
Section 1: The Governmental Relationship

Maintain a governmental relationship with Federally Recognized tribal governments (American Indian/Alaska Native Policy (FSM 1563)).

- Take the time to meet with tribal governments on a regular basis.
- Build and enhance a mutual partnership.
- Gain an understanding of each other to develop an effective governmental relationship.
- Pursue cooperative and partnership initiatives and efforts.

This section includes information about—

- The Doctrine of Tribal Sovereignty
- Fundamental Powers of Indian Tribes
- Government-to-Government Relations
 - Consultation
 - Communications
- Status of Federally Recognized Indian Tribes
- Consultation With Other Groups and Indian Individuals

Indian tribes are part of the constitutional structure of government. Tribal authority was not created by the Constitution—Tribal sovereignty predated the formation of the United States and continued after it—but tribes were acknowledged by the Constitution in the reaffirmation of previously negotiated treaties (most of which were with Indian Tribes), the two references to “Indians not taxed,” and the Indian Commerce Clause. Relations were then cemented through the treaties and treaty substitutes.

The modern presidency, Congress and Supreme Court continue squarely to acknowledge this third source of sovereignty in the United States ...

—Charles F. Wilkinson (1987)⁶⁰

Article 1, Section 8, Clause 3 of the U.S. Constitution empowers Congress “(t)o regulate commerce ... with the Indian tribes,” which basically means that “Indian relations are ... the exclusive province of Federal law.” (County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1989), making the unique status of Indian tribes and the special relationship with the Federal Government (a government-to-government relationship) clear.

⁶⁰American Indians, Time, and the Law 103–04 (1987).

Worcester v. Georgia 31 U.S. (6 Pet) 515 (1832) reinforced three bedrock principles relating to Indian tribes:

- Indian tribes, because of their aboriginal and territorial status, possessed certain incidents of preexisting sovereignty.
- The United States could reduce or eliminate such sovereignty, but individual States could not.
- The tribes' limited inherent (preexisting) sovereignty (Fletcher, 10 U.S. (6 Cranch) at 147) and their corresponding dependency on the United States for protection imposed a trust responsibility on the United States.

These principles shape American Indian law:

- Sovereignty
- The Federal-to-Tribe (government-to-government) relationship
- The "Trust Responsibility" of the U.S. Government to Indian tribes

The Doctrine of Tribal Sovereignty

Indian tribes are not foreign nations, but distinct political entities, governing themselves, and making treaties with the United States (Cherokee Nation v. Georgia (1831)). Their relationship to the United States Government is that of domestic, dependent nations—the relationship is similar to that between wards and their guardians.

Indian Nations had always been considered distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil ... The very term "nation" so generally applied to them means "people distinct from others."

—John Marshall, 1832
Worcester v. Georgia
31US(6 Pet.)515, 561

Indian tribes recognized by the U.S. Government have a special and unique legal and political relationship with the Government, defined by history, treaties, statutes, court decisions, and the U.S. Constitution. Although *the U.S. Constitution does not apply to tribes*, Article 1, Section 8, Clause 3 authorizes Congress to regulate "... commerce ... with Indian tribes."

The important point of sovereignty is that *tribes are independent nations*. Some characteristics of sovereignty are:

- Tribes were not granted sovereignty, they have always possessed it.
- Indian tribal governments have always maintained sole responsibility to perpetuate their status as sovereign nations and to exercise their rights as defined by treaty or other statute.
- Depending upon the legal document establishing a tribe's status and recognition, there may be certain rights that only Congress can alter.
- Sovereignty is a status rigorously guarded and maintained by tribal governing bodies, Indian Nations to not delegate sovereignty to other entities.

Fundamental Powers of Indian Tribes

The Supreme Court has found—

- That tribal governments are “unique aggregations possessing attributes of sovereignty over both their members and their territory.”⁶¹
- That tribal powers not limited by Federal statute, by treaty, by restraints implicit in the protectorate relationship, or by inconsistency with their status remain with tribal governments or reservation communities.⁶²

Attributes of Sovereignty. Most tribal governments possess and exercise inherent self-government powers unless such powers have been extinguished. Tribal governments frequently have considerable powers that are separate and equal to those of State and local governments, particularly civil and criminal jurisdiction over individuals and corporations. The following are fundamental categories of tribal government power that have been recognized under Federal law. These are also the attributes of sovereignty:

Attributes of Sovereignty

- The power to establish a form of government.
- The power to determine membership.
- The power to legislate or otherwise adopt substantive civil and criminal laws.
- The power to administer justice.
- The power to exclude persons from the territory or reservation.
- The power to charter business organizations.
- The power of sovereign immunity.

Powers of Alaska Native Tribes and Groups. Absence of treaties between the United States and Alaska Natives precluded the development of the “dependent sovereignty” status. The inherent governmental powers that treaty making addressed with the Indian Nations in the “lower 48” are not found in the developing relations with Alaska Natives and their respective tribal governments, societies, or clans. This lack of recognition has contributed to Alaska Natives’ continued difficulties in exercising tribal powers with both the State and Federal governments and undermined rather than supported Alaska Native tribal powers.

When the *Indian Reorganization Act of 1934* was originally passed, it did not fully take into account the unique needs of Alaska Natives. In 1936, it was amended to do so. Thus, the Federal Government acknowledged a relatively limited and fragmented landownership-related trust responsibility toward Alaska Natives. One benefit resulting from the act took place in the following year, 1937, when Congress made reindeer herding an exclusively Native

⁶¹ *United States v. Wheeler*, 435 U.S. 313 (1978).

⁶² F. Cohen. *Handbook of Federal Indian Law* 232-35 (1982).

activity. Through such activities, Congress was treating Alaska Natives in much the same way as they did Indian tribes elsewhere.

Eventually, executive orders created more than 150 special Native reserves to support reindeer herding, schools, and vocational education. Some reserves were also created to protect extensive areas for subsistence activities. Only one Indian reservation was ever established in Alaska at Metlakatla. It was created under unique circumstances by an Act of Congress in 1891 (Price 1990:78–83). At that time, Alaska was still a territory. Creation of these reserves provoked fierce battles between territorial leaders and the Secretary of the Interior over who would control Alaska lands and resources. The territorial leaders viewed the reserves as barriers to Alaska's development and the progress of its people—a view reinforced by the Federal Government's termination policy in the early 1950's.

Government-to-Government Relations: Consultation

National Forest System lands are public lands. While most Indian title to these lands has been extinguished, the Forest Service has to be concerned where there are—

- Tribal rights reserved by treaty.
- Spiritual and cultural values and practices and archeological and heritage resources.
- Adjacent tribal or trust lands.
- Tribal water rights.

Tribes are sovereign nations and other governments. *They are not publics.* Consultation with tribes will be discussed throughout this document. Consultation with tribal governments must be established and maintained for a lasting government-to-government relationship.

Whom to Consult

Government-to-government consultation may only take place between the Federal Government and Federally Recognized Indian Tribes.

Many tribes have at least two forms of leadership—the elected body and the traditional/spiritual leaders. *Consultation with tribal governments occurs through the elected tribal officials*—presidents or chairpersons of tribal executive or business councils, headmen or women, and governors in some Southwest tribes. Federal heritage laws may include consultation with traditional cultural or spiritual leaders as well as elected tribal government leaders.

- *The Forest Service contact for government-to-government consultation is the line officer at the Forest Service level where a decision that may affect a tribe will be made.*
- *The line officer initiates and develops the government-to-government consultation.*
- *The Forest Service line officer in this government-to-government consultation is acting as a representative of the President of the United States.*

Conducting Consultation

Consider the following in conducting government-to-government consultation with Indian tribes:

- Conduct consultation with official tribal leadership.
- Visit, listen, and communicate in person.
- Respect tribes as sovereign governments.
- Seek an understanding of how the tribe wishes to be consulted.
- Identify preferred methods of communication, develop protocols or a Memorandum of Agreement on how consultation should be conducted.
- Develop points of contact for tasks (such as staff work). Determine with whom staff work should be conducted.
- Be sensitive to the effects of history on the consultation relationship. There may be a lack of trust.
- If consultation is likely to occur repeatedly, or with a number of different tribes, with the tribe's agreement, consider establishing a consultation working group.
- Be flexible—especially with deadlines. If particular deadlines must be set, be sure to explain them and why they exist. Expect to negotiate.
- Conduct field trips. Understanding is generally shared on field visits.
- Questions may not be answered immediately. It may be necessary to pose a question and allow tribal leaders to think about the question and discuss it with tribal committees, members, or tribal councils.
- Be clear about whether you are notifying the tribe of an action or consulting with them and seeking agreement. For actions on National Forest System lands, some statutes such as the Archaeological Resources Protection Act (ARPA) require notification, but not necessarily consent, although consent/agreement is certainly the desired outcome.
- Respect confidentiality.

Specific steps of consultation can be developed with specific tribes. This information can be formalized in an agreement or in a regional tribal resource book.

Laws That Require Consultation

Several authorities may require consultation with tribes:

- *The National Environmental Policy Act (NEPA)*. Regulations implementing NEPA at 40 CFR 1507.7, require Federal agencies to invite Indian tribes to participate in the scoping process on projects or activities that affect them.

Tribes with treaty rights upon National Forest Service lands may also meet with line officers in advance of the formal planning processes about their reserved rights.

- *Federal Land Policy and Management Act of 1976* (90 Stat 2743; 43 U.S.C. 1712, Sec 202 (b)). This act directs the Secretary of Agriculture to coordinate National Forest System land use planning with Indian tribal land use planning (Table 1.1.) (page 39).
- *The National Forest Management Act (NFMA) and Forest and Rangeland Renewable Resources Act (RPA)* for forest planning.
- *Historic Preservation laws.*
- *Executive orders* such as the one on Indian Sacred Sites. (See Appendix A.)

See also Table 1.1 (page 39).

Communication

It is important to distinguish between government-to-government consultation and the communications, coordination, and public involvement efforts commonly carried out between tribal government *staff members* and equivalent Forest Service staff and employees. Many tribes have technical staff, legal counsel, advisors, and administrators employed to help run tribal affairs. These staff people usually do not speak on behalf of the tribe about tribal policies or other tribal governmental actions. However, they can be invaluable professional contacts for Forest Service staffs. Staff-to-staff work can continue or even precede government-to-government consultations.

Intertribal Groups and Organizations. There may be groups, such as the Intertribal Timber Council, the Native American Fish and Wildlife Society, and others that provide information, advice, and technical assistance to the tribes on resource matters, but these groups do not speak for or represent the tribes. Contact with such groups does not substitute for the Forest Service conducting government-to-government consultation with elected tribal officials.

Status of Federally Recognized Indian Tribes

The Forest Service conducts government-to-government consultation only with Federally Recognized Tribes.

Federally Recognized Indian Tribes. Federal recognition is the acknowledgment of an Indian tribe by the Secretary of the Interior as a tribal government with a special relationship with the U.S. Government. This unique and special relationship recognizes that Indian tribes receive some benefits and reserve some rights not available to other citizens. The process, regulations, and criteria for attaining Federal recognition are found in 25 CFR 83.

Treaty Indian Tribes. Until 1871, Congress developed, negotiated, and ratified formal treaties with individual tribes or confederated tribes. Early cases clarifying these treaties established the basic elements of Federal Indian law. *Treaty Indian tribes are governments that have retained rights on Federal or other lands* that may include hunting; fishing; gathering food and

Table 1.1.—Tribal Coordination and Consultation Requirements

Law	Whom To Contact	Subject	Time Frame
AIRFA—American Indian Religious Freedom Act	Traditional Religious Practitioners	Obtain and consider views during decisionmaking.	Not specific.
ARPA—Archaeological Resources Protection Act	Tribal Officials	If permitted work may harm or impact an “Indian religious or cultural site on public lands.”	FS must notify the tribe 30 days before issuing a permit.
NFMA—National Forest Management Act	Tribal Officials	Provide opportunity to raise issues and comment on land-use plans, and ensure consistency between FS and the tribe’s land use plans.	Vary depending upon the stage of the planning process. 30 days or more.
NAGPRA—Native American Graves Protection and Repatriation Act	Tribal Officials, Lineal Descendants, and Culturally Affiliated Groups	Treatment and disposition of human remains and associated funerary items and items of cultural patrimony. Also, when human remains or associated funerary items are accidentally discovered.	Not specific, but because of ref. to ARPA, 30 days before excavation. FS must notify the tribe within 3 working days and mitigation must be completed within 30 days of discovery.
NEPA—National Environmental Policy Act	Tribal Officials	Provide opportunity to participate in land management decision-making.	Scoping process, comment period, 30 days on EA; 45 days on EIS.
NHPA—National Historic Preservation Act	Tribal Officials, Traditional Cultural Leaders	Provide opportunity to consult as “interested persons” if action may affect properties of historic value to an Indian tribe on non-Indian lands. Invite to participate as concurring parties when they request it.	Not specific, but incorporate in NEPA. Not specific.
RFRA—Religious Freedom Restoration Act	Religious Practitioners	Ensure agency decisions do not burden free exercise of religion (access, use, or ritual practice)	Not specific.
EO Government-to-Government Relations	Tribal Governments	Consult to greatest extent and operate within a government-to-government relationship.	Not specific.
EO Sacred Sites	Tribal Officials and Religious Leaders	Accommodate access to and ceremonial use of sacred sites and avoid physically affecting the integrity of such sites.	Not specific but incorporate into NEPA/NFMA.

cultural and medicinal plants; and grazing livestock on open and un-claimed lands.

Executive Order Tribes. Not all reservations were established by treaty. Some reservations were identified or created by executive order. Between 1871, when Congress discontinued formal treaty making, and 1910, tribes not previously recognized were surfaced by executive order.

As a rule, executive order tribes rarely reserved off-reservation rights or privileges. *Therefore, the Forest Service may have different land management responsibilities for areas adjacent to or neighboring executive order tribes than they do with treaty tribes. The Forest Service must consult with both.*

Alaska Native Corporations (Alaska Native Claims Settlement Act of 1971—ANCSA Corporations). Congress passed ANCSA in an attempt to accomplish a fair and just settlement of all aboriginal land claims by Alaska Natives and Alaska Native groups. Native corporations under ANCSA do not take the place of tribal governments in Alaska, where there are 226 Federally Recognized Tribes. These tribes have traditional governments formed under the Indian Reorganization Act of 1934 (amended in 1936 to include Alaska Natives) and have a unique relationship with the Federal Government. The Forest Service works on a government-to-government basis with these Federally Recognized Tribes—not the Native Corporations.

Non-Federally-Recognized Indian Groups. There are a number of Indian communities and groups who identify themselves as tribes, but are not Federally acknowledged. *The Forest Service has neither the authority nor the obligation to work with these groups on a government-to-government basis, although the Forest Service may work with them as other interested publics.*

Consultation With Other Groups and Individuals

Although the Forest Service may work with American Indian or Alaska Native *individuals*, groups, organizations, and communities in compliance with NEPA, NFMA, and other related laws, *this is not recognized as government-to-government consultation.*

However, types of consultation other than government-to-government consultation, with traditional practitioners, communities, and other interested parties may be conducted to comply with NEPA, NFMA, the American Indian Religious Freedom Act (AIRFA), and the Native American Graves Protection and Repatriation Act (NAGPRA) (the latter for lineal descendants).

- *The National Historic Preservation Act (NHPA)* requires consultation with traditional practitioners and communities and other interested parties.
- *AIRFA* encourages Federal agencies to consider traditional practices, which often have spiritual associations and connotations, and recommends that the Forest Service also contact nonrecognized groups about cultural sites and archeological sites and resources.

There may be non-Indian groups or organizations claiming to represent tribal views and positions. In these instances, Forest Service staff should consult with Indian tribes and groups to verify this representation.