

State Attorney General announces free, prior and informed consent policy with Washington tribes

By Frank Hopper



From the fish wars to informed consent, Attorney General Ferguson acknowledged Quinault Indian Nation President Fawn Sharp as person “most responsible” at press conference

Once, there was no easy recourse for tribes when governments or corporations engaged in one-sided, or unilateral, actions that negatively affected them. But on May 10, a major milestone in the fight for Native sovereignty was reached when Washington State Attorney General Bob Ferguson announced a new state policy regarding Washington’s federally-recognized tribes.

Ferguson, along with several tribal leaders and members of the Affiliated Tribes of Northwest Indians, made the announcement at a press conference in Seattle.

“Effective immediately,” Ferguson said, “my office is adopting a consultation and consent policy regarding Washington’s 29 federally-recognized tribes. Going forward my office will obtain free, prior and informed consent before initiating a program or project that directly affects tribes in our state.”

This principle of free, prior and informed consent, (FPIC) goes beyond the customary tradition of merely consulting with tribes about issues that affect them and will require actual consent or permission before proceeding. He went on to state he believes this is the first agency in the state and the first state attorney general’s office in the nation to adopt such a policy.

‘A pretty basic principle’

Quinault Indian Nation President Fawn Sharp, who helped create the new policy, co-moderated the press conference. Attorney General Ferguson acknowledged her as the person “most responsible” for bringing everyone together at the event.



Quinault President Fawn Sharp during a recent interview with Indian Country Today in Washington, D.C. Photo by Frank Hopper

Indian Country Today interviewed President Sharp while she was in Washington, D.C. when she was meeting with federal officials about fisheries disaster relief.

“Our policy objective,” she explained, “is to ensure no other sovereign is able to take unilateral action affecting our land, territories or people without our consent. It’s a pretty basic principle, but it’s been so difficult to achieve, just a basic understanding of inherent civil rights, basic human rights, that all tribes should possess.”

Sharp described how the FPIC principle was included in the United Nations Declaration of Rights for Indigenous People, which the United States first rejected in 2007, but then accepted 2010. In that document, the FPIC principle is only “aspirational” and not enforceable, a situation that became clear when her tribe later negotiated with the federal government over a fisheries issue,

“After the Obama administration came into office we still found that when we would consult on critical issues, the U.S. was still taking unilateral predetermined action. We had a fisheries issue in upper Quinault and we consulted with four or five federal agencies over our science, over federal science, over our policy and legal objections. They consulted with us, but they still proceeded with unilateral action.”

This caused Sharp to include the FPIC principle in a Washington state carbon tax initiative called I-1631 that she helped write.

“It was our goal to utilize that as a vehicle to raise awareness about FPIC in Washington state. And so while I-1631 failed at the ballot box, it became a widely-known principle in the State of Washington.”

The downside to the new policy

Critics of the policy note two main downsides. The first is that it only applies to federally-recognized tribes in the state and the second is that it is only an executive policy within the state attorney general's office and not an official law.

Washington tribes such as the Chinook and the Duwamish, who have been fighting for federal recognition for years without success, are not covered by the mandate. Sharp told Indian Country Today that she feels this situation is regrettable and all Indigenous nations deserve to be asked permission regarding actions that affect them.

"Every indigenous voice has meaning," she said, "and is authentic whether you're a constitutional government, a traditional government, or a customary government."

The other downside—that it's not an actual law—will be addressed next year when Attorney General Ferguson plans to propose legislation in the 2020 legislative session to lock-in the policy as a state statute.

"It's our goal," Sharp explained, "to populate the different state agencies this year and then in the next legislative session try to put Attorney General Bob Ferguson's policy into statute. He's committed to working with us to try to get a statute passed. And so once we're successful in the State of Washington then we can move to nationalize it as a principle."

Although the advancements in tribal sovereignty gained by the new policy aren't as complete as some would have liked, they still represent a significant move forward. In contrast, on March 27, the State of Alaska denied the Chilkat Indian Village of Klukwan's request to be consulted over the construction of an exploratory mine 17 miles upstream from their village.

It's clear the fight for the right to consultation and consent from all tribes for matters affecting them still has a long way to go. But at the May 10 announcement of Washington's new policy, the presence of a Puyallup elder from the old fish war days showed how far things have come.

A voice from the past

Assisted by Puyallup Council member James Rideout, 80-year-old tribal elder Ramona Bennett approached the podium and spoke about the old days when her tribe fought the State of Washington for Native fishing rights.



Washington State Attorney General Bob Ferguson speaks with Puyallup Tribal elder Ramona Bennett at the May 10 announcement of his office's new FPIC policy. From the Attorney General's Facebook page.

"My name is loch-shad. I'm known as Ramona Bennett and I'm the former chairwoman of the Puyallup Tribe, back in the more crazy days of the sixties and seventies. What I've been taught and told, is that we were put on that river to protect our brothers and sisters, the nations of salmon. And it's been a battle. We were the tribe that triggered the Boldt Decision. When I say triggered, I mean literally. We really had to

fight for that right to harvest salmon.”

Bennett’s presence brought a certain circularity to the state’s announcement. On September 9, 1970, state law enforcement officers surrounded the fish camp set up by the tribe on the Puyallup River and raided it using tear gas and billy clubs. Bennett was the leader of that camp and was hauled away in handcuffs and thrown in jail along with all the other Native people there that day.



Ramona Bennett being taken into custody at the September 9, 1970 Puyallup Fish Camp raid. Archive Photo by Dolores Varela

Her nemesis at the time was Washington State Attorney General Slade Gorton who fought against the tribe’s treaty-protected right to fish. The conflict eventually resulted in a decision by a federal judge named George Boldt, who said the tribes in Washington were entitled to half the state’s yearly harvest of salmon. It was the first major treaty stand victory in modern times.

President Sharp later described how meaningful it was for her to look at Bennett during the announcement and see her smiling face. The moment spoke of the poetic nature of the event. The

office of Bennett's previous enemy was now the source of a major advance in the fight for Native sovereignty.

Bennett told the gathering the new policy is beneficial not only to Native people but also to the planet and the environment.

"Us Indians," Bennett said, "really are the monitors and the guardians and the protectors of our share of the planet. And if we can get a little flow started here, maybe it'll spread."

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