Chapter 530

Tribal Approvals

530.01 WSDOT Policy for Working With Tribes

The Washington State Department of Transportation (WSDOT) has a unique relationship with tribes due to their legal status, rights reserved through treaties, and cultural interests throughout the state. Tribes retain many sovereign rights that are guaranteed under treaties and federal laws. WSDOT maintains as government-to-government relationship with 35 federally recognized Tribes. We recognize that each federally recognized Tribe is a distinctly sovereign nation. WSDOT employees will consult with Tribes on all decisions that affect their rights and interests. Consultation is independent from the public involvement process. Our goal is to create durable intergovernmental relationships that promote coordinated transportation partnerships in services to all of our citizens. Each reservation in the state constitutes a bordering jurisdiction for state agencies and projects may be subject to various Tribal permits or approvals.

530.02 Treaty Rights

Between 1853 and 1856, treaties were negotiated with tribes in the Washington Territory. In these treaties, tribes reserved a number of rights, including the “right of taking fish, at all usual and accustomed grounds and stations,” which was “further secured to said Indians, in common with all citizens of the Territory.” This phrase is at the heart of the tribal treaty fishing right, and has given rise to the important concept of “usual and accustomed areas” of the treaty tribes, or the so called “U&A areas.” These areas may extend beyond a tribe’s reservation land and also apply to landless tribes. Supreme Court decisions and federal law have affirmed the continued validity of treaties. Federal agencies are bound by their trust responsibility and may require a project to address impacts to tribal treaty rights before issuing a permit. Early consultation with affected tribes is recommended to identify and resolve issues and thereby avoid delays in permitting.

It is important to note, however that tribal areas of interest for consultation are not limited U&A areas. Tribal Consultation Area maps are available on the GIS Workbench. A summary of court adjudicated tribal fishing areas is available in the WSDOT Model Comprehensive Tribal Consultation Process for the National Environmental Policy Act.
530.03 Section 401 Water Quality Certification by Tribes

In Washington State, two agencies (EPA and Ecology) and eight tribes have Section 401 certification authority. The EPA has Section 401 certification authority for activities on most Tribal lands and on Federal lands with exclusive jurisdiction within the state of Washington. As of February 2012, the EPA has approved eight tribes’ Section 401 certification authority over activities on their respective tribal lands (the Confederated Tribes of the Chehalis Reservation, Confederated Tribes of Colville, Kalispel Tribe of Indians, Lummi Nation, Makah Tribe, Port Gamble S’Klallam Tribe, Puyallup Tribe of Indians, Spokane Tribe of Indians). Ecology is authorized to make Section 401 certification decisions for activities on all other public (non-federal) and private lands in the state. See Chapter 430 for background on surface water quality standards and documentation and the WSDOT Federal, State, and Local Permits web page for Section 401 certification.

Similar to the Department of Ecology, tribes have “Certified,” “Certified Subject to Conditions,” or “Denied Without Prejudice” activities covered by certain Nationwide permits (NWPs) within their jurisdiction. On their reservations, the Confederated Tribes of Chehalis, Kalispel Tribe of Indians, Makah Tribe, Port Gamble S’Klallam Tribe, and Puyallup Tribe of Indians have denied without prejudice all 401 Certifications of U.S. Army Corps of Engineers regulated discharges of dredged or fill materials on their tribal lands. Individual certification is required for all activities covered under those Nationwide permits under that tribe’s jurisdiction. The Spokane Tribe has certified, subject to conditions, discharges of dredged or fill material authorized by NWPs on its tribal lands. The Tribe’s 401 general conditions require project proponents to submit their NWP applications to the Tribe for review and approval. Contact the tribe for more information on these permits.

530.04 Section 106 Consultation

Tribes have a consultation role under Section 101 and 106 of the National Historic Preservation Act (NHPA). A Tribal Historic Preservation Office (THPO) can be established by the tribe pursuant to the NHPA and assert jurisdiction otherwise exercised by the SHPO on Indian lands. The following tribes have certified THPOs: Confederated Tribes of Colville, Confederated Tribes of Chehalis, Lummi Nation, Makah Nation, Nooksack Tribe, Port Gamble S’Klallam Tribe, Skokomish Tribe, Spokane Tribe, Squaxin Island Tribe, Suquamish Tribe, Swinomish Tribe, and Yakama Nation.

WSDOT must consult with tribes on projects located within a tribe’s Consultation Area. Section 106 consultation usually occurs during the design/environmental review phase of a project; see Chapter 456 for background on Section 106. See the WSDOT Federal, State, and Local Permits web page for information on when Section 106 consultation may be needed during the permitting, PS&E, and construction phases.
530.05 **Archaeological Resources Protection Act Permit**

Under federal statute, tribal governments approve this permit when the project or activity is on tribal trust land. The Bureau of Indian Affairs issues the permit. See Chapter 456 for background on cultural resources and the WSDOT Federal, State, and Local Permits web page for details on this permit and statutory authority. Contact Bureau of Indian Affairs, Portland Office, and the affected tribe(s) for details on how to apply.

530.06 **Hydraulic Project Approval**

The Washington State Department of Fish and Wildlife (WDFW) requires a Hydraulic Project Approval (HPA) for all non-tribal entities performing HPA activities on tribal trust lands and reservations. Several Tribes, such as the Yakama Nation, also issue approvals similar to an HPA. If you have a project on tribal trust lands or reservation, contact the Tribe’s natural resources office and WDFW’s biologist assigned to the project to determine whether an HPA and/or similar tribal approval applies. We recommend you coordinate with WDFW and the Tribe to ensure that any permit conditions are not in conflict with one another. Because of the complicated nuances of state, tribal, and federal law and jurisdiction, we recommend you discuss any questions of jurisdiction with ESO’s Assistant Attorney General.

530.07 **Tribal Law**

On reservation land, tribal laws may require permits and approvals similar to those required by counties and cities. These permits and approval are required when WSDOT works outside of the highway right of way on the adjacent reservation land. In cases where WSDOT has an easement rather than ownership, the tribe may retain jurisdiction to issue permits and approvals. Examples of permits that may apply include Tribal Environmental Policy Act (TEPA) determinations; critical areas approvals; clearing, grading, and building permits; land use approvals; noise variances; and utility permits. Contact the WSDOT Tribal Liaison for assistance in coordinating tribal permits on reservation land.

530.08 **Permit Assistance**

WSDOT’s Tribal Liaison is a central resource for tribal access and problem solving on natural or cultural resource issues relating to tribes for regions and offices that do not have a dedicated Tribal Liaison position. Consultation area maps for tribes are available on the GIS Environmental Workbench. See the WSDOT Tribal Consultation web page for more information on how to consult with tribes during NEPA environmental review.

See the WSDOT Tribal Liaison web page for tribal contacts, links to tribal treaties, relevant statutes, and WSDOT’s Centennial Accord Plan and Communication and Consultation Protocols. The WSDOT Centennial Accord Plan includes WSDOT’s Executive Order E 1025.01 on Tribal Consultation.

Contact tribal government for assistance with permits or approvals on projects that may affect tribal lands.