



Army Corps of Engineers American Indian/Alaska Native Policy

Application to Project Planning, Construction,
Operations & Regulatory

Chicago, IL, March 5-7, 2012

Tribes and Civil Works

- Tribal interests are not restricted to cultural resource issues
- Are sponsors & partners for water resources projects
- Are applicants for DA permits
- Are contractors and consultants
- Lease Corps lands and operate recreation areas
- Play important roles in planning, operating and maintaining projects and programs (co-management)
- Embody a vast pool of untapped talent and cultural knowledge
- **Working with Tribes helps fulfill our Trust responsibility and accomplish our mission**

The Tribal Program is Growing

- **Tribal Nations Community of Practice**
- **CoP Charter establishes goals & objectives**
- **Tribal Liaison at HQ has access to Army leaders**
- **Leaders take Tribal responsibilities seriously**
- **Education a major thrust, cross-cultural learning goes both directions**
- **It all begins with trust and respect, one person at a time**
- **Tribal Liaisons in ~8 districts and POCs in 30**

Facts About Tribes

- Federally-recognized Tribes are sovereign Nations
- Federal government has a legal relationship (Trust responsibility) with each Tribe based on treaties, statutes, court decisions & executive orders
- Tribes are culturally unique, languages, beliefs, origins
- Tribes respect the military culture, yet some members still mistrust us since it was the Army who removed them from their lands
- Tribes do not get “hand outs” – the government agreed to provide certain services in exchange for lands
- Highest rate of enlistment into the Armed Services

Tribes as Political Sovereigns

- Federal recognition” of an Indian tribe constitutes designation of a Native community as a political sovereign within the U.S. federalist system
- Tribes are subject to federal law, but operate under their own constitutions, administer their own judicial systems, and implement self-managed tax and regulatory regimes

Tribes and Self-Determination

- *“This principal – to the effect that, while a tribe may be wholly encompassed within a state, a federally-recognized tribe is nevertheless a neighboring jurisdiction (rather than a subservient jurisdiction) – extends well beyond gambling to such matters as environmental protection, natural resource and endangered species management, labor relations, civil and family law, and much of criminal law and taxation (Cornell and Kalt 1977)”*

Presidents and Indian Policy

- Johnson – maximum choice, self-help, self-development, self-determination
- Nixon – special relationship between tribes and Federal government, rejected extremes of Federal paternalism and Federal termination (solemn obligation)
- GHW Bush – affirmed policies on sovereignty, self-determination, trust responsibility
- Clinton – EOs 13084 & 13175 on tribal consultation
- GW Bush – emphasized economic development and education

What Does the Dept of Defense Policy Involve?

- Indian Lands
 - Reservations (46.2 M acres)
 - Allotted lands (8.9 M acres)
 - Not Alaska Native Claims Settlement Act corporation lands [Alaska Native Claims Settlement Act]
- Off-reservation reserved or treaty rights – hunting and fishing rights, and also off-reservation tribal resources such as subsistence resources in Alaska
- Tribal rights – access to sacred sites
- Other legal obligations – pre-decisional consultation

DoD AI/AN Policy: Alaska Implementation Guidance, May 11, 2001

- Provides additional information on Alaska tribes/governments
- G2G consultation not required Native Corporations, ANCSA entities, other governmental entities established by the State of Alaska
- Focus attention on tribal rights and resources which the Corps has a trust responsibility to protect
- Covers matters unique to Alaska: marine mammals; certain communities; allotted lands; Native Townsite Act; subsistence rights and “preference”
- Consistent with DoD and Corps policies

USACE National Policy Development

- Tribal Policy Task Force (94, 96, 98, 99, 00)
 - 1995 Listening Sessions (2 vol report)
- Assessment of Corps / Tribal Relations 96
- Tribal Policy Principles Feb 1998 (Policy Guidance Letter #57)
- Indian Sacred Sites - Policy Guidance Letter #58
- Established HQ Tribal Desk, 2003
- Partnering with Indian Nations training began 2005
- Tribal Nations CoP, 2006
- Draft Consultation Guidelines, 2008

Corps Affects Tribal Lands & Resources

- Projects constructed/operated by Corps (~30% of Corps Civil Works projects affect directly treaty and trust resources of ~20% of Tribes in the lower 48 States)
- Projects constructed by the Corps, operated and maintained by non-Federal sponsors
- Activities authorized by the Regulatory Program
 - Rivers and Harbors Act of 1899, Sec 10 (structures in navigable waters)
 - Clean Water Act Sec. 404 (fill in waters of the U.S., including wetlands)
- Support for Others (WRDA 1992) (now “Interagency and International Services”)
- Military Projects
 - (installations, housing, airports, clearing ordnance, HTRW)

How Has the Corps Affected Tribes?

- Communities have been impacted a/o displaced
- Traditional resource areas lost & degraded
- Sacred sites lost & degraded
- Land and water resources lost & degraded
- Tribal/trust resources may include:
 - Topographical features (mountains, rivers, lakes, springs, deserts, trees, caves, rock shelters, routes to sacred places)
 - Fish and wildlife species, medicinal or sacred plants
 - Archeological sites, sacred sites, ceremonial sites, burial grounds, collections of artifacts
 - Petroglyphs and pictographs
 - Resource gathering and processing sites (e.g., pinyon groves, caribou migration routes)

PGL #57: Tribal Policy Principles (Feb 98)

- Tribal sovereignty
- Trust responsibility
- Government-to-Government relationship
- Pre-Decisional consultation
- Self-reliance, capacity building, growth
- Natural and cultural resource management and protection

Note: These principles derive from the unique historical and political relationship between the federal government and American Indians/Alaska Natives.

Alaska Native Claims Settlement Act of 1971

- Congress extinguished aboriginal title, created regional corporations and village corporations, that were incorporated under Alaska State Law
- ANCSA corporations are private, for profit, commercial business operations and not in the same category as Federally-recognized tribes
- Work with ANCSA corporations frequently as landowners (not just G2G)
- Exceptions by law: Metlakatla Indian Community, Annette Island Reserve, Native allotments under the Alaska Allotment Act, and townsites under the Native Townsite Act of 1926

CEPOA-7.1-14, Tribal Coordination (G2G) - SOP

- Defines methods for G2G consultation
- “Tribal rights are “rights legally accruing to a tribe by virtue of inherent sovereign authority, unextinguished aboriginal title, treat, statute, judicial decision, executive order or agreement, and that give rise to legally enforceable remedies (p. 4)”
- Responsibilities of Tribal Liaison, PgMs, PMs, OC, DE

CEPOA-7.1-14, Tribal Coordination (G2G) - SOP

- DE is responsible for G2G relations, and sign documents
- PM/PgM, assisted by TL and OC (and Regulatory when necessary) coordinate, work at staff levels, make determinations of effect,
- “Likely to have an impact on a Tribal right or resource”
- Consider adjustments to action to avoid impacts
- Defines informal and formal consultation
- Use Figure 1 – Native Coordination

PGL # 58: Indian Sacred Sites

- Implements E.O. 13007 (May 1996)
- Accommodates access to, and ceremonial use of, Indian sacred sites by Indian religious practitioners
- Avoids adversely affecting physical integrity of sacred sites, maintain confidentiality
- Maintains confidentiality of information
- Ceremonial use may include collection of plants, clearing of habitat, gathering of animal parts or feathers, and other resource consuming activities

Water Resources Development Act of 1974, Sec. 22

- Planning Assistance to Tribes and States, allows for technical assistance cost shared 50/50
 - Comprehensive water and related land resources planning - projects in 14 Corps Districts
 - Over 100 agreements with Tribes, 30 Tribes (~5% of Federally-recognized Tribes)
 - \$3.3 million since 1991 - 10% of annual PAS budget (average)

Water Resources Development Act of 2000, Section 203

- Tribal Partnership Program
- Just renewed – Sec. 2011, WRDA 2007
- Focused on Tribal water and related land resource needs
- Natural and cultural resource projects (acknowledges they are inextricably linked)
- Credit for traditional cultural knowledge
 - In-kind contributions allowed
- Ability to Pay (cost sharing reduction once rulemaking has been completed)

Water Resources Development Act of 2000, Section 208

- Discretionary authority to rebury human remains on Corps/Federal lands
- Corps Commanders must identify suitable lands for this purpose
- Recovery, preparation and reburial costs 100% Federal expense
- Discretionary authority to transfer those lands to Tribes or use as cemeteries

Land Access Policy

- ER 1130-2-550
Recreation Authorization
- The District Commander may waive day fees for boating, swimming beaches, and other recreational services for Tribal members
- Special use permits should be issued w/o charge to Tribal members for ceremonial purposes
 - Requests must be submitted by the Tribal Government or coordinator that has been authorized by the Tribe to the Commander or their Representative

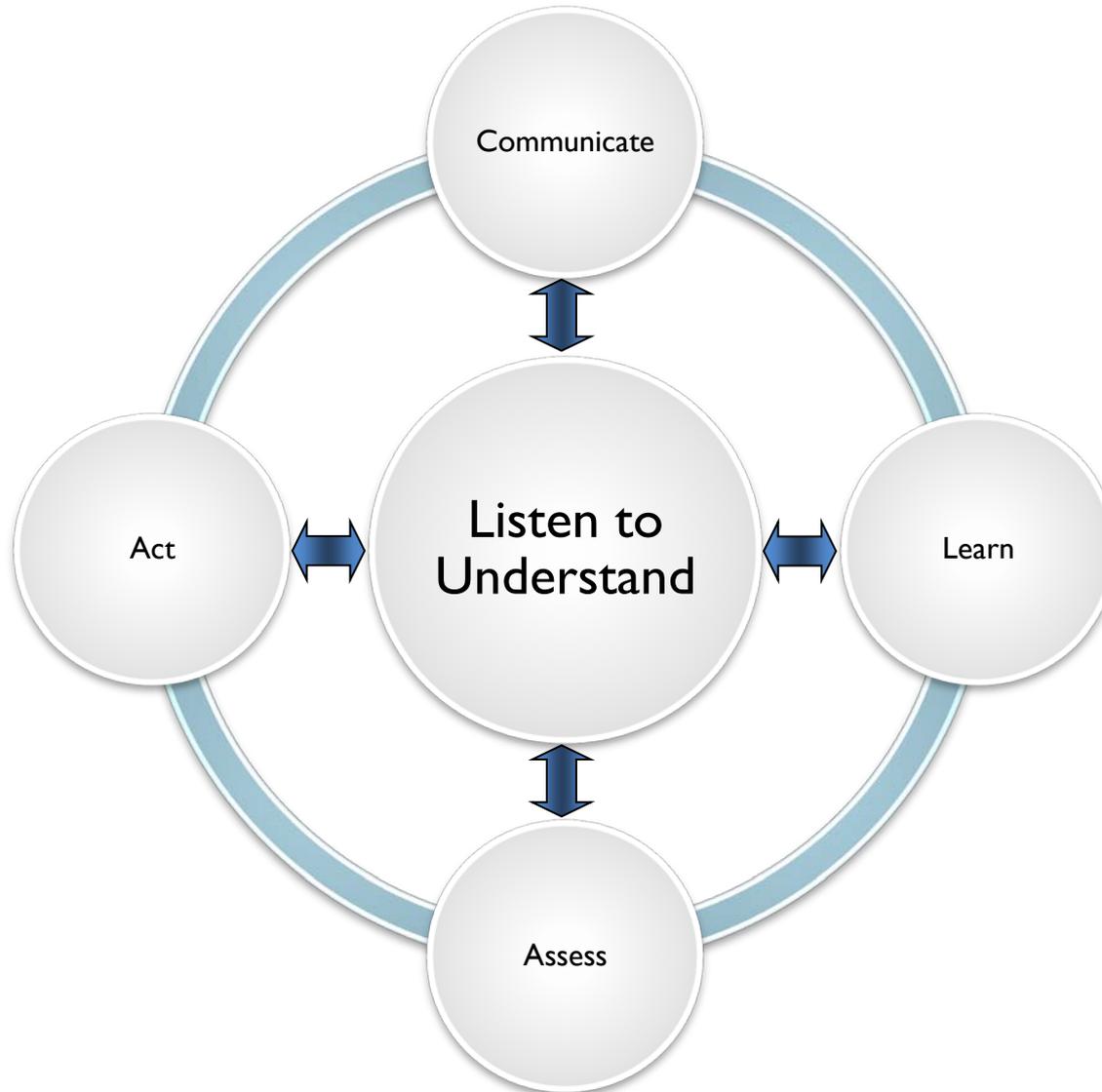
Consultation Considerations

- DoD threshold = “may have the potential to significantly affect”
- Indian Nations are not simply stakeholders in the Government-to-Government context
- Collaborative & ongoing process, may be event, project, proposal, or program driven
- Local protocols can facilitate staff-to-staff communication
- Based upon trust and respect
- Education both directions – continuing education

What is Meaningful Consultation?

- Be pre-decisional: no more “done deals”
- Work toward consensus, but ultimately Corps makes decisions
- Tribes are *not* just another stakeholder, user group, or the “public”
 - Protect Indian rights from adverse impacts
 - Consider cultural factors and perspectives
 - Beyond NEPA and NHPA

What to Do!!



Thoughts & Statements to Avoid

- I didn't think they would care
- I didn't think that XXXX could be important
- I didn't see anything in our files or records
- I wouldn't expect XXXX to be significant
- ?
- ?

Collaboration, Collaboration, Collaboration!!!



Missouri River System Example

- **History:** 1944 - Corps granted authority over all MO River dams.
 - Fort Randall Dam, begun in 1946, flooded 22,000 acres of Sioux land and displaced 136 families
 - 1944-1966 - Flooding & disruption continued throughout construction of all 6 dams. 8 Tribes & 900 families were displaced
- **Challenges** - 6,000+ shoreline miles under Corps mg't contain ~5,000 archaeological and sacred sites
 - erosion, encroachment, looting and vandalism, insufficient funds for stabilization and protection (\$3 million annually for a \$82+ million need)
- **Progress** - Section 106 Programmatic Agreement signed April 2004 (Corps, ACHP, 4 SHPOs, 27 Tribes, National Trust for Historic Preservation, BIA)
 - Activities will take years to complete because it is so comprehensive
 - Reviewed annually

Cochiti Dam and Lake

- **1940's- US Congress passes legislation for Rio Grande Flood control**
- **1950's- Area of Pueblo de Cochiti identified as site of Dam and Reservoir**
- **Early 1960's- Pueblo threatened with condemnation in acquisition of project lands**
- **Late 1960's- construction begins**
 - **Pan-tribal Religious site destroyed**
 - **50% of Pueblo agricultural lands destroyed**
- **1970's- Cochiti Dam and Lake begins operations**
 - **Remaining Ag lands taken out of production**
- **1970's-2000- Litigation, confrontation, hostility (on both sides) characterize USACE-Cochiti relations**

USACE-Pueblo Reconciliation

- **2000- Drought and ESA increases management pressure on USACE**
 - **Cochiti Dam management flexibility tightly constrained by relationship**
- **Albuquerque DE and Pueblo Governor initiate monthly “Partnering Meetings”**
 - **Governor and DE realize progress only made through frank, open discussion**
 - **USACE comes to appreciate broad negative impacts to tribe commits to reconciliation**
- **2003- Reconciliation Ceremony held near destroyed religious site**
 - **Entire Pueblo community attends**
 - **DE apologizes for damage done to community, commits to future collaboration**
- **2010- Pueblo de Cochiti host USACE Cultural Immersion Training**

Program Challenges

- **Funding vs. needs & ability to pay in Indian Country**
- **Visibility/accountability at leadership levels**
- **Leadership changes (both Corps and Tribal)**
- **Identify/remove procedural impediments**
- **Identify sources of funding**
- **Improve consistency of approach**
- **Working with different cultures**
- **Hiring more Native employees**
- **Following through on promises, agreements**

Sunset This Talk



Questions???

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