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Desk Guide to Tribal Government Relations

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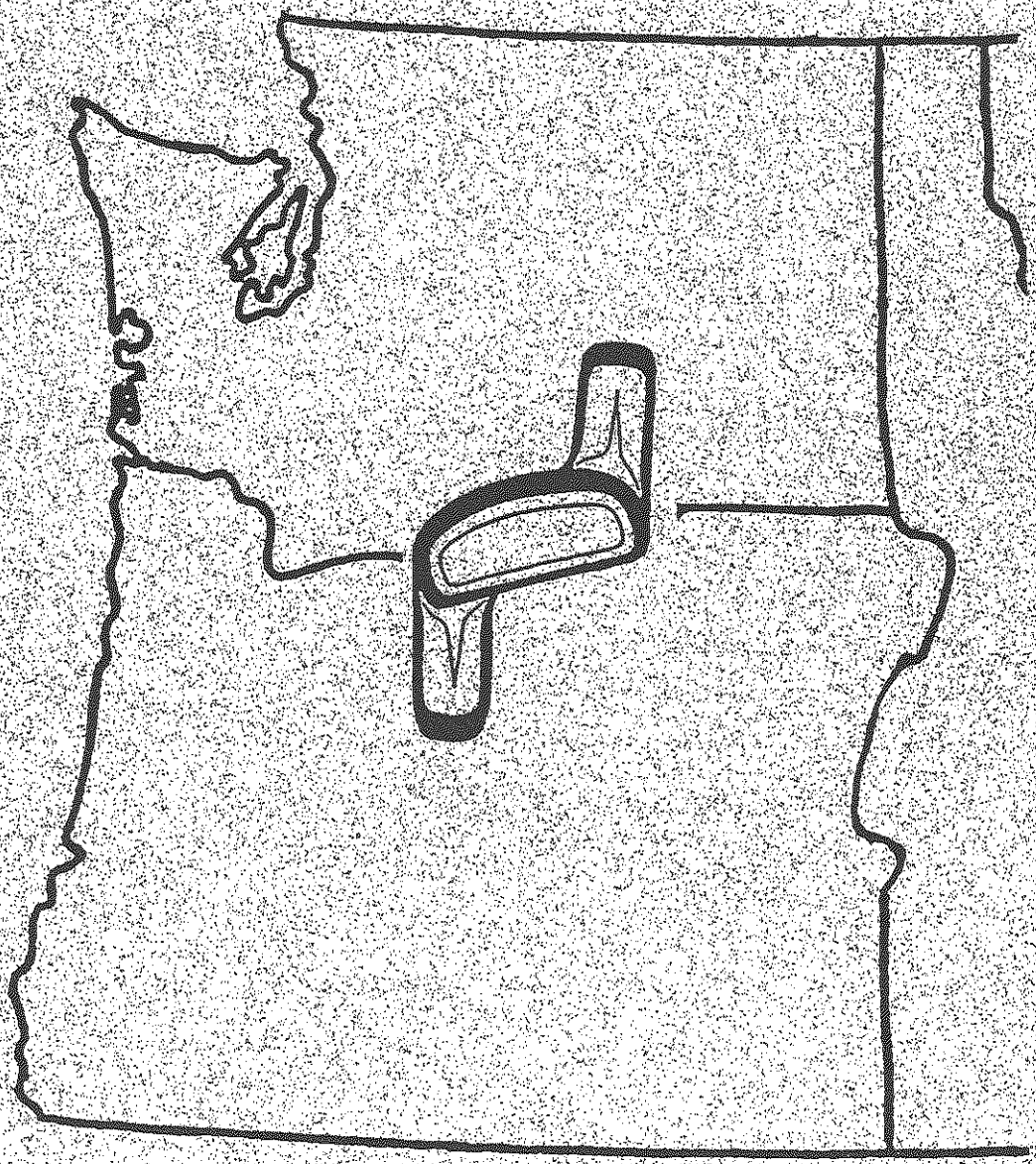

A REGIONAL FORESTERS DESK GUIDE

TO

TRIBAL GOVERNMENT RELATIONS

(Originally Issued September 1991)

U S D A FOREST SERVICE,

PACIFIC NORTHWEST REGION

Revised: Region 6 Tribal Relations Desk Guide
April 1998

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INTRODUCTION

Since the Region Six Desk Guide to Tribal Government Relations was first published in 1991, it has served as a reference book of background material, a management tool to assist Line officers and Staff in exercising professional judgement in working with Indian Tribes and finally as a template for development of a National Resource Book. Unlike the Book, this Desk Guide is designed to assist in decision making processes by applying real life examples of actions at either a Forest or District level.

It is our continuing effort to assist line and staff better understand the special relationship the United States and its Agencies have with Indian tribes and tribal governments, and the indispensable value of in person consultation with them. As can be seen in this revised Desk Guide, there are no "one size fits all" solutions. However, there are some general applications of governmental relationships that will assist line and staff in their efforts to both establish and improve working relations wit tribes.

This Desk Guide is designed to be a reference book that can be read one subject at a time. Each paper is a short discussion of the subject listed in the table of contents.

The basic Forest Service program areas associated with Indian Tribes are: 1) treaty rights; 2) cultural resources; 3) the National Forest Management Act and 4) individual Indian rights. This Guide focuses on the **Treaty and Other Rights and Tribal Governments** aspects of Forest Service responsibilities.

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Les McConnell

Les McConnell,
Tribal Governments Staff Assistant
1998

(Cover design: stylized Tsimshan, Pacific Northwest Coast Indian Tribes)

UNITED STATES AMERICAN INDIAN POLICY

The United States of America Indian Policy was first stated in a formal manner in the Northwest Ordinance, a document ratified by the Continental Congress on July 13, 1787:

> **"The utmost good faith shall always be observed toward the Indians; their lands and property will never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.."**
>
> (Article the Third, Northwest Ordinance, 1 Stat. 51.)

Since those early years in American history there have been many subsequent policies and interpretations of various acts of Congress in continuous attempts to address Indian issues. The 1983 President's policy expanded and developed the earlier (1970) National Indian policy of self-determination for Indian tribes. Then President, Ronald Reagan, said it was the goal of his administration to turn the ideals of the self-determination policy into reality. There is a new policy with this Administration:

Policy Statement From
USDA Forest Service, Washington Office

1. **Maintain a governmental relationship with federally recognized tribal governments.**

2. **Implement our programs and activities honoring Indian treaty rights and fulfill legally mandated trust responsibilities to the extent that they are determined applicable to National Forest System lands.**

3. **Administer programs and activities to address and be sensitive to traditional native religious beliefs and practices.**

4. **Provide research, transfer of technology, and technical assistance to Indian governments.**

AMERICAN INDIAN TRIBAL SOVEREIGNTY

Nations within a Nation

During the time from 1492 up to the adoption of the United States Constitution in 1789, there had been nearly 300 years of legal contracts of various descriptions with American Indians. Early European explorers recognized that the Aborigines had occupancy status on lands similar to the concept of land ownership that was well established in Europe. Also that lands could only be taken by conquest in "just wars" (as the expeditions and colonists were greatly out numbered). In 1630 the Dutch West India Company required their officials to negotiate and purchase land from the Indian leaders of New Netherlands, thereby recognizing an Indian ownership status commonly understood with other sovereign nations throughout the world.

Following a suggestion from the King of England, in 1754, Benjamin Franklin proposed at the Albany Congress that a union of colonies be formed. One of the main purposes for this new union was an attempt to centralize control over Indian Affairs. Indian tribes by this time were recognized as sovereigns and were viewed as a potential threat to the Colonies' land holdings, as the tribes were rapidly forming an allegiance with the French settlements. Franklin's proposal was rejected by the Crown as it was decided that the Colonies would possess too much independent power. Shortly thereafter, during the French and Indian War, the English Crown reserved for itself the sole responsibility to conduct legal and governmental business with Indians; rather than give the colonies the authority originally proposed by Franklin.

In 1763 The King of England proclaimed that: 'lands West of the Appalachians are Indian Territory, reserved for the Indians'. One of the first Acts of the Continental Congress; on July 12, 1775, was to declare its jurisdiction over Indian tribes by creating three departments of Indian Affairs; a Northern, Southern and Middle Department. A Commissioner was named for each: Benjamin Franklin, Patrick Henry and James Wilson, respectively (the selections are an indication of the importance of these positions).

After the Revolutionary War, the newly independent United States was without financial resources to adequately pay soldiers for their service. Many of the men serving in military duties had not been paid for more than a year. The primary asset now in the hands of this new country was land. Therefore, compensation to the former soldiers for their service during the Revolution was land to be selected by the individuals themselves. In opening this new land for settlement there needed to be a temporary government. George Washington knew from experience that through prior use and occupancy, Indian peoples had demonstrated ownership in the eyes of the former colonies and other countries.

The Northwest Ordinance, passed by the Continental Congress in 1787, was the document establishing the governing principles for this new territory. The following provision was included in the Ordinance (Article the Third quoted above) to recognize Indian lands status, as settlers would surely be in contact with Indian Nations as they moved West.

With this ordinance, the "territory of the United States, Northwest of the River Ohio" was opened for settlement. Governors were appointed by the Congress to oversee government operations in the territory based on population requirements in districts or townships.

This formal recognition is the first U.S. Government acknowledgment of Indian people having an ownership status in the land. Land ownership along with the Indians' superior numbers and habitation were the basic principles defining the sovereign status of Indian people. Not all citizens

recognized this status, which lead to continuous conflict with those living at the frontier.

The adoption of the U.S. Constitution and all the subsequent treaties up to 1871, in combination with other Acts of Congress and Supreme Court cases since 1810, contribute to the current well established existence of Indian Tribes as sovereign nations. In 1871, Congress ended the formal treaty making process with Indian Tribes. After that time, Indian Reservations were established by statute (until 1919) or by Executive Order of the President.

In a Supreme Court decision in 1831, it was confirmed that Indian nations were distinct, self-governing political entities that were nonetheless dependent upon the United States as their guardian. This case also described the tribes as "domestic dependent nations"; hence the term 'Nations within a Nation'.

Indian Tribes recognized by the federal government have a unique relationship within our political system. They are separate political entities, to which the United States Constitution does not apply. (Article 1, Section 8, Clause 3 authorized Congress to regulate "commerce... with Indian Tribes.") Despite their sovereignty, Indian Tribes are subject to the complete absolute power of Congress. This Congressional authority over Indian Tribes has a few limits yet to be fully defined. In 1959 a Supreme Court ruling held that the Constitution applies to Tribal Governmental actions only when the Constitution itself or Congress clearly indicates its applicability. Recently there have been court cases that emphasize the inability of Indian Tribes to exercise power inconsistent with their dependent status.

While the term sovereignty has a powerful meaning in the English language, the sovereign immunity of the United States is superior to that of any Tribal Governing body: Tribal sovereignty cannot prevent "the federal government from exercising its superior sovereign powers," (see: U.S. v White Mountain Apache Tribe, 9th Circuit, 1986).

The important concept to remember is that tribes are independent nations; not all tribes are alike. Depending upon the document establishing a tribes' status and recognition, they have certain rights that only the Congress can alter.

This sovereignty is a status rigorously guarded and maintained in a political spotlight by tribal governing bodies. It is not something that Indian Nations delegate elsewhere for representation; just like executive order and treaty reserved rights are not delegated to other entities or organizations. Indian tribal governments have always maintained sole responsibility to perpetuate their status as sovereign nations and to exercise their rights as defined by treaty or other statute.

GOVERNMENT TO GOVERNMENT RELATIONS

As with most federal agencies there is a management system, designed by the Frenchman "Bureau," whereby an organization may continue to function, produce work and serve people in the event that one or more of the leaders or directors are absent. The protocol or line of authority provides for acting supervisors or leaders, and for the most part, divisions of labor continue uninterrupted.

By comparison, Indian Nations had chiefs and head men who were leaders of the nation as a whole. Some division of labor for individuals existed in the form of those with special talents, abilities or expertise would be responsible for certain actions advice or consultation. The historic and educational aspects of tribal governments (as they are called today) were usually reserved for elder tribal members.

Indian people did not become United States citizens until 1924 with the passing of the Citizenship Act (43 Stat. 253). A subsequent Act (1934) provided the Indian Nations an opportunity to draft, adopt, implement, and revise, their own government bylaws. The vast majority of active tribal councils throughout the nation took this opportunity to develop their own Tribal Constitution; formalizing, in modern English, a binding document to guide the newly established tribal government in the continued conduct of their own affairs and commerce with the United States.

Most of these constitutions set forth structured tribal governments with elected officials usually called councilmen with a chairman to guide the group and to chair tribal government business meetings.

These documents were eventually approved by the Secretary of the Interior and published for the respective tribe for their use and pursuits. To date, with the single exception of the Yakama Indian Nation, all tribes within Region 6 have formal constitutions for their governmental operations (the Yakama operates by tribal resolutions).

It is at this elected official level that the Tribal Government is recognized by the United States. The counterpart to USDA Forest Service officers is: any line official as described in the FSM. This is the level at which Government to Government relations are initiated and developed.

Most tribes have technical staff, legal counsel, advisors, and administrators employed to help run the Tribal Government Business. These administrators, professionals, technical people and consultants make up the staff portion of tribal work force. They usually do not speak for elected officials or on behalf of tribal policies or other governmental actions.

In as much as the various Executive Order and Treaty rights are Tribal rights and not individual rights, the tribal governing body has the power to regulate its members in activities involving anything associated with the organic document (e.g. constitution). For instance, the right to harvest fish off reservation is controlled by the tribal council, as it is a tribal right not an individual right; not asserted by individuals by independent actions. The same principle applies to most other rights and resources either on or off the reservation. Individual Indian allotments of land are an exception to this general statement.

Rights reserved by Executive Order or Treaty cannot be delegated to a subgroup or organization unless express and definite delegation of authority is made by a formal tribal resolution.

As discussed in a separate paper in this desk guide, the U.S. Constitution does not apply to American

Indian Nations. Consistent also with the definition of Tribal Sovereignty, many laws placing responsibility on federal agencies do not apply to Indian Nations such as N.E.P.A. and other similar federal decision procedural laws. In light of this, Tribal Governments are not treated as part of the "public" in review and comment process and the associated procedures with time clocks also do not apply for treaty rights issues. In place of these time clocks and standard procedures the Forest Service will best address questions and unresolved issues through a continued consultation process (see Consultation In Indian Country). Further background for this special relationship with the United States can be seen in the treaty reserved right to access usual and accustomed fishing grounds and stations - which constitutes a property right or encumbrance on the land, regardless of land ownership status. No other state or local government has this consideration as a sovereign nation.

Even though some group or organization may be formed as a technical expert on a resource matter and participates in Forest planning process, this does not relieve the Forest Service from its obligations to conduct Government to Government business and consultation with affected Indian Tribes. Formal contact and correspondence from line officials still must be established with the respective tribal government.

Indian Tribes usually do not consider telephone contact as a governmental action and prefer to initiate government business in writing. From that point the tribal governing body may delegate certain tasks or technical issues to tribal staff persons and continue monitoring at a distance. This action can be mirrored by Forest Service officers and the technical work can proceed at those staff levels. While it is still true that the Forest Service remains the primary land manager as designated by the Congress, the consultation process needs to continue in good faith efforts to bring trust resource issues to some conclusion. "Attempt reasonable accommodation without compromising the legal positions of either the Indians or the Federal Government." (See Chief's American Indian Policy, February 1990)

It is important to keep in mind that tribal governments have the ability to contact the White House at any time, for a Government to Government meeting. These people are also well known in both Houses of the Congress. These are not favored practices, nor are they efficient. Tribes prefer to work together in resolving trust resource issues at the combined policy and technical levels. Political actions or federal court filings are last resort methods.

Les McConnell June 15, 1991

CO-MANAGEMENT

A Definition of Terms and Practice

For the purposes of this Desk Guide, the term co-management is defined as follows: **An equal sharing of administrative and management decision making power. As in a shared business or possession ownership, each partner holds a fifty per cent share of the investment or item; no decision can be made without both partners agreeing to the conditions being considered, as to its use, management or other disposition.**

This co-management concept does not apply to managing National Forests. The Forest Service, through the Secretary of Agriculture, is vested with statutory authority and responsibility for managing the resources of the Nations Forests. Commensurate with this authority and responsibility to manage is the obligation to consult, cooperate and coordinate with the Indian Tribes in developing and planning management decisions regarding resources on National Forest Land that may affect tribal rights.

This consultation process will be carried out on a government to government basis, consistent with FS national and regional policies regarding Indian Tribes. There are other papers within this desk guide describing the processes for contacting and communicating with Indian Tribes.

While the Forest resource management responsibility is defined without an equal manager, the Forest Service is aware of various treaty Tribes' status as co-managers of anadromous fisheries. Those trust resource management practices in conjunction with the States of Washington and Oregon are not the same land management practices described above.

INTERPRETING TREATY LANGUAGE

The United States Supreme Court has over the years formulated special rules for interpreting Indian Treaties. These are commonly referred to as the 'cannons of treaty construction'. Many Indian issues have been the subject of federal court decisions that there are very few resource issues without some form of reliance on the laws of this country. The treaties themselves are termed the supreme law of the land, as they have been ratified by the U.S. Congress, (see Article VI of the United States Constitution). The following may be of some use in meetings where treaties are discussed:

1. **Worcester v. Georgia,** (1832)
   "the language used in treaties with the Indians should never be construed to their prejudice."

2. **Oliphant v. Suquamish Indian Tribe,** (1978)
   Indian Treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

3. **Choctaw Nation v. Oklahoma,**(1970)
   Because treaties were imposed on the Indians, "treaties with the Indians must be interpreted as they would have understood them...and any doubtful expressions in them should be resolved in the Indians' favor."

4. **Washington v. Washington State Commercial Passenger Fishing Vessel Association,** (1979)
   The treaty words must be construed "in the sense in which they would naturally be understood by Indians."

Very generally, the purpose for negotiating treaties with tribes in the Pacific Northwest was to facilitate westward expansion and non-Indian settlement of land, while keeping the two peoples segregated - thereby avoiding conflict. Each treaty is different and needs to be reviewed and interpreted in light of the subjects or issues at hand. In addition to this, each tribe is unique and one needs to recognize the differences between various tribes in addressing subjects of interest to neighboring or adjacent tribes.

Court Decisions and Their Effect On Federal Agencies

In the above excerpts of federal court decisions, it must be kept in mind that courts (and not federal agencies) interpret language in treaties with the Indians. Federal agencies are neither qualified nor equipped to conduct such analysis. It is normal practice to read court decisions and operate consistent with the decisions of the Court. However, where questions arise over the intent and meaning of the rulings, i.e. where ambiguity exists staff and line should always consult legal counsel for assistance. It is not appropriate and may even place an agency or an Indian tribe at legal risk if treaty or executive order language is expanded beyond the courts findings.

INDIAN HUNTING AND FISHING RIGHTS

In 1792 Captain Vancouver sailed into the waters of Puget Sound, named waterways, mountains, and noted the wealth of natural resources being utilized by the local Indian peoples. Of special importance the salmon was recognized as a precious commodity with subsistence and ceremonial uses.

When Lewis and Clark completed their expedition to the Pacific Northwest in 1806, writing about the Columbia River and accounts of their observations of those Indian fisheries, both the importance and abundance of this vast resource were again written into history.

In 1832 Congress authorized the President to appoint a Commissioner of Indian Affairs to manage all matters arising out of Indian relations. By 1854, then Governor of Washington Territory, Stevens was in the process of negotiating treaties with Indian tribes in the Pacific Northwest in efforts to make way for European and non-Indian settlement on existing and former Indian lands.

In these treaties the tribes reserved for themselves the following provisions:

> ...'the right to take fish at all their usual and accustomed fishing grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands....'
> (Treaty of Medicine Creek, 1854)

The specific language varies only slightly in treaties signed by Columbia Basin Tribes. It is clear what the reserved right to take fish meant to the Indians. Each of these Treaties was negotiated in a trade language known as Chinook jargon, which contained a total of about 1,000 words in 1855. In a period of eight (8) months from December 26, 1854, to July 1, 1855, Isaac Stevens negotiated and signed 8 treaties permanently affecting approximately 40 tribes and/or bands of Indian people in all of then Washington Territory and parts of Oregon and Idaho.

Simultaneously Joel Palmer, then Superintendent of Indian Affairs in Oregon Territory, negotiated three (3) treaties in Oregon. The Klamath Treaty was concluded much later in 1864.

These rights were reserved by the Tribes for themselves in treaties that were negotiated and signed by United States officials and tribal representatives or chiefs, then subsequently ratified by the U.S. Congress. The extent and nature of these reserved rights have been strongly contested at times by both states; Oregon and Washington. Actions by Indians tribes and their tribal members to exercise these rights have brought them into conflict with state Governments and their natural resource and law enforcement authorities. Disagreements usually resulted in federal court actions and decisions that served to clarify and/or affirm portions of treaties and existing Indian law. Some aspects of hunting and fishing activities may be affected by the management of fish and wildlife habitat in National Forests.

Within the boundaries of reservations, Tribal governments have exclusive jurisdiction to regulate tribal members who exercise their right to hunt and fish without state regulation. Federal courts have concluded that the rights reserved in treaties are tribal rights - to be regulated by the respective tribal governments; not individual rights as some tribal members have claimed.

Treaty areas, more commonly referred to as ceded lands, include portions of National Forests.

Treaty rights vary depending on the language of the treaty and subsequent legislation, (in the form of public laws) and court decisions. A Tribe with a treaty reserved right to hunt on open and unclaimed lands and take fish at their usual and accustomed grounds and stations, in common with the citizens of the territory, is currently recognized by both states as having a "co-management" status for the purposes of setting harvest seasons and other regulations such as limits and gear type or harvest allocation. These reserved rights constitute a property right in the land where the trust resource exists. The State may only regulate Indian hunting and fishing activity off reservation where it is essential to preserve the species, i.e. for conservation purposes. Management of habitat used by anadromous fish, migrating wildlife and other species that cross state or federal jurisdictions is much more complicated, where several other managers and agencies participate in resource protection and management activities.

Tribes' position is that treaty rights extend to the habitats upon which these trust resources depend. This claim includes the way fish and wildlife habitats are affected, by the manner in which the Forest Service manages timber harvest, recreation, water, grazing, and minerals exploitation on National Forests. Tribes maintain that the Government has an obligation to manage habitat in a manner that will not diminish fish and wildlife populations to the extent the Indian share is diminished.

While the treaties themselves made specific mention of the fish and wildlife traditionally take, there is no reference to populations or other share concept that becomes a burden on the U.S. or its agencies in terms of guaranteed harvest levels. Subsequent court decisions have confirmed that the tribes are entitled to up to 50 percent of the harvestable run, while providing sufficient fish to escape for the perpetuation of the resource.

What the U.S. does have is an obligation to protect the tribes' property right to usual and accustomed grounds and stations. Also, to see that the individual successors in interest to these rights are not prevented from accessing those locations and exercising the rights and that the trust resources are protected. Treaty rights can survive Congressional termination of a Tribe. The Klamath Tribe has been asking for a much stronger role in wildlife habitat management as this affects their treaty rights within the old reservation boundary.

Court decisions applicable to the tribes' off-reservation usual and accustomed grounds and places for hunting and fishing apply to large areas of National Forest lands. National Forest management is experiencing some major changes in terms of the Forest Service Handbook with the recently signed Tri-Region Anadromous Fisheries Policy and Implementation Guide. These documents serve to clarify FS duties and responsibilities with respect to fish habitat and any Forest activity that may affect the quality or quantity of that habitat. Within the Government to Government national policy, Tribes are accorded similar treatment as state governments in the consultation and planning processes. Involving them early in planning consistent with FS obligations for consultation is by far the best method to assess the level of and specific interests in proposed Forest actions. Regarding consistency between Forests and regions in consulting with tribes, there is an excellent opportunity to learn from implementing the new Fish Policy as it is being included in the Forest Service Handbook throughout the Columbia Basin.

One important principle regarding the off-reservation right to take fish at usual and accustomed places is that the right constitutes a property right: an encumbrance on the land to access the fishing site - regardless of land ownership. This is the major principle of treaty law that elevates treaty tribes to a higher level than States of the Union when discussing relationships and governmental matters with tribes. (See also "Land Exchanges" paper)

There have been specific areas of concern by the public and special interest groups where a reserved treaty right is perceived to conflict with participation in a recreation activity. In the Columbia River Scenic Area there has been a recent dramatic influx of board sailors (or wind surfers). Many discussions have taken place about the board sailing activity occurring at times when Indian fishing nets are in the water. This competition for use of the river is just now escalating to the point where some resolution to the issue will be called for. The Tribes' position is that there exists a treaty reserved right to take fish, and that no similar right has been granted to recreationists.

CONSULTATION IN INDIAN COUNTRY

Consistent with the Government to Government national policy, Tribes are accorded special consideration as compared to state and county governments in the **consultation** and planning processes mentioned in the Forest Service Manual and other regulations. All federal agencies have some basic responsibility to **consult** with tribes on a wide variety of subjects and procedures. Securing tribal involvement early in the planning process is by far the best method to asses the tribes' level of and specific interests in proposed Forest actions.

In Indian Country the term "**consultation**" is not synonymous with "negotiation". While it is true that Tribal Governments are accomplished negotiators, it is their position that the terms of the treaty were negotiated long ago and it is now up to the Federal Government to honor those treaty or other legal and binding promises. The Tribal view of **consultation** may vary from tribe to tribe depending upon the resources in question and the treaty or other rights implicated. For the most part, the tribes appreciate being approached with flexible time frames; not bound to the same structure as state and local governments. After defining areas of common agreement, remaining subjects can be discussed in a consultation process. This means for the subject matter not yet agreed to, the tribes want to embark on a mutual exchange of ideas, intent, meaning, feelings, and even the gray area known as perceptions.

Many tribal officials and leaders have described the atmosphere in meetings with state, county and federal staff as one of negotiation. It is the Indians' observation that positions and policies have been established; that they are polished to a certain extent and there is only a small margin remaining for lateral movement. Regardless of the intent of the agency or their staff, this is how the tribal officials and their staff feel and perceive the meeting.

Consultation does not preclude exchange of data and information in the technical sense. Instead, it is the tribes' opportunity to be heard as a Government while not having to be on the defensive or locked into a self protective mode thinking that: 'if the guard is dropped, some resource will be lost or some opportunity will be replaced by a new federal policy'. The traditional Indian concept of consultation is different from the federal concept. Many of the non-Indian methods of conducting business are viewed by Indian people as: hurried, insensitive, regimental (stemming from War Department and Cavalry days), and territorial. The lines currently delineating National Forests mean nothing to deer, salmon or other species. Likewise, they mean little to tribal people - except that they are modern laws that must be considered in some unclear manner during a consultation process.

Consult For Understanding: Communicate ideas, proposed actions and general information in a manner or to an extent that assures both parties UNDERSTAND the information being presented. Frequently, association with tribal staff members is of a technical nature, there are agendas prepared with specific goals and decision points to be made about natural resource needs. Many of those meetings can be accomplished by standard processes. However, when the tribes' technical interests are based on an interpretation of treaty language or subsequent federal court decisions, the entire complexion of the meeting and how those issues or concerns are discussed changes to a much more sensitive one. The tribe or tribes involved may seem to be posturing, evasive, non-committal, or even postpone or cancel meetings with one or more of the participating agencies. Tribal officials usually won't articulate the political or legal reasons for their silence. Federally recognized Tribal governing bodies have a special relationship with the United States. This is not true with state or local governments. For some subjects there may have been a joint review committee or other group formed to work on specific areas. Tribal people may not feel comfortable in those groups; there may be a lack of trust or credibility stemming from a past experience.

With this in mind, the Forest Service line officers and staff would benefit most by meeting with tribal representatives separate from joint forums. This is the extra step that could make a big difference to improved long term relationships between the Forest Service and tribal governments. There have been examples where communications with tribes were accomplished by letters. The unexpected results were that each time a letter was received by one or the other, the two entities grew further apart.

In these instances it is much more important to understand the origins of these impasses rather than focus on how to get the tribe(s) back to the table. To the tribal way of thinking, "getting back to the table" is not the proper method or forum in which treaty rights should be discussed with the primary (Secretary of Interior) or secondary (other U.S. Officers) trustee. The necessary steps in order to have their concerns heard are going to be along the lines of private meetings; as sovereign nations. Forest Service representation to participate in such a meeting should be decision makers who have knowledge of the subject. The tribes priority is to be heard on an individual basis as a Government without the threat or feeling that they have to negotiate something. They are of the mind that their treaty rights are not subject to negotiations; that the Congress, through the appropriations process and a long list of court cases and statutes, supports treaty rights protection on every front.

Meanwhile, back at the Forest or District, staff members and line officers may be attempting to confirm a meeting to further the discussions at the point where the tribe left. The Supervisor or Ranger may obtain more productive results by arranging a special meeting with tribal elected officials, at the reservation, with the single goal of listening to tribal leaders to gain an understanding of their perception, what the issues are, and how the tribe feels about the future. It may be best to arrive without an agenda; without a time line; and most important with the sincere intent to share open discussions or dialog. Subjects like Forest Service policy and regulatory procedures should be set aside until some later date. This may seem to be against modern teachings of conducting business with: 'agenda in hand complete with scheduled break and lunch times'. It may not be possible for most seasoned tribal officials to carry on uninhibited discussions if presented a series of agenda items with time requirements. This is especially true for elders or traditionalists who will remain reserved or silent for most of the meeting until they have heard several thoughts expressed from other people in the room.

The most important point in any federal/tribal consultation process is to obtain a mutual understanding of the subject matter or information. As stated elsewhere in this Desk Guide, there are no "one size fits all" solutions to procedures for this. Consulting For Understanding will help assure that the communications between governments progress. Once both parties have a shared understanding, discussions will be easier, even if there is disagreement as to a proposed action or methodology for a natural resource management decision.

Without a standardized approach or measurable system for consultation, this process may seem vague to many Forest Service staff and line officials. It may also seem to take extra time at first. However, once a few successful meetings are held, tribal participation will likely accelerate. There are times when the subject matter will be strictly policy or even legal in nature. For those instances, one can explain to the tribe there is a need to discuss or confer with other policy people inside Forest Service, and that a response will be relayed to the tribe once in-house discussions are complete. Probably the single most important accomplishment in the above example is that the Forest Service will have conducted a true Government to Government meeting consistent with both national policy, and likely, tribal expectations.

We have on record the advantage of several federal court decisions and regulatory procedures

expressing the findings that tribes have a property interest in lands ceded to the United States as applied to usual and accustomed grounds and stations for fishing; hunting; gathering and grazing, including uninterrupted access to certain places, regardless of land ownership status. While the Forest Service has final decision making authority on National Forest land, it is also a responsibility to conduct federal business as a trustee consistent with those treaties, executive orders or other laws.

The challenge at hand is to: 1) address tribal concerns and implement treaty rights protection to the highest extent possible; 2) address the requests, concerns and desires of the public as a whole during the planning and implementing processes consistent with multiple use requirements; 3) accomplishing both of these simultaneously in a comprehensive manner. 4) **consult for understanding**; i.e. continue discussions until there exists a shared understanding of issues, goals or information. Each Forest will probably encounter unique situations as each tribe has a unique government.

It is safe to say that the tribes in Oregon and Washington understand many of the constraints with which one is faced. Many times it will be the spirit of one's voice and the demonstration of sincere intent to listen to the tribes that will spell success in Forest planning and action efforts.

Some readers may be asking the question now: "just how far does the Forest Service go in consultation with tribes and their elected officials? There must be a point at which one concludes consultations and render a decision." Yes, there are limits to anything a federal agency can do. This is the point at which the long term gains should be measured against concessions or conditions collectively sent to us by the publics. As long as the treaty rights are protected and one has been sincere in the efforts, honest with the tribal officials and assisted them in understanding the final decision, the Forest Service will have benefited from their final decisions and actions. The question remaining is "what constitutes a treaty right on National Forest land?" Those questions not easily resolved by consultation will have to be referred to legal counsel for assistance. Each response will necessarily be developed and decided on its own merits.

Les McConnell, May 23, 1991, revised June 1998

EXAMPLE OF CULTURAL RESOURCES PROGRAM ACTIONS AS APPLIED TO TRIBAL RELATIONS

Government to Government Relations: This substantive process is a reflection of the desire, by tribal governments, that communications occur between line officers and tribal councils. Within the Forest Service, the work of inventory, identification of issues and recommended avoidances of adverse effects is commonly performed by professionals at the sub-staff level. These individuals usually work in concert with tribal cultural resource or heritage committees. It is only after issues are resolved, or areas of disagreement defined, that tribal councils are accustomed to being consulted. The most common "issue" is a problem - the lack of understanding or acceptance by the Forest Service of the decision making structure of tribal governments.

Tribal governments in Region 6 generally have two levels of organization: the Tribal Council and the General Council. The enrolled members of the tribe constitute the General Council. The General Council provides the direction for and elects representatives to the Tribal Council. The Tribal Council (other forms are Boards of Trustees or Executive Committees) includes officers of the General Council. The Tribal Council generally works towards a consensus level of decision making. The Tribal Council evaluates staff recommendations in accordance with treaty considerations and council objectives. Council decisions may or may not reflect staff recommendations.

Although primary tribal staff is Indian, specialists at the sub-staff level are commonly non-Indian. It is at this level, where Forest Service sub-staff, charged with gathering data or implementing management plans or policy, assume that they are communicating at an equal level of responsibility within the tribal organization. This assumption is often encouraged by the greater inclination to work with non-Indians due to reasons of communication style and self-imposed inclinations towards dealing with fellow specialists.

In the area of cultural resources as other subjects, miscommunication can occur when a Forest Service cultural resource specialist assumes that the recommendations of a non-Indian tribal or contract archaeologist will be acceptable to the tribal council. A similar potential for miscommunication exists when working directly with tribal cultural heritage committees. The cultural resource specialist or staff officer should not assume that recommendations of the cultural heritage committee, even if composed exclusively of Indians, will be concurred by the tribal council.

One should work with the tribal council and chairman prior to making contact with the tribal culture and heritage committees in order to avoid misunderstandings. All letters to tribal governments should be from the responsible line officer. The maintenance of good communications between the cultural resource specialist and the tribal culture and heritage committee is essential, but decisions need to be between Line and the Council.

Consultation: Tribal governments have a perception of "consultation" that is different from that of the Forest Service. To the Forest Service, consultation is the process of informing and inviting "input" or response to assist the agency in reaching a management decision. Responses are weighed by the criteria developed for a particular undertaking, and may or may not be incorporated into the final decision.

Tribal views of "consultation" are quite different. Tribal governments expect to be approached early in the planning process, to be briefed by Forest Service personnel of equal standing, and to participate on a continuing basis in the planning process. "Consultation" is not completed until the council has deliberated a proposal to their satisfaction, which often means that Forest Service staff is

requested to supply information to, and work with, tribal staff in developing background information to the level desired by the council. The desired state is to reach a consensus between the tribal council, or a clear majority of the council, and the Forest Service.

Tribal councils view most Forest Service "consultations" to be notifications, since the agency may not seek continued interaction with a tribal council, and neither work within its deliberative process nor fully incorporate or acknowledge its decisions. It is best, in the early stages of a scoping process, to be specific about what the intentions are regarding "consultation" and the extent to which one can, or are able to, incorporate council deliberations and recommendations.

Consultative Cultural Resource Management: Consultative management requires that there be meaningful and consistent consultation with the tribal governments in the exercise of the Forest Service's federally mandated responsibilities for cultural resource protection. Three areas of concern are: The Archaeological Resources Protection Act of 1979 (ARPA), the "Guidelines for the Evaluation and Documentation of Traditional Cultural Properties" (National Register of Historic Places, Bulletin 38) and the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).

Prior to issuing a permit for excavation or other archaeological research on National Forest lands, ARPA requires that the Regional Forester notify any Indian tribe which may consider the site as having religious or cultural importance (P.L. 96-95, S. 4[c]). Although ARPA specifies consent of a tribal council only for permits on Indian Reservation or trust lands, it leaves open the resolution of tribal council objections to permits issued on Forest lands. In fact, it may not be possible for the Forest Service to arrive at determinations of No Adverse Effect with the SHPO and Advisory Council if there is opposition from a tribal government. This is related to the "consultation" discussion above. Clearly, ARPA specifies "notification". It is silent, however, on the resolution of objections and the necessity of reaching resolution when there is a need for excavation in culturally sensitive areas.

Related to the subject of cultural or spiritual significance are the "Guidelines for the Evaluation and Documentation of Traditional Cultural Properties". These guidelines are used by the SHPOs, the Advisory Council on Historic Preservation and the Keeper of the National Register of Historic Places to evaluate properties for their traditional cultural significance, or the role they may have in the continuance of a community's contemporary but historically rooted beliefs, customs and practices. This guidance applies to cultural properties of non-Indian groups or communities.

Examples of Indian traditional cultural properties include locations associated with traditional beliefs, locations where religious practitioners perform ceremonial activities in support of traditional practices, and traditional plant gathering areas.

Project planning must take these issues into account. The application of the Traditional Cultural Property inventory and evaluation in the project planning process will be a sensitive issue with tribal governments. Traditional cultural properties, in particular, cannot be evaluated by a cultural resource specialist without in-depth coordination between the Forest Service and tribal governments. Successful consultative management will be determined by the extent to which tribal governments are involved in the inventory and evaluation, and the degree to which their concerns are incorporated into project implementation.

The Native American Graves Protection and Repatriation Act establishes requirements for federal agencies and federally supported or assisted organizations in the identification and protection of American Indian graves and associated cultural items. It further establishes a process for the return

of institutionally held skeletal material, grave items and other sacred objects to their groups of cultural affiliation. A key requirement throughout the Act and its provisions is tribal consultation. The Forest Service is well advised to consider this Act whenever designing cultural resource inventory, evaluation or excavation contracts. Consultation with the appropriate tribal governments in advance of any such undertaking should be a standard procedure prior to any cultural resource undertaking. Agreements concerning determination of cultural affiliation and the treatment and disposition of human remains, associated or unassociated funerary and sacred objects should be documented prior to initiation of fieldwork.

Confidentiality of Records: The records of and locations for archaeological sites and sensitive cultural properties are exempt from disclosure under the Freedom of Information Act (16 USC 470hh and 36 CFR 296.18). Tribal governments are reluctant to disclose the locations of sensitive plant species, traditional use areas, cemeteries, and archaeological sites, for fear of exploitation or looting. The reluctance to disclose archaeological sites and cemeteries is of long standing. The commercial exploitation of traditional plant resources has become a more recent issue of resource confidentiality. It is difficult to plan undertakings without being entrusted with resource locations. Therefor it is essential to build a long-term relationship of trust and absolute confidentiality of information given to the Forest Service.

Cultural Resource Inventory and Evaluation: The issues of Traditional Cultural Properties highlighted under the discussion of co-management/joint managment above are particularly relevant here. Briefly, it is becoming more critical to work closely with tribal governments when conducting inventory in ceded areas, and when working on evaluations of resources.

Mitigation: The discussions above on consultation and government-to-government relations apply to test excavations and data recovery. Tribes should be afforded the opportunity to participate directly in excavation work, by having individuals as paid members on crews. Necessary services provided by a tribe, such as religious leaders for removal or reburial of human or other remains should be reimbursed by the Forest Service or it's agent. It is absolutely necessary to respect tribal positions regarding sacred objects and human remains. The laws of both Washington and Oregon are quite specific about consulting with, and respecting the wishes of, tribal governments and Indian people where human remains are known or likely to occur. Agreements between the Forest Service and tribal governments regarding the treatment of human remains, for example, and other contingencies must be formalized prior to any excavation work. National Forests are "open and unclaimed lands" under most of the treaties negotiated by then Governor Stevens in 1855. Traditional gathering areas must be considered and included in cultural resource inventories as areas potentially subject to exercise of treaty rights.

Executive Orders: Some tribes in Region 6 were established by Executive Order of the President. These tribes have certain rights to consultation regarding cultural rights also. Even where sites are within the treaty area or ceded lands of another tribe, some formal notification and in person follow up must take place with the respective tribal governing body.

Michael Boynton, September 16, 1991

MULTI-TRIBAL ORGANIZATIONS

Columbia River Inter-Tribal Fish Commission (CRITFC): The four Fish Committees of the Yakama, Umatilla, Warm Springs, and Nez Perce Tribes established CRITFC in 1976 at the recommendation of Bonneville Power Administration (BPA) and other federal agencies to facilitate a consensus of Tribal fisheries interests as they relate to federal hydro-electric project operations. The goal of achieving a unified Indian voice was the primary reason for bringing the four tribes together to discuss their off-reservation fishing interests. The staff, under daily supervision of the Executive Director, reviews Columbia River anadromous fishery resource data and makes general recommendations to the four member tribes and the states of Washington and Oregon for consideration in setting season regulations and salmon harvest allocations in the Columbia River.

After the first year of funding and participation, BPA requested the Bureau of Indian Affairs (BIA) take over the contract responsibility; as the primary trustee of Indian rights and resource protection. BIA agreed and has maintained the federal contract under their authority since 1977.

The CRITFC operates a BIA program in the best interest of the four Fish Committees of the respective member tribes. Neither the four Fish Committees nor CRITFC has authority to represent any Tribal Government positions or other official tribal business. Authorities are for technical services only.

The Fish Committees elect into office one or more Commissioners and a Chairman. The Commissioners direct the overall efforts and staff operations located in Portland, and Hood River, Oregon. The constitution establishing CRITFC requires a unanimous vote of all four member tribes for any action taken that addresses tribal goals, objectives, policy or procedures consistent with the Zone 6 fishery. For other fishery questions that may have an affect on the treaty rights of the individual participating tribes, the Commissioners carry information and recommendations back to their respective tribal governments for final approval by their tribal councils. The Commissioners then reconvene for a final vote and assigns a technical support role or work project to the staff.

The BIA contracted program duties and responsibilities for CRITFC are defined in two documents (under the authority of P.L.93-638): one for technical services addressing the commercial fishery between Bonneville and McNary Dams (commonly referred to as Zone 6). The other, to implement the Pacific Salmon Treaty terms and conditions. This means the organization is subject to all federal regulations in 25 CFR Parts 89, 271, 272 and other general contract provisions as the BIA deems appropriate. The BIA has final approval authority over all aspects of this contract and the resultant program expenditures. The contracted Bureau program is audited by the Office of Inspector General (Interior) on an annual basis. There are also federal standards that apply to their fisheries enforcement office in Hood River. Other federal funds are sometimes made available to this group for specific projects; e.g. Bonneville Power Administration (BPA) and the Power Planning Council (PPC).

The organization as a whole contributes extensive information into the Congressional Budget process. There is a core staff of fishery biologists who remain active in anadromous fishery management issues.

There is a staff of environmental specialists who review and make recommendations for changes to environmental documents, proposed development projects, shipping and transportation activities on the mainstem Columbia. This staff also monitors state and national proposed legislation. In some instances, staff members participate in developing proposed legislation.

There is an inter-tribal enforcement code signed by three of the tribes committing time and

resources to an Inter Tribal Fisheries Enforcement program, complete with armed, uniformed officers. The Yakama Nation is self-governing and not a signatory to this code. The program office and dispatch center is located in Hood River, Oregon. Fisheries enforcement authority and jurisdiction is limited to Zone 6 of the Columbia River proper; there is no jurisdiction on the ground. There are some cross deputy options being discussed at the County Sheriff level however, these have been only partially successful. The Hood River Office acts as a central dispatch unit service for three neighboring counties and is reimbursed for those services.

The absence of an appeal by a Tribe does not relieve or alter the obligation to consult with a tribal government, as no other group or organization can represent a sovereign nation. Other treaty rights may be affected if the only subject for consideration is anadromous fish.

Northwest Indian Fisheries Commission (NWIFC): In his landmark Federal District Court decision, Judge Boldt made some recommendations that he felt would assist the 20 tribes party to this lawsuit in conducting business with the State of Washington and its fisheries departments. He advised the tribes to organize amongst themselves in the form of a consortium or other group, enabling them to present unified positions in the realm of off-reservation fisheries management and enforcement. Out of this advice evolved the NWIFC.

The first constitution establishing the organization had a representative named Commissioner from each of the treaty areas; five in all. Each Commissioner had one vote with a tie to be broken, in the quorum of four, by the Chairman of the Commission. After a reorganization in 1984, each of the 20 member tribes has one vote. There are now a total of eight Commissioners, corresponding to the geographic river drainages where tribes have common interests in anadromous fisheries management. There is a staff of biologists, computer specialists, policy analysts, and fish health pathologists. NWIFC operates a diagnostic laboratory to serve the needs of the 32 salmon and steelhead hatcheries located throughout western Washington.

A recent addition to the program operations in Washington State is the Timber Fish and Wildlife project (TFW). This is an agreement between the State of Washington, The Indian Tribes in Washington State, and various major private logging interests such as Weyerhaeuser, Scott Paper, Boise-Cascade, referred to collectively as Private Timber Industry. The goal of TFW is to conduct logging activities and forest practices on state and private lands in such a manner as to protect and maintain viable fish habitat. The focus of study and research is on riparian areas, which has in turn helped to establish the Center for Streamside Management now located in the School of Forestry at the University of Washington, Seattle. Academic and professional contributions to this Center have been substantial over the past four years.

Program funds are appropriated by the U.S. Congress specifically for NWIFC through the BIA, who is the primary trustee with responsibilities to implement the 1974 federal court decision mentioned above. The program activities NWIFC staff are involved in focus on technical expertise in fisheries biology, including all aspects of escapement and harvest levels and fishing season recommendations. Each individual tribe promulgates their own fishing regulations consistent with NWIFC run size and timing estimates and other information received from Washington Department of Fisheries.

This group of Commissioners and the staff are also quite visible on the Hill during appropriations hearings. Travel to Washington, DC is frequent and usually consists of agenda items specific to the area west of the Cascade Mountain Range. There has been some travel to the Great Lakes region to participate in national events where Indian tribes are addressing federal regulations and similar federal court decisions.

Like CRITFC, there is a core staff who review and comment on a wide variety of state and federal

environmental documents. There is also a close liaison with some private industries and county officials for proposed commercial developments.

The State of Wisconsin has adjudicated off-reservation fishing. This law suit was ruled in favor of the tribes with reservations in both Wisconsin and Michigan. Since that time, the Great Lakes Indian Fisheries has been established and organized very similar to NWIFC.

The primary resource focus of NWIFC is on anadromous fish. However, the Commissioners have agreed to facilitate multi-tribal meetings regarding hunting rights on open and unclaimed lands in western Washington.

The geographic area with which NWIFC normally operates is the marine waters of: Puget Sound, the Strait of Juan De Fuca, and the Washington coast, along the Olympic Peninsula. For the most part, the fresh waters of western Washington are considered of primary importance to the respective tribe who has treaty reserved rights to take fish at usual and accustomed grounds and stations. Most services are therefore accomplished by individual tribal efforts.

The scientific and professional expertise of NWIFC staff is respected by the State and Federal agencies and is well established in federal court. Communications with this staff of technical experts would benefit forest Service staff in their planning efforts. There is also an excellent Public Information service at NWIFC.

If policy or more formal communications are needed, the respective Forest Supervisors should conduct business directly with the affected Tribal Governments. As with CRITFC, there is no tribal representation authority, by any NWIFC staff or their Commissioners. The tribes participating in this effort are shown on the following organizational chart: Nisqually, Puyallup, Squaxin Island, Jamestown, Lower Elwha Port Gamble, Skokomish, Muckleshoot, Suquamish, Tulalip, Stillaguamish, Swinomish, Upper Skagit, Sauk-Suiattle, Lummi, Nooksack, Makah, Quinault, Hoh, and Quileute Tribes.

Upper Columbia United Tribes (UCUT) is an organization that was developed in response to resident fish and wildlife interests above the Chief Joseph Dam region of the Columbia Basin as defined by the Power Planning Council. The member tribes are: Spokane, Kalispell, Kootenai, and Coeur D' Alene. These are Executive Order Tribes and have no off-reservation anadromous fishing rights adjudicated through a federal court.

Point No Point Treaty Council (PNPTC) is a multi-tribal organization of tribes who are successors in interest to this same treaty. The staff office in Kingston, Washington is a consortium of biologists and fisheries enforcement officers who serve the four member tribes having common commercial fishing areas. This is a cost savings effort to reduce potential duplication of fisheries management funding and efforts between the member tribes: Port Gamble, Skokomish, Lower Elwha, and Jamestown-Klallam. This group is also very active in reviewing and commenting on environmental documents for land use and land management actions.
There is no overlap in these duties with those of NWIFC. Instead; a compliment of fisheries expertise. The annual budget, which includes three salmon hatcheries is $1,100,000.

Skagit System Cooperative (SSC) is also a small organization serving the Swinomish, Sauk-Suiattle and Upper Skagit Tribes. The staff office in La Conner, Washington provides fisheries technical and enforcement services to these tribes who all share common usual and accustomed fishing areas. There is also a hatchery biologist to maintain two fish rearing facilities. Their

program is also funded with federal dollars through the BIA. The annual operating budget is about $450,000. This group has successfully developed off reservation fish hatcheries agreements with Puget Sound Power and Light which owns and operates several hydro-electric dams in the area. Their political influence is most directed at efforts to implement the Pacific Salmon Treaty, as two indicator salmon stocks of international importance originate in the Skagit River Drainage Basin.

Native American Fish and Wildlife Society (NAF&WS): This is a National organization maintaining an open membership to anyone interested in protecting fish and wildlife populations. Only members who are American Indians may vote in business sessions. The primary function of this group is to track national laws and the law making process to assist Indian Tribes in their efforts to maintain fish and wildlife species in viable populations. The methods of general operation is through lobby efforts in Washington, D.C. There has been some concern that some goals and actions of this group may conflict or even compete with individual Tribal goals. Some funding is generated from membership dues. The Staff Office is located near Denver, Colorado. There is a news letter printed quarterly. The office facilitates national conferences and workshops on a wide variety of natural resource subjects.

CONTRACTING WITH AMERICAN INDIANS

In efforts to improve relations with Indian Tribes in Region 6 there are several options under the normal process of contracting for labor and services that would serve both the Forest Service and Indian Tribes. Organizational contracting officers have the requisite knowledge and skills to accomplish such acquisitions.

Benefits: Training an American Indian work force would help decrease the high unemployment levels existing in the American Indian population. Working with Indian contractors would put the Forest Service in a positive position of supporting the Indian Self-Determination and Educational Assistance Act (P.L. 93-638) January 4, 1975, 25 USC 450. Over time it would increase the pool of qualified contractors to perform Forest Service work.

Internal Requirements: The critical requirement is strong line officer support for efforts to increase contracting with American Indians. This support is needed to provide necessary resources and gain acceptance by contracting and program personnel who may be unfamiliar with this option. Creating procurement methods, with attendant legal documents, will require sound innovative approaches. For a period of time until sound procedures are in place and a viable core of American Indian contractors is developed, there may be some increases in cost and time.

As there has been no appreciable amount of Indian contractors involved in the type of work the Forest Service contracts, they will be on the ascending side of the learning curve. Also, getting American Indians interested in becoming contractors will require outreach efforts. The following approaches appear to offer the best chances for increasing these procurement options.

Simplified Procurement Procedures: This approach is for procurements less than $25,000 where requests for quotes (RFQ) procedures can be used. RFQs for identified procurements exceeding $1,000 could be requested from only American Indian firms where it is expected at least two responses will be received. In the initial stages of the program this method offers the best chance for success.

Competitive Set Asides: This approach is based on P.L. 99-661, which granted DOD the authority to set aside five percent of its procurements where there are at least two minority businesses that can compete for the contract. Enlarging this law to permit use by the Forest Service will require Congressional legislation and the legislation would have to be specific as to the minority firms being American Indian owned.

BUY INDIAN ACT The Buy Indian Act (25 USC 47; June 25, 1910, C.431, Sect. 23, 36 Stat 861) authorizes the Secretary of the Interior to contract directly for employment of Indian labor and purchase products of Indian industry. Presently only the Secretary of Interior has this authority. Competition is required by the Competition in Contracting Act and the USDA has no authority to contract with Indians as a class set-aside. Indian owned businesses must be certified by the Bureau of Indian Affairs before they can compete among other Indians firms for contracts. If there are no Indian firms that qualify for a bid, the application process is opened to non-Indians.

Cooperative Funds and Deposits (Agreements): P.L. 94-148, (16 USC 565a-1). This Act provides the Forest Service with the authority to enter into cooperative agreements for a number of activities:

> *"To facilitate the administration of the programs and activities of the Forest Service ...to engage in cooperative manpower and job training and development programs; **to develop and publish cooperative environmental education and forest history materials;** and to perform forestry protection, including fire protection, timber stand improvement, debris removal, and thinning of trees. The Secretary (of Agriculture) may enter into aforesaid agreements when he determines that the public interest will be benefited and that there exists a mutual interest other than monetary considerations."*

Background: The policy of the United States is to assist Indian Tribal Governments in economic development, self-determination and the overall belief in a government-to-government relationship. On many Indian reservations in the northwest, there exists an 80 percent unemployment rate and few new industries are moving onto or near Indian Country.

Many National Forests are adjacent Indian Reservations. Approval of this proposal will assist the Forest Service in their efforts to improve government-to-government relationships and mutual understanding, develop Indian businesses to become competitive in the open market, assist Indian Tribes in their economic development efforts, and decrease the high unemployment rate.

The proposal would increase coverage to National Forest System lands. This would benefit Indians whose reservations have common boundaries with National Forests. The Bureau of Indian Affairs would still certify Indians. The Forest Service would compete and award contracts among Indians as a class set-aside under the Act's authority which would be exempt from the Competition in Contracting Act.

Alternatives: 1. Amend 25 USC 47 directly by adding authority for the Secretary of Agriculture to the existing legislation; 2. Restrict increased authority to the Chief of the Forest Service; 3. Submit as a legislative proposal for the 101st Congress; and 4. a combination of the above.

This approach is for the Forest Service to contract directly with American Indians for goods and services according to provisions of the existing Buy Indian Act, 25 USC 47, (June 25, 1910 C. 431; Section 23, 36STAT.861). Presently only the Secretary of Interior has procurement authority per the Buy
Indian Act.

Indian Preference Set Asides: This approach would be based on statutory authority of the Small Business Act, 15 USC 631 et. seq. The mechanics of this method would be similar to class set asides such as small business and labor surplus areas provided for in Section 15 of the Act. A further adaptation would be to set aside for Indian firms on a noncompetitive basis similar to Section 8a of the Act, i.e., an 8a contract without involvement by the Small Business Administration. Administrative Services presently has such a proposal before the Chief.

Primary Contractors Subcontracting With Indian Businesses: Public Law 100-442 Amendments to the Indian Financing Act of 1974, Section 504, permits an agency to give a prime contractor a bonus for subcontracting with a certified Indian firm. The bonus is 5% of the subcontract value. Administrative Services is working with the Chief's office in an effort to develop procedures and implementing clauses. This would, of course, increase contract prices. Its use is

discretionary.

Methods Other Than Procurement: The use of cooperative agreements, partnership agreements, memorandums of understanding are not literally procurements, although they have some contractual implications and to some extent are administered as contracts. Presently the Winema has executed such an agreement with the BIA to effect a pass through of FS work to the Klamath Indians. For reasons of funding methods and loss of control over the work, this has not yet proven to be a useful tool. The Forest is making another attempt with variations on the existing agreement.

Summary: It is Regional policy to develop good relations with American Indians. Acquisitions that develop working relationships is one way to do so. There are benefits and requirements, and for a period of time additional effort and cost will be needed to establish a successful program.

TRUST RESPONSIBILITIES

Recent attention to the American Indian influence on managing National Forests has surfaced the issue of Trust Responsibility on these lands.

There is no question that the United States has a trust responsibility brought about by the Treaties and Laws related to American Indians. Further, the welfare of Indians, the land and resources of the Indians are intrusted to the United States Government. For The Bureau of Indian Affairs and the Indian Health Service, the application of trust responsibility is clear because their mission centers around caring for the welfare, land and interests of Indians. For other Agencies, including the Forest Service, their trust responsibility is not that clear. The basic problem is when the mission of providing goods and services related to National Forest System lands for the benefit of all the people conflicts with the interests or wishes of Indian tribes.

The term "trust" is defined as "something committed to one to be used or cared for in the interest of another." This would seem to apply to Indian reservations as land actually belonging to Indians but being cared for and administered by the Bureau of Indian Affairs. Or to the medical welfare of Indians as attended to by the Indian Health Service. These responsibilities apply to specific Agencies and not to others. What does apply to the Forest Service are rights and privileges related to treaties, executive orders, laws and court decisions that apply directly to specific National Forest lands.

On lands ceded to the United States that later became National Forests these treaty rights and privileges include:

1. The right of taking fish at all usual and accustomed places in common with citizens.....and erecting suitable buildings for curing.
2. The privilege of hunting, gathering roots and berries...upon open and unclaimed land.
3. The privilege of pasturing horses and cattle upon open and unclaimed land.
4. The implied reservation of water to effectuate hunting and fishing rights.

These rights and privileges have been amplified and clarified by Federal Statutes and Court decisions so that they may apply differently to various National Forests. An illustration of the administration of a Treaty is the Yallup-Bruckert Handshake Agreement of 1932 defining areas of berry picking.

There may be a trust responsibility in regard to managing the resources that the Treaties depend on. This responsibility is redeemed through proper management of the resource as determined in the Forest Plan and through consultation with Tribes in the formulation and implementation of the Plan.

The administration of a treaty depends not so much on whether the elements of the treaty are called Trust Responsibilities or Rights and Privileges, but on carrying out the intent of the treaty in a just and responsive way, and making a strong effort to adjust management of National Forests in favor of the concerns of the Indians as far as practicable, while still maintaining a responsibility to all of the people.

Paul Brady & Mike Trow, June 19, 1989

FULFILLING RESPONSIBILITY WITHIN THE USDA FOREST SERVICE
A Discussion About Indian Treaty Reserved Rights

In reviewing federal court decisions and legislative actions that both use and discuss the principles, there is yet to be a comprehensive definition for the term "TRUST RESPONSIBILITY". Similarly, no Executive, at either the Presidential or Cabinet level, has created a definition for the term. Indian Tribes have consistently avoided attempts to define the term.

Litigation, beginning in 1832 continuing through the 1990's, has focused on resources and property (Indian owned assets) usually within the bounds of an Indian reservation . This holds true with Congressional actions. For off-reservation rights and some implied rights of Executive Order reservations & Tribes, there is little written information that the Forest Service can turn to for assistance in grasping the concept of Trust Responsibility as it applies to this agency.

On the subject of abrogation or violation of a treaty, if there has been no action on the ground, it would be difficult to conclude that writing or publishing a document has somehow adversely affected a treaty right. While such strong words seem to give reason for grave concern - without action there can be no demonstration that something has been damaged (abrogated or violated).

"Trust responsibility" is a concept applied to NFS lands, can neither be implemented nor defined. "Trust responsibility" is a construct of a special duty or charge, often referred to as both a political and legal term. The best measures one can make for fulfillment of a trust duty or responsibility, is to form a set of **principles** derived from court cases, federal policies and regulations addressing resources outside the bounds of an Indian reservation. Using these **principles**, one can compare the proposed actions in an informed manner to the resource species and habitat or environmental conditions desired to be maintained. Fulfilling this charge or duty therefore, is a matter of action, not the writing of a document. Yet the document should incorporate tribal recommendations in their own words wherever possible.

TRIBAL INVOLVEMENT: Two frequently asked questions are:

1) "To what extent does a tribe get involved in the Forest Service decision making process?" Planning processes and documents should include tribal officials and staff prior to the scoping step in NEPA compliance on a government to government basis. The extent needs to be measured against FS mission as stated in NFMA, other authorities and laws, and the resources of interest to the respective tribes.

2) "Do tribe have a veto vote in a FS decision?" No, FS has the sole responsibility for the agency decision. Similarly, there is no sharing of liability for a FS decision. Professional judgement must be exercised in a fair and consistent manner where technical impasses exist so as to avoid a polarizing of expert opinions. The ultimate goal is to obtain a healthy balanced ecosystem. "How" the FS achieves that is often the only debate.

The Forest Service is not able to manage National Forest System lands exclusively for treaty resources. What FS can do is fulfill those management requirements delegated by Congress, while remaining consistent with treaty rights protection responsibilities delegated by the President to the Secretary of the Interior. (See also 25 USC Sec. 2 & 9)

DISPOSAL OF TIMBER BY SALE OR FREE-USE TO AMERICAN INDIANS

This paper reviews briefly the authorities for timber disposal that are available to Forest Service personnel with delegated timber disposal authority. The subject of treaty rights or privileges which may convey "gathering rights" for various products is not addressed in depth, since it is being addressed in other briefing papers. If it is determined the American Indians have rights to firewood or other products under their treaty, the authorities and procedures discussed here would probably be used to fulfill those treaty rights.

Regulations and policies governing Forest Service sale and disposal are written for the conventional products. Unconventional products are not always addressed; consequently, instructions, forms, and reporting processes may not fit some of the products used by Indians.

Current regulations which authorize timber disposal do not identify American Indians or Indian Corporations for any different treatment outside Alaska. However, these authorities provide significant flexibility for making some products available either free or at reasonable costs, and in so doing would address some other concerns such as employment.

A number of authorities exist which could be exercised to allow American Indians the opportunity to utilize wood:
(See also 36 CFR 223)

1. Free-use Permits. Where supplies of firewood exceed demand or in hardship cases, free-use permits could be issued to American Indians. The permit is necessary to comply with State law and to avoid difficulties with law enforcement. Also, permits are desirable to limit quantities, time of cutting, and to control location of harvest. Another administrative difficulty is identifying who is to receive the free-use permit. Several Forests have contracted with stores or service stations to issue firewood permits. Perhaps there is a store on the Reservation that would like to issue permits under contract with the Forest Service.

2. Administrative Use Timber Sales. Administrative use is limited to situations where the Forest will benefit and/or for study purposes. These contracts are usually advertised, but may be sold directly. Sale must be supported by a study plan or the benefit must be clearly documented.

3. Public Works Contracts with salvage rights. Contracts in which the American Indians or the Corporation would contract for thinning, timber stand improvement, or slash disposal, and would be given salvage rights to material on the contract area. These contracts are governed by Public Works Contracting authorities for such requirements as advertising, dollar limits, bonding, etc.

4. Timber Sales. Timber Sales range in size from small sales for personal use to large commercial sales. Small sales may be sold directly, without advertising, at standard stumpage rates.

Wendall Jones, 1990

HUNTING ACCESS ON CLOSED ROADS

Importance to the Region

Hunting access on closed roads is allowed now, but not using motorized vehicles. The concern seems to be one of motorized vehicular use on roads closed during hunting season or roads closed in traditional year around tribal hunting areas.

The Oregon Department of Fish and Wildlife in 1984 attracted some 5,000 hunters to statewide workshops who felt their greatest concern was forest roads. Sixteen thousand questionnaires indicated closing roads was a more favorable solution to road problems than other possible strategies.

The "Green Dot" system has been in use for several years on National Forests in Oregon and Washington to indicate which roads can be driven on during hunting seasons. This type of road closing has been highly successful in some places and mediocre in others.

American Indians who retain hunting and fishing rights on ceded land areas for traditional year around tribal hunting are becoming concerned about reduced motorized access. This issue is emerging as a result of Forest Plan direction to manage the forest road systems for economic efficiencies and habitat improvements.

After decisions are made in Forest Plans, National Forests will implement an access and travel management process. Objectives will be to determine what access is needed, when, by whom, and what access is not needed. This information should be obtained with full public participation and consultation with Indian Tribes who have retained off-reservation rights to hunt. Access needs of National Forest customers must be blended with resource management objectives such as wildlife habitat.

This process will likely result in additional road closures. The access restrictions applied to a road closure will equally apply to American Indians.

Proposed Implementation

All Forest users including American Indians should be involved in the development of Access and Travel Management decisions for each National Forest.

Paul Brady, 1990

INDIAN WATER RIGHTS

Indian Water Rights are different from Federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights, but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, or otherwise convey its own Federal reserved water rights, its powers and duties regarding Indian Water Rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of trust resource protection.

The reserved water right as applies to Indians is derived from Winters v U.S., 1908. The quantity of water is determined by evaluating the purposes for which an Indian reservation was established and applies to all uses; including irrigation of lands that are not currently serviced with a water supply. Also, into this analysis goes information regarding current and planned reservation uses such as municipal, industrial, natural resource populations, festive, and existing uses that will ultimately benefit a tribal economy.

Of recent interest in Region 6 with respect to a federal reserved right, is the instream flow right which is based on uses such as esthetic, religious, cultural, channel stability, and to support fisheries.

For aboriginal water rights and claims, the priority date is the most important aspect in establishing a water right. This right is retained by the tribe based on prior use and occupancy. The priority date is derived from a treaty or other agreement signed by United States officials. These include hunting and fishing primarily, and can occur either on or off-reservation.

Instream flow water rights for fish have been recognized in five federal court cases in the northwest. In instances where anadromous fish are found, there are water flow needs for down stream migrating juveniles, the returning adult runs of salmon and steelhead. The recent efforts to nominate certain salmon species as threatened or endangered within the Columbia River Basin has also brought water quality and fish habitat to the forefront of water discussions in Region 6.

The commonality between the Forest Service and Indian Tribes with respect to water rights and claims can be summarized as: occurring in the same geographic area; flows for fish populations and their habitats; channel maintenance and maintenance of the wildlife populations.

There would be benefit to the Forest Service to communicate regularly with both the respective Indian Tribes and the Bureau of Indian Affairs. There is a continuing need for all entities to remain consistent with data collection and methodologies, sharing and exchanging data to avoid duplication of effort and central costs, arrive at a coordinated comprehensive federal claim, and maintain a consistent documentation with respect to confidentiality of records and issues in anticipation of potential court actions that may be filed against the USDA Forest Service by third parties.

Les McConnell, June 27, 1991

Definitions Applying to Water Rights in Region 6:

Federal Reserved Rights - Water is reserved by the United States as of the date when a federal agency first establishes the purposes and intent for which an Indian Reservation was created. The Winters Doctrine contains a descriptions of the implied right to a water reserve on behalf of Federally recognized Indian Tribes.

Consumptive Water Uses/Rights - Water which is diverted from the stream or other body of water.

Nonconsumptive Water Uses/Rights - Water which is used within the stream a body of water. Sometimes referred to as instream flow needs.

Minimum instream flows - Those instream flows in a quantity sufficient only to maintain the purpose of use at the very minimum (as opposed to the maximum or intermediate needs).

-Generally, there is one current major issue regarding Indian water rights where Forest Service is involved; The Klamath Indian Tribe.

-Generally, Indian water claims are complimentary to USFS rights and/or needs and can even strengthen or reinforce USFS needs e.g.; Klamath River Adjudication.

-While Indian water rights is a complex legal subject the courts have ruled in favor of several Indian Tribes' claims for traditional and modern Reservation purposes; at least on existing or former reservation lands.

USFS has reserved rights for two purposes: (1) timber related; and (2) securing favorable conditions of flow, as per a 1978 U.S. Supreme Court Decision (and other court cases) as of the date of the reservation of water.

Usually the priority date of other rights are "junior" to any rights the Indians might claim as a reserved right; e.g., Klamath Adjudication.

-USFS must file a claim with the state for non-reserved uses with priority dates matching the application date.

-For non-consumptive, non-reserved recognition of uses in the courts the USFS should either (1) utilize existing state processes or procedures; e.g., instream flow quantification, withdrawals, or river basin planning or (2) capitalize on those who can claim mutually beneficial uses; e.g., the Indians.

-Administratively, however, the USFS has numerous options to protect its consumptive and non-consumptive reserved or non-reserved rights such as through permits, protest, license, MOU's, purchase, court action, filing under state law or process, construction of dams or storage; etc.

-Quantification of instream flows in the Klamath River in cooperation with the tribe

-Quantification of uses in Yakama basin (issues regarding Indian claims revolve around reservoir management by Bureau of Reclamation)

-Water right claims on ceded lands have not been an issue and there are no court cases addressing that issue, in Region 6. Resolution of future claims, should be on the premise of cooperation and consultation.

-In the past, Indian claims for water have primarily been for non-consumptive purposes associated with their treaty rights on former or existing Indian reservation lands. Consequently, the major potential for conflict is where upstream USFS consumptive uses may interfere with an Indian tribe's non-consumptive use. This is a relative low risk possibility. USFS consumptive uses are usually very small in quantity, sporadic in nature, and other less conflicting sources are often available.

G.W. Swank, June 6, 1990, revised June 7, 1991

GRAZING LIVESTOCK ON OPEN AND UNCLAIMED LANDS

The chronology of events leading up to modern items where the Forest Service manages rangeland grazing dates back nearly 200 years, coinciding with westward expansion, the arrival of the horse in the great basin and rapid adoption of this animal for transportation by Indian tribes. At the time of treaty negotiations in the mid the horse was in common use and some Indian tribes maintained herds of cattle. The idea of a treaty reserved right to grazing was as a supplement to the other subsistence needs of Indian tribes who would now be required to live on a reservation of limited space. In addition, the horse was a source of transportation that was used to participate in the exercise of rights such as fishing and hunting.

As mentioned in other parts of this guide, these rights are to be exercised in common with the citizens of the territory, and include about 42 tribes in the Northwest. It is imperative therefore, to read and understand the treaty being applied to the Forest Service decision or permit process where grazing rights may be an issue to be considered or facilitated.

Current direction for processing permits for treaty based grazing rights is found in VISUM 2235.1. In developing permits to individuals or the tribal governing body, it is advised to consult with EGG for the terms or conditions of the permit.

Understanding the treaty provisions is important since some treaty documents reserve grazing rights for horses, while others state "livestock" as the reference for a type of grazing.

- How to allocate the existing range for treaty grazing purposes
- Defining the geographic scope as it applies to the treaty right
- How the Forest Plans may affect treaty rights to graze
- Defining the term "traditional use areas" as it applies to grazing rights

At least one tribe has forwarded the position that the term "ceded lands" does not apply to the definition of open and unclaimed lands. This question about ceded lands as compared to "traditional use areas" has been sent to OGC for review and advise. An opinion was drafted in April 1988, discussing how different principles of federal court fishing rights cases may have some bearing on the right to graze livestock outside the boundaries of an Indian reservation. The discussion letter does not address the general treaty right. Instead, there is a focus on the Umatilla Tribes' treaty of 1855.

*ADDRESSING INDIAN RIGHTS IN NATIONAL ENVIRONMENTAL POLICY ACT DOCUMENTS

Pre-Existing Conditions and Obligations

Prior to European contact, there were hundreds of American Indian cultural groups and bands of distinctly different peoples living in the Western Hemisphere. Prior to colonies being established on the North American continent, settlement and conquest or encroachment onto American Indian occupied lands was conducted in a variety of ways. Some were hostile, while others were achieved by negotiated agreements between a European country and the respective American Indian band or nation. During the 1600's, trade agreements were developed, and the economic system so well known in the Old World was well established on the North American Continent. This lead to transatlantic trade which further enhanced the desire to expand colonies, ultimately bringing about permanent change to the total American Indian population in the Americas.

The first session of the Continental Congress met in Albany, (in present day New York) in 1754 for the purpose of improving American Indian relations between the Iroquois Nations and the colonies and gain their loyalty against the French. Shortly after the colonies declared their independence from England, there was another urgent need for new and improved relations with American Indian nations. After the Revolutionary War, two major laws were passed in the form of ordinances; 1785 and 1787. Respectively, the laws were:

1. To create the public domain, and
2. To create some form of regulation over citizens as they continued to move west. The treaty making process served as an instrument to extinguish Indian title to lands. Treaties are cited in the Constitution as follows:

"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, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Article VI)

Treaties, acts of Congress (as may apply in Alaska), and executive orders after 1871, obligate the United States and its agencies to the certain trust responsibilities. This complex and legal relationship with American Indians and Alaska natives and their governments should be discussed in any planning document. While the environment proper may not be altered in a Forest Service (FS) proposed action, there are certain rights that require protection, which may result in special considerations for lands where these rights apply. Entire libraries of legal decisions (case law) and Congressional acts, accompanied by numerous implementing regulations, have been published over the past 100 years on the subject of American Indian rights and resource interests.

The federal responsibility stemming from treaties or other laws has been generally referred to as the **federal trust responsibility**. Unlike many standard terms in federal vocabularies, this term has never been defined or outlined by the President or any executive branch of government. Virtually all of the reserved treaty rights and subsistence rights, outside reservation boundaries, are exercised in common with non-Indian citizens. They take place on federal lands, which are former Indian lands. This is also described as a "co-mingled trust responsibility," in light of the accompanying public trust duties a federal agency is charged with while managing lands for multiple uses. Indian Tribes have also resisted placing a fixed definition on the term trust responsibility.

There is no specific mention of these pre-existing rights and interests within the National Environmental Policy Act or its accompanying Council on Environmental Quality Regulations. The

Secretary of the Interior signed a directive dated November 1993, instructing that any environmental document prepared by an Interior agency, include a discussion of American Indian reserved treaty rights and the effects on such rights as may take place as a result of a pending federal decision. The United States Department of Agriculture has not made a similar policy statement.

Public Involvement - Where Do Tribes Fit?: An important principle that applies to planning efforts is developing environmental documents that are built on clear, shared expectations within the agency and with the public. Both the FS and the public should have clear shared expectations of what is intended and what is possible. The best way to assure American Indian tribes have been included in the communications is to consult with them at the earliest possible time in planning efforts.

Many federally recognized American Indian tribes have property rights or interests on federal lands (see enclosed paper on "Wilderness"). In Alaska, subsistence rights apply to National FS lands and some waterways on forests. Indian tribes who have rights to fish, hunt, gather, graze livestock, or trap on National Forest lands also have the asserted they have an implied right to have associated resources (habitat) protected from degradation. Tribes may seek a legal remedy to this assertion. Federal agencies have an overriding responsibility to perform their trust duties in a manner so as not to diminish or abrogate reserved treaty or executive order rights, (if defined by law or statute) or subsistence rights as applies in Alaska.

The Federal Obligation: In addition to obligations in treaties and statutes, the FS has an obligation to consult with federally recognized Indian tribes on a government-to-government basis throughout the planning processes. Performing this function should be initiated prior to the public scoping announcement. Pre-project planning communication with a potentially affected Indian tribal government could save time and resources by gaining information relevant to lands affected by the proposed action or decision. This does not mean that a Forest or District must wait for tribal concurrence. This does not mean that the time schedule need be arranged to accommodate tribal response. (Some due dates are imposed on the agency by Congress or the President). Early consultation is needed to initiate discussions about project plans between the two governments in the event secret, confidential, or resource information is made available to the agency. The agency has an opportunity to maintain confidentiality of information as provided in NHPA, Sec. 304., or other laws.

EXAMPLE: If a picnic area development were proposed for a river bank, the District line and staff should consult with the local American Indian tribe prior to public notice. This pre-project communication could reveal the existence of confidential or sacred information or locations of artifacts that the agency would be able to protect as provided in NHPA, Section 304.

Without the benefit of preliminary discussions with a local American Indian tribe, the FS may be in a situation of having created extra work load, or possibly created an opportunity for site vandalism, or acted in a manner that would damage the relationship with tribal officials. Early tribal involvement could assist the FS in streamlining the planning process in the event sacred sites, information, or artifacts exist on National FS land, thereby providing the protections those places deserve.

How Much is Enough?: For those examples where rights exist, there may be a question: "to what extent does a right or interest have an effect on the Forest Service's planning process?" Some people refer to this as the "quantification question." That is, how many or how much of a resource must remain or be protected in order to fulfill the trust responsibility? Unfortunately, there is no standard of measure; no legal yardstick for stating at what point the federal agency has met or fulfilled the "trust responsibility" or prevented abrogating a treaty. Instead, FS must glean from existing case law a series or collection of discussions that will assist us in answering the rights question(s) at hand. No

treaty document guarantees a specific number or quantity of a resource as a reserved right. There are no fixed numbers for natural resources mentioned or referred to in the treaties. Consultation with tribal technical staff is helpful. Not all tribal governments or villages have technical expertise that can be of assistance to the FS staff in answering questions about environmental effects.

Incorporating Tribal Consultation: The history of Federal American Indian policy up to the time of the Indian Self Determination Act of 1976, provided little opportunity for tribes to participate in the federal decision making process for areas outside the bounds of an Indian reservation, or on National Forest System (NFS) lands. Since that time, many congressional acts and court decisions lean toward much more tribal involvement in the federal decision making process. That is, more in keeping with the concept of government-to-government relations and the related self determination status of American Indian tribes.

It is important to contact American Indian tribes or villages in order to make an informed decision. The process, as with relationships, is continuously dynamic. Forest Service staff and line officers will have the best success by remaining involved and informed with the various groups and governments on a continuous basis.

The following outline can apply either to a project or Forest Plan. It is not necessary to develop the following in detail for a lesser Environmental Statement (EA) or for small projects or undertakings of any kind where rights and interests are not affected.

SUBJECTS AND CATEGORIES IN NATIONAL ENVIRONMENTAL POLICY ACT DOCUMENTS

The National Environmental Policy Act contains several processes. Both Titles I and II discuss various means by which the federal government may conduct business so as not to infringe upon the rights and interest of the public. In some instances, the Office of General Council has defined "the public" to include American Indian nations. However, American Indian tribes, for the most part, do not consider themselves as part of the public; rather, as sovereign nations or distinct and separate political entities, with specific rights and interests which the federal government has responsibilities to protect.

The federal government, as trustee of American Indian rights and interests, does have certain trust duties that must be fulfilled in the normal course of conducting business and carrying out agency missions. One section in NEPA guides us to consider information from other sources; Section 105.:

> "The policies and goals set forth in this Act are supplemental to those set forth in existing authorizations of Federal agencies."

There has been express concern that the existing sections within the
Council on Environmental Quality (CEQ) regulations are sufficient to fulfill the needs for preparation. The recommendation here is not to create more paperwork for Forests and Districts that have no American Indian interests. Instead, the goal is to substantially reduce the work by reducing the number and complexity of the appeals for Forests that have such interests.

Therefore, these directions would provide a look at other laws--including treaties with Indian tribes. Within the purview of this tribal relations book, as technical advice to address the various aspects of American Indian rights and interests, it is recommended that including document sections and categories, titled and developed as follows:

Chapter I - Purpose and Need for Action

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

B. If consultation with a tribe regarding the proposed action indicates there is an issue with the proposed action and is related to treaty rights or other rights or interests, alternatives to the proposal should be discussed as early as possible. If necessary, develop mitigation measures. The analysis should be incorporated into Chapters 2 through 4 of the NEPA document.

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

1. An excerpt from the treaty(s) applying to this area.

a. List the resources, related to the proposed action, mentioned in the treaty, executive order or statute.

b. Discuss any regulation or case law that may also apply to these rights.

c. Discuss the land area affected by the treaty or executive order.

2. Illustrate the area of land affected by the treaty or order.

3. List the names of tribe(s) and their respective governing bodies that may have an interest in participating in government-to-government consultation.

D. If no significant issue related to treaty or other tribal rights is found to exist, this "finding" and supporting documentation (such as letters from the tribe or meeting notes) should be placed in the project record and referenced in the NEPA document.

(NOTE - For some project proposals there will be no effect on, or conflict with, American Indian rights. Once this finding has been made and documented, no additional discussion/analysis in the NEPA document is required. This is consistent with 40 CFR 1502.2 b, which states that for other than significant issues there need; ".....only be enough discussion to show why more study is not warranted.")

E. In the case of a broad, programmatic NEPA document (such as the EIS for a forest plan revision) the discussion in Chapter 1 should include discussion of all treaty and other rights and their relationship to the proposed action if related to the purpose and need.

Chapter II - Alternatives Including the Proposed Action

A. Whenever a proposed action has the potential of affecting lands that support treaty resources there is more that environmental considerations at issue. Treaty or other tribal rights may be a part of the underlying need for the proposal, or when there is a significant issue related to treaty or other tribal rights, this chapter of the NEPA document should clearly indicate that the proposed action and all alternatives meet the requirements of the U.S. Forest Service complies with American Indian treaty, executive order or statutory rights and address individual Indian interests.

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

Chapter III - Affected Environment (for documents which include this section)

A. Introduction - These first few paragraphs should include a short reference of the treaty resources potentially affected by the proposed action.

B. Trust, treaty or subsistence resources and their location - The land area affected by the proposal should discuss in general terms what, if any, areas or sites or streams have or support treaty resources. It can be brief yet maintain continuity in illustrating that more than environmental considerations are at issue. In the case of programmatic documents such as EIS's for forest plan revisions, it should also include a map of any land ceded to the U.S. via treaty or other document. A discussion should encompass the overall goals of the FS as land manager with duties to honor treaties or acts of Congress for subsistence use of resources.

Where possible this should include descriptions as to the extent of the rights identified and where on the forest certain activities occur. The existence of such treaty rights may have the effect of precluding certain alternatives for the proposed action. That is, a treaty reserved right may hold a priority over a proposed action for a specific site or location. This discussion may also include certain cultural resources that would have a direct effect on the proposed alternative, and consequently, the ability to maintain confidentiality of the information gathered about cultural sites or resources.

EXAMPLE: In 1988 the U.S. Army Corps of Engineers was found to be in potential violation of the Treaty of Point Elliott if the Corps issued a "Section 404" permit for dredging. Issuance of this permit would have allowed a developer to construct a 1200 slip marina, cutting off access to the Muckleshoot Tribes' usual and accustomed fishing area. While the effects to the environment were of acceptable levels and could be mitigated, the treaty right and potential violation of that right was of far greater weight with respect to the proposed federal action.

C. Environmental Components within the Project area or Planning Area - Each of these resources, if related to the proposed action, needs to have associated with it a discussion of a trust duty that may impose upon the FS a need for special consideration or protection. For a "project", discussion can be limited to those aspects related to the project. For a broader, programmatic NEPA document, such as for a forest plan revision, a more detailed discussion is needed as for:

1. Topography include a ceded lands map or reference
2. Climate
3. Water - an implied right that needs protections
4. Fish - a treaty or subsistence resource
5. Wildlife - a treaty or subsistence resource
6. Grasses - a treaty resource for gathering rights
7. Plants, Roots and Bulbs - medicinal/spiritual or a reserved right
8. Riparian Areas - another resource that affects fish
9. Cultural Resources - while these are not reserved rights, they may be tribal or individual Indian interests. Discussions should remain consistent with existing cultural resource laws.

D. Decision Notice or Record of Decision - In decisions where the treaty or other tribal rights were identified as a significant issue with the Proposed Action, the decision document should explain how this issue was considered in the decision making process.

SUMMARY

For some Forests and Regions this may be a first look at the unique relationship that federal agencies have with Indian Country. (Please also refer to FS Policy as stated in FSM 1560.) There will be an opportunity to articulate what has worked with the respective tribe(s) during development of this document.

The recommendations in this paper are consistent with the governmental relationship with American Indian Tribes and Alaska Tribes and Villages. Documentation of federal proposals and their potential effects on the reserved or legal rights of American Indians and Alaska Natives is an essential part of the planning process. In efforts to develop comprehensive Forest Plans there has been opportunity to monitor the effectiveness of work as one proceeds with existing laws and regulations. While staff may not be able to develop national direction in a Handbook or Manual, staff may be best able to address recurring questions about American Indian or Alaska Native rights and interests through the NEPA process and thereby avoid the cumbersome appeals process.

CEQ References: The CEQ regulations (40 CFR 1500-1508) for implementing NEPA refer to American Indian tribes and their role in NEPA analysis in several places
1502.16 (c) - discussing effects of the proposed action on Indian plans
1503.1 (a) (2) - requesting comments from; 1506.6 (3) - providing notice to tribes when effects may occur on reservations,
1508.5 - American Indian tribe as a "cooperating agency" in NEPA analysis

Special Forest Products and the Gathering Rights and Interests of American Indians

The United States negotiated 389 treaties with Indian Nations. Of these, approximately 60 treaties contain language of reserved use rights or treaty rights within the treaty documents:

> "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." (Treaty with the Dwamish, Suquamish, Etc., 1855, Article 5)

Similarly, the treaties East of the Cascades and in Oregon contained the following provisions and reserved rights:

> "That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same; also the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, is secured to them." (Treaty With the Tribes of Middle Oregon, 1855, Article 1)

In the Great Lakes areas treaties were similar:

> The Indians stipulate for the right of hunting on the ceded territory with other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall continue in force, in respect to their trade and intercourse with the whites until otherwise ordered by Congress (Treaty with the Chippewas, 1842, Article II).

In 1980, the Alaska National Interest Lands Conservation Act was signed into law. This law addresses Alaska Native subsistence as a part of everyday life. To the Western/European culture, subsistence means the gathering and preparation of resources for nutritional purposes. To others it represents a life style. To the Alaska Native, it represents the very core of their existence as a people. It is a spiritual, cultural and economic means to the continuation of their heritage, It is the essence of their being. In addition to treaties, the U.S. has utilized Presidential Proclamations and Executive Orders to define rights and interests of tribal governments. Current National Policy: "to be sensitive to Native religious beliefs and practices" (FSM 1563) paves the way for Forests and Districts to develop written agreements to accommodate tribal use of NFS lands for gathering purposes.

Federal Responsibility: The Forests and Districts have broad responsibilities to manage the resources, use and occupancy on NFS lands. Many of the natural resources are those that make the exercise of Indian treaty reserved rights a meaningful right. The FS has a responsibility to honor treaty rights. The protection of treaty reserved rights is commensurate with protection of resources. Managing and/or protecting "Special Forest Products" are a part of this responsibility as it is a part of a multiple use management direction.

Recent increases in the use of NFS lands, has led to increased consumption of resources collectively referred to as Special Forest Products. Included in this broad category are species such as: berries, roots, medicinal plants, mosses, fungi, grasses and shrubs, tree bark, and generally wood that does not fit the 36 CFR criteria for "timber". Timber varies in definition depending upon the location. Generally it means: standing green trees with a diameter (DBH) of less than 10 inches. The FS has not developed a system of inventory for most Special Forest Products, consequently there is no management tool that could serve to estimate the levels of use or the overall availability of special forest products.

Agreements: Because of the increased demand for products other than timber, there is a need for an inventory and a system to monitor the levels of use. Written agreements with Tribes are a viable method of accommodating the exercise of treaty rights and can assist the FS in efforts to make available sufficient quantities of special forest products to fulfill the needs of Indian tribes. In an agreement or Memorandum of Agreement (MOA), it is possible to involve the tribal government directly in developing a mutually beneficial management tool. The expectations for harvest and access to NFS lands could be identified in the MOA by both parties and the tribe could accomplish necessary monitoring levels of use and access to NFS lands.

Permit Systems: The method often used for access to and use of resources has been the special use permit or free use permit (see 36 CFR 251). Lacking any other management tool that could assist the FS in addressing the access and use issues, these permits have served land managers with some basic information necessary to fulfill FS multiple use requirements. It is possible that permits could assist American Indians maintain privacy when necessary by providing the Ranger or local manager the ability to designate alternate sites for the general public. Permits can continue to be a management tool for protecting the natural resources and assist the tribes in treaty harvests. Without some documentation of use there would be no means to assure that the FS is fulfilling its obligations to manage these important resources, or provide protection for certain species or areas. There have been some instances where public groups from urban areas have essentially out-competed Indian people for certain resources. The public generally has access to most NFS lands. However, the public does not have a treaty reserved right to forest products as many tribes in the West and Alaska have reserved for themselves by treaty or other statute. If a permit system is selected as the management tool for gathering, some direct governmental communications with tribe(s) is in order.

Free Use Permits: Generally, these can apply to tribal members, for personal use, in the following categories: 1) Treaty tribes with off-reservation reserved rights; 2) Treaty tribes without off-reservation rights; and 3) Executive order tribes and 4) Alaska Natives exercising subsistence rights.

Permits With a Fee: In situations where gathering is for commercial purposes it is recommended a fee be assessed by the District or Forest. Evaluations should be made for permit applications that state the purpose and to whom the permit will apply and which species are being gathered.

Telephone or Personal Notice and No Permit: There are instances when the Tribe or its members rightfully require confidentiality or secrecy for gathering certain plants such as medicines or ceremonial objects. Those notices can be optional and no fee need be applied to that type of gathering.

The above examples could also be used within a MOA where a tribal government would conduct the monitoring of their own tribal members. The Line Officer should be informed of special circumstances and make judgements accordingly. Forests and Districts that boarder other Forests, should maintain consistency in treatment of the permits or MOA among neighboring tribes.

Access: The exercise of treaty rights is a subject of complex discussions due in part to a lack of specific and uniform definitions for the terminology used. Congress, federal agencies, the federal courts and the Indian Tribes have historically used different terms to describe various aspects of treaty or executive order documents and the rights identified in them. In a broad sense, the fundamental right has three elements that should be considered as a whole:

a. **the activity** is the (taking, hunting, gathering, grazing, trapping...)
b. **the resource** is the (fish, deer, whale, plant, berry, grass, water...)

c. **the location** is a (habitat or site; federal land or water...)

To discuss the treaty right in an educational context, all 3 elements: activity; resource and location, must exist together for the treaty right to have real meaning. Treaty rights are a special type of property right that only Congress can alter or have direct affect on. Some elements of the treaty or property right can be separated from public lands. For instance: when a federal agency sells public land into private ownership, treaty rights for hunting gathering and grazing do not necessarily survive the land transaction as a lien attached to the land title. Instead, as in most cases, they are separated from the land title claim. Historically there has been no compensation for the loss of access to open and unclaimed or unoccupied land once it passes into private ownership.

Usual and Accustomed Areas: In normal discussion within the FS a "property right" usually means an easement, mineral right, title claim or real property. When discussing treaty rights as property rights, differences need to be identified in the context of the treaty being addressed. For clarification on the term "property right" it is best to seek legal advise from OGC. Each treaty is different and must be evaluated on its own merits.

Some treaties make reference to specific lands. Of special status in this regard are lands known as: **"usual and accustomed areas"**; specific sites of land or water associated with the right to take fish. (See treaty excerpts above). Those rights have been described by federal court to include an encumbrance on the land, a servitude of access to a site, regardless of land ownership status.

Open, unclaimed or unoccupied lands: have not been treated the same as "usual and accustomed areas". In the 1800's one of the basic goals of treaty making was to extinguish Indian title to the land and make way for settlement; transferring former Indian lands (ceded lands) by homestead or sale into private ownership. At the conclusion of the land sale, the access to that former Indian land is severed. While the one element of the treaty right (the activity) may continue unaffected by a title action, the third element (the location) may no longer be accessible. In time, there will be a need for an analysis of the cumulative effects of decreasing land base on the exercise of treaty reserved rights.

Gathering in Wilderness Zones or areas: The Wilderness Act, (P.L. 88-577) was established for several purposes, the overriding theme being preservation. Laws and regulations affect and define land management activities and on federal lands. In Section 4.(c) of this Act the administrative responsibilities are discussed:

> "...each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of such area for such other purposes for which it may have been established, as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational conservation, and historic use."

The Wilderness Act takes great steps in two different directions at the same time. First, it establishes a preservation goal. Second, there are several sections dedicated to exceptions and 'no effect statements.' Mining activity is not affected; nothing in the Act is to interfere with the purposes of NF's, Multiple Use and other authorities. Of specific interest: treaty rights do not appear to have been altered or amended by the Act. The exercise of those rights appear to be consistent with the stated purposes. At Section 4 (c) (4&7) there is reference to grazing which will not be affected, nor: "the jurisdiction or responsibilities of the several State[s] with respect to wildlife and fish in the National Forests."

The Act is further discussed at 16 USC 1132, note 3: "the major purpose of this chapter is to remove absolute discretion from Secretary of Agriculture and FS by placing ultimate responsibility for

wilderness classification with Congress." Congress may addresses treaty rights on the face of a statute, or through legislative history:

> "[W]here the evidence of congressional intent to abrogate is sufficiently compelling, the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute. What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty." (United States v. Dion, 476 U.S. 734, U.S. 739-40 (1986)).

Congress designated the use of Wilderness areas to include recreation, scenic, scientific, educational, conservation and historic uses. The exercise of treaty reserved rights is clearly a "historic use" and would normally compliment the preservation goals of the Act.

The manner in which Wilderness is managed is by a plan developed by the local Forest. In an area that affects more than one Forest, one Forest SO usually takes the lead in administration of the provisions of the Plan. The Wilderness Plan should include descriptions of activities and conditions - if any that may apply to the area being considered.

Some considerations may apply: If the exercise of treaty rights were to leave obvious traces of human activity, or otherwise alter the natural or 'wild' appearance of an area with this designation, then two questions surface: 1) is the preservation goal not met? 2) is the exercise of treaty rights placing unusual burden on the resource(s)? Some discussion with the respective tribe is in order. It is possible to make alterations or set conditions on use and access to Wilderness areas to meet preservation goals stated in the Plan. Again it may be necessary to evaluate the actions, taking into consideration treaty rights that may apply to the area.

For example, if stripping bark from trees alters the natural appearance of an area, some limitations on volumes of bark removed may need to be written into the Plan, in consultation with Indian tribes whose rights or interests may be affected. Similar discussions may have taken place in consideration of the use of horses or other modes of transportation. In Wilderness areas in the West, even horse travel may be regulated or limited to prevent soil erosion or other impacts to the ground. Each Plan may have different criteria tailored to the respective lands being managed.

It is possible to develop an agreement with local Indian tribe(s) to address the exercise of treaty or other rights and still remain consistent with both laws; the Act and the treaty or statute. Documents used in this instance would be policy documents and could not have the effect of creating new law or regulation. Rather to agree in a formal manner as to how management decisions are made and implemented. It would spell out the normal conduct of business between the two governments.

Open and candid communications with Indian peoples is a must if these considerations are put in writing as suggested above, via MOA or joint written agreement. It is possible to maintain preservation goals while accommodating traditional historic activities of Indian lifeways.

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* (These papers are submitted as background information to USDA Forest Service line officers and staff to assist them in exercising their professional judgement when writing documents for proposed land management actions that may have an indirect affect on the rights and interests of Indian Tribes. For questions or comments please contact Les McConnell, Tribal Governments Staff Assistant, 503/808-2603. 6/94, revised and edited: 1/15/96)

INDIVIDUAL INDIAN INTERESTS AND RIGHTS *
As Compared to Reserved Rights of Tribal Governments

Tribal or Corporate Rights:
Treaties negotiated and signed by the United States and Indian Nations are governmental actions between sovereign nations. The rights reserved are Tribal rights, not individual rights. The tribal governing body has the power to regulate its members in activities involving anything associated with the organic document, which is primarily the treaty and could include the tribes' constitution or by laws establishing the official tribal governing process.

For instance, a right to harvest fish off reservation is regulated by the tribal government; not by individuals through independent actions. The same principle applies to most other rights and resources either on or off the reservation. Generally, these rights in Region 6 are: Fishing; Hunting; Gathering; Grazing and Trapping.

Individual Indian Interests:
In contrast to the above examples, individual Indian interests are: cultural and spiritual practices and objects; and allotments of land. No treaty or executive order contains reference to cultural, spiritual or religious interests. There is no fiduciary or trust responsibility regarding these interests. Federal statutes applying to individual interests include:

*Antiquities Act of 1906 (P.L. 209) as amended.
*National Historic Preservation Act of 1966 (P.L. 89-665, as amended, P.L. 91-423, P.L. 94-422, P.L. 94-458 and P.L. 96-515)
*Alaska Native Claims Settlement Act of 1971 (P.L. 92-203)
*Archeological and Historic Preservation Act of 1974 (P.L. 93-291)
*The American Indian Religious Freedom Act of 1978 (P.L. 95-341)
*The Archeological Resources Protection Act of 1979 (P.L. 96-95)
*Alaska National Interest Lands Conservation Act of 1980 (P.L. 96-487, 16 U.S.C. 18f)
*Management of Museum Properties, (18 U.S.C. 1163)
*E.O. 11593 - Protection and Enhancement of the Cultural Environment (1971)
* Native American Grave Protection and Repatriation Act, [P.L.101-601]

Individual Indian Rights:
Religious freedom is an individual right; a civil right. The specific Congressional Act articulating the definition and meaning of this right is:

Indian Civil Rights Act of 1968: The Act defines Indian Tribes and their members as having the same civil rights as non-Indian citizens under the U.S. Constitution. (P.L.90-284)

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* (This paper is presented as background and information to assist USDA Forest Service line officers in making informed decisions on a number of religious freedom questions as may apply to American Indian individuals and tribal groups. For questions or comments please contact Les McConnell, Tribal Governments Staff Assistant, revised: 1/15/96)

This Act applies to tribal governments to protect individual Indian's (tribal members) rights in the same manner as the Constitution applies to the federal government for non-Indians' rights:

> "The purpose of this chapter is to prohibit Indian tribal governments from violating the civil rights of individual members of an Indian Tribe." Also: "...to protect individual Indian from excesses of tribal authority. ...these limitations would be applied with recognition of the tribes' unique cultural heritage and its experience of self-government and the disadvantages or burdens, if any, under which the tribal government was attempting to carry out its duties." (25 USC 1302, 2. & 6.)

Land Uses for Cultural Purposes: The subject of historic (sacred) sites is covered in various statutes mentioned above. With respect to sites less than the 50 year old NHPA standard, there are questions about the applicability of existing laws that may provide some protection of newer sites. American Indian populations today are generally smaller than in historic times. Having suffered losses from diseases and wars, the remaining populations usually survived in such small numbers that only remnants of tribes remain to carry on a cultural practice. As a result of these drastic population losses over time there are corresponding losses of cultural knowledge and practices, most of which are permanent (Keyser 1992). Spiritual truths are not a part of this discussion. Resurgence of sacred site uses and cultural activities are resulting in additional requests for use of National Forest lands.

Ceded Land Boundaries As Indicators: As a part of treaty negotiations, ceded land lines were established by the non-Indian treaty negotiators with little understanding of the meaning or nature of Indian personal and family mobility over the land prior to treaty times. Likewise, Indian people had no concept of defining limits to uses by drawing lines on a map. The U.S. representatives were often arbitrary in line selection. There is some indication that convenience played a role when one sees natural geographic features such as ridge tops and streams or meridian lines used in the meets and bounds descriptions. This in no way indicates that Indian people did not travel to or occupy areas outside the lines of ceded land boundaries. Further, there were many examples of relocations of Indian people after treaty signing. As a result, many reservation populations today include Indians whose historic origins are from several different areas of a State or the United States.

Ceded land lines on maps are like a set of 20th century measuring instruments being applied to 15th century cultures. It would seem inappropriate to think any non-Indian or non-local Indian should embark on a definitive description of where Indians lived; practiced some specific or general religion; passed on their culture to following generations or to what extent intermingled with other tribes in prehistoric, historic or recent times.

The best approach would be to defer to local Indian people who can demonstrate their aboriginal use and occupancy, to discuss and present their views and histories. Once this is accomplished one should give priority consideration to the information from those peoples who traditionally traveled or lived in that area. When that is accomplished to the best of one's ability, FS may be able to conduct an ethnographic survey and apply it to additional analyses.

Non-Local Indian People:
Indian people not from the local area are becoming more involved in claims of rights to access and use cultural sites. U.S. relocation and assimilation policies have caused permanent changes in countless life histories and cultural practices. There is no set of rules regarding the implications of these federal policies having been applied to relocated peoples. The governmental role of the United States and its agencies is usually viewed as that of a protector of rights - not a protector of religions. In this regard, Forest Service actions with non-local Indians must remain consistent with the clauses of the Constitution. The guide here is to remain neutral; FS actions should be neither for nor against any religion or belief. In light of this, uses of certain sites by non-local Indians should be viewed as a religious use like any other religion, not as an American Indian cultural heritage issue. Non-local Indians are afforded the same rights and treatment on Forest lands as the general non-Indian public.

Individual Indian Rights as Applied to the Land: Indian individual rights are not generally viewed as a property right when associated with federal lands. There exists the right to pursue ones' religion and practice certain activities. However, these practices in and of themselves do not place a lien or reserve on lands managed or owned by the United States.

It is possible that Forests and Districts will receive requests or claims from individuals that certain sites belong only to them. For those situations there is a set of criteria to follow in NHPA, which includes the possibility of a site being found eligible for the National Register of Historic Places. The Forest Service does not have a standard policy for modern sites that are less than 50 years old. There is also intent in the Act that the use is traditional which indicates it is being used by members of a local tribe having appropriate oral histories of the site and its significance.

THE HUCKLEBERRY EXAMPLE

Some treaties containing language reserving rights to gather berries result in a duel application for access and use. For instance, **huckleberries are both a trust resource** (in common with citizens of the territory) **and a traditional cultural value**. These instances require us to examine both sets of rights: tribal and individual. The end result of FS management action will need to address both situations. One may include a necessity for a use permit and the other may include the full evaluation process under NHPA. It is important therefore, to decipher the type of use(s) intended. The tribal government(s) **and** the individual(s) need to be consulted. Information should be compiled and considerations made for each category; tribal or cultural. There may be an overlap of authorities of various laws and regulations. In these instances, some statement of priority or preference from the Tribal government may be helpful in assisting the line officer with a decision. Like other actions that have potential multiple affects, it may be best to consult OGC for legal advice.

INDIAN TITLE, CEDED LANDS AND INDIAN SACRED SITES

Forests and Districts in Region 6 are receiving an increasing number of requests to use tracts of National Forest land and specific sites for cultural and religious purposes. This background information may serve as a partial map of uncharted territory. It illustrates that the decision making process is fraught with uncertainties, complex in nature and will be an emerging issue as increased uses of National Forests continue. It is possible to accommodate many of the requests. Forests and Districts should approach these requests in a methodical and consistent manner, taking into consideration the differences of culture, religion and laws of the lands manage by the Forest Service.

Requests are prompting the question: "whether or not to issue a permit?" They are being brought to the forefront by environmentalists, special interest groups and American Indian individuals, families and groups. Requests are primarily for religious sites or sweat house (or lodge) activities. The activities may be traditional or contemporary. The types of interest being expressed include the following: 1) for sweat houses to participate in a nativistic movement; 2) from Indian people relocated from their traditional home lands; 3) cultural exchanges between groups or individuals; 4) ceremonial uses; 5) to preserve specific tracts of land that may be proposed for other uses or development; 6) for health reasons; and 7) for personal or group religious purposes.

INDIAN TITLE: Laws applying to the North American continent prior to European contact and settlement were usually Indian laws created and enforced by tribal sovereign powers. When contact with people from other nations began, the Indian (aboriginal) title to the territory (which had existed for several thousand years) was recognized, to varying degrees, by those arriving nations. Under the pressures of westward expansion, in the interest of making or keeping peace and for adding new states to the Union, the United States government negotiated treaties with Indian tribal governments in order to extinguish Indian land title. Extinguishment of Indian title made it possible to pass federal laws and regulations to govern the former Indian owned lands.

CEDED LANDS (AS DERIVED FROM TREATIES): Treaties between the U.S. and Indian tribes involving grants or cessions of land should not be viewed as ordinary land transactions where the seller conveys all rights in property sold. Some treaty language ceded lands without reserving any off-reservation rights to Tribes. In many treaties, Indians ceded title and interests to the U.S. while reserving for themselves certain use rights; and other rights not specifically conveyed. The term "ceded lands" has at least two definitions: The most common is found in the context of treaty language which is paraphrased as follows: 'a tribe or band of Indians cede to the U.S. all right title and interest to lands in the following boundaries: ...' This general treaty reference was used by then Governor Stevens within Regions 1, 4 and 6, during the 1850's. Off-reservation reserves are listed in a latter part of the text. The Bureau of Indian Affairs (BIA), Portland Area Office, developed a map in 1983 titled "Treaty Boundaries" to illustrate areas of reserved rights. Their map has been adopted by tribes and states in the Pacific Northwest, and several federal agencies as containing the accurate description of "ceded lands" or lands ceded to the United States where off-reservation reserved rights exist. Treaty reserves do not include lands for religious purposes.

This paper is written to assist USDA line officers in exercising professional judgement, each Tribe needs individual consultation. Les McConnell, 12/2/95

INDIAN CLAIMS COMMISSION: The second definition of the term "ceded lands" is from this Commission. American Indian Tribes have been litigating claims against the United States government for scores of years. The most common type of legal action has been for lands previously owned by an Indian tribe under the doctrine of "Indian title". These legal actions have usually been claims that lands were taken from them without adequate compensation. When a tribe proved such a claim, it is a demonstration that a particular tract was owned by Indian title; that the tribe had exclusively occupied and used a tract for a long time. Information submitted to the U.S. Court Of Claims was collected using the testimony of expert witnesses such as anthropologists, historians and ethnohistorians. In 1978 within its final report, this Court issued a map illustrating what land areas had been adjudicated. A delineation of the boundaries of the Indian title tract within the contiguous United States was compiled onto a single map titled: "Indian Land Areas Judicially Established" (currently out of print). The ceded land principle applied by this Court was that a tribe couldn't file claims against nor "cede lands" to the United States for which there was no Indian title.

The Court summarized its findings in 1978 thereby closing a long and complicated chapter of Indian law which had attempted to settle outstanding claims against the U.S. and bring some lasting resolve to the questions of treaty making and land cessions. A few claims remain unresolved to this day:

"The future of the debate on land claims rests now in a more searching examination of the treaties and the intent of both participants. It also lies in how the Indians are able to push their claims for land and how far the United States is willing to acknowledge them. Between these contending positions the treaties will be interpreted or reinterpreted, or even revoked, as the ripening climate of American opinion allows it to happen." (Indian Claims Commission Final Report)

TRADITIONAL SACRED SITES: The National Historic Preservation Act (NHPA) and similar laws contain specific criteria for assessing traditional sites for National register nomination. The key factor is traditional use - which means used by Indian people from the local area. The vast majority of these new requests do not qualify as traditional sites as defined in NHPA. Historically, traditional religious practices took place at the location of a tribe in their aboriginal territory. Historic land use patterns where Indian people traditionally traveled to hunt, fish, gather foods and objects and practice cultural activities, can be used as an indicator for sorting out traditional from contemporary sites.

In an Indian fishing rights case in Washington State, the judge made provisions for tribes to define their "usual and accustomed fishing areas" (U&A). Again, the basis for these findings was a collection of expert witness testimony, oral histories and ethnohistorians works. Anthropological and archaeological evidence and information was also compiled to help illustrate where a tribe used specific areas continuously over time. The Court adopted area maps and made them part of the case file. There is also a provision for revising U&A maps if additional information supporting the historic uses were submitted to the court. U&A areas can transend the boundaries of ceded lands. For hunting and gathering rights (and the associated activities), courts have generally held that the rights on open and unclaimed lands are limited to the ceded lands or aboriginal territories as defined by the respective treaty.

Due in part to the reservation system and treaties, some land use patterns today have joint tribal use, while others may have inter-tribal competing interests. It would not be appropriate for Forest Service staff to say in a definitive manner that activities A, B & C took place at location X by any given tribe(s) or individual(s) without consultation and a thorough look at ethnohistories. For permit applications to construct a sweat house, or similar cultural or religious structure, one need examine all of the information and various legal findings prior to making a decision to help avoid inter-tribal conflict or other differences that may arise from issuing a permit for activities on NFS land.

CONTEMPORARY RELIGIOUS SITES: Unlike traditional sacred sites and the NHPA, the American Indian Religious Freedom Act has no such age and continuous use criteria. Religious sites often being requested now, are termed "sacred" by non-Indians and non-local Indian people. The actual use is contemporary. This means a second type of information review should be conducted prior to making a decision on the merits of the proposed location. Such a permit application may require us to consider peoples relocated from their aboriginal areas by circumstances or personal choice who wish to exercise a type of traditional Indian religious activity at a non-traditional location. In some instances an Indian band that historically lived near a claimed site may have so few surviving members that the oral history will be insufficient to demonstrate or document a continued use with any degree of reliability as required in NHPA. In this regard, ceded land lines on maps are just the beginning of search for comprehensive information and would contribute very little to a request for contemporary uses.

Once consultation with Indian individuals is accomplished, weight should be given to the information from those peoples who traditionally lived or traveled in that area. Other forms of information gathering and research are also available to us in this effort, for example, an ethnographic survey. The decision maker will need to weigh all the information compiled in a manner that is consistent with federal regulations, traditional uses, aboriginal Indian title, proposed uses and existing court decisions that may apply to a permit application or other document. It is possible that the location would need to be modified prior to permit approval for contemporary purposes.

THE U.S. CONSTITUTION: The legal guide in association with the Establishment Clause (see First Amendment) is neutrality; that federal agencies make no regulations for or against any type of religion. The Constitution identifies Tribes as sovereigns. Religious activities are individual rights. They should not be viewed as a government-to-government issue. Written agreements with tribal governments that set aside land or sites for religious purposes have the potential of infringing upon individual religious freedoms.

TRADITIONAL SACRED SITE PROTECTION: This is possible. One may need to use a combination of laws, policies and regulations. Developing a written two party agreement for protecting sacred sites must be done on a culture by culture basis in consultation with tribal members and traditional practitioners, wherein religion; its beliefs and practices are individual rights and freedoms. In other words, on a religion by religion basis, as there may be multiple religions or beliefs to be considered. Including one or more tribal governing bodies into a permit or other written agreement document places tribal governments above religions and possibly in competition with one another or amongst the tribal membership. It may also have the effect of placing individuals at odds with their own tribal government, and would create a precedent inconsistent with the Constitution with respect to federal involvement in religious activities.

SUFFICIENT GUIDES EXIST: The only requirement in AIRFA was to produce a final report that assessed federal laws and regulations. Where ambiguities or obstructions existed in these regulations, modifications were to be made. This was accomplished on schedule in 1979. The special use permit system outlined in 36 CFR 251 and the accompanying Forest Service Manual 2700, contain sufficient information and instructions to process permit applications like those mentioned above. In addition to the permit application, the Forest or District should have a fundamental knowledge of Indian interests in lands traditionally used for such purposes. This collection of data should be weighed along with other considerations when applications are reviewed, giving deference to a combination of Indian title and ceded land status.

Indian sacred sites can be protected through federal agency actions, taking into consideration all the laws and individual interests before acting. A grouping of management criteria into a single document is possible, as long as the effect of favoring one religious practice over another, or creating incompatible uses of natural resources for different practices is avoided. The best way to avoid most difficulties is to conduct thorough consultation with the traditional tribal members, religious practitioners and elders from the local area. Consultation with those peoples should be done prior to a site designation and prior to involved discussions with non-local Indian peoples.

BREAKING NEW GROUND: In contrast to traditional sites regulations, there are no statutory or other requirements or guides to protect contemporary use sites. The Forest Service, charged with the responsibility to manage lands, may necessarily control the location of contemporary sites or non-traditional land areas being requested. This too is important in light of the distinct possibility that some uses or locations may conflict with the religious practices of Indian people from the local area. For some examples there will be no easy answer; it is possible that not all applications will be approved. There has been some interest in developing a national sacred site Forest Service policy. This however, is to take place some time in the future and may require extensive legal review prior to publication.

ACCESS TO SITES: This subject is one of continuing debate even with the occasional uses of certain sites in across America. There are circumstances when the FS must control access to sites. These circumstances would include: safety; law enforcement activities; fire prevention or control; criminal investigation; restrictions for wilderness areas; environmental damage prevention; and similar examples where the FS has jurisdiction and authorities. Access by foot may be substituted for vehicular modes of transportation in some cases; again depending upon the site and other circumstances involved.

SUMMARY: The permit application process is written and available. The real work of consultation starts once the application is received. Many staff persons will be plowing new ground. Existing regulations and statutes will assist us in assessments. Please keep in mind the following: 1) no two Indian religions or cultures or spiritual belief systems are exactly alike; 2) traditional sites have a priority status above contemporary uses; 3) ceded lands and Indian title lands need to be considered in an analysis; 4) it is possible some applications may not meet criteria found in federal responsibilities; 5) the Forest Service is responsible for the land use decision; 6) take steps to accommodate the free exercise of any religion; 7) it may not be possible to fulfill every request without infringing upon another religion; 8) there may be multiple bands or tribes in a recognized tribal group or government; **9) it may be necessary to use a combination of policies and statutes to provide protections these sites deserve;** and 10) if questions remain, seek legal advice.

RATIONALE FOR ADDRESSING FEE WAIVERS FOR TRIBAL MEMBERS
OCCUPYING AND USING NFS LANDS & FACILITIES

The fee demonstration project (authorized by Congress) is not without its gray areas and questions as might relate to existing policies. Generally, my advice to the field has been to take the extra step to waive fees for day uses activities on National Forest lands. "Activities" means: tribal members participating in cultural practices; exercising off-reservation treaty rights and more recently; individuals accessing sacred or spiritual sites, as discussed in vague terms by the President in his Executive Order of last May.

Two fundamental rationale exist - briefly, Indian Tribes are governments with a unique political status somewhat similar to that of State Government. During the exercise of treaty rights or participating in cultural events or practices, a fee waiver is one way in which the FS can demonstrate its federal responsibilities to:

> "Maintain a government to government relationship... and Implement programs and activities honoring treaty rights and fulfill legally mandated trust responsibilities to the extent that they are determined applicable to NFS lands." (FSM 1563)

The second point is less clear: The Forest Service has lots of existing regulations and policies directing the agency to 'remove barriers' and facilitate the free exercise of religion (as seen in the American Indian Religious Freedom Act of 1978). In addition to that Act, even though it has no legally enforceable requirements, the more practical applications of policies would be to facilitate uses of NFS lands and avoid clogging the courts with claims of undo governmental interference in 'First Amendment' issues. Forest Service Manual on Indian Policy (FSM 1563) continues:

> "Administer programs and activities to address and be sensitive to traditional native religious beliefs and practices."

For the most part, one doesn't pay to enter a church... and the Forests have served as a spiritual place for tribal peoples since time immemorial. The caution here is to avoid creating a stereotype of Indian spirituality. (How would a FS employee figure out if an Indian individual is at a location for recreation or cultural/spiritual purposes?) It would be far better to waive the fee altogether and relieve one from the duty (or potentially the legal task) to figure this out.

Overnight use: The Winema NF is in the process of working with The Klamath Tribes to write an agreement for long term camping at developed sites within a former reservation boundary. This is recognition of both the exercise of treaty rights and as a cultural teaching need for tribal elders and youth. The important point here is that the Tribes are going to be responsible for the use and occupancy of the area and its general appearance. I don't recommend "universal waivers" since tribal needs differ - each treaty is different and each Forests facilities are different. That too, is why the RO is not sending out a Regional Policy on the fee project. As noted in the Siuslaw's letter, this is a demonstration, and an assessment as to its success will be made.

Under this condition, some innovative solutions to facilitate tribal members activities will benefit both governments. Not all areas will have the same limitations or options available to facilitate long term camping. There are no one size fits all answers - no cook book remedies. Details should be left to the respective Forests and Districts.

Les McConnell, 5/19/97

CONSULTATION IN INDIAN COUNTRY PRIOR TO LAND EXCHANGES *

Existing statutes like the Federal Land Policy and Management Act and various regulations have no clear guidelines that might assist the USDA Forest Service in looking at Indian rights on lands ceded to the U.S. via treaty or other statute, and related interests when contemplating National Forest System land exchanges with private or public entities.

Approximately 60 Treaties with Indian Tribes have within them specific language reserving to the tribal entities, the right or privilege to take fish, hunt, gather roots or berries, trap or graze livestock - or any combination of the above activities, on public lands. In treaties these are usually referred to as: "open, unclaimed or unoccupied land". For this reason, it is important to notify Indian Tribes of any proposed land exchange where there may be associated rights or resource interests.

As stated in the exchange regulations, (36 CFR 254.4) in order for the Forest Service to proceed with a land exchange proposal, "all prospective parties shall execute a nonbinding agreement to initiate an exchange. At a minimum, the agreement must include:... a description of the appurtenant rights proposed to be exchanged or reserved; any authorized uses, including grants, permits, easements or leases and unauthorized uses, **outstanding interests**, exceptions, title defects or **encumbrances**." (emphasis added)

Consultation: Outstanding interests as defined in 36 CFR 254.2: "rights or interests in property held by an entity other than a party to an exchange." (This includes treaty rights or interests reserved by an Indian Tribe at "usual and accustomed fishing places". Its application is limited to 24 Indian Tribes that are successors in interest to the "Stevens Treaties of 1855".) Similarly, an encumbrance would include, as defined in Supreme Court rulings: "treaty reserved usual and accustomed fishing grounds and stations." The following is a quote from the 1905 Supreme Court ruling:

> "They [Tribes] reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places" and the right "of erecting temporary buildings for curing them." The contingency or the future ownership of the lands, therefore, was foreseen and provided for - in other words, the Indians were given a right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees." (United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089.)

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* This paper is presented by Les McConnell in the Tribal Relations Training Program, Pacific Northwest Region, USDA Forest Service.

This means for each of the 24 treaty tribes that has specific reserved rights to take fish **at usual and accustomed places**, that access to that site should not be obstructed. Access remains a property right to the respective tribes for those fishing stations or places; it remains an encumbrance to future owners, whether in state, private or federal ownership. This condition has been further discussed in subsequent proposed and final statutes and federal court decisions: (Sohappy v. Hodel, 911 F.2nd 1312; 1990, U.S. 9th Cir., also U.S. v. Oregon, 1969, Civil No. 68-513. and U.S. v. Washington, 384 F.Supp 312, 1974.; The Dalles Dam Settlement, 1957; Seufert Bros. Co. v. U.S., 249 U.S. 194, 1919, also; **Columbia River Treaty Fishing Access Sites**, (102 Stat. 2938); and most recently, Northwest Sea Farms v. U.S. Army Corps of Engineers, No. C94-16210, W. Dist. Washington, 1996.

The Dalles Dam Settlement is one of the largest settlements on this issue to date: In the agreement reached between the U.S. Army Corps of Engineers and 4 treaty tribes and about 110 individual Indians not party to any treaty, in 1957, the U.S. paid Tribal Governments and Indians a sum of $26,888,395.00 for the loss of the right to access specific fishing sites along the Columbia River, when The Dalles Dam was completed - as the reservoir inundated fishing stations of the Columbia Basin Tribes in the vicinity. In 1996 a District Court ruled that Sea Farms company was denied a permit to anchor net pens for fish rearing in Puget Sound, as it would have displaced the Lummi and Nooksack Tribal fisherman from their usual and accustomed fishing places. That is, usual and accustomed fishing places pertain to the taking of fish. These areas may transcend the ceded land boundaries. Conversely, open and unclaimed or unoccupied lands pertain to hunting gathering grazing or trapping. It is possible that both may occur in the same location - but they have different legal meanings that apply to the exercise of treaty rights.

With the single exception of the fishing stations and usual and accustomed fishing places discussed above, other treaty rights and other land categories are not tantamount to interests in real property. Other conditions may exist that would necessitate further analysis in a NEPA document. Restrictions or reserves imposed by other statues such as the Endangered Species Act; Native American Graves Protection and Repatriation Act; National Historic Preservation Act; adjudicated water rights, or other law that may constitute a right of access like usual and accustomed fishing sites on NFS lands. Regarding the language in treaties specific to taking fish, this same property right does not apply to the exercise of treaty rights to hunt, gather graze or trap on "open and unclaimed or unoccupied lands". The courts have treated "open, unclaimed and unoccupied" lands differently than fishing places. Land categories known as "open, unclaimed or unoccupied" have not been interpreted, by a federal court, to create encumbrances and are most often associated with the treaty rights of hunting, gathering, grazing and trapping. These rights are often referred to as "defeasible rights"; that private ownership or fee paten status defeats (nullifies) the right when the exchange or sale is completed. It is possible for both of these types of land categories to transcend a treaty area or ceded land boundary. As seen in a cattle grazing case of the Western Shoshone Tribes, any federal lands could be considered as "open, unclaimed or unoccupied", since the treaty right is not confined to ceded lands.

The first step of consultation with Indian tribal government(s) should be from the Forest Service official responsible for decision. Preliminary contact and consultation is implied by the above definition, also the requirement to protect fish and wildlife habitat, and not dependent upon NEPA or other statutes. Consultation in this context is a governmental action.

For example, if a District Office has been approached with an offer to exchange land within the District, the Ranger is the consulting official for the FS. It is possible that a proposed land exchange may affect two or more Indian Tribes, as the ceded lands and fishing locations in the Pacific Northwest are many and often overlap with neighboring tribes.

For the initial steps to be consistent with other FS consultation processes, the District should make the first contact with the respective Indian Tribal Government(s) that may have an interest, rights or cultural resources in that area. A letter announcing the proposed action is the first formal step - however with Indian Tribes it is much better to make personal or telephone contact with a tribal leader as soon as an action is contemplated. This means prior to the general public.

The steps in 36 CFR 254.1 - 254.44, provide some detail for initiating exchanges, disposal and making land acquisitions. At 254.3, there is a section that discusses the discretionary nature of exchanges: 'There is no requirement that the FS exchange lands; what is the public interest or benefit?; and what are the specific factors for a proposed exchange? At 254.3 (1), there is specific reference to protection of fish and wildlife habitat (as stated above); cultural resources are also listed as important objectives that require special consideration or protections. (consult FS archaeologists here).

Treaty resources listed or inferred within treaties or other statutes constitute resources of special interest and status to Indian Tribal Governments. Watersheds and wilderness and aesthetic values; also, accommodation of existing or planned land use authorizations; promoting multiple-use values... and fulfillment of public needs are also listed as factors to be considered in the regulations (36 CFR).

Historically, the Forest Service focus for land exchanges has been to make more efficient land management via planning, improved access, simplifying the boundary survey work and easing the work load for future planning through consolidation of land holdings. Historic uses of NFS lands by Indian people fall within the parameters of these listed factors.

At 254.44, (2) (i), there is guidance for findings of consideration made for potential exchanges adjacent Indian Trust lands - whereby agency actions "will not substantially conflict with" said trust lands. This explicit requirement in the regulations places on the Agency a responsibility that any proposed action does not affect the exclusive jurisdiction of that tribe for the trust lands and resources located thereon. The regulations do not expand on the term "significantly conflict with". It is best to initiate communications with the primary trustee of Indian trust land; the Secretary of the Interior or that person's designee. This can be initiated with the local Bureau of Indian Affairs, (BIA) office. The respective Tribal Government(s) must also be contacted at the same time for consultation.

Equal value exchanges as stated in 36 CFR indicate that lands or interests involved must be of equal value, or equalized according to methods in 254.12. There is no standardized method for assessing the resources that would apply to a tribal off-reservation fishing right or cultural site that contains artifacts. Wildlife or fish resources (including their respective habitat) may be inventoried or otherwise measured as an element of resource value, especially where habitat as described in the ESA applies. The regulations contain a description of a methodology for making fair market valuations for the lands involved. However, there are some limits from other agencies:

Justice Department Attorneys and appraisers do not endorse natural resource values, public interest values or similar interests in the appraisal process, because these values cannot be supported through the market. Appraisal requirements are based on the Uniform Appraisal Standards for Federal Land Acquisitions (a publication). It is the highest and best use of the land appraised based on economic terms that determines the market value estimate of the land. Market value estimates are based on sales of similar properties that were purchased for cash. The Uniform Appraisal Standards limit how FS can (and cannot) put a dollar value on resources.

The FS has limited ability or authority to "sell" land. Only under the Small Tracts Act (small parcels - often 1/10 acre in size - where there are improvements such as a house on NFS land) and in very limited situations under the Sisk or Townsite the FS can sell to a municipality (actually, the Sisk act is an "exchange" because the agency would use the money from "selling" the public land to buy replacement land). As an example: the town of Sisters, Oregon, was seeking a way to build an additional school or expand the existing one in an area restricted on several sides by NFS land. The FS used this authority to accommodate the towns need, as there wasn't developable land sufficient to construct a school within the town's jurisdiction or ownership.

Cultural resources: need to be evaluated or addressed when considering proposed exchanges. This subject invokes yet another set of laws and regulations. Some cultural resource laws are procedural while others contain protection or enforcement provisions. Consultation with a respective Indian Tribe and a FS archaeologist is necessary. Early and constant communications with Indian Tribes is the best overall policy for instances where Indian interests may exist. Consultation must include the tribal governing body at the very least, and any special committees or other groups or tribal elders, as the tribe may designate.

Summary: 1) Consultation with Indian Tribes is a necessary part of the process. Tribes should be the first exterior entity contacted prior to discussions with the general public or the proposing agency or business. Cultural values must be protected, mitigated or otherwise addressed in the proposed exchange of lands. 2) Land exchange values are based on sales of similar lands or lands with similar attributes, that were sold for a cash sum. 3) There are no criteria for natural resources values {except for timber value stumpage estimates} or other rights or interests (such as treaty rights or executive order rights) that may have an influence in the worth (value) of the land in an exchange assessment within current appraisal rules. 4) Tribe(s) may become directly involved in a land exchange process by submitting information about a potentially "significant effects to adjacent Indian trust land"; or in areas where "usual and accustomed fishing places" exist. This is a part of Forest Service regulations where the agency must make an assessment of those potential effects, which may include cultural resources. Consultations with archaeologists is important. 5) For lands in the Pacific Northwest that encompass or include "usual and accustomed fishing places", a notice to the parties must be made that the property right to access (sometimes called the right of ingress and egress) remains an encumbrance at these fishing sites, regardless of land ownership status.

Les McConnell, 6/10/95, revised: 6/19.97

THE ORIGIN OF MODERN INDIAN POLICY

During the first one hundred fifty years after the establishment of this Country, Indian policies of the United States evolved in a dynamic and somewhat unpleasant manner. Eventually the downward trend that had prevailed since Andrew Jackson's times culminated in a national policy known as "termination policy", which was aimed at dissolving reservations and the dependence of Indians on federal subsistence programs and further assimilating Indian people into mainstream American society. Similar policies continued until the period of social and political unrest of the 1960's. It wasn't until 1968 when President Johnson wrote about American Indians as the "Forgotten Americans", that some preliminary steps were taken to replace the termination policies of the Eisenhower Administration. President Johnson had another policy known as the War on Poverty. Both of these were met with initial praise and optimism. Unfortunately, FS involvement in Southeast Asia including armed combat soon dwarfed these policies into obscurity.

The late President Richard Nixon, was the first to articulate a clear and comprehensive Indian policy denouncing the former termination efforts as dismal failures. Mr. Nixon made public a new Indian Policy and coined, for the first time, the term 'self determination':

> "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 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."
> (Message to Congress from Richard Nixon, July 8, 1970)

This new policy, titled "Self-determination Without Termination" contained four points: 1) Rejecting termination; 2) The right to control and operate Federal programs; 3) Indian Education; and 4) Economic development legislation.

The overall effect of this new and positive policy on both Congress and the American public is still having its influence and support. The original policy has been reaffirmed by each subsequent President. It has also been applied in the Indian Policy Review Commission (P.L. 93-580); and the Indian Self Determination Act (P.L. 93-638). Most subsequent Acts of Congress regarding Indian Education and economic development (including Alaska Native issues) have been greatly influenced by the Nixon policy and vision. On April 29, 1994, President Clinton issued a formal memorandum reiterating commitments made to date in Indian Country and reaffirmed the government-to-government relationship. FS may see Congress respond to this most recent policy statement through new legislation that could change trends and courses. Once new laws are enacted FS will be able to assess such continuing commitments.

AMERICAN INDIAN OR INDIAN?
(Not Native American)

November is National **American Indian** Heritage Month, (Public Law 101-343 August 3, 1990). This Act originated as a Joint resolution (H.J. 577) and was codified into law by Congress. It set aside November of each year for special recognition:

"...the President is authorized and requested to issue a proclamation calling upon Federal, State and local governments, interested groups and organizations, and the people of the United States to observe the month with appropriate programs, ceremonies and activities."

Since this time, President Bush issued proclamations in 1990, 91 and 92, expressing interest in and enthusiasm for historic highlights and information during November that have an American Indian theme and recognition.

The term **American Indian** has been used by Indian Nations all across the country for nearly 500 years. Tribal members growing up through the 1970's grew up "Indian". Their parents and Great Grandparents grew up "Indian". The Interior agency; the Bureau of **Indian** Affairs was named consistent with use of the term in law. Similarly, the U.S. Constitution uses the term "Indian". No Indian Tribe as of 1996 has requested Congress change their official tribal name from "**Indian**", nor to address them using any other term (like Native American).

Throughout the 500 plus years of formal, informal, legal and political relations with American Indians, this country's law makers, Presidents and military forces; as well as judges, lawyers and writers, have universally used the term **Indian** or **American Indian** in laws, regulations, the Constitution and books.

During the civil rights awareness era of the 1960's'and 70's, a new term was created as Americans embarked upon a new social journey sometimes called "political correctness". A new term: "Native American", was applied by civil rights groups attempting to differentiate Indians of North America from those peoples or their descendants who had moved to this country from India. It has now worked its way into present day English.

Only one Act of Congress uses the civil rights term 'Native American': Native American Grave Protection and Repatriation Act of 1990 - (the same year Congress designated November as National American Indian Heritage Month). In this grave protection act, there was an attempt to define the title of the Act in a collective sense; it includes: American Indians, Alaska Natives and Native Hawaiians... for the purposes of that specific Act. This was done in the interest of simplifying names of groups of peoples who may be affected by federal actions involving certain cultural resources. In Alaska, the term Alaska Native was a result of the land claims settlement act, also a product of the 1970's. Again, this was an attempt to simplify references to Indian Tribes or Alaska Tribes as separate from Indians in the lower 48.

By comparison; if one were born in Oregon that person is known as a Native Oregonian. Likewise, for anyone born in America, the term is Native American. To use a term other than **Indian** would be inconsistent with history, formal names of **Indian** tribes and several hundred federal statutes.

HISTORICAL NOTE ABOUT AMERICAN INDIANS' ACCOMPLISHMENTS

During November the agency celebrates American Indian Heritage Month. There are usually some questions about accomplishments of Indian people in history. Aside from the usual references to Indian Wars of the West, there are many artists, authors, humorists and politicians, who have been recognized for their contributions to the U.S. in a variety of ways from the theater to U.S. Government positions. One important figure often gets overlooked:

Charles Curtis, (Republican; Kansas) was part Kaw Indian, {Kaw Indian Tribe of Oklahoma}. He started his legal career in Kansas as a County attorney in the mid 1880's and was elected to the House or Representatives in 1892. He was a people person with a warm personality and favored personal (Kansas) agenda of politics rather than the Washington, DC issues and goals. He was elected United States Senator in 1907 and remained in office until 1929 - with the exception of 2 years when he lost a primary race.

Mr. Curtis was the Chairman of the Committee on Rules and the U.S. Senate Majority Leader from 1924 to 1929, at which time Herbert Hoover had selected him as running mate in his Presidential bid. Hoover won the Presidential election in 1928. Curtis served the full term as Vice President (Presidential terms are reported beginning with the year sworn into office: 1929 to 1933), and was re-nominated to run with Hoover in a second term. However, the election of 1932 was won by Franklin D. Roosevelt.

After his term, in his mid-70's by now, Curtis practiced law in the Washington D.C. area until he died in 1936.

TRIBAL STATUS

Federally Recognized Indian Tribes: A matrix of these tribes in Region 6 can be found at page _. The process and regulations criteria for attaining federal recognition are found in 25 CFR 83. The basic requirements include the following in the form of a petition to the Secretary of the Interior:

1. A statement of facts regarding the continued identity of a group as "American Indian" or "Aboriginal" from historic times to the present.

2. Evidence that a group exists as a community separate from other populations.

3. Evidence that political influence has been maintained over its group members.

4. A governing document such as a constitution.

5. An enrollment list of all members.

7. The group can not be involved in pending legislation, or terminated by former congressional action.

Treaty Indian Tribes: The above mentioned matrix also identifies which tribes have treaties ratified by the Congress. Most treaties negotiated with Indian Tribes in Washington and Oregon contain references to reserved rights outside the boarders of a reservation in an area known as ceded lands. Activities and treaty rights applying to these areas are usually hunting, fishing, gathering food and medicinal plants, and grazing livestock on open and unclaimed lands. The formal treaty making process was discontinued in 1871 by the Congress. There are some tribes whose formal relationship with the United States was terminated in an agreement. Of those actions taken in the 1950's, six tribes have been re-established or restored to federal recognition status, in Oregon.

Some tribes in Washington were party to treaty negotiations but treaty documents were not ratified by the Congress. While in other instances, some bands or tribes were mentioned in treaties but did not maintain separate identity throughout history until the Indian Reorganization Act of 1934.

Executive Order Tribes and Reservations: During the period of time from 1871 to 1910, Indian agreements and formal government business were concluded by an Executive Order of the President of the United States. These actions included recognizing tribes, and establishing Indian reservations to be placed in trust status for the Secretary of the Interior to administer.

Not all treaties established reservations. In those instances, such as Quinault, Indian reservations were identified or created by a subsequent Executive Order. (See 25 USC, Sec. 9.)

These documents rarely contain rights or privileges outside the bounds of an Indian reservation. Therefore, the Forest Service has a different relationship and land management responsibilities for areas adjacent or neighboring these reservations, than with a treaty tribe who has reserved off reservation rights.

Indian Groups Without Federal Acknowledgment: There are several communities and groups of Indian people who use Indian tribal name and refer to themselves as a Tribe. For whatever reason, these peoples have not met the criteria in 25 CFR 83, although many of them in Washington and Oregon have made formal petitions to that end. Consequently, the Forest Service has no legal obligation to conduct business in a formal manner with these groups. In fact, Federal Agencies and their officials are often challenged by those tribes who have federal recognition for consulting or otherwise communicating with these groups.

There is one instance wherein some communication at the staff level is warranted: One interpretation of the American Indian Religious Freedom Act recommends the Forest Service contact these groups for information about cultural sites and archeological resources. These kinds of contacts are beneficial to society as a whole and may prove to be beneficial to various academic disciplines or even a museum. As long as Forest Service line officials use informal means of communication, this type of activity can still be within the National and Regional policy of Government to Government relations; i.e. do not address these groups as one would a federally recognized tribal government.

Les McConnell June 7,1991

INDIAN LAND CATEGORIES

Indian Territory: Prior to the United States Constitution, lands occupied or used by American Indians were referred to as Indian Territory. Historic documents dating back to the 16th century refer to these unsurveyed regions as a territory.

Indian Land: This term was used to describe certain parcels or areas where American Indians lived. It generally represented a smaller concept than the term territory. Today it refers to any land held in trust status by the U.S.

Ceded Lands: This term was first used in the Treaty With The Wyandot, 1789. Since that time many treaties referred to land cessions made by tribes to the U.S. This term is used interchangeably with "treaty boundary" described below. Most federal agencies and Indian tribes prefer to use Ceded Lands when describing areas where a tribe ..."cede, relinquish and convey to the U.S. all their right title and interest in an to the lands and country occupied by them"...at treaty signing or when reservations were established. See also maps titled: Indian Lands Judicially Established, and Treaty Boundaries.

Treaty Boundaries: A modern term that applies to lands described above, 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.' See also map titled: Treaty Boundaries.

Indian Reservation: Usually created by treaty document or an executive order, this term refers to lands set aside for residence and for other purposes. The primary intent of the United States at treaty negotiations was to maintain (or secure) peace between Indian peoples and European settlers. It was also to make certain lands accessible for settlement. This land was also described by meets and bounds, was put into a "trust" status whereby a United States agency had a responsibility to maintain reservation lands for the use and benefit of Indian people, consistent with the intent identified in the respective treaty. Reservations can also be established by Executive order of the President - even subsequent to a peace keeping treaty.

Usual and Accustomed Grounds and Stations (or Areas): This treaty term describes lands where a tribe(s) usually or was accustomed to travel to for the purpose of fishing. As this term applies to Region 6, these areas are all outside reservation boundaries. Various federal courts have either referred to or defined the term when deciding lawsuits regarding the extent of a tribes' off-reservation treaty fishing rights. It is possible for Usual and Accustomed areas to extend beyond a treaty area, and to overlap large areas of a neighboring tribe, based on the specific treaty language.

Open and Unclaimed Lands: This term is also a trademark of the treaties negotiated by Isaac I. Stevens in 1855 (in Region 6) and appears in the same sentence as Usual and Accustomed Areas mentioned above. At the time of signing, domestic use of horses and cattle was the main non-Indian life style in the American West and had been for a full century. The term applied to lands held by the U.S. that had not been fenced or claimed through a land settlement act. Today, it applies to lands remaining in the public domain, (for the purposes of hunting, gathering foods and grazing livestock). In a hunting case known as U.S. v. Hicks, 1984, a federal judge ruled that Olympic National Park lands are not included in this category.

Major Laws and Regulations - Pre-Constitutional

Included in this appendix is general information about existing laws and court decisions. Several excerpts from Forest Service authorities are also listed to provide a point of reference to the reader.
Before the U.S. Constitution, Indian Nations treated with (the act of signing treaties) by most European countries, except England. The British Crown issued doctrines describing the relationship it held as being a political relationship with Indian Nations. By 1763 the King of England further defined areas west of the Appalachians as Indian Territory. Indian tribes were recognized as sovereign nations.
Once lands Northwest of the Ohio River were opened for settlement, the Continental Congress passed the Northwest Ordinance (1 Stat. 51, 1787) in part to have some representation of law and order, because settlers were sure to encounter Indian Nations occupying lands there.
The courts had established that "discovery" gave European colonial powers fee simple ownership of the domain they had "discovered," subject to the Indians' right of occupancy and use or "Indian title." This fee title passed to the United States on its independence from England, subject to treaty rights or conditions reserved by or for the Indians and by subsequent actions by Congress or the Executive to abrogate or condition treaties, laws, and agreements.

Aboriginal Rights

Aboriginal rights are based on aboriginal title, original title, or Indian title which is the exclusive occupancy of land that Indians have traditionally used. Congress could extinguish such rights or title at will through treaty or otherwise. Individual aboriginal rights were based on continuous actual possession by occupancy, enclosure, or other actions establishing a right to the land to the exclusion of adverse claimants. For National Forest System lands, such possession must have predated the establishment of the National Forest.

Constitutional

The Federal-Tribal relationship is based upon broad, but not unlimited, Federal constitutional power over Indian affairs, often described as "plenary." The *Commerce Clause* is the Constitution's primary authority over Indian tribes. Under it, Congress is authorized to "regulate commerce with foreign Nations, and among the States, and with the Indian Tribes." Other constitutional powers were important in the early years such as the *Treaty Clause*. The courts have determined that these two clauses, along with the *Supremacy Clause*, are the primary basis for the U.S. Government's exclusive authority to provide for the Federal management of Indian matters. The specific clauses pertaining to Indians are:
Article 1, Section 8, Clause 3: Power under Indian Commerce Clause is limited to Federally Recognized Tribes. Congress "shall have the power to regulate Commerce with... the Indian Tribes."
Article I and 14th Amendment: Indians are not taxed.
Article 11, Section 2, Clause 2. The Treaty Clause: "...the President shall have the power to make treaties, provided two thirds of the senators present concur..."
Article VI, Clause 2: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or shall be made, under the Authority of the United States, shall be the Supreme Law of the Land-, and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Laws and Treaties Specific to Indians

Approximately 60 Treaties. Beginning with a Treaty with the Delawares in 1778, the United States sought to maintain the peace, establish boundaries for protection of settlers and Indians, and acquire

territory to be opened to settlement. Subsequent treaties beginning with the Treaty with the Wyandots (January 9, 1789, 7 Stat. 28) and others provided for certain rights, such as hunting, to be retained by the Indians.

Non-Intercourse Acts of 1790 and 1834. Delegated from Congress to the Federal Government, the authority over Indian matters and provided a basis for U.S. Indian policy.

The Northwest Ordinance, 1787: Stated that Indian land and property shall not be taken from Indians without their consent. (Applied to the old Northwest territories)

Treaty with France for Louisiana Purchase of 1803. The French ceded the Mississippi drainage to the United States bringing the territory and its inhabitants under U.S. rule and protection free from European intervention.

Treaty of Ghent: In 1814, 25 years after the Constitution was ratified, and in order to bring the War of 1812 with Great Britain to a close, the United States signed the *Treaty of Ghent*. This was the first document establishing that the Federal Government would act as a guardian for Indian Nations and their lands. Great Britain insisted that its provisions include the return of lands taken from Indian tribes by the United States before 1812 (the former Northwest Territory).

Indian Removal Act of 1830. Enabled the President to negotiate and remove tribes from east of the Mississippi to areas west of the Mississippi (Indian Territory = modern day Oklahoma).

Treaty of Dancing Rabbit Creek 1830. Involved dissolution of tribal territory and assimilation into U.S. society.

Treaty with Great Britain added Oregon Territory in 1846. Ceded the Northwest Territory to the United States, bringing the area and its inhabitants under U.S. rule and protection free from European intervention. The Organic Act establishing the Oregon Territory reiterated within it the same Third Article from the Northwest Ordinance, which states in part 'that Indian lands and property shall not be taken from them without their consent...'

Treaty with Mexico 1848. Treaty with Mexico (also known as the Treaty of Guadelupe Hidalgo) ceded the southwest territory to the United States, bringing the area and its inhabitants under U.S. rule and protection free from European intervention.

Rider in Appropriation Act of 1871. Ended treaty making authority with Indian tribes.

Major Crimes Act 1885. Extended federal criminal jurisdiction to Indian Country.

General Allotment Act 1887 (Dawes Act). Provided for the allotment of lands to Indian individuals on various reservations and public domain and extended the protection of laws of the United States and territories over Indians. The act also offered U.S. citizenship to any individual applying for an allotment. This act resulted in the transfer of over 80 million acres (actual estimates of acreage transferred ranged from 50 to 134 million acres) of Indian lands into private ownership.

Court of Private Land Claims Act of 1891. Gave the Court of Private Land Claims jurisdiction over all Spanish or Mexican land grant claims in Colorado, Nevada, and Wyoming and all land claims in Arizona, New Mexico and Utah.

Intercourse Act of 1892. This act prohibited the intrusion of non-Indians on Indian lands.

Alaska Native Allotment Act of 1906. Congress created procedures whereby individual Alaska Natives could acquire land. The Act specifically provided that land acquired would be held in trust by the United States for the benefit of the individual Native owner. The Alaska Native Claims Settlement Act of 1971 (ANCSA) repealed this act.

Buy Indian Act (25 USC 47; June 25, 1910, C.431, Sect. 23, 36 Stat. 861) authorizes the Secretary of the Interior to contract directly for employment of Indian labor and purchase products of Indian industry. Presently only the Secretary of Interior has this authority. Competition is required by the Competition in Contracting Act and the USDA has no authority to contract with Indians as a class set-aside.

Indian Preference Set Asides: This approach would be based on statutory authority of the Small Business Act, 15 USC 631 et. seq. The mechanics of this method would be similar to class set asides such as small business and labor surplus areas provided for in Section 15 of the Act. A further adaptation would be to set aside for Indian firms on a noncompetitive basis similar to Section 8a. of the Act, i.e., an 8a contract without involvement by the Small Business Administration. Administrative Services presently has such a proposal before the Chief.

Primary Contractors Subcontracting With Indian Businesses: Public Law 100-442 Amendments to the Indian Financing Act of 1974, Section 504, permits an agency to give a prime contractor a bonus for subcontracting with a certified Indian firm. The bonus is 5% of the subcontract value. Administrative Services is working with the Chief's office in an effort to develop procedures and implementing clauses. This would, of course, increase contract prices. Its use is discretionary.

Cooperative Funds and Deposits (Agreements): P.L. 94-148, (16 USC 565a-1). This Act provides the Forest Service with the authority to enter into cooperative agreements for a number of activities:

> *"To facilitate the administration of the programs and activities of the Forest Service ...to engage in cooperative manpower and job training and development programs; **to develop and publish cooperative environmental education and forest history materials;** and to perform forestry protection, including fire protection, timber stand improvement, debris removal, and thinning of trees. The Secretary (of Agriculture) may enter into aforesaid agreements when he determines that the public interest will be benefited and that there exists a mutual interest other than monetary considerations."*

Allotment Act of 1910 (Amended Dawes Act of 1887). Section 31 provided for allotting lands to Indians found to be occupying, living on, or having improvements on lands that had become National Forest land.

The Indian Citizenship Act of 1924. Granted the status of citizenship to Indians, regardless of their land tenure or place of residence. Up until this time, the U.S. Constitution did not apply to individual Indians.

Pueblo Lands Board Act of 1924. Allowed non-Indians to validate title to previously acquired Pueblo lands.

Indian Reorganization Act of 1934. Allowed Indian Tribes to reorganize and adopt bylaws and so forth under the Secretary of the Interior, ended allotments in severalty, and gave the Secretary authority to acquire land inside or outside of reservations to provide lands for Indians.

Indian Claims Commission Act of 1946. Established Indian Claims Commission (ICC) as an independent agency to hear and determine claims in law or equity arising under the Constitution, laws, treaties of the United States, all other claims in law or equity, and claims based upon honorable dealings that are not recognized by any existing rule of law or equity.

House Concurrent Resolution No. 108 of 1953. Articulated U.S. Government policy leading to Termination Acts. Between 1954 and 1967, the federal/tribal relationship for 109 tribes and bands was terminated.

Indian Civil Rights Act of 1968. Defined Indian individuals as having the same civil rights as non-Indian citizens under the U.S. Constitution (P.L. 90-284).

General Laws and Policy Statements

The Forest Service Organic Act of 1897. This act provides that National Forests shall be established only to improve and protect the forest therein, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for use and necessities of the citizens of the United States. In addition, the Secretary of Agriculture may make rules and establish such services as well assure the objectives of the Forest Reserves, namely, to regulate their occupancy and use and preserve the forest thereon from destruction.

The Weeks Law of 1911. Authorizes and directs the Secretary of Agriculture to acquire forested, cut over, and denuded lands within watersheds of navigable streams necessary to the regulation of the flow of navigable streams or for timber production. Under the act, such lands are to be permanently reserved, held, and administered as National Forests.

Bankhead-Jones Act of 1937. Authorizes and directs the Secretary of Agriculture to develop a program of land conservation and utilization, to correct maladjustments in land use, thus controlling soil erosion, and reforestation, preserving natural resources, protecting fish and wildlife, developing and protecting recreation facilities, mitigating floods, conserving surface and subsurface moisture, protecting watersheds of navigable streams, and protecting the public lands, public health, and welfare.

Sustained Yield Forest Management Act of 1944. Provides authority to the Secretary of Agriculture and the Secretary of the Interior to establish cooperative sustained yield units with private and other Federal agencies in order to provide for a continuous and ample supply of forest products and to secure the benefits of the forest in maintenance of water supply, regulation of stream flow, prevention of soil erosion, amelioration of climate, and preservation of wildlife. Under Section 7, trust or restricted Indian land, whether tribal or allotted, could be included in such a unit with the consent of the Indians concerned.

Multiple-Use Sustained-Yield Act of 1960. Confirms the policy of Congress that National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. It authorizes and directs the Secretary of Agriculture to develop and administer the renewable resources for multiple use and sustained yield of the several services and products obtained therefrom. It authorizes the Secretary of Agriculture to cooperate with interested State and local governmental agencies and others in the development and management of the National Forests.

The Snyder Act: Authorizes the Secretary of the Interior to issue grants of federal appropriations directly to Indian Tribes for the improvement of tribal governmental operations.

Self Covernance Act: Authorizes the Secretary of the Interior to develop compacts directly with Indian tribal governments for programs without involving the Bureau of Indian Affairs.

Intergovernmental Personnel Act:

Fish and Wildlife Conservation Act of 1960. Provides for Interior/Agriculture coordination in cooperation with States to develop, plan, maintain, and coordinate programs for the conservation and rehabilitation of wildlife, fish, and game including, but not limited to, specific habitat improvement projects and protection of threatened or endangered species.

National Environmental Policy Act (NEPA) of 1969 (P.L. 91-190). NEPA's implementing (CEQ) regulations require Federal agencies to invite Indian tribes to participate in the scoping process on projects and activities that affect them. Tribes may also meet with line officers in advance of the formal planning processes about their reserved rights or interests.

Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974. Directs and authorizes the Secretary of Agriculture to make an assessment of the renewable resources and to determine the ways and means needed to balance the demand for and the supply of these renewable resources, benefits, and uses in meeting the needs of the people of the United States. Assures that National Forest plans provide for multiple use and determine harvesting levels and availability and suitability for resource management. It also specifies procedures to insure that such plans are in accordance with NEPA.

Federal Land Policy and Management Act (FLPMA) of 1976. Section 103(e) states that the term "public lands" means any land and interest in land owned by the United States and administered by the Secretary of the Interior through the Bureau of Land management, without regard to how the United States acquired ownership, except: (2) lands held for the benefit of Indians, Aleutes and Eskimos. Section 202(c)(9) directs the Secretary of the Interior to coordinate land use and resource management plans for the public lands with land use planning and management programs of Indian Tribes by considering the policies of approved tribal land and resource management plans. **FLPMA also:** Directs the Secretary of Agriculture to coordinate National Forest System land use plans with the land use planning and management programs of and for Indian tribes by considering the policies of approved tribal land resource management programs. Parts of sections on range management and minerals on surface rights also apply to National Forest System lands.

National Forest Management Act (NFMA) of 1976. Directs consultation and coordination of National Forest System planning with Indian tribes.

National Indian Forest Resource Management Act (PL 101-630). Provides for the management of forested tribal trust lands, by the Bureau of Indian Affairs or through Self-Governance Compacts.

Alaska Native Claims Settlement Act (ANCSA) of 1971 (PL 92-203). Provides settlement of Alaska Native land claims and provides specific Federal benefits and services for those lands and for the development of Native corporations.

Alaska National Interest Lands Conservation Act (ANILCA) of 1980 (P.L. 96-487, 16 U.S.C. 18f). Recognizes subsistence hunting and fishing rights for rural users. Recognizes conservation units and protection of lands and waters and so forth.

Federal Advisory Committee Act: Indian Tribes are exempt from this act for the purposes of meetings, advice and consultation when federal agencies embark on proposed federal decisions or projects.

Specific Indian Occupancy and Use Laws

In addition to the general laws, such as the Forest Service Organic Act of 1897, the following laws have application under specific circumstances on Federal lands and will have a major effect on the interpretation and implementation of Forest Service policy.

Antiquities Act of 1906 (P.L. 209), as amended. Provided penalties for the illegal removal, disturbance, or destruction of any object of antiquity on Federal lands. Required permits for examination, excavation, or gathering of objects of antiquity on Federal lands. Authorized the President to designate national monuments to protect historic and prehistoric structures and other objects of historic or scientific interest.

Indian Reorganization Act of 1934 (IRA) (25 U.S.C. 461 et seq.). Its primary thrust was to establish tribal governments with whom Congress and the Department of the Interior could conduct governmental business and other provisions directed toward improving the lot of Indians.

National Historic Preservation Act of 1966 (NHPA) (P.L. 89-665, as amended, P.L. 91-423, P.L. 94-422, P.L. 94-458 and P.L. 96-515). NHPA states that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." The 1992 amendments to NHPA strengthen requirements for cooperation between Federal agencies and American Indian tribes and Native Hawaiian Organizations.

Indian Civil Rights Act of 1968: Provides the same protections of the Bill of Rights for individual Indian people as the Constitution does for non-Indians.

Alaska Native Claims Settlement Act of 1971 (ANCSA) (P.L. 92-203). Provided settlement of Alaska Native land claims and provided specific Federal benefits and services for those lands and Native corporations.

Endangered Species Act of 1973 (P.L. 93-205, as amended by (P.L. 94-325, P.L. 94-359).: There are two schools of thought on this act; tribal: in that it does not apply - and U.S. Fish and Wildlife Service and National Marine Fisheries Service; it does apply to Indian tribes. A joint Secretarial Order has been signed by Commerce and Interior Secretaries, outlining the protocol for consultation under this act. (#3206)

Preservation of Historical and Archeological Data, act of 1974 (P.L. 93-291). The Act makes provisions for protecting sites when inadvertent discovery is made during projects or construction activities.

Indian Self Determination and Education Assistance Act of 1975 (P.L. 93-638). Encouraged tribes to assume responsibility for Federally funded programs designed for their benefit that had previously been administered by the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS).

The American Indian Religious Freedom Act of 1978 (AIRFA) (P.L. 95-341). The policy of the United States is to protect and preserve religious rights, practices, and beliefs of the American Indian, Eskimo, Aleut, and Native Hawaiian. This includes, but is not limited to: access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites. (No regulations for this Act)

The Archeological Resources Protection Act of 1979 (ARPA) (P.L. 96-95). Establishes a permit process for the management of cultural sites on Federal lands which provides for consultation with affected tribal governments.

Management of Museum Properties (18 U.S.C. 1163).

E. 0. 1593, Protection and Enhancement of the Cultural Environment (1971).

Native American Grave Protection and Repatriation Act (NAGPRA) (P.L. 101-601, 25 U.S.C. 3001-3013). Addresses the rights of lineal descendants and members of Indian tribes, Alaska Native and native Hawaiian organizations to retain certain human remains and precisely defined cultural items. It covers items currently in Federal repositories as well as future discoveries.

Executive Order 13007: Guidance for honoring Indian sacred sites. (caution: parts of this Order are inconsistent with AIRFA).
Executive Order 13084: The Administration's advice to involve Indian Tribes in rule making through consultation processes.

The United States Constitution, Article I, Section 8, includes a clause commonly referred to as the *Commerce Clause: 'Congress shall regulate commerce with... the Indian Tribes...* " It further states, in Article VI, that judges in every State shall be bound to the laws of the United States. The sovereign status of Indian Nations has been addressed consistently over time:

The Trade and Intercourse Act of 1 790 , (I Stat. 13 7), established a fiduciary relationship between Indians and the U.S. Government. By 183 1, Chief Justice Marshall in his Supreme Court opinion reaffirmed the guardian/ward relationship that the U.S. Government has toward Indians. This was reiterated by the Supreme Court in U.S. v. *Kagama,* 1886: "Indian Tribes are wards of the Nation." In 1832, Congress authorized three items:

- The Presidential appointment of a Commissioner of Indian Affairs within the Department of the Interior.
- Delegations of authority for the Secretary of the Interior.
- Authorized the President to prescribe regulations pertaining to Indians (25 U.S.C., Sec. 1, 2, and 9). The authority of the President to make executive regulations is subject to the implied condition that they be consistent with the statutes enacted by Congress and in execution of and supplementary thereto (*Romero v.* U.S., 1889, 24 Ct. Cl. 331).

No statute, law, or court decision to date has affected or altered the above assigned trust responsibility or related principles. Even the recent 'Self-Governance Compacts" negotiated between the Secretary of the Interior and Indian tribes do not change the statutory duties delegated by Congress. In these compacts, the trust responsibility associated with individual Indian trust lands has been specifically reserved by the Secretary of the Interior.

Presidential Indian policy provides guidance in working with Indian tribes. Any divergence from the long standing and pervasive role of the Secretary of the Interior would be inconsistent with Federal statutes, tribal sovereignty, and the guardian-ward relationship the United States has with Indian Nations.

Excerpts from the Forest Service Manual and Litigation

FSM 5550.15, *Judicial Interpretations*. The courts have issued decisions and final judgments that interpret treaties, statutes, laws, rules, and regulations as to the extent of Indian rights and interests including those rights reserved by or for Indian tribes in treaties with the U.S.

Federal Court Interpretations of Treaty Language, Where Ambiguities Existed

Worcester v. Georgia (1832). "...the language used in treaties with the Indians should never be construed to their prejudice."

Choctaw Nation v. Oklahoma (1970). Because treaties were imposed on the Indians, "treaties with the Indians must be interpreted as they would have understood them... and any doubtful expressions in them should be resolved in the Indians' favor."

Oliphant v. Suquamish Indian Tribe (1978). Indian treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

Washington v. Washington State Commercial Passenger Fishing Vessel Association (1979). The treaty words must be construed 'in the sense in which they would naturally be understood by Indians."
Worcester v. Georgia (1832). Indian tribes are "distinct, independent political communities" with powers of self government that exist by reason of their original tribal sovereignty.
Whitefoot v. United States (1962) and United States v. Washington (1975). Treaty rights are reserved to or by the tribe not to the individual; they are tribal rights regulated by tribal government actions.
United States v. Wheeler (1978). Realty management activities, land exchange, occupancy and use, title claims and so forth, must be carried out with the tribal government level.

U.S. v. White Mountain Apache Tribe (9th Cir. 1986). "Tribal sovereignty cannot prevent the Federal Government from exercising its superior sovereign powers."

Nature of Treaty Rights Affecting National Forest System Lands

Worcester v. Georgia (1832). Since statutory direction is limited, use the Court interpretations when dealing with the exercise of treaty rights affecting or affected by realty management activities.
U.S. v. Dion (1985). Treaty rights may be abrogated by Congress only through clear explicit language. (Abrogation of treaty rights cannot be affected by realty management activities, they must rely on Court interpretation or explicit Congressional direction).

Lac Courte Oreilles Band of Chippewa Indians v. Wisconsin (1990). Valid existing Treaties reserved a tribal usufructuary right or right of occupancy and use natural resources on lands ceded to the U.S.

United States v. Winans (I 905). The Court ruled that for tribes who had the treaty language "usual and accustomed fishing places" that these areas of land must remain open for Indian people to exercise their treaty reserved fishing right, regardless of land ownership status.

- Non-Indians may not prevent members of the Yakama Indian Nation from accessing their fishing sites.
- The affected Indian tribes reserved to themselves certain rights by treaty. The United States did not grant rights to Indian Tribes through the treaty process.
- The off-reservation right to "take fish at usual and accustomed fishing places" constitutes a servitude or easement on the land to access such sites regardless of land ownership.

(note: this ruling has since been applied to all tribes whose treaties contain the "usual and accustomed" language for the taking of fish. It has not been expanded to include treaty activities such as: hunting, gathering, trapping or grazing)

Seufert Brothers v. United States (249 U.S. 194, 1919). The United States Supreme Court determined that the Indians signing the Yakama Treaty would have understood their reserved fishing rights to extend to all their traditional fishing areas, without regard to ceded land boundaries.

Tee-Hit-Ton Indians v. United States (1955). The court held that aboriginal or original Indian title is not a property right, but is a right of occupancy which the Sovereign grants and protects against intrusion by third parties. This right of occupancy may be terminated and lands fully disposed of by the Sovereign itself without any legally enforceable obligation to compensate the Indians.

Lyng v. Northwest Indian Cemetery Protective Association (1988). The court ruled, regarding a proposed road construction project that could lead to infringement on Indian rights to exercise their religion, that "...there is no violation of the free exercise of religion clause because the affected individuals will not be coerced by governmental action into violating their religious beliefs, nor will the Government action penalize religious activity." One Supreme Court Justice further clarified this issue with the following:

> *"However much we might wish it otherwise, the government simply could not operate if it were required to satisfy every citizen's religious needs and desires."* (485 US 452, 795 F2nd, at 693)

United States v. Dann (1989). The court ruled that:

- Only Congress can extinguish aboriginal title;
- Individual American Indian grazing rights were retracted to those exercised before their withdrawal from public lands; and
- Treaty rights, when shared with others, are subject to reasonable regulations.

Water Rights

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

UDSA Forest Service Manual

USDA Forest Service
Pacific Northwest Region

1563.03

TITLE 1500 - EXTERNAL RELATIONS

1563.03 - Policy. In carrying out the unique relationship and obligation the United States Government has with Indian Tribal Governments and similar legally defined relations with Alaska Native Corporations, the Forest Service policy shall be to:

1. Maintain a governmental relationship with Federally recognized Tribal Governments.

2. Implement our programs and activities honoring Indian treaty rights and fulfill legally mandated trust responsibilities to the extent they are determined applicable to National Forest System lands.

3. Administer programs and activities to address and be sensitive to traditional Native religious beliefs and practices.

4. Provide research, transfer of technology, and technical assistance to Tribal Governments.

1563.04 - Responsibilities

1563.04a - Deputy Chief, State and Private Forestry. The Deputy Chief, State and Private Forestry, carries out the American Indian and Alaska Native program service-wide and in the Washington Office.

1563.04b - Regional Foresters, Station Directors, and Area Director. Regional Foresters, Station Directors, and Area Directors are responsible for establishing and implementing an effective American Indian and Alaska Native program.

1563.04c - Line and Staff. Line and Staff at all organizational levels are responsible for implementing a comprehensive American Indian and Alaska Native program.

1563.05 - Definitions

1. Federally Recognized Tribes means an Indian group for which: (1) Congress of the Executive Order created a reservation for the group either by treaty (before 1871), statutorily expressed agreement or by Executive Order or other valid administrative action; and (2) the United States has some continuing political relationship with the group, such as providing services through the Bureau of Indian Affairs.

2. Treaty means a legally binding agreement between the United States Government and a Tribe, or the Tribe's legal successors.

APPENDIX I
1563.04C--1
TITLE 1500 - EXTERNAL RELATIONS

*1563.02 - Objective. Ensures that policies, programs, and project activities of the Pacific Northwest Region affecting American Indians are applied consistently between Forest and meet the overall Federal policy of working as one government to another.

1563.03 - Policy. Recognizing that Indian tribes are sovereign governments with powers, rights, and privileges parallel to and in some instances identical to state and county governments, it is the policy of the Pacific Northwest Region to exercise our responsibilities to the American Indian in the Northwest by:

1. Establishing a government to government relationship between the Forest Service and tribal governments in the Region.

2. Building stable, long-term working relationships with tribal governments, which result in positive, mutually understood, and beneficial solutions to common situations.

3. Raising the understanding and awareness of employees, managers, and executives to the rights, concerns, and culture of the American Indian.

4. Bringing American Indian workers into the work force in ways that benefit and accommodate the needs and sensitivities of the Forest Service and American Indians.

15603.04 - Responsibilities

1563.04b - Regional Foresters, Station Directors, and Area Directors. The Regional Forester will focus on Regional level Tribal associations and situations, and will establish leadership and direction to implement this policy. The Deputy Regional Forester for State and Private Forestry is assigned responsibility for this policy.

Research and assistance in the legal aspects of Tribal government and Forest Service interaction will be provided from the Regional Office and the Office of the General Counsel. This includes the determination of the Forest Service obligations pertaining to the Federal responsibilities and treaty interpretation. Policy implementation and analysis of the consistent application of regional operational policies in staff areas and on forest will be through general management, program, and activity reviews.

1563.04c - Line and Staff

1. Directors. Staff directors in each staff area will review operational policies that have an effect on tribal governments' rights, culture, concerns, and regulations that inhibit tribal governments' rights will be recommended for change to the Deputy Regional Foresters as appropriate, to ensure that forests can meet their responsibilities toward tribal governments in a consistent manner.

-FSM 3/89R-6 SUPP 74-

Provide leadership in staff area that encourages the development of the government to government approach to Tribal governments.

2. Forest Supervisors. Forest Supervisors will focus on Tribal governments and resource issues within the Forest's area of responsibility.

The implementation of this policy will be through joint development of action schedules, specific to each Tribal government, outlining the steps each government will take in establishing and maintaining a government to government relationship. Key parts of the schedule include developing and maintaining effective communications, assigning key contact responsibility to one individual, participating with each other in local events and activities, process steps for jointly evaluating actions which affect each government, planning local awareness/cultural appreciation activities and other items, which foster and facilitate the government to government relationship.*

3. Tribe means any Alaska Native corporation or group, Indian Tribe, Band, Nation, Pueblo, Community, Rancheria, Colony, or Group recognized in statues or treaties by the Federal government.

4. Trust Responsibility means the permanent fiduciary relationship and obligation of the United States Government to exercise statutory and other legal authorities to protect Indian rights. As applied to the Forest Service activities, the trust responsibilities are defined primarily by the authorities listed in part 1563.01, and by treaties which may have application to specific areas of the National Forest System. Treaty rights on National Forest System lands are interpreted and applied by the Court.

1563.06 - Relationship to Other Programs

The Indian Program differs from Civil Rights Special Emphasis Programs because of the governmental nature of the Indians and Alaska Natives. However, the goals of the Special Emphasis Program (FSM 1761.3) are applicable to carrying out an effective Civil Rights Indian Program.

1565 - IMPLEMENTATION OF EXECUTIVE ORDER 12372, INTERGOVERNMENTAL REVIEW OF FEDERAL PROGRAMS

1565.01 - Authority. Executive Order (E.O.) 12372 of July 14, 1982, as amended by E.O. 12416 of April 8, 1983, requires the Forest Service to allow State and Local governments to review proposed Federal financial assistance and direct Federal development programs. E.O. 12372 and E.O. 12416 (ex. 1 and ex. 2) replace the Office of Management and Budget (OMB) Circular A-95 clearing house process. The Department's implementing procedures are in 7 CFR 3015, Subpart V, and Departmental Regulation 2400-4 dated August 10, 1983.

-FSM 3/89 R-6 SUPP 74-

-FSM 10/88 AMEND 123-

Enrolled Tribal Fishermen and Women of Treaty Indian Tribes within Washington, Oregon and Idaho

Tribal Name	Number of Fishermen	Tribal Population *
U.S. v Washington (Boldt Case) Area		
Hoh	40	72
Jamestown-Klallam	102	200
Lower Elwha	108	430
Lummi	1,333	2,888
Makah	265	480
Muckleshoot	154	780
Nisqually	41	300
Nooksack	270	956
Port Gamble	173	490
Puyallup	80	800
Quileute	118	326
Quinault	165	2,112
Sauk-Suiattle	26	90
Skokomish	139	1,008
Squaxin Island	108	160
Stillaguamish	63	90
Suquamish	130	240
Swinomish	190	500
Tulalip	208	1,200
Upper Skagit	110	400
Subtotal	3,823	13,547
U.S. v Oregon Case Area		
Umatilla	25	700
Nez Perce	25	2,100
Warm Springs	30	2,100
Yakima	320	5,300
Subtotal	400	10,200
Other		
Chehalis (executive order)	25	280
Flathead	20	3,000
Metlakatla (executive order)	85	1,200
Shoshone-Bannock	25	2,000
Subtotal	155	6,480
TOTAL	4,378	30,227

* Estimated living on or near the reservation (this information changes annually and not all enrolled fishermen or women participate in the fishery, every year)

Les McConnell, January, 29, 1991

GLOSSARY OF TERMS

Aboriginal Areas: This term is used today to describe the historic and prehistoric lands where a tribe(s) carried out food gathering or seasonal activities or traded with other Indian peoples. These areas are extensive. The extent of the range varies depending on the geographic terrain. The Makah, for instance, claim to have paddled whaling canoes in excess of 120 miles from the Washington Coast, into present day Canada. The Nez Perce used to hunt buffalo in Eastern Montana; the Umatilla used to travel to the Oregon Coast and the Warm Springs used to fish at Willamette Falls.

Allotted Lands - On Reservation: The Daws Act or General Allotment Act (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. Of this remainder, 20 million acres is desert. The decline in Indian ownership was largely due to land being sold by Indian people in the interest of a short-term financial gain combined with a general disinterest in becoming a farmer. In 1934, this act was superseded by the Indian Reorganization Act.

Allotted Lands - Off Reservation: These 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 these acres are held in Trust status by the Interior Department, and administered by The Bureau of Indian Affairs.

Ceded Lands: This term was first used in the Treaty with the Wyandot, 1789. Since that time, many treaties referred to land cessions made by tribes to the United States. This term is used interchangeably with "treaty boundary" described elsewhere in the definitions. Most Federal agencies and Indian tribes prefer to use 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 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."

Federal Campus: These are small parcels of land within a reservation for the use of the Bureau of Indian Affairs to build and maintain government housing, schools and administration buildings.

Federal Recognition: Acknowledgment of an Indian tribe as a government entity that has a special relationship with the United States government. This relationship recognizes that Indian tribes receive some benefits or reserve some rights not available to other citizens; for example, health and education benefits from the trust relationship or off-reservation hunting and fishing rights related to treaties with tribal governments.

The basic requirements for attaining Federal recognition include the following in the form of a petition to the Secretary of the Interior:

1. A statement of facts regarding the continued identity of a group as "American Indian" or "Aboriginal" from historic times to the present.
2. Evidence that a group exists as a community separate from other populations.
3. Evidence it has maintained political influence over its members.
4. A governing document such as a constitution.
5. An enrollment list of all members.

6. Not be involved in pending legislation regarding their status, or terminated by former Congressional action.

Federal Reserved Rights: Water is reserved by the United States as of the date when a Federal agency first established the purposes and intent for which an Indian Reservation was created. The Winters Doctrine contains a descriptions of the implied right to a water reserve on behalf of Federally recognized Indian Tribes.

Fee Patton (Fee Simple Title): Absolute ownership of a land area, unencumbered by any other interest or estate.

In Lieu Sites: This land category describes the parcels of land held in Federal ownership on both sides of the Columbia River in lieu of usual and accustomed fishing grounds and stations lost due to inundation caused by construction of Bonneville Dam. The current area is comprised of 26 separate sites encompassing approximately 160 acres. A recent Congressional mandate to the U.S. Army Corps of Engineers requires that Agency to set aside additional land up to a total of 400 acres on the banks of the Columbia for the tribes to access the river for fishing. These lands are not held in trust status like tribal land on reservations. The affected tribes are the Warm Springs, Umatilla, Yakama and Nez Perce.

Indian Land: Any land in collective tribal holding or ownership for which the Secretary of the Interior has a continuing trust responsibility to manage for the benefit of the respective tribe. In the past this term described certain parcels or areas where Indian lived and represented a smaller concept than Indian territory.

Indian Rights and Interest. Indian treaty and other rights or interests recognized by treaties, statutes, laws, executive orders, or other government action, or federal court decisions.

Indian Territory: Unsurveyed lands that were recognized by the Federal government to be occupied or used by Indians. Prior to the United States Constitution, lands occupied or used by American Indians were referred to as Indian Territory. Historic documents dating back to the 16th century refer to these unsurveyed regions as a territory.

Indian Tribe: Any American Indian or Alaska Native tribe, band, nation, pueblo, community, rancheria, colony, or group meeting the provisions of the Code of Federal Regulations Title 25, Section 83.7 (25 FR 83.7) or those recognized in statutes or treaties with the United States.
In Lieu Sites: Unique to the Columbia River, this land category describes the parcels of land held in federal ownership on both sides of the Columbia River in lieu of usual and accustomed fishing grounds and stations lost due to inundation caused by construction of Bonneville Dam. The current area is comprised of 26 separate sites encompassing approximately 160 acres. A recent congressional mandate to the U.S. Army Corps of Engineers requires the Agency to set aside additional land up to a total of 400 acres on the banks of the Columbia for the tribes to access the River for fishing. These lands are not held in Trust status like tribal land on reservations. (The affected tribes are the Warm Springs, Umatilla, Yakama and Nez Perce)

Indian Country: A popular term today, which was derived from a reference to lands occupied by Indian peoples historically; then applied to reservations. It is commonly used now when referring to areas of concern to Indian tribes or even individuals, when conducting Indian business or protecting rights.

Northwest Ordinance: (1787), U.S. territorial legislation based on a proposal by Thomas Jefferson. Under the provisions of the ordinance, Congress would appoint a governor, a secretary, and three judges to govern the territory, and when the population numbered 5,000 adult free males, a bicameral legislation would be added. Three to five states could be made from the territory, with 60,000 free inhabitants required for admission. The new states would be equal with the original states and have the same freedoms of worship, jury trial and public education. It also banned involuntary servitude except as punishment for crimes. For references to Indian Law, this ordinance is most often cited to emphasize it was the first U.S. statute stating federal Indian Policy:

Native American Party: (1845-60), U.S. political party based on the idea that immigrants were becoming too powerful and that only Native Americans should hold political office.

Public Domain Land. Any land ceded to the Federal government from the colonial states, and land acquired by the Federal government by purchase from or treaty with the Indians or foreign powers.

Recognized Title: Indian title that is authorized by treaty, statute, or executive order. Recognized title rights are protected under the Fifth Amendment to the Constitution; therefore, if extinguished, there is a right to compensation.

Sovereignty: First addressed in the United States Constitution, (Article I, Section 8. and Article VI). For Indian Tribes that have federal recognition, this is the inherent governmental power from which all specific political powers are derived. Indian governmental powers, with some exceptions, are not powers granted by Congress, but are inherent powers of a limited sovereignty that have never been extinguished. Congress has the authority to limit or abolish tribal powers. However, absent Congressional action, a tribe retains the inherent right to self-government and no state may impose its laws on a reservation, (See also Tribal Self-government.)

The Supreme Court first recognized the inherent right of tribal sovereignty in an 1832 case, Worcester v. Georgia. Worcester decided the question of whether the state of Georgia could impose its laws on the Cherokee Indian Reservation, a reservation located within the States' borders. In holding that Georgia could not extend its laws within the reservation, the Court stated:

> Indian nations (are) distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States...Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil from time immemorial...The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and the citizens of Georgia, have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.

The Worcester doctrine of inherent tribal sovereignty has undergone some changes over the years, but its basic premise remains the same. An Indian tribe is a distinct political government. Congress has the authority to limit or even abolish tribal powers. Absent Congressional action, a tribe retains its inherent right to self-government, and no state may impose its laws on the reservation. The Court reaffirmed this principle in 1991: "Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territories. Moreover, in recent years Congress has made a determined effort to strengthen tribal self-government. As the Supreme Court remarked

in 1983, Congress appears "firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous Federal statutes."

Traditional: The beliefs, acts, practices, objects and/or sites for the perpetuation of an Indian culture originating from or historically located at a specific area. This may include cultural practices that are so interrelated with spiritual activities that they cannot be separated from the land location.

Treaty: A legally binding agreement between two or more sovereign governments. With respect to American Indian tribes, a treaty is a document negotiated and concluded by a representative of the President of the United States and ratified by 2/3 majority vote of the U.S. Senate.

Treaty Boundaries: A modern term that applies to lands described within the treaty document, usually outlining an area of land that is ceded to the U.S.

Treaty rights: Tribal rights or interests reserved in treaties, by Indian Tribes for the use and benefit of their members. The uses include such activities as described in the respective treaty document. Only Congress may abolish or modify treaties or treaty rights.

Tribal Self-Governance: First stated in modern terms by former President Nixon in 1970, as "Self Determination", this refers to the ability of Indian Tribal governments to make decisions that affect either the general tribal population or tribal assets. A modern U.S. Indian policy that reinstates the independent decision making process of Indian tribal entities that had existed before European contact. In 1982, Congress passed new authorities whereby Indian Tribes could sign a Compact directly with the Secretary of the Interior without involving the Bureau of Indian Affairs in the delivery of federal services. Using appropriations formerly sent through the Bureau of Indian Affairs, Indian Tribes can now prioritize their own expenditures of federal funds.

Trust allotment: Federal land set aside for the exclusive use of an Indian, who is the allottee. The Federal government retains land ownership, many allotments are outside the bounds of Indian reservations, called public domain allotments.

Trust Land: Any land in collective tribal holding or individual ownership for which the Secretary of the Interior has a continuing trust responsibility to manage in a manner to benefit the respective tribe or individual. The most common example is forested acres on a reservation. Some Trust lands were set aside as compensation for claims made against the Government; most of which are off-reservation.

Trust Responsibility: This term has never been defined by the U.S. Congress, any President or Cabinet official. Generally it is a set of principles and concepts outlining the responsibilities of the United States Government to act as the trustee of Indian people and Indian owned assets. The United States 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 acts as the trustee of Indian assets. Fulfilling or redeeming a trust responsibility, can best be reflected or demonstrated as a matter of action; a stream that was protected, a site that was maintained in tact, a property right that has been left unaffected by a federal action. The writing of an environmental document is not an example of fulfillment of a trust duty.

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FED. RECOGNIZED TRIBES

	TRIBE	RATIFIED TREATY	EXEC. ORDER	OFF-RESERVATION RIGHTS	AFFECTED FORESTS	RESERVATION ACRES
1	Burns Paiute	No	Yes	No	04, 07	13,700
2	Chehalis	No	Yes	No		2,076
3	Colville	No	Yes	Yes	21, 08, 17	1,664,457
4	Coos	No	Yes	No	12, 11	6
5	Coquille	No	Yes	No	12, 11	None
6	Cow Creek	Yes, Ter.	Yes, Res.	No	15	29
7	Grand Ronde	Yes, Ter.	No, Res.	No	12	9,811
8	Hoh	No	Yes	F, H, G, R*	09	433
9	Jamestown Klallam	No	Yes	F, H, G	09	2
10	Kalispel	No	Yes	State Recog	21	4,557
11	Klamath	Yes, Ter.	Yes, Res.	No	02, 20	175
12	Lower Elwha	Yes		F, H, G, R	09	427
13	Lummi	Yes		F, H, G, R	05	7,680
14	Makah	Yes		F, H, G, R	09	27,266
15	Muckleshoot	Yes		F, H, G, R	05	1,275
16	Nez Perce**	Yes		F, G, H, R	14. 16, CRG	85,097
17	Nisqually	Yes		F, H, G, R	05, 03	930
18	Nooksack	Yes		F, H, G	05	2,988
19	Port Gamble	Yes		F, H, G	09	1,303
20	Puyallup	Yes		H, F, G, R	05	121
21	Quileute	Yes		H, F, G, R	09	814
22	Quinault	Yes		H, F, G, R	09	140,703
23	Sauk-Suyattle	Yes		F, H, G	05	23
24	Shoalwater	No	Yes	No		355
25	Siletz	No	Yes	No	12	3,869
26	Skokomish	Yes		F, H, G	09	2,987
27	Spokane	No	Yes	No	21	135,262
28	Squaxin Island	Yes		F, H, G	09	971
29	Stillaguamish	Yes		F, H, G	05	20
30	Suquamish	Yes		F, H, G	05	2,894
31	Swinomish	Yes		F, H, G	05	3,602
32	Tualalip	Yes		F, H, G	05	10,665
33	Umatilla	Yes		F, H, G, R	14, 16, CRG	85,256
34	Upper Skagit	Yes		F, H, G	05	74
35	Warm Springs	Yes		F, H, G, R	1,4,6,7.18,CRG	643,571
36	Yakima	Yes		F, H, G, R	03, 17, CRG	1,130,286

Ter = Terminated
Res = Restored Government Status
* F = Fishing, H = Hunting, G = Gathering, R = Range Grazing on open and unclamed land
** Reservation is in Region 1
CRG = Columbia River Gorge National Scenic Area
Tribes in Oregon: 1,4,5,6,7,11,25,33 & 35

LISTENING TO INDIAN TRIBES

The Active Practice of Consultation in Indian Country

INTRODUCTION: Somewhere along ancient trade routes where neighboring Indian Nations of long ago needed a common form of communication, a series of signs formed by hand movements eventually evolved into the most universally understood language in the western hemisphere. We call it "sign language" or "Indian Sign language" today. It mattered little from which tribe one originated, because hand motions and meanings remained the same. The language, as it experienced its height in the middle part of the 19th century, was commonly understood by tribes from the Atlantic Coast South into present day Mexico, North to Canada and as far West as the Cascade Mountain Range.

TRIBAL GOVERNMENTS AND FEDERAL AGENCIES. The USDA Forest Service administers a vast public land area that was once held in exclusive occupancy by Indian nations or bands. When a federal representative speaks from sets of rules and Indian Peoples speak from the heart about the lands they once occupied, it is evident that a gap exists between the two governments or cultures as to what the land needs. One might get the idea that different languages are still being used.

NO COOK BOOK EXISTS: There are 557 federally recognized Indian Tribes in America today. In order to respect their quasi-soveriegn political status, an approach to consultation and listening to tribes should be tribe specific. There are no one size fits all solutions or methods for consultation.

A. *Initial Contact*: Some Tribes prefer to be addressed by telephone, while others may prefer technical contacts first. Some may want to receive letters while others might request a combination of the above. The only way to be certain is to contact the respective tribe to find out what method works best for them.

B. *The Irreplaceable In-person Meeting*: Indian Tribes continue to relay on meeting face to face with other governments to discuss important subjects. In this two way exchange of information, feelings and traditional knowledge about the land and resources, Indian people generally have an opportunity to develop an understanding of the proposed federal action, its description and magnitude. These in-person meetings continue to be the best form of consultation either in initial planning stages or continuing exchanges of technical information or data.

C. *A Written Method to Formalize Consultation*: The best way to maintain consistency in communications with tribes is to develop an agreed to method or approach. The easiest way would be to formalize the method in a letter. Other ways are to develop a Memorandum of Agreement or Understanding. Once a letter or similar document is in place, review it on a regular basis and leave room for the dynamics of change - whether it is governmental or natural resource based.

D. *Incorporate Tribal Information*: Contributions from Tribes about federal proposals need to be added to the federal decision and land management actions wherever possible, using tribal language.

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U.S. Forest Service, 10/3/97