Section 2: Treaty Rights and Forest Service Responsibilities

Implement Forest Service programs and activities honoring Indian treaty rights and fulfill legally mandated trust responsibilities to the extent that they are determined applicable to National Forest System lands (American Indian/Alaska Native Policy (FSM 1563)).

- Visit our tribal neighbors. Learn about their treaties and rights.
- Talk with them about areas of mutual interest.
- [Endeavor to] reconcile Indian needs and claims with the principles of good management, multiple use, and national forest laws and policies.
- Attempt reasonable accommodation without compromising the legal positions of either the Indians or the Federal Government.
- Work together to develop ways to accomplish the goals of this policy.

This section includes information about—

- Treaties
- Treaty Rights on National Forest System Lands
- Characteristics of Treaty Rights
  - Grazing Rights
  - Hunting and Fishing Rights
  - Gathering Rights and Interests
  - Water Rights
  - Alaska Native Subsistence Rights
- Trust Responsibilities
- National Environmental Policy Act (NEPA) Consultation
- Cooperation in Management

The United States obtained the vast majority of public domain land in the lower 48 States by signing treaties with Indian tribes. Approximately 60 of these tribes have treaties that contain some rights to off-reservation lands and resources. Other laws define Alaska Natives' rights to subsist from the natural resources of the land (described in this section under Alaska Native Subsistence Rights). *Treaties are Federal law*.

The Federal/Tribal relationship is one often described as a guardian/ward relationship. Under differing laws, different departments, executive branches of government, and agencies have different responsibilities. The Secretary of the Interior, for example, has specific trust-holding responsibilities not delegated to any other department or agency. The Federal trust

responsibility is based upon a “corpus” or “holding” of assets such as land. The Department of the Interior's Office of American Indian Trust, has defined the trust relationship to include the protection of treaty rights. This will be discussed further in this section.

Alaska Native Rights on Federal Lands

In the lower 48 states, the United States used treaties to create public domain land and reserve certain use rights to tribes. There was no similar process that applies to the lands Alaska Natives have inhabited for thousands of years. Alaska political leaders succeeded in achieving statehood, but aboriginal land claims were not resolved as Alaska became the 49th state. Statehood brought momentum to the Native land claims movement, which basically asserted that the United States had not justly compensated Alaska Natives for the lands taken at the time of the Treaty with Russia. “The use and occupancy title of the Tlingit and Haida Indians was not extinguished by the Treaty of 1867 between the United States and Russia, nor were any rights held by these Indians arising out of their occupancy and use extinguished by the treaty. The negotiations leading up to the treaty and the language of the treaty itself show that it was not intended to have any effect on the rights of the Indians in Alaska, and it was left to the United States to decide how it was going to deal with the native Indian population of the newly acquired territory.”

In the early 1960's, the State of Alaska began to select public domain land that would be placed under State jurisdiction. This created a direct threat to the Alaska Natives' aboriginal land rights and Native leaders organized to protest the selections the state was making and sought congressional settlement.

Native representatives testified at numerous hearings and mounted a vast lobbying and education effort until finally, in 1971, Congress passed the *Alaska Native Claims Settlement Act* (ANCSA). This significant legislation was unprecedented in terms of its magnitude and complexity.

Even though ANCSA articulated new public land law, it remained silent on the nature, extent, or definition of Alaska Native tribal governments. Thus, when the Forest Service considers the relationship between Alaska Natives and the Federal Government in its proposed actions and planning, we must be conscious not only of present legislation, but of past legislation, policies, and legal principles which culminated in the present Federal policies. Such policies continue to evolve, further defining and determining the nature of this unique legal relationship between Alaska Natives and the Federal Government.

ANCSA in some respects was a treaty—a law—with the U.S. Government. In return for a grant of title to about 44 million acres and other benefits for Alaska Natives, the act extinguished aboriginal title to the remaining lands Alaska Natives traditionally used and occupied. However, Congress wrote the act to deliberately exclude traditional features of treaties.

- It excluded reserves of land for exclusive use and occupancy, termed “reservations,” in the lower 48.

- It made provisions for addressing the Bureau of Indian Affairs (BIA) or their delegated trust responsibilities for Indian-owned land and resources.
- Alaska Natives were not signatories to the act; American Indians were signatories to treaty documents negotiated by the U.S. before 1871.

The resolution of ANCSA provided a battleground for two dissimilar value systems—that of the Alaska Natives, whose tribal perspective viewed land and its resources as something of value to be passed on to future generations of tribal members, and that of Congress, which viewed Native corporation land as an asset that could be sold or even lost in risky commercial ventures.

Nonetheless, ANCSA provided for the grant of title to about 44 million acres to the Alaska Natives and provided for continued efforts to protect Native subsistence rights (Conference Committee Report).

ANCSA is the product of two Federal Indian policies:

- The Termination Policy of the 1950's
- The Self-Determination Policy of today

While the language speaks of self-determination, the overall goal of ANCSA was termination and assimilation. Alaska Natives were given full control over their land and money; however, Congress assigned control not to tribal governments, but to State-chartered Native corporations.

Federal courts generally support the special political status of Alaska Natives. However, complexity, ambiguity, and contradiction have not been eliminated from Indian law and policy. Even where policy seems consistent, there is still room for dispute.

Given the ambiguity of the record and political resistance to claims of "sovereignty" in Alaska, Alaska Natives have turned to practical political and social actions to strengthen their special status and cultural identities. Alaska Natives' special status is ultimately a political question, not a legal one, in which status depends less on what Federal policymakers say, than on what Alaska Natives choose to do.

The Secretary of the Interior has defined which Alaska Tribes and groups are Federally Recognized. A full listing of Federally Recognized Indian Tribes is found in the Federal Register/Vol 51, No. 226/Wednesday, November 13, 1996/Notices (pp 58211–58216). A copy may also be found in Appendix C.

Treaties

Treaty Language

Indian land title was recognized in varying ways when European countries arrived in the Western Hemisphere. The U.S. Government negotiated treaties with Indian tribal governments for western expansion, to keep the peace, and to add new states to the Union. *American Indian treaties were not a grant of rights to tribes, but rather a grant of rights from tribes, with the Indian tribes retaining all of the powers and rights of sovereign nations granted by the tribe pursuant to the treaty or taken from the tribe by Federal statute.* Extinguishing Indian title made it possible for the U.S. Government to govern former Indian lands.

Treaties between the United States and Indian tribes involving grants or cessions of land were not ordinary land transactions where the seller conveys all rights to the property sold to the buyer. In many treaties, however, Indians ceded (relinquished) title and interests to the United States Government, while *reserving* certain use rights to themselves.

The term "ceded lands" has at least two definitions. This term was first used in the Treaty of the Wyandots, 1789. Since that time, many treaties have referred to land cessions made by tribes to the United States. Most Federal agencies and Indian tribes prefer to use "ceded lands" to describe areas that a tribe did "cede, relinquish, and convey to the U.S. all their right, title, and interest in the lands and country occupied by them" ... at treaty signing or when reservations were established. This does not mean that tribes ceded all their rights. Many tribes reserved rights on ceded lands—there are places where rights remain intact and protected. The U.S Court of Claims qualified the legal definition of ceded lands in 1978 when it said that, in effect, "only lands actually owned by a tribe could be ceded to the U.S."

Sixty tribes negotiated and reserved their treaty rights on the public domain. After tribal representatives and U.S. officials signed treaties, they were then ratified by the U.S. Senate. Although some treaties were signed by unauthorized people, the treaty rights and provisions within them remained a matter of law.

Treaty provisions in the lower 48 States varied depending on the lands and the tribal groups involved in the negotiations.

The Supreme Court has found that treaties are superior to State laws, including State constitutions, and are accorded equal status with Federal statutes.

Treaty Rights on National Forest System Lands

The U.S. Constitution (Article II, Section 2, Clause 2) provides that treaties are equal to Federal laws and are binding on states as the supreme law of the land.

From 1777 to 1871, United States relations with individual Indian Nations were conducted through treaty negotiations. These "contracts among nations" created unique sets of rights for the benefit of each of the treaty-making tribes. Those rights, like any other treaty obligations of the United States, represent "the supreme law of the land." As such the protection of treaty rights is a critical part of the Federal Indian trust relationship.

Off-Reservation (Property) Rights. Off-reservation (property) rights reserved by treaties on National Forest System lands are very important to Indian tribes. *The United States has a duty to protect these treaty rights, as these rights are agreed upon by government-to-government agreement, or as defined by statute or court decision.*

Generally—

- The scope and allocation of treaty rights depends upon the language in each treaty.

Characteristics of Treaty Rights

- Some treaty rights occur on open and unclaimed or unoccupied lands (this refers to lands not in private ownership at the time the treaty was signed).
- Some treaty rights extend beyond present-day boundaries of reservations or Indian trust lands.
- Some treaties express a *priority right* for a resource; others a proportional, or *in common*, right; and others indicate a *share* to complement subsistence provided by other sources.
- Treaty rights have been upheld in courts and exercised in various ways.
- The Forest Service has no trust responsibility in treaty rights on reservation lands.

Off-reservation treaty rights that may be reserved on present-day national forests include: grazing rights, hunting and fishing rights, gathering rights and interests, water rights, and subsistence rights.

Grazing Rights

The current Forest Service Manual 2235.1 gives direction to—

> *Give Indian Tribes fair and reasonable opportunity to enjoy any treaty grazing rights reserved to them by treaty on ceded lands. Grazing rights reserved by treaty are a continuing privilege beyond that enjoyed by other citizens. The Forest Service shall not deprive Indians of treaty rights; but the Regional Forester, acting on behalf of the Secretary of Agriculture, may regulate enjoyment of the treaty grazing right for the purpose of protecting and conserving Forest Service administered resources.*

Many western tribes have treaties that provide for pasturing animals on off-reservation land. These rights, which have been upheld by the courts, have been exercised in varying ways. The allocation of grazing rights on National Forest System lands depends on the treaty language.

Based on consultation with tribes, the Regional Forester may authorize treaty-based grazing under a Memorandum of Understanding. Tribal governments are exempt from the Forest Service policy against issuing term grazing permits to governments. Therefore, Regional Foresters *may* issue treaty-based term permits to them (FSM 2204.2(13). Before issuing such a permit, the Regional Forester should consult the Office of General Counsel (OGC). Treaty grazing permits are free of charge.

Hunting and Fishing Rights

On-Reservation Rights. Tribal governments have exclusive jurisdiction over the right of tribal members and non-tribal people to hunt and fish within reservation boundaries. In a 1983 Federal Court decision, *New Mexico* v. *Mescalero Apache Tribe,* the U.S. Supreme Court upheld the tribe's exclusive right to regulate non-Indian hunting and fishing on a reservation. *Federal courts have affirmed that treaty rights are tribal rights—not individual rights.* Generally, the Forest Service has no role in treaty rights on reservation lands.

Off-Reservation Rights. Off-reservation hunting and fishing rights vary depending on treaty language, subsequent legislation, and court decisions.

Treaty rights may extend to fish and wildlife habitats, including how the Forest Service manages those habitats and how those habitats relate to national forest timber harvest, recreation, water, grazing, and minerals exploration. Some tribes believe that the U.S. Government is obligated to manage wildlife and fish habitats to protect the tribes' treaty rights.

Court decisions have confirmed that tribes are entitled to 50 percent of harvestable salmon and steelhead in certain waterways covered by treaties as long as escapement goals are met (*U.S.* v. *WA*, 1974, Dist Ct WA; U.S. Supreme Court, 1979; also *Lac Courte Oreilles* v. *Wisconsin*).

In some treaties in the Pacific Northwest, the U.S. Government is obligated to protect the tribes' right to access "*usual and accustomed grounds and stations*" and must assure that Forest Service actions do not prevent tribes or their members from accessing such locations, exercising tribal rights, and protecting treaty resources. Courts have held that if *either* hunting or fishing rights are mentioned by treaty, *both apply.*

Gathering Rights and Interests

The traditional way of life for many American Indian and Alaska Native Tribes involves gathering and using products from their natural surroundings. In some treaties, these rights were included under the term "gathering rights."

In negotiating treaty terms, many tribal governments reserved off-reservation rights to gather miscellaneous forest products such as berries, roots, bark from trees, mushrooms, basketmaking materials, tepee poles, cedar for totem poles, and medicinal plants.

These products were often bartered, traded, or sold between tribes for fuel, transportation, food, shelter, clothing, and cultural utilitarian items. In some western treaties, tribes reserved the right to cut fuelwood and fire-wood for domestic purposes on off-reservation land.

An example of the treaty language that refers to gathering rights and interests is "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, together *with the privilege of hunting and gathering roots and berries on open and unclaimed lands*" (Article V, Treaty with Dwamish Suquamish, 1854).

Water Rights

Indian Reserved Water Rights. Most western and midwestern states have used the *prior appropriations doctrine* to allocate water. It is based on the notion of "first in time, first in right." Basically, under State law, a water user obtains a right senior and superior to all later users if he or she appropriates the water by (1) diverting water out of a watercourse, and (2) putting it to a beneficial use for such purposes as irrigation (a major water use in the West), mining, industrial, municipal, or domestic use. Once these conditions are met, the water user has established an appropriation date.

Although Indian reserved water rights are not expressed in treaties, they are inherent or implied rights. Ordinarily, State law applies to water rights on Federal lands; however, Federal law applies to American Indian water rights on reservation lands; their extent depends on the purposes for which the reservation was established.

The *reserved water right as applied to Indians* is derived from *Winters* v. *U.S.*, 1908. This landmark Supreme Court case held that *"sufficient water was implicitly reserved to fulfill the purposes for which the reservation was established."* This *Doctrine of Federal Reserved Rights* established a vested right (a right so completely settled that it is not subject to be defeated or cancelled) whether or not the resource was actually put to use, and enabled the tribe to expand its water use over time in response to changing reservation needs. The quantity of water was determined by evaluating the purposes for which the Indian reservation was established and applied to all uses—including irrigation of lands that were not currently serviced with a water supply. This analysis includes information about current and planned (future) reservation uses such as municipal, industrial, and natural resources. The Winters Doctrine provides that tribes have senior water rights and the national forests have junior rights. Some recent court decisions have given Indian reservations priority water rights on Federal lands, including national forests.

Both the Forest Service and Indian tribes have mutual interest in water rights and claims since these rights and claims often occur in the same geographic area and involve flows from the same stream for fish populations and their habitats, as well as maintenance of stream channels, maintenance of wildlife populations, and maintenance and protection of riparian areas.

Alaska Native Subsistence Rights

Congress enacted the *Alaska Native Claims Settlement Act* (ANCSA) in 1971. To this day, some acclaim it as an outstanding settlement, while others view it as the beginning of the end for Alaska Native people. While earlier versions of ANCSA, at the insistence of Native spokespeople, contained subsistence provisions, the law that was ultimately passed, which granted Alaska Native people title to 44 million acres, remained silent on the matter of subsistence. The accompanying Conference Committee Report stated that the Interior Secretary possessed sufficient authority to protect Native subsistence rights and that Congress wanted the Secretary and the State of Alaska to do just that.

Because ANSCA failed to address subsistence, Congress included it under the *Alaska National Interest Lands Conservation Act (ANILCA)* Title VIII, which was signed into law in 1980.

Subsistence has many definitions depending on whom you speak to and in what context. To the Western/European culture, subsistence means the gathering and preparation of resources for nutritional purposes. To others, it represents a lifeway. To Alaska Natives, subsistence represents the very core of their existence as a people. It is a spiritual, cultural, physical, and economic means of continuing their heritage. It is the essence of their being.

People living in remote rural villages are totally dependent on subsistence activities to feed their families and to barter or perhaps to make some cash through the sale of handicraft articles. In rural Alaska, a cash economy is seasonal. Most money made by rural residents is spent on heating fuels, snow machines, skiffs and outboard motors, ammunition, and clothing. A majority of the food rural Alaska Natives consume is gathered through subsistence activities. These activities include, but are not limited to hunting; fishing; berry picking; canning, drying, and smoking fish; collecting and processing plants; and manufacturing arts and handicrafts.

Culturally and socially, subsistence activities are intertwined in the very existence of village life. Celebrations, stories, songs, dance, and spirituality are derived from subsistence activities. These activities teach skills that determine the future success of younger tribal members as providers and productive members of the village to ensure the perpetuation of the culture for generations to come. Through subsistence activities, children learn respect for the wildlife and fish that present themselves for use. They also learn to share, respect, and provide for their elders, care for the land, and coexist with other human beings and cultures.

Protection of subsistence activities is of vital importance to the Alaska Native. Elimination of subsistence is viewed as the termination of the Alaska Native culture.

Historically, as long as the waters and lands used for subsistence purposes were not used by others for other purposes, there was no conflict with subsistence. During the 16th, 17th, and 18th centuries, there was intense international competition for the wealth of the New World. Alaska was claimed under the “Rule of Discovery” by Russia. Alaska Natives lived harmoniously within their ecosystems and did not experience a threat to their way of life until Russia began commercial exploitation of Alaska’s natural resources.

The “Rule of Discovery” held that the nation first arriving on the land in the New World acquired complete title and domination over the land and its inhabitants exclusive of other nations. The rule also included the taking and exploitation of natural resources. Russian commercial activity had a limited effect on Alaska Native subsistence. Russia’s activities were focused on sea otters and Russian settlements were few and widely dispersed. Russian activities ended with the Treaty of 1867, in which Russia sold all its interest in Alaska to the United States for the sum of $7.2 million.

The U.S. Government’s concern for Alaska Native subsistence is not a recent issue. Congress has dealt with subsistence as a distinct part of Alaska Native policy for at least the last 45 years. When the Indian Reorganization Act of 1934 (IRA) was originally passed, it did not fully take into account the unique needs of Alaska Natives. In 1936, the Indian Reorganization Act was amended to do so. With the signing of the Migratory Bird Treaty, and since 1936, Congress has provided for Alaska Native subsistence by way of exception to wildlife conservation treaties and statutes. There have been problems with this process, however. Exceptions have many times been ineffective and rendered useless by the restrictive provisions of other treaties. Exceptions themselves can also be a problem. An

example is the *1966 Fur Seal Convention* whereby the "method" exception for harvesting of animals was rendered useless because the treaty makers failed to recognize that Native subsistence culture depended on the "use" made of wildlife and not on how the wildlife was harvested. However, this does not mean that Congress's early attempts to protect Alaska Native subsistence were all failures.

The *Walrus Protection Act,* the *Endangered Species Act,* and the *Marine Mammal Protection Act* all recognize the importance of Alaska Native subsistence use. These acts allow Alaska Native subsistence activities for the specific purposes of food, clothing, and handicrafts. To ensure this protection, Congress has restricted the Secretary of the Interior's authority to regulate subsistence under the *Marine Mammal Protection Act,* and the *Endangered Species Act* only if the taking "materially and negatively" affects the "endangered or threatened" species.

When Congress passed ANILCA, Title VIII, it sought to "preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" (P.L. 96–487 Sec.101(a)).

ANILCA also provided an opportunity for rural Alaskans engaged in a subsistence way of life to continue to do so. Fish and wildlife subsistence activities were to be managed in accordance with recognized scientific principles. In Title VIII, Congress found that:

> *The continuation of the opportunity for subsistence uses by both Native and non-Native rural residents of Alaska, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;*
>
> *The situation in Alaska is unique in that, in most cases, there are no practical alternative means to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;*
>
> *Continuation of subsistence opportunities on public lands and other lands in Alaska is threatened by Alaska's increasing human populations—with resultant pressure on subsistence resources, by sudden declines in populations of some wildlife species which are crucial subsistence resources, by increased accessibility to remote areas containing subsistence resources, and by fish and wildlife being taken in a manner inconsistent with recognized principles of fish and wildlife management;*
>
> *In order to fulfill the policies and the purposes of the Alaska Native Claims Settlement Act (ANCSA), and as a matter of*

equity, it is necessary for the Property and Commerce Clause of the Constitution *to protect and provide the opportunity for continued subsistence uses on public lands by Native and non-Native rural residents; and*

The national interest in the proper regulation, protection, and conservation of fish and wildlife by residents of rural Alaska requires that an administrative structure be established to enable rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on public lands in Alaska. This is a statutory right which can be regulated and Congress chose to regulate it to the benefit of the rural user.

Section 804 of ANILCA declares:

Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.

Relative to how subsistence rights affect land use decisions, ANILCA, Section 810, states:

In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his/her designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would produce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

Section 810 requires the head of such a Federal agency to:

Give notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to Section 805; (See P.L. 96–487, Section 805,(a),(b)&(c)).

Give notice of and hold a hearing in the vicinity of the area involved; and

Determine that:

(a) Such significant restrictions of subsistence are necessary, and consistent with sound management principles for the utilization of the public lands;

(b) The proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition; and

(c) Reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

Section 811(a) of ANILCA directs the Secretary of the Interior to ensure that:

> *Rural residents engaged in subsistence uses will have reasonable access to subsistence resources on the public lands.*
>
> *Federal and State agencies will undertake research on fish, wildlife, and subsistence use on public lands.*
>
> *Data will be sought and local residents consulted to gain special knowledge from those engaged in subsistence uses.*
>
> *Findings and results will be made available to the State, local, and regional councils and other appropriate persons and organizations.*

ANILCA Section 805(3)(D)(d) empowers the State of Alaska to implement laws of general applicability which are consistent with, and provide for the definition, preference, and participation in subsistence specified in ANILCA, Sections 803, 804 and 805.

In 1989, the Alaska Supreme Court ruled that the subsistence priority for rural Alaskans violated the State constitution. This holding prompted the State of Alaska to discontinue its subsistence program on Federal lands. In response, the Secretary of the Interior promulgated regulations for subsistence hunting and fishing on Federal lands in Alaska. In effect, the Federal Government took over the management of subsistence on Federal lands in Alaska. Both the State of Alaska and Alaska Natives filed suit, challenging the legality of these regulations. The Ninth Circuit Court of Appeals upheld the Federal Government's exercise of regulatory authority over "subsistence uses on Federal lands, waters, and interests therein in Alaska, including waters subject to Federal reserved water rights."

Trust Responsibilities

The trust responsibility is the U.S. Government's permanent legal obligation to exercise statutory and other legal authorities to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaska Native Tribes.

Federal Indian Policy and "trust responsibilities" have developed from court decisions, congressional laws, and policies articulated by the President.

The trust responsibility is a legally enforceable obligation, a duty, on the part of the U.S. Government to protect the rights of Federally Recognized Indian

Tribes. In several legal cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of dealings between the U.S. Government and Indian tribes.

For the Forest Service, trust responsibilities are essentially those duties that relate to the reserved rights and privileges of Federally Recognized Indian Tribes as found in treaties, executive orders, laws, and court decisions that apply to the national forests and grasslands. For Forest Service activities, the trust responsibilities are defined primarily by the authorities listed FSM 1563.01 (a copy of which is in Appendix A), and by treaties which may apply to specific areas of the National Forest System. Treaty rights on National Forest System lands are interpreted and applied by the Court.

One of the Forest Service duties is to consult and coordinate land and resource projects and activities on National Forest System lands adjacent to or adjoining Indian tribal lands to—

- Consult with Federally Recognized Tribes with whom the United States has a government-to-government relationship. (See Appendix C for a list of Federally Recognized Tribes.)
- Gain knowledge of adjoining Indian tribes' interests and rights. Seek this knowledge from within the Forest Service and from Indian tribes.
- Determine if a tribe(s) has reserved rights by treaty or other interests upon National Forest System lands. Work with your Lands staff to determine if treaty rights apply.
- Honor rights that apply to National Forest System lands, consistent with other Federal laws.
- Seek the advice of other Forest Service staff or of OGC in applying treaty rights.
- Consult with Indian tribes on plans, projects, programs, or activities that may affect the tribe's reserved rights on the National Forest System lands.
- Incorporate the information from such consultations into planning documents and the decisionmaking process.
- Show tribes how their information was used.
- Facilitate access, consistent with Federal law, so that tribal members may exercise rights reserved by treaty.
- Recognize that some, but not all, occupancy and use regulations related to National Forest System lands may apply to tribes and their members in the exercise of treaty rights.
- Consult between tribes, the Forest Service, and other parties as necessary to resolve conflicts that may arise.

Fulfilling the trust duty is accomplished through actions, not by writing books or environmental documents, not through process or procedure. The duty is redeemed by protecting a stream or animal habitat; by facilitating the exercise of treaty rights or the traditional cultural practices of Indian tribes and their members; and by continuing to work on a government-to-government basis.

Mutual cooperation and the development of government-to-government relationships between the Forest Service and Federally Recognized American Indian Tribes and Alaska Native Tribes should lead to the effective performance of trust duties and responsibilities. Developing and sustaining these relationships is a fundamental action which fulfills these mutual responsibilities.

NEPA Consultation

In 1994, President Bill Clinton held a Tribal Summit, hosting elected representatives from all Federally Recognized Tribal governments within the United States, where he articulated the government-to-government policy of his administration. The following sections of his memorandum to heads of executive departments and agencies refer to the role of government-to-government consultation in planning. (A copy of the complete memorandum is on page 7 in the introductory part of this document.)

a) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with Tribal governments prior to taking actions that affect Federally Recognized Tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

b) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on Tribal trust resources and assure that Tribal government rights and concerns are considered during the development of such plans, projects, programs and activities.

Treaties, acts of Congress (which may apply in Alaska), and executive orders after 1871, also obligate the United States and its agencies to fulfill certain trust responsibilities. Planning documents should discuss this complex and legal relationship. Certain reserved rights may need to be protected by special land and resource management actions.

The Forest Service has an obligation to consult with Federally Recognized Indian Tribes on a government-to-government basis throughout the Forest Service planning process.

The *National Environmental Policy Act (NEPA)* of 1969 (P.L. 91–190) implementing regulations require Federal agencies to invite Indian tribes to participate *in the scoping process* on projects or activities that affect them. Tribes with treaty rights on National Forest System lands may also meet with line officers in advance of the formal planning processes about their reserved rights.

- *Initiate consultation prior to the public scoping announcement.* Particularly if a tribe has reserved rights upon National Forest System lands or cultural/spiritual or other interests upon the area.
- *Contact any tribal government that may be affected by the proposed action or decision.*

Tribes may have reserved rights on present-day National Forest System lands. They may also have resource or confidential information on a proposed project area.

- This *does not mean* that a forest or district must wait for tribal concurrence.
- This *does not mean* that the time schedule needs to be arranged to accommodate tribal response.
- It *does mean* the Forest Service should be consulting, communicating, and coordinating regularly with the affected tribes.

Early consultation may simplify the planning process for proposed project areas that contain sacred sites or artifacts by providing them with the protection that they deserve.

Reserved treaty and subsistence rights outside reservation boundaries are essentially exercised in common with non-Indian citizens. These rights may even take place on former Indian lands which are now managed by the National Forest System. Neither NEPA nor the Council on Environmental Quality (CEQ) regulations mention these preexisting rights. A November 1993 directive signed by the Secretary of the Interior requires that environmental documents prepared by Interior agencies include a discussion of American Indian reserved treaty rights and the effects a pending Federal decision may have on these rights. As of yet, USDA does not have a similar policy.

The following outline may apply to either a Forest Plan or a proposed land management project. Environmental assessments do not require indepth discussions—neither do small projects or undertakings that do not affect reserved rights or tribal interests.

As technical advice to address the various aspects of American Indian rights and interests, we recommend including document sections and categories, titled and developed as follows:

NEPA Consultation

Chapter I—Purpose and Need for Action.

A. If restoration, rehabilitation, or enhancement of resources constituting a treaty right or other reserved right are part of the underlying need for a proposal, state this in the *Purpose and Need* section of Chapter I. For example, a proposed action intended to rehabilitate anadromous fish habitat or wildlife habitat in an area where a tribe has a treaty right to fish or hunt wildlife should include a discussion of the treaty right as a part of the underlying need for the proposal.

B. If consultation with a tribe shows there is an issue related to treaty rights or other rights or interests, discuss alternatives to the proposal as early as possible. If necessary, develop mitigation measures. Incorporate this analysis into Chapters II through IV.

C. Whenever A or B is applicable, include the following in the document:

   1. An excerpt from the treaty(s) applying to the area.
      a. List the resources, related to the proposed action, mentioned in the treaty, executive order, or statute.
      b. Discuss any regulation that may also apply to these rights.
      c. Illustrate and discuss the land area affected by the treaty or executive order.
   2. List the names of tribe(s) and their respective governing bodies that may have an interest in participating in government-to-government consultation.

D. If there is no significant issue related to treaty or other tribal rights, place this "finding" and supporting documentation (such as letters from the tribe or meeting notes) in the project record and reference it in the NEPA document (in Chapter I; Chapter II, where we discuss scoping and sorting of issues into nonsignificant/significant (1501.7); Chapter IV; or in an appendix. *For some project proposals there will be no effect on, or conflict with, American Indian rights. Once this finding has been made and documented, no additional discussion/analysis is required in the NEPA document.*

E. In the case of broad, programmatic NEPA documents (such as the EIS for a forest plan revision), Chapter I should discuss all treaty and other rights and their relationship to the proposed action if they are related to the purpose and need.

Chapter II—Alternatives Including the Proposed Action

A. Whenever a proposed action may potentially affect lands that support treaty resources—more than environmental considerations are at issue. Treaty or other tribal rights may be a part of the underlying need for the proposal, or there may be a significant issue related to the treaty or other tribal rights; Chapter II of the NEPA document should clearly indicate that the proposed action and all alternatives meet Forest Service requirements and comply with American Indian treaties, executive orders, or statutory rights and address individual Indian interests.

B. Where the alternatives use different means to assure that treaty or other tribal rights are protected, Chapter II of the NEPA document should include a comparison of these differences.

Chapter III—Affected Environment

A. Introduction: The first few paragraphs should include a short reference to the treaty resources potentially affected by the proposed action.

B. Trust, treaty, or subsistence resources and their location:

Discuss in general terms, what, if any, areas, sites, or streams have or support treaty resources. This section can be brief yet illustrate that more than environmental considerations are at issue. In the case of programmatic documents such as EIS's for forest plan revisions, it should also include a map of any land ceded to the United States via treaty or other document.

There should be a discussion of overall Forest Service land management goals, including duties to honor treaties or acts of Congress for subsistence use of resources.

Where possible, include the extent of the rights identified and where these rights occur on the forest. The existence of a treaty reserved right may hold a priority for a specific site or location over a proposed action.

This discussion may also include certain cultural resources that would have a direct effect on the proposed alternative and, consequently, the Forest Service's ability to maintain confidentiality of the information gathered about cultural sites or resources.

C. Environmental Components within the Project or Planning Area—Each of these resources, if they are related to the proposed action, needs to have associated with it, a discussion of a trust duty that may impose upon the Forest Service a need for special

consideration or protection. For a "project," discussion can be limited to those aspects related to the project. For a broader, programmatic NEPA document, such as the EIS for a forest plan revision, a more detailed discussion is needed for—

1. Topography (include a map of ceded lands or a reference to them)
2. Climate
3. Water—an implied right that needs protection
4. Fish—a treaty or subsistence resource
5. Wildlife—a treaty or subsistence resource
6. Grasses—a treaty resource for gathering rights
7. Plants, Roots, and Bulbs—medicinal/spiritual or a reserved right
8. Riparian Areas—how they affect fish and their habitats
9. Cultural Resources—while these are not reserved rights, they may be tribal or individual Indian interests. Discussions should remain consistent with existing cultural resource laws and executive orders.

D. Decision Notice or Record of Decision—In decisions where the treaty or other tribal rights were identified as a significant issue within the proposed action, the decision document should explain how this issue was considered in the decisionmaking process.

For some Forests and Regions this may be a first look at the unique relationship that Federal agencies have with Indian Country. (Please also refer to Forest Service Policy stated in FSM 1563—Appendix A.)

CEQ References: The CEQ regulations (40 CFR 1500–1508) for implementing NEPA refer to American Indian tribes and their role in NEPA analysis in several places:

- 1502.16 (c)—Discussing effects of the proposed action on Indian plans
- 1503.1 (a)(2)—Requesting comments from American Indian and Alaska Native Tribes
- 1506.6 (3)—Providing notice to tribes when effects may occur on reservations
- 1508.5—American Indian tribe as a "cooperating agency" in NEPA analysis

Cooperation in Management

The *Organic Act,* the *National Forest Management Act,* and other similar statutes require the Forest Service to manage National Forest System resources in a manner that serves the needs of the general public.

National forest management must consider a myriad of rights, other than treaty rights, to Federal land. While use conflicts may occur between these various rights, they can generally be resolved by mutual effort.

Joint and comanagement continues to be an issue between the tribes and the Forest Service. The tribes have interpreted joint or comanagement to mean codecisionmaking. Others interpret it to mean shared management in the sense of sharing information and ideas on management actions. The Forest Service has not accepted these interpretations.

The Forest Service can usually provide for Indian gathering, hunting, and similar reserved rights while meeting its land and resource mission. The key to this success is mutual cooperation through consultation and agreement with affected Indian tribes and individuals.