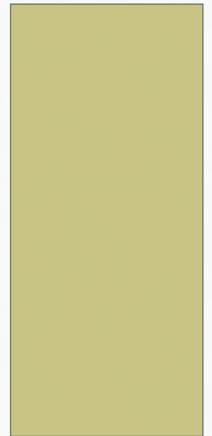


# LAWS THAT TRIGGER CONSULTATION

JENNIFER R. RICHMAN  
PORTLAND DISTRICT OFFICE OF COUNSEL

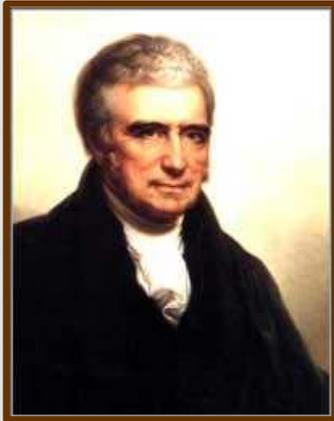


# CONSULTATION “TRIGGERS”

- Trust Responsibility
- Treaty Reserved Rights
- Laws
  - NHPA, ARPA, NAGPRA, AIRFA, NEPA
- Executive Pronouncements
  - Executive Orders:
    - Sacred Sites
    - Consultation
    - Environmental Justice
    - Preserve America
    - Cooperative Conservation

# ORIGINS OF THE INDIAN TRUST RESPONSIBILITY: THE PROTAGONISTS

Chief Justice Marshall



Andrew Jackson



# ORIGINS OF THE INDIAN TRUST RESPONSIBILITY

- *Cherokee Nation v. Georgia* (1831)
  - neither states nor foreign nations
  - “domestic dependent nations”
  - “in a state of pupilage”
  - stand as a “ward to his guardian”

# ORIGINS OF THE INDIAN TRUST RESPONSIBILITY

- *Worcester v. Georgia* (1832)
  - Tribes separate & distinct political communities
  - Tribes sovereign over lands retained
  - Treaties intended to ensure availability of sustainable, land-based, traditional existence
  - *Duty of protection* bargained for consideration for land cessions

# PATERNALISM RUN AMUCK

- Guardian-ward language serves as rationale for “plenary power” doctrine
- Major Crimes Act (1885)
  - Federal jurisdiction over crimes committed by Indians in Indian country
  - First intrusion into internal affairs of tribe
- General Allotment Act of 1887 (The Dawes Act)
  - Power to abrogate treaties unilaterally
  - Congress’ “perfect good faith” presumed

# THE DUTY OF PROTECTION

- Against what?
  - Then: unrelenting pressure of immigrant intrusion, resources availability (gold, timber, water pasture) and States rights
  - Now: environmental and other threats to tribal lands, resources, reserved rights, burials, economic equity, and tribal interests

# SATISFYING THE DUTY OF PROTECTION

- Narrow view:
  - U.S. owes *general* trust responsibility to Indian tribes, but...
  - Absent a specific obligation, duty is discharged by compliance with general laws and regulations not aimed at Indians
    - May be settled law in the Ninth and DC Circuits
- Query: **What's become of the duty?**

# SATISFYING THE DUTY OF PROTECTION

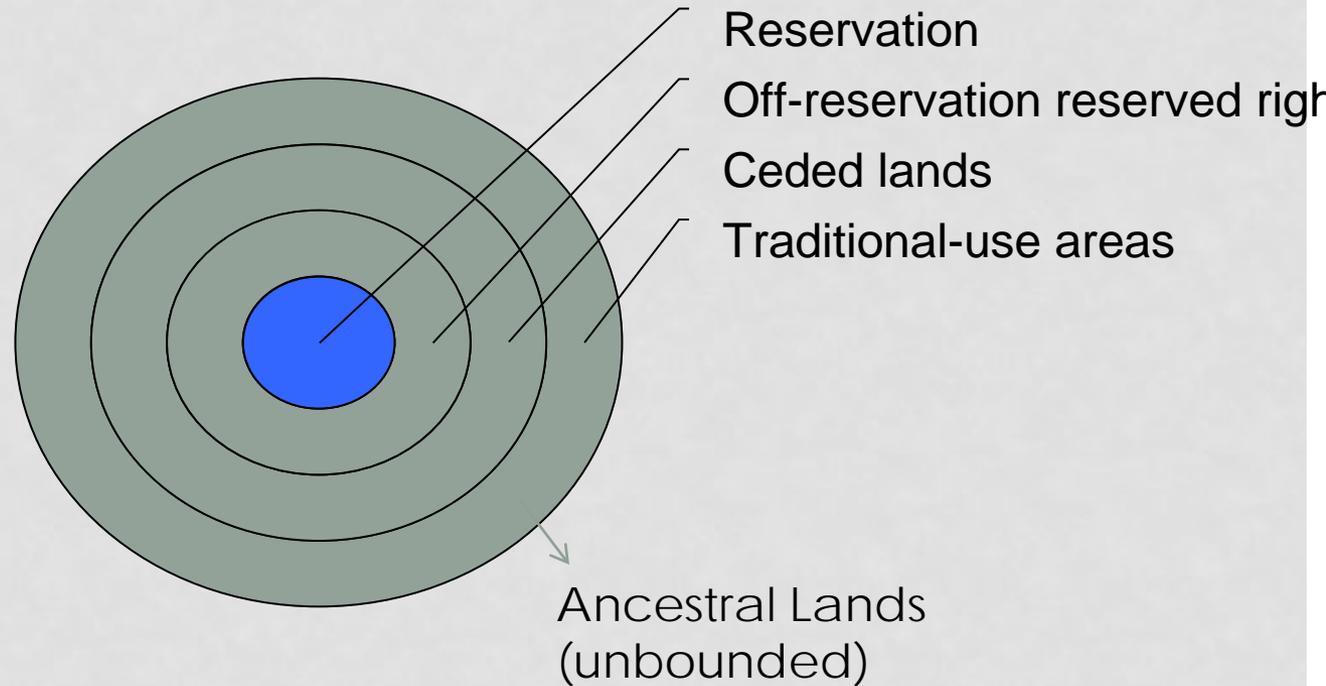
- Broader view:
  - Promise of protection “bargained for” consideration for land cessions
  - Compliance with laws of general applicability may not be enough
  - General trust responsibility may not be enforceable, but...
  - Agency discretion in imposing greater level of protection likely to be sustained

# MEETING THE TRUST RESPONSIBILITY

- U.S. both *obliged* and *empowered* to protect Indian Nations' cultural and political integrity
- Trust responsibility extends to all federal agencies and actions
- But again, absent a specific obligation, duty is discharged by compliance with general laws and regulations not aimed at Indians
  - Trust relationship alone will not support claim for damages or equitable relief
  - Courts have, however, consistently upheld the trust responsibility as independent basis for federal action

# EXERCISING DISCRETION CONSISTENT WITH THE DUTY

- Timber sales on former Klamath reservation
- Corps permit for fish farm in Lummi U&A
- Expansion of open-pit gold mine in Little Rocky Mountains
- Emergency regulation of off-shore salmon fishing
- Coal leasing near Northern Cheyenne
- Navy agricultural out-leases
- Pyramid Lake Paiute Tribe's cui-ui fishery



Protected Tribal Resources:

-Tribal trust lands

Reservations (46.2M acres)

Allotted lands (8.9M acres)

Off-reservation *reserved* rights

Other legal obligations

# THE UPSHOT

- Trust responsibility shared by all federal agencies
- Agencies have broad discretion to consider duty
- Discretion exercised to protect tribal lands, resources, and cultural properties will be upheld
- Obligation to consult when tribal lands, resources, or cultural properties at risk
- Duty of protection may not be limited to specific statutory obligations

# TREATY RESERVED RIGHTS

- Treaties are not grants of rights to the tribes, but reservations of rights not surrendered
  - Implied rights (e.g., water, minerals)
  - Express rights (e.g., off reservation fishing, access)
- Treaty tribes and other tribes

# NATIONAL HISTORIC PRESERVATION ACT OF 1966

- 16 U.S.C. § 470 et seq.
- Comparison to National Environmental Policy Act
- Provisions of the NHPA
  - National Register
  - Advisory Council on Historic Preservation
  - Local Government involvement
  - State and Tribal Historic Preservation Offices
  - Section 110
  - Section 106

# NATIONAL HISTORIC PRESERVATION ACT

- Section 106 (16 U.S.C. § 470f)
  - The head of any Federal agency having direct or indirect jurisdiction over a **proposed Federal or federally assisted undertaking** in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, **prior to the approval of the expenditure of any Federal funds** on the undertaking or **prior to the issuance of any license**, as the case may be, **take into account** the effect of the undertaking on any district, site, building, structure, or object that is **included in or eligible for inclusion in the National Register**.
- 36 C.F.R. part 800

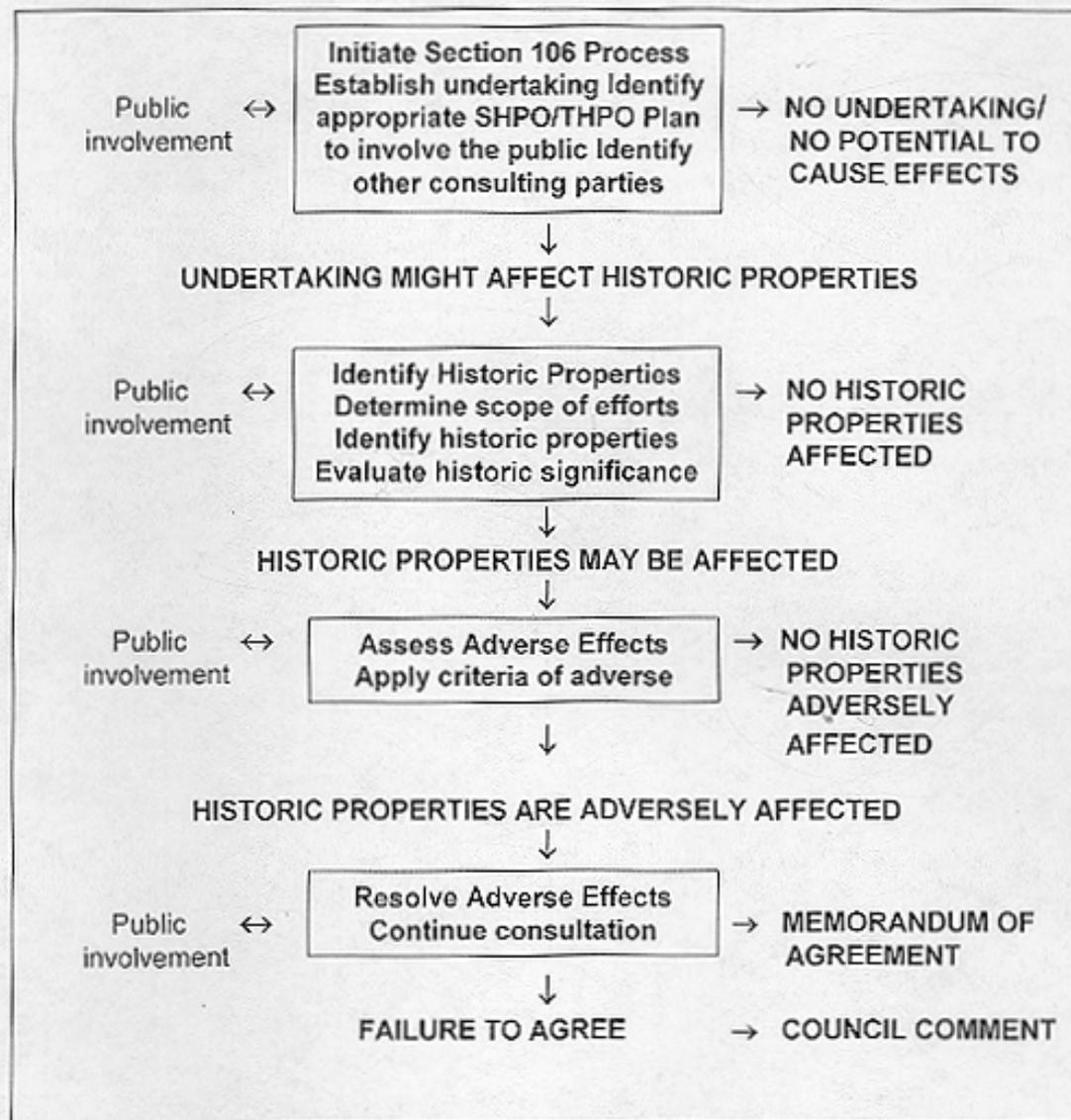
# NATIONAL HISTORIC PRESERVATION ACT

- Evaluating Historic Properties for NRHP (36 C.F.R. § 60.4)
  - Generally at least 50 years old and possesses integrity of location, design, setting, materials, workmanship, feeling, and association and
    - Associated with important event (written or oral “history” )
    - Associated with important person (or entity)
    - Embodies distinctive characteristics of a type, period, or method of construction; work of master; high artistic values; or significant whole greater than components
    - Has yielded or is likely to yield important information in prehistory or history

# SECTION 106

- The ACHP's regulations define consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.” 36 C.F.R. § 800.16(f).
  - *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995)
  - *Muckleshoot Indian Tribe v. United States*, 177 F.3d
- The 1992 amendments enhanced tribal role.
  - Consultation with tribes that attach religious or cultural significance to sites, wherever located (on or off tribal lands)
  - Traditional Cultural Properties (TCPs) (NPS Bulletin No. 38)

# SECTION 106 FLOW CHART





## LEVEE REHABILITATION AT SUNKEN VILLAGE

SAUVIE ISLAND, OREGON

# SUNKEN VILLAGE

- Levee operated by Sauvie Island Drainage Improvement Company
- Levee is on private property.
- Rehabilitation of the levee will require the placement of dredged or fill material into waters of the United States (which requires a Clean Water Act Section 404 permit from the Corps)
- BUT, whoops! Levee was built on top of Sunken Village, a National Historic Landmark
- In a traditional area of the Grand Ronde, Silietz, and Warm Springs tribes.



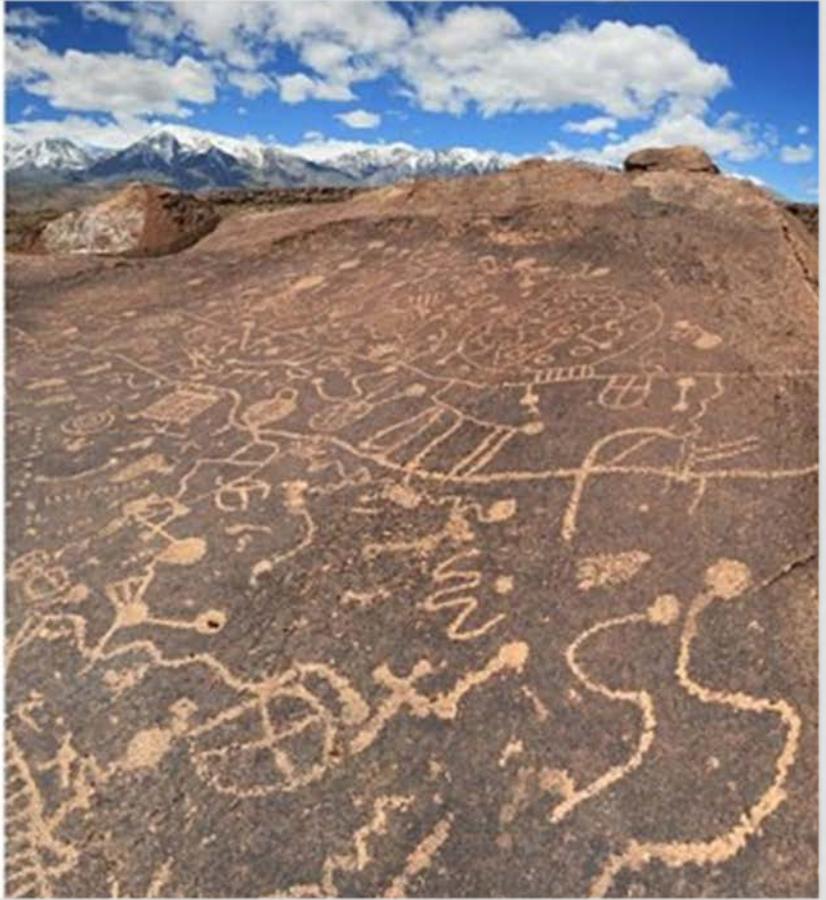
UNITED STATES V. DIAZ, 499 F.2d 113 (9<sup>th</sup> Cir. 1974)

ANTIQUITIES ACT OF 1906

# ARCHAEOLOGICAL RESOURCES PROTECTION ACT

- 16 U.S.C. § 470 *et seq.* Enacted in 1979 and amended in 1988
- Like Antiquities Act, there is a permit requirement for the “excavation or removal” of “archaeological resources” from public or Indian lands.
  - Notification to tribes required (v. consultation)
  - Relationship to Section 106
- archaeological resource
  - material remains of past human life
  - of archaeological interest
  - at least 100 years of age
  - including (but not limited to): pottery, basketry, bottles, weapons, weapon projectiles, tools, structures, pit houses, rock paintings, rock carvings, graves, human skeletal materials

- ARPA also provides both criminal and civil penalties.
- Criminal penalties apply to any person who “knowingly violates or counsels, procures, solicits, or employs any other person to violate. . ..”
  - Excavate, remove, damage, or otherwise alter or deface an archaeological resource or attempt to do so without a permit.
  - Sell, purchase, exchange, transport, receive, or...offer to do so.
  - Sell, purchase, exchange, transport, receive or offer to...in interstate or foreign commerce any archeological resource...in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.



## VOLCANIC TABLELANDS, CALIFORNIA





UNITED STATES V. LYNCH, 233 F.3D 1139 (9<sup>TH</sup> CIR. 2000)

"I'M NOT A TWISTED DUDE OR NOTHIN' "

# NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

- Legislative History; 25 U.S.C. §§ 3001-3013
- Native American human remains and cultural items
  - funerary objects (associated and unassociated)
  - sacred objects
  - objects of cultural patrimony
- Inadvertent discoveries and intentional excavations on tribal or federal lands
- Museum and agency collections
- NAGPRA Regulations, 43 C.F.R. part 10
- <http://www.nps.gov/history/nagpra/INDEX.HTM>

# NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

- *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004)
  - Native American?
  - Cultural Affiliation?
- “Native American” means “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” 25 U.S.C. § 3001(9).
- “Cultural affiliation” means that “there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” 25 U.S.C. § 3001(2).



## KENNEWICK MAN





KENNEWICK MAN

AND DR. DOUG OWSLEY

# KENNEWICK MAN, 2002 DISTRICT COURT OPINION

- Interior's decision that remains are "Native American" was arbitrary and capricious.
  - Not "Native American" and not culturally affiliated
- Corps' decision to repatriate was arbitrary and capricious.
- Corps' decision to "bury" the discovery site violated the National Historic Preservation Act.
- Corps must grant access to the plaintiffs to study the remains subject to reasonable terms and conditions.

# KENNEWICK MAN, 2004 NINTH CIRCUIT OPINION

- District Court opinion affirmed in its entirety.
  - Remains are not Native American.
  - District Court retained jurisdiction of all post-judgment proceedings.
- *Fallon Paiute-Shoshone Tribe v United States*, 455 F. Supp. 2d 1207 (D. Nev. 2006), page 868
- Other ancient remains
  - On Her Knees Caves, Marmes



## *THE MARMES ROCKSHELTER*

# *HISTORY OF THE MARMES COLLECTION*



- First recorded in 1953
- Excavated from 1962 through 1968 prior to the inundation of Lower Monumental Dam

# *MARMES EXCAVATION*



- Over 500 cubic feet of material excavated
- 800 ybp to 11,000 ybp
- Amazing site

# *MARMES CLAIM*

- First claims submitted in 1995
- Colville, Yakama, Nez Perce, Umatilla, and the Wanapum Band
- Joint claim submitted in April 2006

# *MARMES, PART I*

- Native American Determination (2008)
  - Substantial evidence to find human remains and funerary objects associated with Burials 1-22 and the Small Numbered Cast were Native American
  - But not enough information for Marmes I through Marmes IV and the Cremation Hearth /Burial 23.
- Culturally affiliated with the Claimant Tribes in 2009 and repatriated in Sept. 2009
  - MNI= 45; 2,000+ funerary objects
  - 800 ybp to 8,170 ybp

# *MARMES, PART II (THE SEQUEL)*

- Kennewick Man
  - AKA, The Elephant in the Room
- Native American Determination
  - December 7, 2009
- Cultural Affiliation Determination
  - April 26, 2010





*MARMES REBURIAL*

*JUNE 25, 2010*



*MARMES REBURIAL*

*JUNE 25, 2010*

# AMERICAN INDIAN RELIGIOUS FREEDOM ACT (AIRFA), 1978

- Protect right to exercise traditional religions
- Act creates no veto power, new substantive rights, nor enforceable procedural duties
- Duty to:
  - Consult with traditional religious leaders
  - Consider American Indian religious values
- *Lyng* case (485 US 455 (1988)) reduced import of the Act

# RELIGIOUS FREEDOM RESTORATION ACT

- Trigger: substantial burden on exercise of religion
- Obligations: compelling government interest, least restrictive means
- Government may substantially burden the exercise of religion only if there's a compelling government interest and uses the least restrictive means
- *Navajo Nation & Havasupai Tribe v. USFS & Arizona Snowbowl*, 9<sup>th</sup> Cir., March 12, 2007
  - San Francisco Peaks sacred to at least 13 tribes
  - Use of treated sewage effluent to make snow is prohibited

Religious activity penalized; or coerced to act contrary to religions beliefs

# NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

- Purpose: Informed, transparent decision-making that considers environmental effects
- No consultation trigger per se, but. . .
- Consultation triggers:
  - Invitation to participate in scoping
  - Discuss conflicts w/ tribal land use plans and policies
  - Invitation to comment on draft EIS when effects on Indian lands
  - Notice of hearings, meetings, and docs when effects...
  - May be cooperating agency when effects...are on Indian Lands

# INDIAN SACRED SITES

- Executive Order 13007 (May 24, 1996)
- Obligations:
  - Notice of proposed actions that may limit access to or adversely affect sites
  - Accommodate access to & ceremonial use of Indian sacred sites by Indian religious practitioners
  - Avoid adversely affecting physical integrity of sacred sites

# CONSULTATION WITH TRIBAL GOVERNMENTS

- Executive Order 13175 (November 6, 2000)
- Obligations:
  - Consult regarding regulations, proposed legislation, or other policy statements that may have substantial effects on tribes
  - Use consensual mechanisms to develop regulations and policies affecting:
    - treaty rights
    - tribal self-government
    - tribal trust resources

# ENVIRONMENTAL JUSTICE

- Executive Order 12898 (Feb. 11, 1994)
- Purpose: Ensure minority or low-income populations do not suffer adverse environmental effects “disproportionately”
- Means:
  - Greater public participation and access to information
  - Analyze subsistence consumption of fish and wildlife

# OTHER EXECUTIVE ORDERS

- Preserve America (E.O. 13287)
  - Partner with Indian tribes to promote economic development through use of historic properties
- Cooperative Conservation (E.O. 13352)
  - Take account of tribal interests in land and other natural resources
  - Promote tribal participation in Federal decision-making

# PRESIDENTIAL MEMOS ON GOVERNMENT-TO-GOVERNMENT RELATIONS

- President Clinton, April 29, 1994
  - Consult prior to taking actions that may affect tribes
  - Assess effect of actions on trust resources
- President Bush, Sept. 23, 2004
  - Respect tribal rights of self-government and self-determination
  - Cultivate mutual respect
- President Obama, Nov. 9, 2009
  - Committed to regular and meaningful consultation
  - Directs agencies to develop and implement plan of action to carry out EO 13175\*
- All recognize unique legal relationship