

REGULATORY IIA

TRIBAL ISSUES

Federal Trust Responsibilities and Tribal Consultation in the Corps Regulatory Program

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FY17/FY18



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DISCUSSION TOPICS

- Background
- Fundamentals: Why we Consult and the Trust Doctrine
- Key laws that require Consultation
- Policy: DoD, Army and USACE
- Regulatory Program application
- Tribal Consultation
 - -Why, Who, What, When, How
- Best practices
- Tools
- Final Thoughts



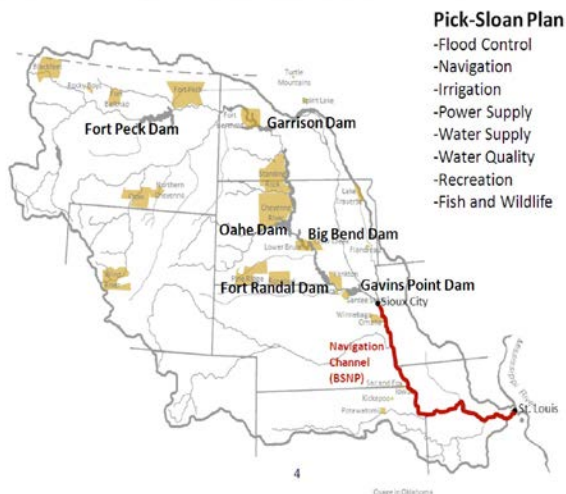
BACKGROUND

- Currently, there are ~573 federally recognized Indian Tribes within the US (33 states). Approximately 229 of those are in Alaska.
- Tribes are sovereign entities:
 - Each has a unique government, culture and language
 - Many have reservation lands.

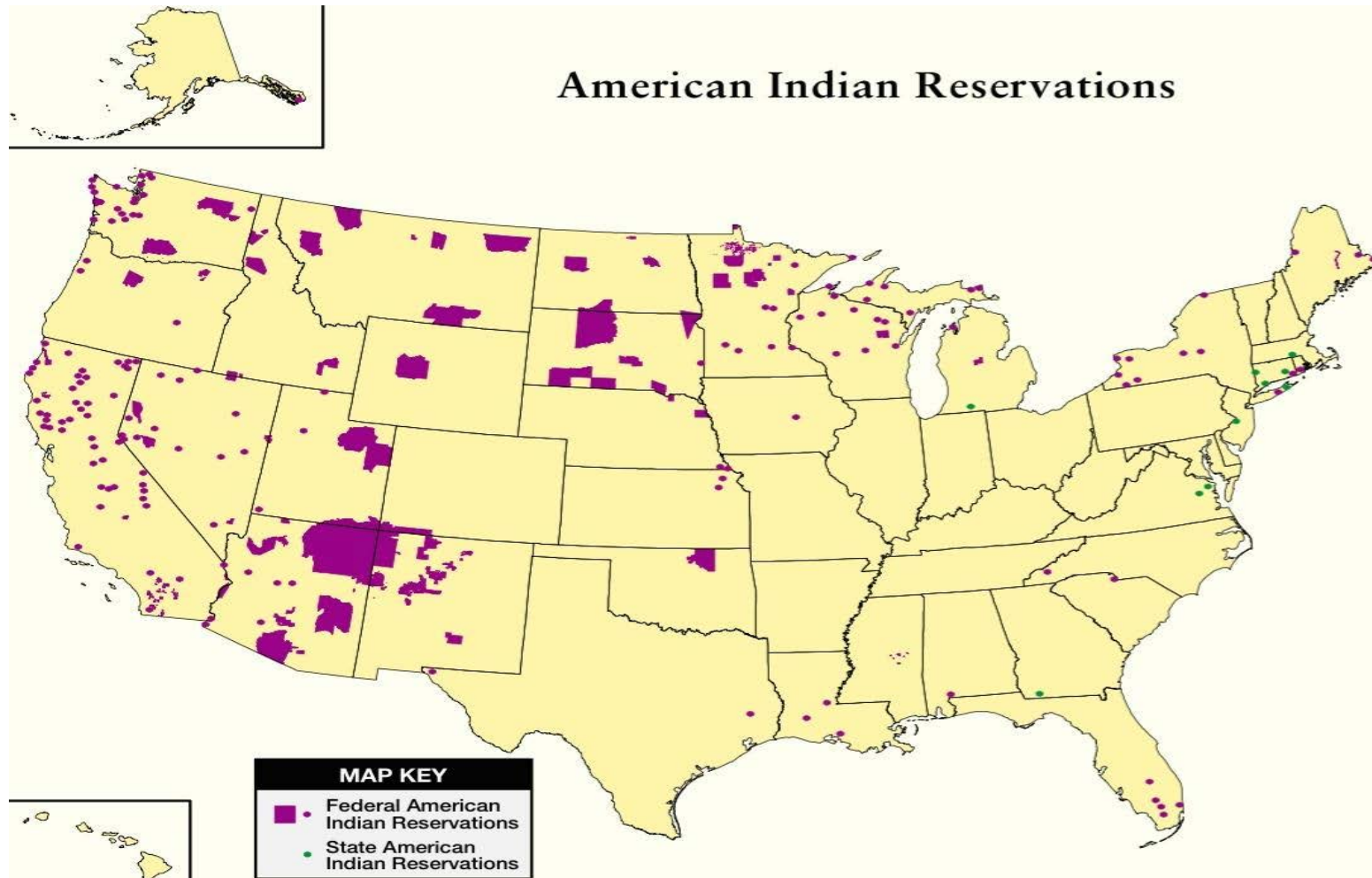


BACKGROUND

- The Federal government has a very long, historic, and legal relationship with each Tribe based on treaties, statutes and executive orders
- Many Tribes respect the military culture, yet may still mistrust the Army and the Corps since it was often the Army who removed them from their lands. Some historic Army Corps of Engineers' Civil Works projects have also adversely affected tribes.



TRIBAL LAND AREAS - RESERVATIONS



TRIBAL LAND AREAS-INDIAN COUNTRY-ALASKA



WHY WE CONSULT-THE LEGAL CONTEXT

US Constitution:

- Commerce Clause, Article I, Section 8: gives right to do business with tribes to Federal government, not States.
- Supremacy Clause, Article VI: Treaties are the supreme Law of the Land
 - Treaties – >500 signed (about 380 ratified by Senate)
- National Historic Preservation Act
- National Environmental Policy Act
- Executive Order 13175, Consultation with Indian Tribal Governments – 2000
- Presidential Proclamation - Nov 05 2009



FEDERAL TRUST RESPONSIBILITIES

- Seminole Nation v. United States, 1942
- Consultation is required by Executive Orders and statutes, and the Federal government cannot diminish tribal treaty rights, only the U.S. Congress can.
- Consultation is a means for fulfilling responsibilities of the federal government to Tribes



KEY LAWS THAT REQUIRE CONSULTATION

National Historic Preservation Act (NHPA) 1966

Promote preservation of historic properties

Obligations:

Consult w/any tribe that attaches religious/cultural significance to the property, and take into account effect of the undertaking.

- '92 Amendments enhanced tribal role

Consult with tribes regarding religious or cultural sites

- On or off tribal lands

Traditional Cultural Properties (NPS Bulletin No. 38)

THPO may assume SHPO role on Indian lands



KEY LAWS THAT REQUIRE CONSULTATION

National Environmental Policy Act (1970)

Informed, transparent decision-making that considers environmental effects



Invite tribal participation in scoping

Discuss conflicts w/tribal land use plans and policies

Invite comment on draft EIS when effects on historical Indian lands



OTHER DIRECTIVES THAT REQUIRE CONSULTATION

- American Indian Religious Freedom Act, 1978
- Archaeological Resources Protection Act, 1979
- Indian Sacred Sites--Executive Order 13007, 1996
- Religious Freedom Restoration Act, 1993



SITES OF RELIGIOUS AND CULTURAL SIGNIFICANCE



Heart of the Monster

Celilo Falls



RELIGIOUS AND CULTURAL “SIGNIFICANCE” FOR TRIBES

USACE Policy anticipates a two-step process:

1. To overcome the fact that, as non-Indians, we may not always recognize the effect our actions may have on tribal interests unless WE ASK
2. To allow the Corps to proceed without the need for further consultation unless potentially significant consequences are identified during this initial discussion.



TRADITIONAL CULTURAL PROPERTIES AND SACRED SITES



TRADITIONAL CULTURAL PROPERTY

A location associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world

A rural community whose organization, buildings and structures, or patterns of land use reflect the cultural traditions valued by its long-term residents

A location where Native American religious practitioners have historically gone, and are known to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice

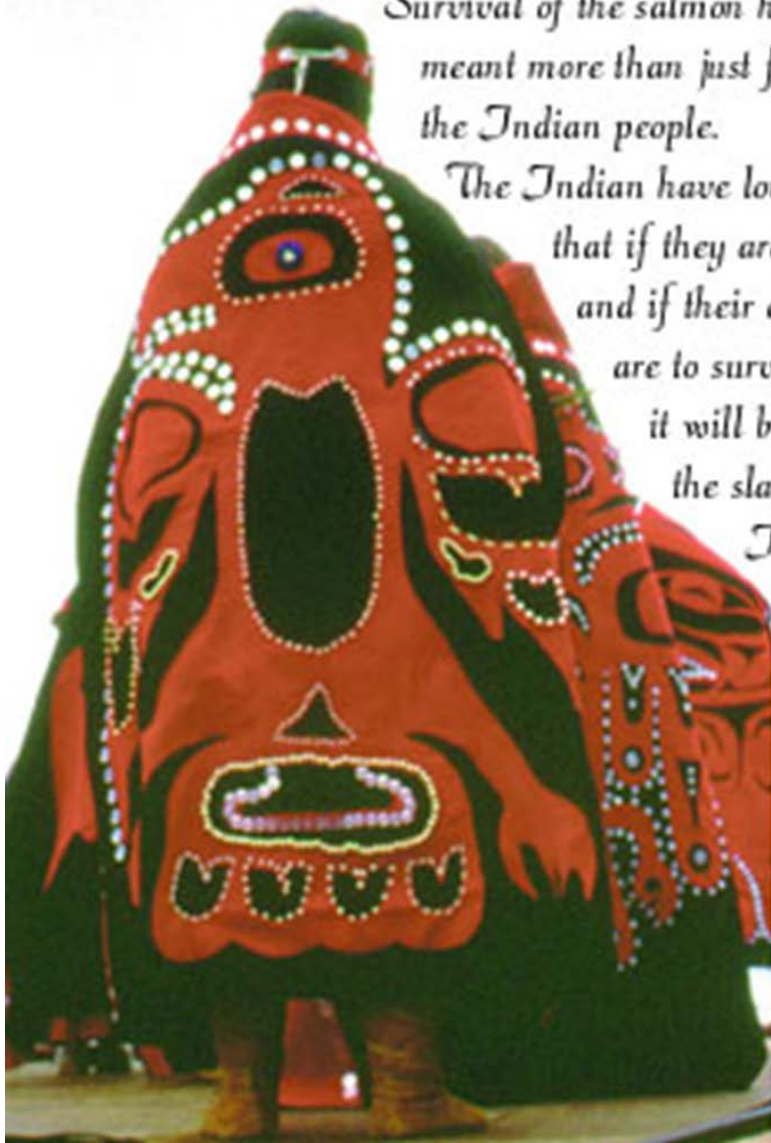
A location where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historical identity



The Legacy of the Salmon People

*Survival of the salmon has always
meant more than just food for
the Indian people.*

*The Indian have long recognized
that if they are to survive,
and if their children's children
are to survive,
it will be because
the salmon survives.
It is their legacy.*



Traditional Cultural Property - Salmon



DOD AMERICAN INDIAN POLICY

- American Indian and Alaska Native Policy (Oct 24, 2012). DoD Instruction No. 4710.02: DoD Interactions with Federally-Recognized Tribes.
- Army Regulation. AR 200-1 Environmental Protection and Enhancement (Environmental Quality)



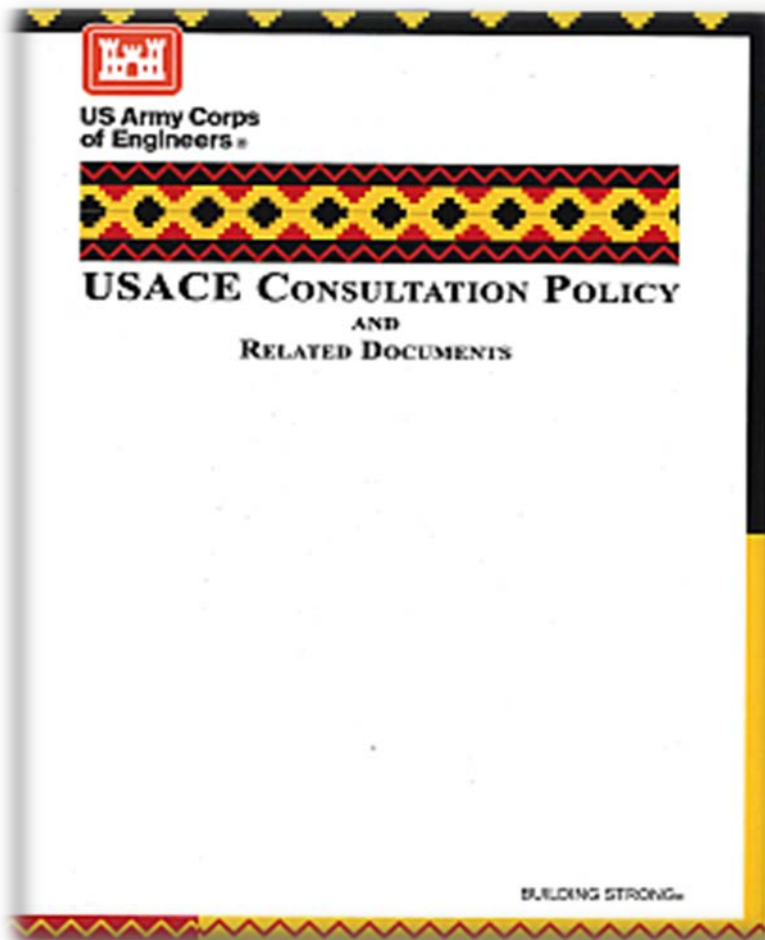
AMERICAN INDIAN AND ALASKA NATIVE POLICY

AND

DEPARTMENT OF DEFENSE INSTRUCTION
NUMBER 4710.02: DoD INTERACTIONS WITH
FEDERALLY-RECOGNIZED TRIBES



USACE TRIBAL POLICY DOCUMENTS



- USACE Consultation Policy and Related Documents (Nov 1, 2012)
- *Tribal Consultation Responsibilities in the Regulatory Program* (19 Aug, 2016)

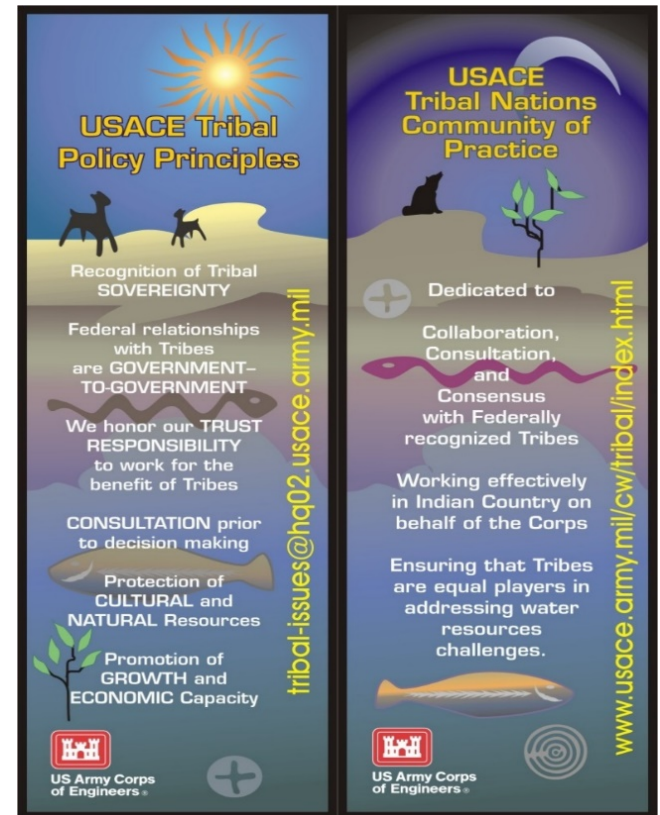
USACE TRIBAL POLICY PRINCIPLES

In recognition of the special considerations due to tribal interests, the USACE has adopted the following

Tribal Policy Principles:

- Recognition of Tribal SOVEREIGNTY
- Federal relationships with Tribes are GOVERNMENT TO GOVERNMENT
- We honor our TRUST RESPONSIBILITY to work for the benefit of Tribes
- CONSULTATION prior to decision making
- Protection of CULTURAL and NATURAL resources
- Promotion of GROWTH and ECONOMIC capacity

<http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/>



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404 AND A LARGER CONTEXT



EVALUATING PERMIT APPLICATIONS

- 33CFR Part 320.4(e)-Historic/cultural-...archeological resources, including Indian religious or cultural sites and such other areas as may be established under federal or state law for similar and related purposes.
- 320.4(g)(6)-Consideration of property-...Furthermore, a DA permit does not authorize any injury to property or invasion of rights...
- 33 CFR Part 330.5 NWP(b) Special Conditions for, (a) authorized activities to be valid: (10) That the construction or operation of the activity will not impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.



CONSULTATION RESPONSIBILITIES

2016 Policy Memorandum

- District commanders must ensure that any permit decision does not violate any treaty, or impermissibly impact other protected interests.
- District commanders must consult with Tribes pursuant to the NHPA.
- Develop communication protocols and operating procedures.
- Guidance and practices in place for identifying and evaluating potential to tribal resources, tribal rights, tribal lands, and historic properties.



CONSULTATION FOR NHPA / APPENDIX C

- Consider views of SHPO, THPO, ACHP and consulting parties.
- Weigh all public interest factors, including impacts on historic properties
- If adverse effects on historic properties, consider alternatives to avoid, minimize, and mitigate those adverse effects.



TREATY RIGHTS OR OTHER PROTECTED INTERESTS

If meeting Tribes for Consultation-consider these questions during meetings to ensure Regulatory Policy objectives:

- Do treaties exist within a specific geographic area?
The permit area?
- What treaty rights exist in, or what treaty- protected resources rely upon, the specific geographic area?
- How are treaty rights potentially affected by the proposed action (permit)?

If you're not Consulting face-to-face, how are you documenting any treaty rights review?



CONSULTATION UNDER ESA

As part of any Section 7 the FWS/NMFS will:

- Notify tribes if proposed federal action may affect tribal trust resources



- Encourage action agencies to invite affected tribes to participate in consultation processes
- Give full consideration to information received from tribes in developing reasonable and prudent alternatives

OTHER ACTIONS FOR ASSURANCE

Tribal interests are not restricted to just cultural resources

- NWP non-reporting actions. They are not valid on Indian land without EPA or Tribal 401 Water Quality Certificates.
- WQC grants and waivers by the states do not apply to Indian lands.



TREATY DELIBERATIONS



WHY ARE WE CONSULTING

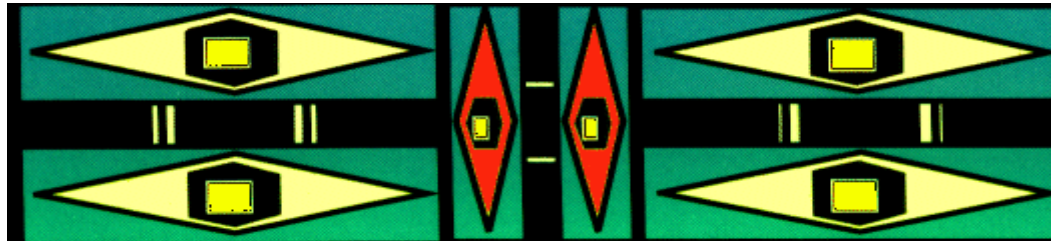
- Our permit authority may impact tribal natural or cultural resources on/off reservation lands.
- Traditional Cultural Properties or Sacred Sites could be impacted
- Regulatory permit actions cannot impermissibly impact tribal treaty/reserved rights



WHAT DOES IT MEAN TO CONSULT

-USACE Tribal Policy Definition-

Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect, and shared responsibility. To the extent practicable and permitted by law, consultation works towards mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights), or Indian lands.



WHO CONSULTS

- Day-to-Day: Regulatory staff and/or Tribal Liaison and Tribal representatives



- More formal: District Commanders, TL and Tribal Leaders



TYPES OF CONSULTATION

Government-to-Government (formal):

- Letter from Tribal Chair or Commander inviting Consultation for a specific Regulatory permit action

Consultation (informal)*:

- On-going dialogue (i.e. letters) between the staff of two governments; exchange of information (i.e., Command Change, flag exchange, etc.)

Coordination (notification on project specific information)

- Advance information on large area project with multiple agencies

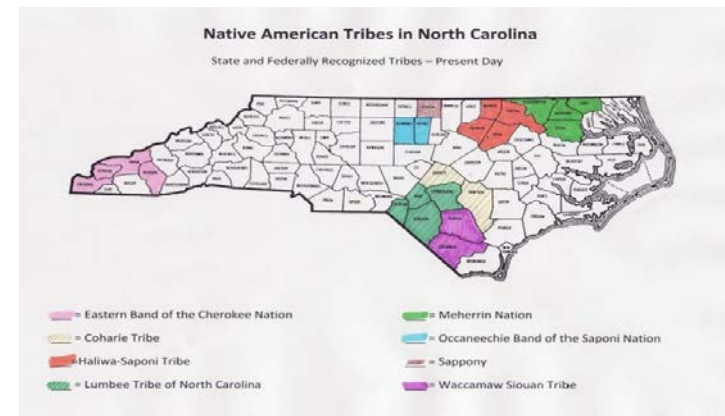
Collaboration (discussion of multiple RD projects over time)

- Quarterly tribal interaction for geographic areas



NON-FEDERALLY RECOGNIZED TRIBES

- Government to government consultation only occurs with federally-recognized Indian Tribes.
- The Corps will listen to non-recognized or state-recognized Tribes, but they are essentially interested parties in the Regulatory process, and generally treated like any other stakeholder group.
- Some non-recognized or state-recognized Tribes may claim to be federally recognized



CONSULTATION PROCESS

The following are not sufficient for requesting consultation:

- Public Notices
- General interagency coordination letters
- Other mass mailing.



REGULATORY CONSULTING HURDLES

- Scope of Analysis/Permit Area/Undertaking (106, ESA, NEPA).
- Extent of Trust responsibility for non-Corps activities
- Roles for non-compliance and enforcement
- Time frames for commenting on Public Notices or responding to letters perceived as insufficient
- Non-notifying NWP



TRIBAL & AGENCY VIEWS OF CONSULTATION

What's important to Tribes:

- Respect and being heard
- Exchange of views and ideas
- Input in final decisions and plans
- Achieving a mutual understanding

What's important to the Agency:

- Be respectful and indicate agency has listened
- Focus on techniques and details during meetings
- Getting to a final decision
- Achieving results



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TRIBAL VISION

The Tribal people have lived on the land and have been connected to the land from time immemorial.

The people made use of every type of habitat that historically existed, and were the original stewards of the land.

Next seven generations



CONSULTATION

Ongoing, meaningful dialogue whereby views, recommendations and/or advice are encouraged, exchanged, and considered.

Notification is the start of consulting, but alone does not constitute consulting.



THINGS TO KEEP IN MIND

Within a single Tribal entity there may be substantial cultural and philosophical differences between people. It may not be safe to assume that one person's opinion is that of the Tribe, unless that person is a duly authorized Tribal spokesperson.



THINGS TO KEEP IN MIND

Some Tribal cultural knowledge is not meant to be public knowledge, and is kept secret

The amount and type of knowledge shared varies widely from Tribe to Tribe



A CHINOOK INDIAN LODGE, 1841 (From Wilkes' Exploring Expedition)



THINGS TO KEEP IN MIND

- Tribes are sovereign nations
- Tribal Councils = Presidents, Senators, or Congresspersons. *Govt-to-govt* Consultation is what they seek.
- As the executive and legislative branch of the sovereign Tribal government, Tribal Councils often wish to meet directly with executives and legislators of the U.S. and state governments.



Hon. Cheryle A. Kennedy, Tribal Council Vice Chair,
Confederated Tribes of Grand Ronde



THINGS TO KEEP IN MIND

- Staff-to-staff consultation is also frequently sought.
- Communication from governments is expected to be made to the Tribal Council Chair or other designated member of Tribal Council, with CC's to appropriate Tribal staff.
- Once a consultation is established, staff may be contacted directly.



Kelly Dirksen, Fish and Wildlife Program Manager,
Confederated Tribes of Grand Ronde

Steelhead (*Oncorhynchus mykiss*)



COLORADO RIVER INDIAN TRIBE-12 MAY 2017

Standards for G2G Consultation-Policy

- Explain agency decisions based on legal, practical, and policy constraints on decision-making.
- Involve agency decision-makers with ultimate authority in consultation meetings.
- Sufficiently prepare for consultation meetings with Tribal Council to be able to respond to and address the Tribes' concerns.
- Do not claim that communication with CRIT staff, between CRIT and project applicants, or in the presence of multiple Tribes is government-to-government consultation.
- Consult on any potential impacts of a proposed project or action on CRIT, its members, its land, or its cultural resources.
- Keep information obtained via government-to-government consultation confidential.



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CONCERNS EXPRESSED BY TRIBES

- The Corps doesn't consult. Corps makes a decision, announces it, and defends it.



- Corps methods viewed as hurried, insensitive, regimental, and territorial.

CONCERNS EXPRESSED BY CORPS

No resources to consult (i.e. money, staff, time)

My deadlines won't permit me to consult



I don't know who should be part of the consultation

Tribes use 'consultation' as a tactic to stop projects

How much is enough? Must I consult until they agree?



ORAL COMMUNICATION - DIFFERENCES

American Indian/Alaska Native Culture:

- Speaks from the heart and can be emotional
- Person/relationship oriented
- Past, present, future are circular



The Government Culture:

- Speaks objectively / impersonally about facts and data
- Project and problem-solving oriented
- Focuses on the present and sticking to an agenda (linear process)



THE ADMINISTRATIVE RECORD



ADMINISTRATIVE FILE DOCUMENTATION INDIVIDUAL AND GENERAL PERMITS

3.4 Tribal Trust Responsibilities

3.4.1 Was government-to-government consultation conducted with Federally-recognized Tribe(s)?

Provide a description of any consultation(s) conducted including results and how concerns were addressed.

3.4.2 Other Tribal including any discussion of Tribal Treaty rights?



ADMINISTRATIVE FILE DOCUMENTATION

Cultural Resource Survey Reports

Treaty Rights Review

Ethnographic Research

Interview Transcriptions

Letters / Emails

Meeting Agendas / Notes

Maps

Permit Area

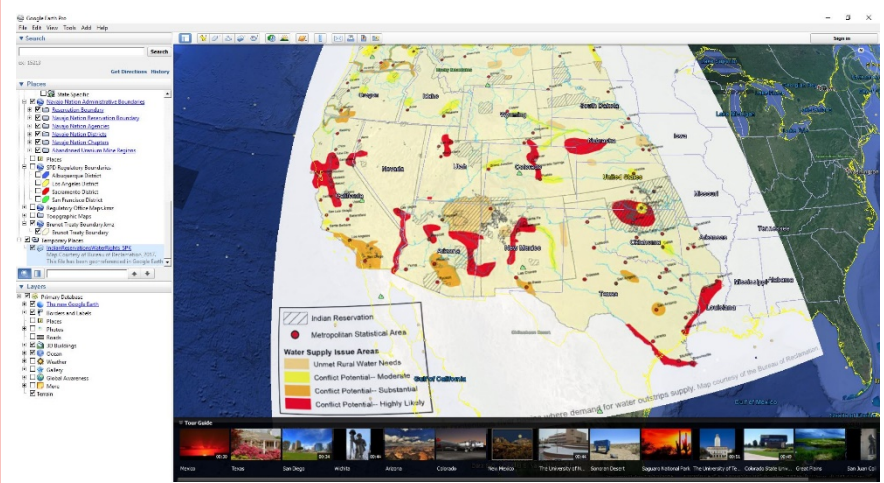
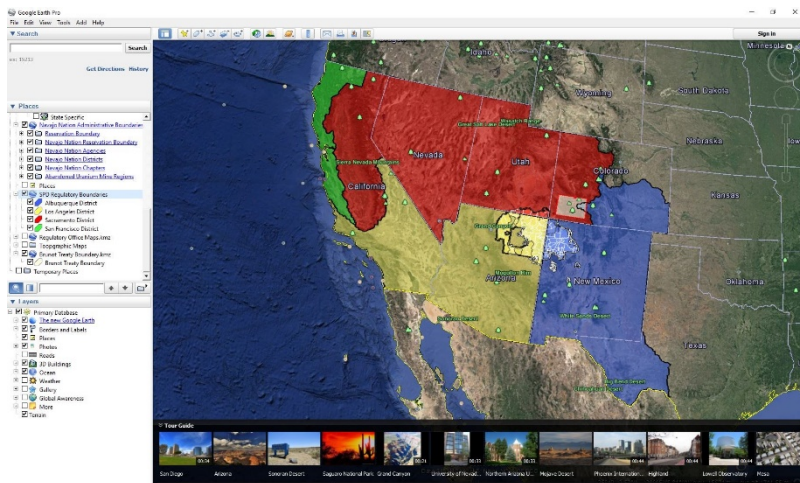
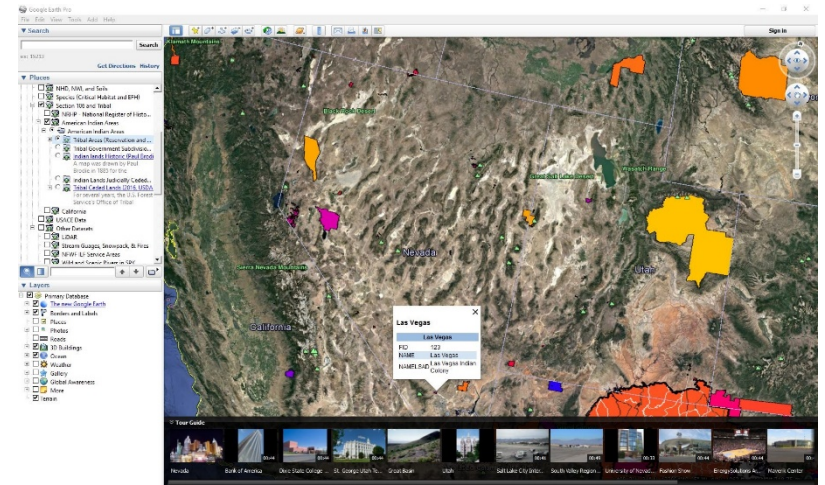
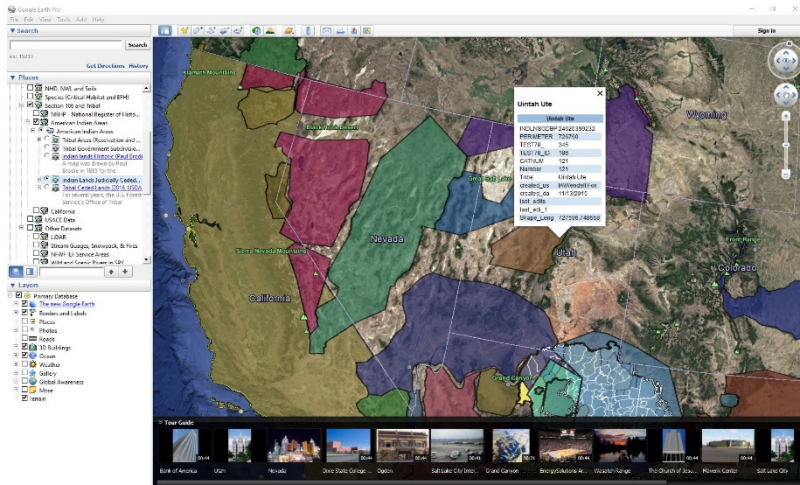


TOOLS

- Agency mapping and spatial data tools
- BIA shape file integration to Google Earth
- Tribal ancestral lands map information
- Tribal Liaison, Regulatory Archeologist
- ORM letter for treaty trust rights review
- Develop an evaluation similar to how we evaluate impacts to listed species and their critical habitat



TOOLS: GOOGLE EARTH-TRIBAL DATA



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PIT RIVER TRIBE-ANCESTRAL TERRITORY

PIT RIVER TRIBE ANCESTRAL TERRITORY

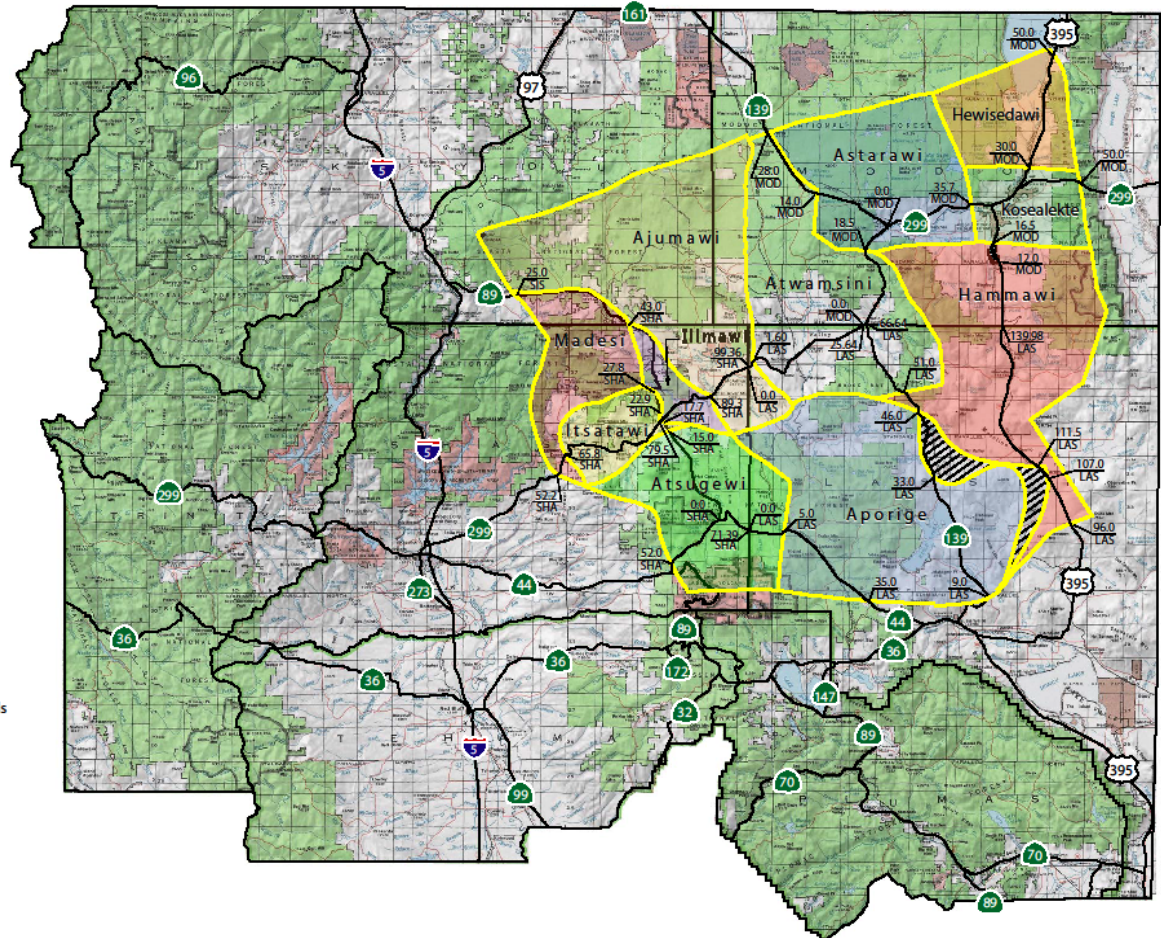


updated 10-24-03

LEGEND:

 Shared Area w/Adjacent Tribal Bands
To Insure Cultural Representation on
State Highway Projects

This mapping of the Pit River Tribe Ancestral Land is based on research of the various historical maps and field notes between staff from the State Department of Transportation (Department) and members of the Pit River Tribe. This map is not for legal purposes and will only be used by the Department to reference which Band and Cultural Resource Management for contact, as agreed to, in the Memorandum of Understanding between the Department and the Pit River Tribe.



BEST MANAGEMENT PRACTICES AND TIPS



BEST PRACTICES

Establish the relationship before project-specific issues arise

- Be informed about the tribe's culture, protocols, history, history with Corps and other federal agencies, etc.
- Early relationship helps develop mutual trust, fostering more open dialogue
- Meeting often without specific issues provides an opportunity to clarify Regulatory authorities and limitations



CONSULTATION AWARENESS

- Cultural bias-everybody has one
- Traditional beliefs and wildlife are intertwined
- Religion in meetings
- English as a second language
- Humor
- Being greeted with silence
- Attorney's role
- Perspectives and expectations
- Duration of the meeting
- Proper titles for delegates
- Conflict or anger
- Appearance
- Proffering of food and/or gifts



PLANNING A CONSULTATION MEETING AGENDA

- Location (meet at Tribal offices)
- Date/Time, Meeting room
- Preparations- read-ahead materials
- Develop draft agenda with Tribal input
- Special requirements (Interpreters?)
- Who runs the meeting; ground rules
- Social aspect- Food

DURING A MEETING

- Applicant & Tribal interests frequently differ
- Avoid Tribal politics
- Listen more than you talk
- Don't promise what you can't deliver
- Have reasonable expectations

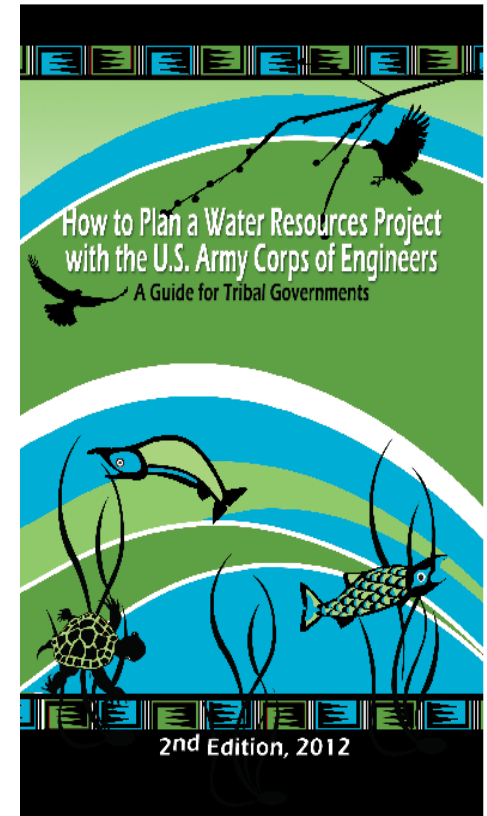


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FACING DISAGREEMENT

- Be prepared for debate, heated discussion and disagreement, even surprise agenda items.
- Caucus is OK
- Consider other talking points to offer options regarding water related concerns (TPP/WRDA)
- Stay calm in the face of anger
 - Listen, don't react
 - Forgive, forget, move forward
 - Don't take history personally
 - Don't defend past decisions that you don't own
 - Keep an overall focus on your objectives



CONSULTATION – WHAT NOT TO DO

- Present a decision that appears to be already made
- Be dictatorial
- Dismiss the past as unimportant
- Interrupt
- Ridicule or criticize
- Be defensive
- Show a lack of respect for cultural differences
- Insist on sticking rigidly to the agenda



CONSULTATION MEETINGS

Before a Meeting

- Talk early – talk often
- Consult your Tribal liaison
- Know your Tribal contacts
- Plan meeting with Tribal input
- Provide program, project, or activity info to Tribe in advance
- Familiarize yourself with Tribes and their cultures to enhance understanding
- Be prepared for a long meeting, 4+ hours is not uncommon

During a Meeting

- Listen more than you talk
- Don't interrupt
- Respect elders
- Don't be defensive; don't argue

- Communicate open-mindedness and humility
- Silence is a sign of respect, not lack of interest
- Accept unanticipated changes to agendas, be flexible
- Partake of/offer snacks, coffee, etc.
- Sometimes small gifts are exchanged

After a Meeting

- Don't rush off, stay and talk informally, ask for a site visit/community tour
- Share a meal or snacks
- Send out draft meeting notes
- Collaboratively plan next step



AFTER THE CONSULTATION MEETING

- Follow up with a phone call a couple of days later
- Distribute the minutes to all parties
- Participating in consultation; ask for input.
- Agree to the follow-on
 - Another meeting
 - Staff to work together to finish products
 - Formal signing
- Continue communicating



FINAL THOUGHTS

- Due diligence...know what you need to know
 - Stop, look and listen
 - Take a Hard look
 - Document
- Don't rush to failure
- Hug your Tribal Liaison occasionally
- Go slow, but get to Green...

