**Consultation, Coordination, and Relationship-Building**

**USACE and American Indian and Alaska Native Governments and Communities**

**[Unofficial, Informal Tips adapted from Many Sources]**

“***Protect American Indian and Alaskan Native people, communities, governments, and resources from adverse impacts through respectful, open, and positive interactions. Acknowledge tribal sovereignty. Coordinate and consult BERFORE Federal programs, projects, and activities are proposed or undertaken. The Federal government has a shared interest in environmental and cultural preservation, restoration and protection in Indian Country for the benefit of all Americans.***”

**Army Civil Works/USACE Tribal Nations Community of Practice**

Is dedicated to:

* Collaboration and consultation
* Consensus building with Federally-recognized Tribes
* Ensuring that Tribes are equal players in addressing water resources challenges
* Become knowledgeable regarding American Indians and Alaska Natives and applicable laws, regulations, Executive Orders, and policy guidance
* Pursue partnerships, joint research, and exchanges of technical assistance
* Establish two-way communications and exchanges of information
* Understand and value Tribal cultures, perspectives, beliefs, and ideas

**Six USACE Tribal Policy Principles**

* Recognize Tribal sovereignty
* Acknowledge Gov’t to Gov’t Relationship
* Consult BEFORE decisions are made
* Acknowledge and implement Federal trust responsibility
* Protect cultural, natural, spiritual resources/places when possible/authorized
* Promote economic capacity building

**Attributes of Sovereignty**

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

**Aspects of USACE Lands of Concern to Tribes**

* Tribal rights reserved by treaty
* Spiritual and cultural values and practices
* Archaeological and heritage resources
* Adjacent tribal or trust lands
* Tribal water rights
* Usual and customary fishing sites
* Landscape features/locations with spiritual significance to the Tribe

**Examples of Treaty rights** (may be on or off reservation lands)

* Grazing Rights
* Hunting and fishing rights
* Gathering rights
* Water rights
* Some extend beyond present-day reservation borders

**Learn the History of Federal Indian Policy**

* Pre-Constitution Policy (1533-1775)
* The Formative Years/Colonial Period (1776-1820)
* Removal Era (1820-1850)
* Reservation Era (1850-1887)
* Allotment & Assimilation (1887-1934)
* Reorganization (1934-1953)
* Termination & Relocation (1953-1968)
* Self Determination/Self Governance (1968-present)
* [Comment: not sure if you want to add this] Alaska Native Claims Settlement Act (1971)

**Tips for Conducting Effective Consultation & Coordination**

* Take time to meet with Tribal governments and visit on a regular basis
* Build and enhance mutual partnership
* Gain an understanding of each other to develop an effective governmental relationship
* Learn about treaties and rights of Tribes in your region
* Identify and collaborate on areas of mutual interest
* Attempt reasonable accommodation without compromising the legal positions of either the Indians or the Federal government
* Walk the land with Tribal representatives to gain an understanding and appreciation of their culture, religion, beliefs and practices
* Identify preferred methods of communication, develop protocols a/o agreements
* Be sensitive to the effects of history on the consultation relationship and longstanding trust issues
* Be flexible, especially with deadlines
* Allow time for questions to be asked and answered during consultation meetings and after them
* Be clear about what the Federal agency is proposing, why, the authority or requirement for the action, etc.

**What is Meaningful Consultation**?

* Consultation is a process not an event, with shared responsibility for outcome
* Talk before decisions are made, no more “done deals”
* Work towards consensus, but ultimately USACE makes decisions on water resources programs, projects, and activities, including permits
* Tribes are not just another stakeholder, user group, or the “public”
* Cultivates an open and fluid exchange of information, ideas, and solutions both directions
* Beyond NEPA and NHPA
* Protect Indian rights from adverse impacts

**Tips for Successful Consultation Meetings**

**Before a Meeting**

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

**During a Meeting**

* Listen more than you talk
* Don’t interrupt
* Respect elders
* Don’t be defensive; don’t argue
* Communicate open-mindedness and humility
* Silence is a sign of respect, not lack of interest
* Accept unanticipated changes to agendas, be flexible
* Partake of/offer snacks, coffee, etc.
* Sometimes small gifts are exchanged

**After a Meeting**

* Don’t rush off, stay and talk informally, ask for a site visit/community tour
* Share a meal or snacks
* Send out draft meeting notes
* Follow up with phone calls and emails
* Collaboratively plan next step

**When USACE Consults**

* Any time there is a potential to significantly adversely affect tribal lands or tribal resources; may be off-tribal lands [Dept of Defense Policy]
* Projects funded, permitted, constructed, or operated by USACE
* Projects constructed by the Corps and operated by non-Federal sponsors (USACE partners)
* Navigation, flood risk management, hydropower, ecosystem restoration, water supply, recreation, disaster response, cleanup of formerly used defense sites (FUDS)….
* Department of the Army permit decisions under the Rivers and Harbors Act and the Clean Water Act
* Military projects (work for DoD) [Comment: In Alaska we have the component that is having things built do Gov-to-Gov because it is on their installation and they have the relationship with those tribes on an installation basis]

**Key Concepts**

* Tribes do not receive handouts from the Federal government. They are not on welfare. The services they receive are in fulfillment of the treaties and Executive Orders as part of agreeing to transfer land to the United States
* Projects constructed/operated by the Corps directly affect treaty and trust resources and USACE manages over 70,000 known archaeological sites and other historic properties, a majority of which are associated with tribes
* Before 1492 North America was all Indian land

**Laws and Executive Orders Affecting Management of Historic, Cultural, and Traditional Uses of Lands Under the Jurisdiction of USACE**

* Antiquities Act of 1906
* American Indian Religious Freedom Act of 1978, as amended in 1994
* Archaeological Resources Protection Act of 1979
* Religious Freedom Restoration Act of 1993
* Native American Graves Protection and Repatriation Act of 1990
* National Historic Preservation Act of 1966, as amended in 1992
* Environmental Justice, Executive Order 12898
* Indian Sacred Sites, Executive Order 13007
* Consultation with Tribal Governments, Executive Order 13175
* Memorandum for Heads of Executive Departments and Agencies, November 5, 2009

**Key Definitions (abridged)**

**Canons of Treaty Construction (Interpretation of Treaties)**: Courts have adopted fundamental rules and principles to interpret written documents such as treaties. In legal terminology, these rules and principles are known as “Canons of Construction”. Canons that pertain specifically to Indian law have been developed to the benefit of Tribes. For example, the canons provide that treaties be construed broadly to determine Indian rights, but construed narrowly when considering the elimination of those rights. Most of the special canons of construction dealing with treaty rights also have been applied to agreements, executive orders, and statutes dealing with Indians. [Antoine v. Washington; Arizona v. California; United States v. Dion]

**Aboriginal Areas**: The historic and prehistoric lands where a tribe(s) carried out food gathering or seasonal activities or traded with other Indian peoples. These areas may be extensive depending on the geographic terrain and movement patterns of individuals, groups and communities. [**Note**: ***the term “pre-historic” is a non-Indian term used to define the period of time before the arrival of EuroAmericans --- in fact there was “history” in the land now known as the U.S., just not history recorded by EuroAmerican observers.***]

**Aboriginal Rights**: Rights based on aboriginal title, original title, or Indian title, which is the possessory right to occupy and use the area of land that Indians have traditionally used. The U.S. Congress can and did at times extinguish such rights or title at will through treaty or otherwise. Aboriginal rights were based upon continuous actual possession by occupancy, enclosure, or other actions establishing a right to the land to the exclusion of adverse claimants. In Indian parlance, the concept of possession is dissimilar and in the view of some may be periodic occupation and use, and roaming across the landscape.

**Alaska Native Corporations**: There is currently only one reservation in Alaska [Metlakatla on Annette Island Indian Reservation]. Congress passed the Alaska Native Claims Settlement Act (ANCSA) of 1971 to settle aboriginal land claims by Alaska Natives and Alaska Native groups. Alaska Native corporations (ANCs) formed under ANCSA are private, for profit businesses. ANCs do not take the place of tribal governments in Alaska where there are ~229 Federally-recognized tribes. These tribes have both traditional governments and Indian Reorganization Act (IRA) tribes (The IRA of 1934 was amended in 1936 to include Alaska Natives). Alaska Native tribes have a unique relationship with the Federal government. USACE works on a government-to-government basis with these Federally-recognized tribes. USACE works closely with ANCs as landowners and stakeholders.

**Allotted Lands – Off Reservation (public domain allotments)**: These public domain lands were set aside to fulfill a need to maintain recognition of a specific group of Indian people. These are sometimes called “Public Domain Allotments”. Nearly all of these acres are held in trust status by the Department of the Interior, and administered by the Bureau of Indian Affairs.

**Allotted Lands – On Reservation**: The Dawes Act, or General Allotment Act of 1887, provided for dividing reservations into separate parcels to encourage individual Indians in agricultural pursuits. Parcels were 160 acres for each family or 80 acres per single person. Any remaining acres over the population allocation were deemed “surplus” and opened up for settlement by non-Indians. Under the Act, Indian-held lands declined from 138 million acres in 1887 to 48 million acres in 1934. In 1934, the Dawes Act was superseded by the Indian Reorganization Act.

**California Tribes**: The Federal government’s relationship with California Indians is unique. It reflects a legally and politically complex history that was shaped by the State’s economic and social forces. A few reservations have been established through executive order, legislation, and purchases. It is advised that one look into the effects of Spanish and Mexican rule, overlain by the effects of how the State of California has interacted with Tribes from qualified experts/sources.

**Ceded Lands**: This term was first used in the Treaty with the Wyandot of 1789. Since that time, many treaties have referred to land cessions made by tribes to the United States. Most Federal agencies and Indian tribes prefer to use the term “ceded lands” when describing areas where a tribe did…”cede, relinquish, and convey to the U.S. all their right title, and interest in the lands and country occupied by them”…at treaty signing or when reservations were otherwise established. Ceded land references are qualified by the legal definition of original tribal occupancy issued in 1978 by the U.S. Court of Claims. In effect: “only lands actually owned by a tribe can be ceded to the U.S.”. This term is used interchangeably with “treaty boundary” described elsewhere in the definitions.

**Congress’ Plenary Power (Elimination of Rights)**: Congress may eliminate rights established by treaty or other documents. [see Lone Wolf v. Hitchcock] Article I, Section 8, Clause 3 of the U.S. Constitution: “The Congress shall have Power…to regulate Commerce with Foreign Nations, and among the several States, and ***with the Indian Tribes***.”

**Indian**: a person recognized as an Indian by that person’s Tribe or community; Tribal membership requirements can be established by usage, written law, treaty, or intertribal agreement; today, membership is typically defined by a Tribal constitution, Tribal law, or Tribal roll---varying degrees of blood quantum are required by different Tribes.

**Indian Citizen Act of 1924**: Enacted to provide U.S. citizenship to Indians. Indians had previously not been U.S. citizens because they remained members of sovereign nations. Many of the tribes that took allotments were given United States citizenship. For example, the Citizen Pottawatomi Nation signed a treaty in 1861 in which they gave up our tribal membership and became United States Citizens and took our allotted land in Oklahoma. There were other tribes that also did the same thing, but we did not have all of the rights other citizens had, such as the right to vote. The 1924 law gave the Citizen Pottawatomi Nation the right to vote, although that issue was debated for many years.

**Indian Country**: the territorial boundaries of Indian Tribal governments, typically “reservations” in the lower 48 but not always so; defined specifically by Federal statute (18 U.S.C. § 1151) to include all land, regardless of ownership, within the exterior boundaries of Federally-recognized Indian reservations.

**Indian Homelands**: Land ownership patterns within the exterior boundaries of Indian reservations vary; sometimes all lands are held in trust and sometimes there is a mix of trust lands, Indian-owned lands, and non-Indian owned lands.

**Indian Reserved Water Rights**: Most western and Midwestern states have used the *prior appropriation doctrine* to allocate water. Although Indian reserved water rights are not expressed in treaties, they are inherent or implied rights. Federal law applies to American Indian water rights on reservation lands. The reserved water right as applied to Indians is derived from Winters v. U.S., (1908). This landmark Supreme Court case held that “sufficient water was implicitly reserved to fulfill the purposes for which the reservation was established”. The Winters Doctrine provides that tribes have senior water rights in most cases.

**Indian Tribe**: ethnological a/o political entity under the Indian Commerce Clause of the U.S. Constitution, and those Tribes/tribal governments that are Federally-recognized by the Bureau of Indian Affairs and listed annually in the Federal Register. Federal recognition is the acknowledgement of an Indian Tribe by the Secretary of the Interior as a Tribal government with a special relationship with the U.S. government. This unique and special relationship recognizes that Indian Tribes receive some benefits and reserve some rights not available to other citizens. [see 25 CFR Part 83]

**Land Data**: In the lower 48 states, there are ~46.2 million acres of Indian trust land and ~8.9 million acres of individual trust allotments; ~565 Federally-recognized AI/AN tribes; 314 reservations, 278 of which are administered as Federal Indian reservations; total land base of ~615,210 square miles, with the largest reservation being Navaho (15 million acres) and some Federally-recognized Tribes having no reservation lands.

**Non-Federally Recognized Indian Groups**: There are a number of Indian communities and groups who identify themselves as tribes, but are not Federally recognized. USACE has neither the authority nor the obligation to work with these groups on a government-to-government basis.

**Reserved Rights Doctrine**: The United States did not grant rights to Tribes, including rights to land and self-government. Tribes *reserved* such rights as part of their status as prior and continuing sovereigns. [United States v. Winans]

**Sacred Site**: Means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian or Alaska Native tribe, or Indian or Alaska Native 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 Federal agency of the existence of such a site. A sacred site may or may not be a traditional cultural property as defined by the National Historic Preservation Act, as amended.

**Traditional Beliefs**: Administer programs, projects, and activities to address and be sensitive to traditional American Indian and Alaska Native religious/spiritual beliefs and practices. Most tribes and individual Tribal members conceive of spirituality, or sacred sites and activities, as including all aspects of their way of life---a “holistic” or all-inclusive existence. Indian people believe all living things are interconnected. The spiritual and natural worlds are not separate. Spirituality is a part of everyday life. In some cases, subsistence represents the very core of a Tribes existence as a people. Subsistence activities are spiritual, cultural, physical, and economic aspects of their heritage and perpetuating beliefs and practices perpetuate the Tribe and an individual’s place in the tribal community. ***Indian people determine what is of spiritual importance to them***.

**Tribal Governmental Status**: Indian Tribes are sovereigns with the power to govern themselves. They have their own tribal governments. State law does not apply to Indian lands without the consent of Congress. [Worcester v. Georgia]

**Tribal Self-Government**: The Indian Reorganization Act’s (IRA) most significant contribution was to promote tribal self-government --- but at the same time it essentially eliminated traditional Tribal forms of self-governance. It encouraged the Tribes to adopt a form of government not too dissimilar from that of the United States. Tribes have the inherent right to operate under their own governmental systems. Many have adopted constitutions, while others operate under Articles of Association or other bodies of law, and some still have traditional systems of government. The chief executive of a Tribe may be referred to as a Tribal chairperson, principal chief, governor, or president. The chief executive usually presides over what is typically the tribal council. The tribal council performs the legislative function for the tribe, although some tribes require a referendum of the membership to enact laws.

**Trust Relationship/Responsibility**: Indian Tribes are not foreign nations, but they do constitute “distinct political” communities that may, more correctly, perhaps be described as domestic, dependent nations whose “*relation to the United States resembles that of a ward to his guardian*”. [Cherokee Nation v. Georgia] The trust responsibility is the U.S. government’s permanent legal obligation to exercise statutory and other legal authorities to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaska Native Tribes. Interestingly, the term “*trust responsibility*” has never been defined by the U.S. Congress, any President, or any Cabinet official. Generally, it is a set of principles and concepts outlining the responsibilities of the U.S. Government to act as trustee of Indian people and Indian-owned assets. The U.S. Government, through the President, has certain responsibilities to protect Indian property and rights, Indian lands, and resources. The trust responsibility may involve a fiduciary obligation in which the President, through the Secretary of the Interior and all Executive Branch agencies, act as the trustee of Indian assets.