

# Tribal Regulation of Treaty Gathering



# Tribes possess the sovereign right to regulate and manage treaty gathering

Settler v. Lameer 507 F.2d 231 (9th Cir. 1974).

- Tribes did not relinquish right to regulate off reservation treaty fishery
- Confirmed that Tribes have enforcement authority over the conduct of treaty fishery outside reservation boundaries

State/ federal governments have limited authority to regulate treaty right.

- Tulee v. Washington, 315 US 681(1942)- State can not require treaty fishers to obtain state licenses.
- Same principle applies to state permit requirements for treaty gathering.

US. v. Washington,  
384 F. Supp. 312 (1974).

State regulation limited:

- Regulations necessary for perpetuation of species;
- are least restrictive means to achieve conservation purposes;
- do not restrict treaty harvesting in favor non-Indian harvesting.

# Tribal governing powers

Tulalip Constitution grants power:

To regulate by ordinance the exercise of the right to hunt and fish, gather berries, roots, shellfish and other rights and areas, including those heretofore secured to the tribes and bands of the Tulalip Reservation.

*Article VI, Section 1.U., Tulalip Constitution*



# Reasons for Tribal regulation:

- Tool to help protect culturally important plants
- Tool to help protect important gathering places
- Sets up a mechanism to identify and address conflicts and threats to culturally important plants/ Tribal gathering
- Builds Tribal capacity to participate effectively in federal /state regulatory /management process.

# Exercise of Tribal sovereignty

- The Ninth Circuit held that the **effective tribal self-regulation of treaty fishing precludes State regulation.** *United States v. Washington*, 530 F.2d 676, 685-86, 693 (9th Cir. 1975).
- Similarly, tribal regulation should help protect against state and federal regulation of treaty gathering



# Gathering Code Provisions- Tribal Examples

There is a broad scope of approaches:

- From short statements of policy with gathering issues referred to a gathering or culture committee, to comprehensive codes that set rules for different plants, set plant protection status, permit requirements, commercial gathering requirements, enforcement and penalties for violations.



# Designating Plants as Cultural Materials

(Warm Springs Cultural Resources Code)

- **(4)** "Cultural material" means materials or objects designated by the Tribal Council as having cultural significance that are obtained from (a) protected lands or (b) outside the Reservation, if associated with treaty rights or other tribal rights.

Cultural materials may include such things as eagle feathers, fish, game, **roots,**

- **berries, cedar bark, Indian medicines and water** having special significance.

# Creation of “Cultural Plants” Program

(From Rosebud Tribal Code)

## The Cultural Plants Program:

- (1) Shall serve as the principal advisor to the Department and the Tribal Council about the identification, preservation, protection, and improvement of Cultural Plants;
  - ...
  - (6) Shall recommend to the Department any cooperative agreements regarding Cultural Plants with the federal, state, and other tribal governments or their agencies or political subdivisions that are necessary or advisable to implement the provisions of this Code; and,
  - (7) Shall develop and recommend to the Department any policies, procedures, or other measures to preserve, protect, and manage Cultural Plants consistent with this Code.
- (h) Adverse effects:**
- 3) All persons knowing of any adverse effects to Cultural Plants shall promptly report such knowledge to the Cultural Plants Program.
  - (4) The Cultural Plants Program shall investigate all reports of adverse effects to Cultural Plants. All such investigations shall be documented in writing.
  - (5) Subject to the approval of the Department, the Cultural Plants Program may recommend and seek the assistance of the Tribal Police, the Tribal Natural Resources Department, the Tribal Forestry Department, the Sicangu Oyate Land Use Office, the Tribal Land Use and Environment Commission, the Tribal Attorney, and the US Attorney to address potential adverse effects to Cultural Plants.

# Plant Inventory

(Rosebud)

The Cultural Plants Program:

- (1) Shall develop an inventory, which may be an electronic data base, of all Cultural Plants within Tribal Territory. In developing such inventory, the Cultural Plants Program may use tribal community, spiritual, and traditional leaders, and tribal healers and medicine people. In developing such inventory, the Cultural Plants Program may use oral tradition. The inventory shall refer to Cultural Plants by their common names and scientific names;
- (2) Shall develop a map, which may be electronically generated, that shows the general location, distribution, or range of all Cultural Plants in the inventory;
- (3) Shall regularly retain, maintain, and keep current the inventory, map, and any supporting data thereto;
- (4) Shall provide copies of the inventory and map to all tribal departments, agencies;

# Acknowledgment of Religious/Ceremonial Harvest

(Model off-reservation gathering code GLIFWC)

## ➤ Religious or Ceremonial Use of Natural Resources.

(1) Nothing in this ordinance shall prohibit the harvest or use of natural resources in a manner otherwise prohibited by this ordinance which is harvested, taken or otherwise obtained in a National Forest within the ceded territory for religious or ceremonial purposes in accordance with the traditions and customs of the Tribe and with the consent of the Tribe's governing body, or its designee.

# Tribal Permits for commercial gathering

(GLFWC Model off- Reservation gathering code)

## ➤ Commercial Wild Plant Gathering Permits.

(1) No member shall gather to sell conifer boughs, princess pine or ginseng without possessing a valid commercial wild plant gathering permit.



# Tribal Permits – Protected Plants

(Gila River Native Plant Law)

- The Tribal Council shall authorize the Tribal Police Commission to issue permits, tags and seals for a fee as prescribed by the Commission, which fee shall not be less than \_\_\_\_per plant for all native plants . . . to persons who take **protected native plants** from their original growing site.
- No person, except as provided in this chapter shall take or transport or have in his possession any protected native plant from its original growing site in the Gila River Indian Community unless at the time of taking he has a valid permit on his person and attaches the tags or seals to the native plants at the time of taking and exhibits any permit and tags or seals upon request for inspection by any duly authorized agent of the Gila River Indian Community Tribal Council or by any peace officer as provided for in this chapter. No tag is valid unless it is used with a valid permit and such permit bears the tag or seal number on its face.

# Other tools

Tribes have turned to other tools to protect gathering rights off reservation.

- Intergovernmental agreements regarding management of plants and gathering places;
- NHPA\NEPA\ESA processes;
- direct engagement in state and federal regulatory and legislative processes to ensure gathering rights are protected;
- Litigation.



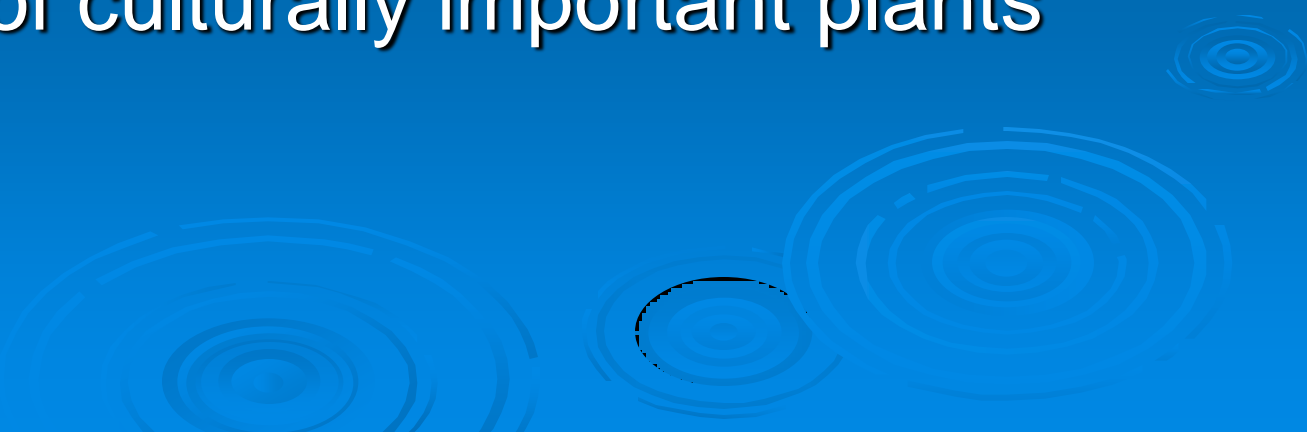
## Working with off-Reservation land managers

(Umatilla)

- It is the policy of the Confederated Tribes to reaffirm and reacquaint all federal agencies with their trust responsibility to the Confederated Tribes. The trust responsibility means that proper and adequate management regimes which provide the optimum level of trust protection for important natural resources and ecosystems that provide much of the Confederated Tribes cultural resources.
- It is the policy of the Confederated Tribes to encourage management activity by city, county, state and federal agencies outside the Umatilla Indian Reservation which will enhance, protect and preserve the treaty rights of the Confederated Tribes.

# Confidentiality

Types of sensitive information:

- Identification of certain culturally important plants
  - Uses of certain culturally important plants
  - Locations of culturally important plants
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# Statutes that help protect confidentiality

Put confidentiality requirements into agreements when management projects involve sharing of information

- 25 USC 3056 -- Confidentiality— Forest Service
- 5 USC 552 (b) 4 Trade Secrets exemption in Freedom of Information Act – confidential information to Tribe, has economic value to tribe
- 16 USC 470w-3 confidentiality of places eligible under the National Historic Preservation act (including “traditional cultural properties”)
- RCW 42.56.300 Washington Public Records Act- exemption for information acquired during watershed analysis that identifies location of sites of traditional religious, ceremonial or social uses of Indian tribes.