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State–Tribal Collaboration: State Role in Tribal Legal Framework

There are 574 federally recognized Tribes and Alaska Native entities that have concurrent jurisdictions with 36 states in the United States. Alaska and California overlap with the most federally recognized Tribes and Native entities with 229 and 109 Tribes, respectively.[1]

While the other 14 states do not overlay Tribes who are federally recognized, they do have Indigenous populations whose relationships with their traditional territories are no less significant than those communities with federally recognized governments. Tribes can also be recognized by states regardless of their federal recognition. State recognition does not grant the same level of sovereignty or benefits as federal recognition but is still a way for a state to acknowledge the existence of a Tribe and establish a government-to-government relationship.[2] This means that all states are able to engage respectfully with the land's original stewards, regardless of whether a Tribe is federally recognized.

Brief History

Since the early 1970s, the U.S. Supreme Court has established federal law regarding state law and jurisdiction in Indian Country, including stipulations around taxation, zoning, regulations, and civil adjudications. This has resulted in highly contentious legal battles on a variety of issues around Tribal inherent jurisdiction. However, Tribal-state agreements have occasionally been negotiated in three particular areas: regulatory functions, taxation, and the delivery of services.[3]

In the 1980s, amidst extremely high tensions between states and Tribes, Tribal and state organizations came together and established state-specific Commissions on State-Tribal Relations.[4] These Commissions sought to find a better approach than states assuming jurisdiction over reservation lands and activities. Federal law also clearly stated that states cannot assume jurisdiction over reservations unilaterally, but only through a vote from Tribal members.[5] Due to the work of the Commissions on State-Tribal Relations, many states have entered into mutually beneficial intergovernmental agreements with Tribes that overlap state jurisdictions through executive orders, legislation, or other mandates. In 1989, Washington state led by signing the Centennial Accord

[1] https://www.usa.gov/indian-tribes-alaska-native
[2] https://nni.arizona.edu/our-work/research-policy-analysis/governance-under-state-recognition
[3] Hanna, Tassie, Sam Deloria, and Charles E. Trimble. 2012. "The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship." *Tulsa Law Review* 47 (3): 553–598.
[4] https://www.ncsl.org/quad-caucus/state-committees-and-commissions-on-indian-affairs
[5] 102. Kennerly v. Dist. Ct of the Ninth Judicial Dist. of MT., 400 U.S. 423 (1971).

with the 26 federally recognized Tribes with concurrent jurisdictions. This agreement recognized the sovereignty of the Tribes and affirmed the government-to-government relationship between Washington state and the Tribes.[6] Various other states have signed similar agreements, such as The State Tribal Collaboration Act in New Mexico, Senate Bill 770 of 2001 in Oregon, and the Millenium Agreement in Alaska.[7] While legal conflicts still occur between states and tribes, these agreements allow cooperation on specific issues by having in place policies and procedures for interactions.

What States Cannot Do

When working with federally recognized Tribes, states have limited jurisdiction over Tribes and reservation land. The list below highlights some key areas where state jurisdiction is limited:

1. States cannot regulate (including taxation) individual Tribal members or Tribes on Tribal lands.
2. States cannot condemn or otherwise regulate uses of Tribal lands.
3. Tribes, as governments, have rights of eminent domain.
4. States cannot exert zoning over Tribal lands.
5. States cannot require environmental or permitting compliance on trust lands unless delegated by the Tribe or U.S. Congress.
6. States cannot unilaterally impose state environmental review processes on Indian Country.
7. States cannot impose taxes on Indians on reservation or Indian Tribes, or Tribal trust lands, but they may tax non-Tribal entities or individuals operating on reservations, or non-Native customers involved in certain transactions (including energy sales). There are additional complexities around Gaming Compacts.
8. States cannot prosecute Tribal members for crimes committed in Indian Country (with exceptions under Major Crimes Act, PL 280, or cross-deputization agreements).
9. States cannot regulate Tribal utilities or infrastructure unless agreed upon by the Tribe.
10. States cannot determine who is eligible for Tribal programs or interfere in Tribal elections or internal governance.

How Can States Support Tribal Energy Activities?

There are a multitude of ways that states can support Tribal energy activities. The following list covers some key areas:

1. Acknowledge Tribal sovereignty through official channels and engage with the Tribes through a formal government to government framework.
2. Create a designated Tribal Liaison for each state governmental department that needs to work respectfully with Tribes.
3. Direct utilities to work directly with Tribes for services to the Tribe and on Tribal lands and clarify that these discussions do not have to include the regulators.
4. Inform the Public Utility Commission that they do not have authority on Tribal lands. The exception is if the Tribe participates in a state's law (i.e., net energy metering) and thus chooses to defer to state regulators for Tribal participation.
5. Work with Tribal Nations by inviting Tribes to participate in state hearings or other topics and activities of interest. Send a delegation to affiliated Tribes to explain any proposed legislation, ask for input from Tribes, and use transparent and consistent communication.
6. Proactively offer formal government-to-government consultation on all projects, studies, or programs that affect Tribal or Tribal adjacent land.
7. Seek out and incorporate Tribal input when planning and siting generation or transmission.
8. Create or expand workforce development and continued educational opportunities for Tribal members.
9. Incorporate Tribal energy plans into the state's energy plan. In the case that a Tribe does not have a formal energy plan, the state could offer technical assistance for the creation of one.
10. Identify areas where energy goals overlap or conflict between the state and all potentiall impacted Tribes, and develop agreements of cooperation that benefit both parties.
11. Ensure Tribes are included in grant programs and other state efforts. Ensure that Tribal applicants are not forced to partner with counties or state agencies to access funding that Tribes should be able to apply for directly.

[6] https://goia.wa.gov/state-tribal-relations-centennial-accord/centennial-accord
[7] https://dot.alaska.gov/tribalrelations/documents/Millennium-agreement.pdf

12. Recognize that Tribal utilities or energy departments are governmental agencies and consider requiring respectful engagement as such.
13. Coordinate grid interconnection planning and avoid state roadblocks to Tribal energy sovereignty.
14. Provide carveouts or exemptions in state energy laws or incentives that acknowledge Tribal jurisdiction.
15. Support the capacity building and knowledge sharing with Tribal Nations through shared training resources, internships, and other opportunities for Tribal staff and Tribal citizens.

Conclusion

States have a responsibility to understand and recognize that Tribes and Native Villages have concurrent jurisdictions with Tribal entities for all federally-recognized (and perhaps state-recognized) Tribes with whom they overlap. As such, there are specific restrictions to state actions on Tribal lands and with Tribal members and there are many opportunities for states to actively support Tribal energy activities.

Resources

Understanding Tribal-State Jurisdiction- Per State[8]

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[8] narf.org/tribal-state-jurisdiction

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