



US Army Corps
of Engineers®

CONSULTING WITH TRIBAL NATIONS

GUIDELINES FOR EFFECTIVE COLLABORATION WITH TRIBAL PARTNERS

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INTRODUCTION: WHY WE CONSULT

American Indians, Alaska Natives and Native Hawaiians once called all lands in the Americas home. At various times throughout U.S. history, Tribes signed treaties ceding lands to the Federal government. Others were also forcibly removed from their ancestral lands and put on reservations by the government. In return for land, the government enacted laws to protect remaining Indian lands, and cultural and natural resources; to guarantee aboriginal hunting and fishing rights; and to provide for the general well-being of the Tribes through such services as education and health care.

All federal agencies (not just the Bureau of Indian Affairs or the Department of the Interior) are obligated to promote the welfare of Federally recognized Tribes under the Trust Responsibility, a doctrine developed throughout US history by Treaty, statute, case law (including Supreme Court decisions), regulation and policy. We consult with Tribes because it is our legal responsibility to do so. In other words, we have a legal relationship with Tribes, not a cultural or racial one.

The Corps is literally everywhere. We have projects and programs in every state of the Union that affect many Tribes. Through consultation and collaboration, we partner with Tribes, seeking their expertise based on their intimate knowledge of the land. Collaboration and cooperation result in better projects and allow us to achieve improved success in our mission areas.

TRIBAL NATIONS

The terms Nation and Tribe have been used interchangeably in Indian treaties and statutes. These terms generally identify a Tribe as a government, possessing authority over its territory and people. Today, most Tribes refer to themselves as Nations in recognition of their sovereign status.

A group of individual Indians may collectively call themselves a Tribe and be recognized as such by other Tribes, but to qualify for the benefits, programs and services that Congress has made available to federally recognized Tribes, the group must meet the requirements for federal recognition established by the Department of Interior.

Today (2013), there are 565 Indian tribes and Native tribal organizations that are federally recognized. An Indian Tribe is defined in 25 USC 3001 (7) as any Tribe, band, Nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Native Hawaiians do not have the same federal status, and are represented by Native Hawaiian Organizations (NHOs) instead.

Each Tribe has its own eligibility requirements for membership, often determined by descent or minimum blood quantum. Indian Tribes have the authority to determine who is Indian for tribal purposes only, not for state or federal purposes. Each Indian Tribe and Alaska Native village is unique. Over 250 languages are spoken. Each Tribe has its own culture, history and identity. Since no two Tribes are exactly alike, what is good for one Tribe may not be good for another. Consequently, there are no broad-brush solutions to the many challenges currently facing Tribes. Today, Tribes work to balance values between two different worlds: their traditional culture and the current social system of the larger society.

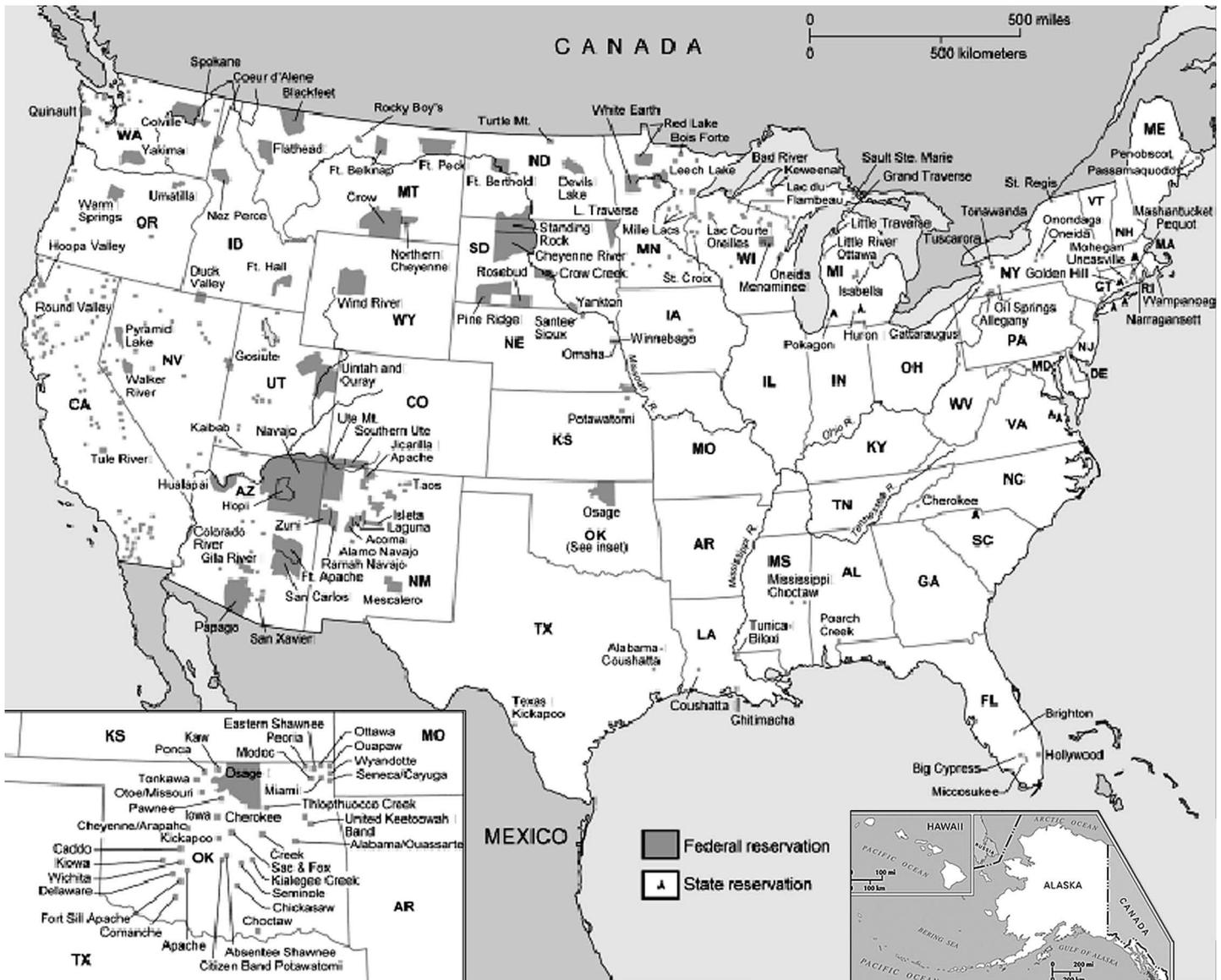


Village of Brule, SD, late 19th century, by John C H Grabill

RESERVATIONS

An Indian reservation is land reserved for most federally recognized Tribes and is land that has been geographically recognized in Treaties, agreements, and/or court cases, including Supreme Court cases. There are approximately 275 Indian reservations in the United States. Reservation sizes range from 16 million acres to less than 100 acres. On each reservation, the local governing authority is the tribal government.

Approximately 56.2 million acres of land is held by the United States government in trust for various Tribes. On behalf of the United States, the Department of the Interior serves as the trustee of such lands for Indian Tribes, and also delegates many responsibilities to officials of the Bureau of Indian Affairs. The states in which reservations are located have limited powers over them, and only as provided by Federal law. Some 140 reservations consist entirely of tribally owned land with no inholdings.



Map of Indian Reservations (source: infoplease.com, 2007, Pearson Education).

"INDIAN COUNTRY"

...includes (a) reservations under the jurisdiction of the United States government, (b) all dependent Indian communities within the borders of the United States and (c) all Indian allotments (18 USC, Section 1151). Most American Indians and Alaska Natives would include all aboriginal homelands and territories—e.g., all of the Americas. For a more detailed map, go to <http://www.nps.gov/history/nagpra/documents/resmap.htm>

BRIEF HISTORY OF FEDERAL INDIAN POLICY

Pre-Constitutional Policy (1533-1775)

Administrators of British, Russia, and Spanish colonies negotiated treaties with Indian tribes. These treaties accorded them equal status to a colonial government.

The Formative Years (1776-1870)

The new US government assumed the treaty making role with Indian tribes. Federal policy, not state policy, dominates because the United States Constitution specifies in Article 1, Section 8 (Commerce Clause) that "The Congress shall have the power [to regulate Commerce with foreign nations and among the several states, and with the Indian tribes]. The Marshall Trilogy (Johnson v. McIntosh - 1823; Cherokee Nation v. Georgia - 1831; Worcester v. Georgia - 1832) handed down by the Supreme Court further defined the relationship Tribes had with the U.S. government, and established the doctrine of federal trust responsibility.

Allotment & Assimilation (1871-1927)

The U.S. quit making treaties during this time to assimilate Indians into "white" society. To ensure assimilation, Congress passed the General Allotment Act of 1887 (Dawes Act). Communal ownership of tribal lands was changed to individual ownership. Each Indian male over 18 was given an allotment of acres and the rest of the tribal lands, considered to be "excess," were sold to non-Indians. The Indian Citizenship Act, passed in 1924, granted Indians United States citizenship.

Reorganization (1928-1952)

The Merriam Report of 1928 declared allotment to be a complete disaster. The Indian Reorganization Act (IRA) of 1934 set up Reservation Business Councils to govern Tribes, and provided for the adoption of constitutions and the granting of federal charters. Many, but not all, Tribes adopted the IRA structure.

Termination (1953-1967)

Legislation was passed that mandated a reversal of the tribal self-government movement previously endorsed and ended the trust relationship between federal and certain tribal governments. More than 50 tribal governments were terminated. The federal government simply no longer recognized them as Indian Nations. Public Law 280 passed in 1953, gave six states mandatory and substantial criminal and civil jurisdiction over Indian country. The states included were Alaska (except for Metlakatla Reservation), California, Minnesota (except Red Lake Reservation), Nebraska and Oregon (except Warm Springs Reservation). Ten other states also opted to accept some degree of P.L. 280 jurisdiction. They are: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington.

Self-Determination/Self Governance (1961-Present...)

The abuses of the termination era led to reforms. This period has been characterized by expanded recognition of the powers of tribal self-government. Important legislation includes: Indian Civil Rights Act of 1968, Indian Self-Determination and Education Assistance Act of 1975, Indian Child Welfare Act of 1978, American Indian Religious Freedoms Act of 1978 and Native American Graves Protection and Repatriation Act of 1990.

CONCEPTS AND PRINCIPLES OF FEDERAL INDIAN POLICY

Sovereignty

The internationally recognized concept of the power of a people to govern themselves. Sovereignty is the foundation upon which our government-to-government



Winter in Alaska. (USACE photo)

relationship is built. American Indian tribal powers originate with the history of Tribes managing their own affairs. Case law has established that Tribes reserve the rights they had never given away. American Indian Tribes possess a “Nation-within-a-Nation” status.

“Perhaps the most basic principle of all Indian law, supported by a host of decisions...is the principle that those powers lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each tribe begins its relationship with the federal government as a sovereign power, recognized as such in treaty and legislation.” Felix S. Cohen (1942) [Emphasis in original]

Treaties

A Treaty is a contract between two nations. The U.S. Constitution authorizes the President, with the consent of two-thirds of the Senate to enter into a Treaty on behalf of the U.S. (Art. II, Sec. 2) The Constitution declares that Treaties are “the supreme law of the land.” (Art. VI) Indian Treaties were designed to take land from a Tribe in exchange for a set of promises. In 1871, Congress ceased making treaties with Tribes.

Trust Responsibility

The Trust responsibility is the Federal government’s requirement to honor their obligations to Tribes, as identified in Treaties and other legal instruments, and to represent the best interests of the Tribes, their resources and their members. Examples of Trust resources are fishing sites, sacred sites, and access to clean water. Trust responsibility extends to such things as the practice of traditional ceremonies and protection against terrorist threats. The extent of Trust responsibility is open to interpretation. It should be discussed with your Office

NOTE: Tribes do not receive handouts from the Federal government. They are not on welfare. The services they receive are in fulfillment of the Treaties they signed, transferring land to the United States.

HERE ARE A FEW OF OUR ACCOMPLISHMENTS

- Tribal Consultation Policy signed by Commanding General on November 1, 2012
- Unique cultural immersion course hosted by various Tribes called Native American Perspectives on Corps Missions, offered once or twice a year on an Indian reservation. The target student is a federal project manager, or other professional who interacts with Tribes and wants to interact successfully with a different culture, with the result that both the federal government and the Tribe gets a better project or program. Instructors are tribal officials and elders. Our hosts have included the Seminole, Osage, Lac du Flambeau, Umatilla and Nez Perce Nations. Google “Purple Book” for the Corps’ training catalogue, then find course #950.
- Our free 2-day Consulting with Tribal Nations training moves around the country, located at various Corps offices. Topics include History of Indian Law, Federal Policy, Partnering with Tribes, Consultation Strategies and Cross-Cultural communication. The class has been offered twice a year since 2005.
- Between August 2011-2012, the Corps participated in over 1,400 tribal consultations, including 436 face-to-face meetings and 76 government-to-government meetings. We formally interacted with 250 Tribes.
- Section 203 (Water Resources Development Act of 2000), the Tribal Partnership Program, currently has 30 current tribal partners. This purpose of this authority, written exclusively for federally recognized Tribes, is to study all manner of water resources issues. The initial study is funded by the Corps. After a cost-shared in-depth feasibility study, the Tribe seeks appropriations from Congress to construct and operate the project. Pueblos in the southwest, many Alaskan Villages, and several Tribes in the Midwest and Northeast have greatly benefitted from information obtained in the reports.

For information on all of these items, and more, see <http://www.usace.army.mil/Missions/CivilWorks/TribalIssues.aspx>

of Counsel.

THE CORPS' SIX TRIBAL POLICY PRINCIPLES

Policy Guidance Letter 57, 1998, reissued in 2010.

- Recognition of tribal sovereignty
- Government-to-government relationships with each Tribe
- Pre-decisional consultation
- Adherence to the Trust responsibility
- Protection, when feasible, of cultural and natural resources
- Promotion of tribal economic capacity building and self-reliance



At the National Tribal Environmental Council conference, Albuquerque NM (Photo courtesy SPA)

CAVEAT:

Federal policies have been extremely inconsistent and harmful to tribal cultures. What wasn't accomplished during the Indian Wars was largely finished during the periods of allotment and assimilation, followed by termination. The destructive effects of these policies and the role of the US Army as Federal agent has not been forgotten. The effects on families and tribal identity are remembered. A Tribal member has stated of our history books—"What you call battles, we call massacres." You must be an ambassador to "Indian Country," to acknowledge the past and look toward the future. There are a growing number of partnerships between USACE and various Tribes. We are cultivating an era of friendship, trust, and respect.



At the American Indian Science & Engineers Society(AISES) Conference, Phoenix, AZ [Photo courtesy SPL (Phoenix Area Office)]

HOW TO CONSULT

Consultation begins with trust and respect.

- Talk early—talk often
- Start with a cordial relationship
- Rely on your Tribal Liaison
- Know your Tribal point of contact
- Know your Tribes' histories; display their flags
- Operate transparently; involve Tribes at the beginning; share project information
- Together, decide how consultation should proceed and its goals
- Draft a written protocol, if need be
- During a consultation meeting—
 - Be respectful, not defensive; Stop, look & listen (& listen more than you speak); Don't interrupt; Expect and accept changes, disagreements; Serve refreshments*; Give small gifts depending on circumstances*; Accept gifts graciously*
* see note next page
- After a meeting—
 - Don't rush off—socialize, share a meal if possible Stay in touch by phone, e-mail, face-to-face; distribute draft minutes
- Collaboratively plan next steps

Remember: consultation begins with trust and respect.

WHEN WE CONSULT

- Anytime there is a potential to significantly adversely affect tribal lands or tribal resources *(off-tribal lands)*:
- Projects funded, constructed and operated by the Corps
- Projects constructed by the Corps, operated and maintained by non-Federal sponsors
- Permits issued by the regulatory program
 - Rivers and Harbors Act of 1899, Sec 10 *(navigable waters)* *
 - Clean Water Act Sec. 404 *(waters of the US, including wetlands)* *
- Military Projects
 - Installations, housing, airports, clearing ordnance, hazardous waste
- Laws that require consultation
 - National Historic Preservation Act *
 - Native American Graves Protection and Repatriation Act
 - National Environmental Policy Act *
 - Archeological Resources Protection Act

**these apply on private lands*



Buffalo herd in the Dakotas. (USACE photo)

WHAT RESOURCES DO WE AFFECT?

- Water quality and quantity
- Topographical features *(mountains, rivers, lakes, deserts)*
- Fish and wildlife species, migratory bird species, medicinal or sacred plants
- Archeological, sacred & ceremonial sites, burials, artifacts
- Resource gathering and processing sites *(e.g. pinyon groves, reindeer corrals, caribou migration routes)*

TWO IMPORTANT CULTURAL ISSUES —food and gifts

It's customary for a Tribe to provide coffee and light refreshments when they host a meeting. Consequently, it's expected we will do the same when the Corps hosts a meeting. Not doing so would be considered rude. The only way to pay for refreshments is through the HO's representation fund. Otherwise, and especially because this nationwide fund is so small, you may have to pass the hat or pay out of pocket for muffins, fruit, doughnuts and juice. Tribal members should not be asked to pay.

The giving and receiving of gifts is also customary, but provides an ethical problem for the government. We are allowed to give small gifts such as pins and plaques. Often a tribal member will give you a gift that is beyond the \$20 limit of what we can accept. If you receive a significant gift- a blanket or a basket, for example - accept it in the name of the Corps. If you wish to keep it, make a donation to the Tribe in the approximate value of the gift. You can also turn the gift over to the Protocol officer, DE or EEO for display at the District or Division office.

Providing and sharing food, as well as giving and receiving gifts, are ways of showing respect and friendship, and maintaining a cordial relationship in Indian country. So, be cordial, but be careful and consult your Office of Counsel.



John Berrey, Chairman of the Quapaw Tribe of OK, and COL Vernie Reichling, Commander of the Memphis District, sign the Programmatic Agreement concerning cultural resources for the Birds Point New Madrid Floodway, Nov 2012 (Photo courtesy of Memphis District).

USACE TRIBAL LIAISONS AND THE TRIBAL NATIONS COMMUNITY OF PRACTICE

Dedicated to:

- Collaboration, Consultation and Consensus
- Working effectively in Indian Country on behalf of the Corps
- Ensuring Tribes are equal partners in addressing water resources challenges

Visit our website:

<http://www.usace.army.mil/Missions/CivilWorks/TribalIssues.aspx>
for a list of all USACE Tribal Liaisons & other useful information.

Other useful links:

NEWS:

Indianz.com

Indiancountrytoday.com

INFORMATION:

ncai.org (National Congress of American Indians)

usetinc.org (United South and Eastern Tribes)

nathpo.org (Nat'l Assn of Tribal Historic Preservation Officers)

ntec.org (National Tribal Environmental Council)

nativefederation.org (Alaska Federation of Natives)

tribalgov.pdx.edu (Institute for Tribal Government)

aises.org (Am. Indian Science & Engineering Society)

atntribes.org (Associated Tribes of Northwest Indians)

americanindian.si.edu (Nat'l Mus. of the American Indian)

oha.org (Office of Hawai'i an Affairs)

nps.gov/history/ailo (National Park Service)

achp.gov/nap.html (Advisory Council on Historic Preservation)

narf.org (Native American Rights Fund)

For information on a particular Tribe, visit its website.

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MG Walsh, Director of Civil Works and Emergency Operations, is welcomed by Brian Patterson (Oneida), President of the United South and Eastern Tribes at their winter meeting, 2013. (Photo by FT Eyre)



Tsagaglallal, She Who Watches. Petroglyph in Columbia River Gorge, Dalles Dam pool, WA. (Photo courtesy of NWP)