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DESK GUIDE
FOR TRIBAL LEADERS AND DEPARTMENT OF DEFENSE

This “Desk Guide” is for use by tribal governments and military commanders. Section III, in particular, provides tools that will help tribal governments and all military branches communicate more effectively on issues of mutual concern, especially with respect to activities that may affect tribal lands and resources.

We encourage all leaders to use this tool as a basis for building true government-to-government working relationships. This will require the participation of tribal government elected leaders and Department of Defense senior installation commanders. The Office of the Deputy Undersecretary of Defense (Installations & Environment) in Washington, DC is taking a lead role in this effort.

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EXECUTIVE SUMMARY

This desk guide is a resource for the U.S. Department of Defense (DoD) and American Indian and Alaska Native tribal government leaders. Its purpose is to aid tribal and military policy makers as they develop government-to-government relationships and protocols in accordance with federal laws and policies. For the military, the key guiding policy document is the “Department of Defense American Indian and Alaska Native Policy (Policy).”¹ The Policy was created in response to the Presidential Executive Memorandum, “Government-to-Government Relations with Native American Tribal Governments”²

As domestic dependent nations, tribal governments exercise inherent sovereign powers over their members and territory. The U.S. Constitution, Supreme Court decisions, treaties with the U.S. government, legislative acts, and numerous federal policies and Executive Orders define these authorities. There are over 560 federally recognized tribal governments in the U.S., of which 229 are located in Alaska.

Many tribes are directly or indirectly affected by current and past military activities on or near tribal lands. The Department of Defense has legal and policy obligations to protect tribal

lands and resources, consistent with its military preparedness mission.

Tribal governments and military installation commanders share common interests on many issues. These include environmental damage from past and present military activities, related health and safety concerns (such as unexploded ordnance, hazardous materials on tribal lands), natural resources protection (land and water), and cultural resources protection under federal laws (tribal sacred sites, access to resources, and tribal traditional and religious use of lands, air and water). Military activities that potentially may affect air, land and water resources are of critical concern to neighboring tribal governments who possess legal rights associated with protection of those resources.

Section II of this desk guide provides legal background and history of federal Indian law and policies regarding the unique status of tribes as governments.

Section III is the key toolbox for the Department of Defense and each Native American and Alaska Native tribe. Practical, how-to guidance on how tribal governments and the Department of Defense can mutually benefit through frequent and effective communication is emphasized. The tools provided will help tribal governments and military installation commanders to work together as they strive for mutually acceptable outcomes. True government-to-government relationship building requires an understanding and accommodation of each others priorities and needs.

¹ Secretary of Defense William Cohen, October 20, 1998

² President William Clinton, April 29, 1994

The other key purpose of Section III is to develop and maintain government-to-government protocols for the long-term. As commands change and new tribal leaders are elected, Section III will help maintain and preserve the tribal government's and Defense Department's institutional record.

Important information such as key points of contact is to be provided and jointly maintained by local tribal governments and military policy representatives. Guidance for military and tribal departmental staffs, military contractors, employees and others will help promote smooth administrative transitions and help avoid unnecessary confusion or conflict.

Success will require the commitment of military installation commanders and tribal elected leaders at each local level where impacts are greatest.

Part III of the desk guide is a suggested model for maintaining communication and addressing major concerns. It requires that assigned personnel from military commanders work with their executive counterpart at the tribal government(s) in the vicinity of the installation.

Importance of Policy Level Involvement

Much of the work already underway will continue to be carried out by tribal and non-tribal professionals, including sub-contractors, whose jobs include environmental clean up, disposal of unexploded ordnance, debris removal, cultural and natural resources inventorying, resources protection, and other projects.

However, this guide emphasizes the mutual obligation of tribal and military policy leaders to engage in direct, effective communication, leadership and joint action. *This two-way approach enables the Department of Defense and tribal governments to communicate their needs, priorities, and concerns and take corrective action.*

By formalizing communication on a regular basis, DoD's preparedness mission will be served. Tribes will be served by improving each tribal government's ability to exercise *their legal rights to tribal self-determination and self-governance while avoiding undue conflict with the Department of Defense*. The desk guide is a first resort resource for military and tribal government leaders when circumstances require routine and emergency policy level communication.

The suggested format in Section III allows tribal governments and installation commanders to update and adapt the guide as local situations require.

Institute for Tribal Government
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Section I.

Introduction to Desk Guide

During 2002-2004, the Institute for Tribal Government held regional meetings with tribal government officials, representatives of the Office of the Deputy Under Secretary of Defense (for Installations and Environment), and military installation representatives. The regional tribal and Department of Defense policy sessions were held in the Pacific Northwest (Portland, OR), the Southwest (Ak-Chin/Maricopa, AZ), and Alaska (Fairbanks). All area tribes from these regions were invited, and many elected tribal officials were able to attend and participate in the dialogue. Military installation representatives as well as senior Department of Defense (DoD) personnel, project level staff, and project contractors were also participants.

The meetings were held for the purpose of determining whether tribal governments were aware of the DoD American Indian and Alaska Native Policy. That Policy was developed over several years through the efforts of the Office of the Deputy Undersecretary of Defense and tribal representatives designated by the National Congress of Americans. Secretary of Defense William Cohen formally signed the Policy on October 20, 1998. (Section IV page 46 of this document).

During the multi-day meetings held by the Institute for Tribal Government, tribal leaders and military representatives were able to have substantive discussions about the origins of the Policy, participation of tribal people in its development, and DoD's outreach efforts to tribal governments.

Following the regional meetings, the Institute for Tribal Government reported its findings and recommendations to the Office of the Deputy Undersecretary for Defense, Washington, D.C. Key findings were:

Tribal government leaders (elected officials) were sometimes unaware of the Policy. However, once introduced to the Policy, there was broad support for the purposes and intent of the Policy. No major revisions or changes were deemed necessary by the tribal government participants.

A number of military representatives indicated that working with tribes can be difficult, primarily due to their own lack of understanding about the rights of tribes and how individual tribal decision-making processes work. A major concern was that, in some regions of the country, there is little contact at the installation command/tribal government policy levels (despite the DoD Policy's emphasis on this requirement).

Much of DoD's work involves data collection, studies related to resource planning, cultural resources inventorying and similar technical activities. This work is done by staff or contractors. If inadequate communication between tribal policy leaders and military commanders occurs, projects are delayed and tribal priorities are not effectively heard and considered. It can be difficult to get the attention of policy makers whose work responsibilities include many complex issues.

It was recognized that most of the Defense Department's work eventually requires the involvement of tribal decision makers, since projects may directly or indirectly affect tribes, and, likely will require tribal approval or adoption. Projects were often delayed or opposed by tribal governments due to the lack of tribal participation in the process. Furthermore, military funded projects often had unintended consequences that violated tribal cultural or other values, further eroding government-to-government relationship building.

Need for and Purpose of Desk Guide:

A key lesson learned was that tribal governments (elected officials) need to be formally contacted early in the planning process, well in advance of conducting activities that might impact tribes or tribal resources on or near tribal lands. This principle is already included in the Policy, but may not always satisfactorily implemented.

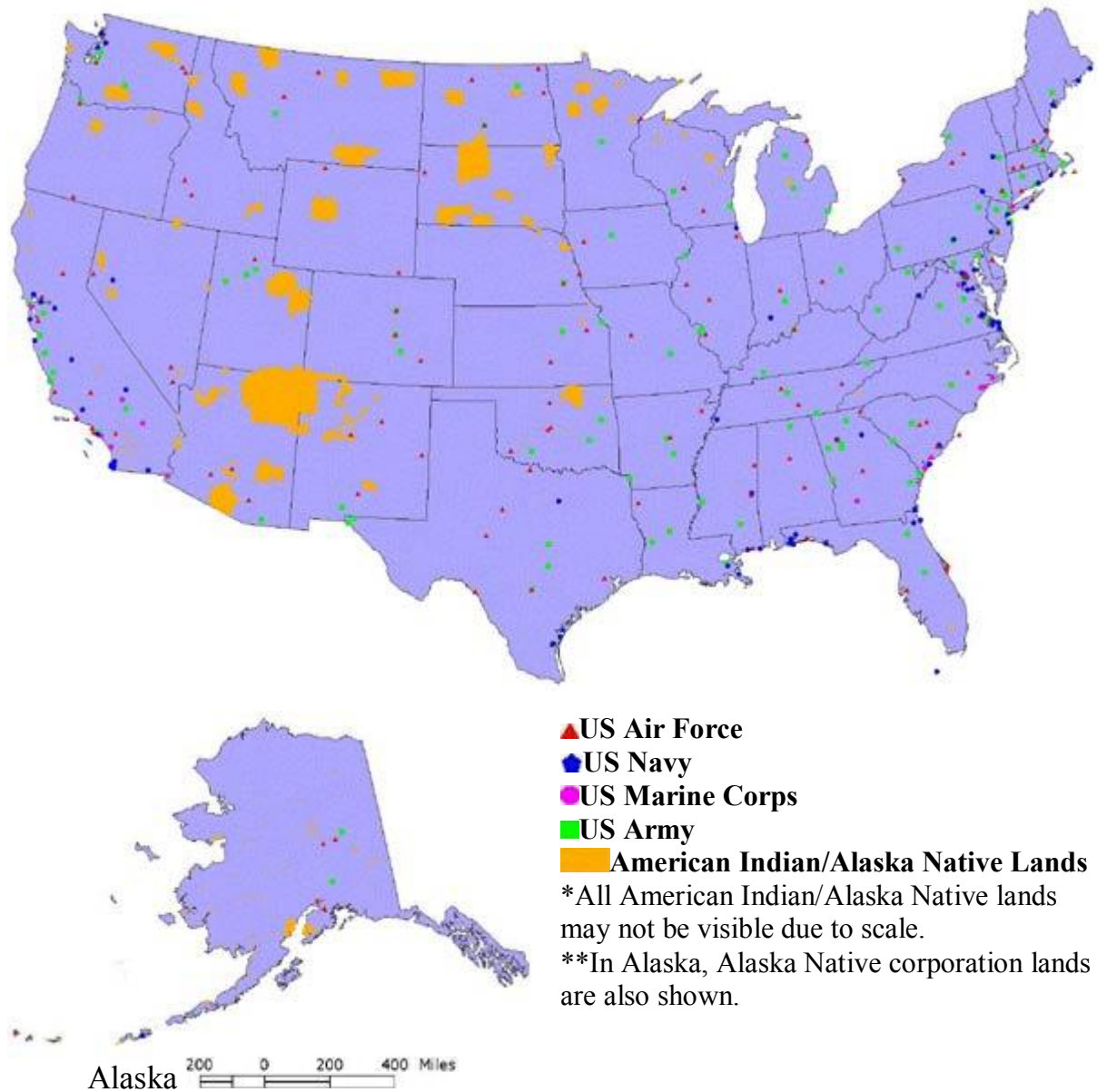
The Institute for Tribal Government, involved tribes, and military representatives concluded that more detailed implementation guidance regarding the DoD Policy is needed at the installation and tribal government levels. **A strategic method of engaging both tribal government leadership and installation level commands would further the Policy's implementation, promote government-to-government dialogue, and mutually benefit tribal governments and DoD.**

As a result of that consensus, this desk guide was developed. The desk guide is primarily intended to be a resource of first resort to help:

- educate military personnel, contractors, and tribal leaders about the DoD Policy; and to promote its usage, particularly at the tribal leadership/installation command level;
- educate personnel and staffs about the unique legal status of each area tribe and the associated Constitutional, treaty, statutory, and other relevant laws and policies that apply;
- educate the military community about tribal governments, their legally protected exercise of self-determination and self-governance;
- provide important orientation information and educational resources for military personnel, staffs and contractors;

- institutionalize regular communication with each on a government-to-government basis in recognition of tribal sovereignty;
- establish enduring relationships, regardless of changes in command or tribal elected leadership;
- provide a format/template for tribes and military installations to use to record accomplishments, correspondence, contact points, projects, calendars, cooperative agreements, meetings, and other information as part of institutionalizing and sustaining government-to-government relationship building;
- develop and institutionalize communication protocols, points of contact, and procedures for elevating issues of concern to the policy level;
- encourage military installations whose activities may potentially affect tribes to designate a tribal liaison in order to maintain strong lines of communication with local tribes (if it has not done so already);
- assure DoD's required annual review of the status of relations with tribes occurs to ensure that DoD is fulfilling its federal responsibilities and addressing tribal concerns related to protected tribal resources, tribal rights, or Indian lands (as set forth in its American Indian and Alaska Native Policy);
- establish, as a priority, regularly scheduled face-to-face meetings with tribal government leaders;
- provide tribes with information regarding DoD related contracting, subcontracting, education, training and grant opportunities for tribes and tribal members, and,
- provide tribal governments with notice and opportunities to obtain surplus equipment and property.

Figure 1.
American Indian and Alaska Native Lands
U.S. Military Installations



Sources: U.S. Military Installation Road Map (Military Living's Publication; 1997). Indian land boundaries were extracted from EPA's American Indian Lands Environmental Support Project and Reference Encyclopedia of the American Indian, 6th Edition. Alaska Native boundary information provided to EPA by the Bureau of Indian Affairs.

For more detailed mapping of Indian lands, see USGS link
<http://nationalatlas.gov/mld/indlanp.html>

Section II.

The DoD American Indian and Alaska Native Policy: Background & Purpose

The DoD American Indian and Alaska Native Policy was developed as a direct result of a Presidential Executive Memorandum of April 29, 1994 titled “Government to Government Relations with Native American Tribal Governments,” signed by President Clinton.³ The Executive Memorandum states, in part:

“In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

- (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments (*Executive Order 13175 Consultation & Coordination with Indian Tribal Governments*, November 6, 2000).
- (b) 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.⁴ All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.
- (c) 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.
- (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.
- (e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.
- (f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 (“enhancing the Intergovernmental

³ Substantially re-affirmed by George Bush Presidential Memorandum for the Heads of Executive Departments and Agencies – Government-to-Government Relationship with Tribal Governments (September 23, 2004)

⁴ Official list of “federally recognized tribes” is maintained by the Bureau of Indian Affairs

Partnership”) and 12866 (“Regulatory Planning and Review”) to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.”

The President further elaborated on the government-to-government policy in Executive Order 13084, signed May 14, 1998. It provides definition of terms and expectations as follows:

“The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes Executive orders, and court decisions. ***Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory.***” (Emphasis added).

Native Americans: A One Page U.S. Historical Synopsis

Pre-1492	Native population of North America (excluding AK & HI) est. 5 million
1492	Arrival of Columbus
1607	Jamestown founded
1622	First major Indian retaliation
1741	First contact between Alaska natives and foreigners
1744	Treaty of Lancaster: Appalachian Mts. separates settlers, tribes
1754-63	French and Indian War
1775	Revolutionary War begins
1776	Declaration of Independence & first treaty between US and Delaware Tribe
1783	Revolutionary War ends
1803	Louisiana Purchase for \$15 million
1824	Bureau of Indian Affairs established under Dept. of War
1830	Indian Removal Act abolishes tribal land rights east of Mississippi R.
1838	“Trail of Tears” some 60,000 members of the 5 “civilized tribes” (Cherokee, Creek, Chickasaw, Choctaw, Seminole) forced marched to Oklahoma Territory. Some 60 tribes over 10 years were removed to Oklahoma
1848	First gold strike in California
1850s	Extensive treaty-making period between the U.S. and western tribes
1861	Civil War begins
1868	Railroad Act
1865	Civil War ends
1868	Fort Laramie peace conference
1871	Treaty making between U.S. and Indian tribes ends
1887	General Allotment Act (Dawes Act) eliminates rights of tribes to hold land in common; over 90 million “surplus” acres taken & redistributed by government
1890	Indian lands are less than 4% of the continental U.S.
1917	U.S. enters World War I
1924	Indian Citizenship Act passed (granting U.S. citizenship to Indians)
1934	Indian Reorganization Act enacted (policy era)
1941	U.S. enters World War II
1947	Indian Claims Commission Act
1948	Indians allowed voting rights in Arizona
1954	Tribal Termination and Relocation Act era
1954	Utah law prohibiting voting by tribal reservation residents is repealed
1962	Indians allowed voting rights in New Mexico
1968	Indian Civil Rights Act enacted
1971	Alaska Native Claims Settlement Act (ANCSA) enacted
1972	Indian Education Act enacted
1975	Indian Self-Determination & Education Assistance Act (policy era)
1978	American Indian Religious Freedom Act enacted
1978	Indian Child Welfare Act enacted
1980	Alaska National Interest Lands Conservation Act (ANILCA) enacted
1988	Indian Gaming Regulatory Act enacted
1990	Native American Graves Protection & Repatriation Act (NAGPRA)
1991	Native American Languages Act.

Source: Adapted from Native American FAQs Handbook by George Russell, 2000

American Indians in the U.S. Constitution:

Article I. Section 7:

“The Congress shall have power...to regulate Commerce with foreign nations, among the several States, *and with the Indian Tribes;*” (emphasis added)

Article VI:

“This Constitution, and the laws of the United States which shall be made in pursuance thereof, *and all treaties made*, or which shall be made under the authority of the United States, *shall be the supreme law of the land; and the judges in every state shall be bound thereby*, any thing in the Constitution or laws of any state to the contrary notwithstanding.” (emphasis added).

Explanation:

Indian tribes are recognized as *domestic dependent nations* under the protection of the United States. Through treaties, tribes specifically retained “sovereign” rights while relinquishing legal title to much of their lands to the U.S. The inherent rights *they did not relinquish* are protected and enforceable by U.S. law. Tribes exercise inherent sovereign powers, defined as authority over their *members* and *territory*. The United States has guaranteed the right of Indian tribes to *self-government*, also sometimes referred to *self-determination*.

The U.S. Constitution, which is patterned after the Great Law of the Iroquois Confederacy, recognized Indian tribes as sovereign nations. During the colonial period and in the infancy of the United States, tribes were considered military and political equals, and were often key allies in power struggles between the colonies and other Old World countries. The Supreme Court recognized that the relationship between Indian tribes and the U.S. was that between *one nation to another and did not involve states or local governments*.

As the U.S. followed Manifest Destiny westward, consuming land and resources, tribes began to be looked upon as *dependent domestic nations*. As domestic nations within another nation, the federal government has a responsibility to protect the interests of Indians. This *trust relationship (also called trust responsibility)* evolved judicially and survived occasional congressional attempts to terminate the government’s obligations to Indians.

The United States is a *fiduciary* whose actions are to be judged by the highest standards. Because the federal government has so much control over the resources of Indian nations and individual Indians, the trust doctrine is implied in dealings even if not explicitly stated. Trust responsibility affects everything the federal government is involved in, from education and health care to trust lands, natural resources and the Bureau of Indian Affairs. (Source: Native American FAQs Handbook, 2000).

American Indians and the United States Constitution

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The United States Constitution provides that “*Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.*” It is no surprise that American Indian tribes are mentioned in our Constitution. Indian tribes have always played a major part in the non-Indian exploration, settlement, and development of this country. When Christopher Columbus thought he had discovered the "New World" in 1492, it is estimated that 10-30 million native people lived in North America, that is, in the present day countries of Mexico, United States and Canada. These millions of people lived under governments of varying sophistication and complexity. These native governments were viable and fully operational political bodies which controlled their citizens and their territories and were an important factor in the development of the United States government we live under today.

The European countries that colonized North America dealt with the native tribal governments as sovereign governments, that is, as governments that had independent and supreme authority over their citizens and territories. Especially in the area of the present day United States, the European powers interacted with American Indian tribal governments through official diplomatic means. Starting with England as early as 1620, and France, Spain, and Holland, the European powers negotiated with Indian tribes through official government to government council sessions and by entering treaties which recognized tribal governmental control over the territory of this "New World." The European countries had a selfish motive for dealing with American Indian tribes in this fashion. The European governments wanted to legitimize the transactions they entered with Indian tribes to buy tribal lands. Thus, they wanted to make the transactions look official and legal by buying Indian lands through governmental treaties so that other European countries could not contest or object to these land sales.

The United States adopted this tradition of dealing with Indian tribes as sovereign governments from the European powers. From the very beginning of its existence, the U.S. dealt with Indian tribes on an official governmental and treaty making basis. Political involvement in Indian affairs was a very important part of governmental life in early America. Indian tribes were very powerful in the 1700s and early 1800s in America and were a serious threat to the new United States. Hence, the United States government was heavily involved in negotiating and dealing with tribes as part of its governmental policies. The United States ultimately negotiated, signed and ratified almost 390 treaties with American Indian tribes. Most of these treaties are still valid today.

The United States did not “give” Indian tribes anything for free in these treaties. Instead, the treaties were formal government to government negotiations regarding

sales of land and property rights that the tribes owned and that the United States wanted to buy. The United States Supreme Court stated in 1905 that United States and Indian treaties are “not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.” Thus, while tribal governments sold some of their rights in land, animals, and resources to the United States for payments of money, goods, and promises of peace and security, the tribes held onto or reserved to themselves other lands and property rights that they did not sell in the treaties. The United States Supreme Court has likened these Indian treaties to contracts between “two sovereign nations.”

When the thirteen American colonies decided to rebel against England and seek their independence, they formed the Continental Congress to manage their national affairs. This Congress operated from 1774-1781 and dealt with Indian tribes on a diplomatic, political basis and signed one treaty with the Delaware Tribe in 1778. The political interest of the United States at that time was to keep the tribes happy with the new American government and to keep Indian tribes from fighting for the English in the American Revolutionary War during 1775-1781. This Congress engaged in diplomatic relations with tribes by sending representatives to the tribes bearing many gifts and promises of peace and friendship to keep the tribes neutral in the United States’ war with England.

The thirteen American colonies then adopted the Articles of Confederation in 1781 and convened in a new Congress to manage their affairs on the national level. This Congress also had to manage Indian affairs and keep the tribes from fighting against the United States. The new Congress also sent diplomatic representatives to the tribes and promised friendship and peace, and ultimately it signed eight treaties with Indian tribes between 1781-1789, including treaties with the Iroquois Confederacy, the Cherokee Tribe, the Shawnee Tribe and numerous other tribes. However, this Congress’ power in Indian affairs was limited because the Articles of Confederation did not clearly give this Congress the exclusive power to deal with tribes. Thus, various states meddled in Indian affairs and actually caused wars between tribes and Georgia and South Carolina, for example, because the states were trying to steal Indian lands.

The problems caused by states getting involved in Indian affairs led many people to call for the formation of a new and stronger United States government wherein the exclusive power over Indian affairs would be placed only in the hands of the national government and would be taken completely away from the states.

When the representatives of the thirteen colonies/states started drafting the United States Constitution, to form the United States government we now live under, the "Founding Fathers" of this nation had to carefully consider the role of Indian tribes in the political arrangement of the new nation. As James Madison pointed out, much of the trouble that England and the thirteen colonies had suffered with Indian tribes from the 1640's forward arose when individual colonists or colonial governments tried to greedily take Indian lands. In those instances, the colonies and individual colonists would negotiate with tribes without the permission or the involvement of the English King or the American national leadership. The drafters

of the U.S. Constitution tried to solve this problem by taking Indian affairs out of the hands of the colonies/states and individuals and placing the sole power to deal and negotiate with tribes into the hands of the U.S. Congress. Thus, Indian tribes and their people, and the United States relationship with tribes are addressed in the U.S. Constitution.

In Article I, (the very first matter to be addressed in the Constitution), the United States Constitution accomplishes the goal of excluding states and individuals from Indian affairs by stating that only Congress has the power “*To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .*” The United States Supreme Court has interpreted this language to mean that the Congress was granted the exclusive right and power to regulate trade and affairs with the Indian tribes. The very first United States Congress formed under our new Constitution, in 1789-1791, immediately assumed this power and in the first five weeks of its existence it enacted four statutes concerning Indian affairs. In 1789, the new Congress, for example, established a Department of War with responsibility over Indian affairs, set aside money to negotiate Indian treaties, and appointed federal commissioners to negotiate treaties with tribes. In July 1790, this Congress passed a law which forbids states and individuals from dealing with tribes and from buying Indian lands. This law is still in effect today.

Indian tribes are also referred to, but are not expressly designated, in Article VI of the Constitution where it is made clear that all treaties entered by the United States “*shall be the supreme Law of the Land.*” In 1789, the United States had only entered a few treaties with European countries while it had already entered nine treaties with different Indian tribes. Consequently, this treaty provision of the U.S. Constitution states that the federal government’s treaties with Indian tribes are the supreme law of the United States.

Individual Indians are also mentioned in the Constitution of 1789, Article I, and again in the Fourteenth Amendment to the Constitution which was ratified in 1868. In counting the population of the states to determine how many representatives a state can have in Congress, Indians were expressly not to be counted unless they paid taxes. In effect, Indians were not considered to be federal or state citizens unless they paid taxes.

After the Civil War when citizenship rights were extended through the Fourteenth Amendment to ex-slaves and to “[a]ll persons born or naturalized in the United States,” that Amendment still excluded individual Indians from citizenship rights and excluded them from being counted towards figuring congressional representation unless they paid taxes. This demonstrates that Congress still considered Indians to be citizens of other sovereign governments even in 1868 when the Fourteenth Amendment was adopted. This view was correct because most Indians did not become United States citizens until 1924 when Congress passed a law making all Indians United States citizens. For many years after 1924, states were still uncertain whether Indians were also citizens of the state where they lived and in many states Indians were not allowed to vote in state elections.

American Indian tribes have played a major role in the development and history of the United States and have engaged in official, diplomatic governmental relations with other sovereign governments from the first moment Europeans stepped foot on this continent. Indian tribes have been a part of the day to day political life of the United States and continue to have an important role in American life down to this day. Tribes continue to have a government to government relationship with the United States and they continue to be sovereign governments with primary control over their citizens and their territory. It is no surprise, then, that the relationship between Indian people, tribal governments and the United States is addressed in the provisions of the United States Constitution.

“The Doctrine of Discovery”

From 1492 forward, European countries and the United States justified their dealings with the natives and American Indian tribes in North and South America under the “doctrine of discovery.” Under this principle, the European country that first discovered a new area where Christian Europeans had not yet arrived could claim the territory for their own country. This did not mean that the natives lost the right to live on the land or to farm and hunt animals on it but it did mean that the natives could only sell their land to the one European country that “discovered” them and that they should only deal politically with that one European country. In most situations, the Europeans also enforced the doctrine of discovery against themselves because they recognized and agreed to be bound by the principle that the discovering country earned a protectable property right in newly discovered territories. The audacity of one country “discovering” and claiming lands already occupied and owned by American Indians came from the idea that Christians and white Europeans were superior to people of other races and religions.

When European countries first came to the New World, they were not strong enough militarily to just take the land from the Indian tribes. Thus, they entered treaties with tribes to make the transactions look legal and valid, and they bought the lands they wanted. In addition, influential scholars in England and Spain, for example, believed that Indians had a legal right as free people to continue to own their lands and that a European country could only take lands by force in an honorable war.

In exercising its control over the American continent, the United States also enforced the doctrine of discovery. Thus, as the United States Supreme Court stated in 1823, in the case of Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823), the United States acquired the sole right to buy lands from Indian tribal governments under the doctrine of discovery. Thus, sales of land that Indians had made to persons other than to the United States government were invalid. Tribes continued to have the right to use and occupy their lands but their governmental sovereign powers were restricted in that they could only sell their lands to the United States. Johnson, 21 U.S. at 573-74. The United States gained this power under the doctrine of discovery from England and from other European countries as the U.S. bought or acquired the “discovery” authority of these European countries over various parts of the American continent.

In upholding this power of discovery over Indian tribes for the United States, the Supreme Court had to ignore its own opinion that Indians possessed natural rights to their lands. In fact, the Supreme Court refused to say why American farmers, “merchants and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess” or to limit the tribal rights. Instead, in determining tribal rights to sell their lands, the Court relied on the doctrine of discovery and the fact that the United States had beaten some tribes in war to decide that only the United States could buy Indian lands. “Conquest gives a title [to the land] which the Courts of the conqueror cannot deny” *Id.* at 588.

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Alaska Natives: A Distinct History of Law and Policy

© 2004. Charles Wilkinson & American Indian Resources Institute. "Indian Tribes as Sovereign Governments" Second Edition. American Indian Lawyer Training Program. Oakland, CA.

Alaska Natives experienced relatively little contact with non-Indians following the cession of Alaska by Russia to the United States in 1867 (under which Alaska's "uncivilized" tribes were made subject to the laws and regulations of the United States). Subsequent legislation, most notably the sweeping Alaska Native Claims Settlement Act (ANCSA) of 1971, recognizes the United States' obligations to protect Native [land] allotments and to provide federal services to Alaska Natives in a manner comparable to that provided to Indians in the lower 48 states. The distinctions between Alaska Natives as governments and as landowners, however, have remained clouded. The result has been a variety of conflicts, most notably over subsistence rights, the exercise of sovereignty, and the management of the corporations established by ANCSA.

The originally enacted Indian Reorganization Act (IRA) did not apply fully to Alaska Natives, but was amended in 1936 to include them. Amendments to the IRA permitted the Secretary of the Interior to designate public lands actually occupied by Natives as reservations or as additions to reservations. Natives were permitted to organize as tribes under the IRA if they maintained a common bond of occupation or association, or resided in a well-defined community. Numerous lands were withdrawn and councils created, but litigation ensued calling into question the permanency of the reserves and the nature of Native claims to land. Federal and state policy encouraging the incorporation of Alaska Native communities under state law began in 1963. Many Native communities that chose to incorporate also included IRA provisions in their city charters. Today, about 127 predominantly Native communities are organized under Alaska's state municipal corporation statute. Thus the IRA tribes and state entities exist side by side.

ANCSA extinguished all Native claims to land or water areas in Alaska. In return, the Act called for Alaska Natives to receive 44 million acres of land---an area larger than the State of Washington. The United States also agreed to transfer about \$1 billion into a separate Alaska Native Fund. ANCSA also provided that the lands, patented in fee simple, be transferred to 12 regional corporations and over 200 local village corporations. Native corporations are profit-making entities chartered under state law to perform proprietary functions. Currently, the land is exempt from state and local real property taxes if it has not been developed by third parties.

Subsistence hunting and fishing rights also were extinguished by ANCSA. Presently, Native subsistence rights are recognized to various extents by the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), by state law, and by specific federal laws such as the Marine Mammal Protection Act. The ANILCA

subsistence provisions, which have been vigorously contested by the State of Alaska, provide especially significant protections for Alaska Natives.”

In 1998, Alaska Natives were dealt a blow by the U.S. Supreme Court in its decision in Alaska v. Native Village of Venetie Tribal Government. There, the Supreme Court held that the Native lands at issue in ANCSA were not “Indian Country” under the relevant federal statutes. As a result, although some issues remain unresolved, the tribes of Alaska have a limited geographic area over which to exercise their powers of tribal self-government. Native leaders, however, continue to press for greater sovereignty through legislation, litigation, and negotiation.

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Section III.

Government to Government Desk Guide: Tools

Introduction and Purpose

The Department of Defense Policy defines a threshold for triggering consultation with tribal governments: when an event or proposal is being considered by DoD. The question becomes: **does this activity have the potential to affect tribal rights or resources or Indian land?** If the answer from the tribe or Department of Defense is “yes” or “maybe” then the Policy of government-to-government communication must come into effect. (See Annotated Policy in Section IV of this document for specific wording and procedures.) In all instances, it is the policy of the Department of Defense to deal with each tribal government on a **“government-to-government”** basis. This means that the tribal elected leadership must be contacted and consulted with in a meaningful and direct manner. This duty is the mutual responsibility of the Defense Department policy and command leadership.

Therefore, consultation is to be done at the highest policy levels: the installation commander and each tribal government’s executive branch. Under DoD’s trust responsibility, the command must work with the tribe(s) to accommodate tribal government needs and concerns. In this “consultation process” both parties are working to find ways to minimize or eliminate the effect on tribes and tribal resources, and, whenever possible, to reach mutually agreeable outcomes.

This section is a tool intended for use by local tribal government(s) and Department of Defense installations. The tool can serve as a template for working on a government-to-government basis. It is also a tool for staff, subcontractors, and anyone else working on behalf of DoD or tribal governments.

Because of the frequent turnover in military installation command (approximately every two years) and the election cycles of tribal governments, it is important to create and maintain information for sustaining effective communication. The following list of topics will help both tribal governments and local military installation commands institutionalize their relationship building.

This desk guide is intended to be dynamic. As changes occur, new information will need to be added. A CD is enclosed with this desk guide to permit military and tribal staffs to update relevant information. Tribal and military liaison staffs are encouraged to work on this guide together to assure that both entities have correct and current information. Importantly, this

guide provides an opportunity for DoD and tribal representatives to educate one another about their respective priorities, mission, needs, and concerns.

Regular review and updates of this guide will help institutionalize government-to-government relationship building as required by current laws and policies.

Key Information

for Tribal Governments and Department of Defense to Consider

General Information & Geography

- Federally recognized tribes that may potentially be affected by military activities
- Map of tribal lands (i.e., reservation, pueblo) and off-reservation lands utilized by local area tribe(s) such as ceded areas, cultural use areas, food gathering, and sacred sites. Important: this information may necessarily be general in nature in order to protect sites and respect cultural activities.
- Primary military installation identified/map
- Secondary, and any other branch/installation conducting operations in area
- What lands, waters, if any, are designated as “off limits” by agreement of installation and involved tribes. It may be for safety reasons, cultural reasons or other military or tribal purpose.
- Is there a verbal, written or other agreement on any lands within the area? If so, what are the conditions, when was it done, and by whose authority at the tribe and/or installation?
- Are there opportunities for tribes to contract with Defense Department to conduct work on or near tribal lands? Unemployment is a key concern in tribal communities.
- Do any of the affected tribes have cultural or other protocols (written or unwritten) for dealing on a government-to-government basis with federal agencies such as the Department of Defense.

Primary Points of Contact at Installation and Tribal Government

- Names and titles of installation commander and tribal executive(s) in area
- Contact information for each of the above: office address, phone and fax numbers. Exchange cell phone numbers if feasible
- Name and contact information of executive assistants
- Emergency numbers for tribe(s) and military installation(s)
- Official names, addresses of tribes in the area; also include information for contacting displaced tribes if reservation is located elsewhere encouraged
- Organizational chart of local military installation and tribal government(s)
- Names and contact information for designated military and tribal staff working on inter-governmental communication (individuals named by commander and tribal executive, respectively)

- Names and staff contact information at tribe, installation. Examples: cultural resources, natural resources, archaeological specialists; range management, other disciplines
- Update changes in key personnel, staff at least quarterly

Correspondence

- Maintain tribe(s) to installation (or higher level) and installation to tribe correspondence
- Procedural correspondence. Examples: notices of planned or proposed activities; requests for consultation; requests from tribal government leadership (usually on tribal letterhead), problems, request for executive level meeting
- Informal correspondence: Examples: invitations to celebrations, commemorations, community events

Cooperative Agreements, MOAs, MOUs

- Specific to local area tribe(s) and installation
- Progress, issues, related information
- List of contractors used (and performance)

Calendar (jointly maintained by tribe(s) and installation)

- Tribal election cycle, dates
- Tribal events; sensitive dates or timeframes such as ceremonial, cultural, food gathering
- Military activity notice to tribes: action dates that may affect tribal community
- Military and tribal celebrations, events are opportunities for interaction (open to public; community events)
- Change of command ceremony; invitation, introduction with tribal leaders
- Regularly scheduled government-to-government meetings between installation commander and tribal elected leaders (semi-annually or more frequently if possible)
- Continuously review contracting opportunities for tribes or tribal members regarding DoD projects (including but not limited to clean up activities). Establish lines of communication so that tribes know how and when to participate in the contracting process.

2. Maps of tribal lands (reservations, ceded areas, cultural use areas, hunting, gathering, subsistence, migration areas; Alaska tribal land use areas, individual native allotments, town site lots, and any other Indian lands identified as potentially affected)

To be provided by local tribal government(s). Sensitive areas need *only be broadly and generally identified* in order to maintain confidentiality and preserve tribal cultural privacy, sovereignty and site security. Information is to be used by the military installation to avoid harming sensitive areas during military training or exercises. Some confidential information may not be appropriate for record keeping. Direct discussions between the tribe and military may be necessary in those instances.

3. Maps of local military installation and activity areas in relationship to tribal lands or tribal use areas (to be jointly developed by local tribe(s) and DoD installation tribal liaison staffs)

4. Maps of any additional natural, cultural or other resource areas of concern to tribal government(s) and local military installation. May include federal wetlands, refuges, endangered species habitat, management units, subsistence resources (ANILCA), marine mammals, NAGPRA, other federal laws, and tribal resource protection laws and policies.

(To be jointly developed by tribal government(s) and DoD installation liaison staff)

Important Points of Contact

For Tribal Governments:

Names of Tribe(s)

(include displaced/absentee federally recognized tribes of the area)

Mailing Addresses:

Executive Officer (Chairperson or other) contact information:

Chairperson's phone and fax numbers, cell phone and email:

Tribal Chairperson's assistant or administrator: name, phone number, email:

Emergency Numbers:

Fire:

Police:

Other:

Designated Tribal Staff Person who deals with military matters:

Name:

Contact information:

Other Information:

For Military Installation/Command:

Name of Installation:

Mailing Address:

Installation Commander:

Commander Contact Information (phone, email, fax, cell phone):

Executive Assistant name, phone number, email:

Emergency Numbers:

**Designated Military Installation Tribal Liaison:
Name:**

Contact Information:

Other Information:

Correspondence & Phone Log Record

DATE	FROM	TO	ACTION or OUTCOME

ANNUAL CALENDAR

This calendar is a useful tool that can be jointly maintained by Installation Commanders and Tribal Government designated staffs. All parties are encouraged to share annual calendars and invite communities to public events.

- Tribal cultural, ceremonial timeframes, general locations and precautions:

- Military exercises, timeframes that will affect tribes; notification to tribes and precautions:

- Tribal government – Installation Command Government-to-Government meetings, discussions (semi-annually and as needed). May be informal or formal depending upon circumstances.

- Noteworthy Events:
 1. Tribal Council meeting dates (if regularly scheduled)

 2. Defense Installation change of command: date, event, tribal invitations, any changes in points of contact:

 3. Tribal election dates and notification of newly elected governing body, elected chairperson, officers, changes in points of contact:

 4. Community events/celebrations/commemorations to share:

Section IV.

References & Additional Resources

Examples of Cooperative Agreements between DoD and Tribal Governments

“Alaska Implementation Guidance for Department of Defense American Indian and Alaska Native Policy,” Dr. Jerome Montague, ALCOM, USAGAK, Elmendorf Air Force Base, 2005.

Memorandum of Understanding in Development of the Government-to-Government Relationship Between the Tohono O’Odham Nation and the 56th Fighter Wing at Luke Air Force Base. 2001

Resolution for the Tohono O’Odham Legislative Council re: Luke Air Force Base. 2001.

Alaska Tribal and Military Leaders Meeting III. Alaskan Command. December 2004.

MOU between 11th Air Force and Louden Tribal Council

DoD Alaska Native Liaisons/Points of Contact for Alaskan Command (ALCOM), USACE, USAF, US Army, Missile Defense Command, USAF 354th Fighter Wing, US Navy Alaska, US Army National Guard. 2005

Copies of above documents available through Office of Deputy Undersecretary of Defense for Installations and Environment, Senior Tribal Liaison, Washington, D.C. Phone 703 604-1926.



Cooperative Agreements

Lower 48 States

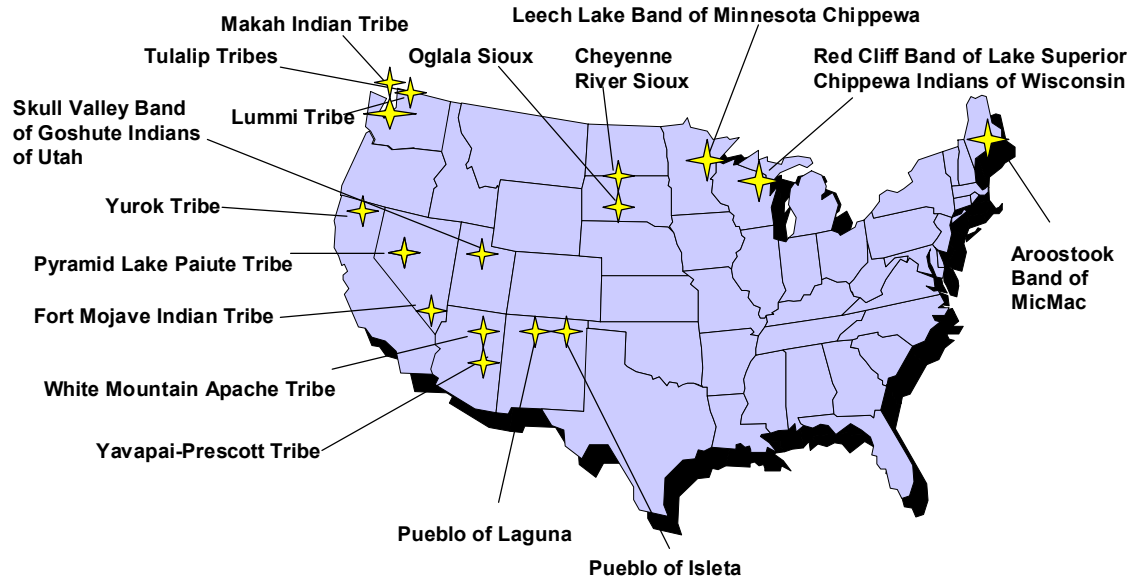


Figure 2.1



Cooperative Agreements

Alaska

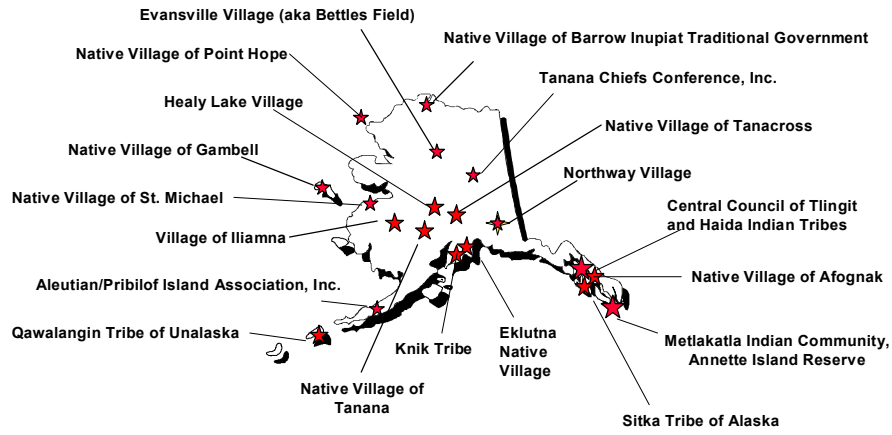


Figure 2.2

Department of Defense Programs & Contacts Related to Tribal Governments, Lands & Resources:

Department of Defense Native American Lands Environmental Mitigation Program (NALEMP).

Funded by Congress, mitigates for environmental impacts on Indian lands and Alaska (ANCSA) lands resulting from past Department of Defense activities. Eligible tribes can be funded through cooperative agreements. DoD provides training and technical assistance to tribes so that they may participate in clean up activities. Building tribal capacity helps tribal economic development. Annual budget currently only \$10 million nationally. Demand far exceeds funding level. Contact Paul Lumley, Senior Tribal Liaison, Washington, DC at 703 604-1926 or paul.lumley@osd.mil

NAETS: Native American Environmental Tracking System. Computerized, online tracking and reporting system for DoD related environmental issues nationally. Part of NALEMP tracking system. Tribes encouraged to report problems. Free hotline at 1-888-623-748 or on the web at: www.naets.info

Office of the Deputy Under Secretary of Defense (ODUSD), Installations and Environment, Washington, D.C. Primary office within DoD dealing with American Indian and Alaska Native programs, including DoD American Indian and Alaska Native Policy, NALEMP, NAETS, cultural communication training for DoD employees, tribal outreach, and cultural resources protection such as NAGPRA and the American Indian Religious Freedom Act. Contact: Paul Lumley, Senior Tribal Liaison at 703 604-1926 or paul.lumley@osd.mil

Tribal Liaison/Contacts for Military Service Branches:

Each military branch also has designated senior staff as tribal government liaisons for environmental, cultural and tribal consultation matters:

US Army Corps of Engineers:

Dr. Georgeanne Reynolds: Georgeanne.L.Reynolds@HQ02.USACE.army.mil

US Army:

Lee Foster: Alfred.foster@hqda.army.mil

Chip Smith: chip.smith@hqda.army.mil

US Marines:

Anthony C. Greene: GreeneAC@hqmc.usmc.mil 703 695-8232

US Navy:

Jay Thomas: thomasj@navfac.navy.mil

Kathleen McLaughlin: Kathleen.McLaughlin@navy.mil

US Air Force (all Alaska)

Dr. Jerome Montague: Jerome.montague@elmendorf.af.mil

Section V.

Policies & Laws: Government-to-Government

A. Department of Defense American Indian and Alaska Native Policy signed October 20, 1998

PREAMBLE

These principles establish the Department of Defense's (DoD) American Indian and Alaska Native Policy for interacting and working with federally-recognized American Indian and Alaska Native governments (hereinafter referred to as "tribes"¹). These principles are based on tribal input, federal policy, treaties, and other federal statutes. The DoD policy supports tribal self-governance and government-to-government relations between the federal government and tribes. Although these principles are intended to provide general guidance to DoD Components on issues affecting tribes², DoD personnel must consider the unique qualities of individual tribes when applying these principles, particularly at the installation level. These principles recognize the importance of increasing understanding and addressing tribal concerns, past, present, and future. These concerns should be addressed prior to reaching decisions on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.³

I. TRUST RESPONSIBILITIES

DoD will meet its responsibilities to tribes. These responsibilities are derived from:

- Federal trust doctrine (i.e., the trust obligation of the United States government to the tribes);
- Treaties, Executive Orders, Agreements, Statutes, and other legal obligations between the United States government and tribes, to include:
 1. Federal statutes (e.g., Native American Graves Protection and Repatriation Act, American Indian Religious Freedom Act, National Environmental Policy Act, National Historic Preservation Act, Alaska National Interest Lands Conservation Act, Alaskan Native Claims Settlement Act, and Archeological Resources Protection Act); and
 2. Other federal policies (e.g., Executive Order 12898, "Environmental Justice"; Executive Order 13007, "Indian Sacred Sites"; Executive Order 13021 "Tribal Colleges and Universities"; "Executive Memorandum: Government to Government Relations with Native American Tribal Governments," dated 29 April 1994; and Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments").

DoD will annually review the status of relations with tribes to ensure that DoD is:

- Fulfilling its federal responsibilities; and
- Addressing tribal concerns related to protected tribal resources, tribal rights, or Indian lands.

II. GOVERNMENT TO GOVERNMENT RELATIONS

Build stable and enduring relationships with tribes by:

- Communicating with tribes on a government-to-government basis in recognition of their sovereignty;
- Requiring meaningful communication addressing tribal concerns between tribes and military installations at both the tribal leadership-to-installation commander and the tribal staff-to-installation staff levels;
- Establishing a senior level tribal liaison in the Office of the Secretary of Defense and other appropriate points of contact within DoD to ensure that tribal inquiries are channeled to appropriate officials within DoD and responded to in a timely manner;
- Providing, to the extent permitted by DoD authorities and procedures, information concerning opportunities available to tribes necessary to enable tribes to take advantage of opportunities under established DoD authority to: 1) compete for contracts, subcontracts, and grants, and participate in cooperative agreements; 2) benefit from education and training; 3) obtain employment; and 4) obtain surplus equipment and property;
- Assessing, through consultation, the effect of proposed DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands before decisions are made;
- Taking appropriate steps to remove any procedural or regulatory impediments to DoD working directly and effectively with tribes on activities that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands; and
- Working with other federal agencies, in consultation with tribes, to minimize duplicative requests for information from tribes.

III. CONSULTATION

Fully integrate (down to staff officers at the installation level) the principle and practice of meaningful consultation and communication with tribes by:

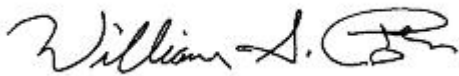
- Recognizing that there exists a unique and distinctive political relationship exists between the United States and the tribes that mandates that, whenever DoD actions may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands, DoD must provide affected tribes an opportunity to participate in the decision-making process that will ensure these tribal interests are given due consideration in a manner consistent with tribal sovereign authority;
- Consulting consistent with government-to-government relations and in accordance with protocols mutually agreed to by the particular tribe and DoD, including necessary dispute resolution processes;

- Providing timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands;
- Consulting and negotiating in good faith throughout the decision-making process; and
- Developing and maintaining effective communication, coordination, and cooperation with tribes, especially at the tribal leadership-to-installation commander level and the tribal staff-to-installation staff levels.

IV. NATURAL AND CULTURAL RESOURCES PROTECTION

Recognize and respect the significance tribes ascribe to certain natural resources and properties of traditional or customary religious or cultural importance by:

- Undertaking DoD actions and managing DoD lands consistent with the conservation of protected tribal resources and in recognition of Indian treaty rights to fish, hunt, and gather resources at both on- and off-reservation locations;
- Enhancing, to the extent permitted by law, tribal capabilities to effectively protect and manage natural and cultural tribal trust resources whenever DoD acts to carry out a program that may have the potential to significantly affect those tribal trust resources;
- Accommodating, to the extent practicable and consistent with military training, security, and readiness requirements, tribal member access to sacred and off-reservation treaty fishing, hunting, and gathering sites located on military installations; and
- Developing tribal specific protocols to protect, to the maximum extent practicable and consistent with the Freedom of Information Act, Privacy Act, National Historic Preservation Act, and Archeological Resources Protection Act, tribal information regarding protected tribal resources that has been disclosed to, or collected by, the DoD.



William S. Cohen
Secretary of Defense

1. As defined by most current Department of Interior/Bureau of Indian Affairs list of tribal entities published in Federal Register pursuant to Section 104 of the Federally Recognized Indian Tribe List Act.

2. This policy is not intended to, and does not, grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

3. Definition of Key Terms:

- **Protected Tribal Resources:** *Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.*
- **Tribal Rights:** *Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.*

- **Indian Lands:** *Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.*

**Annotated version of
Department of Defense
American Indian and Alaska Native Policy of October 20, 1998
(provides explanatory annotations as footnotes in preceding DoD policy)**

PREAMBLE

These principles establish the Department of Defense's (DoD) American Indian and Alaska Native Policy for interacting and working with federally-recognized American Indian and Alaska Native governments (hereinafter referred to as "tribes"¹)(a). These principles are based on tribal input, federal policy, treaties, and federal statutes. The DoD policy supports tribal self-governance and government-to-government relations between the federal government and tribes. Although these principles are intended to provide general guidance to DoD Components on issues affecting tribes² (b), DoD personnel must consider the unique qualities of individual tribes when applying these principles, particularly at the installation level. These principles recognize the importance of increasing understanding and addressing tribal concerns, past, present, and future. These concerns should be addressed prior to reaching decisions on matters that may have the potential to significantly affect (c&d) protected tribal resources, tribal rights, or Indian lands³ (e).

¹ As defined by most current Department of Interior/Bureau of Indian Affairs list of tribal entities published in Federal Register pursuant to Section 104 of the Federally Recognized Indian Tribe List Act.

²*This policy is not intended to, and does not, grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.*

³ *Definition of Key Terms:*

- **Protected Tribal Resources:** *Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.*
- **Tribal Rights:** *Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.*

- **Indian Lands (f):** Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

(a) This policy governs Department interactions with federally recognized tribes only; it does not govern interaction with unrecognized tribes, state-recognized tribes, Alaska Native village or regional corporations, or Native Hawaiians. [In Alaska, as a practical matter, the Department may need to discuss proposed actions with Alaska Native village or regional corporations simply because these corporate entities own and manage much of the land in Alaska. In such cases, the relationship between the Department and the corporate entity is a business relationship between the government and a private party, not a government-to-government relationship.]

(b) This policy neither enlarges nor diminishes the Department's legal obligations with respect to federally recognized tribes, nor does the policy provide an independent cause of action upon which the Department may be sued.

(c) The phrase "may have the potential to significantly affect," which appears throughout the policy, establishes the general threshold or "trigger" for consultation to be used unless a statute or other legal obligation specifically establishes a lower threshold for consultation. It is expected that DoD personnel will informally contact interested tribes whenever there is any real possibility that tribal interests may be affected by proposed DoD actions, but that continued, more formal consultation will be necessary only when it appears, from initial discussions with a tribe, that tribal interests will be *significantly* affected by the proposed action. In other words, the policy anticipates a two-step process designed first, 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; and second, to permit DoD to proceed without the need for further consultation unless potentially *significant* consequences are identified during this initial discussion. [Note: The word "significantly" is used in this policy in its ordinary dictionary sense; i.e., as a synonym for "material" or "important." It should not be interpreted in the NEPA or Council on Environmental Quality NEPA Regulations sense, as that would set a higher threshold for consultation than is intended.]

(d) There is no obligation to consult with tribes in advance of a proposal that "may have the potential to significantly affect" tribal interests. In other words, the obligation to consult with tribes under this policy is event- or proposal-driven. Nonetheless, as a matter of discretion, general consultation may be desirable where an installation expects to have frequent interaction with a tribe and wishes to establish a stand-by

protocol for consultation absent the pressures associated with a particular proposal.

(e) The phrase "protected tribal resources, tribal rights, or Indian lands," which appears throughout the policy, works in conjunction with the "may have the potential to significantly affect" trigger to determine when DoD must consult with tribes. Generally speaking, DoD must consult with tribes only when its proposed actions may have the potential to significantly affect Indian lands, treaty rights, or other tribal interests protected by statute, regulation, or executive order. [Note: Some statutes may establish a lower threshold for consultation than the default threshold established in this policy (see, e.g., 16 U.S.C. 470a(d)(6)(B)); in such cases, the Department must consult with tribes in accordance with the statutory requirements.] [Note also, that individual rural residents of Alaska, including both Natives and non-Natives, generally have a right to engage in non-wasteful subsistence uses of fish, wildlife, and other wild, renewable resources on public lands in Alaska. While this right is not a *tribal* right *per se*, installations nonetheless may find it both convenient and beneficial to consult with the appropriate Alaska Native entity whenever a proposed DoD action may have the potential to adversely affect the subsistence activities of several members of the same village or tribe.]

(f) With respect to Alaska, the term "Indian Lands" does not include lands held by Alaska Native Corporations or lands conveyed in fee to an Indian Reorganization Act entity or traditional village council; the term may include village-owned townsite lands (depending on the particular status of the village itself and upon a fact-specific inquiry into whether the area at issue qualifies as a dependent Indian community), and individual Native townsite lots and Native allotments (so long as these properties remain in either restricted fee or trust allotment form).

I. TRUST RESPONSIBILITIES

DoD will meet its responsibilities to tribes. These responsibilities are derived from:

- Federal trust doctrine (g) (i.e., the trust obligation of the United States government to the tribes);
- Treaties, Executive Orders, Agreements, Statutes, and other obligations between the United States government and tribes, to include:
 1. Federal statutes (e.g., Native American Graves Protection and Repatriation Act, American Indian Religious Freedom Act, National Environmental Policy Act, National Historic Preservation Act, Alaska National Interest Lands Conservation Act, Alaskan Native Claims Settlement Act, and

Archeological Resources Protection Act); and

2. Other federal policies (e.g., Executive Order 12898, "Environmental Justice"; Executive Order 13007, "Indian Sacred Sites"; Executive Order 13021 "Tribal Colleges and Universities"; "Executive Memorandum: Government to Government Relations with Native American Tribal Governments," dated 29 April 1994; and Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments").

DoD will annually review the status of relations with tribes to ensure that DoD is:

- Fulfilling its federal responsibilities; and
- Addressing tribal concerns related to protected tribal resources, tribal rights, or Indian lands.

(g) Under the federal trust doctrine, the United States--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 (i.e., treaties, statutes, agreements) creating the duty. Where agency actions may affect Indian lands or off-reservation treaty rights, the trust duty includes a substantive duty to protect these lands and treaty rights "to the fullest extent possible." Otherwise, unless the law imposes a specific duty on the federal government with respect to Indians, the trust responsibility may be discharged by the agency's compliance with general statutes and regulations not specifically aimed at protecting Indian tribes

II. GOVERNMENT TO GOVERNMENT RELATIONS

Build stable and enduring relationships with tribes by:

- Communicating with tribes on a government-to-government basis **(h)** in recognition of their sovereignty;
- Requiring meaningful communication addressing tribal concerns between tribes and military installations at both the tribal leadership-to-installation commander and the tribal staff-to-installation staff levels **(i)**;
- Establishing a senior level tribal liaison in the Office of the Secretary of Defense **(j)** and other appropriate points of contact within DoD to ensure that tribal inquiries

are channeled to appropriate officials within DoD and responded to in a timely manner;

- Providing, to the extent permitted by DoD authorities and procedures, information concerning opportunities available to tribes to: 1) compete for contracts, subcontracts, and grants, and participate in cooperative agreements; 2) benefit from education and training; 3) obtain employment; and 4) obtain surplus equipment and property;
- Assessing, through consultation, the effect of proposed DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands before decisions are made **(k)**;
- Taking appropriate steps to remove any procedural or regulatory impediments to DoD working directly and effectively with tribes on activities that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands; and
- Working with other federal agencies, in consultation with tribes, to minimize duplicative requests **(l)** for information from tribes.

(h) Indian tribes have been called "domestic dependent nations"--i.e., nations within a nation. As such, consultation with tribes on a "government-to-government basis" requires a high degree of formality (see attached sample framework for consultation). Unless--or until--a tribal-specific protocol for consultation has been developed, formal contact with a tribe should be made by the installation commander, and should be directed to the tribe's senior elected official, usually referred to as the tribal chair, governor, or president.

(i) Although communication with tribes on a government-to-government basis demands attention--at least initially--at a relatively senior level of command, the goal should be to develop mutually acceptable protocols or procedures that will allow most day-to-day liaison and work with interested tribes to be accomplished on a staff-to-staff basis. Senior commanders and tribal leaders should be kept apprised of this day-to-day interaction, but--once these protocols are in place--need act personally and directly only when requested to do so by the other party.

(j) Although the Deputy Under Secretary of Defense for Environmental Security will provide tribes with a senior-level liaison to ensure tribal inquires are promptly addressed, DoD officials at all levels of command should strive to make it easier for

tribes to receive timely answers to the questions they may have concerning DoD activities that may affect them. One way to accomplish this at the installation level could be to designate and announce a principal point-of-contact for the receipt of tribal inquiries.

(k) The single most important element of consultation is to initiate the dialogue with potentially affected tribes *before* decisions affecting tribal interests are made. Meaningful consultation demands that the information obtained from tribes be given particular, though not necessarily dispositive, consideration; this can happen only if tribal input is solicited early enough in the planning process that it may actually influence the decision to be made. Consultation is worth very little if decisions have already been made.

(l) Keep in mind that many tribes have relatively few enrolled members and only a limited staff to respond to your requests. This being the case, coordinate your requests for information with other federal agencies whenever doing so may reduce the administrative burden on the affected tribe.

III. CONSULTATION

Fully integrate (down to staff officers at the installation level) the principle and practice of meaningful consultation and communication with tribes by:

- Recognizing that there exists a unique and distinctive political relationship between the United States and the tribes that mandates that, whenever DoD actions may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands, DoD must provide affected tribes an opportunity to participate in the decision-making process that will ensure these tribal interests are given due consideration in a manner consistent with tribal sovereign authority **(m)**;
- Consulting consistent with government-to-government relations and in accordance with protocols mutually agreed to **(n)** by the particular tribe and DoD, including necessary dispute resolution processes;
- Providing timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands;

- Consulting in good faith throughout the decision-making process **(o)**; and
 - Developing and maintaining effective communication, coordination, and cooperation with tribes, especially at the tribal leadership-to-installation commander level and the tribal staff-to-installation staff levels.
-

(m) What constitutes "due consideration...consistent with tribal sovereignty" depends, in part, on the underlying law that dictates that consultation take place.

"Consultation" can vary from simple notice of a pending action to negotiation to obtain the tribe's formal consent to a proposed action (the absence of which may be enough to stop that action from proceeding). The attached table summarizes the specific legal obligations owed tribes under the trust doctrine and various statutes. In general, two principles should be kept in mind. One, tribes are not just another interested party; where tribal interests may be significantly affected, tribes must be regarded as separate from the general public for the purposes of consultation. Second, in most cases, consultation should include an invitation to potentially affected tribes to provide information to DoD concerning actions that may significantly affect tribal interests; that information should be given special consideration. In some instances, e.g., where Indian lands or treaty rights may be significantly and adversely affected, tribal rights may take precedence and dictate that DoD protect these rights to the fullest extent possible.

(n) There are over 570 federally recognized Indian tribes, each with its own distinctive cultural identity. Just as is true with foreign nations, a "one-size-fits-all" prescription for consultation with Indian tribes is neither appropriate nor possible. Instead, installations should expect to have to negotiate a mutually agreeable protocol with each separate tribe with which it must consult. While certain elements can be expected be a part of any such protocol, installations should be mindful of the fact that tribes all have different ways of controlling property, harvesting natural resources, revering the environment, and even conducting consultations.

(o) Keep it in mind that the consultation trigger contemplates a two-step process. Consultation need continue throughout the decision-making process only for those proposals that have the potential to *significantly* affect tribal interests.

IV. NATURAL AND CULTURAL RESOURCES PROTECTION

Recognize and respect the significance tribes ascribe to certain natural resources and properties of traditional or customary religious or cultural importance by:

- Undertaking DoD actions and managing DoD lands consistent with the conservation of protected tribal resources and in recognition of Indian treaty rights to fish, hunt, and gather resources at both on- and off-reservation locations **(p)**;
- Enhancing, to the extent permitted by law, tribal capabilities to effectively protect and manage natural and cultural tribal trust resources **(q)** whenever DoD acts to carry out a program that may have the potential to significantly affect those tribal trust resources;
- Accommodating, to the extent practicable and consistent with military training, security, and readiness requirements, tribal member access to sacred and off-reservation treaty fishing, hunting, and gathering sites located on military installations; and
- Developing tribal specific protocols to protect **(r)**, to the maximum extent practicable and consistent with the Freedom of Information Act, Privacy Act, National Historic Preservation Act, and Archeological Resources Protection Act, tribal information regarding protected tribal resources that has been disclosed to, or collected by, the DoD.

(p) Fulfillment of the trust responsibility demands that federal agencies protect the lands and habitats that support the resources upon which the meaningful exercise of tribal hunting, fishing, and gathering rights depend. This includes actions on non-Indian-owned lands (including DoD installations) that may affect Indian lands or off-reservation treaty rights (such as reserved rights to hunt, fish, or gather on treaty-ceded lands or "usual and accustomed" grounds and stations). In addition, in Alaska, DoD must endeavor to protect the continued viability of all wild, renewable resources in order to minimize, to the extent possible, the adverse effects of its actions on rural residents who depend upon subsistence uses of such renewable resources.

(q) Where a proposed DoD action may have the potential to significantly affect tribal *trust* resources (i.e., Indian lands or treaty rights to certain resources) or DoD has been given express statutory authority (e.g., §8050 of the Department of Defense Appropriations Act of FY 1999), DoD may have limited authority to help develop and enhance the affected tribe's capacity to better manage these resources. This, however, is an area fraught with fiscal law pitfalls; consequently, installations are advised to consult with legal counsel before committing to expend appropriated funds for this purpose.

(r) Presently, legal authority to protect tribal information concerning sacred sites is very limited. Section 9 of the Archeological Resources Protection Act (16 U.S.C. § 470hh) and Section 304 of the National Historic Preservation Act (16 U.S.C. § 470w-3) may provide some protection from a request for such information, but may not be enough to guarantee confidentiality in the face of a Freedom of Information Act request for disclosure--especially the NHPA provision. A written consultation agreement with a tribe may be appropriate in some circumstances and permit an installation to withhold disclosure under FOIA Exemption 5, but even this tactic may prove to be ineffective. As a consequence, installations should be careful not overstate their ability to keep sensitive tribal information confidential.

C. Federal Orders and Policies Regarding Consultation with Tribal Governments (and electronic links to complete text on the internet)

Courtesy of T. Schlosser www.schlosserlawfiles.com

Presidential

[Presidential memorandum](#) for the Heads of Executive Departments and Agencies Government-to-Government Relationship with Tribal Governments (September 23, 2004).

[Bush pledges](#) to uphold sovereignty (Aug. 30, 2000)

[Executive Order No. 13175](#) – Consultation and Coordination with Indian Tribal Government, 65 Fed. Reg. 67249 (Nov. 6, 2000).

[Executive Order No. 13096](#) – American Indian and Alaska Native Education, 63 Fed. Reg. 4268 (August 6, 1998).

[Executive Order No. 13084](#) – Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27655 (Apr. 14, 1998).

[Executive Order No. 13007](#) – Indian Sacred Sites, 61 Fed. Reg. 26711 (May 24, 1996).

[Presidential memorandum](#) for the Heads of Executive Departments and Agencies regarding Government-to-Government relations with Native American Tribal Governments (Apr. 29, 1994), 59 Fed. Reg. 22951 (May 4, 1994).

[Statement by President George H. Bush](#) – reaffirming the government-to-government relationship between the federal government and tribal governments (June 14, 1991).

[President Ronald Reagan's American Indian Policy](#), 19 Weekly Comp.Pres.Doc.98 (Jan. 24, 1983).

[President Richard Nixon's special message](#) on Indian affairs (July 8, 1970).

Department of Defense

[Memorandum for U.S. Army Corp of Engineers](#) Commanders – Policy Guidance Letter No. 57, Indian Sovereignty and Government-to-Government Relations with Indian tribes (Feb. 18, 1998).

[Department of Defense](#) American Indian and Alaska Native Policy (October 20, 1998)

Federal Orders, Executive Statements (cont.)

67249

Federal Register

Vol. 65, No. 218

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Title 3—

The President

Executive Order 13175 of November 6, 2000

Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) “Policies that have tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) “Tribal officials” means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties,

statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. *Policymaking Criteria.* In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated

official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. *Increasing Flexibility for Indian Tribal Waivers.*

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by

the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. *Accountability.*

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. *Independent Agencies.* Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. *General Provisions.* (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

/s/ William J. Clinton

THE WHITE HOUSE,

November 6, 2000.

[FR Doc. 00-29003

Filed 11-8-00; 8:45 am]

Billing code 3195-01-P

Federal Orders, Executive Statements (cont.)

Executive Order 13007 of May 24, 1996

Indian Sacred Sites

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

- i. "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;
- ii. "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian tribe; and
- iii. "Sacred site" means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Section 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things,

- i. any changes necessary to accommodate access to and ceremonial use of Indian sacred sites;
- ii. any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and
- iii. procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Section 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, "agency action" has the same meaning as in the Administrative Procedures Act (5 U.S.C. 551[13]).

Section 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person.

/s/ **William J. Clinton**

The White House

May 24, 1996

Updated April 30, 2002

Federal Orders, Executive Statements (cont.)

PRESIDENT NIXON, SPECIAL MESSAGE ON INDIAN AFFAIRS

JULY 8, 1970

The new direction of Indian policy which aimed at Indian self-determination was set forth by President Richard Nixon in a special message to Congress in July 1970. Nixon condemned forced termination and proposed recommendations for specific action. His introduction and conclusion are printed here.

To the Congress of the United States:

The first Americans - the Indians - are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement employment, income, education, health - the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proved to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country - to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

SELF-DETERMINATION WITHOUT TERMINATION

The first and most basic question that must be answered with respect to Indian policy concerns the history and legal relationship between the Federal government and Indian communities. In the past, this relationship has oscillated between two equally harsh and unacceptable extremes.

On the other hand, it has - at various times during previous Administrations - been the stated policy objective of both the Executive and Legislative branches of the Federal government eventually to terminate the trusteeship relationship between the Federal government

and the Indian people. As recently as August of 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies. This would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled. Tribal property would be divided among individual members who would then be assimilated into the society at large.

This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.

The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.

The third argument I would make against forced termination concerns the effect it has had upon the overwhelming majority of tribes which still enjoy a special relationship with the Federal government. The very threat that this relationship may someday be ended has created a great deal of apprehension among Indian groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the Federal government will disavow its responsibility and cut them adrift.

In short, the fear of one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the Federal government. In many cases this dependence is so great that the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials in Washington, D.C., rather than to the communities they are supposed to be serving. This is the second of the two harsh approaches which have long plagued our Indian policies. Of the Department of Interior/s programs directly serving Indians, for example, only 1.5 percent are presently under Indian control. Only 2.4 percent of HEW's Indian health programs are run by Indians. The result is a burgeoning Federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale.

I believe that both of these policy extremes are wrong. Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

This, then, must be the goal of any new national policy toward the Indian people to strengthen the Indian's sense of autonomy without threatening this sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy....

The recommendations of this administration represent an historic step forward in Indian policy. We are proposing to break sharply with past approaches to Indian problems. In place of a long series of piecemeal reforms, we suggest a new and coherent strategy. In place of policies which simply call for more spending, we suggest policies which call for wiser spending. In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.

But most importantly, we have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be furthered. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

The Indians of America need Federal assistance – this much has long been clear. What has not always been clear, however, is that the Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life. It is a new and balanced relationship between the United States government and the first Americans that is at the heart of our approach to Indian problems. And that is why we now approach these problems with new confidence that they will successfully be overcome.

[*Public Papers of the Presidents of the United States: Richard Nixon, 1970, pp. 564-567, 576-76.*]

Federal Orders, Executive Statements (cont.)

American Indian Religious Freedom Act of 1978

§ 1996. Protection and preservation of traditional religions of Native Americans

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Glossary and Definition of Terms

“Indian Tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. The United State’s legal definition for Indian tribes: *“Any tribe, band, nation, rancheria, pueblo, colony or community which is recognized by the United States government as eligible for programs and service provided by the Secretary of the Interior to Indians because of their status as Indians.”*

There are over 260 federally-recognized tribes in the U.S. (314 recognized reservations)

229 of those tribes are in Alaska

Populations range from several individuals in California tribal bands, to Cherokees of Oklahoma at over 350,000

Approximately 200 tribes are extinct

“Consultation with Tribes” (generally). In formulating policies that significantly or uniquely affect Indian tribal governments, agencies are to be guided by principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique legal relationship between the Federal Government and Indian Tribal governments. (See Executive Order 13084, May 14, 1998)

DoD personnel must consider the unique qualities of individual tribes, particularly at the installation level. Concerns should be addressed prior to reaching decisions on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands. (See DoD American Indian and Alaska Native Policy Preamble, October 20, 1998)

“Consultation” (for regulatory actions published in the Federal Register affecting tribes). Each agency shall have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities. A description of the extent of the agency’s prior consultation with representatives of affected Indian tribal governments, a summary of the nature of their concerns, and the agency’s position supporting the need to issue the regulation, and any written communication submitted to the agency by Indian tribal governments. On issues relating to tribal self-government, trust resources, or treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking. (EO 13084, May 14, 1998)

“Sacred Site” means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to

be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonials use by, and Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site. (EO 13007, May 24, 1996)

“Indian Trust Lands” Lands held in trust by the United States for the benefit of any Indian tribe or individual.

“Protected Tribal Resources” Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for , Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources. (DoD American Indian and Alaska Native Policy, October 20, 1998)

Reservation or Reserve: *An Indian reservation is an area of land held in trust by the federal government, reserved for Indian use.*

“Tribal Rights” Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement. (DoD American Indian and Alaska Native Policy, Preamble, October 20, 1998)

“Trust Responsibility” The United States is a fiduciary whose actions are to be judged by the highest standards. Because the federal government has so much control over the resources of Indian nations and individual Indians, the trust doctrine is implied in dealings even if not explicitly stated. Trust responsibility affects everything the federal government is involved in, from education and health care to trust lands, natural resources and the Bureau of Indian Affairs. (Source: Native American FAQs Handbook, 2000).

“Trust Relationship” is a doctrine of federal trusteeship where Indian tribes, according to the U.S. Supreme Court, are not foreign nations, but are “distinct political” communities that the Court referred to as “domestic, dependent nations” and whose “relation to the United States resembles that of a “ward to his guardian.” See Cherokee Nation v. Georgia (1831).

The trust responsibilities of federal officials require “obligations of the highest responsibility and trust” and “the most exacting fiduciary standards” when working with tribes. The 1995 Executive Memorandum of President Clinton directed each federal agency to establish a government-to-government policy. As a result, the special relationship reaches far beyond the Bureau of Indian Affairs.⁵

“The purpose behind the **trust doctrine** is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources,

⁵ Charles Wilkinson & American Indian Resources Institute. “Indian Tribes as Sovereign Governments” Second Edition. AILTP. Oakland, CA. (2004).

and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.” The federal government’s trust duty “is owed to all Indian tribes” including those that did not enter into treaties with the United States. The trust doctrine “transcends specific treaty promises and embodies a clear duty to protect the native land base and the ability of tribes to continue their ways of life.”⁶

⁶ M.C. Woods, “Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited.” *Utah Law Review*. (1994)

Historical Eras of Federal Indian Policy

History of Federal Indian Policy

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The relationship between European countries, the United States and American Indian tribes on the North American continent has been one of conflict, strife and occasional warfare between different people, cultures and religions. Indian tribes owned properties the European settlers and, later, the American colonists and United States citizens wanted; land and its valuable resources including animals and furs, water, timber, and minerals. Europeans also brought new ideas, new ways of life, new forms of government and religion, and new diseases to the North American continent. All of these factors played a major role in changing the cultures and lives of the natives of North America.

American Indian tribes and native people also played an important role in American history and had an important effect on the European settlers who came to this continent. From the first time European settlers landed at Jamestown Virginia in 1607, tribes sometimes helped and sometimes opposed the European settlement and development of the North American continent. Indian tribes undoubtedly had a major influence on the development of the original thirteen English colonies in America and on the establishment of the United States government. The European countries, and later the United States government, had to deal politically on a government-to-government basis with tribal governments and had to address the interests of Indian people.

The overriding theme of the policies pursued by the governments of England and the United States towards tribes was to assimilate, or absorb Indian people into the non-Indian population by teaching them the christian religion, and by “civilizing” them by changing their cultures and ways of life. The alternate goal of many United States citizens and politicians in the past was to exterminate Indians.

These non-Indian governments decided from the beginning to interact with tribes as governments which had authority, or jurisdiction, over their people and their territory. Thus, the countries of England, France, Spain, Holland and the United States entered treaties with tribes to purchase land and to guarantee peace between the new settlers and the Indians. This decision to deal with Indian tribes on a political government-to-government treaty basis has left American Indians today with the status of being citizens of the United States, the state wherein they live, and also as citizens of their individual tribes. Consequently, Indian people have a political status vis-a-vis the United States and thus when the U.S. enacts laws that benefit or harm Indians it is an issue of “affirmative action” or that the U.S. is preferring one race over another. This is so because federal laws directed at Indians are based on the political status of the citizenship of Indians in their tribal governments and thus U.S. actions towards Indians and tribes are politically based and not racial in nature.

Knowledge of the policies that the European countries and the United States followed with regards to Indians is very important to understanding how tribes have survived to this day as sovereign governments, why the United States treats Indians as tribal citizens, why tribes possess treaty rights, and the very history of non-Indian and Indian interactions in this country. The official United States Indian policies often changed slowly over time but occasionally they changed drastically and in a very short time. This has left our history with a confusing mix of federal actions taken toward Indians which reflect the twin goals of either assimilating Indians into American society or exterminating them. We will examine the various stages of federal Indian policy in their chronological order.

Colonial Period (1492-1774) including military relationship with tribes

In 1492, when Christopher Columbus landed on the island of Haiti in the Caribbean Ocean, he thought he had discovered a "New World." However, it is estimated that 10-30 million native people were already living in North America, that is, in the area that now encompasses the present day countries of Mexico, United States and Canada. In fact, the island of Haiti had a population of about 250,000 Indians when Columbus arrived. In less than 20 years, the population had declined to less than 15,000 because European diseases, warfare, and the effects of slavery on the Indians had killed off the majority of the island's natives. This depressing historical pattern also occurred to most of the native people of North America. It is estimated that European diseases such as smallpox, influenza, and the measles killed up to 90% of all natives in North America. These diseases were often spread to tribes by lone trappers, explorers or other Indians, and often well established and complex native societies and governments were ravaged by epidemics and nearly destroyed long before white settlers appeared on the scene.

England and the other European countries that explored, colonized and settled what is now the United States followed official governmental policies of dealing with Indian tribes as sovereign governments through diplomatic means. Starting with England as early as 1620, and France, Spain, Russia and Holland, the European powers negotiated with Indian tribes through official government-to-government council sessions and by entering treaties which recognized tribal governmental control over their citizens and territory. These European countries were interested in gaining control over land, minerals such as gold and silver, and other valuable assets. They dealt with tribal governments and the native people as being the rightful owners of these resources. The European countries were also interested in spreading their christian religion and their culture, or what they called "civilization," to Indians.

England's North America policy was to settle and colonize the land, develop it for farming and European habitation, extract as much money and value from the land and Indian people as possible, and to civilize and christianize the Indians. The King of England demonstrated these policies by granting a Crown Charter in 1606 to the Virginia Company, a business group of investors and merchants, to establish colonies in North America. One of the main purposes of the Charter was to introduce the christian religion to the Indians because, as the King thought, Indians lived in "Darkness and miserable Ignorance of the true knowledge and worship of God." The King also thought that learning the European religion would "bring the Infidels and Savages . . . to human Civility, and to a settled and quiet Government." Most of the other European countries that explored and settled in the New World also pursued the religious conversion of natives. English law in 1608 assumed that the christian English King had a

right to conquer and rule non-Christian countries because they were assumed to be enemies of Christianity and subjects of the devil. Various popes of the Catholic Church also granted permission for European countries to explore, conquer and Christianize parts of the world.

Indian tribes were a significant danger and a problem for England in its attempt to colonize North America. Several wars broke out between England and tribes starting as early as 1622 due to tribal distrust of the increasing number of English settlers and their encroachments on tribal lands. England also had to fight other major Indian wars in 1644, the French and Indian War in 1754, and had to deal with continuous minor fighting between its settlers/colonists and tribes. In fact, the colonists meddled in Indian affairs and encroached on tribal lands so often that the subsequent fighting threatened the English Crown's interests in North America and was an expensive and troublesome problem for the King. Hence, King George III of England issued the Royal Proclamation of 1763 to prohibit encroachments by his English subjects in the thirteen American colonies and in Canada on tribal lands without the King's permission and without prior English governmental arrangements with the tribes. This Proclamation literally defined "Indian country" and the areas the colonists should stay out of as all lands west of the Appalachian Mountains on the western borders of the thirteen American colonies. However, land speculators, which included George Washington, Thomas Paine and others of our "Founding Fathers," violated this order of the King and continued to survey, purchase and prepare to settle Indian lands that the King had said were off limits to colonial settlement.

English policies towards tribes also emphasized the importance of securing the friendship of tribes and preventing them from joining with France to fight the English settlers. England engaged in treaty making and official diplomatic relations to address tribal concerns and gave many gifts to tribes to secure their friendship and peace. The Royal Proclamation of 1763 was part of this official attempt by the government of England to deal with tribes politically and as sovereign governments.

Confederation Period (1774-1789)

As the thirteen colonies in America chafed under English rule, they loosely organized themselves in September 1774 under a "Continental Congress" which would address the colonies' affairs on the national level. When resistance to English control led to fighting in 1775 and 1776, the colonies took the dramatic step to declare independence from England on July 4, 1776 and to fight the Revolutionary War. The Continental Congress, which existed from 1774-1781, fought and won the Revolutionary War and also enacted official policies towards Indian tribes in an attempt to keep them neutral in the War to prevent tribes from fighting for England or even to recruit the tribes to fight for the new American government. Many tribes fought for the English; some tribes fought with George Washington in the Continental Army against the English. The Continental Congress dealt with Indian tribes on a diplomatic basis, sent treaty negotiators and gifts to the tribes, and did everything it could to keep Indian tribes happy and from helping the English. The Continental Congress ultimately entered one treaty with the Delaware Tribe in 1778. This American government placed the highest priority on maintaining good relations with tribes.

The attitude of the American colonists towards Indians, however, was generally one of fear and hatred. Many colonists, especially on the western borders, were often involved with

skirmishes and battles with Indians. Thus, even after winning independence from England, the new United States government, now called the Articles of Confederation Congress, from 1781-1789, was heavily involved in dealing with Indian tribes and keeping the peace on the border. This new government was very weak, however, and lacked money and an army to fight the Indian tribes and the thousands of warriors they possessed. Thus, the Articles of Confederation government was very desirous of keeping tribes happy and avoiding warfare.

The attitude of the new American government towards Indians as of 1783 was well exemplified by what George Washington described as the "Savage as Wolf." Most Americans believed that Indian tribes would just slowly disappear and die off as the American pioneers and settlers expanded the frontier and built new farms and cities further and further west. As the forests were cut down and farms and towns established, George Washington wrote that just as the animals and wolves of the forest vanished before the advance of the American settlements and the destruction of the forest so too would the Indians just slowly vanish before the advance of white civilization. He argued that it was unnecessary to fight wars against the tribes and waste tax money and lives when time and the advancement of the American society would soon enough drive back the tribes.

The Articles of Confederation was a document adopted in 1781 by the thirteen colonies/states to form a new government and to meet in a new Congress to manage their affairs on the national level. The states had come to realize that they needed a stronger, better organized national government than the Continental Congress. A very important function of this new Articles of Confederation Congress was to handle Indian affairs and prevent wars with tribes. To keep the peace, this new Congress also sent diplomatic representatives and gifts to the tribes and promised friendship and peace. This Congress ultimately signed eight treaties with Indian tribes between 1781-1789. The Articles of Confederation, however, did not give this government the exclusive power to deal with tribes and thus different states began to meddle in Indian affairs and enter agreements with tribes to buy Indian lands. This actually caused wars and conflicts between tribes and New York, Georgia and North Carolina, for example. The impact on the national government from states getting involved in Indian affairs led many people to call for the formation of a new and even stronger United States government where the exclusive power over Indian affairs would be placed only in the hands of the national government and would be taken completely away from the states and individuals. Hence, issues over Indian affairs and the power of the national government to institute and enforce policies towards tribes led to the formation of a new United States government; the very government we live under today.

When the representatives of the thirteen colonies/states started drafting the United States Constitution, our "Founding Fathers" had to carefully consider the role of Indian tribes in the political arrangement of the new nation and the direction of federal Indian policies. As James Madison, one of the main drafters of our Constitution, pointed out, much of the trouble that England and the thirteen colonies had suffered with Indian tribes from the 1640's forward arose when individual colonists or colonial governments tried to steal Indian lands by dealing with tribes without the involvement of the English King or the American national leadership. The drafters of the United States Constitution tried to solve this problem by taking Indian

affairs out of the hands of the colonies/states and individuals and placing the sole power to deal and negotiate with tribes into the hands of the U.S. Congress. The new Constitution of the United States was ratified in 1789 by the thirteen colonies/states and the new government began functioning and meeting in a new Congress in the fall of 1789.

Trade and Intercourse Era (1789-1825)

The United States government we live under today was created and began operating in the fall of 1789. At the beginning, one of its most important duties was to keep the peace with the Indian tribes and to manage affairs with tribes by keeping the thirteen states and individuals from meddling with tribes. Indian affairs were the most pressing and important foreign affairs issues that the new United States was faced with because the thousands of hostile Indians who lived within the United States itself and on its western borders created a serious threat to the security of the new United States.

The United States immediately instituted the English, colonial and European tradition of dealing with Indian tribes through a governmental, sovereign-to-sovereign, political relationship. From its very beginning, the U.S. dealt with Indian tribes through official diplomatic means and through negotiated treaties. Indian affairs was a very important part of governmental life in early America. Indian tribes were very powerful in the 1700s and early 1800s in America and were a serious threat to the new United States; hence, the U.S. government was heavily involved in negotiating and dealing with tribes as part of its governmental policies. The United States ultimately negotiated and ratified almost 390 treaties with American Indian tribes. These treaties were formal government-to-government negotiations primarily regarding sales of land and property rights that tribes owned and that the United States wanted to buy.

The first Congress organized under the new U.S. Constitution immediately assumed the exclusive power granted it to control affairs with Indian tribes. In the first four weeks of its existence in 1789, the new Congress passed several laws setting out the official United States policy towards Indian tribes. First, Congress established a Department of War with responsibility over Indian affairs. Second, it set aside money to negotiate Indian treaties and it appointed federal commissioners to negotiate treaties with tribes. Thereafter, in July 1790, the new Congress passed a law called the Trade and Intercourse Act which is still in effect today. This Act gave this era of federal Indian policy its name. The Act forbids states or private individuals from dealing with tribes and from buying Indian lands. Consequently, the federal policies of dealing with tribes as political sovereign governments on a treaty basis and excluding states and individuals from having any role in the process were instituted from the very beginning of our United States government.

Just as the King of England had tried in 1763, the United States policies attempted to define Indian territory and to protect Indian rights by controlling purchases of Indian land, by regulating the trade of alcohol in Indian country and all traders' dealings with tribes, and by controlling the pioneers and settlers who were trying to take Indian lands. The United States also established official government trading houses throughout Indian country to sell goods to tribes both to foster peaceful relations but also to bind the tribes economically to the U.S. The

United States also made a poor attempt to enforce criminal laws in Indian territory against whites and Indians and it tried to promote civilization and education among Indians.

The tribes, however, remained a serious threat to the U.S. because they were still militarily powerful into the early 1800s. Thus, tribes possessed a strong bargaining position in the early days of the United States and the early treaties were slanted in favor of tribes. In fact, the very first American treaty with a tribe, the Delawares in 1778, invited them to form a state and join the union of the thirteen colonies. Later, in a 1785 treaty with the Cherokees, the tribe was invited to send a representative to Congress. After the American War of 1812, however, when many tribes fought for England, and the threat of English invasion of the United States ended, Indian tribes started losing power in relation to the U.S. because tribes lost the option of looking to England for supplies and arms to fight the U.S. As the United States grew stronger and its population grew larger, it began to overpower tribes and treaty making became more and more one-sided as the U.S. was able to dictate the terms of treaties to tribes.

Removal Era (1825-1850s)

The declining power of tribes and the increasing strength of the United States led to a change in federal Indian policy. In the mid-1820s, the federal government began openly discussing forcing all tribes to move west of the Mississippi River to give the United States room to grow and to end state and tribal conflicts over land and sovereignty issues. Actually, President Thomas Jefferson had written privately as early as 1803 that the tribes would one day have to be moved west of the Mississippi and, as mentioned above, George Washington had assumed that Indians would just disappear before the advance of white civilization as the wild animals of the forest disappeared before white farmers and settlements. The U.S. policy, then, became the peaceful and orderly advancement of the western frontier. The American frontiersmen and many of the states, however, had a more aggressive and deadly goal because they were openly hostile to Indians and wanted to ruthlessly drive them away so that white settlers could occupy and settle tribal lands.

In 1829, Andrew Jackson became the United States President. He was the first President from the western parts of the U.S. and he advocated a frontier, land-hungry, hostile attitude towards Indians. President Jackson supported and Congress passed the Removal Act to force tribes to move west of the Mississippi River. Ironically, some supposedly knowledgeable and sincere people also supported removing Indians to get them beyond the reach of white civilization so that Indians could avoid the bad habits of civilization while they slowly learned the good habits of education, civilization, and christianity.

The government picked land for tribes to be relocated to, called the "Indian Territory," in what is now the state of Oklahoma. Ultimately, the vast majority of tribes and Indians who lived east of the Mississippi River were removed to the Indian Territory. In the 1830s, many tribes, including the Cherokee on the infamous Trail of Tears, were forcibly marched to the Indian Territory. The final expulsion of the Cherokees in 1838 from their ancestral lands in Georgia by thousands of U.S. troops led to the death of over 4,000 out of the 16,000 Cherokee who started on the march. The Cherokee Tribe had vigorously fought removal by political means and even resorted to filing lawsuits in the United States Supreme Court. (See Sidebar) Tribes

from the Pacific Northwest and other areas of the country were also removed to the Indian Territory.

Many tribes were also removed to the Indian Territory via numerous treaty modifications. The United States often asked tribes to enter new treaties because frontiersmen and settlers had encroached on Indian lands and then, as conflicts developed, the federal government would convince the tribe to cede its lands and move further west under a new treaty which always promised the tribes they could keep these new lands forever.

Early Policy Interpretation: The Supreme Court and the Cherokee Cases

In the 1820s and 1830s, the state of Georgia fought vigorously to take over the Cherokee Tribe's lands and to destroy the ability of the Tribe to govern its people and territory. Between 1828 and 1830, Georgia passed several laws that violated the United States Constitution and the treaty promises the federal government had made to the Cherokees. Georgia claimed to divide up Cherokee land among various Georgia counties, to extend Georgia state laws to Indians and other persons in Cherokee country, to invalidate all Cherokee laws, and to make criminal any attempts by the Cherokee government to meet and act.

The Tribe first relied upon its treaty and the United States' promises to protect the Tribe and its lands and to keep states out of Indian affairs. President Andrew Jackson and the Congress, however, rejected the Tribe's requests. As a last step, the Tribe asked the United States Supreme Court for relief. This situation ultimately led to two very important cases which established many of the fundamental legal principles that still guide federal Indian law today. The lawsuits are called the Cherokee cases. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

In the Cherokee Nation case, the Tribe sued the state of Georgia to stop the state from passing laws that interfered with the Tribe and its territory. The Tribe argued that the United States Supreme Court had jurisdiction, or authority, to hear its case against Georgia because the U.S. Constitution said the Supreme Court had jurisdiction over suits by "foreign states" against any of the American states. Thus, the Supreme Court had to decide whether Indian tribes are "foreign states."

The Tribe argued that it was a foreign state because it was not one of the states of the union of the United States; its citizens, or tribal members, were aliens and not citizens of the United States; and that a government of aliens like the Cherokee Tribe must be a foreign state. The U.S. Supreme Court did not agree and held that the Tribe was not a foreign state and that consequently the Court did not have jurisdiction to hear the case. Hence, the Tribe could not sue Georgia in that Court. The Supreme Court said that Indian tribes are states, that is, they are distinct political entities capable of managing their own affairs and that by entering treaties with tribes the U.S. demonstrated that tribes were states. However, the Court held that tribes were not foreign to the United States. Instead, tribes relied on the protection and treaty promises of the U.S. and were "domestic dependent nations" who relied on the United States for protection and supplies. In fact, tribes are like a ward and the United States is the guardian and the federal government owes a duty to care for tribes. Hence, tribes were not "foreign" to the United States.

In the Worcester case, Georgia arrested and sentenced New England missionaries to prison for going into Cherokee country without the permission of the Governor of Georgia. The missionaries appealed their convictions to the U.S. Supreme Court. The Court ordered the missionaries freed because the laws of Georgia could have no effect in Cherokee country. This conclusion was based on the Court's analysis of the history of the federal government's relationship with tribes and its treatment of tribes as "distinct, independent, political communities" who had exclusive authority in their territory; the Cherokee treaties with the U.S. which demonstrated the Tribe was a government with control over its territory and people; and the constitutional and federal policies to keep states out of Indian affairs.

The Cherokee cases are still applied today and stand for the proposition that tribes are the wards of the nation and that the United States is their guardian and owes a trust responsibility to protect tribes and Indian people. Tribes are also sovereign governments as recognized by the treaties they signed with the United States, and they have the authority to govern their territory and their citizens. Moreover, for the most part, state laws still do not apply in Indian country unless Congress has provided otherwise.

Reservation Era (1850s-1887)

The federal policy to slowly and methodically remove all tribes to the Indian Territory was overwhelmed by the rush of events. In 1849, the discovery of gold in California, along with the opening of the Oregon Trail from 1840 forward, caused a leapfrog effect as U.S. citizens swarmed across the continent and began settling in areas owned by tribes. The massive immigration of gold seekers and white settlers into California and the filing of land claims for mining resulted in an experiment of setting aside specifically designated and separate tracts of land as reservations for Indian tribes. Tribes were asked or forced to give up their rights in all their lands and would instead "reserve" for themselves clearly defined areas of reservation land where their people and governments could exist separate and hopefully safe from the American gold miners and settlers.

The United States adopted this idea and began to pursue a reservation policy of entering treaties with tribes all over the country to separate Indians from white Americans so that conflicts and battles over land and rights would end. Originally, tribes were allowed to reserve vast amounts of land such as the 44 million acre reservation for the Shoshone Tribe in Wyoming. In 1851, the treaty with the Sioux tribes provided for the Great Sioux Reservation which included all of present day South Dakota, and parts of what is now Nebraska, Wyoming, North Dakota, and Montana. Only later did the U.S. realize it had allowed tribes to retain too great an amount of land for their reservations and hunting grounds and the U.S. came back time and again asking the tribes to enter new treaties and to accept much smaller reservations.

Indian Reorganization Era (1934-1940s)

The failure of the Allotment Era to assimilate Indians into white society, to teach them American capitalism, property rights and values, and the failure to raise their standard of living led to a major change in federal Indian policy. A federal report in 1928, demonstrated that allotment of tribal lands and the attempt to assimilate Indians was a total failure and that Indians were living under worse economic and social conditions than even before Allotment was instituted in 1887. Thus, as part of the New Deal under President Franklin Roosevelt, Congress passed the Indian Reorganization Act (“IRA”) and commenced a new federal Indian policy called the “Indian Reorganization” Era which ran from the early 1930s to about 1945.

Under the IRA, the United States completely reversed its Allotment policy due to the evident failure of attempts to assimilate Indians and to destroy their governments and cultures. Congress and the Executive Branch decided instead to support tribal governments and their sovereignty instead of attempting to destroy them. The IRA ended any more allotments of reservation lands and stopped the sales or loss of any remaining Indian allotments. Consequently, on many reservations today many individual Indians still own individual allotments of land left over from the Allotment Era. These people cannot sell or lease their allotments without the permission of the United States.

The IRA also took a first step towards allowing Indian people to regain control of their lives and to take back the power over their lives and cultures from the federal government. The IRA also tried to help strengthen tribal governments and help them to begin functioning as real governments controlling life on the reservations. The IRA provided for tribes to form governments under constitutions that are very similar to the U.S. Constitution. Tribes were encouraged to form court systems that imitate the United States court system. Tribes were even encouraged to form tribal corporations to provide economic development and jobs on reservations. Ironically, though, many critics charge that the IRA has resulted to a great extent in the assimilation of Indians because it has imposed American forms of government and judicial systems on tribes and has inhibited some traditional tribal governments and cultures.

Termination Era (1940s-1962)

In another complete turnabout in federal policy, from the mid-1940s to 1962, the United States again adopted an official Indian policy which sought to end the federal/tribal relationship, to terminate tribal treaty rights, and to assimilate Indians. Members of Congress now called for the repeal of the Indian Reorganization Act and Congress attempted to end the authority and legal existence of tribal governments. Once again, assimilation became federal policy as Congress sought to integrate Indians into the general American society. During this time, the federal government terminated the legal relationship between 109 Indian tribes and the United States. Thus, treaty rights, the existence as federally recognized sovereign tribes, and the right to various federal benefits were lost to these 109 tribes. In addition, these tribes lost the ownership of another 1.3 million acres of Indian land.

Congress also took other steps to save federal tax dollars and limit federal involvement in Indian affairs, and to expose tribes and Indians on some reservations to state control and jurisdiction. In 1953, Congress created state civil and criminal jurisdiction over Indian country in certain states. In the 1950s, Congress also transferred many of its educational responsibilities for Indians to the states and also transferred federal responsibilities to protect

the health of Indians from the Bureau of Indian Affairs, which has specific duties towards Indians, to the U.S. Department of Health, Education and Welfare. The Bureau of Indian Affairs also actively worked to relocate reservation Indians to big cities so that the federal responsibility to Indians could be ended.

Self-Determination Era (1962-Present?)

Federal Indian policy completely changed again in the early 1960s when President Kennedy's administration refused to undertake new actions to terminate more tribes. This was followed by federal programs in the mid-1960s which invested millions of dollars into tribal programs and infrastructure under the poverty programs of President Johnson's "Great Society." In 1970, President Nixon issued a landmark statement which named the new federal policy for Indian nations as "Self-Determination."

The "Self-Determination Era" of federal policy is still the official Indian policy today (2006). Under this policy, the government repudiated the termination of tribes. In fact, in the 1970s and 1980s, Congress "restored" most of the same tribes to full federal recognition that had been terminated in the 1950s. These tribes were restored to the full government-to-government political relationship with the United States, regained the ability to receive federal services, and were once again recognized by the federal government as sovereign tribal governments.

The principal federal law that marks this Era, and also takes its name from the policy, is the Indian Self-Determination and Education Assistance Act of 1975. This Act instituted a fundamental, philosophical change in the federal administration of Indian affairs. The Act allows tribes the major role in the governance of their territory and their people. It allows tribes to contract with the federal government for the delivery of federal services and programs to the reservation. While tribal programs continue to be federally funded, the programs can be planned, operated, and administered by the tribes themselves. Thus, federal domination of Indian affairs is supposed to end.

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