

Climate Change and Tribal Consultation: From Dominance to D tente

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Introduction

As climate change progresses, consultation with indigenous peoples can be a critical tool for shaping agreements to protect natural and cultural heritage. For indigenous peoples, cultural survival is at stake. For the Parks, the ability to maintain a preservation and conservation mission is at stake. Climate change as a phenomenon is ridiculously complex, stretching across the arenas of scientific inquiry, policy-making, political boundaries, and economics. Stronger relationships between tribes and agencies can set forth a defense against a muddling, fragmented approach to a common threat. And it is something that we can all accomplish.

The model of consultation as an agreement-making process emerged after the period of self-determination and self-governance in the 1970s in the United States. Earlier, treaty-making as a consent system settled boundary issues, but it left a level of persistent conflict for implementing environmental policies. Assertions of federal dominance prolonged tension and conflict in intergovernmental relations. Consultation developed as a framework for reducing conflict and enlarging the area of shared interests during a time when most government land-management agencies moved to policies of ecosystem management. At the same time tribes moved to self-determination policies, and consultation moved to participatory decision-making. The potential impacts of climate change suggest that consultation policies and frameworks need to be further strengthened to face unpredictable events and serious impacts on natural and cultural resources. Today, boundaries melt nearly as fast as the arctic ice. Animals and plants cross boundaries or reach barriers, land masses and coastlines change, and access to traditional resources becomes difficult. Getting it wrong by getting stuck in conflict is not an option. Increased understanding of the legal, social, cultural and political context of consultation and agreements makes the case for a survival toolkit as “We are entering an era where we are looking out for each other” (Williams 2009). D tente, as recognition of the legitimate role of multiple authorities and partnership, replaces dominance when the endgame is to mitigate the impacts of climate change.

Tribes hold water rights and land, so they come to the table with resources of great importance to the ecosystem. They move from a reactive position and take the initiative to ask the questions, call meetings and define strategies. Tribes have an equal stake in the process and the outcome, and so “should play an equal part in deciding the shape of the system” (Deloria 1995, 10). The rebalancing of the consultation system is nowhere more evident than in Obama’s change, echoed by Interior Secretary Salazar, from government-to-government language to that of nation-to-nation, for consultation.

Steps in consultation

Identification of authority. The first step in an effective consultation process is for all par-

ties to identify themselves and their authority to be in a formal consultation process. This step can be taken through a memorandum of understanding or memorandum of agreement, as a means of establishing trust and credibility. These agreements may need flexible provisions to accommodate multi-lateral negotiations in addition to bi-lateral negotiations. Increasingly, tribes are coming together in multi-lateral entities, like the Northwest Indian Fish Commission, or the National Congress of American Indians.

Who shall treat? Higher-level employees who are empowered with authority to make decisions need to be involved in key decisions around climate change. At the same time delegation of authority to people with special expertise to make agreements in detailed matters remains important to success and speed of decisions. Often, getting external brokers who stand between tribes and agencies out of the way increases speed.

Strategy-building. The third step emerges to identify strategies with specific tasks, time, and resource commitments. Through strategies, much important work can be accomplished, short of making laws or applying to the courts. The consultation process allows tribes and agencies to craft site-specific and issue-specific actions in tailoring strategies from the bottom up. Cooperative agreements or compacts and contracts are useful to identify roles, tasks, and responsible parties, along with budgets and funding sources. Multi-lateral strategies are not easy, and all parties need expanded capacity and training to achieve success.

Working across boundaries

Tribal trans-boundary efforts. Examples of tribal initiation and management of trans-boundary consultation processes are significant for understanding the process. The Salish Gathering in the Northwest provides an example of tribal initiation of meetings to deal with the impact of climate change on both sides of the U.S.-Canada border. States also play an important role in multilateral agreements for climate change that include tribes. Many examples of state and tribal negotiations resulting in agreements can be found in enforcement and environmental regulations (Reed and Zelio 1995, 72–73). In some states, like Oregon, conservation easements carry specific components enabling the holder to protect air and water values, and provide for tribes to obtain cultural conservation easements to protect cultural values (Olmsted 2009). Tribes have the flexibility to use the tools of private property ownership themselves, or cooperatively in combination with the land-into-trust process, to achieve otherwise unattainable goals on private property. The Sinkyone Tribal Wilderness and the Arleco Creek project of the Lummi Tribe are examples of such interactions that extended the borders of influence to protect a larger landscape.

Jurigenesis, traditional ecological knowledge, and consultation

Cultural rights bleed into legal rights as tribes enter into consultation with a set of important assumptions. From their position, indigenous rights are pre-existing and prior rights bound in customary practice that forms its own body of common law and lands that they ceded in treaties or other agreements. It is asserted that all that was not specifically given up is retained as a pre-existing right. Prior rights, such as water rights, demonstrate this position and many tribes are concluding their water settlement agreements. Climate change impacts these

rights, as well as National Parks, by changing access to natural and cultural resources. Besides loss of ecosystem services, climate change has profound impacts on the cultural and religious practices of people around the world, and threaten traditional knowledge about innovative responses and practices. “When adapted to functioning ecosystems on tribal or on adjacent lands, traditional ecological knowledge defines special frameworks and practices that support the cultural, political and economic life of the tribe,”(Stumpff 2006) so these impacts reverberate within and without boundaries.

In the cultural context, stories and narratives act as analogues to precedent, and they provide the reasons and reinforcement for consensus about broad principles, while they justify or criticize certain deviations. (Borrows 2002, 14) They can be regarded as the authoritative basis for law and regulation by tribal members. They are guidance, more gyroscope than compass, and require specific internal interpretation to deal with dynamic issues, like climate change. Burrows describes the process of applying cultural narratives to decisions and rule-making as jurigenesis (Borrows 2002).

Given a deepening cultural understanding, agreements based on harmonizing interests between distinctly different bodies of law becomes possible. The following table suggests some mechanisms for harmonizing the process across different cultures and bodies of law.

The rolling carpet of doom: Climate change, parks, and tribes

Current scientific opinion points out that we are living in a time period within some sort of a tipping point range for climate change, that leaves us teetering at the edge. Reducing carbon emissions by 15–20% below levels of 2000 by 2020 is required (UCS 2008). Concurrently, we work on solutions outside the usual range of Western science and indigenous knowledge, with ecological impacts that may be difficult to predict, and are largely unknown. Because indigenous knowledge provides information about phenomena at the extremes and at the center, while offering alerts to problems in the ecosystem, it is key to agreement-making. The Quileute know something is wrong because there are no smelt eggs in time for Honoring Elders Day to make “stinky eggs,” so they know the smelt are out of balance often before scientists realize that this keystone species is faltering.

Why agree? Agreements are needed now for some of the known and likely impacts, and

Table 1. Mechanisms of harmonizing multiple legal cultures.

Relationships over time establish trust.
Sui generis doctrine – Legal implications of cultural differences: uniqueness requires recognizing different categories, what is missing in common law requires that examples applied examples be drawn from appropriate legal, social and regulatory bodies in different cultures..
Negotiation
Expanding each parties’ notion of the others foundations in law, history and culture
Recognition of dynamic nature of common law
Creative use of conservation easements, cultural easements and other mechanisms provided through state law for private property
Recognition of the current status of federal and tribal authority as a basis for action
Utilize tools from existing law: self-governance compacts, self-determination contracts, annual funding agreements with Indian tribes under the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638) as amended and additional new and innovative types of agreements

our ideas about boundaries and access may need to change if we are to preserve ecosystems. Animals are moving. Will the Tulalip become “People of the Mahi Mahi” instead of “People of the Salmon,” Tulalip Tribal Natural Resources Director Terry Williams asks. In addition to exotic species that thrive and out-compete natives in the changing environment, southern native species are turning up in northwest waters. Animals are moving north. Alpine and high-mountain species may be most at risk, since they cannot go higher. Tribes hold indigenous knowledge about the habits and migration routes of many species and they can act with considerable flexibility. Should assisted migrations become necessary due to climate change, tribal partnerships can be critical operational partners, especially when agency authorities to carry out such activities are lacking and there may even be an appearance, but not a substance, of violating the agency mission.

Forests may receive serious long-term impacts, since trees cannot adapt quickly by moving, and old-growth is not easily replaced. If, in fact, large forested areas are lost, as predicted for Alaska, due to increased fire or other climate-related impacts, species relocation and plant relocation may also come into play, and reliance on tribal partners for knowledge and practice will be important. Where there are trust responsibilities to American Indians and Alaska Natives, agreements ensure that these are met, especially when large changes in accessible species take place. If permafrost becomes grasslands, then replacement species like buffalo may be the only means of continuing subsistence rights. Root systems are impacted by heat in the soil; insect infestations increase. Herbaceous plants used for cultural and medicinal purposes may not be available. Already, basket makers note that the beargrass is smaller and smaller. Exotic species and disease are likely to proliferate. If a tribe or agency puts significant resources towards reducing pinebark beetles, it is going to be important that compatible and effective controls are used on adjacent jurisdictions. Many climate change scenarios suggest actions similar to those listed below.

The process of consultation: Nuts and Bolts and détente

Consultation is not the same thing as consent, since consent implies absolute power to accept or refuse, though it often takes place in the long shadow of treaties, that were, at least

Table 2. Initiate innovative administrative harmonizing mechanisms.

Develop a cross-departmental cross-governmental approach, including budget, to deal with significant climate change problems (possible model is the fire budget) to reduce delays and increase effectiveness:
Initiate institutional practices like talking circles to reduce conflict pre and post agreement and to assist in harmonizing interests and finding out whether or not a conflict really exists.
Identify areas of common interest like riparian restoration to build relationships before climate change reaches crisis proportions in its impacts
Establish standards for problems like water quality that are exacerbated by climate change to establish standards.
Look for ways to create, share and exchange green energy programs, infrastructure and use with Tribes developing local and regional models
Engage tribes in multi-departmental agreements for solutions such as carbon offsets, habitat protection, and energy conservation
Wider use of traditional indigenous knowledge as covered in Secretarial Order 3206 as a model (ESA) and the Convention on Biological Diversity

legally, consensual in their nature. The plenary power of congress affects tribes while the trust doctrine applies to federal agencies as they work with tribes. In consultation, one party has the power to make the final decision, not as a right, but as a matter of law and power, and that party is usually the federal government (Deloria 1995, 9). Yet negotiation and compromise are required to achieve the support and general agreement that consultation implies, and to find out what tribes want. In some regions as well as nationally, court cases set the tone for consultation. The Boldt decision on the implementation of tribal treaty rights colors consultation in the Northwest, and provides tribes with protective parameters around their rights to usual and accustomed sites for fishing, hunting, and gathering activities.

Today, tribes hold significant resources, especially the rights to water resources, so they come to the table with resources of great importance to the ecosystem. The sea change in relationships is underway as tribes take the initiative to ask the questions, call meetings, and create partnerships through federal, state, and private relations. Under conditions of climate change, the equity principle becomes self-evident, as all have a stake when plants and animals move across boundaries, and water resources become unpredictable. Because of this, tribes have an equal stake in process and outcome, and so “should play an equal part in deciding the shape of the system” (Deloria 1995, 10). The rebalancing of the consultation system is nowhere more evident than in Obama’s change, through Interior Secretary Salazar, from government-to-government language, to that of nation-to-nation, for consultation. It is a time when all nations should come together to protect the resources.

TAKE ACTION
BUILD TRUST
HARMONIZE IN THE FACE OF SURPRISE
THE POWER OF PLACE IS IN YOU

References

- Borrows, J. 2002. *Recovering Canada: The Resurgence of International Law*. Toronto: University of Toronto Press.
- Deloria, P.S. 1995. Consultation in Indian affairs. Unpublished paper written in preparation for a conference of tribal and federal officials.
- Reed, J.B., and J.A. Zelio, eds. 1995. *States and Tribes: Building New Traditions. A Broad Examination of the Condition of State-Tribal Relations and Opportunities for Mutually Beneficial Cooperation as the 21st Century Approaches, From a State Legislative Policy Perspective*. Denver, Colo.: National Conference of State Legislatures.
- Stumpff, L. 2006. Reweaving Earth: An indigenous perspective on restoration planning and the National Environmental Policy Act. *Environmental Practice* 8, 93–103.
- UCS [Union of Concerned Scientists]. 2008. Global warming. On-line at www.ucs45A.org/assets/documents/globalwarming. Accessed 8 November 2008.
- Williams, T. 2009. Lecture presented to the Graduate Program in Tribal Governance at Evergreen State College, Olympia, Wash.
- Olmsted, J. 2009. Interview by author at the Public Interest Environmental Law Conference, University of Oregon, March 4.