My Goal Today

- Define Tribal sovereignty and self governance;

- Outline why Tribal sovereignty is an issue for State regulatory agencies & Public Health Community; and

- Share the experiences of the state of Washington in “stepping up” to sovereignty.
Indian Tribes

- An Indian Tribe is a distinct political community.
- Indian Tribes are not considered instrumentalities of the federal government.
- Indian Tribes are not states nor are they local governments.
Sovereignty is Tricky
What is Tribal Sovereignty?

- Sovereignty - the right or power that comes from itself, and no other source, that a government draws upon to govern.
- Federally recognized Indian Tribes enjoy all inherent powers of a sovereign nation, except those powers Congress has specifically removed.
Tribal Sovereignty...It's Real.

Tribal sovereignty is:
- Inherent (predates US government).
- Not granted by any government.
- Recognized in treaties, court decisions, and the US Constitution.
- Separate and independent from the federal and state governments.
- Subject to some limitations.
29 Indian Tribes are Located Within the State of Washington
Minnesota Tribes
Sovereign Powers of a Tribe

Includes:

- The power to determine the form of government,
- Define the conditions of membership,
- Regulate domestic relations among its members,
- Prescribe rules of inheritance,
- Levy taxes on members and nonmembers,
- Control entry onto Tribal lands,
- Regulate the use and distribution of Tribal property, and
- Administer justice among members of the Tribe.
U.S. Constitution: Commerce Clause

“The Congress shall have power...to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”

This clause is the basis for Congressional Authority to pass laws dealing with Tribes and for the Government to Government relationship.
U.S. Constitution:  
*Supremacy Clause - Treaties*

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land…”

Treaties between Indian Tribes and the federal government enjoy legal superiority over any conflicting provisions of a state constitution or law. They are the “supreme law of the land.”
U.S. Constitution: Treaty Clause

- "No state shall enter into any treaty..."
- "He [The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators concur..."
- Statutory rule of construction: Treaties are construed to the benefit of Tribes.
- In 1871 Congress ended the practice of entering into treaties with the Indian Tribes. The federal government entered into more than 400 treaties with various Indian Tribes from 1778 to 1871.
The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

First. That perfect toleration of religious sentiment shall be secured....

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to ... all lands lying within said limits owned or held by any Indian or Indian tribes; and ... said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States ....; and that no taxes shall be imposed by the state on lands or property therein...
What is a Treaty?

The U.S. Supreme Court said:

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."
Treaty Facts

- A treaty is not a grant of rights to a Indian Tribe. It is a grant of rights from the Indian Tribe to the U.S. government, and a “reservation of rights” not granted.

- Rights not granted are called “reserved rights.”

- Treaty rights do not diminish with the passage of time, periods of nonuse, or changes in technology. Some treaty rights extend outside of reservation boundaries.
Geography is a Strong Component of Sovereign Authority

- Indian Country
- Indian Reservation
- Trust Land
- Fee Land
Why Learn About Tribal Authority?

- Both state and Tribal governments have inherent authority to impose taxes.
- State and Tribal governments’ authority to tax is not the same but does overlap in some instances.
- We are taxing the same people, regulating in the same geographic area, and have similar jurisdiction.
- And, some state taxes are preempted by Federal Law.
Tribal Authority to Tax Non-Indians

On Trust land:
- Tribal authority to tax nonmembers on trust land is generally accepted.

On Fee land within the Reservation:
- Tribal authority to tax nonmembers on fee land within the Reservation is evaluated under the U.S. Supreme Court’s *Montana* test.
Tribal Authority to Tax Non-Indians on Fee Land - Montana Test

A Tribe can regulate non-members on fee land in Indian Country if:

- The nonmember enters into consensual relationships with the tribe or its members; or
- The nonmember’s conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of Tribe.
“...a fundamental attribute of Tribal sovereignty.”

“At the outset, the State argues that the Colville, Makah, and Lummi Tribes have no power to impose their cigarette taxes on nontribal purchasers. We disagree. The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.” Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 152 (1980)
State Authority to Tax

- The state has authority over non-Tribal members, including within Indian Country.
- Authority to tax non-Indians may be preempted under the balancing test.
- State and local governments have no authority to tax Tribes or their members in Indian Country, unless authorized by Congress.
- This is true throughout Indian Country and outside Indian Country for treaty issues.
Federal Preemption

Federal Preemption of state and local authority:

- Preemption is determined using a balancing test – Tribal and federal interests are combined and are weighed against state interests. This analysis is very fact specific.
State and Tribal Interests Overlap – For Instance:

- Tribal economic development involves doing business with non-Indians.
- The state has leverage over and access to non-Indians.
- Tribal successes in enterprise activities require certainty in business arrangements.
Factors That Contribute To Litigation Also Contribute To Collaboration

- U.S. Supreme Court rulings lack clarity (so there is a need for bright lines and a current law baseline.)
- Jurisdictional imperatives (and concurrent jurisdiction begs for communication.)
- Fundamental disagreements (should not stop practical discussion of interests.)
- Evolving areas of law and Tribal governments and Tribal enterprises (highlight mutual interests.)
- History of state opting for litigation (was proven unsuccessful in cigarette regulation.)
Why It Matters Overall

- Sovereignty is the Law.
- Conflict is costly.
- Legal authority isn’t clear cut and risk exists for both parties.
- Establishing trust & working relationship benefits everyone.
- Cooperative agreements accommodate interests.
Three Converging Tracks Lead to Change in Overall Approach

- Colville Case – 1980 (end result – 19 cigarette compacts).
- Centennial Accord – 1989 (end result – open and accessible).
1980 Colville Case – *Huge Win on its Face*

- Tribal members exempt from state taxes on sales within reservation.
- State may require Indian retailer to affix state stamp to cigarettes.
- The state can seize cigarettes in transit to smokeshop.
- The Tribe can tax non-Indians buying cigarettes from Tribal smokeshops.
- Silent on methods to enforce collection of state taxes.
Hollow Victory

- Absolutely no value in ending the conflict.
- Collections do not increase.
- Tensions do increase.
- Relationships in general worsen.
In 2001 the Washington State Legislature authorized the Governor to enter into cigarette compacts with certain Indian Tribes. The Department of Revenue was delegated the responsibility to negotiate and recommend to the Governor (RCW 43.06.450-460).

- In May 2001 there were zero compacts.
- By May 2005 the Governor had signed compacts with 19 of the 29 Tribes in the State and more are on the way.
Centennial Accord

- 1989 Historic Document –
  - Signed between federally recognized tribes in WA and the Governor.

- Framework –
  - Government to Government relationship.

- Guidelines –
  - Establishment of mutual goals through improved relationships between sovereign governments.
Administrative Practices to Provide Business Certainty

Took dusty and neglected case law off the shelves and invigorated them.

- Preemption and balancing test.
- Indian Trader.
- Value generated on the reservation.
- Treaty rights (Treaty Fishery Project).
Best Practices for State Agencies

- **Internally –**
  - Develop a strategy to change agency culture.
  - Institutionalize accessibility and openness.
  - Evaluate policy positions versus litigation positions.

- **Externally –**
  - Communicate proactively and share information.
  - Be open minded about solutions.
  - Foster a genuine interest in well being.
  - Take reasonable risks.
  - Find someone to talk to; build a relationship.
Best Practices for Advocates

- If you care about what’s happening on Reservations, include Tribal Governments in planning just like State & Federal Governments.
- Two tracks: Prevention/Cessation & Policy Change.
- Build relationships.
What Is on the Horizon for Washington State & Tribes?

- Tribal Sovereignty Workshops – seven locations throughout the state, partnership between Tribes, Governor’s Office, DOR, and the Business Community.
- Tribal Tax Workgroup - Framing up concurrent jurisdiction and the Tribal tax base.
- Cigarette Issues – Emphasis on issues of price control and tobacco cessation.