

HOW TRIBAL CONSULTATION TRAINING SUPPORTS THE MISSION OF MY RANGE

MIDWAY 5 | 1:00-5:00

Thursday, August 16, 2018

1:00pm – 5:00pm

Room Midway 5

St. Louis, MO



Sustaining Military Readiness Conference
Restoring Readiness Through Planning and Partnerships



Instructors

- Alicia Sylvester, Senior Advisor & Liaison for Native American Affairs, DoD
- John McDonagh, Associate General Council, DoD Office of General Counsel for Environment, Energy, and Installations
- Justin Buller, Associate Deputy General Counsel, Department of the Army



Gov-to-Gov Consultation with American Indian & Alaska Native Tribes

Presented by:

Alicia Sylvester

DoD Senior Advisor and Liaison for Native American Affairs



Consultation

“Consultation is the process of seeking, discussing, and considering views of tribes and when feasible, seeking agreement with them.”

- Secretary of the Interior’s Standards and Guidelines

“The single most important element of consultation is to initiate the dialogue with potentially affected Tribes before discussions affecting Tribal interests are made.”

- DoD’s American Indian & Alaska Native Policy



What Is Consultation?

- Implies a conference, a discussion, an exchange; a process, not just an event
- Government-to-Government
 - Between federally recognized tribes and Federal Government and its agencies
- May or may not involve agreement
- Defined in laws, amendments, executive pronouncements, judicial decisions, etc.
- Origins in tribal sovereignty as acknowledged in the U.S. Constitution



DoDI 4710.02 and Each Military Depts' Policy on Consultation Require

- Consultation be conducted at the installation level
- Consultation be part of an ongoing effort to maintain an effective working relationship with affiliated tribes
- Initiated as early as possible in the process of planning a proposed action, such as a MILCON project
- Set up to provide a tribe(s) a minimum of 30 days to respond to an invitation to consult or provide comment



Formal Government-to-Government Consultation

- May involve a high level of formality
- Meeting of two heads of government or their appointed representatives
- Occurs when there is mutual agreement that consultation is taking place
- Usually issue-focused with a concern for implementation of an action or project



Government-to-Government Consultation

- Must be initiated with tribes individually
- Once established, federal agencies may use tribal consortia to exchange information
- Only tribes may authorize use of tribal consortia for consultation
- Tribal consortia may not be used for initial consultation



Informal Consultation

- On-going dialog between the staff of two governments; exchange of information and opinions
- Informal meetings that are not issue or event-driven
- Can be in person, by phone, or by email or mail
- Critical element of maintaining on-going dialog
 - Talk early and often
 - Coordinate to set up ground rules and processes



Tribal View of Consultation

- What's important to tribes
 - Listening
 - Exchange of views and ideas
 - Meaningful input in final decisions and plans
 - Achieve mutual understanding



Federal Agency View of Consultation

- Meet with tribes and indicate the agency/installation has listened
- Focus on techniques used and details provided
- Be friendly and show concern
- Achieve consultation goal



Best Practices in Consultation

- True government-to-government contact works best
- Multiple contacts early in the process and throughout the project
- Multiple venues for meetings
- Make an early effort to identify tribal concerns
- Institutionalize the process



Best Practices in Consultation

- Inclusive approach to outreach to tribes with an interest; concerted effort to have all tribes with an interest participate
- Assume that consultation with state-recognized tribes will be separate from that with federally recognized tribes
- Provide tribes with full and candid information before the consultation
- Have an open and flexible agenda for the meeting
- Research and then take tribal cultural traditions into consideration when planning the agenda
- Alternate facilitators between military and tribal leaders, use a military tribal liaison when available



Mutual Benefits to Consultation

- Investment of time and money into consultation will help ensure the mission is not compromised or delayed
- Good management practice – the military mission also involves being a good neighbor
- Working in Indian Country can be professionally exciting and personally rewarding



Tips on Consultation With Tribes

- Visit www.denix.osd.mil/na for tips and tools related to
 - When to consult
 - What to consult about
 - Planning the timing of consultation
 - Must be meaningful AND pre-decisional
 - Who to involve in consultation
 - Considerations regarding tribal protocols
 - How to address culturally sensitive information
 - How to record the results of a consultation
 - How host a DoD cultural, communications, and consultation course at your installation



The Federal Trust Responsibility

Meeting DoD's Obligations to American Indians and Alaska Natives

Presented by:

John A. McDonagh
Associate General Counsel
Environment, Energy, & Installations
DoD Office of General Counsel



Introduction

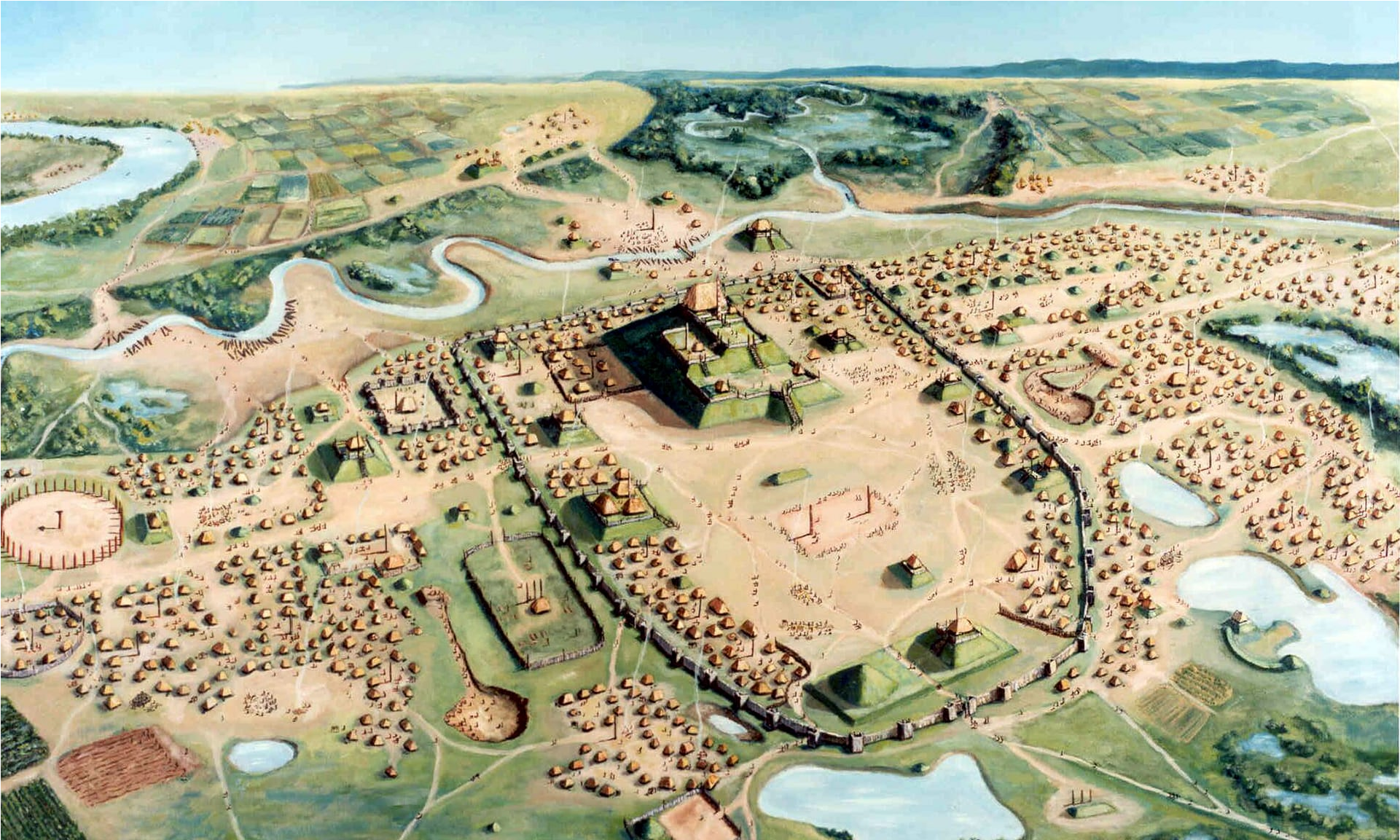
Some Perspective
on
Perspective...

a/k/a

“Where you stand often depends upon where you sit.”







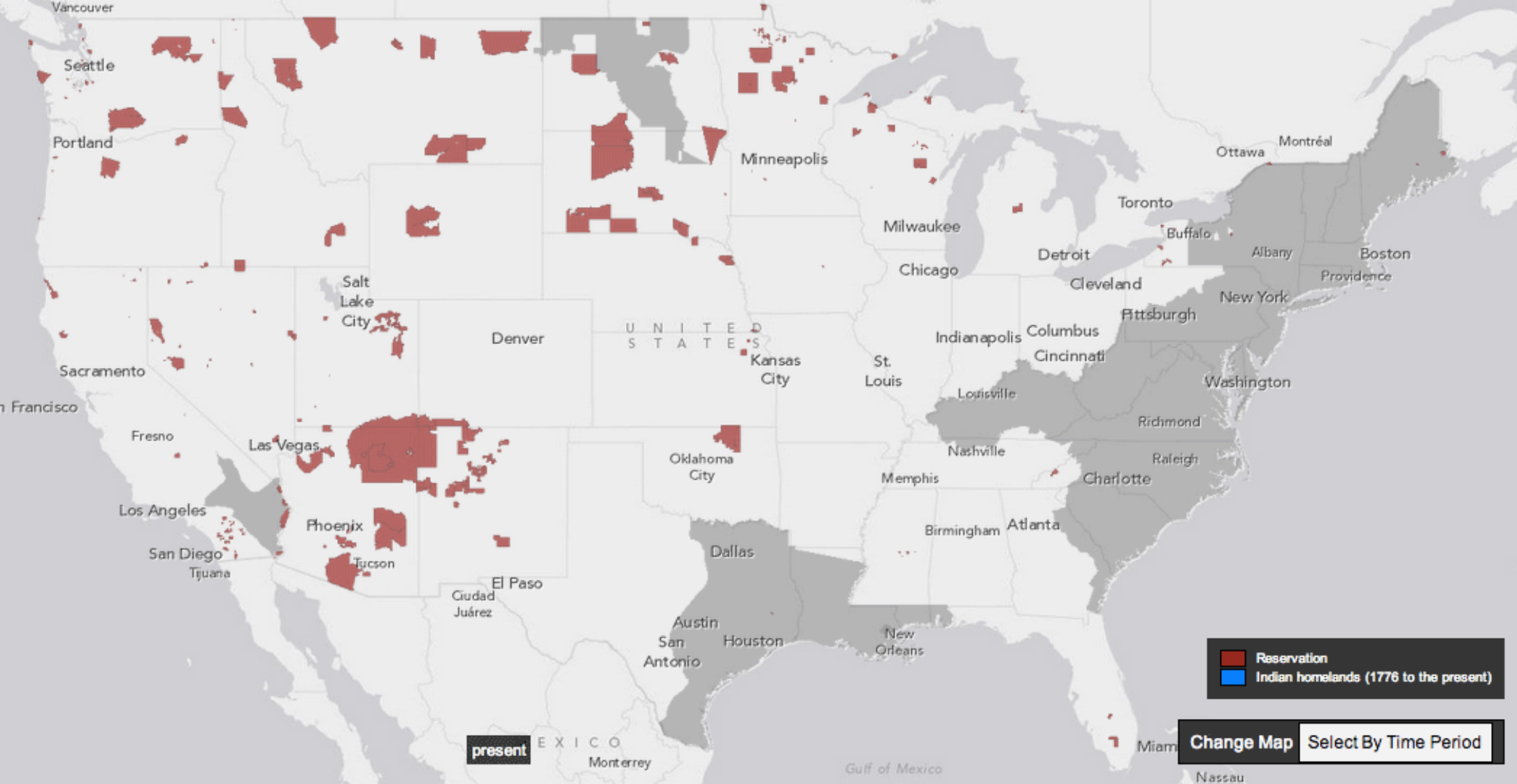


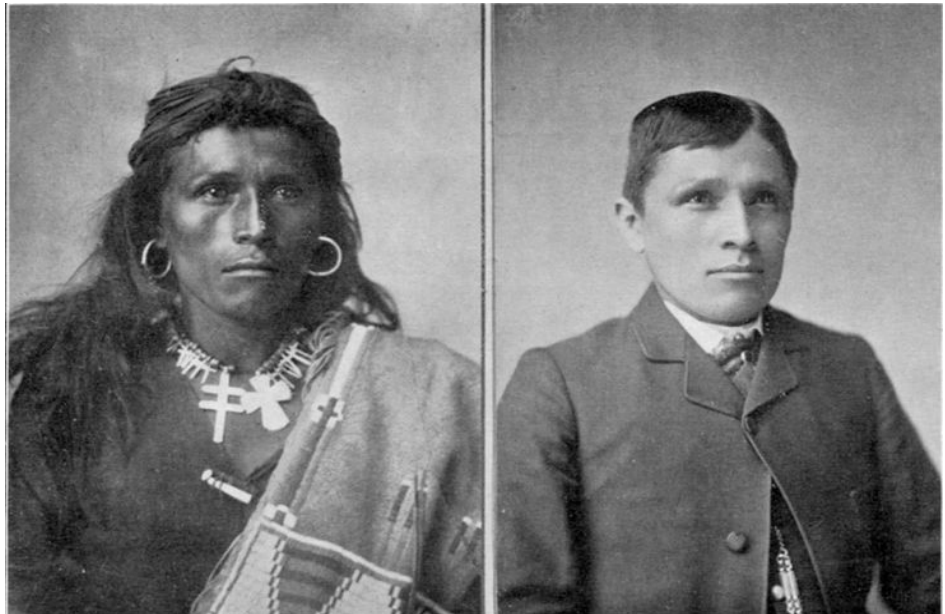


Setting the Stage

- *The Sovereignty-Assimilation Pendulum*
 - First Contact Era (1400s-1600s)
 - Treaty Making Era (1700s-1870s)
 - Removal Era (1830s-1850s)
 - Reservation Era (1850s-1870s)
 - Allotment Era (1880s-1930s)
 - General Allotment Act (1887) (a/k/a Dawes Act)
 - Indian Reorganization Era (1930s-1940s)
 - Indian Reorganization Act (1934)
 - Termination Era (1950s-1960s)
 - Self-Determination Policy Era (1970s-present)

Origins of Federal Trust Responsibility







Setting the Stage

- *Major Themes of Indian Law & Policy*
 - **Federal Power *over* Tribes:** Fed. Preemption
 - **Federal Obligation *to* Tribes:** Fed. Trust Resp.
 - **Tribal Sovereignty:** Control over Tribal lands, resources, affairs, and members
 - Correlation to Tribal land base
 - **Tribal Reserved/Retained Rights** (i.e. rights the Tribe retains that were not bargained or forcibly stripped away)



Origins of Federal Trust Responsibility

- *The Doctrine of Discovery*
 - Papal Bull “Inter Caetera” (1493)
 - El Requerimiento (1513)
- *Marshall Trilogy (I): Johnson v. McIntosh* (1823)
 - Incorporated Discovery Doctrine into Fed. Law
 - Defined nature of aboriginal title

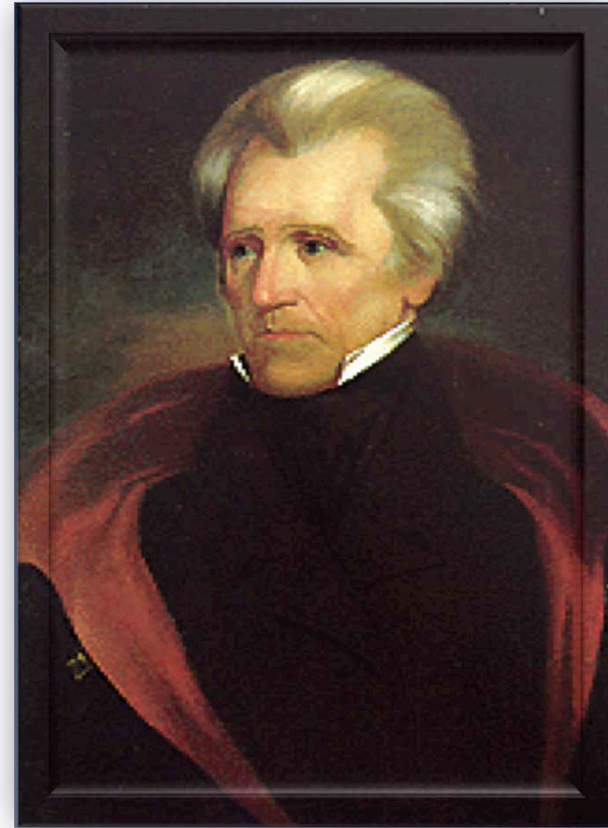




The Protagonists



Chief Justice Marshall



President Jackson



Origins of Federal Trust Responsibility

- *Marshall Trilogy (II): Cherokee Nation v. Georgia (1831)*
 - Tribes:
 - Neither states nor foreign nations
 - “domestic dependent nations”
 - “in a state of pupillage”
 - Stand as a “ward to his guardian”
 - Evolved into source of federal power over Indians



Paternalism Run Amuck

- *Marshall II* guardian-ward language adopted as justification for “plenary power” doctrine
 - **Major Crimes Act (1885)**
 - Federal jurisdiction over crimes committed by Indians in Indian Country
 - Early intrusion into internal affairs of tribe
 - **General Allotment Act of 1887 (a/k/a Dawes Act)**
 - Exercise of Federal power to *abrogate treaties unilaterally* and dispose of tribal lands w/o tribe’s consent
 - Espoused objective was Indian cultural assimilation.
 - Mandatory allotment process *freed up “surplus” tribal lands for disposition* to non-Indians
 - Resulted in “checkerboard” ownership patterns w/in reservation exterior boundaries
 - Congress’s “perfect good faith” presumed





Origins of Federal Trust Responsibility

- *Marshall Trilogy (III): Worcester v. Georgia (1832)*
 - Tribes separate & distinct political communities
 - Tribes sovereign over lands retained
 - Treaties intended to ensure availability of sustainable, land-based, traditional existence
 - Treaties retain everything not expressly given up
 - *Duty of protection* bargained-for consideration for land cessions



The Duty of Protection

- Against what?
 - **Then:** unrelenting pressure of immigrant intrusion and forced displacement
 - **Now:** environmental and other threats to tribal lands, resources, graves, and traditional cultural properties



Meeting the Trust Responsibility

- Trust responsibility *extends to all federal agencies and actions*
- But *absent a specific obligation, duty is discharged by compliance with general laws and regulations (those not aimed at Indians)*
- Courts have, however, consistently upheld the trust responsibility as an *independent basis for federal action*



Fiduciary Duty

- Fiduciary duty arises where federal officials have a *pervasive role in management of Indian resources*
- Federal officials must:
 - Consult with tribes to determine best use of resources
 - Analyze all relevant information
 - Make decisions based on tribe's best interests
 - Maintain and provide to the tribe an accurate accounting of all transactions



The Upshot

- Fiduciary duty of protection *not limited to specific statutory obligations*
- Agencies have *broad discretion* to take fiduciary duty into consideration
- Discretion exercised to protect tribal lands, resources, and cultural properties *generally will be upheld*
- *Obligation to consult* when tribal lands, resources, or cultural properties at risk



Protected Tribal Resources

- Tribal trust lands – the tribal land base
 - Reservations (46.2 M acres)
 - Allotted lands (8.9 M acres)
- Off-reservation *reserved rights* – E.g., off-reservation hunting, fishing, and subsistence gathering rights
- Other legal obligations – often associated with protecting tribal religious interests, ceremonial activities, artifact protection & repatriation



Treaty Rights

- Treaties are the *supreme law of the land*
- Treaty rights are *not diminished* by the passage of time or non-use
- Two basic categories of reserved TRs:
 - **Express rights:** TRs *specifically articulated* (e.g., land reservation; hunting, fishing, gathering, and grazing rights)
 - **Implied rights:** TRs not specifically articulated, but *necessary to make express reserved rights meaningful* (e.g., right to water).



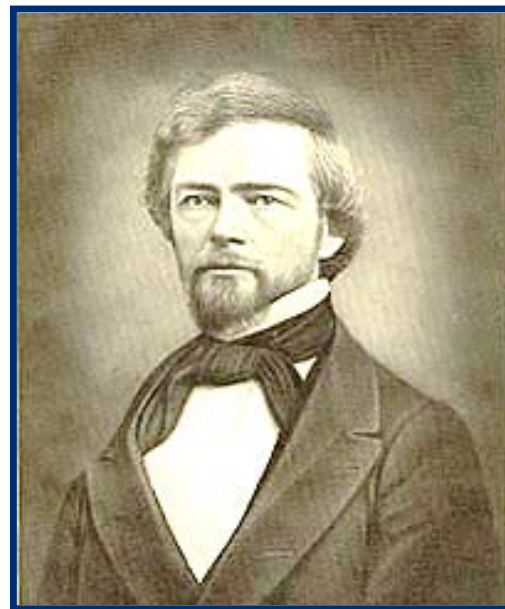
Treaty Rights (cont'd)

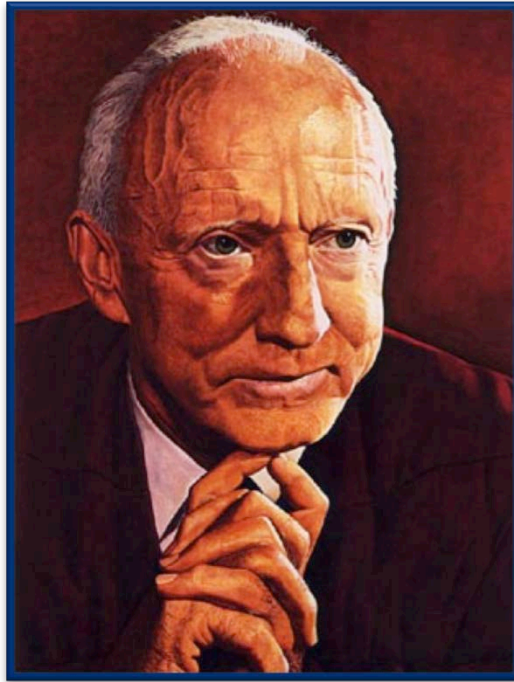
- Treaties *construed as the Indians would have understood them* at the time of signing—rule of sympathetic construction
- Congress may *unilaterally abrogate* treaty promises, but must do so *expressly and unambiguously*
- Abrogation of a treaty right is *generally compensable*



Treaty Fishing Rights in the Northwest

- “The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory...”
- Three components:
 - “Access”
 - “Fair Share”
 - “Habitat protection”





“Great nations, like great men, should keep their word.”

--Justice Hugo Black

BACKUP SLIDES



Consultation Obligation Roots

- Trust Responsibility
- Treaty Reserved Rights
- Laws:
 - NHPA, ARPA, NAGPRA, AIRFA, RFA, NEPA
- Executive Pronouncements:
 - EO's: Sacred Sites, Consultation, EJ, Preserve America, Cooperative Conservation
 - Pres. Memos on Gov't-to-Gov't Relations
- UN Declaration on the Rights of Indigenous Peoples



Independent Basis for Action

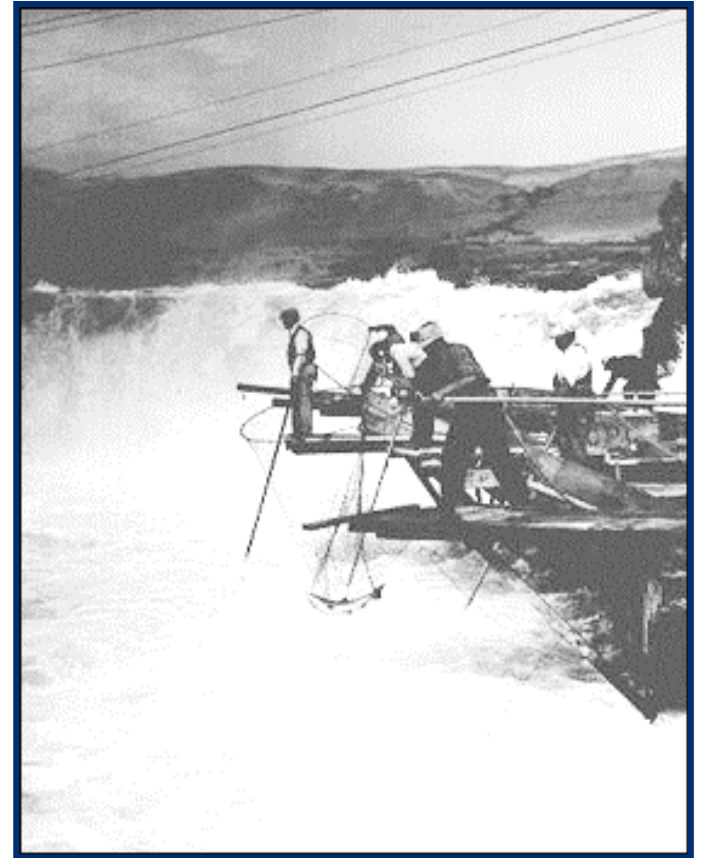


- Emergency regulation of commercial salmon fishing
- Corps permit for fish farm in Lummi U&A area
- Navy agricultural out-leases and the Pyramid Lake Tribe's cui-ui fishery
- Timber sales on former Klamath reservation



Access

- Tribe has a right to access “usual and accustomed” fishing locations
- Tribal members may cross private lands to fish
- Courts view with extreme skepticism action that limits access to reserved treaty fishing locations
 - *Muckleshoot v. Hall* (W.D. Wash. 1988)
 - Enjoined construction of 1200-slip marina





Fair Share

- “Boldt decision” in 1974
- Tribes entitled to half of the available fin and shellfish, with a “moderate living” limitation
- Tribal share to be reduced if less than 50% will support moderate living
- Hatchery fish included for treaty purposes





Habitat Protection

- Right to continued existence of sufficient fish to meet moderate living needs
- Affirmative obligation to protect salmon habitat
- Culverts Decision (9th Circuit 2016)
- Treaties impose duty on the state to refrain from building or maintaining culverts that block fish passage
- State ordered to correct high-priority barrier culverts
- Ruling arguably could apply to host of state actions that have degraded salmon habitat



Treaty Rights, Reservations, & Jurisdiction

- “Indian Reservation”:

- Federally-protected Indian tribal lands that the US Government has set apart for tribal and federal jurisdiction.

- “Indian Country”:

- Defined in the Major Crimes Act 18 USC 1151

- Includes:

- Lands within exterior limits of Indian reservation
 - Indian allotments
 - Dependent Indian communities



Treaty Rights, Reservations, & Jurisdiction

- State vs. Tribal Jurisdiction

- Key Factors:

- Nature of Claim/Offence: Criminal vs. Civil
- Tribal Citizenship: Indian vs. Non-Indian
- Land Ownership: Tribal/Trust Land vs. Private Fee Land
- Congressional Authorization: Congress can expressly grant jurisdiction



Treaty Rights, Reservations, & Jurisdiction

- State vs. Tribal Jurisdiction (Cont.)
 - **Criminal Jurisdiction:** GR: Tribes lack criminal jurisdiction over non-Indians for crimes committed within reservation boundaries.
 - Non-member Indians: Jurisdiction authorized under Indian Civil Rights Act
 - Public Law 280 (1953): Provides for state assumption of criminal jurisdiction over Indians in Indian Country in certain states. CA is a PL 280 State.
 - Granted CA broad criminal jurisdiction over offenses committed by or against Indians within Indian Country within the State.



Treaty Rights, Reservations, & Jurisdiction

- State vs. Tribal Jurisdiction (Cont.)
 - **Civil/Regulatory Jurisdiction:** GR: Tribes lack civil/regulatory jurisdiction over non-members within reservation boundaries. (*Montana v. US*)
 - Exceptions to GR (very narrowly construed):
 - Consensual Relationships
 - Threats to Tribal Integrity
 - Power To Exclude: Tribe retains broad power to exclude non-members from Tribe-owned lands.
 - Congressional Authorizations:
 - Regulation of alcohol sales
 - CAA regulatory authority assumption



Overview of Federal Indian Law and Policy and the Changing Role of the Military

Presented by:

Alicia Sylvester

DoD Senior Advisor and Liaison for
Native American Affairs



What To Expect

Materials will highlight the history of laws and policy and provide summary information on the impacts of those laws and policies on contemporary American Indian people and communities.



Why?

Why is this history important to you if you work directly or indirectly with Tribes?

“The farther backward you can look, the farther forward you are likely to see...”

Winston Churchill



Basic Concepts - Cornerstones

- Government-to-Government relationship, based on Tribal Sovereignty
- Doctrine of Aboriginal Title
- Trust responsibility
- Consultation



Basic Concepts - Cornerstones

- Sovereignty
 - Tribes always had the power inherent in sovereign nations
 - Congress gave itself/has plenary power
 - Power to diminish sovereignty
 - Power to overrule Tribal government decision



Basic Concepts - Cornerstones

- Government-to-Government
 - Unique relationship has historical continuity
 - Affirmed by current laws and policies
- Trust Responsibility
 - Fiduciary duty
- Consultation
 - Implicit & explicit in laws, executive orders, regulations, judicial decisions, policies and instructions



Basic Concepts – Basis for Taking Land

Pre-Colonial Period

- Prior to 1532, official position of Christian Europe
 - Indigenous people of the Americas are not fully human, because they are not “Christians;” as “heathens,” they lack property rights
- Bartolome de las Casas – 1532 - *Brief Report on the Destruction of the Indians (or Tears of the Indians)*
- Francisco de Vitoria – 1532 - *Consent Theory*
- Pope Paul III/*Sublimus Dei* - 1537: Indians are people; they want to be Christians; are entitled to liberty, possession of their property; should not be enslaved



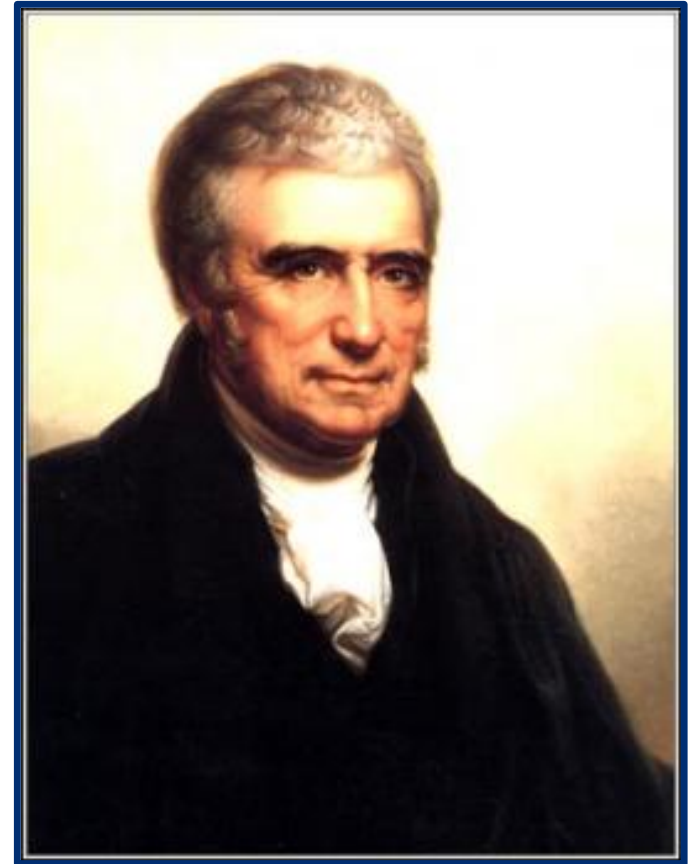
Basic Concepts – Basis for Taking Land

- Colonial Period
 - Right of Discovery
 - “Discovering” European nation granted exclusive pre-emptive right to extinguish aboriginal title by treaty, purchase or conquest



Beginning of Federal Indian Law

- THE MARSHALL TRILOGY
 - 1823 Johnson v. McIntosh
 - 1831 Cherokee Nation v. Georgia
 - 1832 Worcester v. Georgia





Relations with the Military – 1776 to 1887

- New Treaties
 - New nation wanted to avoid Indian wars
 - Constitution gave power to make treaties solely to Federal Government
 - Federal Government continued precedent of dealing with Tribes as sovereign entities
- 1786: Secretary of War now responsible for Indian Affairs



Relations with the Military – 1776 to 1887

- Trade & Intercourse Acts (1790 - 1834)
 - Prohibited non-Indians from acquiring Indian land
 - Dealt with crimes against Indians
 - Made trade with Indians subject to Federal regulation and license
 - Authorized appointment of Indian agents



Relations with the Military – 1776 to 1887

- Indian Removal Act of 1830
 - Authorized use of force
 - Army given responsibility for all “relocation”
 - Military personnel used as first Indian Agents (1832 to 1870)
 - Congress passes regulations in 1870 prohibiting military officers from serving as Indian agents



Relations with the Military – 1776 to 1887

- End of Treaty-making – 1871
 - Why did Tribes agree to treaties and accept Reservation system?
 - Why did Federal Government end Treaty-making?

“Eighty or a hundred years ago, perhaps, when there were great confederated nations upon our borders, not entirely upon soil owned by ourselves, we might treat with them in order to keep peace; but now the whole thing is changed. We have absorbed the whole of the territory over which they then roamed; it now belongs to us, not to them.”

-Rep. Aaron Sargent (Cal.), 1871



Relations with the Military – 1776 to 1887

Movement to Reservations – 1830 to 1887

- Implementation of policy of removal in Plains & West leads to violent confrontations
 - Massacres of peaceful encampments
 - Death from exposure and starvation
 - Significant loss of life on all sides (military, state militia, Indians)
 - “Peace in the West” at all costs



Forced Assimilation and the Erosion of Indigenous Rights – 1871 to 1928

- Carlisle Indian Industrial School – Carlisle Barracks, PA, 1879
 - First official boarding school
 - Native children were required to attend
 - “Kill the Indian, and Save the Man.” – Capt. Richard H. Pratt
 - Continued until the mid-to-late 1960s
 - In Alaska, continued into the 1970s



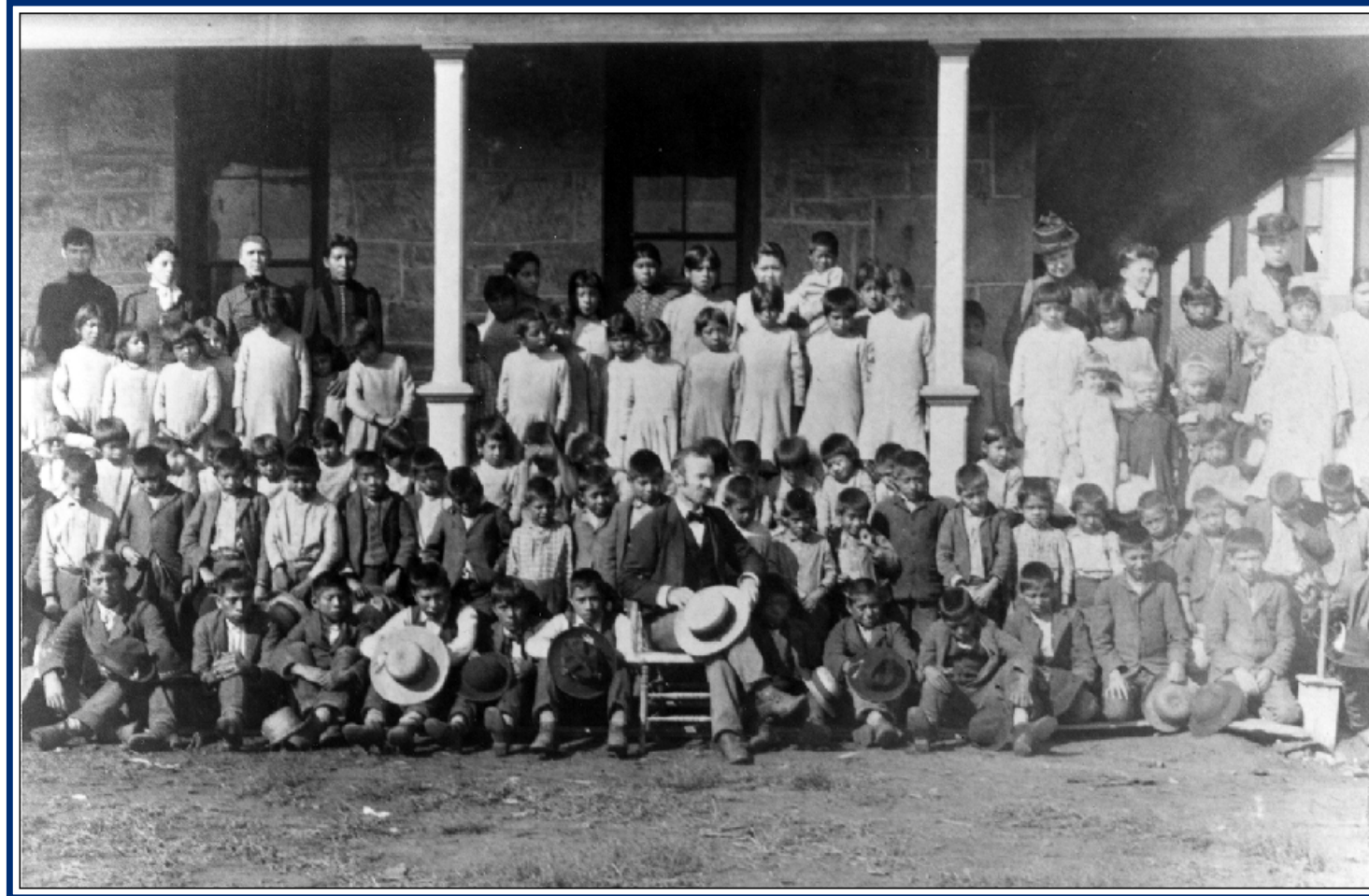
Carlisle Indian Industrial School

- From 1879 until 1918, over 10,000 Native children from 140 tribes attended Carlisle. Only 158 graduated.





Pawnee School, 1891





Boys at St. Mary's Mission Omak, Washington – 1950s





St. Catherine's Indian School, 1894 - 1998





Forced Assimilation and the Erosion of Rights – 1871 to 1928

- Code of Indian Offenses published in 1883
- Courts of Indian Offenses established in 1883
- Major Federal Crimes Act passed in response to Crow Dog Case (1883)



Forced Assimilation and the Erosion of Rights – 1871 to 1928

- General Allotment Act of 1887 (Dawes Act)
 - Dissolved tribal landholdings
 - Divided land into sections
 - Land taxable after 25 years

INDIAN LAND FOR SALE

GET A HOME

OF
YOUR OWN

♦
EASY PAYMENTS



PERFECT TITLE

♦
POSSESSION

WITHIN
THIRTY DAYS

FINE LANDS IN THE WEST

IRRIGATED
IRRIGABLE

GRAZING

AGRICULTURAL
DRY FARMING

IN 1910 THE DEPARTMENT OF THE INTERIOR SOLD UNDER SPECIAL BIDS SELECTED INDIAN LAND AS FOLLOWS:



Erosion of Native Rights – 1871 to 1928

- Impact of the Dawes Act
 - Devastating impact on Tribes
 - 90 million acres of Indian lands lost
 - Today, approximately half of the population living on reservations is non-Indian



End of the Allotment Period

- Citizenship Act of 1924
 - Prior to 1924, Indians became citizens by accepting allotments
 - Citizenship extended to all Native people, including Alaska Natives
 - Nationality Act of 1940 resolved ambiguities



End of Allotment

- Meriam Report – 1928
 - Three year independent study of Indian Affairs; advocated for strong Indian communities
- Indian Reorganization Act of 1934 (IRA) –
Wheeler-Howard Act
 - Tribes could become legal entities by developing constitution, adopting it, and governing by Tribal Council



Termination and Restrictions 1953 to 1968

- Approximately 100 Tribes terminated
- Removed Indians from reservations
 - Sold the land
 - Gave proceeds to individual tribal members
 - Supported by energy corps
- Moved Indians to urban areas
- Ended Government-to-Government relationship
- Time of expansion for DoD



Self-Determination 1968 to 1982

- Nixon's Indian Policy – 1970
 - Advocated for and supported maximum autonomy for Tribes in managing their own affairs





Self-Determination 1968 to 1982

- P.L. 93-638/Indian Education & Self-Determination Act – 1975
 - Allowed Tribes to administer and control federally-funded local government services



Native Americans in the Military

- American Indians have served in our nation's military since colonial times
 - Revolutionary War
 - Civil War
 - Army Scouts
 - WWI & WWII
- In recent decades, they have served at a higher rate in proportion to their population than any other ethnic group
- NMAI (DC) to create a memorial honoring Native veterans



“We serve this country because it’s our land. We have a sacred purpose to protect this place.” – Jeffery Begay, Dine (Navajo) veteran



Overview of American Indian Overview of American Indian Cultures & Concepts

Presented by:

Alicia Sylvester

DoD Senior Advisor and Liaison
for Native American Affairs



Before We Begin

- Generalizations
- Range of values, practices, beliefs
- Generalizations help understanding
- Generalizing is not stereotyping



What is Culture?

- Culture is a world view – Perspective
 - **Unique way a given group experiences and expresses being human in the world**
- Culture tells us where we fit in the physical and supernatural universe
- Culture is continuous; it has a remembered past
- Culture determines priorities



What is Culture?

- Integrated pattern of human behavior that includes thought, language and action
- Depends on human capacity to learn and transmit knowledge to succeeding generations



What is Culture?

PERSPECTIVE

- World-view is expressed in how common, enduring human problems and challenges are solved



What is Culture?

- Can encompass:
 - Gender
 - Religion
 - Age
 - Physical ability
 - Military Service
 - Ethnicity and nationality
 - And more...
- Cultures are heterogeneous wholes
- Variation is the key to survival



What Does Culture Include?

- Shared history and language
- Variation in values around a core of belief
- Social structures and methods for resolving disputes



Major Elements of American Indian Cultures

- Consensus
- The influence of the past on the present
- Humility in person-nature relations
- Pragmatic view of work
- Reverence for ancestors
- Importance of children and elders in community



Interconnection of Health, Culture & Environment

- Consistent throughout all Tribal cultures is the idea of the connection between individual and group well-being and the health of their environment
- Impacts how Village/Tribal members view DoD activities



Interconnection of Health, Culture & Environment

- “Nature” is intimately connected to healing and spirituality
 - Animals, plants, places and forces of nature are vital spiritual resources
 - Power depends on purity; purity measured by “nature’s way”



Culturally Significant Sites

- Can be expression of spiritual connection
- Can be burial places, sacred areas, historic trails, travel corridors, subsistence locations, etc.
- Knowledge of sites is often private and cannot be shared with outsiders
- Proprietary Information: location and use of cultural resources not released or published by DoD



Subsistence

- Does not mean an impoverished existence
- Has a physical, historical, psychological and spiritual dimension
- Importance in the Northwest & Alaska





Perception of Time

- One of the most consistent differences between American Indian/Alaska Native cultures and majority culture
- Seasonal round (cycles) vs. calendar time (linear)



Perception of Time

- American Indian/Alaska Native tend to place high value on the past
- Majority culture tends to place greatest importance on the present and future
- American Indian/Alaska Native are “future looking”protecting and preserving culture and resources “unto the Seventh Generation”



Acculturation vs. Assimilation

- Tribal cultures borrow from changes around them (acculturate)
- Tribal cultures do not give up the past



Some Similarities, Some Differences

- Life paths remarkably similar in essence
 - **Creation stories explain origins, structure & order of reality**
 - **Customs & institutions exist in harmony with the entire universe**
 - **Road of human life is endless, everlasting and is an eternal way that has been followed since the beginning of all things**



Some Similarities, Some Differences

- Prayer a part of everyday life
- Spirit world is near, couldn't take an important action without praying
- Important to individual's safety and well-being



Some Similarities, Some Differences

- Many occurrences or stages of life are marked by special ceremonies
- Life is a continuous process of spiritual development; often age-related milestones





Some Similarities, Some Differences

- Storytelling one of the major methods of instruction
- No matter what Tribe, all American Indian children are told to listen to their elders



Some Similarities, Some Differences

- Kinship a major “shaper” of life for adult American Indian people
- Defined the status, rights and duties of the members of a specific group



Some Similarities, Some Differences

- Customs surrounding death vary considerably
- Almost all American Indian peoples believed in some sort of “afterworld”



Traditional Ceremonies

- Sundance
- Vision Quest
- Sweat Lodge
- Warrior and Women Societies



Religion and Resistance – General

Revivalist Movements

- Emphasized importance of traditional values
- Emergence of prophetic religious leaders
- Preservation of core values and beliefs key to survival



Traditional Common Elements

Respect others



Each person has a gift

Share



Giving makes you richer

Know who you are



You reflect your family

Have patience



Life can't be rushed

Live carefully



Carelessness returns

Care for others



Cannot live without them

Honor your elders



They show you the way

See connections



All things are related



Communication Styles Generalities

ORAL PATTERNS

AI

Subjective/emotive

(speak from the heart)

Build relationships

(maintain relationships)

Past, present connected

(includes long range view)

Military/Gov't

Objective/impersonal

(speak from the mind)

Attend to business

(meet objectives)

Focus on present

(future is typically incremental)



Communication Styles Generalities

ORAL PATTERNS

AI

Holistic

(context is wider)

Indirect

(metaphors, narrative)

Documentary style

Deep listening

Military/Gov't

Categorized

("briefing" culture)

Direct

(facts, information, data)

Get to the Point

Hearing

(formulating response)



Communication Styles Generalities

WRITTEN PATTERNS

AI

Brief

Historically oral
(transition to written
forms today)

General English

Visuals

Military/Gov't

Volumes!

Historically written
(traditional reliance on
written word)

Specialized language

Words & numbers



Communication Styles Generalities

- NON-VERBAL COMMUNICATION
 - Gestures, Facial Expressions, Body Movement
 - Dress, Attire



Communication Styles Generalities

- NON-VERBAL COMMUNICATION
 - Emotional distance
 - Physical distance
 - Touch
 - Turn taking
 - Pace, pauses
 - Volume
 - Context



Communication Styles Generalities

NON-VERBAL COMMUNICATION

Understanding Silence

- Context
- Silence is often sign of respect
- Don't take it personally if AI people don't say much at a meeting
- Don't assume you were not heard or that people do not understand because they are silent
- Silence or head nodding does not necessarily mean agreement
- Silence can be productive; what are you saying to yourself in the silence, what are you feeling?



Working Effectively

- Honor and respect differences
- Human-to-human relationship most important
- Don't assume, ask questions



Laws and Regulations Regarding Tribal Consultation

Presented by:

John A. McDonagh
Associate General Counsel
Environment, Energy, & Installations
Office of the General Counsel
Department of Defense



Consultation “Triggers”

- Trust Responsibility
- Treaty Reserved Rights
- Laws:
 - NHPA, ARPA, NAGPRA, AIRFA, RFA, NEPA, ESA
- Executive Pronouncements:
 - EO’s: Sacred Sites, Consultation, EJ, Preserve America, Cooperative Conservation
 - Presidential Memos on G2G Relations
- UN DRIP
 - Requirements not binding under US law



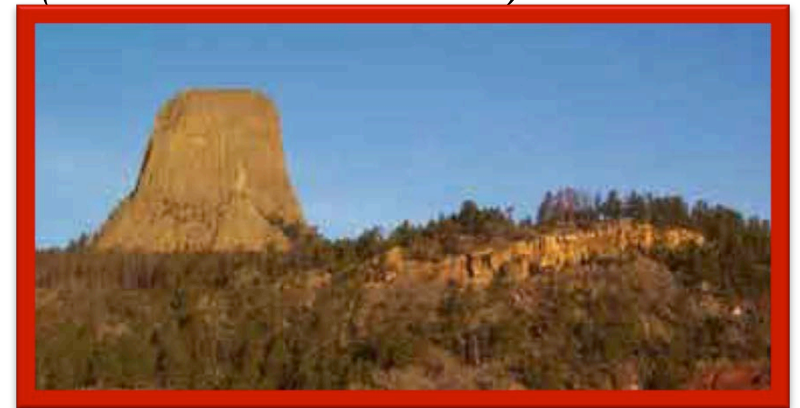
National Historic Preservation Act

- Trigger:
 - Federal undertaking
 - Anywhere in U.S.
 - May affect a Register-eligible property
- Obligations:
 - Consult with any tribe that attaches religious/cultural significance to the property
 - Take into account effect of undertaking



NHPA (cont'd)

- 1992 Amendments enhanced tribal role
- Consult w/tribes re religious or cultural sites, wherever located - on or off tribal lands
- Traditional Cultural Properties (NPS Bulletin 38)
 - *Pueblo of Sandia, 50 F.3d 856 (10th Cir. 1995)*
 - *Quechan Tribe v. DOI, 755 F.Supp.2d 1104 (S.D. Cal. 2010)*
- Concurrence role on Indian lands
 - THPO may assume SHPO role





Archaeological Resources Protection Act

- Trigger:
 - Excavation of “archaeological resource”
 - Material remains of human life at least 100 years old
 - On public or Indian lands
- Obligations:
 - Notify tribes; consult on permit terms
 - Obtain tribal consent if on Indian lands
- Criminal enforcement possible
 - Trafficking in arch resources removed without a permit
 - Potential felony conviction



Native American Graves Protection & Repatriation Act

- Trigger:
 - Intentional excavation or inadvertent discovery
 - On Federal or Tribal lands
 - Of Native American cultural items: human remains; funerary objects; sacred objects; objects of cultural patrimony
- Obligations
 - Stop work; protect site; consult
 - Plan of action or comprehensive agreement
 - *Yankton Sioux Tribe v. USACE*, 83 F.Supp.2d 1047





American Indian Religious Freedom Act (AIRFA)

- Protect right to exercise traditional religions
- Act creates no veto power, new substantive rights, nor enforceable procedural duties
- Duty to:
 - Consult with traditional religious leaders
 - “Consider” American Indian religious practices
- *Lyng* case (485 US 455 (1988)) reduced import of the Act



Religious Freedom Restoration Act

- Trigger:
 - Substantial burden on exercise of religion
- Obligations:
 - Compelling governmental interest
 - Least restrictive means
- But see *Navajo Nation* decision (9th Cir. 2008); burden only if:
 - Religious activity penalized; or
 - Coerced to act contrary to religious beliefs
- Compare *Comanche Nation v. U.S. Army* (W.D. Ok. 2008)



National Environmental Policy Act (NEPA)

- Purpose: informed, transparent decision-making that considers environmental effects
- Means: written, public environmental analyses
- Trigger: proposal with biophysical effects not categorically excluded



NEPA (cont'd)

- Responsibilities owed to tribes:
 - Invite tribal participation in scoping
 - Discuss conflicts w/tribal land use plans and policies
 - Invite comment on draft EIS when effects on Indian lands
 - Provide notice of hearings, meetings, and docs when effects on Indian lands
 - Tribes may be cooperating agency when Indian lands may be affected



Endangered Species Act

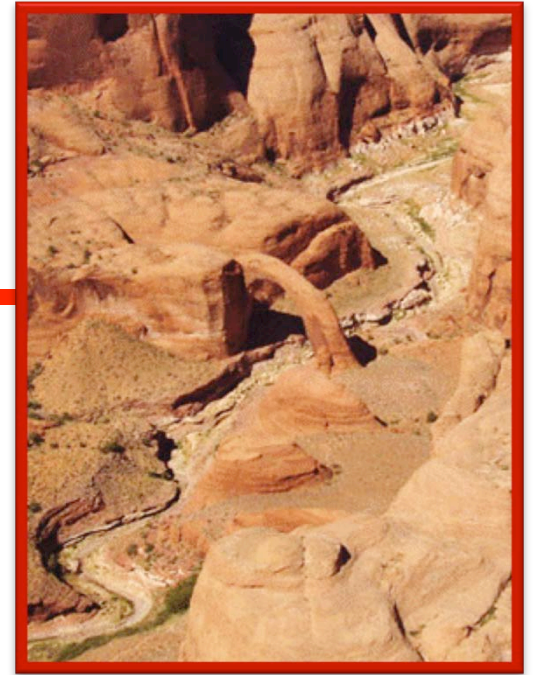
- As part of § 7 process, FWS/NMFS will:
 - Notify tribes if proposed federal action may affect tribal trust resources
 - Encourage action agencies to invite affected tribes to participate in consultation process
 - Give full consideration to information received from tribes in developing reasonable and prudent alternatives





Indian Sacred Sites

- E.O. 13007, May 24, 1996
- Obligations:
 - Provide notice of proposed actions that may limit access to or adversely affect sites
 - Accommodate access to & ceremonial use of Indian sacred sites by Indian religious practitioners
 - Avoid adversely affecting physical integrity of sacred sites





Consultation with Tribal Governments

- E.O. 13175, November 6, 2000
- Obligations:
 - Consult re regulations, proposed legislation, or other policy statements that may have substantial effects on tribes
 - Use consensual mechanisms to develop regulations and policies affecting...
 - treaty rights
 - tribal self-government
 - tribal trust resources



Environmental Justice

- E.O. 12898 (Feb 11, 1994)
- Purpose: Ensure minority or low-income populations do not suffer adverse environmental effects “disproportionately”
- Means of ensuring:
 - Greater public participation and access to information
 - Analyze subsistence consumption of fish and wildlife



Other E.O.s

- Preserve America (E.O. 13287)
 - Partner with Indian tribes to promote economic development through use of historic properties
- Cooperative Conservation (E.O. 13352)
 - Take account of tribal interests in land and other natural resources
 - Promote tribal participation in Federal decision-making



Presidential Memos on G-to-G Relations

- Pres. Obama, Nov 5, 2009
 - Commitment to “regular and meaningful consultation”
 - Consistent implementation of E.O. 13175
- Pres. Bush, Sep 23, 2004
 - Respect tribal rights of self-government & self-determination
 - Cultivate mutual respect
- Pres. Clinton, Apr 29, 1994
 - Consult prior to taking actions that affect tribes
 - Assess effect of actions on trust resources
- All recognize unique legal and political relationship



UN Declaration on the Rights of Indigenous Peoples

- Indigenous peoples petitioned UN in 1977 for recognition of collective and individual human rights
 - To self-determination
 - To protection of the environment
 - To maintain relationship with traditionally used lands, waters and coastal seas, and other resources
- U.S. adopted the DRIP on 16 Dec 2010:
“The United States supports the Declaration, which—while not legally binding as a statement of current international law—has both moral and political force.”
- No country in the world now opposes the Declaration



DRIP – What is it?

- Set of principles about the treatment of, and the obligations owed, indigenous peoples and individuals
- Non-binding and not [yet] international law
- Nonetheless, an official statement of aspirations this country seeks to achieve
- But, U.S. issued lengthy interpretation of key elements at odds with that intended by most indigenous peoples
 - Laying ground for “persistent objector” doctrine



Informed Consent

- Art 19: States must consult in good faith & obtain “free, prior, and informed consent” (FPIC) before implementing actions that may affect indigenous peoples
 - United States understands this Article to call for a process of meaningful consultation with tribal leaders, but not necessarily agreement
 - United States intends to consult in good faith on policies that “directly and substantially affect” indigenous peoples



Key Articles

- Art 20: Right to engage freely in traditional activities & obtain redress if deprived of means of subsistence
- Art 26: Right to lands and resources traditionally used
- Art 28: Right to redress for lands taken without FPIC
 - U.S. interprets to be consistent with existing system for legal redress in the U.S. (but cf. Tee-Hit-Ton v. U.S.)
- Art 30: No military activities in the lands or territories of indigenous peoples unless freely agreed to



Import of the Declaration

- New dimension to federal-tribal relations
- Adoption signals official recognition of rights
- Political and moral force
- Expectations and demands for implementation
- Spur recognition as customary international law

***“What matters far more than words...
are actions to match those words.”***



DoD and Component Tribal Consultation Policies

Presented by:

John A. McDonagh
Associate General Counsel
Environment, Energy, & Installations
Office of the General Counsel
Department of Defense



DoD's 1998 American Indian and Alaska Native Policy

- DoD will:
 - Meet its responsibilities to tribes
 - Recognize tribal sovereignty
 - Consult before taking action
 - Manage its lands consistent with the conservation of protected tribal resources



DoDI 4710.02

14 Sept 2006

- Formalizes DoD's 1998 AI/AN Policy
- Establishes principles & practices for “meaningful” consultation
 - Consult on all proposed actions with potential to significantly affect tribes
 - Consult on ICRMPs and INRMPs
 - Develop and memorialize tribe-specific process for consultation
 - Consult early – when decision may be impacted



DoDI 4710.02

- The Guidance establishes expectations that Tribal consultations will be –
 - *Conducted at the installation level*, between the installation commander and the tribal leader, as well as among the staff level contacts they designate
 - *Part of an ongoing effort* to maintain an effective working relationship with each tribe culturally or historically affiliated with installation-managed lands
 - *Initiated as early as possible* in the process of planning a proposed action



DoDI 4710.02 – Pending Revision

- DoDI 4710.02 (2006) version currently undergoing update
 - Anticipate publication of revised version in 2018
 - Updated DoDI will be discussed at future sessions of the DoD-sponsored AICCC Course offered annually to Military Departments
 - DoD will promote Tribal awareness of updated DoDI through dissemination via tribal organizations/contacts and DENIX website



DoDI 4710.02 – Pending Revision

- Revised DoDI will provide additional clarity regarding --
 - Circumstances triggering consultation
 - Appropriate topics for consultation
 - Consultation timing/scheduling
 - Must be meaningful AND pre-decisional
 - Who to involve in consultation
 - Considerations regarding tribal protocols
 - Addressing culturally sensitive information
 - Recording consultation results



DoDI 4710.03 – Consultation With Native Hawaiian Organizations

- Establishes policies/responsibilities for consultation with NHOs
- Recognizes special status afforded NHOs through Federal laws, regulations, and policy
- Requires DoD Components to –
 - *Conduct “meaningful” consultation with NGOs* to avoid or minimize the effect of DoD actions on sites of traditional religious or cultural importance
 - *Integrate consultation activities into mission activities* in order to facilitate early and meaningful consultation
 - Develop consultation procedures and provide cultural communications training



DoDI 4710.03 – Consultation With Native Hawaiian Organizations

- Provides MILDEPs with direction re conduct of consultations
 - When to consult
 - Whom to consult
 - How to consult
 - Accommodating NHO access to sites of traditional religious and cultural importance
 - Developing written agreements to promote effective consultation –
 - Agreements to protect confidential/sensitive information
 - Agreements w/ HI SHPO to address effects of proposed DoD undertakings



Component Consultation Policies

- Army – AR 200-1 and Secretary of the Army Policy Memorandum: American Indian and Alaska Native Policy. (2012).
 - Echoes principles of DoDI 4710.02
 - Establishes Army consultation policy and implements DoDI at all Army organizational levels
- Navy –SECNAVINST 11011.14A. (2005)
 - Echoes principles of DoDI 4710.02.
 - Establishes Navy policy, responsibilities, procedures, and guidelines for consultation and related relationships with tribes.
 - Commits Navy to training personnel responsible for consultation activities
 - Provides guidance on planning for effective consultation and documenting consultation results



Component Consultation Policies

- Marine Corps – MCO P5090.2A (2009).
 - Consultation policy is outlined in the 2009 Appendix to the *Environmental Compliance and Protection Manual's* chapter on “Cultural Resources Management.”
 - References DoDI 4710.02 and SECNAVINST 11011.14A.
 - Commits to establishing a “permanent relationship” with American Indian and Alaska Native tribes and Native Hawaiian Organizations (NHOs) to identify and address resources management concerns.
 - Commits to engage tribes and NHOs as early as possible in the project planning process
 - Commits to respect the confidentiality concerns of tribes and NHOs regarding sensitive cultural information shared during consultations.



Component Consultation Policies

- Air Force – AFI 90-2002.
 - First published in 2014
 - Requires Air Force installation commanders to meet at least twice per year with the leader of each tribe culturally or historically affiliated with installation-managed lands.
 - Each commander must appoint an Installation Tribal Liaison Officer.
 - Every installation must develop a Tribal Relations Plan including key contacts and established protocols.
 - Each installation must annually submit a report to Air Force HQ on consultation activities for the previous year addressing compliance with law, DoD policy, and Air Force policy.



Maintaining Confidentiality of Sensitive Information

Why Care About Confidentiality in Consultations?

- Provide Protection
 - Privacy: Protection against invasions of privacy
 - Harm: Protection against harm to the resource
 - Use: Protection of traditional use (e.g. religious ceremonies)
- Demonstrate Respect
- Promote Confidence, Credibility, & Constructive Dialogue
- Laws and Policies say so



OASD(EI&E) Memorandum, *Guidelines on Maintaining the Confidentiality of Information about Indian Sacred Sites* (23 Mar. 2018)

- Don't request info re sacred site locations unless absolutely necessary – and instruct consultants & contractors not to do so.
- Where SS potential exists, collect info only in general terms (e.g., w/in broad “Area of Sensitivity”)
 - Avoidance Strategy: Where practicable, plan actions so as to avoid AoS (w/o need to know specific SS location)



OASD(EI&E) Memorandum, *Guidelines on Maintaining the Confidentiality of Information about Indian Sacred Sites (23 Mar. 2018)*

- Where it's absolutely necessary to obtain specific/detailed SS info:
 - Consult orally
 - Document that consultation took place
 - Note meeting and site visit times & dates
 - Document that consultation ➡ AoS identification
 - Share AoS (in broad terms) w/ installation planners
- In response to disclosure requests:
 - NHPA § 304 and/or ARPA § 9 may provide legal authority to withhold sensitive SS information
 - The duty to withhold information is non-discretionary *if* statutory prerequisites are met.



Confidentiality Under NHPA § 304

- NHPA § 304 provides limited authority for an agency to withhold information concerning a historic property when releasing the information may --
 - Cause a *significant invasion of privacy*,
 - Cause *risk of harm* to the historic property, or
 - Impede the *use of a traditional religious site* by practitioners.
- If the NHPA § 304 prerequisites are met, agency has authority to withhold information regarding the historic resource's --
 - Location,
 - Character, and
 - Ownership



Confidentiality Under ARPA § 9

--A Straightforward Confidentiality Provision--

ARPA § 9 requires that *managers responsible* for the protection of archeological resources hold information about the *locations and nature* of the resources confidential

unless

providing the information would further the purposes of the statute and not create a risk of harm for the resources.



Maintaining Confidentiality of Sensitive Information

Summary

- We address confidentiality issues in the consultation context because it's the right thing to do, the smart thing to do...and it's required by law & policy.
 - NHPA § 304: A convoluted confidentiality provision with broad coverage.
 - ARPA § 9: A straightforward confidentiality provision with narrow coverage.
 - NAGPRA: No confidentiality provision, but NAGPRA § 3 loops in ARPA § 9.
- Early issue identification, consideration, and engagement essential.
 - Establish and maintain positive relationships with tribes/NHOs.
 - Consider using early-stage NHPA § 106 agreements (CPs).
- When dealing with sensitive information:
 - Don't ask for information about sacred sites unless you need it
 - Don't ask for discrete/specific locational information if more general locational info will enable you to make an informed decision.
 - Don't record discrete/specific locational information in writing unless absolutely required to do so to support a key decision.
 - Don't over-promise – you can't always guarantee confidentiality.
 - Please don't hesitate to reach out when you need assistance.



Carlisle Indian Industrial School: Disinterment and Return of Remains Case Study and the Value of Consultation

Presented by:

Justin Buller

Associate Deputy General Counsel, U.S. Army



Q & A



Sustaining Military Readiness Conference

Restoring Readiness Through Planning and Partnerships