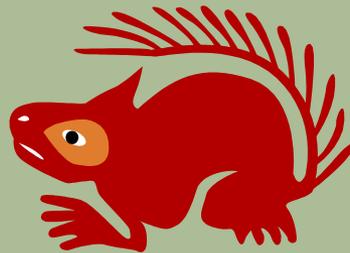


# Key Laws That Require Consultation: Why We Do What We Do

Ron Kneebone, Ph.D.  
Tribal Liaison, Albuquerque District



# Consultation “Triggers”

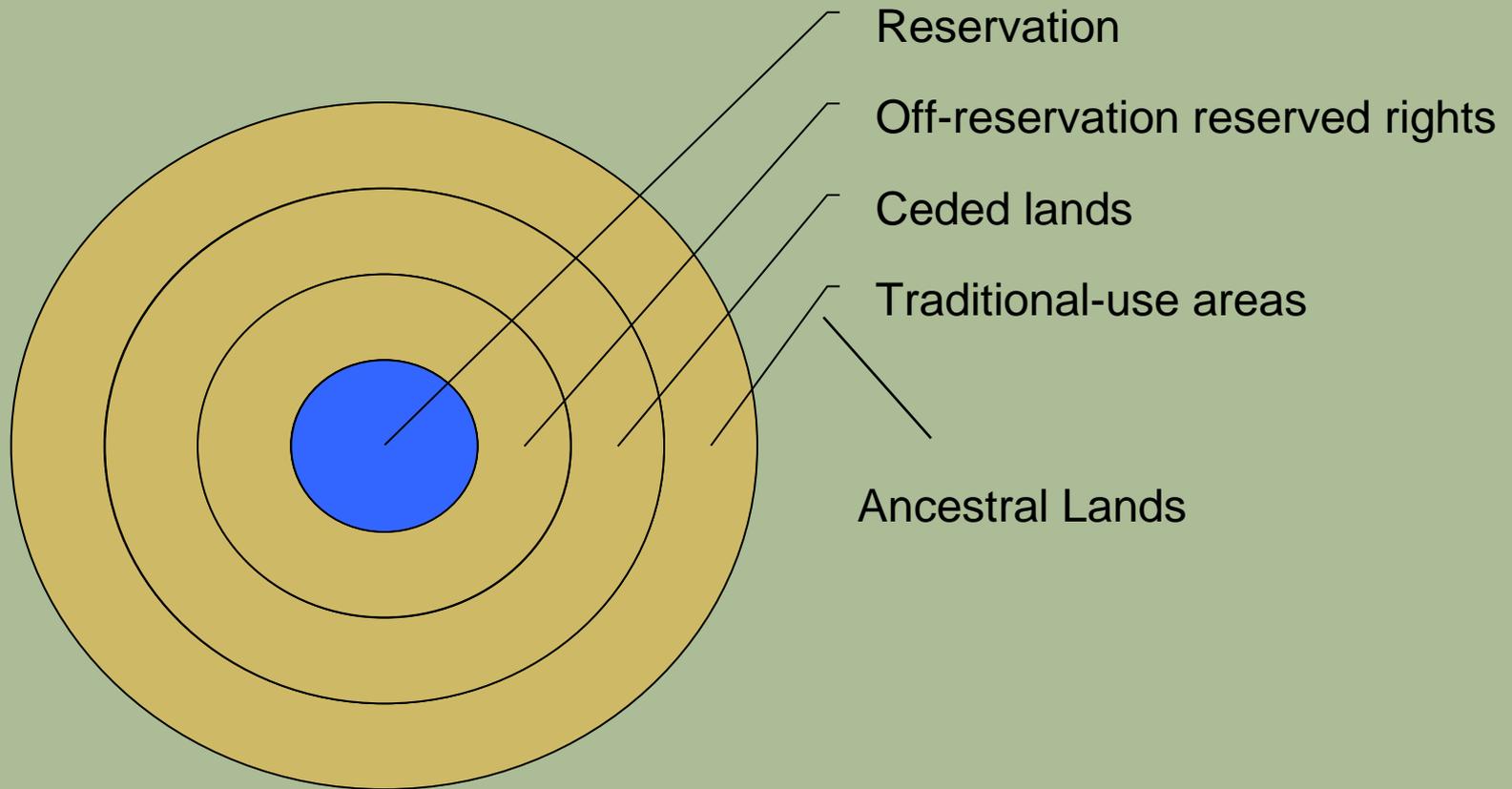
- Trust Responsibility
  - Constitution: Article I: Section 8: Clause 3; Article II: Section 2: Clause 2
  - Supreme Court:
    - Court rulings repeatedly cite ‘the Government’s trust obligation toward the Indian tribes.’ Further, they link special treatment for Indians *as a political class* with the Federal government’s obligations to Indians.
- Treaty Reserved Rights
- Laws
  - NHPA, ARPA, NAGPRA, AIRFA, NEPA
- Executive Orders
  - 13007, 13157
- Presidential Proclamations
  - Obama Proclamation of 05 Nov 09
- Presidential Memoranda
  - Concerning consultation

# Origins of the Indian Trust Responsibility

- *Cherokee Nation v. Georgia* (1831)
  - “Domestic dependent nations”
  - Stand as a “ward to his guardian”
  - Unquestionable right to occupancy
- *Worcester v. Georgia* (1832)
  - Most important case in Federal Indian law
  - Tribes sovereign, separate & distinct political communities
  - Treaties ensure availability of sustainable, land-based, traditional existence, have a right to Federal protection
  - Still, Congress has plenary power

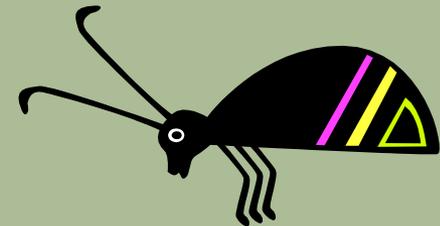


# Where does the Trust Responsibility Lie?



# *The Bottom Line*

- ▶ Trust responsibility shared by all federal agencies
- ▶ Agencies have broad discretion in interpretation of the extent of Trust responsibility
- ▶ Government-to-government (G2G) relationship tied to the Trust responsibility
- ▶ Obligation to consult when Tribal lands, resources, or cultural properties at risk
- ▶ How do you know if Trust resources are at risk? You *ask!* You consult with the affected Tribes.

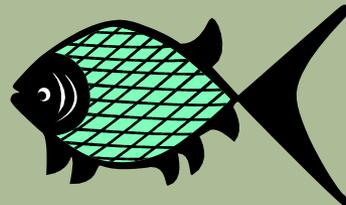


# National Historic Preservation Act (NHPA) 1966 (& amendments)

- Purpose of NHPA:
  - Promote preservation
  - “Consider” effects
  - §110: locate, evaluate, nominate, protect
  - §106: consult 36 C.F.R. pt. 800 (last amended 2004)
- Process
  - 36 C.F.R. part 800
  - Not necessarily to save the resource
  - [33 C.F.R. part 325, Appendix C]

# NHPA, cont.

- ▶ Consult with tribes regarding religious or cultural sites, wherever located - on or off tribal lands
  - Traditional Cultural Properties (NPS Bulletin No. 38)
  - *Pueblo of Sandia* case (50 F.3d 856)
  - *Muckleshoot Indian Tribe* case (177 F.3d 800)
- ▶ Concurrence role on Indian lands
  - THPO may assume SHPO role



# Archaeological Resources Protection Act (ARPA, 1979)

- Purpose: Protect archaeological resources on public and Indian lands
  - 100 year-old remains of past human life of archaeological interest
- Notify tribe before issuing permit affecting any Indian religious or cultural site
  - If items found, other laws may also apply
- Tribal consent required on Indian lands
- Criminal and civil enforcement provisions
  - Prohibits trafficking in archaeological resources
  - Potential felony conviction
- Curation

# Native American Graves Protection & Repatriation Act (NAGPRA)

- Purposes:
  - Establish process for repatriation of human remains and cultural items
  - Protect remains and cultural items recovered from federal and Indian lands
- Native American human remains & cultural items must be repatriated
  - Where culturally affiliated
  - In custody of federal agencies or federally funded museums (Section 5 and 6) or
  - Inadvertently discovered or intentionally excavated on federal lands (Section 3)

# 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
- *Navajo Nation & Havasupai Tribe v. USFS & Arizona Snowbowl*, 9<sup>th</sup> Cir., March 12, 2007



# National Environmental Policy Act (NEPA)

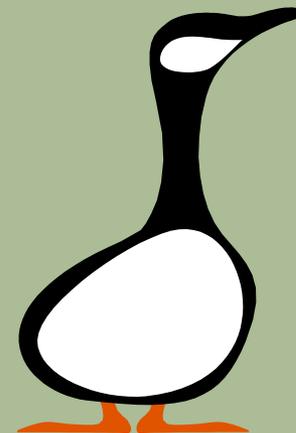
- ▶ Purpose: Informed, transparent decision-making that considers environmental effects
- ▶ Means: Written, public environmental analyses
- ▶ Consultation triggers:
  - Invitation to participate in scoping
  - Discuss conflicts w/ tribal land use plans and policies
  - Invitation to comment on draft EIS when effects on Indian lands
  - Notice of hearings, meetings, and docs when effects...
  - May be cooperating agency when effects...

# Indian Sacred Sites

- *Executive Orders apply to Federal agencies, not the public*
- Executive Order 13007 (May 24, 1996)
- Obligations:
  - Who defines a sacred site? The Tribe. You must ask them.
  - 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

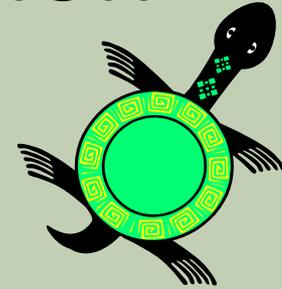
# Other Executive Orders

- 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
  
- ▶ Both recognize unique legal relationship

# Obama Administration



- Proclamation of 5 Nov 2009
  - Reaffirms E.O. 13175
    - Mandates each agency produce consultation guidelines
    - Agencies must report to OMB and submit updates according to a specific schedule
- Has appointed more tribal individuals in high places than ever before
- Has had yearly national Tribal summit meetings in DC for all tribal leaders

# DoD Response to Proclamation

- DoD submitted for all branches of the armed services
- Included Corps information
- DoD/Corps emphasized:
  - Training
  - Outreach
  - Partnerships
  - Next steps
    - Reporting yearly on consultations
    - Consultation policy, etc.
- Status: *still* waiting for OMB guidelines