On November 3, 1989, the Tribal Planning Director advised the applicant that prior to rendering a decision to extend Tribal water service, several outstanding issues would first require resolution. These issues included:

1. The underlying issue of the consistency of the residential subdivision must be reviewed against Tribal land use policy;
2. Before water service or the issuance of a groundwater withdrawal permit, the wastewater treatment system must be demonstrated adequate; and

³²⁶Memorandum of October 9, 1989, Department of Ecology.

³²⁷Notwithstanding that the Swinomish Tribe's reserved water right had not been quantified as necessary to determine whether any excess Reservation groundwater exists.

3. Alternative options for supplying water to the site required further examination.

The letter requested the applicant to submit documentation supporting the Kwonesum plat, including as-built design drawings and specifications, a property survey, an operations and maintenance report on the water and sewage systems, and a formal Tribal Utilities water service request application and application fee. Concurrently, on February 1, 1990, the State DOH indicated that the Kwonesum water system would be treated as an "existing system" and would be approved for a maximum of 6 residential connections pursuant to the state's 5,000 gallons per day exemption rule. Service to a maximum of 24 connections, however, would be subject to the issuance of an Ecology Water Right. On August 7, 1990, the Skagit County Board of Commissioners voted to lift a building moratorium for the Kwonesum plat and allow up to the 6 total residential units to be constructed under the exemption.³²⁸

Ecology issued notification to the Tribe on May 26, 1992 of its final Report of Examination that granted a water right to Kwonesum Associates over the Tribe's objections and outlined the state's appeal process.³²⁹ On June 26, 1992, the Tribe submitted its Notice of Appeal to Water Right Application No. G1-23501 based on the objections contained in its May 27, 1988 letter, and a further objection based on procedural grounds that a formal determination was not properly entered. A formal hearing before the Pollution Control Hearings Board was requested to hear the Tribe's appeal.³³⁰

In an October 8, 1992 letter to the Tribe, the attorney representing Kwonesum Associates indicated his client's interest in resolving this matter by

³²⁸August 14, 1990 Skagit Argus, Public Notice. Until that action occurred, a total of two dwelling units were constructed on the site.

³²⁹Chapter 43.21B RCW provides for the appeal of decisions by Ecology to the Pollution Control Hearings Board of Washington.

³³⁰Swinomish Indian Tribal Community v. Ecology. PCHB No. 92-116.

settlement rather than through "adversarial proceedings before the Hearings Board and possibly the courts." On January 3, 1993, Kwonesum Associates submitted partial materials requested earlier by the Tribe to support its request for Tribal water service. However, on January 25, 1993, the Tribe initiated an enforcement action against Kwonesum Associates for land clearing activities without the prior issuance of a Tribal permit. The Tribe exercised its zoning powers over the development for the first time and encouraged the applicant to meet with the Tribal staff to resolve the matter. In response to the Tribe's letter, Kwonesum Associates requested applications for all necessary Tribal permits that were then forwarded to the applicant on January 29. Having still not received formal applications, on March 5, 1993 the Tribe issued a stop-work order against a construction in progress on the Kwonesum property. On April 2, 1993, the applicant submitted an incomplete application for the Coastal Zone Management permit and an environmental checklist, but neglected to submit the required processing fee. In a letter dated April 13, 1993, the Tribe again outlined the process necessary to satisfy Tribal administrative code requirements, including the process for requesting a rezone and subdivision plat approval. On April 28, 1993, an environmental checklist, preliminary subdivision application, rezone application, and other documents were submitted supporting an application for rezone from forestry to residential and to request approval to subdivide the property for twenty residential homesites. The Tribe concurrently held several meetings with the Skagit County Planning Director who was supportive of the Tribe's efforts to reach settlement through compliance with the Tribe's regulatory process and agreed to participate in several meetings between the Tribe and the applicant. On May 28, 1993, the Tribe issued a letter to Kwonesum Associates indicating that the application was determined to be complete subject to the preparation of several technical studies.

On July 31, 1993, the Tribe voluntarily withdrew its appeal from the action before the Pollution Control Hearings Board on the grounds that the Board lacks jurisdiction to determine the underlying federal and constitutional matters supporting the Tribe's claim to jurisdiction over the waters of the Swinomish Reservation. In a

letter dated August 9, 1993 to the Pollution Control Hearings Board, the State Attorney General's Office did not object to dismissing the action, but expressed Ecology's objection to the Tribe's filing a Memorandum of Authorities with the "apparent intent to have the Board dismiss the appeal based on the recognition of such arguments." Ecology disagreed with the Tribe's analysis regarding its jurisdiction over Reservation groundwater and the authority of the Board to review Ecology's authority to issue a groundwater permit. On August 31, 1993, the Pollution Control Hearings Board ordered the dismissal of Appeal No. PCHB No. 92-116.

On May 25, 1995 the Swinomish Planning Commission held a public hearing to consider and approve the application by Kwonesum Associates and authorized the Plat of Kwonesum as a non-conforming land use, subject to several conditions requiring the applicant to: complete construction of recommended improvements and transfer ownership of the community well to the Swinomish Utility Authority; meet several on-site design, stormwater management, and setback standards; obtain approval from the Tribe for connecting to the Tribe's sewage collection system or install an approved on-site system for twenty homesites; to avoid trespass litigation on Tribal tidelands, execute a legal instrument that recognizes Tribal ownership of the tidelands; and make available to the public the existing recreational facilities located on the tideland property. Each of the conditions were required to be met before the final plat could be approved.

Case Event Analysis:

This case has traced, over a period of twenty years, the capacity of the Tribe to assert its political authority to effect the compliance by the applicant to Tribal land use laws. While the case did not result to clarify the Tribe's water right authority over that of the State, pursuant to the Tribe's stated position, the State appeals forum does not possess the jurisdiction to make such determinations. Further, the case did not cause the removal of County regulation. Instead, the applicant voluntarily agreed to comply with the concurrent jurisdiction of both governments. The resolution of the dispute resulted in advancing several Tribal

interests, including: the recognition of the Tribe's tideland ownership claims; the eventual support by Skagit County that encouraged the applicant to comply with Tribal jurisdiction; the protection of cultural and stream resources along Munk's Creek, neighboring the property; and the provision of public access to recreational facilities. Water pollution abatement from the development's sewage facility will require the abandonment of the drainfield and installation of an acceptable alternative before full build-out may occur. Finally, the matter of State jurisdiction in allocating Reservation groundwater was avoided since the Tribe's Utility Authority will accept the community well field as part of the Tribe's public utility system. Appropriation of groundwater then relies solely upon the Tribe's reserved water right, which is not subject to State control, to service the now authorized development.

Table 8.10
Effects of Tribal Intervention to Effect Compliance with Tribal Laws

TRIBAL ACTION	APPROACH	OUTCOME
Tribal powers remain dormant	Isolationism.	Unobstructed exercise of County and State authority.
Tribal asserts zoning authority; water rights.	Confrontation.	County acknowledges Tribal interests but ignores assertion of authority.
Tribal files appeal in State's water right permit.	Conflict	Challenge to State authority to regulate Reservation waters.
Tribal participates in regional water supply plan.	Cooperation and Deferment to Tribal authority.	Concurrent activity that acknowledge Tribal water supply service area requiring compliance prior to water right permit decision.
Tribal enforces zoning and building code.	Conflict-Confrontational	Stop work order issued. Threat of litigation. Applicant elects to comply to concurrent Tribal and County land use authority.
Tribal approves project with conditions.	Negotiation and Conflict Avoidance.	Applicant accepts conditions, State water right application replaced with Tribal water service; Concurrency land use complied with; County-Tribal relations maintained and advanced.

Tribal intervention successfully employed several approaches to illustrate the validity of the hypothesis, as summarized in Table 8.10. During the early absence of a Tribal authority, Skagit County pre-empted the Tribe by applying its county-wide regulations. Tribal intervention was conveyed through the conflict approach that sought the applicant's compliance with Tribal laws, rather than directly challenge the application of Skagit County's authority. The conflict approach was also applied to challenge the authority of the State to grant Reservation water rights. Rather than resolving these questions before a State adjudicatory body, the Tribe imposed a condition upon the applicant that required the water system to be transferred to the Tribal Utility Authority. This approach avoided the conflict by removing the imposition of State water laws from the project. Water service to the project now becomes dependent only upon the Tribe's appropriation of its reserved water rights. Further, cooperative approaches also contributed to conflict resolution with the Tribe's participation in regional coordinated water supply planning. The State, County, and regional water purveyors acknowledged the Tribe's authority for water service delivery. This necessitated the applicant to request public water from the Tribe before a State water appropriation would be considered. Cooperation was also exhibited as Skagit County participated in several meetings with the Tribe and the applicant to encourage compliance with both governments as a preferable approach to avoid further conflict and possibly litigation. Finally, the applicant acknowledged that compliance with Tribal laws represented a preferable alternative to continued uncertainty that prevented development on the property. In this respect, the Tribe's assertion of jurisdiction over land use, water appropriations, and other claims represented sufficient incentive to persuade cooperative behavior. Although the final outcome represented a compromise to the strict application of the Tribe's zoning regulations to accommodate the non-conforming land use, the Tribe was agreeable³³¹ to granting an exception of its land use policy as a negotiated

³³¹Conversation with the Chairman of the Swinomish Planning Commission. September, 1995.

compromise to achieve several other important goals. This matter became resolved, then, through the acceptance of concurrent regulatory requirements, representing a utilitarian agreement between the parties, and the avoidance of State water rights jurisdiction through the Tribe's assumption of the community water system relying, instead, on appropriations from its own reserved water right in which the State did not assert an interest.

Case 4: The Island Meadows Development Proposal

The applicants for the Island Meadows development (Proponents) have applied to Skagit County for two development permits on the Swinomish Indian Reservation. On June 17, 1994, the Proponents filed a preliminary plat application for a business park that involves approximately 80 acres, and on June 2, 1995 Proponents applied for a planned unit development (the "PUD") permit that involves approximately 900 additional acres. Skagit County has determined the business park application was incomplete as it failed to demonstrate water service availability from the Tribe, and subsequently refused to accept the PUD application. The Proponents submitted an application for water service to the Swinomish Utility Authority for their business park on March 15, 1995, but have failed to make any request for water to serve their PUD.

By letter dated March, 21, 1995, the Tribal Utility Manager notified Proponents that their request had been forwarded to the Tribal Planning Department for review. Review by the Tribal Planning Department is consistent with the agreed process for handling water applications for new projects within the Swinomish Indian Reservation.³³² One of the first steps in the review process requires a determination of land use compliance. If the project does not conform to underlying land use and zoning, then the Proponents are directed to meet with the designated

³³²The Coordinated Water Systems Plan, page IV-3, provides that "Applications for new development are presented either to the incorporated cities if the development lies within the incorporated boundaries, to the Swinomish Tribal Community within the Reservation, or to Skagit County if it is in unincorporated areas outside the reservation."

purveyor to discuss water delivery requirements and land use changes needed to bring the project into compliance.

In a letter dated April 24, 1995, the Tribal Director of Planning expressed several concerns over the Proponents' project due to the potential effects it may pose to the welfare of the Reservation community: 1) the project encompasses approximately 1000 acres of land and 1/7th of all of the uplands within the Swinomish Indian Reservation; 2) the project may result in substantially increasing the current Reservation population; 3) the project may require significant governmental services by the Tribe; and 4) the project was inconsistent with both the existing Tribal comprehensive plan and zoning designation, conflicted with several existing County zoning designations, and conflicted with the proposed comprehensive land use policy as developed jointly by the Tribe and Skagit County. A further concern expressed by the Tribe involved the potential that, pending the adoption of the proposed joint comprehensive plan by both governments, the proposed development might disrupt the cooperative efforts of the governments to adopt complementary public policies.

Proponents have proposed to meet the County's water availability requirement by creating a new public water system that would withdraw groundwater from the aquifer beneath the Reservation and dispose of sewage effluent by field application on property located within the Reservation. Since the proposed development may pose a substantial effect on Tribal interests, the Tribe has determined³³³ that the proposed development will likely meet the jurisdictional tests established by the United States Supreme Court in Montana and therefore become subject to the regulatory authority of the Tribe. Consistent with the Coordinated Water Supply Plan, the Tribe informed Proponents that applicable Tribal zoning regulations designated the property as "forestry" and that, in order to make a determination regarding their request for water service, Proponents would

³³³Legal brief of Tribal Attorney Allan Olson, dated July 12, 1995, in Skagit County Administrative Appeal No. AAP-95-012.

have to take the necessary procedural steps to bring the project into compliance. In the letter dated April 24, 1995, the Tribe outlined three alternative suggestions to the Proponents:

1. Review and resubmit plans that conform to existing zoning; or
2. Request an amendment to the Tribal Comprehensive Plan and Zoning Ordinance to provide for the increased density and land use sought; or
3. Submit an application for planned unit development (PUD) under the appropriate provisions of the Tribal zoning ordinance.

In that same letter, Proponents were invited to contact the Tribe to review these procedural requirements more fully. On May 11, 1995, the Proponents met with the Tribe's Director of Planning and on May 15, 1995 the Tribe forwarded application forms to the Proponents to initiate the formal rezone application process. Without pursuing any of the land use alternatives identified by the Tribe, Proponents informed the county by letter dated May 19, 1995, that the Tribe had determined that it would not provide water service to the proposed project. On May 30, 1995, the Tribe responded in a letter to Proponents stating its dismay in its misrepresentation to Skagit County and that it continued to wait for Proponents' submission of a rezone and/or PUD application. Proponents again restated this misrepresentation in their letter to the County dated August 7, 1995, claiming that "the Tribe announced that . . . water service would not be extended to Island Meadows" in its April 24 letter. Proponents then claimed that in the April 24, 1995 letter, the Tribe concluded "that although it has the capacity and ability to provide water service, it will not do so since the proposed use does not comply with the Tribe's forestry zoning designation." The Proponent continued to refuse to request the land use modifications identified in the Coordinated Water Supply Plan and to participate in the Tribal planning process.

On May 22, 1995, Proponents proceeded to circumvent the Tribe's authority by requesting water service from adjacent water purveyors. By letter dated May 30, 1995, the Director of the City of Anacortes Public Works Department advised

Proponents that it was "unclear to me as to whether or not service had been denied by the Swinomish Tribal Authority" and that it is therefore "premature to process a request for water service." In addition, Proponents also made a request for water service to Skagit County Public Utility District No. 1. In a letter dated November 18, 1994, the Skagit PUD informed the Proponents that their project was in the "designated service area of the Swinomish Tribal Community" and that the PUD could not consider providing water service to Proponents unless "the Tribal Community is unable to provide water service to this development."

On June 2, 1995, the Tribe wrote a letter to the Skagit County Health Administrator to clarify misrepresentations made by Proponents and to make clear the status of Proponents' request to the Tribe for water service. In response to Proponents' statement that the Tribe had denied service to Proponents, the Tribe stated that Proponents' request should be considered "incomplete" and that it would not be possible to make a determination of water availability until Proponents took the necessary steps to bring their project into zoning compliance as outlined in the Tribe's April 24 letter. On June 12, 1995, the County wrote to Proponents to advise them that the Tribe's letters of April 24 and June 2 did not constitute letters of water availability and that their applications remained incomplete. Proponents filed a complaint in Whatcom County Superior Court and a notice of appeal of the County's administrative decision to the Skagit County Hearing Examiner on June 15, 1995.

In the June 27, 1995, complaint against Skagit County, Proponents requested the court to: 1) declare that the Swinomish Tribal Community did not have authority to impose its zoning regulations upon Proponents' lands within the Reservation; and 2) declare that Proponents were not required to obtain a letter of water availability as a condition to the County's accepting their application as complete. The Swinomish Tribe was granted leave to appear as amicus curiae and joined in Defendant Skagit County's Memorandum In Opposition To Application For Writ Of Mandamus filed by the Skagit County Prosecuting Attorney. At the hearing held on July 24, 1995, the Court denied the requested relief based upon Proponents' failure to exhaust

administrative remedies and advised Proponents to immediately begin participating in the Tribe's permit planning process.

In response to Proponents' appeal of June 15, 1995 before the Skagit County Hearing Examiner, five arguments were advanced by Skagit County in defense of their administrative decision denying the acceptance and vesting of the Proponents' development application.³³⁴ First, the County argued that it may lawfully require a Letter of Water Availability as a prerequisite to a complete and vested application. As the County argued before the Whatcom County Superior Court, local jurisdictions may create their own vesting rules for "discretionary," as opposed to ministerial, permits.³³⁵ Proponents' applications for the business park and the PUD permits are both discretionary permit applications and therefore subject to the County's application and vesting rules.

Secondly, Skagit County Ordinances require a Letter of Water Availability at the time of application in order to submit a complete and vested application. The pertinent provision of Section 12.48.240(1)(a) of the Skagit County Code provides: "Complete land division applications to the Department of Planning and Community Development must include: a) A public water system satisfactory evaluation by the Health Department." By memorandum dated February 27, 1995, the County notified Proponents that Proponents' projects would require a new "public" system in the event that water service could not be obtained from an existing purveyor. Proponents were thus given the option of obtaining water from a public water system or a new public system. In order for the County Health Department to perform a public water system evaluation, the County has to know which public water system to evaluate, a new system or an existing system. In the event that

³³⁴Adapted in part from the legal brief filed by the Swinomish Office of the Tribal Attorney dated July 12, 1995, and the decision of the Skagit County Hearing Examiner, Administrative Appeal No. AAP-95-012.

³³⁵Burley Lagoon Improvement Association v. Pierce County, 38 Wn. App. 534, 686 P.2d 503 (1984).

Proponents can secure water from an existing purveyor under the first option, Proponents must obtain a Letter of Water Availability from the purveyor. In that regard, the County informed Proponents³³⁶ that "The Coordinated Water System Plan (CWSP) prescribes that the Swinomish Tribal Utility, City of Anacortes and PUD must deny service before [they] can begin a new public system." In the event that Proponents were required to create a new public system, the County Health Department would have to evaluate the design of the new system. In her February 27, 1995 memorandum, the County Health Administrator pointed out that: "Since we have no aquifer information for this area, if you intend to use this process, we will need to ask the Swinomish Tribe for aquifer information since they have had a USGS study of the area and a well head study too. We do not have copies of these studies." Proponents also misstate the requirements of SCC § 12.48.204(1)(a) when they claim that "What the regulations require is that an applicant identify the source of water for the proposal and a commitment that the procedures for seeking water service will be followed."

Thirdly, the April 24, 1995 letter from the Swinomish Tribe did not constitute a Letter Of Water Availability for purposes of SCC § 12.48.204(1)(a). The Tribe's letter of June 2, 1995 was written to clarify the status of Proponents' pending application for Tribal water service and to distinguish between the "capability" of the Tribe to provide water service and the absence of any determination regarding the "availability" of Tribal water for the project. For purposes of determining when an applicant can request water service from an adjacent water purveyor, the CWSP requires a determination by the designated purveyor that it "cannot serve" the project. This is a physical test of capability under the CWSP. If the designated purveyor "cannot serve" a project, then an adjacent purveyor may consider providing service or alternatively a new public system may be established on an interim basis until the designated purveyor has developed the capability of providing service directly or agrees to manage the system for the developer. In its letter of June 2, the

³³⁶Skagit County Memorandum of February 27, 1995.

Tribe explained that although it had the capability of serving Proponents' project, it was impossible for the Tribe to make a determination of the suitability for "water availability" until Proponents had taken the necessary procedural steps to bring the project into conformance with Tribal land use policy. The Tribe further advised the County that:

Water is therefore not currently available to the Island Meadows project from the Swinomish Utility Authority. The current status of the application for water service is "incomplete" and should not be considered "conditionally approved" based upon the Tribe's capability to provide service.

Proponents' interpretation of the County's statement that the Tribe's April 24 letter "satisfies conditions of the Coordinated Water System Plan" was also taken out of context. That statement refers only to the "triggering mechanism" within the CWSP that permits a developer to request service from an adjacent purveyor when the designated purveyor declares that it "cannot serve" a project. The Swinomish Tribe's capability of providing water service meets the CWSP's threshold condition that the purveyor be physically capable of serving the new project. Under the CWSP, Proponents must take all of the necessary procedural steps to apply for water service from a designated purveyor capable of providing service (the Tribe) including those steps necessary to bring the project into compliance with Tribal land use policy.

Fourthly, the County argued that requiring Proponents to comply with the CWSP does not violate the vested rights doctrine. The CWSP provides a precise procedure for obtaining potable water for a proposed development. The major impediment to Proponents obtaining water is Proponents' refusal to proceed through the entire application process for obtaining water service from the Tribe. Proponents have therefore avoided the CWSP's application process based upon their own interpretation of federal case law to maintain that Tribal governments cannot regulate activities on fee lands within their reservations. The Tribe indicated in its testimony before the Skagit County Hearing Examiner that Indian tribes exercise substantial regulatory authority over activities on fee lands that threaten the health,

safety and welfare of the Tribe and its members. Furthermore, the Tribe stated that Proponents cannot simply assume that Tribal laws do not apply and then refuse to participate in CWSP procedures agreed to by all participating local governments for the delivery of public drinking water. Proponents argued that the County has inappropriately imposed Tribal zoning laws on Proponents' project when, in fact, the County has only required Proponents to obtain water service from one of three public purveyors or create a new public water system of their own.

The decision of the Skagit County Hearing Examiner upheld the County's administrative decision. The Proponents then appealed the decision before the Skagit County Commissioners who ruled to uphold the Hearing Examiner's decision. In October 1995, the Proponents appealed to the Skagit County Water Utility Coordinating Committee requesting that they find the Tribe's decision not to grant water service to constitute a denial, thereby permitting Proponents to request service from other purveyors. The committee voted to dismiss the appeal, finding that they do not possess the authority to make such a determination.

Case Event Analysis

The pending Island Meadows development proposal illustrates an attempted form of expropriation of Reservation resources by attempting to circumvent the Tribe's regulatory jurisdiction over Reservation fee lands. In this example, resource expropriation is exemplified by attempting to gain greater development use privileges than permitted outright under Tribal regulations. In contrast with the Kwonesum case, the Tribe's jurisdiction over land use regulation and Reservation water delivery was in place at the time the Proponent submitted its development proposal to Skagit County. Table 8.11 summarizes the outcome from the Tribal intervention. The effect of the approved regional water system agreement that was in place averted the necessity to confront County jurisdiction since their vesting rules required the prerequisite Tribe determination of water availability. The outcome of the event supported Tribal policies and illustrates intergovernmental cooperation as an effective approach to advancing Tribal objectives.

Table 8.11
Effects of Tribal Intervention to Prevent Circumvention of Tribal Authority

TRIBAL ACTION	APPROACH	OUTCOME
Tribal land use authority in effect.	Political Action	County exercises its own regulatory procedures and acknowledges concurrency of Tribal laws as conditional to granting water service.
Tribe exercises water purveyor authority.	Political Action	County defers to Tribal decision-making on determination of water availability.
Tribe requires Proponent to comply with Tribal land use laws.	Political Action and Confrontation; Cooperation	Intervention prevents applicant from circumventing Tribal laws to obtain water service from outside sources; County and regional water purveyors acknowledge Tribe's authority to require compliance with its local laws.
Defense of County Administrative Determination	Cooperation	Tribe supports County defense of administrative decision and advances cooperative model of concurrency.

Case Study Conclusion

This research has shown that Tribal community development approaches that provide for direct Tribal engagement in its dynamic planning situation serves as an effective model for reversing the historic usurpation of jurisdiction by non-tribal governments. The utilitarian relationships that resulted between the Tribe and County, State, and local governments are represented in a co-regulatory or "concurrency" model where Tribal and non-tribal authorities are simultaneously applied to guide development activities occurring within the Reservation. While this approach provides for the avoidance of jurisdictional conflict by fostering a regional public policy inclusive of tribal interests, it does not preclude future litigation that would clarify the extent of jurisdiction possessed by the parties. Questions arise, however, that are beyond the scope of this research as to whether a judicial decision that held in favor of exclusive tribal authority would result to further isolate tribes from regional coordination, and whether that would be advantageous. This research has demonstrated that tribal interests can be effectively advanced through a process that begins with tribal political action to assert tribal interests, followed, then, by the

application of approaches that enable the inclusion of those interests in decisions affecting the reservation.

The case studies examine events that confront the Swinomish Tribe's ability to maintain the essential character of its Reservation. The cases demonstrate how, in the absence of Tribal governance, decisions regarding the use and appropriation of Reservation resources had been controlled by non-tribal governments that generally served interests other than those of the Tribe. In order to alter the pre-emption of Tribal authority by State and local governments, the case studies observed several effective approaches exercised by the Tribe that increased its participation in regional government decision-making and reduced Reservation incorporation.

The case studies demonstrate the effectiveness of Tribal intervention to counter the imposition of external variables operating upon the Reservation by creating a condition of concurrent jurisdiction. The exercise of the Tribe's authority represented a first step to reversing Reservation incorporation by creating several confrontational situations to resist the external forces. In an effort to resolve other long standing disputes encountered under the application of concurrent jurisdiction, the Tribe and Skagit County agreed to work towards developing utilitarian relations in order to avoid continued confrontation through cooperative planning. Although the cooperative model is still under development and not fully implemented, the approach represents the second step to reversing incorporation by entering agreements intended to overcome conflicting public policy. The commitment to cooperation was later tested in the Island Meadows development proposal that sought to bifurcate the emerging utilitarian relationship. The sustained cooperation between the two governments resulted in the unified defense of several appeals that were filed, to further strengthen the governments' resolve to overcome conflicts through a government-to-government approach.

The case examining the Tribe's assertion of authority to regulate the Reservation water resource was demonstrated to be pivotal in both the Kwonesum and Island Meadows case studies. The Tribe sought to reverse Washington State's historic appropriation of Reservation water resources by confronting the State's legal

authority, and by promulgating its own governmental powers to regulate the waters of the Reservation. The strategy effectively limited the State's unilateral authority over Reservation resources. The Tribe's voluntary participation in regional water systems planning was also effective in reversing a pattern of regional decision-making. The acknowledgement of the Tribe's purveyor role resulted from confrontational actions when the Tribe declared its sole authority for water systems delivery over its territory in 1984. Once its jurisdictional authority was delineated, cooperation between water purveyors throughout the region became possible. Because the Washington State Growth Management Act requires, among other things, the determination of water availability as a precondition to granting development permits, the Tribe's ability to determine Reservation land use became further strengthened as non-tribal governments deferred water availability decisions to the Tribe.

Prior to the Swinomish Tribe's direct participation in regional coordination, both Washington State and Skagit County, as illustrated in the Kwonesum case study, unilaterally exercised decisions regarding land use and water supply over all development activities occurring on fee lands. As a direct consequence of the Tribe's participation in coordinated land use planning³³⁷ and, especially, in water utilities planning, the Tribe's ability to influence decision-making has emerged as a pre-condition to other regional actions and forms a foundation to building regional political pluralism. These cases demonstrate how Tribal objectives can be advanced through the direct participation in regional government activities. While the approach does not in itself settle questions regarding the Tribe's absolute authority over land use and resource management, it effectively incorporates Tribal public policy and decision processes within the larger dimension of regional decision-making. Table 8.12 compares, in an analytical model, the arguments advanced in

³³⁷Because the Tribal-County coordinated comprehensive land use plan had not yet been adopted, the proposed land use classifications and policy changes that would remove several inconsistencies contained in the two governments' comprehensive plans were not then in effect.

the research hypothesis with the four case experiences. The model summarizes the processes employing political action to overcome identified obstacles. The model observes the causal effects of Tribal political action to the advancement of Tribal goals and the reversal of Reservation incorporation.

Table 8.12
Hypothesis Testing Model

ATTAINMENT OF TRIBAL GOALS	NECESSITATES TRIBAL INTERVENTION	MEANS TO OVERCOME OBSTACLES	REVERSAL OF RESERVATION INCORPORATION
Case 1: Regain control over Reservation Territory.	Enactment of Dormant Zoning Powers.	Tribal Constitutional amendment; Negotiate Land Use Conflict Resolution.	Removal of Federal Review; Unilateral County authority replaced by concurrency.
Case 2: Control of Reservation Waters.	Enactment of Water Code; Participant in Regional Water Plan;	Challenge State Authority; Amend Code to avoid adjudication; Regional acceptance of Tribal Purveyor Rights.	State agrees to cooperate in Code administration; State and region defer to Tribal Water Purveyor decisions and retreat from Reservation.
Case 3: Consistency with Tribal laws; Regain Control over Water Resources; Regain Trespass Lands.	Exercise Zoning authority; Challenge State Water Rights; Negotiate transfer of tideland title.	Applicant conforms to Tribal laws; Tribal ownership of water system and tidelands; Compliance with Tribal conditions.	Unilateral County authority replaced with concurrency; State jurisdiction retreats; Project conforms to Tribal laws.
Case 4: Conformance to Tribal land use policy.	Granting water availability contingent upon compliance with Tribal laws.	Water availability denied pending compliance.	County land use authority becomes dependent upon Tribal decisions.

In Table 8.13, the forms of intervening political actions employed in each case event are examined by comparing the prior state of Tribal involvement to the

causes that contributed to the obstacle. The model then identifies the means employed in each intervention, describing the various approaches used. The model illustrates the concurrent use of strategies that include the approaches of conflict and cooperation. The model does not indicate a particular advantage among the several approaches employed. It was observed, however, that for each case that involved a cooperative outcome, the acceptance of Tribal interests was institutionalized through formal agreement. These cooperative resolutions have also been shown to occur following the use of conflict and confrontational approaches that served to introduce the assertion of a Tribal interest. The only case where confrontation was not employed to encourage government cooperation was the last case event, where cooperation between the Tribe and the County had been previously established. The confrontational approach was effectively applied, however, to persuade the applicant's compliance with Tribal laws.

Table 8.13
Forms of Intervening Political Action

PRIOR STATE OF TRIBAL AUTHORITY	CAUSE OF OBSTACLE	INTERVENING MEANS	FORMS OF INTERVENTION EMPLOYED
Case 1: Dormant Tribal Powers	County asserts land use authority.	Tribe enacts zoning ordinance; Tribal Constitutional amendment; Negotiates concurrency Agreement.	Political action; Political action; Cooperation.
Case 2: Tribe enacts water code; Participates in Regional Water Plan.	State appropriates Reservation waters; Regional governments control water system delivery;	Enacts Water Code, amendments to code; Confronts State's authority; Tribal Purveyor rights are asserted and recognized.	Political action, Compromise; Confrontation; Conflict Avoidance, Deferment, Cooperation.

Case 3: Dormant Tribal Powers	County asserts land use jurisdiction; State asserts Water rights; Applicant circumvents Tribal laws.	Enactment and enforcement of zoning powers; Challenge State authority to grant water right; Applicant's compliance with Tribal laws.	Political action and Confrontation; Political action and Confrontation; Concurrency and State Deferment to Tribal Authority.
Case 4: Land Use Concurrency; Participant in Regional Water Agreement	Applicant circumvents Tribal authority.	Assert Water Purveyor rights; Require Applicant to adhere to Tribal policies; Defense of County appeal in Amicus Brief.	Confrontation; Political Action, Confrontation; Cooperation.

A model is presented in Figure 8.2 to illustrate the application of the research logic that results in several outcomes as observed in these case studies.

Confrontation represents the initial outcome resulting from Tribal political action that is resolved in either conflict or, as a form of conflict avoidance, in negotiation. Negotiated resolution to confrontation becomes formalized in agreements, represented in the model as two further outcomes: "deferment to Tribal authority" and "political pluralism," providing for regional governmental collaboration. In the case of water service delivery, the outcome resulted in the deferment to Tribal authority alone. The concurrency model, as a form of political pluralism, provides for the concurrent application of dual land use regulations. Hence, the major outcomes of the negotiated approach that were observed from the case study research are summarized in the following typology:

Concurrency - representing the joint application of dual government authority, recognizing regional political pluralism;

Cooperation - as an advanced form of the concurrency model, agreement is reached to overcome conflict in public policy through joint planning or other means. The cooperative approach may then become further advanced by

agreements that minimize duplication by deferring to a single system of administration;

Pre-Emption - as demonstrated in the Kwonesum water right application, the outcome represented a change in circumstances that advanced one government's jurisdiction while the other government retreats in its jurisdiction; and

Deferment - this outcome occurs when one competing governmental interest voluntarily agrees to defer the application of their authority to the other government, as demonstrated by the Tribe's designation as the Reservation water purveyor.

Conflict is shown to result in three likely outcomes: 1) to affirm Tribal authority that may isolate the Tribe from further regional participation; 2) to affirm a non-Tribal authority that may perpetuate Reservation incorporation; or 3) to require a negotiated outcome. As discussed in earlier chapters, litigation often provides the only effective remedy to certain types of conflict that then may require mandated cooperation. A court decision favorable to the Tribe tends to strengthen the Tribe's position in negotiations. Conversely, an unfavorable decision tends to weaken its negotiating position.

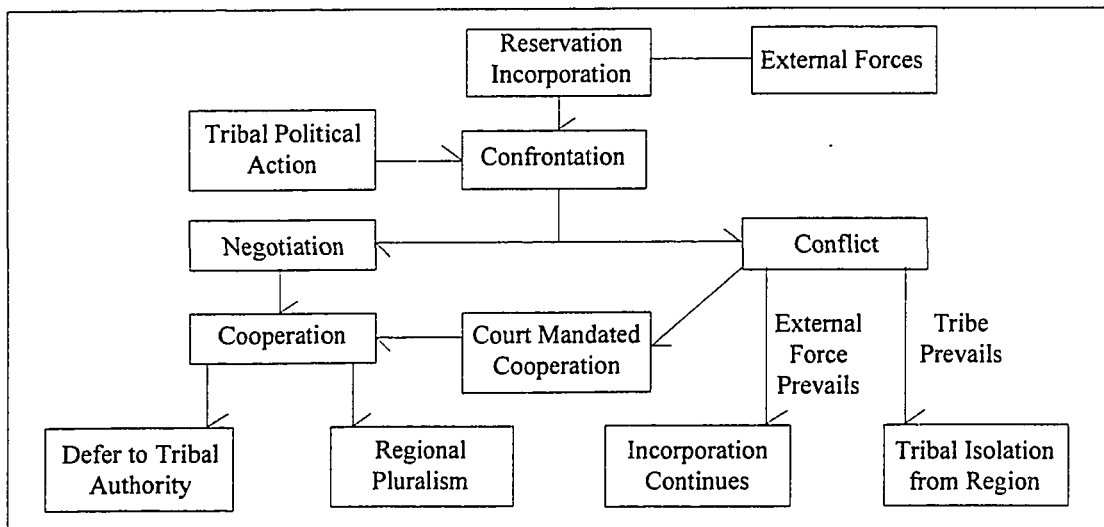


Figure 8.2
Model of Tribal Political Action

Table 8.14 summarizes the historic process of reversing Tribal incorporation by demonstrating how the absence of Tribal governance in the first three case events created a situation where Reservation resources became controlled unilaterally by external interests. The initiation of Tribal intervention in its affairs is shown to occur primarily through the development of its self-governance capability with which to confront the forces exerted by independent variables. As the intervention by Tribal authority was further advanced, a reversal to incorporation is observed. In the case of land use regulation, this occurred by forming utilitarian relations through cooperative co-regulatory arrangements between Skagit County and the Tribe. In the case of utility decision-making, the intervention resulted in the referral of utility matters to the discretion of the Tribal Utility Authority. While the threat of litigation challenging both State and County authority in Reservation affairs represented an important variable in the Tribal confrontational strategy, the parties chose to proceed on a course of regional cooperation as a preferable approach to addressing the longstanding and complex jurisdictional issues.

Table 8.14
Cross-Case Study Analysis

CASE EVENT	THE PROCESS OF REVERSING INCORPORATION THROUGH TRIBAL ENGAGEMENT IN ON-RESERVATION AFFAIRS		
	ABSENT OF INTERACTION	INITIAL INTERACTION	FULL INTERACTION
Land Use Regulation and Cooperative Planning	Strongest Incorporation from County Zoning Pre-emption.	Isolated events of Conflict as Tribe exercises Political Action.	Conflict avoidance; Concurrency reverses Incorporation through utilitarian accommodation.
Water Resources - Groundwater - Public System	Absolute as State and County pre-empt Tribal authority.	Weakening Incorporation Fosters Increased Regional Cooperation.	Weakest Incorporation as State and County defer to Tribal Utility Authority; State agrees to Cooperate with Tribe to Administer Water Code

(Table 8.14 con't.)

Kwonesum Subdivision Conflict	Strongest Incorporation from County Zoning Pre-emption.	Weakening Incorporation as Tribe Threatens to Litigate State action; Exercises zoning enforcement action.	Weakest Incorporation; Cooperative resolution through compliance with Tribal authority.
Island Meadows	Established Concurrency assured Tribe's early participation.	Utilitarian relations in water agreements constitutes a defacto Tribal zoning authority.	Weakest Incorporation; Fosters Cooperation in future land use coordination.

Table 8.15 concludes the case study analysis by summarizing the four criteria advanced in the chapter's introduction that provide verification of the research hypothesis. For each of the case studies: 1) the external forces that exert unilateral influence to tribal affairs were identified; 2) the processes contributing to the Tribe's engagement in the event were documented; 3) the degree to which the outcomes of Tribal engagement were effective in reversing the unilateral actions were affirmed; and 4) the degree to which the outcomes were influenced by the Tribal engagement rather than other external forces were observed. As a result of the case study findings, the hypothesis suggesting that Tribal engagement, through the exercise of political action, is a necessary prerequisite to reversing Tribal incorporation was affirmed. While the case analyses discuss particular strategies employed by the Tribe, they do not arrive at conclusions regarding the particular effectiveness of one strategy over another, rather, emphasis is placed on examining the importance for direct intervention through the development and exercise of Tribal political action. Furthermore, while the political action model may not be applicable to all tribal situations, it is expected that the approach can be effectively employed to other situations with conditions similar to those of the case study tribe. Those conditions include: 1) a significant degree of reservation incorporation; 2) a state Indian policy that favors cooperation over confrontation in state-tribal relations; and 3) a tribal political capacity to effectively engage and confront unilateral forces. This latter condition includes the development of tribal legislation and administrative capability to enable the application of tribal jurisdiction, a political structure that supports

affirmative political action, and, finally, a willingness to enter negotiated cooperative dialogue to resolve conflicts.

A three-phase model depicting the process of Tribal engagement in its external planning situation is presented in a series of propositional statements:

Isolationism Created a Situation of State Incorporation - Historic isolationism by the Tribal Political Community, resulting in part from historic federal Indian policy, created a situation where external interests arose to pre-empt a tribe's governance over its territorial affairs;

Overcoming Incorporation is Largely Dependent Upon the Intervention of Tribal Political Action - To alter and reverse the effects of external controlling influences in tribal affairs, a tribe must exercise political action to confront the unilaterally imposed actions. Confrontational means may employ litigation or other forces to resist the intruding authority. The exercise of Tribal political action over its affairs serves to diminish or replace the unilateral external force;

Resolution of Jurisdictional Conflict Can Advance Tribal Goals - Resolution of the ensuing conflict may be overcome through forms of negotiation to accommodate the various interests. Intergovernmental relations that result in utilitarian relations provide a mechanism for regional cooperation. The ultimate goal in cooperative relations is the development of political pluralism that provides for the integration of Tribal political and cultural sovereignty within the political region for the advancement of Tribal objectives.

Table 8.15
Evaluation of Case Study Verification of Hypothesis

CASE STUDY EVENT	FORMS OF EXTERNAL FORCES	PROCESS OF TRIBAL ENGAGEMENT	DEGREE INTERACTION WAS BENEFICIAL	DEGREE OUTCOME INFLUENCED BY TRIBAL ACTION
Land Use Regulation and Cooperative Planning	County Pre-emptive Jurisdiction.	Exercise of Inherent Sovereignty by enacting Police Powers.	Strengthened Self-Governance and Weakened Incorporation.	Willingness by County to Cooperate in Joint Planning and Avoid Conflict.

(Table 8.15 con't.)

Water Resources	Incorporation by non-tribal water purveyors and State appropriation of Reservation waters.	Exercise of Political Action by enacting water code; Participation in Regional Water Planning; Development of Water Utility Infrastructure.	Resulted in deferral to Tribe on water service decisions; State cooperation Tribal water code administration.	Regional support of Tribal Authority for Water Service; State support of cooperative solutions.
Kwonesum Subdivision Conflict	County and State Pre-emption of Land Use and Water Resources Jurisdiction.	Enforcement of Tribal Zoning Authority; Appeal of State Authority.	Resulted in Compliance with Tribal Policies and Regulations and avoidance of state litigation.	Advanced with County Support of Land Use Concurrency and Tribal Water Purveyor Right.
Island Meadows Proposal	Initiated by Private Development Interests, pre-existing agreements provided early participation by Tribe in cooperation with County.	Tribe supports and defends County Denial Decisions through <u>Amicus</u> ; County supports Tribe's utility service decision process.	Resulted to affirm Tribal Authority over water utility, in turn strengthening Tribal land use concurrency authority.	Outcome advanced from County and Regional Government support of Cooperative Agreements.

CHAPTER 9

CONCLUSION AND RECOMMENDATIONS A Proposed Model for Tribal Community Development

This research examines the evolution of tribal governance to understand the contemporary problems that face tribes in advancing their community goals through reservation development. The analysis of the historical tribal context provides new knowledge about the obstacles encountered in the modern tribal planning situation. This research considers the causal factors that influence the setting within which tribal community development occurs and applies its observations to inform future tribal planning. Through a sequence of research investigations, the study identifies a diverse range of external and independent variables that constrain tribal community development, and argues that in order for tribes to overcome forces that affect their development, political interventions that emanate from the exercise of their sovereignty is required. American Indian tribes are extremely diverse culturally, locationally, and politically, whereby the needs and planning strategies appropriate to each tribal community are recognized as unique and complex situations.

This concluding chapter of the research summarizes the findings concerning the several research questions and the hypothesis that guided the study and develops an operational planning model useful in anticipating and overcoming constraining variables to advance tribal self-determination. The following discussion restates these research questions and summarizes the empirical findings established from the research.

1. In what manner have historical federal events diminished tribal inherent sovereignty and its ability to determine its own development?

The research has demonstrated in Chapter 2 an historic pattern of disruptive public policy in the treatment of the tribal political community since the federal government first established its trust relationship. The Supreme Court recognized the existence of a trust relationship in its earliest decisions interpreting Indian treaties in Cherokee Nation v. Georgia and Worcester v. Georgia. In almost all of the treaties entered into between 1787 and 1871, Indians ceded their land territories

in exchange for the guarantee of a permanent reservation for their tribes and the federal protection of their safety and well-being. The Supreme Court has repeatedly held that such promises establish the principle of a special trust relationship. The relationship characterized as that of a guardian to his ward brought with it the continued federal duty of protection towards Indians and their territorial resources. Furthermore, the basis of this special relationship involves mutual trust: Indians would trust the U.S. government to fulfill the promises it made in exchange for Indian lands.

However, federal Indian policy history serves as a record of the U.S. government's continued failure to observe faithfully its trust commitments to tribes. In spite of the fact that Congress has a responsibility to fulfill this nation's treaty commitments, it has broken nearly all of its Indian treaties. Tribes have also been found to have a limited inherent power due to their status as domestic dependent nations. Despite certain limitations to that inherent sovereignty, tribal governments continue to retain their own sources of governing powers and generally require only limited authorization from the federal government to exercise these powers.

Tribal sovereignty has been effectively used to prevent the intrusion of state law and jurisdiction within Indian Country with certain restrictions. The Supreme Court has consistently prohibited state law from applying to Indians in Indian Country. The court held in Williams v. Lee that state law had application only where "essential tribal relations" were not involved and that "absent governing acts of Congress," the question has always been whether the state action infringes on the right of reservation Indians to make their own laws and be governed by themselves. The Supreme Court in McClanahan held that state law would only be permitted into Indian Country if two conditions were met: the intrusion would not interfere with tribal self-government and non-Indians were involved. While William v. Lee established that state law may not interfere with tribal self-government, it is generally considered an independent test to be applied along with pre-emption analysis. Hence, the scope of state interference in tribal self-government is generally more narrowly defined and most cases involving the application of state law in

Indian Country are decided on pre-emptive grounds.

The central premise of this research is that the preservation of the tribal political community is dependent upon the ability of tribes to exercise control over their territories. Tribes clearly possess the power to regulate Indians in Indian Country, and may even regulate its members outside of Indian Country when important tribal interests are at issue, such as treaty fishing by its members. However, this research has also established the substantial tribal powers to regulate non-Indians engaged in activities in Indian Country that have an effect on the political integrity, the economic security, or the health or welfare of the tribe. Further, a tribe's authority to regulate the activities of non-members who enter consensual relationships with the tribe is also extended through contractual arrangements.

Based on these and other landmark rulings, tribes are generally understood to retain sufficient sovereignty to enforce civil authority against all reservation residents, including non-Indian fee owners. The evolution of federal Indian policy since pre-treaty periods has been demonstrated as an abrupt and contradictory pattern and its effects on the tribal territory continue to frustrate the development of tribal communities.

2. In what manner have these events introduced the presence of the political economy as an intervening force in tribal affairs?

The ability of tribal governments to control their territories has been historically obscure due to federal assimilation policies that provided for a complex land tenure composition on many reservations and the subsequent intrusion of state political authority over those lands. Historic events originating with the General Allotment Act of 1887 established two irreversible conditions to the current situation comprising reservation property interests. The Act introduced individual ownership through the parcelization of the formerly community-owned reservation territory, and the authorization to transfer trust parcels to non-Indian fee ownership. Settlement of non-Indians onto reservations made possible and encouraged through the Act resulted in a property rights condition that no longer only affected just the tribes.

Many reservations in Washington State contain fragmented land ownership causing a plurality of property rights interests that have been shown as the most pervasive variable constraining tribal territorial control. While it has long been recognized that the tribes retain inherent rights to control their territories, non-Indian fee property interests within the reservation continue to resist the exercise of tribal police powers over non-trust lands.

The research examining the sixteen tribes of the Puget Sound region depict, in Tables 7.1 and 7.2, varying degrees of incorporation as reflected in reservation land tenure. Highly incorporated reservations are defined as containing fee lands in private, non-Indian ownership, as well as a larger proportion of non-Indian residents within the reservation boundaries, correlating the non-Indian reservation population to the reservation's pattern of alienated land holdings. The degree of reservation alienation was also attributed to the type of reservation formation. The occurrence of alienated lands was documented for all reservations created under treaties and affected by the General Allotment Act. For all surveyed reservations, the presence of land use conflict associated with reservation incorporation exists where the alienation of trust territories is present. In contrast, territorial alienation was absent in reservations established in the years following the Act. Hence, the relationship between the alienation of reservation lands and its incorporation are summarized as follows:

For reservations established under Congressional treaties and subjected to the General Allotment Act, some degree of territorial alienation is likely to have occurred, increasing the degree of incorporation by the political economy. This incorporation is first manifested by non-Indian ownership and occupancy of land areas, and then by the encroachment upon the reservation by external political forces representing those non-tribal interests. Further, in these situations, the application of non-tribal government land use and resource management policies tend to emerge as major obstacles to the attainment of tribal goals, especially when the intruding authority seeks to advance non-tribal interests.

For purposes of this research, the concept of "obstacle" is regarded as the independent variables that act to limit the ability of a tribal political community to

determine developmental outcomes within its reservation territory. The independent variables manifest as non-tribal governmental interventions to supplant a tribe's political authority. The constraining variables identified have emerged throughout the preceding chapters in investigating the phenomena of the tribal planning situation to inform the selection of planning actions. Overcoming these obstacles to tribal development are dependent upon the exercise of tribal political actions that resist the effects from external forces.

A typology of four major sources generating external interferences to tribal self-governance were identified in Chapter 4 as: 1) historical public policy, resulting principally from past federal, state, and local government actions that diminish tribal sovereignty and permit the intrusion by non-tribal authority; 2) current public policy of state and local governments that act to pre-empt tribal authority; 3) the private institutional economy; and 4) the interests and influences of private individuals. Together, these four sources serve to represent the plurality of interests by the U.S. political economy's expansion into tribal affairs, expressed as the incorporation of the tribal political community. The forces imposed upon tribal governments and their territories include four characteristic features:

External Forces - They are external forces in that they are exerted outside the control of the tribes. Intended as intervening forces, they represent the historical supplantation of tribal jurisdiction by non-tribal governments;

Historic Forces - These forces represent the aggregate of intervening actions that have taken place over an extended period of time. Historic federal Indian policy has been shown as the principal cause that enabled non-tribal interests to emerge in tribal affairs;

Economic Forces - These forces represent external economic interests that operate within the Indian territory for the purpose of extracting Indian resources that benefit the external interests. These forces are largely represented by the private economy.

Political Forces - These forces primarily manifest through political means, including executive acts and laws enacted through the plenary powers of the United States Congress and the unilateral exercise of intervening powers of state and local governments, imposed directly upon the Indian territory and tribal political authority.

While the terms "alienation and incorporation" refer to the historic processes that severed the exclusive reservation territory from tribal control, the concept has been extended in the research to include the ways in which non-Indian interests have caused disruption to tribal affairs. The principal means that cause reservation incorporation were identified as those forces that create a separation between the tribal territory and the tribal sovereignty. The research has established in Chapter 4 the importance of tribal control over reservation resources as a fundamental condition to the fulfillment of tribal sovereignty, and that the forces of incorporation, if unabated, serve to prevent the attainment of tribal goals. The condition of reservation incorporation, then, supplants tribal control over its societal affairs and threatens the tribal community's social, political and economic security. Hence, it becomes increasingly necessary to mediate the complex conflicts that arise as state and local government authority infringes on tribal sovereignty.

3. What is known from the theoretical literature to explain the causes of the underdeveloped conditions of Indian communities?

Indian incorporation theory provides a framework for explaining the effects of the historic expansion by non-tribal interests into tribal affairs. The application of Indian incorporation theory builds on the concept of incorporation developed in Dependency Theory that explains the nature of imbalanced power relations between different economies. These theories are useful for conceptualizing the ways in which Indian resources have become incorporated into the U.S. political economy as a result of the historic erosion of tribal sovereignty over their affairs.

Incorporation theory shares several assumptions about the nature and objectives of the U.S. political economy from World Systems and Dependency Theory. The first assumption views the modern political economy's expansion as motivated by a drive for capital accumulation. The development of the economy's expansion leads to contact with new economies, which constitutes a peripheral or colonial relationship with the incorporating core economy. The effect from incorporation is that it tends to retard the development of the incorporated areas as it produces positive benefits to the core areas.

Jorgensen (1972) observed that the lack of development and the accompanying slow rate of acculturation of Indians into the U.S. economy was a direct result of exploitation by the incorporating state. Snipp (1986) describes two separate phases in the process of Indian incorporation. The "captive nation" phase refers to the initial post-treaty period, when tribal communities began a period of reservation isolationism separate from the emerging U.S. economy. The principal source of contact with that society was through the form of dependency relations with federal services guaranteed in the treaties. The second, or "internal colonial" phase, describes a process by which Indian territorial resources became expropriated from the Indian territory by non-tribal interests. The period of transition from captive nation to internal colony coincided with federal Indian policy periods that encouraged assimilation and termination. The earliest forms of resource expropriations are linked to the General Allotment Act of 1887, which permanently disrupted a formerly cohesive pattern of community ownership through the eventual alienation of the territorial land base. Sale of lands, under the Act, resulted in non-Indians moving to these private properties on the reservations. The application of state and local jurisdiction often followed to supplant tribal authority over those alienated lands. The effects of incorporation ranged significantly between tribes depending upon the degree of alienation that each reservation experienced.

This research demonstrates that the process of incorporation can be interrupted, and under certain circumstances even eliminated, through the exercise of effective tribal political action. The means for reversing incorporation are largely dependent upon the ability of the tribal government itself to mobilize and exert the forces necessary to direct such outcomes, as illustrated in the Chapter 8 case study. Dependency theory provides an explanation to express the imbalanced relationship between the internal tribal community and the external U.S. political economy, where the tribal community functions as the periphery economy and the political economy represents the core.

Critical theory has also been employed in this research to aid in understanding the conditions of tribal underdevelopment by examining historic

relations between the tribes and the political economy in terms of subjugating relations. Critical theory emphasizes the resolution of conflicts arising out of imbalanced relations that constitute mechanisms of power coercion over the tribal affairs through new forms of governmental relations. The federal government-to-government relationship model has emerged to address problems of coercion by advancing new forms of intergovernmental relations that acknowledge tribal sovereignty within a regional framework of political pluralism.

4. What is the importance of a tribe's ability to exercise control over its territory in the understanding of tribes as sovereign governments?

A tribe's ability to control its territory has been established in Chapter 4 as fundamental to the sustainability of its political integrity, economic security, and cultural cohesiveness. The historic erosion of that control as described in this research has resulted in continued uncertainty as to the extent of tribal authority. Since the 1970's, however, the implementation of the federal self-determination policy, coupled with judicial rulings, has resulted in restoring many powers that had been previously dormant.

Effective tribal governance requires an informed understanding as to the extent of authority it may exercise over non-tribal reservation lands. For example, the courts have clarified in Montana the boundaries of a narrowed tribal sovereignty that restricts tribal regulation over non-tribal interests. Further, the courts have established that the exercise of tribal authority beyond what is necessary to defend tribal self-government is inconsistent with the dependent status of the tribes without express congressional delegation. The two important and broad exceptions to its ruling in Montana do, however, establish where tribal authority may be affirmed over all reservation activities:

1. A tribe can retain its authority to regulate the activities of non-members who have entered into consensual relations with the tribe or its members through commercial dealings, contracts, leases, or other arrangements;
2. A tribe also retains its inherent regulatory authority over the conduct of non-Indians on fee lands when that conduct "threatens or has some

direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

The second test serves as a fundamental principle to the tribal planning approach when strategies are formulated that respond to threats to the tribal political integrity, its economic security, and the health and welfare of the community. An effective tribal planning approach that incorporates these principles into its strategy advances the likelihood of its defensibility. The affirmation of tribal territorial jurisdiction is dependent, in large part, upon the tribe's ability to demonstrate that the loss of comprehensive land management would represent a significant impact on tribal interests to justify tribal authority under the Montana exception. Brendale also establishes a test for determining the extent of tribal regulatory control over county powers. Under the ruling, direct regulation over non-members' use of fee land on a reservation is dependent upon the following three conditions: 1) whether the tribal policy has clearly established the "essential character" of the entire reservation; 2) whether the regulated activity "imperils the political integrity, the economic security, or the health or welfare" of the tribe; and 3) whether the particular activity is based on a contractual or consensual relationship with the tribe.

5. Can a general framework be devised to describe the boundaries of tribal political sovereignty, the goals of self-determination, and the range of activities that comprise the field of tribal community development?

The research defines tribal self-determination as an exercise of political sovereignty and develops a model to depict the field of tribal community development. A typology was constructed in Table 6.1 containing the three salient elements that comprise the tribal political community: a tribe's political sovereignty, its cultural cohesiveness, and its territoriality. The typology was then expanded to incorporate six general goals, or principles, of tribal self-determination. These principles include: trust fulfillment, the government-to-government relationship and tribal sovereignty, cultural and religious freedom, social cohesiveness, protection of tribal lands and resources, and economic self-sufficiency. The resulting matrix

comparing the three dimensions of the tribal political community to the principles of self-determination constitute a general model of tribal community development and defines the boundaries of tribal planning activity.

Tribal community development planning is understood as a field of planning practice concerned with strengthening the sovereignty of the tribal political community and its corresponding exercise of authority over its territoriality. The territorial resource is defined as consisting of the reservation land base and treaty natural resources, its cultural resources, and the institutional assets attributed to its sovereignty of self-government. The utilization of the community's assets, however, is dependent upon the ability of the tribe to exercise sufficient control over decisions affecting the use and allocation of the community's territory.

The subject matter of tribal planning has been demonstrated as a broad and complex field, as depicted in the Swinomish Tribe's experiences in Table 8.4. First, the field encompasses comprehensive planning, land use regulation, resource management, environmental protection, public safety, health and welfare protection, and the provision of capital facilities and infrastructure to support the development of the territory. Similar to activities practiced in local government planning, these activities are supported under the tribe's inherent police powers, subject to its own constitution. In addition, a tribe's regulatory authority over the management of territorial resources is exercised through express Congressional authority. Secondly, tribal planning emphasizes the promotion of economic development where the tribal government itself functions as the primary focal point for directing actions and resources for the development of the reservation economy. In the absence of a developed private tribal economy, tribal governments perform an entrepreneurial role to stimulate capital formation and economic development. Thirdly, tribal planning is intrinsically concerned with the preservation of the community's cultural identity. In this respect, tribal planning is concerned with the adaptation of programs and activities that serve the cultural priorities of the community. Tribal planning, then, must reconcile the implications of reservation development, as simultaneously advanced by tribal efforts as well as the external political economy, against its

effects upon the sustainability of the cultural community.

6. Can models from planning and community development theory be applied to help inform an approach to overcome obstacles in the tribal planning situation that serves the emancipatory goals of tribal self-determination?

Models from the fields of planning and community development can be effectively applied to address the unique problems confronting tribal planning. This research helps inform a tribal community development approach by adapting a conception of planning intervention that has its roots in a philosophy that reflects the tribal community's historic experiences and its emancipatory objectives.

Furthermore, the approach demonstrates a concern for overcoming the obstacles encountered in historic relations between the tribes and their surrounding region. The role of tribal planning, as a form of advocacy of the objectives of the Indian community, is concerned with the advancement of tribal interests by informing the tribal community's understanding about the context within which planning decisions occur and of the selection of means to advance tribal goals through program implementation.

The phenomenological approach contributes to this goal by emphasizing the importance of understanding the tribal planning situation and integrating the dynamics of that situation within its general planning construct. The often turbulent and shifting planning situation presents a particular dilemma for tribal planning by requiring a continuous assessment of external variables that operate to resist tribal authority. The dynamics of the tribal planning situation therefore warrant the use of models that are adaptive to the uncertainties present in that situation. The social learning models meet these criteria by approaching complex social situations with a capacity to adjust planning strategies to address conditions of conflict. The development of utilitarian relations in the social learning model contributes to cooperation building when its participants acknowledge mutual end-goals. These forms of social relations are especially effective when the source of conflict in tribal planning is understood to be rooted in political and normative misinterpretation.

Further, social learning offers an approach for building cooperative relations with the ultimate goal of achieving full socialization and preventing coercive relations as experienced in the past.

Several planning approaches and models have been evaluated in Chapter 6 to ascertain their suitability for advancing tribal planning objectives. From planning's community activist tradition of social mobilization, the advocacy, community development, and cultural preservation models each offers approaches that are useful to advancing the empowerment of the tribal political community. Historic materialism and critical theory provide an approach to examining the historic dependency relationship of tribal communities and their surrounding regions. Planning's traditions from the School of Social Reform and Policy Analysis provide strategic decision models useful in instrumental decision-making to aid in considering the tradeoffs between short-term resource appropriation against long-term irrevocable consequences. Strategic planning is especially recognized as a useful approach for identifying tribal capabilities as well as threats in its planning situation, and devising strategies for overcoming obstacles to tribal goal attainment.

Contingent planning approaches provide a strategy for the selection of alternative planning models to a tribal planning situation that continuously faces new circumstances requiring corrective alteration to a prescribed course of action. Tribal community development planning has been characterized as an "anticipatory" form of planning that continuously thinks about ways of responding to the independent variables that threaten the stability of tribal sovereignty. As a form of anticipatory planning, effective tribal decision-making requires the incorporation of contingent approaches in the selection of political action. The contingent approach is structured first to anticipate potential threats to the employment of political action, and then to react, when necessary, to its experiences during program implementation.

7. Can subjugating and conflicting tribal relations with state and local governments be overcome by increased tribal participation in regional governmental relations?

Tribal participation in regional government has been demonstrated effective

to reversing reservation incorporation and advancing tribal goals. The cooperative approach to natural resources conflict resolution represents a form of public policy response that provides for meaningful tribal participation in many new areas of state-tribal interaction. The mediating experiences from Washington State illustrate the process of tribal political participation that began with the assertions of treaty rights and evolved into the negotiation of long-standing disputes in cooperative management of fisheries harvest and habitat protection. The ensuing cooperative dialogue then led to the development of social learning among its participants. The examples of cooperative dialogue discussed in Chapter 7 illustrate a progression in state-tribal institutional development that reached a pinnacle with the Centennial Accord. That agreement formally ended a one-hundred-year period of adversity and conflict when the state formally acknowledged the political sovereignty of tribal governments. The experiences cited also illustrate the process for institutionalizing the cooperative model both horizontally, across agencies of state government, and vertically, as demonstrated in the Swinomish Tribal Community case study, in local government relations.

In the past decade, tribes in Washington have experienced a radical transformation in their relationship with the state, offering a promising approach to overcoming obstacles in their pursuit of self-determination. The new precedent favoring negotiated solutions through expanded and inclusive dialogue with the tribes may offer a model for the reconciliation of other historic conflicts posed by the external forces of the U.S. political economy. As the Swinomish case study in Chapter 8 demonstrates, the consequences of the tribe's participation in both land use planning and regional water utilities coordination with Skagit County and other local governments proved to be effective in enabling the Tribe's meaningful participation in regional decision-making, and to reverse the former conditions of reservation incorporation. The intergovernmental cooperative process led to a series of utilitarian relations that further supported regional political pluralism. The case study demonstrated how tribal participation in regional affairs can eliminate the historic usurpation of tribal jurisdictional by non-tribal governments, reverse the

conditions of reservation incorporation, and advanced tribal self-determination objectives.

The Research Hypothesis

This research is based on the hypothesis that the advancement of the tribal community is dependent upon the enhancement of its political sovereignty. The historic erosion of that sovereignty requires the exercise of dormant tribal powers in order to engage the forces of independent variables that intervene in tribal affairs.

The statement of the research hypothesis provides:

Tribal self-determination cannot successfully occur in complete isolation from a surrounding political economy that expands its interests by supplanting tribal interests. Tribal intervention that confronts these pre-emptive authorities and restores non-coercive forms of political relations, therefore, represents a prerequisite condition for overcoming historic conflict necessary to advance tribal goals.

The principle of inherent Indian sovereignty first acknowledged in Worcester v. Georgia recognized Indian nations as distinct political communities. The ability of tribal governments to control their territories, however, has been diminished due to federal assimilation policies and the subsequent intrusion of the non-tribal political economy in tribal affairs. This resulted in the complex composition of reservation lands and non-Indian property rights. Non-Indian settlement onto reservations resulted in a plurality of property rights interests that represent, as illustrated in Table 7.2, a pervasive constraining variable to tribal territorial control. While it has long been held and recognized that tribes retain inherent rights to control their territories, the allotment of the reservation and the subsequent occupancy by non-Indian fee landowners within the reservation boundaries has challenged the tribal exercise of police powers over non-member fee lands. The general principle established in Montana limited tribal authority to that which is necessary to protect tribal self-government, but also established the conditions affirming a broader tribal authority when the tribe's political integrity, economic security, or health or welfare are at risk.

The Brendale opinion challenges the basic tenet of tribal territorial

sovereignty by supporting a principle of uncoordinated and dual regulatory authority in land use management within the reservation planning area. This opinion provides for resolving differences between conflicting land use policies of the two concurrent government authorities by a tribal initiated federal nuisance-type lawsuit to prevent a threatening development. But this approach to conflict resolution is inconsistent with comprehensive, prospective planning, and successful tribal community development must identify alternatives beyond litigation in its approach to protecting community interests. Once the courts begin the process of dividing reservations into areas where tribes do and do not retain authority over non-member lands, a cohesive reservation homeland may become forever unattainable. The uncertainty created by Brendale is compounded in Washington State's Growth Management Act by ignoring the checkerboard conditions of reservation land tenure and failing to offer solutions that encourage intergovernmental cooperation between tribes and counties.

In order for tribes to retain the ability to meaningfully "define the essential character" of the reservation as an exercise of choosing its desired future, the paradox presented in the Brendale argument must be reconciled. The strategy advanced in this research replaces tribal isolationism with an approach that balances tribal development goals with the interests of the assimilated non-Indian community that is contained within the reservation. This approach departs from the Brendale view of the bifurcated community by advancing a new concept of the reservation community that incorporates the plurality of reservation interests.

Furthermore, while Brendale defers final judgement on tribal jurisdiction over fee lands to future court review, it also affirms that tribal sovereignty and jurisdiction exist over fee lands under certain circumstances. For reservations that contain alienated land tenure conditions, tribes may strengthen their assertion of authority when they establish an inclusive definition of the reservation's purpose that incorporates fee lands owned by non-members along with trust lands. The integrative approach that defines the reservation community in terms of a plurality of interests contrasts to past tribal isolationism to represent an effective strategy for attaining utilitarian relations. These relations emphasize an approach to conflict

avoidance by expanding reservation goals to incorporate broader community priorities and representation. While this approach introduces risk that may compromise the advancement of certain tribal objectives, it may well serve as an interim measure to reduce conflicts with non-tribal interests and strengthen the defensibility of tribal jurisdiction. Whether integrative approaches would result in the further alienation of the reservation cultural community is a more difficult consideration. The characteristics of each reservation community contains its own unique thresholds for determining the degree of cultural vulnerability. As Deloria and Lytle (1984:264) add "There are no good guidelines for either policy or programs in this new area of activity." However, the Swinomish case study analysis establishes that direct tribal political action through interventional approaches provides for the effective abatement of unilateral decision-making imposed by non-tribal authorities in tribal affairs -- a necessary first step before a tribe can advance its normative interests within that situation. As further demonstrated in the Swinomish case study, tribal engagement in regional planning provides an effective means to reverse the imposition of a non-tribal authority that serves interests other than tribal interests. This process relies on the development and exercise of a dormant sovereign authority to reverse the processes of incorporation.

This research has argued that tribal community development approaches that provide for tribal intervention in its planning situation serves as an effective model to preclude the usurpation of its jurisdiction by non-tribal governments. The utilitarian relationships that resulted between the Swinomish Tribal Community and state, county, and local governments are represented in a jurisdictional concurrency model where tribal and non-tribal interests are inter-dependent. This approach provides for the avoidance of jurisdictional conflict by fostering a regional public policy that incorporates, rather than resists, tribal interests. The case study demonstrates how, in the absence of tribal governance, a situation was first created where reservation resources became controlled unilaterally by external governments. Tribal intervention in its affairs occurred through the development of its own self-governance capacity to confront the forces exerted by independent variables. As

intervention through tribal political action was advanced, a reversal of incorporation was observed. The case study analysis demonstrates that tribal interests can be effectively advanced through a process that begins with 1) a tribal political action that asserts the tribe's political interests, 2) to resist the pre-emption of tribal authority by fully integrating tribal interests, and 3) results in reversing the processes of reservation incorporation.

Under the concept of an inclusive reservation community that provides for the consideration of non-tribal interests, the tribes establish a stronger foundation with which to reassert their role as the principal government in reservation decision-making. As conflicting reservation interests become resolved through the formation of non-coercive utilitarian relations between tribes and state and local governments, the opportunities for further improvement in those relations then become greatly expanded.

A Proposed Model for Tribal Community Development

Winchell (1995) identifies two important concerns of the process of tribal planning. The first is that tribal governments must define for themselves the meaning of sovereignty, where the definitions become the basis for tribal government and community decision-making. Winchell identifies this in terms of a "political community self-identification process" that responds to the needs and goals of the community, and are not influenced by external forces. The second process concerns the interactive relations between tribal governments and others, particularly state and local governments. Winchell recognizes this process as "troubling because there are no clear preconstructed frameworks" to guide such interactions. A construct supporting a tribal community development model is proposed in this concluding section to overcome the problems associated with Winchell's second concern. The construct contains "internal" and "external" community development processes that are intended to enable tribes to respond to, and influence the independent variables that operate in the tribal planning situation. The construct is then further developed into an operational model in Figure 9.1, adapting features from the contingent planning model.

Internal Developmental Processes

The construct begins by first establishing the tribal community's identification of goals, and then assessing the tribe's self-governance capability to carry out those goals. The first process shares objectives with the self-help approaches as discussed in Chapter 6. The approach emphasizes the importance of a community's self-determination and local empowerment. In the tribal context, the role of tribal government is an integral and unifying component of the social community itself.³³⁸ This activity corresponds to Winchell's self-identification process. As observed by Deloria and Lytle (1984:251): "Almost everything that can be recommended in terms of cultural revival and consolidation involves the fundamental problems of determining a contemporary expression of tribal identity." Therefore, the tribal community development construct begins with the articulation and communication of the tribe's community identity that directs its further political and community development. A second process emphasizes the assessment and development of the political community's governance capacity in order to exercise sufficient authority over the community's affairs.

External Developmental Processes

In contrast to building internal capabilities, the external developmental process responds to political forces that act to usurp reservation authority and destabilize tribal self-governance. This process seeks to understand and formulate responses to political threats against tribal self-governance. As an exercise of tribal political development, approaches are sought to extend the federal government-to-government policy that recognizes the sovereignty of tribes in relations with state and local governments. The development of intergovernmental relations is informed by community development models, political economy theory, conflict theory, and forms of social mobilization theory. The principal objective of tribal community

³³⁸Notwithstanding the presence of divisive social and political fragmentation that may exist within the tribal political community where empowerment actions may be appropriately exercised in a process of restoring democratic representation.

development is to advance the goals of self-determination. The attainment of self-determination necessitates a freedom from external political subjugation that has historically influenced the conditions of Indians. The approach employs the exercise of tribal political action to assert control over the appropriation of territorial resources in order that the distribution of those resources may fulfill community defined needs and sustain the community's well-being. Finally, in order to facilitate the advancement of tribal community goals, what is necessary is a cultural and political pluralism within the greater surrounding region that provides for the acceptance, rather than the rejection, of different cultural and political systems. The tribal community development strategy therefore seeks to effect behavioral changes within the surrounding region as a necessary step toward fostering cultural and political pluralism.

Dimensions of the Tribal Contingent Planning Model

The tribal community development planning model is grounded in a conception of planning that reflects tribal historic experiences and its emancipatory objectives. The model seeks to overcome obstacles encountered in its interactions with the political economy by anticipating the likelihood of opposition within its future planning situation. Several models in planning and community development inform its strategy. For example, the phenomenological approach emphasizes the importance of integrating the dynamics of the planning situation within its general construct. Further, the tribal planning situation requires the use of adaptive approaches that respond to the uncertainties faced in that situation. The social learning models overcome complex social problems by emphasizing the development of utilitarian and normative relations as a basis to overcoming conflict. The contingent framework offers a pragmatic system for selecting appropriate strategies that are both anticipatory and responsive to the dynamics of the tribal planning situation. Decision-making then follows to link the experiences of the tribe's empirical knowledge and the community's goals to the identification of suitable political action alternatives. The contingent model is constructed based on the three dimensions that constitute the tribal planning situation: the territorial, the political,

and the cultural dimensions that comprise the tribal political community.

Structuring the Territorial Variable

Of paramount importance to the tribes is the attainment of improved economic community conditions. The conditions of Indian poverty and the underdevelopment of the reservation economy has been explained through dependency theory that views the conditions of underdevelopment as the consequence of the development process of a more dominant economy. The process creates a situation of dependency where the underdeveloped economies "become appendages" (Wilber 1988:157) of the developed economies. Tribal communities have begun to reverse the process of their poverty by regaining control over their resources. Indian communities are employing economic approaches analogous to what Friedmann (1982) refers to as "self-reliant development," that emphasizes the capacity of the underdeveloped community to selectively limit its dependency relationship on the regional political economy. This approach serves as an important feature of the tribal community development strategy by asserting tribal priorities in decisions that affect the allocation of reservation resources. Of central concern to the tribes, then, is the improvement of community welfare by gaining control over reservation resources. In structuring the tribal territorial variable, an approach is suggested that incorporates the prevailing conditions and priorities of tribal communities in view of the following three considerations:

1. The growing, centralized role of tribal government in conjunction with, or in place of, the free market;
2. The importance of the distributive character of Indian economic systems based on traditional collective values;
3. The view of Indian resources in terms of reserved proprietary collective ownership.

Structuring the Political Variable

Tribal governments exercise their authority through an inherent sovereignty that has never been extinguished. The tribal political authority, however, has been eroded by historic federal policies that subsequently enabled the encroachment by

state and local governments. Under the federal Indian policy of self-determination, tribes now enter an era that promises greater federal support for tribal self-governance in order to overcome obstacles to their development. The structuring of the political variable therefore incorporates the following three considerations:

1. An emphasis on strengthening tribal self-government capacity to fully exercise dormant tribal powers;
2. An emphasis on replacing adversity with utilitarian forms of cooperation in state and local government relations;
3. An emphasis on eliminating political and cultural subjugation and reversing the "incorporation" of the reservation by promoting political and cultural plurality.

Structuring of the Cultural Variable

Native American culture and religion are viewed as inseparable from day-to-day community activity. A shared norm within many tribal communities respects natural resource development as an element of a larger cultural objective in community development, rather than as an end in itself. This community norm often assigns to a natural resource a social use value superior to that of its economic exchange value, emphasizes a concern for the finiteness of its limited natural resources, and stresses the consideration of long-term effects upon the social community. In structuring the cultural variable, then, the following four factors are considered:

1. Resource utility is measured against impacts to cultural stability, and social preference emphasizes the sustainability of natural resources;
2. Emphasis is placed on abating cultural alienation, especially within the reservation territory;
3. Emphasis is placed on balancing the community's social resource use values against its need for economic return;
4. The implications for strengthening social and cultural integration of the community is an integral consideration in community development decision-making.

These three dimensions provide a foundation for the contingent planning model that reflect tribal community development objectives as an endogenous tribal construct. The only exogenous features of the model are those variables in the planning situation that represent external forces over which the tribal community does not exercise complete control. An important feature of the construct is that policy implementation decisions are made internally within the tribal community and anticipate the likelihood for modifying strategies based on the reactions observed from the planning situation. The model is intended to assist tribal decision-making to advance its own goals and prevent decision subjugation by forces that are external to the community. Hence, a model is presented in Figure 9.1 as an adaptive approach to advancing tribal self-determination objectives.

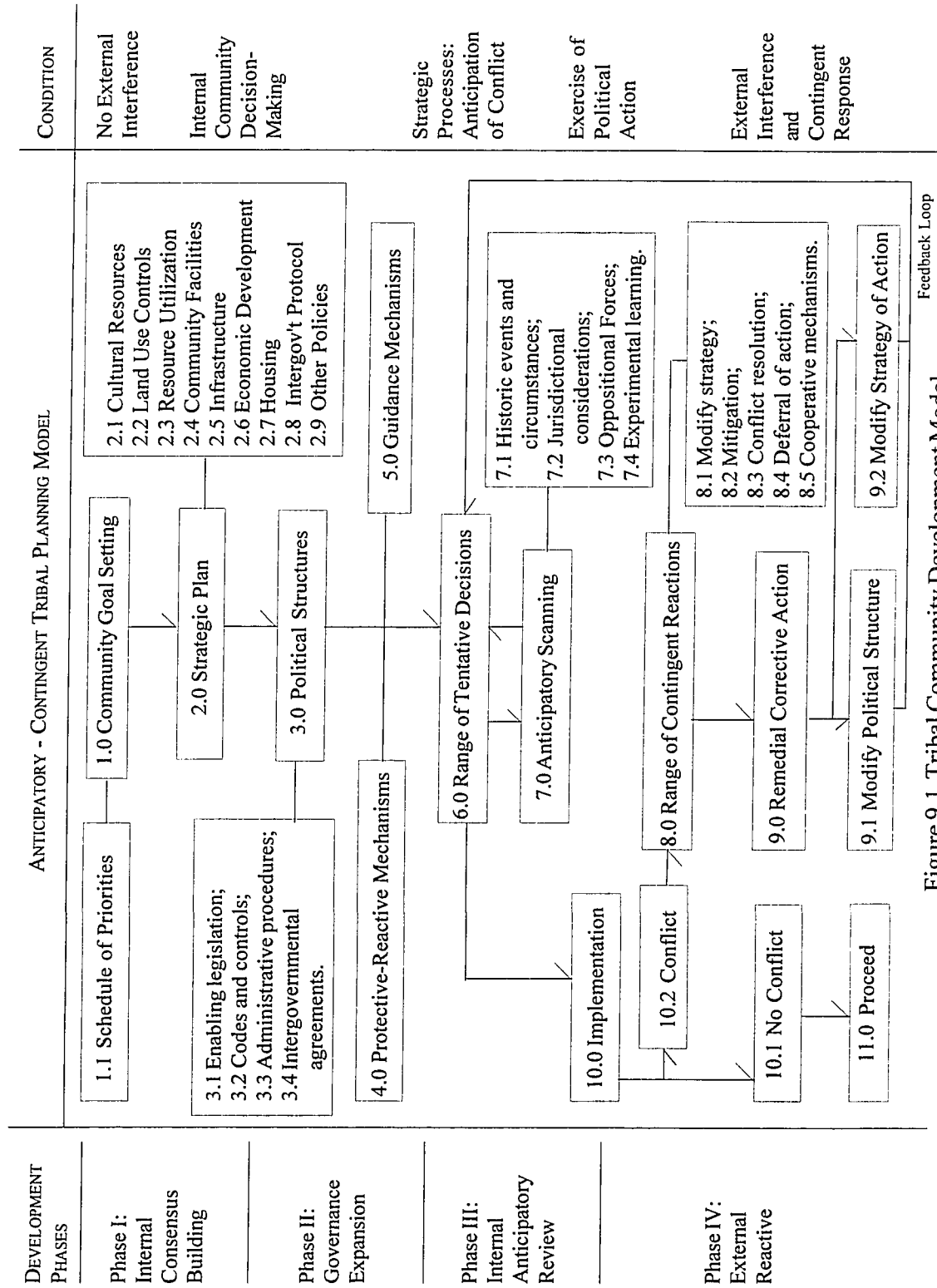


Figure 9.1 Tribal Community Development Model

Discussion of Model Parameters

Tribal community goal setting parallels the goal development process similar to that of other communities and represents actions of "localism" from community development theory. Castells (1983) points out that the search for a community's self-identity is often difficult to discover. Tribes, however, begin this process with a strong understanding and acceptance of their community's social priorities, as the tribal goal setting process is often understood as the articulation of its historic collective identity. The tribal community development approach, then, begins with the revalidation of socially cohesive community goals and proceeds towards its implementation, concerned notably with the mechanisms necessary to actualize goal attainment. The model contains four distinct phases comprising the stages of plan operation. Phase I, the community consensus building phase, represents the internal developmental process concerned with the organization of the social community that is free from external interference. Phase II concerns the selection of strategies to strengthen tribal self-governance and enable the exercise of political action. Under Phase III, critical theory is employed to inform decision processes by anticipating reactions from the planning situation to actions contemplated for advancing community goals. Finally, Phase IV represents the process of implementing actions within the tribal planning situation that are subject to external reaction. The goal of this phase is to advance tribal objectives by overcoming obstacles experienced in the planning situation.

Phase I: Internal Consensus Building

Community Goal Setting (1.0) - This initial phase of the community development model formulates the community's goals. As an internal function of the community, opportunities to engage in broader community dialogue and consensus building also may occur at this stage. This may extend to non-member Indian residents of the community, non-Indian residents of the reservation, adjacent neighboring interests, and the interests of non-resident reservation property owners. The schedule of priorities (1.1) is a subphase of goal setting that establishes priorities to guide the implementation of community action. Goal prioritization

considers the administrative and organization development requirements of the tribal community, as well as the priorities for physical improvements to the reservation territory.

Strategic Plan (2.0) - This stage translates the prioritization of goals into specific planned actions. For example, the strategic plan may specify the allocation of resources first to establish the legislative authority necessary to exercise regulatory jurisdiction on the reservation. A subsequent action then appropriates the resources required to develop the administrative programs to carry out that action. Tribal resource allocation decisions balance the perceived needs of building governing structures such as enabling legislation, and regulatory administration, with the resources required to implement the administration of the plan, as represented in subphase 2.1.

Phase II: Governance Expansion

Political Infrastructure (3.0) - This stage entails the development of the regulatory, legislative, and administrative procedures necessary to administer control over the conduct of reservation activities. The state of the tribal political infrastructure is represented as an evolving system dependent upon the allocation of tribal and federal resources devoted towards its development, and the prioritization of specific political actions evoked as a crisis response from other aspects of the model. Illustrative forms of the political infrastructure include tribal enabling legislation, enactment of regulation and codes, administrative programs and procedures, and cooperative interlocal agreements.

Pre-Scanning (4.0) - This stage represents a distinct step for assessing the likely reaction to a proposed political action from external forces. This may include the anticipation of reactions, such as by a fee land owner's legal challenge to the application of tribal regulatory authority. Expressed as a strategic mechanism, this stage focuses on the early anticipation of likely sources of conflict that may occur within the plan's implementation environment.

Guidance Mechanisms (5.0) - Working in concert with the Pre-Scanning activity in 4.0, this element provides guidance by considering alternative responses

to potential obstacles presented by external stimuli. An example may be the anticipation of a county's response to the fee land owner's petition for county civil regulatory jurisdiction over the reservation activity. A preliminary set of responses is assembled to guide the consideration of alternative action that may include confrontational approaches or the development of agreements for tribal-county cooperation.

Phase III: Internal Anticipatory Review

Tentative Range of Decisions (6.0) - This stage provides for the assessment of the range of anticipated actions and reactions from 4.0 or 5.0, and formulates a protocol for the selection of preferred alternative actions and contingent actions.

Anticipatory Scanning (7.0) - Representing a critical analysis feature of the model, this stage provides an internal evaluation for each proposed action against a series of anticipated responses to the action, thereby enhancing the preparedness of action implementation by furthering an understanding of the potential sources of conflict. Operating as a form of mixed-scanning, the operation is intended to anticipate opposition stemming from a range of independent variables (substage 7.1 and Chapter 5). In anticipating the range of possible vulnerabilities to plan implementation, the analysis produces a range of likely oppositional issues to inform the selection of decisions in stage 6.0.

Phase IV: External Reactive

Proceed with Implementation (10.0) - Implementation occurs in this stage when the action becomes subject to interaction within the planning situation. If no conflict is encountered, the action proceeds (substage 11.0) without further alteration. Conflict encountered in this stage (substage 10.2) results in two possible reactive paths, as decided in stage 8.0. If the identified conflict falls within the anticipated reactions evaluated in the anticipatory scanning stage of 7.0, then a range of contingent pre-selected reactions may be employed. In the event the observed reaction was not earlier anticipated, the reaction is treated as a new variable requiring further consideration (stage 9.0). Here the process may loop back to stage 6.0 to reconsider the range of tentative decisions, or may loop further to stages 2.0

and 3.0 to reconsider the strategic plan or the adequacy of the tribe's political structure. During the course of evaluating contingent reactions, the action itself may be deferred pending decision on a preferred course of remedial action.

Range of Contingent Reactions (8.0) - This stage of the planning model synthesizes the nature of the identified opposition and constructs a range of contingent reactions in substage 8.1 that may include the exercise of tribal political action to overcome the obstacles, the modification to the proposed action, the mitigation of the action to eliminate or reduce opposition, the deferral of the action, the development of new cooperative mechanisms, or consideration of other means of conflict resolution, including litigation. The analysis may result in two outcomes, represented as remedial corrective actions (9.0) in substages 9.1 and 9.2.

Modify Political Infrastructure (9.1) - Modification of the political infrastructure (3.0) may be necessary to remove the perceived vulnerability and strengthen political governance through the development of further enabling legislation, regulations, or litigation. This substage is concerned with the strengthening of tribal capability to carry forth the action; and

Modify Strategic Action (9.2) - The modification of the strategy action itself may be necessary by re-evaluating the balance of priorities within the Strategic Plan.

Recommendations for Future Research in this Field

This research contributes to the development of an approach for the systematic and rational advancement of tribal emancipatory goals within a complex and dynamic planning situation. As a contingent decision approach, planning strategies are selected in anticipation of the reactive tendencies occurring in the planning situation. The model is informed from the empirical research that identifies vulnerabilities to the exercise of tribal political action. The model is further informed by several traditions in planning theory to anticipate likely outcomes based on the technique of scanning the planning situation.

The paradigm's operational feature is intended to respond to both anticipated and experienced resistance through the employment of counteracting measures. The model, in its circumspect capacity, emphasizes the continuous evaluation of feedback

information in selecting strategies that maximize the likelihood for goal attainment. The range of contingent actions is expansive and considers internal actions for further strengthening the capacity of tribal self-governance, the reconsideration of community goals, and the reconciliation of external conflict through the measures of litigation, dispute resolution, and other forms of mediation. The former strategy emphasizes adjustments internal to the community as a form of conflict avoidance. The latter strategy emphasizes the direct interaction with the encountered conflict intended to modify the behavior of that situation.

This research does not sufficiently examine all aspects of the political and technological limitations within the internal tribal organization. The accurate scanning and interpretation of the tribal planning situation is dependent upon both reliable information as well as a capacity to clearly interpret that information upon which the contingent responses are selected. Future field research is needed to verify and test the model advanced in this research, and to identify those structural internal weaknesses within the tribal decision-making organization that require further development. The implementation of an effective planning model is dependent upon the development of an intellectual capacity to continuously employ that strategy in the management of tribal affairs.

The tribal community development planning model is intended as a general framework to consider independent variables in tribal decision-making in order to improve the tribal social condition. As a conceptual approach, it provides a process for policy implementation abstract enough to consider a diversity of contexts, goals, and interests operating in the planning situation. Further research is encouraged that examines more fully the manner in which this general construct may prove suitable to the unique contexts of different tribal planning situations. Research is especially recommended to better understand the effects on the social cohesiveness of tribal communities from the processes of building utilitarian and normative relations with the regional political economy, as advanced under this paradigm.

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APPENDIX A

TABLE OF SELECTED FEDERAL STATUTES

The Northwest Ordinance of 1787

Act of August 7, 1787, 1 Stat. 50.

This Act, ratified by Congress in 1789, establishes the U.S. government's relationship to tribes as having a similar status to that of a foreign nation and declared a policy of "utmost good faith" towards Indians, their lands, and their properties.

The Nonintercourse Act of 1790 and 1834

25 U.S.C. sec. 177, 1 Stat. 137, 1790; and 4 Stat. 729, 1834.

This Act established that no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The Treaties Statute of 1871

25 U.S.C. Sec 71

In 1871, Congress prohibited further treaty-making with Indian Tribes by declaring that "No Indian Nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired".

The General Allotment (or Dawes) Act of 1887

25 U.S.C. sec. 331-334; 339, 341, 348, 349, 354, 381

The Act authorized the allotting of the tribal lands to individual tribal members, the land to remain in trust for 25 years. The stated reason for allotment was to provide for tribal members to become self-supporting members of their communities. The result was that after the twenty-five year trust period, the land became eligible for state taxation resulting in over 17.5 million acres of land lost to non-Indian ownership.

The Dead and Down Timber Act: Act of February 16, 1889

25 U.S.C. 196.

This Act provided for the allotment of lands in severalty to Indians on

reservations.

The Indian Appropriations Act of March 3, 1909.
35 Stat. 783.

This Act provided for the first directed appropriation of funds for Indian forestry programs as an exercise of federal trust responsibility over Indian resources.

The Indian Reorganization Act of 1934 (Wheeler-Howard Act)
25 U.S.C. sec 461-479.

This Act represented a new approach to tribal sovereignty and a commitment to protect Indian culture. Tribes had the opportunity to vote to accept or reject the restructured form of tribal government mandated by the Act. The form of government drawn up by this Act was based on a written constitution mandating open elections and has frequently been compared to a municipal government. Additional provisions in the Act provided: Section 461, "Allotment of land on Indian Reservations", prohibited further allotment of land after June 18, 1934; Section 463, "Restoration of Lands to Tribal Ownership", provided for the protection of existing rights; Section 476, "Organization of Indian Tribes; Constitutions and Bylaws; Special Election", established rights of any Tribe to organize for its common welfare, and adopt an appropriate constitution and bylaws, effective when ratified by a majority vote of the adult members of the tribe. The constitution also vested the following rights and powers: to employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and Local governments; Section 477, "Incorporation of Indian Tribes; rter; Ratification by Election", authorized the Secretary of the Interior, upon petition by at least one-third of the adult Indians, to issue a charter of incorporation to such tribe.

Johnson-O'Malley Act

The Johnson-O'Malley Act of 1934 permitted the federal government to contract for various reservation services with state and local governments and private contractors. Indian people on the reservations thus became entitled for the first time to some state welfare services and Indian children entered the public school system.

The Indian Claims Commission Act of 1946
25 U.S.C. sec 70a (omitted, upon termination of the Commission in 1978).

The Indian Claims Commission was established in 1946 and granted blanket permission for suits for compensation for land or other resources taken from Indian

tribes.

The Indian Country Statute of 1948

Defined the term "Indian country" to means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including the right-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

House Concurrent Resolution 108 of 1953

67 Stat. B132. (1953).

This document included the recommendation that all Indian tribes and individual members thereof should be freed from federal supervision and control, and from all disabilities and limitations specifically applicable to Indians. It further declared that the Secretary of the Interior should examine all existing legislation and treaties dealing with such Indians and report to Congress his recommendations on such legislation, to accomplish the purposes of this resolution.

Public Law 280 of 1953

67 Stat. 588 (1953) as amended. 18 U.S.C.A. sec 1162, 25 U.S.C. sec. 1321-1326, 28 U.S.C. sec. 1360,

18 U.S.C. sec. 1162. "State jurisdiction over offenses committed by or against Indians in the Indian country". This section of the Act made possible the termination of a tribe. Tribes that were deemed ready for termination were paid a per acre fee and the unique relationship between the tribe and the federal government was then terminated. What tribes soon discovered was that the termination of the reservation meant the termination of federal benefits and services and also the termination of the tribe as a sovereign institution.

25 U.S.C. sec 1321, 1322. Enacted as part of the Indian Civil rights Act of 1968, these two statutes modified Public law 280 to require, before any other state may assume civil or criminal jurisdiction over Indian country, "the consent of the Indian Tribe ... affected by such assumption."

25 U.S.C. sec. 1323. "Retrocession of jurisdiction by State". Authorized the United States to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by State pursuant to the provisions of the title.

The Menominee Termination Act of 1954

Ch. 303, 68 Stat. 250 (1954), (Repealed 1973).

The purpose of this Act is to provide for orderly termination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin.

The Menominee Restoration Act of 1973

25 U.S.C. sec. 903-903f.

Federal recognition was extended to the Menominee Indian Tribe of Wisconsin and reinstatement of tribal rights and privileges.

The Indian Civil Rights Act of 1968

82 Stat. 25 U.S.C. sec. 1301-1341.

The purpose of this Act was to protect individual Indians from their own tribal governments and presents a limitation on tribal sovereignty. The Act mandates that tribal governments must provide many of the same protections provided by the U.S. Constitution. Congress did recognize the sovereignty issue by omitting from the Act some rights recognized in the Constitution which would have clearly conflicted with traditional Indian practices.

The National Environmental Policy Act of 1969

83 Stat. 852-856, Public Law 91-190.

This legislation requires federal agencies, including the Bureau of Indian Affairs, to consider the effects of its undertakings on natural and cultural resources.

The Alaska Native Claims Settlement Act of 1971

85 Stat. 688, Public Law 92-203.

This Act provided for the settlement of certain land claims of Alaska natives. The Act revoked reservations and Indian allotment authority in Alaska. Under this Act, the role of the BIA was diminished.

Indian Finance Act of 1974 (Act of April 12, 1974)

25 U.S.C., sec. 1451.

This Act established the policy of Congress to help develop and utilize Indian resources whereas Indians would fully exercise responsibility for the utilization of management of their own resources in order to enjoy a standard of living from their own productive efforts comparable "to that enjoyed by non-Indians in neighboring communities."

The Indian Self-Determination and Education Assistance Act of 1975

25 U.S.C. sec 450. Pub. L. 93-638.

This Act provided for 1) maximum Indian participation in the government and education of Indian people; 2) full participation of Indian tribes in programs and services for Indians conducted by the federal government; 3) encouraged the development of Indian human resources; 4) educational assistance; 5) support rights of Indian citizens to control their own resources.

The Civil Rights Attorneys Fees Act of 1976

Act of October 10, 1976. Pub. L. 89-635, 80 Stat. (codified at 28 U.S.C. sec. 1362, 1976).

This Act provided the tribes the right to obtain attorneys fees if they prevailed in certain types of litigation, increasing the incentive of the tribes to litigate.

The Indian Child Welfare Act of 1978

25 U.S.C. sec. 1901-1963

This Act addressed the long standing problem of large numbers of Indian children being transferred from their natural parents to non-Indian parents pursuant to state adoption and guardianship proceedings.

The American Indian Religious Freedom Act of 1978

92 Stat. 469 (1978) (codified in part 42 U.S.C. sec. 1996).

This Act was passed in 1978 and explicitly recognizes the importance of traditional Indian religious practices and directs all federal agencies to insure that their policies will not abridge the free exercise of Indian religions.

The Indian Gaming Regulatory Act of 1988

25 U.S.C., sec. 2703

This Act establishes the statutory basis for the operation, regulation, and protection of Indian tribal gaming activities.

Native American Graves Protection and Repatriation Act (NAGPRA)

25 U.S.C., sec. 3001.

NAGPRA was enacted in November 1990 as a sweeping federal human rights law to provide four important protections over Native American Cultural Resources: 1) it increases protections for Indian graves located on federal and tribal lands and provides for native control over cultural items obtained from such lands in

the future; 2) it outlaws commercial traffic in Native American human remains; 3) it requires all federal agencies and federally funded museums and universities to inventory their collections of dead Native Americans and associated funerary objects and repatriate them to culturally affiliated tribes or descendants on request; and 4) it requires all federal agencies and federally funded museums to repatriate Native American sacred objects and cultural patrimony under procedures and standards specified in the Act.

The Tribal Self-Governance Act of 1994

H.R. 4842. Title II.

This Act established that the tribal right of self government flows from the inherent sovereignty of Indian tribes and nations; Recognizes the special government to government relationship with Indian tribes, including the right to self-governance; Finds that although progress has been made, the federal bureaucracy has eroded tribal self-governance and dominates tribal affairs; The Act transfers control to tribal governments, upon tribal government request, over funding and decision-making for federal programs, services, functions and activities or portions thereof, in an effective way to implement the federal policy of government to government relations with Indian tribes and strengthens the federal policy of self-determination.

APPENDIX B

TABLE OF SELECTED FEDERAL COURT DECISIONS

Arizona v. California,
460 U.S. 605, 1983.

Atkinson v. Haldane,
569 P. 2d. 151. Alaska, 1977.

Blue Legs v. United States Environmental Protection Agency,
668 F. Supp. 1329 (D.S.D. 1987).

Blue Legs v. BIA,
867 F. 2d 1094, 8th Cir. 1989.

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation,
492 U.S. 408, 106 L.Ed.2d 343, 109 S. Ct. 2994, 1988.

Bryan v. Itasca County,
426 U.S.S. 376, 1976.

Cappaert v. United States,
426 U.S. 128, 1976.

Cardin v. DeLaCruz,
671 F. 2d. 363, 9th Cir. 1982. Cert denied, 459 U.S. 967, 1982.

Cherokee Nation v. Georgia,
30 U.S. 1, 1831.

Colorado River Indian Tribes v. Marsh,
605 F. Supp. 1425 (C.D.Cal. 1985).

Colville Confederated Tribes v. Walton,
647 F. 2d. 42, 9th Cir., 1981.

Confederated Salish and Kootenai Tribes v. Namen,
665 F. 2d. 951, 9th Cir. 1982.

Confederated Tribes of the Yakima Indian Nation v. Whiteside,
825 F.2d 529 (9th Cir. 1987).

Cotton Petroleum v. State of New Mexico,
490 U.S. 163, 104 L.Ed.2d 209, 109 S. Ct. 1698. (1988).

County of Oneida v. Oneida Indian Nation,
470 U.S. 220.

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,
492 U.S. 408, 106 L.Ed.2d 343, 109 S.Ct. 2994 (1988).

Drysdale v. Prudden,
195 N.C. 722, 143 S.E. 530, 536, 1928.

Euclid v. Ambler Realty Co.,
272 U.S. 365, 1926.

Frontenelle v. Omaha Tribe,
430 F. 2d. 143. 8th Cir., 1986, Cert denied, 107, S. Ct. 2461, 1987.

Governing Council of Pinoleville Indian Community v. Mendocino County,
684 F. Supp. 1042 (N.D.Cal. 1988).

Holly v. Totus,
No. C-78-2-JLQ, E.D. Wash., 1983.

Johnson v. M'Intosh,
21 U.S., (8 Wheat.) 543, 1823.

Knight v. Shoshone and Arapahoe Indian Tribes,
670 F. 2d. 900, 10th Cir. 1982.

McClanahan v. Arizona State Tax Commission,
441 U.S. 164, 1973.

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130, 1982.

Moe v. Confederated Salish and Kootenai Tribes,
425 U.S. 463, 1976.

Montana v. United States,
450 U.S. 544, 1981.

Morton v. Mancari,
417 U.S. 535, 1974.

Muckelshoot Indian Tribe v. Trans-Canada Enterprises, Ltd.,

713 F. 2d. 9th Cir. 1983

National Farmers Union Ins. Co., v. Crow Tribe,
471 U.S. 845, 1985.

New Mexico v. Mescalero Apache Tribe,
462 U.S. 324, 103 S. Ct. 2378, 1983.

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191, 1978.

Puyallup Tribe v. Department of Game,
391 U.S. 392, 1968.

Puyallup Tribe v. Department of Game,
443 U.S. 165, 1977.

Puyallup Indian Tribe v. Port of Tacoma,
717 F. 2d. 1251, 9th Cir. 1983.

Rice v. Rehner,
463 U.S. 713, 103 S. Ct. 3291, 1983.

Santa Clara Pueblo v. Martinez,
436 U.S. 49, 1978.

Santa Rosa Band of Indians v. Kings County,
532 F. 2d 655, 9th Cir., 1975. Cert denied, 429 U.S. 1038, 1978.

Seminole Nation v. United States,
316 U.S. 286, 1942.

Snohomish County v. Seattle Disposal Company,
70 Wash. 2d. 668, 425 P. 2d. 22, Cert denied, 389 U.S. 1016, 1967.

Snow v. Quinault,
709 F. 2d. 1319, 9th Cir. 1983. Cert denied, 104 S. Ct. 2655, 1984.

State of Washington, Department of Ecology v. United States Environmental Protection Agency,
752 F.2d 1465 (9th Cir. 1985).

Suquamish Tribe v. Aam,
No. C82-1549V W.D. Wash.

Tulalip Tribes of Washington v. Walker,
Snohomish Co. Sup. Ct. No. 71421, 1963.

Tyndall v. United States,
No. 77-0004, D.D.C. April 22, 1977.

United States v. Anderson,
738 F.2d. 1358. 9th Cir., 1984.

United States v. Cascade Natural Gas Corp.,
No. C76-550V. W.D. Wash.

United States v. Kagama,
118 U.S. 375, 384. 1886.

United States v. Mitchell,
463 U.S. 206, 1983.

United States v. Payne,
264 U.S. 446, 1924.

United States v. Pend Oreille County Public Utility District no. 1.,
No. C-80-116-RMB E.D. Wash.

United States v. Washington,
506 F. Wupp. 187, W.D. Wash., 9th Cir. No. 91-3111, 1984.

Unites States v. Washington,
Subproceeding no. 89-3.

United States v. Washington,
641 F. 2d. 1368, 9th Cir. 1981. Cert denied, 454 U.S. 1143, 1982.

United States v. Washington,
384 F. Supp. 312, W.D. Wash., 1974. Aff'd, 520 F. 2d. 676, 9th Cir., Cert denied,
423 U.S. 1086, 1976.

United States v. Washington,
384 F. Supp. 312, W.D. Wash. 1974.

United States v. Wheeler,
435 U.S. 313, 1978.

United States v. Winnebago Tribe,

542 F. 2d. 1002, 8th Cir., 1976.

United States v. Winters,
207 U.S. 563, 1908.

United States v. Yakima Tribal Court,
806 F. 2d. 853 9th Cir, Cert denied, 107 S. Ct. 2461. 1987.

Washington v. Confederated Tribes of the Colville Indian Reservation,
447 U.S. 134, 1980.

Washington Game Department v. Puyallup Tribe,
414 U.S. 44, 1973.

Washington v. Washington State Commercial Passenger Fishing Vessel Association,
443 U.S. 658, 1979.

White Mountain Apache Tribe v. Bracker,
448 U.S. 136, 1980.

Williams v. Lee,
358 U.S. 217, 1958.

Worcester v. Georgia,
31 U.S. (6 Pet.) 515, 1832.

VITA
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Nicholas received the Bachelor of Arts degree in 1974 in Geography at the State University of New York at Buffalo and his Masters of Science degree in Geography and Urban and Regional Planning in 1979 in the combined Graduate Program at Western Washington University and Huxley College of Environmental Studies in Bellingham, Wa. Nicholas was admitted to Candidacy for the Doctorate Degree in the Interdisciplinary Program in Urban Design and Planning at the University of Washington in 1991.

His professional experience in planning and community development includes positions with municipal, county, and tribal governments, and private consulting practice. For the past fifteen years, Nicholas has worked in Indian Country as the General Manager and Director of Planning and Community Development for the Swinomish Indian Tribal Community.

Nicholas has lectured and taught several courses in urban planning, tribal community development, and natural resources management at Western Washington University and has presented papers on tribal planning and community development at professional planning, economic development, and law conferences. He is a founding Board Member of the Northwest Tribal Planners Forum, dedicated to the advancement of tribal planning professionalism and community development in the northwest. He also serves as a member of the Bellingham Planning and Community Development Commission, the Swinomish Regulatory Gaming Commission, and the Board of Directors of 1000 Friends of Washington. Nicholas is a member of the American Planning Association, the Planning Association of Washington, the Northwest Tribal Planners Forum, the American Institute of Certified Planners, and the National Association for the Advancement of Colored People.