

REGULATORY IIA TRIBAL ISSUES



Federal Trust Responsibilities and Tribal Consultation in the Corps Regulatory Program

Prepared by Mark Gilfillan (SPK) and Chris Parrish (SPA)

FY17/FY18

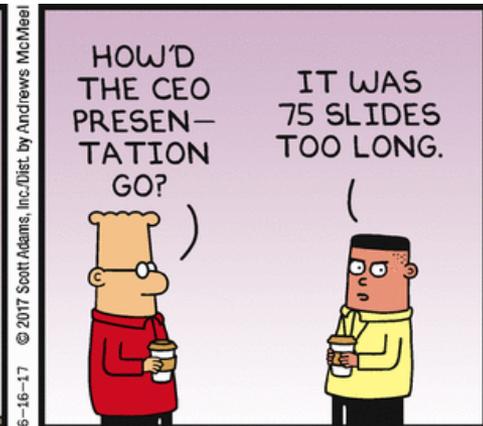
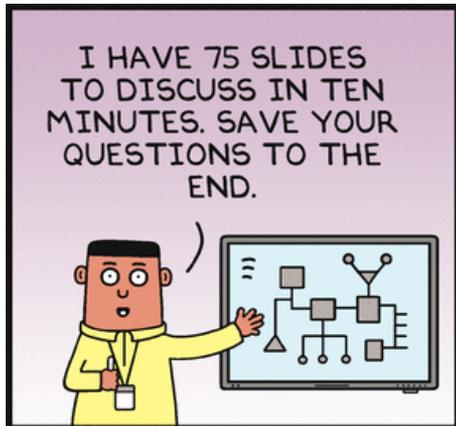
“The views, opinions and findings contained in this report are those of the author(s) and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation.”



**US Army Corps
of Engineers.**



DEATH BY POWER POINT



Dilbert.com @ScottAdamsSays

© 2017 Scott Adams, Inc./Dist. by Andrews McMeel 6-15-17

Dilbert.com @ScottAdamsSays

© 2017 Scott Adams, Inc./Dist. by Andrews McMeel 6-16-17

GOALS AND OBJECTIVES

Provide the historical background and fundamentals for the U.S. government and Corps Tribal Trust relationship

Describe the Corps Tribal Consultation Policy, Department of Defense American Indian and Alaska Native Policy, Presidential Executive Orders, and regulations and statutes related to Tribal Trust responsibilities.



Identify the framework and best management practices (BMPs) for conducting tribal consultation within the Regulatory Program

Identify and discuss resources/tools for tribal consultation (e.g. Regulatory and Tribal Community of Practices [CoPs], District guidance, agency websites)



THE BASIC QUESTIONS

How do we assess potential impacts to tribes and tribal treaty rights/resources as part of the Regulatory Program?



When do we initiate tribal consultation?

How do we conduct tribal consultation?



PRESENTATION OUTLINE

1. Native Americans and Tribal Issues
2. History of Federal Indian Law



3. Policy and Guidance



PRESENTATION OUTLINE

Tribal Consultation and the Regulatory Program

1. Action has the potential to have a “significant” effect to Tribal interests
2. Properties of religious or cultural significance to Tribes
3. The Administrative Record
4. Best Practices
5. Tools and Resources



FEDERAL TRUST DOCTRINE



The U.S., and individual agencies of the federal government owe a fiduciary duty to Indian Tribes.

The nature of that duty depends on the underlying substantive laws creating the duty (i.e. treaties, statutes).



THE CORPS TRIBAL PROGRAM

- Corps Leaders take Tribal Trust responsibilities seriously
- Corps implements Policy Guidance Letter 57: the 6 Tribal Policy Principles
- Tribal Nations Community of Practice
<http://www.usace.army.mil/Missions/CivilWorks/TribalNations.aspx>
- Tribal Liaisons
- Education is a major component

CORPS TRIBAL POLICY DOCUMENTS

- HQ Memo: Tribal Consultation Responsibilities in the Regulatory Program (August 2016)
- USACE Tribal Consultation Policy (Nov 1, 2012)
- Department of Army American Indian and Alaska Native Policy (October 24, 2012)
- USACE Tribal Policy (May 10, 2010)
- Policy Guidance Letter #58: Indian Sacred Sites (Implements EO 13007) (June, 1998)

CORPS TRIBAL POLICY PRINCIPLES

- Tribal sovereignty
- Trust responsibility
- Government-to-Government
- Pre-decisional consultation
- Self Reliance, Capacity Building, and Growth
- Natural and cultural resources



AMERICAN INDIAN CULTURE



© Marcia Keegan. All rights reserved. www.clearlightgallery.com



WHO IS AN AMERICAN INDIAN?

Federal Definition of American Indian

- Member of a federally recognized Tribe
- Blood quantum (Tribes have a role in determining percentage of blood quantum for members)
- Census, however, allows for self-identification

Tribes may determine their membership by

- Rolls
- Blood Quantum
- Kinship
- Constitution/Laws



WHAT IS A FEDERALLY-RECONGNIZED TRIBE?

An American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs (BIA)



TRIBAL STATUS

Treaty Tribes are Tribes with a signed and Senate ratified treaty.

Executive Order (EO) Tribes are those that have reservations established by Executive Order.

Congressionally Restored Tribes are Tribes whose recognition has been reestablished.

Unrecognized Tribes are native groups that have not successfully gone through the recognition process or have not sought recognition from the U.S. government



TRIBAL COALITIONS

Sub-regional Coalitions:

- Columbia River Intertribal Fish Commission (CRITFC)
- Upper Columbia United Tribes (UCUT)
- Upper Snake River Tribes (USRT)

Regional Coalitions:

- Affiliated Tribes of Northwest Indians (ATNI)
- Great Plains Tribal Chairman's Association (GPTCA)

National Coalition:

- National Congress of American Indians (NCAI)

PRIOR TO EUROPEAN CONTACT....



Indian ancestors
inhabited North
America for
thousands
of years

Tribal governments
were already
established



1492



File Name



US Army Corps
of Engineers.



1790



File Name



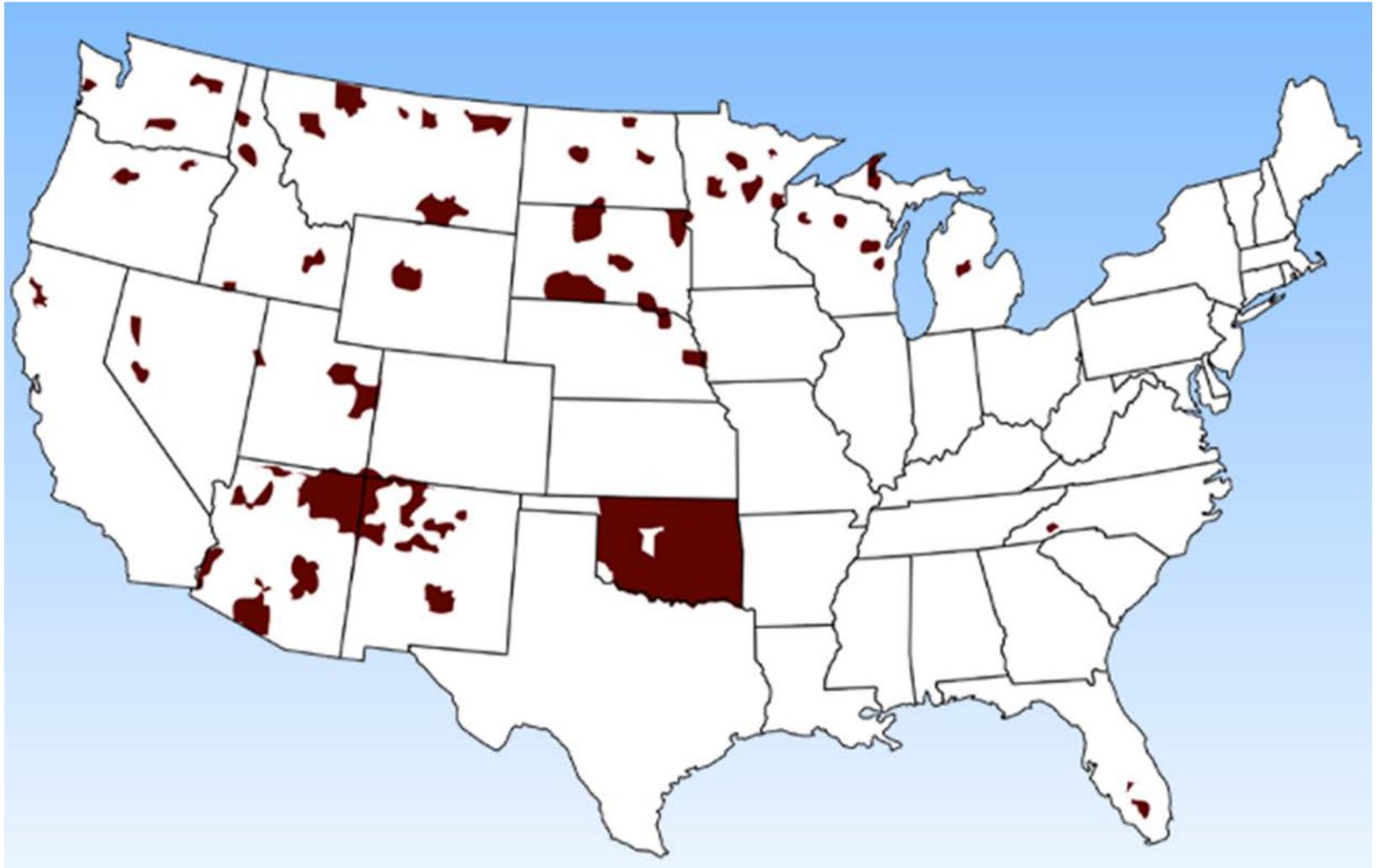
US Army Corps
of Engineers.



1860



1890



File Name



INDIAN LAW AND POLICY



HISTORICAL SUMMARY

- Tribal independence: Up to 1787
- Agreements between sovereigns: 1787 to 1828
- Removal, Reservation, and Treaty Period: 1828-1887
- Allotment and Assimilation: 1887-1934
- Indian Reorganization Act: 1934-1945
- Termination Period: 1945-1965
- Self-Determination Era: 1965-Present

Federal policy has fluctuated dramatically over the years, leading to skepticism and distrust.

Why the fluctuation?

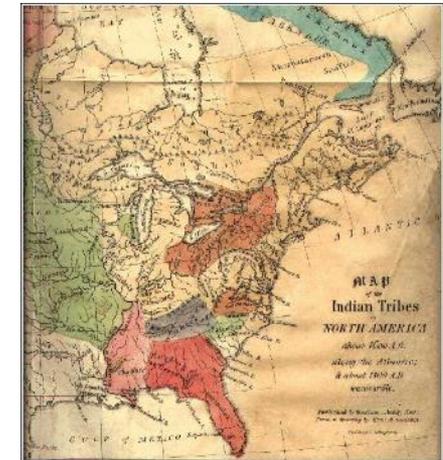


EARLY AMERICAN FEDERAL INDIAN POLICY

The Confederation Congress Proclamation of 1783

This proclamation described all the land west of the Appalachian Mountains as “Indian land”, where settlers were:

- not allowed to enter,
- not allowed to obtain land,
- not allowed to conduct land speculation
- subject to the laws of the Indian tribes.



Northwest Ordinance of 1787

“The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress”



EARLY AMERICAN FEDERAL INDIAN POLICY

Nonintercourse Acts of 1790, 1793, 1796, 1799, 1802, and 1834:

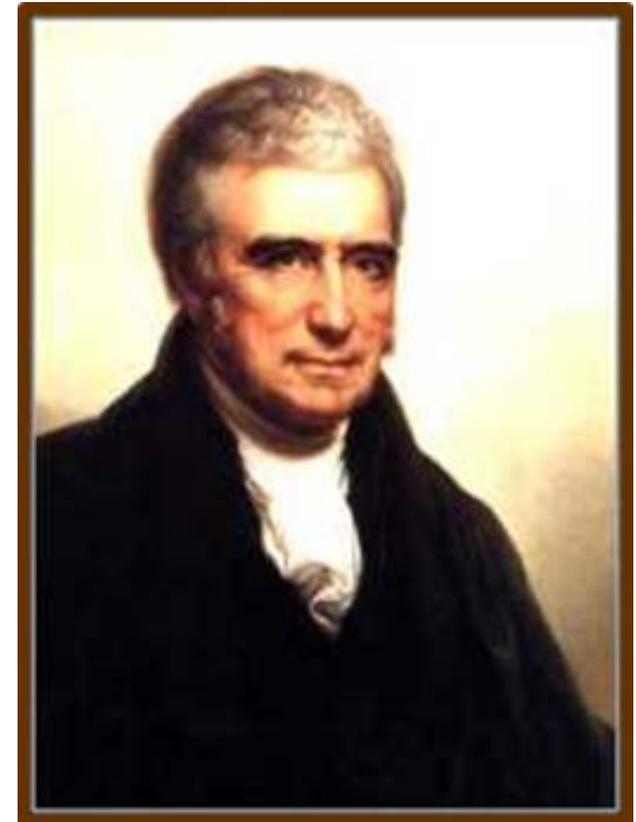
“[N]o purchase, grant, lease, or other conveyance of land, ... from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant the constitution.”
(from 1834 Act)



EARLY AMERICAN FEDERAL INDIAN POLICY

The “**Marshall Trilogy**” refers to three Supreme Court Cases that affirmed the rights of Indians to title of their land; prohibited sale of Indian land to private citizens; affirmed the relationship of recognized tribes with the United States; and prohibited enforcement of state laws on tribal lands.

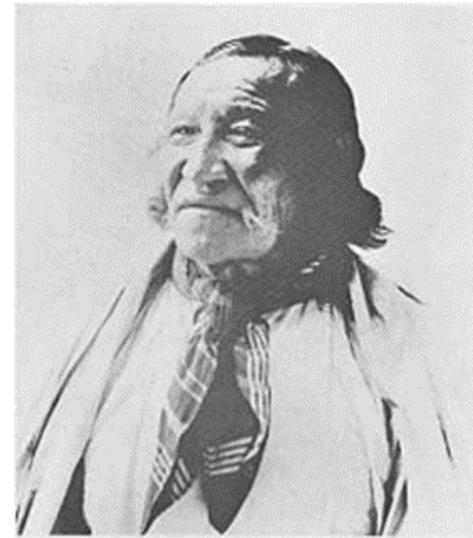
- Johnson v McIntosh (1823)
- Cherokee Nation v Georgia (1831)
- Worcester v Georgia (1832)



CONFLICTING OBJECTIVES

- Fluctuating policy objectives and competing perspectives:

- Independence
- Assimilation
- Termination
- Segregation
- Annihilation



*Those policy fluctuations
still affect tribal perspectives of
and trust in the federal government
and its representatives.*



KEY POINTS REGARDING FEDERAL INDIAN LAW

- ❑ The history of Native American law and treaty making was driven by shifting perspectives and political objectives
- ❑ Native Americans have a right to their view of history
- ❑ Policies & relations have changed in the modern era, and in most cases have improved, but are still challenging



CONTEMPORARY TRIBAL CULTURES



WHAT IS INDIAN COUNTRY?

Tribal Reservations

- Tribal Trust land
- Individual Tribal Allotments



Off Reservation Lands

- Usual/accustomed hunting, fishing, and gathering areas
- Important religious and cultural sites
- Historical places of interaction with federal/state government
- Lands set aside via treaties, executive orders, removals, court cases, etc.



INDIAN COUNTRY: THE TRIBAL PERSPECTIVE



CULTURAL DIFFERENCES: CONCEPTS SURROUNDING LAND USE

European concept: land ownership

- Europeans were settlers
- Land seen as property
- Land & resources to be exploited for human use

Tribal concepts: Use, but not ownership

- Many tribes were nomadic (seasonal camps)
- People are of the land; they come from it
- People use land temporarily; land cannot be owned



TRIBAL CULTURE

- Health, wellness tied to land, spirituality
- Tie to ancestors, burial sites, sacred sites
- Spiritual connection to natural world
- Family and kinship are strong influences; respect older people for their wisdom
- Time is fluid and circular
- Patriotic
- Storytelling major methods of instruction



CONTEMPORARY TRIBAL ISSUES

Preservation of traditional culture

- Language, sacred places, ceremonies, subsistence, technology

Disturbance of ancestral remains

- The worst thing that can happen is for human remains to be mishandled; proper handling and consultation is essential

Environmental issues

- Water quality & quantity
- Infrastructure – housing, plumbing, heating, etc.



CONTEMPORARY TRIBAL ISSUES

Self-determination

Economic Issues

Jurisdiction

Land-base





QUESTIONS?



US Army Corps
of Engineers.

