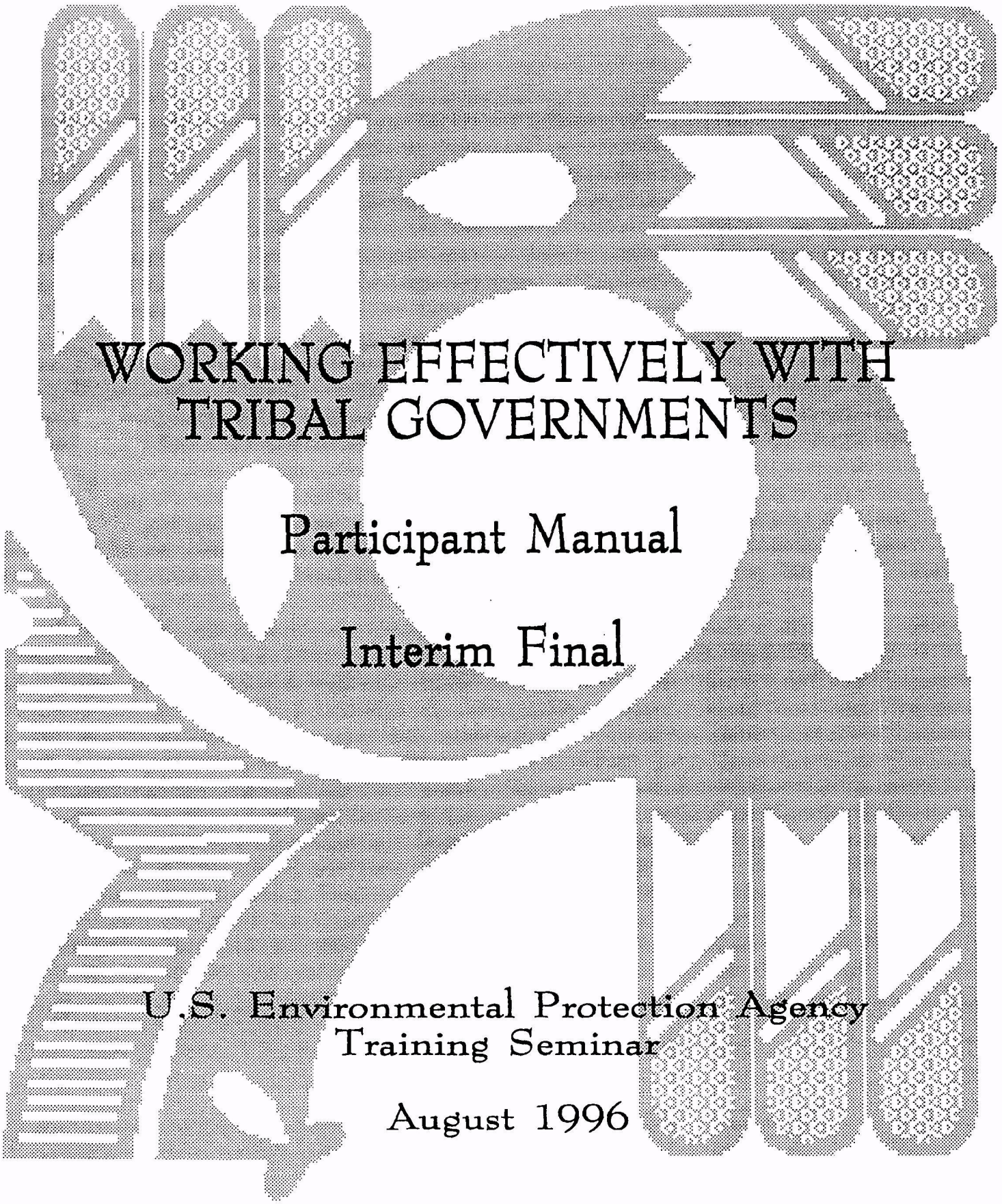


# WORKING EFFECTIVELY WITH TRIBAL GOVERNMENTS

## Participant Manual

## Interim Final

U.S. Environmental Protection Agency
Training Seminar

August 1996

# Working Effectively with Tribal Governments Training
# SEPTEMBER 24-25

| DAY ONE | Sept. 24, 1997 | 9:00-4:30 |
|---|---|---|
| **WHO** | **WHAT** | **WHEN** |
| Jim Sappier | Invocation | 9:00-9:10 |
| Terry Regan | Participant Intro's<br>Training Process<br>Q/As on Training | 9:10-9:30 |
| Jim Sappier | Definition(s):<br>What Is An Indian?<br>What Is A Tribe? | 9:30-9:45 |
| Terry Regan and Bob Goetzl | History Of Federal Policies | 9:45-10:15 |
| Sharon Wells | Treaties Exercise | 10:15 - 10:45 |
| **BREAK** | **BREAK** | **10:45 - 11:00** |
| Jim Havard | Tribal Sovereignty | 11:00 - 11:15 |
| Jim Havard | Trust (Video&Discussion) | 11:15 - 11:45 |
| Jim Havard<br>Sharon Wells | **Jurisdiction** (Various Types of Indian Land)<br>**Treatment As State** (TAS) | 11:45 - 12:55 |
| Terry Regan | Morning Wrap-Up | 12:55 - 1:00 |
| **LUNCH** | **LUNCH** | **1:00 - 2:00** |
| Terry Regan (Intro.)<br>Jim Sappier (Q&A's) | Video - Penobscot: The People and Their River | 2:00 - 2:40 |
| Bob Goetzl | Federal/Presidential Policies | 2:40-3:00 |
| Bob Goetzl | EPA's Overall Mission and our Indian Program Responsibilities | 3:00-3:20 |
| **Break** | **Break** | **3:20 - 3:35** |
| Jim Sappier/Terry Regan | Efforts to Strengthen EPA's Indian Program (Regionally/Nationally) | 3:35 - 4:15 |
| Terry Regan | Any Questions?<br>Tomorrow's Intro. | 4:15 - 4:30 |
| **END DAY ONE** | **END DAY ONE** | **END DAY ONE** |

| DAY TWO | SEPT. 25, 1997 | 9:00-4:00 |
|---|---|---|
| **WHO** | **WHAT** | **WHEN** |
| | **American Indian Culture Session** | |
| Moderator: Jim Sappier | Purpose and Introduce Panel | 9:10 - 9:30 |
| Tribal Representative:<br>*Gayle Dana,*<br>*Passamaquoddy Tribe,*<br>*Pleasant Point (Perry, ME)*<br>*Paulla Jennings,*<br>*Narragansett Indian Tribe (Charlestown, RI)*<br>*Allen Sockabasin,*<br>*Passamaquoddy Tribe,*<br>*Indian Township (Princeton, ME)* | Cultural Presentations | 9:30 - 11:30<br>(With Break At Convenient Time) |
| | Interactive Discussion/ Q&A With Panel | 11:30 - Noon |
| **LUNCH** | **LUNCH** | **12:00 - 1:00** |
| Terry Regan | Protocol For Working With Tribal Governments (Including Experience and Examples From Panel) | 1:00 - 1:30 |
| Ellie Kwong | EPA Indian Policy Exercise and Group Discussion | 1:30 - 2:00 |
| Mike Kenyon | Tribal - EPA Agreements (TEAS) | 2:00 - 2:30 |
| **BREAK** | **BREAK** | **2:30 - 2:40** |
| Bill Nuzzo | Grants / PPG's | 2:40 - 3:00 |
| Mark Sceery | Building Tribal Capacity Direct Implementation | 3:00 - 3:45 |
| Jim Sappier | Reading | 3:45 - 3:55 |
| Bill Nuzzo | Wrap Up & Evaluations | 3:55 - 4:00 |
| **END TRAINING** | **END TRAINING** | **END TRAINING** |

TABLE OF CONTENTS


| SUBJECT | | | Chapter | Page |
|---|---|---|---|---|
| INTRODUCTION | | | | 1 |
| CHAPTER ONE | OVERVIEW OF NATIVE AMERICAN COMMUNITIES AND CULTURES | | I | 2 |
| | I. | Native Americans and Tribes Generally | I | 2 |
| | | A. Examples of Tribal Membership Criteria | I | 3 |
| | II. | Federally-Recognized Tribes and Their Governments | I | 3 |
| | III. | Non-Federally Recognized and State Recognized Tribes | I | 7 |
| | IV. | Native Hawaiians | I | 8 |
| | V. | Native American Population/Communities Outside of Indian Country | I | 8 |
| | VI. | Understanding Native Americans | I | 9 |
| | | A. Native Americans are not a Homogeneous Group | I | 9 |
| | | B. Indian Tribes Have Maintained Significant Government Powers | I | 9 |
| | | C. Unique Federal Status of Tribal Members | I | 10 |
| | | D. Native Americans Pay Federal Taxes | I | 10 |
| | | E. Tribes Receive Services from the Federal Government | I | 10 |
| | VII. | Understanding Native American Cultures | I | 11 |
| | | A. The Impact of Western Expansion | I | 11 |
| | | B. Differences Between Native Americans and Western Styles and Values | I | 12 |
| | | C. Attitudes Towards the Environment | I | 12 |

| | | | | | |
|---|---|---|---|---|---|
| VIII. | Tribal State Relations | | | I | 13 |
| IX. | Selected National/Regional Indian Organizations | | | I | 14 |
| CHAPTER TWO | OVERVIEW OF FEDERAL INDIAN LAW AND POLICY | | | | 17 |
| I. | Definitions and Common Vernacular | | | II | 17 |
| | A. | Indian Country | | II | 17 |
| | B. | Reservations | | II | 19 |
| | C. | Allotments | | II | 19 |
| | D. | Fee Lands | | II | 20 |
| | E. | Trust Lands | | II | 20 |
| | F. | Rancheria | | II | 20 |
| | G. | Dependent Indian Communities | | II | 21 |
| | H. | Colony | | II | 21 |
| | I. | Ceded Territory | | II | 22 |
| II. | Indian Country: Changing Times and Federal Policies | | | II | 22 |
| | A. | Earliest Treaties | (1608-1830) | II | 23 |
| | B. | Removal | (1830-1850) | II | 23 |
| | C. | Reduction of the Indian Land Base | (1850-1871) | II | 23 |
| | D. | Assimilation and Allotment Era | (1887-1909) | II | 23 |
| | E. | Indian Reorganization Act of 1934: Support of Tribal Government | (1934) | II | 24 |
| | F. | Termination: An Old Policy With s New Twist | (1950-1970) | II | 24 |
| | G. | U.S. Indian Policy Since 1970 - Self Determination Act | (1970 - present) | II | 25 |

| | | | | | |
|---|---|---|---|---|---|
| | | | | II | 27 |
| III. | Indian Country: Selected Legal Doctrines | | | | |
| | | A. | Tribal Sovereignty | II | 27 |
| | | B. | Federal Trust Responsibility | II | 29 |
| | | C. | Treaty Rights | II | 30 |
| | | D. | Criminal and Civil Jurisdiction | II | 32 |
| | | E. | Tribal Sovereign Immunity Suits Against Tribes | II | 35 |
| | | F. | The Alaska Difference | II | 35 |
| CHAPTER THREE | OVERVIEW OF ENVIRONMENTAL PROTECTION ON INDIAN LANDS | | | III | 38 |
| | I. | U.S. Environmental Protection Agency's (EPA): Overall Mission and Implementation | | III | 38 |
| | II. | Federal Policies and Executive Orders | | III | 40 |
| | | A. | Presidential Memorandum on Government-to-Government Relations with Tribal Governments | III | 41 |
| | | B. | Executive Order and Memorandum on Environmental Justice | III | 41 |
| | | C. | Executive Order on Sacred Sites | III | 41 |
| | III. | EPA Policies, Guidance and Memorandum of Understanding (MOU) | | III | 42 |
| | | A. | EPA's Policy for the Administration of Environmental Programs on Indian Reservations | III | 42 |
| | | B. | Federal Tribal and State Roles in the Protection and Regulation of Reservation Environments (Concept Paper) | III | 42 |
| | | C. | Tribal Operations Action Memorandum | III | 43 |
| | | D. | EPA Environmental Justice Strategy | III | 43 |

| | | | | |
|---|---|---|---|---|
| | E. | EPA Region 8 Policy for Environmental Protection in Indian Country | III | 43 |
| | F. | Memorandum of Understanding Between the Bureau of Indian Affairs, the Environmental Protection Agency, the Department of Housing and Urban Development and the Indian Health Service | III | 44 |
| IV. | National Tribal Programs | | III | 44 |
| | A. | The American Indian Environmental Office | III | 44 |
| | B. | Building Tribal Capability | III | 45 |
| | C. | Tribal/EPA Environmental Agreements | III | 45 |
| | D. | Performance Partnership Grants | III | 47 |
| | E. | Tribal Assumption of Federal Environmental Programs | III | 47 |
| | | Treatment in the Same Manner as a State (TAS) | III | 48 |
| | | Jurisdictional Issues | III | 48 |
| | F. | Direct Federal Implementation | III | 50 |
| | G. | Protocol for EPA Interactions with Tribes | III | 51 |
| V. | National Work Groups and Advisory Committees | | III | 52 |
| VI. | Regional Programs and Operations | | III | 54 |
| VII. | Tribal Operations in Other Selected Federal Departments/Agencies | | III | 54 |

## INTRODUCTION

This training course is being developed as part of the Environmental Protection Agency's (EPA) overall effort to work with Tribes to strengthen public health and environmental protection in Indian Country. On July 15, 1994, Administrator Carol M. Browner issued the *Tribal Operations Action Memorandum* which called for implementation of specific actions to improve EPA's Indian program, including training for EPA staff and managers on Tribal matters. Administrator Browner stated:

> It is important that EPA employees have the necessary sensitivity, knowledge, and understanding of Indian affairs to facilitate communication between EPA and Tribal representatives. The American Indian Environmental Office . . . will promote and coordinate training on Indian issues for Agency managers and staff.

The initial draft of the training materials was developed by Kickingbird Associates with input from an Agency workgroup led by Caren Rothstein of the American Indian Environmental Office (AIEO) and contract support provided by the Office of Policy, Planning, and Evaluation. The general purpose of the training is to assist EPA staff and managers in implementing the *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (EPA Indian Policy). Specifically, the training is intended to provide adequate knowledge about Indian issues for EPA employees to work effectively with Native American Tribes and Alaska Natives. The course is designed for delivery by EPA staff who have experience working in EPA's Indian Program. The target audience is EPA management and staff in Washington, D.C. and the Regions whose work may either call upon them to work with Tribes or affect Tribal resources and environmental management programs.

The course will be offered as a pilot during the first year in order to evaluate the effectiveness of the interim final training materials. The American Indian Environmental Office (AIEO) intends to revise the training materials after this initial year. During this first year, comments on the materials should be faxed or mailed to Caren Rothstein, AIEO Training Coordinator. Fax number: (202) 260-7509. Mail code: AIEO (4104).

# CHAPTER ONE
# OVERVIEW OF NATIVE AMERICAN COMMUNITIES AND CULTURES

## I. Native Americans and Tribes Generally

Indian Nations hold a unique position in the United States. Throughout the history of the United States, the relationship between the federal and Tribal governments has been a "government-to-government" relationship. Tribes are recognized as sovereign entities, capable of self-government, while holding a dependent status within the federal powers of the United States.[1] As a result, Native Americans hold unique legal rights, not derived from race or ethnicity, but instead through their membership with, and ancestry from, federally recognized Tribes.[2]

Native Americans are comprised of Indians, Native Alaskans, and Native Hawaiians. The terms Native American, American Indian, and Indigenous Peoples, however, are commonly used interchangeably to refer to the people, cultures, and communities of the first Americans, including Alaska Natives and Native Hawaiians. However, in addition to their common use, the terms Indian and Tribe also have specified legal definitions. The term "Indian" is used throughout relevant sections of Title 25 of the United States Code, including those located in sections 461, 462, 463, 464, 465, 466, to 470, 471 to 473, 475, 476 to 478 and 479, and includes all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and includes all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska are also considered Indians. The term "tribe" refers to any Indian tribe, organized band, pueblos, or the Indians residing on one reservation.

From the statutory definition, one can see that much of the definition relies on how individual Tribes define membership. As part of their sovereign powers, Tribes have the power to determine their own members. Most Tribes have a percentage blood quantum that they require for individuals to be enrolled as Tribal members. The percentage of blood ranges from 1/32 (Citizen Band Potawatomie) to the more typical 1/4 degree blood. Some Tribes however, use descendance, instead of blood quantum, as the criteria for membership. Generally this requirement is met by individuals who can show direct descendence from a family member who was listed on a specified previous membership role.

---

[1]Strickland, [Draft] "Native American Law," Oxford Companion to the United States Supreme Court, 1; see also, Worcester v. Georgia, 31 U.S.. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1; Johnson v. M'intosh, 211 U.S. (8 Wheat.) 543 (1823).

[2]Strickland, see note 1.

*Examples of Tribal Membership Criteria*

Membership in the Jicarilla Apache Tribe shall extend to: a) all persons of Indian blood whose names appear on the official per capita-dividend roll of the Jicarilla Apache Tribe on December 15, 1968; b) all persons of three-eighths or more Jicarilla Apache Indian blood born from and after December 15, 1968 whose mother or father is a member of the Jicarilla Apache Tribe.[3]

Article II, Section 1 of the 1969 Prior Lake Sioux Constitution defines the "members" of the Community as (1) those members whose names appeared on the 1969 census roll of residents of the Mdewakanton Sioux Prior Lake Reservation; (2) all children of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood born to an enrolled member of the Community; and (3) all descendants of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace their blood relationship to Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886, Provided they are found qualified by the Community's governing body and are not enrolled as members in another tribe or band of Indians.

## II. Federally-Recognized Tribes and Their Governments

Throughout history, Indian nations have been recognized as sovereign governments. When the Europeans came to America, there were hundreds of organized Tribes, bands and groups with functioning social, political and cultural institutions in what is now the continental United States. Like the many separate countries of Europe, these Tribes, although sharing the same continent, had different languages, customs, traditions, and forms of government. These native governments recognized their mutual sovereignty by negotiating treaties and forming confederacies and military alliances with each other. It is, therefore, no wonder that the European nations of Spain, France, England, and Holland likewise entered into treaties with various Tribes. And when the United States of America was formed, it, too, entered into treaties with the various Tribes.

Today, there exist over 550 Federally-recognized Tribes. These Tribes have retained many of their sovereign governmental powers. Perhaps the best summary of Tribal powers may be found in the *Handbook of Federal Indian Law* where it states that Native American governmental power relies upon three main principles:

1. [A]n Indian tribe possesses, in the first instance, all the powers of any sovereign state.

2. [C]onquest renders the tribe subject to the legislative power of the United States and, in substance terminates the external powers of sovereignty of the tribe, for example, its

[3]Article III, Section I, Revised Constitution of the Jicarilla Apache Tribe

power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe.

3. [T]hese powers are subject to qualification by treaties and by express legislation of Congress. Save as expressly qualified, full powers of internal sovereignty are vested in Indian tribes and in their duly constituted organs of government.[4]

According to the *Handbook*, the considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a "tribe" or "band" have been:

1. That the group has had treaty relations with the United States.

2. That the group has been denominated a tribe by act of Congress or Executive Order.

3. That the group has been treated as having collective rights in Tribal lands or funds, even though not expressly designated a tribe.

4. That the group has been treated as a tribe or band by other Indian tribes.

5. That the group has exercised political authority over its members, through a Tribal council or other governmental forms.

Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group.[5]

*Alaska Natives*

The approximately 226 Alaska Native Tribal governments recognized by the Bureau of Indian Affairs have the same political status with the Federal government as the continental Tribes. They also have social and political organizations fairly similar to those of the Tribes of the lower 48. They are sovereign entities with all the attendant inherent powers and, they receive a variety of federal services.

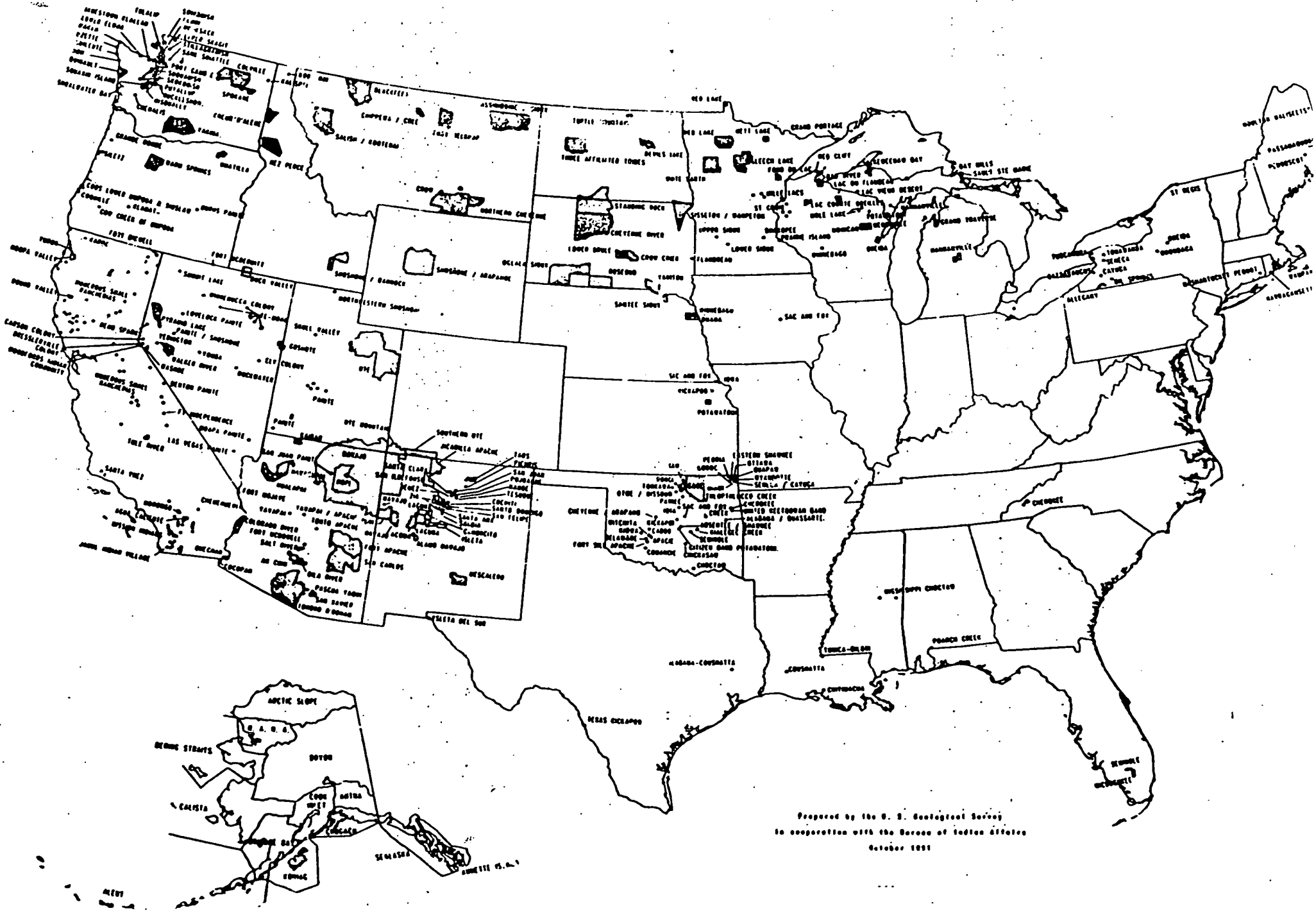
One historic difference between Alaska Natives and Tribes of the lower 48 is that the reservation system was used far less in Alaska. The sovereign Alaska Native Tribal governments include those organized under the Indian Reorganization Act of 1934, and those that have remained traditional, typically having been recognized by the federal government.

---

[4]Cohen, Handbook of Federal Indian Law 241- 42 (1982).

[5]Cohen, Handbook of Federal Indian Law 271 (1988).

# FEDERALLY RECOGNIZED INDIAN TRIBES



In 1971, Congress passed legislation extinguishing the aboriginal title held by the Alaska Natives collectively and provided compensation for it through the Alaska Native Claims Settlement Act. This Act did not diminish their political relationship with the federal government. Since the passage of the Act, however, some people confuse the sovereign Tribal governments with the regional and native village corporations established under the Act. This confusion results from the difficulty of keeping politics separate from economics. The Settlement Act extinguished the aboriginal title, but did not eliminate the sovereign status of the original Tribal governments. The Act reserved fee title to 44 million acres of land for management by the regional and village corporations and paid $962,550,000 to the same corporations in compensation for the rest of the lands that were taken by the United States and the State of Alaska.

Twelve regional State-chartered corporations received subsurface rights to land held by the more numerous native village State-chartered corporations. The Alaska Natives are the shareholders in both types of corporations. Although natives are included in Tribal governments, councils, and village and regional corporations, only the first two are capable of exercising residual sovereign powers.

### A. A Variety of Self-Governance

Although, in some cases, the modern Tribal governmental systems differ from the traditional governmental initiations and forms; the rich cultural heritage of Indian Nations, which includes a governmental tradition, have left their imprint on the present day workings of Tribal government. Demonstrating a wide degree of diversity, most Tribal governments combine traditional features with western forms.

Tribal governments are like national governments in that they are sovereign, they assert jurisdiction over their people and land, they own land, and have at the heart of their mission, meeting the needs of their people. Tribal governments are also like State and local governments in that they administer many federal programs. Tribal governments can also be said to operate like a business in that they manage resources, products, and services for profit.

The traditional way in which Tribal government has been viewed is as a public body with responsibility and obligations to Tribal members, with concern for their economic and social well-being. In another sense, however, the Tribal government may be considered a "quasi-corporation." According to this view, the Tribal councils are responsible for the investment of Tribal resources, for managing those resources for the betterment of Tribal members, and for ensuring that long-term obligations to Tribal members can be fulfilled.

### B. Constitutions and the Source of Tribal Powers

Like many other nations, many Tribal governments operate under constitutions which generally define the source and nature of the government's sovereignty, and the form and

structure of the government. In addition, they spell out the specific sovereign powers that the government may exercise.

Constitutions may be written or unwritten. The Santo Domingo Pueblo government, for example, has been operating under the same unwritten constitution for centuries. On the other hand, the Lummi Indians of Washington adopted a new written constitution in 1970. Some Indian Nations have adopted written constitutions that primarily describe their traditional forms of government. Such are the constitutions of the Seneca of New York or the Muscogee (Creek) or Choctaw of Oklahoma. Other Indian Nations have written constitutions, which describe essentially western forms of government. Many of the Indian Tribes that adopted such constitutions did so in response to external pressures to develop more Western-style governments in order to secure governmental recognition and needed financial assistance. Often this was done under the guidance and pressure of the United States Government. Most of these constitutions are a byproduct of the Indian Reorganization Act of 1934.

### C. Forms and Structure of Tribal Governments

Consistent with their traditional pasts, many contemporary Indian Nations have democratic governments which have combined aspects of their traditional styles and institutions with common western forms. Some, like the Pueblos of New Mexico maintain theocratic forms of Government. Others, like the Gila River Indian Community resemble most closely parliamentary systems in which the legislative and executive functions are interrelated. Still others like the Navajos and some of the Five Civilized Tribes have a governmental organization which operates through a system of separate Tribal councils, Tribal executives, and Tribal courts.

The structures of Tribal governments have developed in response to the same kinds of factors that affect the development of any government. Population size, land base, and economic and political considerations all have had a great impact on the structure and operation of contemporary Indian governments. For example, an Indian Nation with a relatively small population, such as the Kiowa of Oklahoma and the Crow of Montana, may have a Tribal council comprised of all members of the Tribe. Those with vast land areas like the Navajos, Gila River Pima-Maricopa and the T'Ohono O'Odham (formerly Papago) may have well-developed local district governments as well as strong central governments.

It is not uncommon to hear modern Tribal governments being referred to as "traditional" or "non-traditional" or "progressive." It is difficult to make simple generalizations about the differences between these in a contemporary setting. Basically, however, traditional Tribal governments are those where the political leaders are selected by clans, family trees, or religious laws. These leaders, who in some Tribes serve for life, are usually chosen by consensus rather than through elections. Non-traditional governments, on the other hand, generally choose their political leaders through democratic elections.

While few strictly traditional Tribal governments exist today, many so-called non-traditional governments have maintained an informal network of traditional leaders. These

traditional leaders in many cases still exert a great deal of influence on both the social and political affairs of an Indian Nation.

### D. Tribal Statistics

The federal government recognizes 561 Indian Tribes, including Alaska Native Tribes.[6] These federally-recognized Tribes constitute an American Indian and Alaska Native population of over 1 million and a land base of over to 54 million acres.[7] In addition to the population specifically identified with an individual Tribe, over another 1 million Native Americans live outside of Indian Country. Also, approximately 150,000 Native Hawaiians live in Hawaii. The map on the next page shows the location of the federally-recognized Indian Tribes, including Alaskan Natives.

## III. Non-Federally Recognized and State Recognized Tribes

It is estimated that hundreds of non-recognized Tribes and State-recognized Tribes also exist. Many of these tribes never had a formal relationship with the United States government. Others, however, once had such a relationship, but the United States government has since terminated that relationship and not re-recognized those tribes.

A unique aspect of the federal Indian trust relationship is the power of the trustee, Congress, to unilaterally modify its responsibility toward the beneficiary, the Native Americans. After World War II, a desire to assimilate Native Americans into the mainstream of the American population gained support in Congress and numerous bills were passed "terminating" Tribes from the protection of the United States. Termination was viewed as "freeing" the Native Americans from their dependent status and opening the reservation doors to prosperity. In reality, however, the by-products of this "freedom" were disastrous to the Tribes. Their land, no longer having trust status and attendant protections, was often broken up and sold and federal services ended. The federal government has repudiated the termination policy by resuming trust relationships with some Tribes and by passing the Indian Self-Determination and Education Assistance Act of 1975.

In most instances, non-recognized Tribes are ineligible for Federal aid designated for Indian tribes. Non-recognized tribes, however, may be eligible for other sources of federal funding, such as EPA environmental justice grants.

---

[6] EPA American Indian Environmental Office data used for calculating the funding formula for the General Assistance Program Grants.

[7] See footnote 6.

*State-Recognized Tribes*

A number of States, such as Virginia, have formally recognized Indian Tribes who reside within the boundaries of the State. While this recognition does not convey any legal rights under federal Indian law, it often acknowledges unique legal rights retained by or conveyed to the Tribe(s) within State law. Often these Tribes have retained and/or obtained a land base set aside under State law for the Tribe's use and occupancy. These State-recognized Indian reserves are similar under State law to federal Indian reservations that have been reserved for federally-recognized Tribes under federal Indian law.

A number of these Tribes, as with other non-federally recognized Tribes, have been trying to gain federal recognition either through the Bureau of Indian Affairs recognition process or Congressional legislation. In the past several years, the federal government has been trying to reach out to non-federally recognized Tribes and in 1994 the White House met with a number of Tribal leaders from State-recognized Tribes and urban Indian communities.

## IV. Native Hawaiians

The federal government does not recognize a "government-to-government" relationship with the Native Hawaiians, and thus, Native Hawaiians are not recognized as being members of a sovereign Tribal government. Native Hawaiians were first acknowledged as "Native Americans" in the Native American Programs Act of 1974 which defined them as "any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778." The approximately 150,000 Native Hawaiians have maintained a distinct long-standing cultural identity.

Subsequent to the 1974 Act, a private, non-profit corporation for Native Hawaiians was created in Hawaii to further native economic and social self-sufficiency. Funding through the Native American Programs Act goes toward education, economic development, health and native rights concerns. The Native Hawaiian Legal Corporation (NHLC) has also received Federal grants to study the legal feasibility of a trust relationship with the Federal government. Areas such as the formal "recognition" of Hawaiian people as Native Americans, reparations for uncompensated taking of land and acquisition of surplus Federal lands are some of the group's priorities. Because the Hawaiian government had treaties with the United States prior to the overthrow of the Hawaiian monarchy and annexation in the 1890's, NHLC feels that Native Hawaiians are also the rightful beneficiaries of the trust responsibility.

## V. Native American Population/Communities Outside of Indian Country

Many members of non-recognized and terminated Tribes fall into this group. Some Native Americans live in urban and rural off-reservation areas as a direct and indirect result of other federal policies. A significant percentage of the United States Native American population lives outside of Indian country. Although a few recent federal programs serve as out-reach to Indian populations away from Indian country, their political status is not that distinguishable

from other American citizens. While the EPA encourages Tribal governments to assume primacy for the implementation of federal environmental programs for Indian country, environmental protection for Native American populations living outside of Indian country is generally provided for by EPA or State programs

## VI. Understanding Native Americans

### A. Native Americans are not a Homogeneous Group

It is a common notion among those unfamiliar with American Indian Nations and people to think of Indians as a single group of people operating under a single government and sharing languages, customs, and religion. This could not be further from the truth. Today over 550 federally recognized Tribal governments are meeting the needs of their people through systems which generally combine traditional Tribal forms with standard American forms of government. While there are certainly regional and even nation-wide similarities among Indian governmental forms, it is a wise idea to take a cue from the names many Indian Nations give themselves, many of which can be translated into English as meaning, "the people" or "the principal people."--and to consider each Tribal government as a distinct sovereign entity exercising sovereign powers to meet the present and future needs of its people. There are still at least 150 extant native languages spoken in Tribal communities. Tribes can be distinguished from each other by virtue of land holdings, as well. Land bases of Tribes range from 15,662,413 acres of the Navajo to the one acre Nooksak reservation. Also, each Tribe's political and economic history is unique.

### B. Indian Tribes Have Maintained Significant Governmental Powers

Modern Tribal governmental systems are powerful, complex, and detailed. A concise summary of Tribal powers was stated by the United States Supreme Court recently as that which "[is] needed to control [the Tribes'] own internal relations, and [to] preserve their unique customs and social order."[8] Tribal governments, quite simply, govern the internal affairs of the Tribe. Tribal governments make laws, adjudicate, and enforce. Most offer a vast array of social services, including Indian child welfare and Indian family counseling programs. The governmental system may run and manage Tribal police forces, food distribution programs, Indian school systems, and housing services. Tribal court systems are equally powerful, having the power to affect freedom, child custody, torts, contracts, property rights, and marriage.[9] James M. Jannetta notes in "Reciprocity Between State and Tribal Legal Systems," that

> Tribes today exercise extensive governmental authority over their reservations, including considerable civil authority over non-Indians. Tribal courts form a nationwide web of

---

[8]Duro v. Reina, 110 U.S. 2053, 2055 (1990). See also, United States v. Wheeler, 435 U.S. 313 (1978).

[9]Shannon, Tribal Court Advocacy, 1988 Michigan Bar J. 377, 381.

courts with jurisdiction over more than half a million persons, and the many millions more that pass through reservations annually.[10]

### C. Unique Federal Status of Tribal Members

Native American Tribes hold a unique position in the United States. Throughout the history of the United States, the relationship between the United States and Native American Tribes has been a "government-to-government" relationship. The Tribes are recognized as sovereign entities, capable of self-government, while holding a dependent status within the federal powers of the United States.[11] As a result, American Indians hold legal rights, not derived from race or ethnicity, but instead through their membership with, and ancestry from, federally recognized Tribes.[12]

### D. Native Americans Pay Federal Taxes

In ordinary affairs, as a U.S. citizen, Indians pay taxes. As we have seen from looking at the treaties, when Tribes reserved lands and property, the U.S. often promised that they would not have to pay taxes on revenue generated from land held in trust. This is generally true today, which means that, in certain circumstances, Tribes and individual Indians do not pay income taxes to the federal government on sale of land, resources, livestock and agricultural products generated from trust land. However, if they work for Tribal government, or off the reservation, in most instances, they pay taxes like anyone else to both the federal government and the States.

It is important to note, that as sovereign governments, Tribes have the power to tax, and as a result, just like federal, State and local governments, many Tribes levy taxes on sales of goods and services. They often use this revenue to support the operation of government and meet the needs of their own communities rather than relying on other jurisdictions.

### E. Tribes Receive Services from the Federal Government

Services are part of a historical and political relationship between the federal government and Tribes. Services are meant to preserve and enhance the health and welfare of the Tribe. Among other things, Indians gave up nearly 2 billion acres of land and immeasurable natural resources. The money or "per capita" payments you may hear about frequently refers to interest paid on trust funds managed by the Department of the Interior. At other times, it refers to claims payments from the U.S. government serving as compensation for the unfair prices paid to Indians for devalued land and resources in the past.

---

[10]Jannetta, Reciprocity Between State and Tribal Legal Systems, Michigan Bar Journal, 400,401, May 1992.

[11]Strickland, [Draft]"Native American Law," Oxford Companion To The United States Supreme Court, 1.

[12]See footnote 12.

## VII. Understanding Native American Cultures

A sensitivity to the importance and uniqueness of each Tribe's culture is critical for those working with Tribes to develop and implement environmental protection programs in Indian country. Several points are critical to consider while attempting to gain an understanding of Tribal culture.

1. Although there may be common themes between various Tribes' cultures, generally each Tribe has a unique set of cultural beliefs and values.

2. Non-Indians working with Tribes generally will learn Tribal culture more effectively from the Tribes themselves.

3. Understanding Tribal culture requires patience and sensitivity.

4. Sensitivity and respect for Tribal culture is critical for effective working relationships that can lead to strong environmental protection programs.

### A. The Impact of Western Expansion

Much has changed in the manner and form of Tribal government operation since the arrival of western European institutions on the American continent. Some of the change has been evolutionary, produced by the Tribes themselves; the greater change, however, was the result of direct and indirect actions by the United States government. At their present level of development, few Tribal institutions correspond to traditional forms or styles. What forms of government Indian Tribes would have developed to meet the demands of the changing centuries without the persuasive presence of the federal government is not known, and can only be speculated upon.

In the first several years of contact Tribes were for the most part able to retain their traditional governing forms. These were highly diversified, ranging from the sophisticated confederacy of the Iroquois, a precursor of the United States federal system, to informal systems of communal consensus. To characterize all Tribal governments by any single generalization is factually misleading. Several general observations about Indian systems of governments, in contrast to western systems, however, are pertinent.

Indian Tribes and societies generally did not consider private property as central to a government's relationship to citizens, as did most western governments. Communal property concepts are far more prevalent in Tribal societies than are individual property concepts. Rather than the representative styles typical of western governments, Tribal societies were often governed by communal systems of chiefs and elders. Leadership was often earned by performance or acknowledgment and rested upon consensus and theological grounds for exercise. Many different systems existed for resolving disputes and maintaining order. Some Tribes had warrior societies which functioned as enforcement mechanisms; other Tribes utilized

community pressure to enforce norms. Scorn is said to have been an extremely effective method of enforcement. Imprisonment was unknown, and restitution, banishment, and death were the major punishments.

The turn of the century saw a great decline of the traditional Tribal governments. Removal, continuous war, and the reservation era significantly affected many Tribes. Traditional food supplies were greatly diminished. Tribes were placed at the mercy of the United States government. This was particularly true for the Plains and nomadic Tribes whose traditional way of life was drastically altered, who were most directly affected by the great influx of non-Indian settlers and the Indian wars, and who were often most subjected to regulations. It was probably less true of the non-nomadic Tribes who remained in their traditional grounds and continued to survive through the same enterprise and the same cultural setting which had always sustained them.

### B. Differences between Native American and Western Styles and Values

Panel discussion (Trainees are strongly encouraged to take notes). Please see handout.

### C. Attitudes Towards the Environment

It is difficult to generalize about environmental attitudes of the various Tribal governments. Larry Merculieff, City Manager of the City of St. Paul, St. Paul Island, Alaska, however, made some interesting observations at a 1994 symposium on the topic of "establishing Rapport Between Indigenous Coastal Cultures and the Western Scientific Community." Although these observations deal with Alaskan cultures, the thoughts may be relevant to dealing with many other Native people.

> " I don't want to belabor a point, nor do I wish to convey the impression that indigenous knowledge is better than science...however, I'd like to make three salient points on this issue. One, until institutions and professions in the industrialized societies make it safe and acceptable to recognize indigenous knowledge and experience, we will never create a functional bridge between these different worlds and native world views will continue to be marginalized.
>
> Two, by not acknowledging indigenous knowledge and experience such knowledge, experience, ways of life, and culture are unwittingly being eroded and destroyed in countless subtle but significant ways.
>
> The third point is perhaps the most salient. Because of the innumerable subtle ways in which cultures are eroded and destroyed, the world is rapidly becoming a monoculture in terms of agricultural systems, energy use, clothing, education, science, economics, mathematics, and ways of knowing. Our world views are narrowing at a frightening pace. Native Americans value their traditions, their culture, and see self-governance as a way to secure their future."

## VIII. Tribal/State Relations

Tribal/State relationships and jurisdictional issues are often complex. In a discussion regarding the federal trust responsibility as well as the Tribal/State relationship, the Handbook on Federal Indian Law noted that:

> One of the most famous statements explanatory of the limitations upon state power in this field is the statement in United States v. Kagama [118 U.S. 375 (1886)], that [Tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protections, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. . . .

Despite jurisdictional differences however, it is important to note that agreements and cooperative partnerships between States and Tribes can (and have) been reached. For example, in the 1994 National Indian Policy Center Survey of Tribal Water Quality, it was noted:

> We know of several Tribal-State agreements that avoid the jurisdiction issue altogether, while providing for information sharing, common regulatory standards and procedures, joint inspections, cross-depulization of environmental enforcement officials, prior notice and opportunity to comment on proposed permits, and a variety of other procedures that address the interests of both parties and enhance environmental protection.[13]

[13]Gover, Stetson and Williams. National Indian Policy Center, Washington, D.C., September, 1994.

## IX. Selected National/Regional Indian Organizations

In order to maximize limited Tribal resources and to ensure effective networks for communication and dissemination of information, many tribes have joined together to form inter-tribal consortia or national tribally-controlled organizations. In addition to these Tribal organizations, a number of indigenous grassroots organizations have also been formed around various topics throughout Indian Country. These organizations, while not a substitute for direct Tribal consultation and communication, are a valuable resource for public comments and feedback on Agency actions and for disseminating information. More than 150 tribal and indigenous grassroots organizations exist through out the country that address environmental and natural resource issues. Below is an illustrative selection of some of these organizations. For information and contacts for additional organizations, please contact the American Indian Environmental Office at (202) 260-7939.

**National Congress of American Indians:** The National Congress of American Indians (NCAI), founded in 1944, is the oldest, largest, and most representative national Indian organization, serving more than three quarters of the American Indian and Alaska Native population. NCAI is organized as a representative congress of consensus on national priority issues. NCAI issues and activities include, protection of Indian cultural resources and religious freedom, promotion of Indian economic opportunity, and support of environmental protection and natural resources. Over the past few years, NCAI has passed numerous resolutions supporting various environmental issues. (202) 466-7767

**National Tribal Environmental Council:** The National Tribal Environmental Council (NTEC) was formed in 1992 and is a membership organization dedicated to working with and assisting Tribes in the protection and preservation of the reservation environment. NTEC is open to membership to federally recognized Indian tribes and currently has 82 member Tribes from the continental United States and Alaska. NTEC services include, environmental technical support, newsletters, updates and federal regulatory and legislative summaries, workshops on specific environmental issues, resource clearinghouse and reference library, and intergovernmental cooperation. (505) 242-2175

**United South and Eastern Tribes:** The United South and Eastern Tribes (USET) is an intertribal organization comprised of 23 federally-recognized Tribes. The primary goals and objectives of USET include the promotion of Tribal health, safety, welfare, education, economic development, and employment opportunities and the preservation of cultural and natural resources. 1-800-9TRIBES

**Arizona Inter-Tribal Council:** The Arizona Indian Tribes incorporated in 1975 to form the Inter Tribal Council of Arizona (ITCA). Today, after seventeen years of operation, 19 federally recognized Arizona Indian Tribes belong to ITCA. Representatives serving on the Association consist of the highest elected official of each Tribe. ITCA's staff of 32, currently implements over eighteen projects, fulfilling their members goals of ensuring self-determination of Arizona Tribes through their participation in the development of policies and programs which affect their lives.

**Northwest Indian Fisheries Commission:** The Tribes of the Northwest established the Northwest Indian Fish Commission in 1974 to help them coordinate orderly fisheries and to provide members Tribes a single, unified voice on fisheries related issues. The Commission employes about 50 full time people in provide informational and educational services, fishery management, planning, and enhancement support, environmental coordination, and quantitative and technical services. (360) 438-1180.

**Columbia River Inter-Tribal Fish Commission:** The Columbia River Inter-Tribal Fish Commission (CRITFC) was created in 1977 to coordinate the management and protection of the Tribes' treaty fishery resource and to implement the Tribes' fishery policies and objectives in the Columbia Basin. The governing body of CRITFC, the Commission, consists of the Fish and Wildlife Committees of each Tribe. The CRITFC staff consists of primarily of biologists, attorneys, and other professionals who provide legal and technical assistance to the Tribes on issues relating to protection, enhancement, and sustainable use of the fishery resources in the Columbia River Basin. (503) 238-0667.

**Great Lakes Indian Fish and Wildlife Commission:** The Great Lakes Indian Fish and Wildlife Commission (GLIFWC), provides technical assistance to its 11 member Tribes in the conservation and management of fish, wildlife, and other natural resources throughout the Great Lakes region, thereby insuring access to traditional pursuits of the Chippewa people. During 1995, GLIFWC employed approximately 70 full-time and 125 part-time or temporary staff.

**Wisconsin Tribal Environmental Committee:** The Wisconsin Tribal Environmental Committee (WisTEC) is an intertribal consortia consisting of the 11 Tribes located within the exterior boundaries of the State of Wisconsin. WisTEC services include the management of an EPA Environmental Justice grant to assist its member Tribes in the development of their environmental capacity through technical assistance and intergovernmental cooperation.

**Native American Rights Fund:** The Native American Rights Fund (NARF) was formed in 1970 to provide top-quality legal representation to Tribes regardless of their ability to pay. Over the last 26 years, NARF has represented over 189 Tribes and its work has included the areas of, Tribal preservation, protection of Tribal natural resources, promotion of human rights, and development in Indian Law. (303) 447-8760.

**Indigenous Environmental Network:** The Indigenous Environmental Network (IEN) is governed by a National Council of Indigenous grassroots organizations and individuals. The services provided by the IEN National Office include, a national clearinghouse on environmental issues, a resource and referral network for technical information and fact sheets, national/regional/local education on grassroots organizing, training, and strategy development, annual conference planning and development, and information dissemination on indigenous grassroots environmental groups and Tribal government environmental programs. (218) 751-4967.

**American Indian Science and Engineering Society:** The American Indian Science and Engineering Society (AISES) is a private, nonprofit organization which nurtures building of community by bridging science and technology with traditional native values. EPA has a partnership with AISES known as Tribal Lands Environmental Science Scholarship Program, through which the Agency provides educational opportunities to Native American students. (303) 939-0023.

# CHAPTER TWO
# OVERVIEW OF FEDERAL INDIAN LAW AND POLICY

## I. Definitions of Common Vernacular

Specialized areas of study often have their own special words or terminology or "terms of art" which are generally understood in that field. At times, the field of study will take ordinary words and give them special meaning. This practice also occurs in the field of Indian affairs. The public curiosity about Indian affairs has resulted in a general familiarity with the terms of art. Many of the terms and their meanings are obvious. They have appeared in print or film or radio or television for years. Following are a few of the terms that are relevant to the issues of land and the Tribal-federal government relationship.

### A. Indian Country

The term "Indian Country" is often confused with the term, "Indian Reservation." An Indian reservation is simply land, set aside for a Tribe or Tribes. Indian country, on the other hand, is a significant legal term.

> [T]he term "Indian Country", as used in this chapter, means (a) all land within the limits of any Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (d) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Court cases have made clear that Indian trust lands also fall within the definition of Indian country. Thus, Indian country includes Indian Reservations, dependent Indian communities, Indian allotment lands, and trust lands.

#### *Indian Country in Oklahoma*

Indian country exists in Oklahoma, but whether formal reservations exist is still an unsettled question. Generally, the lands of the Western Oklahoma Tribes are held in trust by the United States government, while the lands of the Five Civilized Tribes[14] of Eastern Oklahoma were ceded by the United States to the Tribes in what was known as Indian Territory. The Eastern Tribes did not acquire mere reservations on the public domain in a territory destined to become a future state, but rather received land where Tribal governments could operate without interference or competition by non-Indians and territorial or State governments. The lands were

[14] The Cherokee, Choctaws, Chickasaws, Creeks, and Seminoles.

ceded to the Tribes and, as stated in the treaty, the Tribes retained the power to pass "all such laws as they may deem necessary for the government and protection of the persons and property within their own county."[15] Understanding this, the question of whether there are formal reservations in Oklahoma may not be as relevant as once thought and the existence of Indian country should set Oklahoma Tribes in virtually the same position as other Indian Tribes. The Supreme Court has said that it is immaterial whether Congress designated a settlement of Indians as a "colony" or "reservation" or whether the land is "trust land", rather the test for Indian country is:

> Whether [the land] has been validly set apart for the use and occupancy of Indians as such, under the superintendence of the government.[16]

The Supreme Court of Oklahoma has also recognized the existence of Indian country in Oklahoma and its importance when it stated:

> The touchstone for allocating authority among various governments has been the concept of "Indian Country," a legal term delineating the territorial boundaries of federal, state, and Tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and Tribal concern.[17]

A further indication that Oklahoma Tribes still retain governmental authority over lands in Oklahoma is that the Eastern Tribes were exempted from the General Allotment Act and nothing in subsequent allotments expressly conveyed the reserved rights away from the Tribes. Furthermore, the Tenth Circuit has held that Congress did not intend or act to completely abolish Tribal jurisdiction over Tribal lands, to divest federal government of its authority, or to permit assertion of jurisdiction by Oklahoma[18] and rejected the argument that these Tribal lands had been disestablished.[19] Finally, the Supreme Court has recognized that "no part of the land granted to [the Tribes] shall ever be embraced in any Territory or State."[20]

Although some issues remain on how to effectively implement environmental programs for Indian lands in Oklahoma and disputes over the extent of Tribal jurisdiction are still ongoing, it is clear today that Oklahoma Tribes generally possess the same types of governmental

---

[15] *See, e.g.* Treaty of New Enchota, December 29, 1835, 7 Stat. 478.

[16] U.S. v. McGowan, 302 U.S. 535 (1938); *See also*, U.S. v. John, 437 U.S. 634 (1978).

[17] Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625 (Ok. 1983).

[18] Indian Country, U.S.A. v. Oklahoma Tax Commission, 829 F.2d 967 (10th Cir. 1987).

[19] Chickasaw Nation v. Oklahoma Tax Commission, 31 F.2d 964 (10th Cir. 1994).

[20] Choctaw Nation v. Oklahoma, 397 U.S. 620, 635 (1970).

authority as other federally-recognized Indian Tribes. This authority extends to regulatory jurisdiction over Indian country in the same manner as other Tribes.

### B. Reservations

The Royal Proclamation of 1763 had made clear that the lands of the Indian nations not "ceded to or purchased by" the Crown were "reserved to Tribes...as their hunting grounds...." Since the British colonial era, Tribes have reserved certain lands for their own use. In 1778 the United States in their first treaty with an Indian government, the Treaty with the Delawares, guaranteed that Indian Nation all the Tribal territory described in former treaties. Thus from the very earliest days of Indian-white relationships, Tribal governments have been selling certain lands to non-Indian governments while reserving the unsold lands for Tribal use.

In the United States the land the Tribal governments withheld from sale have been called "Indian reservations" and in Canada they are called "Indian reserves." We see the same terminology applied where other lands are withdrawn for special uses such as the military reservations of the federal government. It is one of the types of land that is defined as Indian country. EPA considers any lands validly set apart for the use of Tribes to be reservations. It is the term most often applied when trying to describe Indian country.

### C. Allotments

Various federal policies have been enacted throughout United States history which have resulted in significant loss of Tribally-controlled lands. One example of this can be seen in the establishment of reservations. Other examples can be found when various federal policies and programs reduced the size of reservations. During the period of history in which assimilationist policies were adopted by the federal government, significant loss of Tribally-controlled lands also occurred through the creation of "allotments."

Within the allotment system, the reservations of affected Tribes were divided into individual parcels called allotments. Each member of affected Tribes was allotted a homestead of 160 acres (the actual acreage might vary) which, in many instances, Tribal members were meant to farm. The allotment system was utilized as an assimilation tool, and it was believed that by discouraging or disallowing the traditional "communal" type of land use, privatization of land ownership would force Tribal members to become quickly assimilated into the non-Indian culture.

Privatization of land, through the allotment system, resulted in Tribal members being taxed for the land for the first time. Since most Tribal cultures did not utilize cash within their economic cultures, it was reasoned that Tribal members residing on privatized land-bases, in an effort to pay their taxes, would be encouraged to become farmers, engage in private businesses, etc.

When the reservations were divided this way the major part of the reservation remained undivided. This area was declared surplus to Indian needs and sold to non-Indian farmers. The allotments to the individual Indians were held in trust by the United States government like the

Tribal lands with a promise to turn them over to the Indian in fee simple at the end of a set term such as 21 or 25 years. During the trust period the lands were not subject to federal or State taxes. After this time, huge amounts of allotment lands were lost for nonpayment of taxes, and more lands were sold to non-Indians in an effort to raise money to pay taxes on remaining lands. After 1934 the tax free status was extended indefinitely.

### D. Fee Lands

In the property law of the United States, it is possible to hold several different types of interests in land or real property. If a person holds or own lands in fee simple this means that he has unqualified ownership in the land and, within the limits of the law, has the power to utilize the land as he pleases. This fee simple ownership is described as legal title. Fee simple land must be distinguished from Trust land. Both fee simple and Trust land can exist within a reservation.

### E. Trust Lands

Significant portions of Indian land are held in trust for the Indian Tribes by the federal government. Within these trust lands, Indians were said to hold the beneficial title and the United States held the fee simple title. These lands are sometimes referred to as trust lands.

As trustee, the United States is obligated to use its integrity and ability to look after the best interests of the Tribal members. Part of the protection provided by the trust relationship includes protecting the land interests of the Tribes. In many instances, the federal government also remains the trustee for allotted lands. In purchasing land from the Indian Tribes through use of the Treaties, the U.S. government committed itself to providing certain services to the Indians as part of the payment for the land. Depending on the particular arrangements, these services sometimes included support for Tribal government, as well as education, social and medical services. Trust obligations continue today.

### F. Rancheria

The small land holdings that the Indians of California hold are now sometimes called rancherias because of the historical background from the days of the occupation by the Spanish and Mexican governments. The Spanish made their claim to California in 1542 but colonization did not effectively begin until 1769 with the establishment of the mission San Diego de Alcala. Spanish policy had placed Indians under the control of individuals in the encomienda system who pledged military service to the crown, instruction in Christianity, protection to the Indians, and maintenance of the Church and the clergy. Under the reduction system, Indians were to be placed in isolated missionary communities under the supervision of the clergy. The estates of the nobility and the church were ranches or rancherias. In 1836, the missions were to be secularized and the communities were to become Indian towns. When the United States acquired California in the Mexican War (1846-48), the bands of Mission Indians had to face a new legal system. The result was 18 treaties negotiated in 1853 which the Senate did not ratify.

In an 1875 executive order, reservations were created and many of the Indians relocated there. In 1890, the Mission Relief Act was passed to provide some additional lands to California Indians.

### G. Dependent Indian Communities

The creation of "Indian Communities" were often a direct result of various assimilationist policies and allotment programs of the federal government. At various points in United States history, the federal government attempted to assimilate Tribal people into the non-Indian society. Many of these attempts resulted in the loss of Tribal governmental power, loss of significant Tribal land bases, and the forced privatization of many remaining lands. With Tribal governmental power significantly diminished and remaining land bases divided into "allotments" for privatization purposes, those Tribes affected by assimilationist policies were dramatically changed. In many instances, Tribal members were often forced to live in fixed communities, rather than in the traditionally scattered sites within the general Tribal jurisdictional area. Sometimes, Tribal members were separated from the rest of their Tribe by significant areas of land -- and in these instances, different bands of Indians ended up in the same community. Many of these communities remain today and are considered to be a part of Indian Country.

The effects of assimilationist policies and enactment of allotment practices between 1887 and 1934 are reflected in the names which appear in the written constitutions that were adopted. The traditional Tribal identity may appear in the name of the presently recognized Tribe, for example, the Absentee-Shawnee Tribe of Indians of Oklahoma. The band and Tribal identity may be expressed in the current name, for example, the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation. Or the Tribal government may have included its community identity in the present name, for example, the Bay Mills Indian Community of the Sault Ste. Marie Band of Chippewa Indians, Bay Mills reservation, Michigan; the Covelo Indian Community of the Round Valley Reservation, California; and the Gila River Pima-Maricopa Indian Community of the Gila River Indian Reservation of Arizona.

### H. Colony

The concept of "Indian colonies" was designed to promote assimilation of Tribal members into the non-Indian society. It was believed that the Indian residents of these colonies could find employment in the nearby non-Indian communities. Colonies were most often established in Nevada and California to provide land where Indians could be permanently located and build adequate housing. Colonies, like Indian communities, are often considered to be "Indian country." Examples of Indian Colonies are the following: Reno-Sparks Indian Colony and Yerington Colony of Nevada, and the Elem Indian Colony in California. Reno-Sparks Colony achieved some level of notoriety because the U.S. Supreme Court determined it was a dependent Indian community in U.S. v. McGowan (1938).

## I. Ceded Territory

Many Tribes have retained treaty rights to hunt, fish, and gather other resources in off-reservation territories which were once their own but which the Tribes ceded to the United States in exchange for peace or protection. Like the treaties which guaranteed them, these rights are part of the "supreme law of the land." The federal government's trust responsibility includes protecting treaty rights whether on or off reservation. Although the exact nature of EPA's trust responsibility regarding a Tribe's treaty right in ceded territory has never been defined by a court, related case law suggests that, as a federal agency, EPA has some such duty. This duty most likely includes an obligation that EPA and/or EPA-approved programs are implemented in such a way as to protect Tribal treaty rights.

## II. Indian Country: Changing Times and Federal Policies

Tribes have a complex relationship and history with the federal government. Indians and the United States government have been involved in formal relations since the early years of the republic. Early in the federal governments establishment, the US. dealt with Indians as sovereign foreign powers with whom they entered into treaties. The position of Superintendent of Indian Trade was established to regulate commerce between United States citizens and Indians. To interfere in the internal affairs of the strong Indian governments would not have been possible for the young nation.

As the United States grew in size and strength, its citizens demanded Indian lands and resources. In 1824, an Office of Indian Affairs was established within the War Department. In 1849, the Indian office was transferred to the newly established Department of Interior. Since 1849, the Bureau of Indian Affairs has played the primary role in carrying out the federal government's trust obligations to Indians. Throughout the federal government however, each Department and Agency, also must work to uphold the trust responsibilities with the Tribes, as well as the government-to-government relationship. As a result, Tribal-specific issues are handled in every federal Department and Agency.

Significant volumes of Tribal-specific legislation and regulations are drafted each year. During the 104th Congress, for example, to date, over 190 bills impacting Native American individuals and their governments have been introduced. 502 bills were introduced in the 103rd Congress. In 1995, there were over 380 State bills on Indians and 1,039 different notices in the *Federal Register* referring to Indians.

The principles of Tribal sovereignty and support and protection of Indian self-government remain in effect today and have formed the backdrop for Indian policy statements from President Washington to President Clinton. Today, Indian governments use these principles to assert their right to self-government; this includes the operation of Tribal court systems, the protection of treaty rights and their lands, and the right to seek fulfillment of federal trust obligations.

Over the years, United States Indian policy has ebbed and flowed in its support of Indian sovereignty and self-governance. Not surprisingly, much of the policy has been influenced by local and national economic interests. Sometimes it has been Congress that has advocated or detracted from Indian sovereignty and at other times it has been the courts. Despite aberrations and anomalies, consistent strains of federal-Indian policy persist. These include: Tribal sovereignty, support of Indian self-governance, and protection of Indian self-government.

### A. Earliest Treaties (1608 - 1830)

From 1608-1830, England and the United States signed the first treaties with Tribal governments. Most treaties created during this time period were designed to promote peace and friendship between the governments. It is important to note that it is during this time period that the first Indian reservations were created. During this same period, the Supreme Court recognized Indian sovereignty in the two historic decisions, Cherokee Nation v. Georgia and Worcester v. Georgia.

### B. Removal (1830 - 1850)

From 1830-1850, the United States instituted the Indian Removal Act policies, designed to move the Tribes west of the Mississippi into the Louisiana Territory. Thousands of people were "removed" from all over the U.S., many of them to what is now the State of Oklahoma. The removals were difficult for Tribal members, who were often forced to leave their territories without adequate provisions and equipment for the long journey ahead. Thousands died along the way. Several Tribes refer to their removals as the "Trail of Tears." Once west of the Mississippi, Tribes were often forced to stay in assigned territories that offered inadequate and unsustainable resources.

### C. Reduction of the Indian Land Base (1850-1871)

From 1850-1871, additional treaties were negotiated, often to reduce the size of reservations. The Great Peace Commission was sent out in 1867 to negotiate peace and friendship treaties with the Tribes. One hundred and sixteen treaties were negotiated during this period.

### D. Assimilation and the Allotment Era (1887 - 1909)

Ironically, this era was, in part, due to well-intentioned, but uninformed, "friends" of the Tribes, operating under the premise that Tribal members were "uncivilized." Reservations were divided into 160-acre "Allotments" which were assigned to every member of an affected Tribe. Acreage left over from the division of the reservations into Indian homesteads was declared surplus and sold to ranchers, farmers and railroads. It was believed the Allotment system would make Tribal people into tax-paying farmers - assimilated into non-Indian communities. The primary result between 1887 and 1934 was the loss of millions acres of land and the displacement of thousands of Indians.

## E. The Indian Reorganization Act of 1934: The Support of Tribal Government

The Tribal Governments operating today are influenced and shaped by the Indian Reorganization Act (IRA) of June 18, 1934. (48 Stat. 984) (25 U.S.C. Sec. 476). This Act, which is also known as the Wheeler-Howard Act, did not "give" governments to the Tribes. They had been governing themselves for thousands of years. Rather, it reaffirmed that Tribal governments had inherent powers which were officially recognized by the United States Government. Powers of Indian Tribes, 55 I.D. 14, 65 (1934).

## F. Termination: An Old Policy With a New Twist (1950 - 1970)

After World War II, the United States' spirit of commitment to Indian self-determination ebbed, and many of the reforms made during the 1930's were reversed. While the war years marked a dormant period in Indian-United States relations, the post-war years saw the development and implementation of a "new" policy which brought a halt to the development of Tribal government for nearly two decades.

Termination was presented as a method of making Indians "first-class citizens", even though they had been made United States citizens in 1924 (Act of June 2, 1924, 43 Stat. 253). By terminating the special trust relationship and a recognition of the sovereign status of Indian Nations, the United States government would be promoting their "assimilation" socially, culturally, politically, and economically into the mainstream of American society. According to the 1949 Hoover Commission Report on Indian Affairs, through termination, Indians would be given the same rights and responsibilities of all other citizens, including the obligation to pay taxes, a notable motivation behind the policy.

The report of the Hoover Commission, published in 1949, advocated complete integration of Indians into the dominant society. With Indian advocacy in the federal sector at a low point, this outlook quickly gained momentum. Certainly, some legislators sincerely believed that integration was both equitable and a desirable solution for the endemic problems encountered by the rural and isolated nature of Indian reservations. This concern and Nationalistic post-war "Americanism" led to an easy passage of House Concurrent Resolution (HCR) 108.

Although a statement of policy only, HCR 108 was quickly followed by the Public Law 280 in August of the same year and subsequently by many pieces of legislation which "terminated" the special relationship between specifically named Indian Tribes and the United States.

Public Law 83-280, Act of Aug. 15, 1953, 67 Stat. 388, passed in 1953, P.L. 280 gave Wisconsin, Oregon, California, Minnesota, and Nebraska criminal and civil jurisdiction in Indian country and provided a mechanism whereby the States could assume permanent jurisdiction over Indian Nations. The law applied to most of the Indian land within the boundaries of those five States. The power given to these States did not include the power to tax, regulate, or decide the ownership or use the Indian property. The statute also authorized

other States to assume civil and criminal jurisdiction over Indian territory by making appropriate changes in their State constitutions or laws. In 1968 the law was amended to require the consent of Indian Nations before States could assume jurisdiction, 25 U.S.C. 1301 et seq.

Over 70 Indian Tribes and rancherias lost federal recognition under the termination policy. Through Congressional legislation, many terminated Tribes have had their federal recognition restored.

### G. U.S. Indian Policy Since 1970--The Self-Determination Era

The authority of Tribal government has been defined further in the last two decades. The termination era ended for all practical purposes in the 1960's and was formally put to rest by Congressional action in the 1980's. The political authority of Tribes to provide effectively for the economic and social well-being of their Tribal members has in the past decade been enhanced by various Presidential policy statements and legislative acts.

The 1970 Indian Policy Statement of President Nixon is often viewed as the beginning of the Self-Determination Era. President Nixon's official federal Indian policy was Self-Determination without termination. Congress, acknowledging that the assimilation/termination policy was a failure, rejected the termination policy by passing the Menominee Restoration Act (1973). Overall, a significant amount of legislation impacting Tribal governments has occurred during this Self-Determination era.

For instance, on January 4, 1975, Congress enacted the Indian Self-Determination and Education Assistance Act was enacted. The Act provides that:

> "The Congress, after careful review of the federal Government's historical and special legal relationships with, and resulting responsibilities to, American Indian people, finds that:
>
> 1. The prolonged federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> 2. The Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

The Indian Self-Determination Act, in addition to reiterating the federal government's recognition of Tribal sovereignty, was intended to strengthen Tribal governments by directing the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) to contract out to Tribes most of the services administered by these agencies. The Act also authorized grants to help strengthen Tribal management of Indian community services. Of singular importance is the

Act's explicit disclaimer that the law is in no way a termination of the federal government's trust responsibility to Indian Tribes.

In the fall of 1988 the U.S. Congress passed a law to bring this Act up to date. The new law is entitled the "Indian Self-Determination and Education Assistance Act of 1988." The law adds this new language:

> "(b) The Congress declares its commitment to the maintenance of the federal Government's unique and continuing relationship with, and responsibility to, individual Indian Tribes and the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian Tribes in the development of strong and stable Tribal governments, capable of administering quality programs and developing the economies of their respective communities.

P.L. 100-472, Act of October 5, 1988, 102 Stat. 2285.

Under Title III, the amendments to the law provide for the support of demonstration Tribal Self-Governance Projects.

The Tribally-Controlled Schools Act of 1988 reemphasizes Tribal control by stating that "the Indian Self-Determination and Education Assistance Act, which was a product of the legitimate aspirations and a recognition of the inherent authority of Indian Nations, was and is a crucial positive step towards the Tribal and community control . . . ." Congress also took the opportunity to make a declaration of policy in this law which "declares its commitment to the maintenance of the federal Government's unique and continuing trust relationship with and responsibility to the Indian people. . . ." Congress defined a National Goal towards Indian people in these words:

> The Congress declares that a major National goal of the United States is to provide the resources, processes, and structures which will enable Tribes and local communities to effect the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

The Act specified that "Congress affirms the reality of the special and unique educational needs of Indian peoples, including the need for programs to meet the linguistic and cultural aspirations of Indian Tribes and communities." The Act also reaffirmed federal relations by stating that "Congress declares its commitment to these policies and its support, to the full extent of its responsibility, for federal relations with the Indian Nations."

## III. Indian Country: Selected Legal Doctrines

Federal Indian law refers to United States federal law regarding the treatment of Tribal governments, lands, resources, and people. Although the United States, early in its history, recognized that the Indian Nations are sovereign governments, the relationship between the federal, State, and Tribal governments has constantly been evolving. As a result, Indian law is one of the most complex and dynamic fields in the law today. The scope of federal Indian Law is very broad including but not limited to: environmental, natural resource, international, property, tax, administrative, tort, and corporate law. For more than a century, Presidents, Supreme Court Justices, Attorney Generals, Secretaries of the Interior, and Commissioners of Indian Affairs have commented on the complex and highly specialized nature of federal Indian law. Federal law governing Indians generally consists of the United States Constitution, treaties, agreements, statutes and regulations, executive orders, and court decisions. Federal Indian law is vital to Indian survival. Whether water, land, oil, or the very ability to govern themselves is the crucial issue for an Indian Nation, Native Americans look to federal Indian Law to make sure their rights are secure.

### A. Tribal Sovereignty

Concepts of sovereignty and government were discussed by the United States Supreme Court as early as the 1830's. From that time through the present the Supreme Court has generally followed a course of upholding Indian sovereignty and the ability of Tribes to exercise sovereign powers.

While the exercise of sovereign powers by Indian governments has been restricted to some extent by the terms of treaties and statutes passed by Congress to carry out those treaties, there is no doubt that the United States and other Nations have recognized the inherent sovereignty of Indian Nations and their right to self-government. Handbook of Federal Indian Law, at 232; U.S. Department of Interior, Solicitors Opinion, Powers of Indian Tribes, at 55 I.D. 14 (1934).

Today, when viewing Tribal sovereignty and Tribal governmental powers, it is important to remember that Tribes generally have all governmental powers that have been retained and not expressly taken. In other words, Indian Tribes generally have all the powers of self-government of any sovereign except insofar as those powers have not been modified by treaty or repealed by an act of Congress. Tribal governmental powers are generally not delegated powers granted by express acts of Congress, but instead, are the inherent powers of sovereignty which have never been extinguished. Each Indian Tribe begins its relationship with the federal government as a sovereign power, recognized as such in treaty and legislation. As a result, the laws and decisions of the Tribal governing authorities have the force of the law.

The most basic of all Indian rights, the right to self-government, is not a right that has been granted by the United States Congress, the President, or the Courts. Tribes are qualified to exercise powers of self-government because they are independent, separate, political entities.

The inherent sovereign authority of Indian Tribes is described by Felix Cohen, in the *Handbook of Federal Indian Law.*

> The most basic of all Indian rights, the right to self- government, is the Indians' last defense against administrative oppression, for, in a realm where the States are powerless to govern and where Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no-man's land in which government can emanate only from officials of the Interior Department or from the Indians themselves. Self-government is thus the Indians' only alternative to rule by a government department.[21]

The powers of sovereignty have been limited from time-to-time by special treaties and laws. Statutes of Congress, then, must be examined to determine the limitations of Tribal sovereignty rather than to determine its source or its positive content. What is not expressly limited remains within the domain of Tribal sovereignty.

In October of 1934, Nathan Margold, Solicitor of the Department of the Interior, was called upon to render an opinion entitled the Powers of Indian Tribes. This opinion, which appears at 55 I.D. 14, was intended to interpret the meaning of Section 16 of the Wheeler-Howard Act in which the phrase the "powers vested in any Indian Tribe or Tribal council by existing law" appears. Solicitor Margold noted in his opinion,

> [Powers vested in any Indian Tribe or Tribal council by existing law] does not refer merely to those powers which have been specifically granted by the express language of treaties or statutes, but refers rather to the whole body of Tribal powers which courts and Congress alike have recognized as properly wielded by Indian Tribes, whether by virtue of specific statutory grants of power or by virtue of the original sovereignty of the Tribe insofar as such sovereignty has not been curtailed by restrictive legislation or surrendered by treaties.

The opinion addresses a number of Tribal government powers in depth including "the Power of an Indian Tribe to Define its Form of Government." The following is an introductory paragraph of that subject:

> Since any group of men, in order to act as a group, must act through forms which give the action the character and authority of group action, an Indian Tribe must, if it has any power at all, have the power to prescribe the forms through which its will may be registered. The first element of sovereignty, and the last, which may survive successive statutory limitations of Indian Tribal power is the power of the Tribe to determine and define its own form of government. Such power includes the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to

---

[21]Cohen, Handbook of Federal Indian Law 122 (1988).

observe in their capacity as officials, and the forms and procedures which are to attest the authoritative character of acts done in the name of the Tribe. These are matters which may be determined even in a modern civilized nation by unwritten custom as well as by written law. The controlling character of the Indian Tribes' basic forms and procedures has been recognized by State and federal courts, whether evidenced by written statute or by the testimony of tradition.

The inherent sovereignty of Indian Nations was recognized in Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). In that case, members of the Tribe asked a U.S. court to stop the Sioux Nation from enforcing two Tribal laws in its Indian courts. One law made adultery a crime. The other law imposed a tax on persons who leased Indian lands for grazing. The U.S. court of appeals upheld the Tribe's power to make and enforce its own laws. The court said that Indian Nations were recognized by the U.S. Constitution as sovereign governments which possessed "all the inherent rights of sovereignty" except where Congress had specifically restricted their powers. The inherent powers of Indian Nations included both the power to make and enforce criminal laws and to tax. Neither of these powers had been limited by Congress and since the powers were inherent, no act of Congress was necessary to support those powers.

In Williams v. Lee, 358 U.S. 217 (1959), a non-Indian who operated a store within the Navajo Nation sued an Indian customer in the Arizona State courts claiming that the Indian customer had not paid for goods sold to him on credit. The Indian appealed to the U.S. Supreme Court claiming that the State courts did not have jurisdiction over the case. The Court recognized that under treaties with the Navajos, "the internal affairs of the Indians remained exclusively within the jurisdiction of whatever Tribal governments existed," and that their sovereign power had not been limited by Congress. Since the Navajo Tribal court exercised jurisdiction over suits by non-Indians against Indians arising on the reservation, the court held that "to allow the exercise of State jurisdiction here would undermine the authority of the Tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves."

In conclusion, by virtue of their sovereign status, Indian Tribes in the United States continue to function as permanent ongoing political institutions exercising the basic powers of government necessary to fulfill the needs of their Tribal members.

### B. Federal Trust Responsibility

The federal trust responsibility arises from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian Tribes. The trust relationship was not created by a single document nor is its scope defined in any one place. Overall, the trust responsibility relates to the United States' unique legal and political relationship with Indian Tribes. The trust relationship relates directly to the development and implementation of federal policy. It requires that the federal government consider the best interests of the Tribes in its

dealings with them and when taking actions that may affect them. The trust responsibility includes protection of the sovereignty of each Tribal government.

In a narrower sense, the trust responsibility defines the precise legal duties of the United States in managing property and resources of Indian Tribes and, at times, individual Indians. In protecting Indian property, the United States must meet the stringent standards of good faith and due diligence. These standards apply to all dealings with the Tribes and to all actions impacting the Tribes. For example, the federal government must meet these standards in managing and accounting for monies in Indian trust funds, as well as protecting and managing Indian lands and natural resources.

Congress plays a primary role in defining the trust responsibility. While Congress has placed major trust responsibilities in the Department of Interior, it also has delegated certain duties to other government agencies. Every federal Department and Agency is responsible for upholding the federal trust responsibility to the Tribal governments. For example, the federal government's trust responsibility on issues impacting human health or the environment are upheld primarily through the cooperative efforts of the Environmental Protection Agency, the Department of Interior's Bureau of Indian Affairs and the Department of Health and Human Services's Indian Health Service, although when needed other agencies also lend support.

### C. Treaty Rights

One of the more misunderstood areas of federal Indian law is Indian treaties. Under international law, treaties are a means for sovereign nations to relate to each other. European Nations first recognized the need to enter into treaties with Indian governments shortly after 1500. All of the colonial powers, and later, the United States recognized the sovereignty of Indian Nations by entering into over 800 treaties with Indians.

The U.S. made hundreds of treaties and "agreements" with Indian Nations. The first U.S.-Indian Treaty was the Treaty with the Delaware in 1778. The purposes of treaties varied. Prior to 1830, a significant number of the treaties were designed to promote peace, friendship, and commerce. Later however, the treaties often were designed to obtain more land and resources from the Tribes.

According to the *Handbook on Federal Indian Law*, within any examination of Indian treaties with the United States, it is important to acknowledge that:

> The legal force of Indian treaties did not insure their actual enforcement. Some important treaties were negotiated but never ratified by the Senate, or ratified only after a long delay. Treaties were sometimes consummated by methods amounting to bribery, or signed by representatives of only a small part of the signatory Tribes. The federal

government failed to fulfill the terms of many treaties, and was sometimes unable or unwilling to prevent States, or white people, from violating treaty rights of Indians.[22]

As more and more treaties were signed, committing the federal government to large financial payments, a dispute arose in Congress. Each treaty required the United States to pay, often through a combination of "gifts", money, and materials, a purchase price or a reparation amount to the Tribal governments participating in the treaties. Under the U.S. Constitution, only the Senate ratifies treaties. The U.S. House of Representatives, the body with responsibility for budget, wanted to have more control over payments made through Indian treaties. With the passage of a rider to an Indian Appropriations Act in 1871, the U.S. ceased to make "treaties" and began to make "agreements" with Indian Tribes. This offered the U.S. House of Representatives more control in the process.

Although the United States no longer makes treaties with the Indian Tribes today, the federal government continues to consult with Indian Nations and to make agreements with them concerning a wide variety of issues including: human health and environmental protection, management of Tribal land and resources, economic development, housing, and education.

Through treaties, Indian Nations ceded certain lands and rights to the United States and reserved certain lands ("reservations") and rights for themselves. In many treaties (especially those negotiated during the 1850's and 1860's), Indian governments reserved hunting, fishing, and/or gathering rights in territories beyond the land which they reserved. These were typically called "usual and accustomed" places. (See examples at the end of this chapter.) Generally, unless changed or abrogated by a subsequent treaty or statute, treaties are still the law of the land. In 1832, Chief Justice John Marshall said this:

> The words "treaty" and "nation" are words of our language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are applied to all in the same sense.

Worcester v. Georgia, 31 U.S. 515, 559 (1832).

***Continued Validity of Treaties***

U.S. Courts have abided by principles of International Law when interpreting treaties. Thus, any ambiguities are usually interpreted in the favor of the weaker party. In the case of Indians, because the negotiations were often held in foreign languages, such as English, and the cultural traditions were different, such as the concept of land ownership, the courts have

---

[22]Cohen, Handbook of Federal Indian Law, 36 (1988).

traditionally given the Indians the best possible interpretation. In fact, " a cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians." [23]

Many people unfamiliar with Indian history and Indian law fail to support Indian treaty rights because they believe that a breach or violation of any part of the treaty on the part of the United States has somehow nullified them. A breach or violation of treaty terms does not nullify a treaty. Generally, Congress must specifically and directly repeal a treaty by legislation to invalidate it. Age alone has not invalidated treaties as the "Supreme law of the land."[24]

*Continued Significance of Treaties*

Treaties are very important in understanding the rights of Indian governments and Indian people today. The 1979 United States Supreme Court decision of Washington v. Washington State Commercial Passenger Fishing Association, ruled on the validity of treaties signed in 1854 with Indians of the Pacific Northwest. In this decision, the Court stated: "a treaty, including one between the United States and an Indian Tribe, is essentially a contract between two sovereign nations...." The Court also restated general principles about treaties and recognized that, through treaties, Indian Nations granted certain rights to the United States and reserved land and rights for themselves.

Treaties are significant to all Tribes, even to those Tribes that did not enter into treaty relations with the federal government, because they acknowledge the sovereign nature of Tribal governments and reserve for Indian Tribes critical rights and access to lands and resources. First, they established a pattern of legal and political interaction based on negotiation between two sovereigns. Second, treaties form the foundation of international as well as federal Indian law affecting all Tribal governments. Finally, even though some Tribes did not formally enter into a treaty with the United States government, subsequent dealings through executive orders or legislation generally have been based on a series of consultations and negotiations between a Tribe and the federal government, similar to the treaty process.

## D. Criminal and Civil Jurisdiction

The term "jurisdiction" relates to those powers that a government has over people and property within a distinct geographical boundary. Jurisdictional disputes between federal, State, and Tribal governments result in the most complex problems in the field of Indian law.[25] Tribal jurisdictional issues were first examined by the United States Supreme Court, early in the country's history. In 1832, in Worcester v. Georgia, Chief Justice Marshall affirmed the sovereignty of the Cherokee Nation and rejected the idea that State laws can have any force and

---

[23] Cohen, Handbook of Federal Indian Law, 37 (1988).

[24] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876).

[25] Canby, American Indian Law in a Nutshell, 89 (1981).

effect on Indians within Tribal boundaries. Presently the general rule remains the same: States have no authority over Indian affairs, Tribal governments, or reservation lands. Numerous judicial decisions acknowledge the doctrine of Federal Preemption to handle Indian affairs when examining what jurisdiction States may exercise in Indian country.

State Constitutions and Enabling Acts reinforce the State exclusionary concept. Disclaimers of jurisdiction over Indians residing within the borders of a State were common in those former U.S. territories admitted to Statehood in the late nineteenth century having significant Indian populations. When dealing with the problem of federal or State jurisdiction, the test is generally not whether a State had disclaimed jurisdiction, but whether Congress has authorized such jurisdiction for the State in federal legislation.

More generally, it should be noted that, Tribal governments have the general power to 1) make laws governing the conduct of Indians in Indian Country, 2) establish bodies such as Tribal police and courts to enforce the laws and administer justice, 3) exclude or remove people from lands within Tribal jurisdiction for cause, and 4) regulate hunting and fishing, land use, environmental pollution, and other activities of non-Indians on fee lands within reservations that may have some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe.

The power of the Tribes to establish courts is firmly recognized in U.S. federal law. In Iron Crow v. Oglala Sioux Tribe, a federal court of appeals upheld the jurisdiction of a Tribal court to punish members of the Tribe for violating a Tribal law, and to enforce a Tribal tax on non-Indians who leased lands on the reservation. The court stated that the power of the Tribe to establish courts to enforce its laws was not dependent upon any federal law, but was inherent in the Tribe's sovereignty.

In Oliphant v. Suquamish Indian Tribe, 98 S. Ct. 1079 (1978) two non-Indians violated Tribal laws on the Port Madison Reservation and were convicted and sentenced by the Tribal court. In this case, the Supreme Court held that Indian Tribes have no inherent power to try and punish non-Indians who commit crimes on Indian reservations unless the Tribe has been granted such power in a treaty of agreement or by act of Congress. The Court stated:

> "Indian Tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the federal government," the Court maintained that "by submitting to the overriding sovereignty of the United States, Indian Tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."

The Supreme Court could find no law which specifically removed the Tribal power to assert criminal jurisdiction over non-Indians, yet it ruled that the exercise of this power is "inconsistent with the status" of Indian Tribes. The Court found that the Tribe's criminal jurisdiction over non-Indians had implicitly been curtailed by the entire history of Indian-United States relations.

For the first time, the Supreme Court declared that a fundamental Tribal power could be extinguished by implication.

The case of Montana v. United States, 450 U.S. 544 (1981), raised the question of the extent of Tribal powers to regulate the conduct of non-Indians on lands held in fee by non-members within the exterior boundaries of a reservation where the Tribe was relying only on Tribal authority. The Supreme Court decided that the Tribe did not have regulatory powers over non-Indians on fee lands inside the reservation unless 1) the non-Indians engage themselves in some kind of consensual relationship through commercial dealings, contracts, leases or other arrangements, or 2) the non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe."

This court ruling, as well as the noted exceptions, comprise the "Montana Test" which EPA employs in an effort to determine jurisdictional authority. Under EPA's formulation of the test, a Tribe can demonstrate "inherent" authority over the activities of non-Indians on fee lands by showing that the activities to be regulated on the fee lands threaten or have some direct effect on the political integrity, the economic security, or the health and welfare of the Tribe that is serious and substantial. EPA relies on this case, as well as Brendale and Bourland (discussed below) to determine the scope of Tribal inherent authority to regulate activities on non-Indian owned fee lands located within a reservation, under serval environmental statutes.

In the splintered decision of Brendale v. Confederated Tribes and Bands of the Yakima Nation, 429 U.S. 408 (1989), the Supreme Court found that the Tribe had authority to zone fee lands located in an area of the Yakima reservation heavily populated by Indian Tribal members, but that the State had zoning authority over fee lands on a part of the reservation in the suburbs of Yakima, Washington, where there was substantial non-Indian ownership. In developing its regulations for water quality standards programs on reservations under the Clean Water Act, EPA read the primary significance of Brendale to be in its result, which was fully consistent with the Montana test. The Court applied the Montana test, finding Tribal authority over activities that would threaten the health and welfare of the Tribe. Conversely, the Court found no Tribal jurisdiction where the proposed activities would not threaten the Tribe's health or welfare. In 1993, the Supreme Court handed down its most recent decision on the issue of Tribal civil jurisdiction over non-Indians. In South Dakota v. Bourland, 113 S.Ct. 2309 (1993), the Court employed the original language of Montana's "direct effects" standard, thus reinforcing the original Montana test.

In Washington Department of Ecology v. United States Environmental Protection Agency, 752 F. 2d 1465 (9th Cir. 1985), Washington State had requested and was granted the authority to administer environmental programs within the State with the exception of Indian lands. Washington then filed suit against the Environmental Protection Agency seeking to prevent the agency from denying its authority over reservations in the State. The District Court upheld EPA's determination that Washington had failed to demonstrate its jurisdiction over Tribal lands. The Ninth Circuit Court of Appeals found that RCRA did not authorize the States to regulate Indians on Indian land.

## E. Tribal Sovereign Immunity and Suits Against Tribes

Generally Tribes, as a function of their sovereign status, are immune from suits unless the Tribe has consented thereto or been subjected thereto by a superior power.[26] A suit against an Indian Tribe cannot be maintained in the absence of clear Congressional authorization.[27]

> Indian Tribes, like the United States, are sovereigns immune from civil suit except where expressly authorized.
>
> ....
>
> It has been the settled policy of Congress not to sanction suits generally against . . . Indian Nations . . . . In respect to their liability to be sued by individuals, except in a few cases, they have been placed by the United States, substantially, on the plane occupied by the States under the eleventh amendment to the constitution. The intention of congress to confer such a jurisdiction [to hear a suit against an Indian Tribe] upon any court would have to be expressed in plain and unambiguous language.[28]

## F. The Alaska Difference

The status of Alaskan Natives is an area of continuing controversy. The Russian-American Treaty of Cession in 1867 contained provisions which required Alaskan Natives to be treated on the same basis and under the same laws as the Native Americans in the lower 48 States. In 1934 the Indian Reorganization Act (IRA) definitions of "Indian" included "Eskimos and other aboriginal people of Alaska. . . ." A 1936 amendment to the IRA made clear that "groups of Indians in Alaska" could adopt constitutions, bylaws and seek charters of incorporation under which to organize their business enterprises.

Because of the great distances and harsh weather conditions that are present in Alaska, native governments have primarily and traditionally operated at the local level. In fact, there are over 1,200 individual native village and community associations operating in Alaska. The majority of these native villages and community associations used the provisions of the IRA to reorganize their governments in the 1930s. These governments adopted IRA, or western, style

---

[26] Cohen, Felix S. Handbook of Federal Indian Law, United States Government Printing Office, Washington 1982.

[27] Id.

[28] Id.

constitutions and function in a manner similar to many of the Indian Nations in the continental United States.

Congress dealt with the status of Alaska Native Tribes after the discovery of a huge oil field on the "north slope" of the Brooks Range. Alaska Natives asserted claims of aboriginal title over the area including the trans-Alaska oil pipeline right-of-way. To settle the conflict, in 1971 Congress passed the Alaska Native Claims Settlement Act (ANCSA). The Act greatly affected the already existing and functioning Tribal governments. Under the terms of ANCSA all aboriginal titles in Alaska were extinguished. In addition, all but one, the Annette Island Reserve, of the few Indian reservations in Alaska were disestablished. As compensation the ANCSA transferred forty-four million acres and approximately 1 billion dollars to the Alaska Natives through a structure of regional and village corporations.

ANCSA provided this compensation to 203 newly-formed village corporations, rather than to the existing Tribal governments. The 203 native village corporations are grouped under 12 regional corporations. As a result, most of the financial power and control over the lands now lie with the native corporations rather than the Tribal governments.

As a result of ANCSA, four different entities, the State of Alaska, the regional and village corporations, and the Tribal governments, have an impact on the lives of Alaska Natives. Although the native corporations, hold title to the land and are able to exert financial control over the real property, the existing Tribal governments still exercise much control over the political, social, cultural, and religious life of Alaska Natives. The Tribal governments are also the administrators of a vast array of social, medical, environmental, and educational services.

On January 12, 1993, the Solicitor for the Department of the Interior released a legal opinion on the powers of Alaska Native villages. Governmental Jurisdiction of Alaska Native Villages Over Land and Non members, M-36975 (Jan. 12, 1993). The opinion created uncertainty in its conclusion that specific factual determination had to be made in each case as to whether or not Alaska Native communities were Tribes with inherent sovereign powers.

This confusion surrounding the status of Alaska Natives led to a Federal Register notice on October 21, 1993 (58 Fed. Reg. 54,366) which included a list of 226 federally recognized Alaska Tribes. The list reaffirmed the Tribal governmental status of Alaskan Natives in this language:

> This list is published to clarify that the villages and regional Tribes listed below are not simply eligible for services, or recognized as Tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian Tribes by virtue of their status as Indian Tribes with a government -to- government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged Tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other Tribes; and are subject to the same limitations imposed by law on other Tribes.

On November 24, 1993, Congress passed the Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994). In this Act, Congress expressly found the Central Council of Tlingit and Haida Indian Tribes of Alaska to be a federally recognized Indian Tribe.

Generally, as with the Tribes in the lower 48 States, eligibility of Alaska Native Villages under EPA's programs must be made on a program-by-program basis as well as according to the specific directives of each statute.

# CHAPTER THREE
# OVERVIEW OF ENVIRONMENTAL PROTECTION ON INDIAN LANDS

Due to the complexity of Indian and environmental law, individuals working on environmental issues within Indian Country need a strong understanding of both Indian and environmental law and policy. For example, jurisdictional issues will frequently impact environmental administration. Knowledge of relevant Indian and environmental law and policy becomes increasingly significant because these issues can become further complicated when trying to address both Tribal and State interests.

This chapter will review concepts that are most relevant to those individuals who work directly with the Tribes to strengthen environmental protection in Indian country and those who develop policies; regulations and guidance that may affect Tribal resources and environmental programs. The chapter discusses EPA's approach for implementing its Indian program. It will also highlight current initiatives of both EPA and the Tribes to implement EPA's programs on Tribal lands.

## I. U.S. Environmental Protection Agency (EPA): Overall Mission and Implementation

Over the last ten years, EPA has developed a strong Tribal program. The Agency's *Policy for the Administration of Environmental Programs on Indian Reservations* (Indian Policy), issued in 1984 and reaffirmed in 1994, recognizes the government-to-government relationship between the Agency and Tribal governments and recognizes Tribes as the most appropriate party for regulating Tribal environments where they can demonstrate the authority and capability to do so. EPA serves federally-recognized Tribes, but in some instances may also provide funding and technical assistance to non-federally recognized Tribes through the Environmental Justice program.

EPA has the authority to approve Tribal management of federal programs under most environmental statutes. These statutes originally did not explicitly allow for authorization of Tribal programs. During the 1980's several of EPA's statutes were specifically amended requiring the Agency to promulgate regulations for Tribes to receive program authorization. These amendments, coupled with the Agency's 1984 Indian Policy, have allowed Tribes to become increasingly included in EPA's programs and operations. In addition, the Agency has noted that under several statutes where Congress did not directly address the issue of whether EPA can approve Tribal programs, EPA nonetheless has the discretion to review and approve such programs.

EPA statutes which have been amended specifically to allow for EPA authorization of Tribal programs:

- Safe Drinking Water Act, 1986
- Clean Water Act, 1987
- Clean Air Act, 1990

In several instances, EPA has reasoned that even though Congress hasn't specifically provided for Tribal assumption of environmental programs in legislation, the Agency has the discretion to allow for Tribal programs. Two acts, where the opportunity to apply for environmental programs has been extended to Indian Tribes by this method are:

- Resource Conservation and Recovery Act
- Toxic Substance Control Act

In addition, three other EPA statutes allow for a limited Tribal role similar to the State's role. These are:

- Federal Insecticide, Fungicide, and Rodenticide Act
- Emergency Response and Community Right-to-Know Act
- Comprehensive Environmental Recovery, Compensation, and Liability Act

Currently, a significant number of Tribal governments are regulating their resources and managing environmental programs. For example, as of July 1996, approximately 100 Tribes had received eligibility to administer grant programs which are intended to build capacity and to assist Tribes in developing EPA programs. Additionally, 18 Tribes have also been authorized by EPA under the Clean Water Act (CWA) to develop water quality standards and several Tribes have developed Tribal standards which have also been approved. Overall, many Tribes intend to eventually implement and assume enforcement responsibility for various EPA programs.

Within the last ten years, the EPA has seen a surge of Tribal environmental activity. Several of the more significant Tribal environmental efforts with the EPA include:

- Application for EPA program development grants
- Tribal employment of environmental technical staff
- Staff training provisions designed to enhance employee environmental capacity
- Acquisition of necessary equipment
- Adoption of necessary laws and codes
- Development of EPA approved programs designed to protect surface and drinking water, air quality, and land, through establishing solid waste management programs
- Tribal resources monitoring
- Construction and improvement of wastewater treatment facilities
- Development of Tribal Environmental Agreements

A recent survey confirms this and found that both the Tribes and the EPA are engaged in a wide variety of environmental protection activities on reservations, especially Clean Water Act

programs designed to address water quality protection.[29] However, the study also found that there still remain a large number of Tribes which are not regulating water quality nor are they significantly involved in other projects to develop environmental programs. Tribes may or may not develop environmental programs for a variety of reasons (e.g., costs involved, technical expertise and assistance availability). Currently, EPA is developing strategies to help fill this gap in protection.

This section will provide an overview of what Tribes and EPA are doing in the area of environmental regulation and management as well as some of the overarching rules impacting these actions. The information is drawn from the above-mentioned survey, data generated by the EPA's American Indian Environmental Office and the workgroup which participated in the development of this manual.

When sifting through the environmental statutes and regulations, and reviewing the laws and court decisions, the following are the general principles for implementing EPA's programs in Indian Country (It is cautioned that various federal statutes may use or define terms (e.g., reservations) that will control the applicability of a particular statute in Indian Country.):

1. EPA has been granted authority by Congress to ensure that environmental programs designed to protect human health and the environment are carried out across the United States.

2. Both States and Tribes may apply for environmental programs.

3. Consistent with federal Indian law and federal policy, Tribal governments generally have regulatory authority over environmental quality within their own territory.

4. Generally, in the absence of an EPA approved Tribal program on Indian country, the federal government has jurisdiction.

5. EPA has a federal trust responsibility in implementing Federal environmental statutes.

## II. Federal Policies and Executive Orders

In the development and implementation of EPA programs, the Agency must take into consideration a number of federal policies and executive orders relating to Indian Tribes and Native American communities. An illustrative selection of the most often controlling policies and executive orders is discussed below. Copies of the full text can be found in the appendix.

---

[29]Gover, Stetson and Williams. National Indian Policy Center Survey, "Survey of Tribal Actions to Protect Water Quality and the Implementation of the Clean Water Act," Washington, D.C., September 1994. The survey collected and analyzed information on 223 Tribes from both the Tribes and EPA regional offices. This represents 41% of the total number of federally-recognized Tribes and Alaskan communities.

### A. Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments

This memorandum was signed in April 1994, "in order to ensure that the rights of sovereign Tribal governments are fully respected." This memorandum is applicable to every department and agency and component bureau and office in the executive branch and is to be followed in all interactions with federally-recognized Native American Tribal governments. The purpose of the memorandum is to clarify the responsibility of the federal government to operate within a government-to-government relationship with federally-recognized Native American Tribes. Among other things, the memorandum specifically states:

> The United States Government has a unique legal relationship with Native American Tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As the executive departments and agencies undertake activities affecting Native American Tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of Tribal sovereignty.

### B. Executive Order and Memorandum on Environmental Justice

Executive Order 12898 on *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* and its accompanying memorandum were signed in February 1994. The order is designed to focus federal attention on the environmental and human health conditions in minority communities and low-income communities and to promote non-discrimination in federal programs substantially affecting human health and the environment. Specifically, section 6-606 of the order states that "each [f]ederal agency responsibility set forth under this order shall apply equally to Native American programs." The Order also specifically addresses subsistence consumption of fish and wildlife. The accompanying memorandum also specifically identifies the need for federal agencies to consider environmental justice implications when taking actions pursuant to the National Environmental Policy Act.

### C. Executive Order on Sacred Sites

Executive Order 13007 was signed in May 1996, to promote accommodation of access to American Indian sacred sites by Indian religious practioners and to provide additional protection for the physical integrity of such sacred sites. The Order applies to federally owned lands, except Indian Trust lands. This Order reflects the federal government's continuing commitment to the religious freedom of all Americans. The Order supplements the protections afforded by the American Indian Religious Freedom Act Amendments, the Religious Freedom Restoration Act, and the Presidential directive of April 1994, requiring executive branch departments and agencies to accommodate the need for eagle feathers in the practice of American Indian religion.

## III. EPA Policies, Guidance, and Memorandums of Understanding

### A. EPA Policy for the Administration of Environmental Programs on Indian Reservations (Indian Policy)

This Policy was first issued by EPA in 1984 and since reaffirmed by every subsequent Agency Administrator, including Administrator Browner in March 1994. The policy is intended to provide guidance to EPA staff and managers in dealing with Tribal governments and in responding to the problems of environmental management on Indian reservations in order to protect Tribal health and environments. In carrying out EPA programs, this Policy "recognizes Tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing [environmental] programs...consistent with Agency standards and regulations" for Indian reservations. As such, the Policy calls on the Agency to respect the government-to-government relationship and "to give special consideration to Tribal interests in making Agency policy." The policy also states that,

> Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government).

This Policy was accompanied by an Implementation Guidance which established the National Indian Work Group consisting of Indian Coordinators to be appointed in each of the Headquarters Program Offices and Regional Offices. In addition, the Guidance also formally placed responsibility for the implementation of Tribal environmental programs in three EPA Offices which is where it remained until the establishment of the American Indian Environmental Office in October 1994.

### B. Federal, Tribal, and State Roles in the Protection and Regulation of Reservation Environments (Concept Paper)

This paper was prepared by a workgroup coordinated by Region VIII to formalize the Agency's role in strengthening Tribal governments' management of environmental programs. At the time, like today, the Agency was under pressure from some States to approve State programs on portions of Indian reservations. Administrator Reilly endorsed the paper in a July 1991 memorandum to EPA managers. The paper expresses the objective of providing for coherent and consistent environmental regulation in reservations and preventing checker boarding of regulatory programs on Indian reservations. The paper also recognizes that differences between the interests of Tribal and State governments can be sensitive and sometimes extend well beyond the specific issues of environmental protection. Thus, the paper also directs EPA staff to promote cooperative approaches to environmental problems that involve both Tribes and States. The principles behind this approach are administrative clarity in the operation of regulatory programs, effective and efficient environmental management, and the support of Tribal self-determination.

### C. Tribal Operations Action Memorandum

AIEO is only one component of the Agency's effort to strengthen the public health and environmental protection in Indian Country and to improve EPA's government-to-government partnership with Tribes. In July 1994, Administrator Browner issued a memorandum outlining steps for prompt implementation throughout the Agency. The action items are as follows:

- Establishment of Tribal/EPA Environmental Agreements (TEAS)
- Establishment of Program and Regional Work plans based on TEAS
- Implementation of Management and Compliance Activities
- Review of Program and Regional Indian Program Organization -- and where necessary -- modification of the organization to strengthen Tribal operations
- Insurance that an Effective EPA/Tribal Liaison Capacity Exists to Provide Direct Field Assistance to Tribes
- Provision of Training to EPA Management and Staff on How to Work Effectively with Tribal Governments
- Enhanced Communications with Tribes
- Use of Available Discretion to Consolidate Issuance and Administrative Requirements of Grants
- Investment of Resources into Tribal Operations.

Please see the attached copy of the July 1994 Action Memorandum for more detail on each of the Administrator's priorities for the Agency's Indian Program.

### D. EPA Environmental Justice Strategy

EPA issued this Strategy in April 1995 in response to Executive Order 12898 on environmental justice. Among other actions, the strategy specifically addresses American Indian, Alaska Native, and Indigenous environmental protection. Many of the initiatives outlined in the Strategy are steps towards achieving more broad public participation and equity in environmental protection for American Indians and indigenous communities. The Strategy calls on the Agency to continue to work to protect and improve Tribal health and environmental conditions by "providing outreach, education, training, and technical, financial, and legal assistance to develop, implement, and maintain comprehensive Tribal environmental programs." The Strategy also states that when the Agency is conducting "human health and environmental research and other activities involving Tribal and indigenous environments and activities [to] take into account cultural use of natural resources."

### E. EPA Region 8 Policy for Environmental Protection in Indian Country

EPA Region 8 issued this Policy in March 1996, to provide detailed guidance and information to the Region's managers and staff on how to implement EPA's Indian Policy. This guidance is intended to respond to and clarify questions that are most frequently raised by both

internal and external Agency customers and constituents, relating to: 1) Agency protocol in working with federally recognized Tribes; 2) Agency support of federally recognized Tribal governments in building capacity to manage environmental programs; and 3) Agency positions on environmental program responsibilities and jurisdiction. Currently an Agency work group, including Region 9 as the lead region, Region 8, and the American Indian Environmental Office, is reviewing the Policy to identify components that could be implemented Agency-wide.

### F. Memorandum of Understanding Between the Bureau of Indian Affairs, the Environmental Protection Agency, the Department of Housing and Urban Development, and the Indian Health Service

The Bureau of Indian Affairs, the U.S. Environmental Protection Agency, the Department of Housing and Urban Development, and the Indian Health Service entered into this Memorandum of Understanding (MOU) in June 1991. The MOU recognizes that each of the agencies have responsibilities and interests pertaining to the protection of human health and the environment as it relates to pollution control on Indian lands. The purpose of the MOU is to identify areas of mutual interest and responsibility of the four agencies and to encourage the coordination of the agencies' activities to promote the most efficient and integrated utilization of resources.

## IV. National Tribal Programs

### A. The American Indian Environmental Office

The American Indian Environmental Office, working with its Regional components, is responsible for coordinating the Agency-wide effort to strengthen public health and environmental protection in Indian Country. AIEO oversees development and implementation of the Agency's Indian Policy and strives to ensure that all EPA Headquarters and Regional Offices implement their parts of the Agency's Indian Program in a manner consistent with EPA's trust responsibility to protect Tribal health and environments, Administration policy to work with Tribes on a government-to-government basis and support of Tribal self governance. AIEO's responsibilities also include:

- providing multi-media program development grants to Tribes under the Indian Environmental Assistance Program Act;
- negotiating Tribal/EPA Environmental Agreements that identify Tribal priorities for building environmental programs and also for direct, EPA program implementation assistance;
- developing tools to assist Tribal environmental managers in their decisions on environmental priorities;

- developing training curricula for EPA staff on how to work effectively with Tribes; and

- working to improve communication between the Agency and its Tribal stakeholders in a number of ways, including assistance to Agency Offices as they consult more closely with Tribes on actions that affect Tribes and their environments, and support for regular meetings of the Agency's Tribal Operations Committee.

EPA's Indian Program is implemented primarily by EPA Regions and Headquarter Program Offices.

### B. Building Tribal Capability

Capability building, sometimes referred to as "capacity building", entails providing Tribes with grants, training, and program technical assistance, as they develop their own environmental programs. A significant source for building capability is through grants provided under the Indian Environmental General Assistance Program (GAP) Act.

The objectives of the GAP Act are to provide funds to federally-recognized Tribal governments to build capacity to administer environmental programs and to provide technical assistance from EPA in the development of multi-media programs. Capability building activities eligible for funding under GAP include: planning, hiring staff, monitoring, and assessing environmental resources and pollution threats. GAP provides Tribes with an opportunity to build a core environmental program and prioritize environmental problems.

Many EPA program-specific grants also help to build Tribal environmental capability and can be used in concert with GAP grants to establish an integrated Tribal environmental program. In order to receive program specific grants in the same manner as States, Tribes generally establish their eligibility through a process referred to as "Treatment in the same manner as a State" (TAS).

In addition to grants, the EPA also provides training and technical assistance to Tribes and provides guidance on developing and implementing environmental programs. In some cases, EPA provides on site staff to work with Tribes as they seek to further develop environmental programs. EPA also hosts Tribal interns and program staff who work at EPA to acquire an understanding of how Agency Environmental Programs work and to bring this knowledge back to Indian Country.

### C. Tribal/EPA Environmental Agreements

To build EPA's Indian Program in an manner consistent with Tribal environmental priorities and EPA's statutory responsibilities, AIEO is developing Tribal/EPA Environmental Agreements (TEAs) with all interested Tribes. As designed by EPA is consultation with Tribal

leaders and environmental directors, TEAs describe the past and current condition of a Tribe's environment, the Tribe's long-range environmental goals and near-term priorities for EPA assistance. These agreements are intended to assist the Tribes and EPA in developing multi-year plans for Tribal assumption of environmental programs and EPA direct implementation of environmental programs in Indian country. The Administrator's July 1994 Action Plan for the EPA Indian Program makes TEAs the cornerstone on which Regions and National Program Managers are to build their Indian Programs.

On March 20, 1995, AIEO issued a template providing flexible guidance on developing TEAs for the Regions and Tribes. The Template identified the following guiding principles:

1. As these Agreements are developed, all principles included in the Agency's Indian Policy shall apply. This includes recognition of a trust responsibility, government-to-government relationship, and Tribal sovereignty.

2. The government-to-government relationship shall be directly between the Agency and a specific Tribe.

3. The Agreement shall be implemented to promote stability in funding, employment, capacity building, infrastructure development, and other such factors that lead to long-term program implementation for the Tribes.

4. These Agreements are being developed with the understanding that the long-term goal is to address, implement, and maintain, where deemed necessary by the Tribe, the full range of EPA's programs to protect public health and the environment.

5. While implementing the Agreement, the Agency is committed to on going, timely and open communications with the Tribe. All efforts will be made to provide timely advice on available grants and other sources of available funding, training and on going meetings that affect Tribes. This also includes a timely transfer of state-of-the-art technology, such as computers and data systems, as the Tribes seek to build capacity.

6. This Agreement is intended to promote flexibility while addressing the needs of the Tribe and can be revisited as appropriate to ensure common sense approaches.

7. The principles of environmental justice shall apply to this Agreement. In general these principles call for the Agency to assure that Tribes are afforded all opportunities afforded to States, including procedures for Tribal participation in the Agency decision making process. In addition, environmental justice principles call for a recognition of Tribal cultural concerns such as subsistence needs and traditional uses of natural resources.

The importance of the TEAs cannot be overstated. They are striking examples of the Agency's commitment to using community-based approaches to environmental protection.

## D. Performance Partnership Grants

A Performance Partnership Grant (PPG) is a multi-program grant made to a Tribal or State agency by EPA from funds allocated and otherwise available for categorical grant programs. PPGs provide Tribes and States with the option to combine funds from two or more categorical grants into one or more PPG. The purpose of the PPGs is to allow Tribes and States to have the flexibility to address their highest environmental priorities across all media and establish resource allocations based on those priorities, while continuing to address core environmental program commitments. The PPGs are also intended to help the grant recipients and EPA to reduce administrative burdens and costs by greatly reducing the numbers of grant applications, budgets, workplans, and reports.

The PPGs, in conjunction with the Tribal/EPA Environmental Agreements (TEA) and the General Assistance Program (GAP), should allow Tribes additional flexibility in developing and implementing their environmental programs according to Tribal needs and priorities. Tribes may include GAP funds in a PPG. In order to maximize the available flexibility under a PPG, Tribes must develop a TEA that specifies how program funds will be reallocated and what environmental outcomes are expected from the expenditure of those funds. States are required to enter a similar agreement with EPA known as an Environmental Performance Agreement. The Agency has issued interim guidance on *Performance Partnership Grants for State and Tribal Environmental Programs* and will develop new regulations for PPGs and the administration of continuing environmental programs to take into account the new flexibility offered by the PPGs.

## E. Tribal Assumption of Federal Environmental Programs

Tribes can assume primacy for environmental programs in Indian Country. EPA, acting under the statutory authority provided by Congress, establishes standards relating to pollution and a system for enforcement of these standards, and upon request of a Tribe or State, authorizes eligible Tribes or States to establish and enforce its own or the federal environmental standards.

Tribal governments by virtue of their inherent sovereignty can exercise Tribal authority to regulate their own affairs as well as activities occurring within their territory. Indeed, federal Indian law permits Indian governments to exercise a great deal of civil jurisdictional powers with respect to Indians and non-Indians.

As Tribes move to develop enforceable environmental protection programs within Indian Country they typically undertake the following steps:

1. Establish the necessary statutory framework by passing Tribal environmental codes;

2. Draft the necessary regulations; and

3. Establish an administrative body, if one does not already exist, which can ultimately seek Tribal administrative or judicial sanctions to enforce the Tribal law.

*Treatment in the Same Manner as a State (TAS)*

In order for Tribes to assume many of EPA's major grant or regulatory programs, they generally must go through a process entitled "Treatment in the Same Manner as a State" (TAS). The General Assistance Program (GAP) does not require Tribes to go through this process. TAS was first put into place through the 1986 and 1987 Amendments to the Safe Drinking Water (SDWA) and Clean Water Acts (CWA). These amendments called on the Agency to develop a process by which Tribes could apply for grants and program authority. EPA established a TAS process for eligibility under various programs according to the criteria identified in SDWA and CWA. In 1990 Congress included similar provisions in the Clean Air Act Amendments. Generally the criteria are as follows:

- The Tribe must be federally-recognized.
- The Tribe must have or be able to exercise substantial governmental powers.
- The Tribe must have jurisdiction over the area in question.
- The Tribe must have the financial, physical and human resource capability to effectively implement a program

In the initial years after establishing the TAS process, many Tribes and EPA staff found the process to be overly burdensome. EPA has increasingly improved its own capacity to help Tribes meet those eligibility requirements, and, in 1994, EPA developed a "TAS Simplification Rule". Under this rule, EPA eliminated the need to meet all four criteria each time the Tribe applies for a program. Once a Tribe has been deemed eligible for one EPA program, it need only establish that it has jurisdiction and capability for each subsequent program. If the Tribe does not have capability, it must have a plan for acquiring capability over time. This is required because each program may require different skills and activities to provide protection that meets the requirements of specific statutes and regulations.

Treatment-As-States, the original term for the process, was changed to "Treatment in the Same Manner as a State" in response to Tribes objecting to the original phrase. Many Tribes commented that they are not "States"; rather, they have a unique relationship with the United States government. (The revised TAS regulation has been included for your reference.)

*Jurisdictional Issues*

In determining whether a Tribe is eligible for TAS, E As we learned earlier, Indian governments, by virtue of their inherent sovereignty, can exercise jurisdiction to regulate their own affairs as well as activities occurring within their territory. PA looks to see whether the Tribe has civil regulatory jurisdiction over the area in question. One of the constant issues facing Tribes, while attempting to apply for EPA grants or program authorization, is dealing

with jurisdictional issues including authority over non-member activities on fee lands and authority to regulate off-reservation Indian country.

Tribal authority over Tribal members and lands is generally unchallenged. However, authority over non-Indians and non-Indian lands within reservations is a difficult political and legal issue, which is a source of friction between Tribes and States. As a result, Tribes generally are cautious while interacting with States. Conflicts also may arise when Tribal programs authorized by EPA and the programs established by neighboring entities have different standards.

EPA's analysis of jurisdiction over activities of non-Indians on fee lands is based on the Supreme Court's recognition in Montana v. United States, that "a Tribe may . . . retain inherent powers to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." In determining whether a Tribe has jurisdiction over an activity, EPA conducts a fact-specific analysis which assesses whether there are actual or potential effects of the regulated activity on the Tribe that are serious and substantial, recognizing that environmental activities generally have serious impacts on human health and welfare.

Some States have contested EPA's approach, particularly the approach applied to reservations with large non-Indian populations. The State of Montana challenged in federal district court EPA's recent approval of the Confederated Salish and Kootenai Tribes' application for program authorization under Section 303 of the CWA (Water Quality Standards) for all surface waters within the boundaries of the Flathead reservation. The Flathead approval was the first time EPA recognized Tribal authority for a regulatory program where Tribes have asserted jurisdiction over non-member activities on fee lands within a reservation. On March 27, 1996, the District Court granted EPA's motion for summary judgment in this case, affirming the Agency's approach under the CWA for determining Tribal authority to establish water quality standards within the exterior boundaries of a reservation. This case is currently on appeal. Similar challenges have been filed in Wisconsin.

Congress has broad authority over Tribal affairs and may, by statute, delegate federal authority to a Tribe. Such a delegation could provide a federal statutory source of Tribal authority that would not depend on the Tribe's inherent authority. In United States v. Mazurie, 419 U.S. 544 (1975), the Supreme Court examined whether the Federal government can "delegate Federal authority" to Tribal governments over non-Indians within reservation boundaries. The issue was raised in the Mazurie case within the context of the regulation of alcoholic beverages in Indian Country in the 1970s. The Court found that Congress may delegate federal authority to regulate the sale of alcoholic beverages in Indian country by non-Indians even though the activity occurred on fee land within the boundaries of the reservation. The Agency is currently deliberating the appropriate interpretation of the Clean Air Act as to whether or not it is

a delegation of federal authority to eligible Tribes to regulate all air sources within the exterior boundaries of an Indian reservation.

### F. Direct Federal Implementation

Under many EPA programs, States or Tribes may apply for EPA authorization to assume program responsibilities. Given that environmental program responsibility requires capability and significant resources, Tribes do not always find it beneficial to assume total responsibility for EPA programs. Based upon a variety of factors, often including program costs, availability of technical expertise and assistance, and maintenance costs, Tribal governments may select certain prioritized activities, but may decide not assume an entire regulatory program. When Tribes decide not to fulfill certain activities under EPA's programs or not to apply for entire programs, EPA directly implements
the environment management programs.

The Agency's Indian Policy clearly identifies Direct Implementation as a responsibility of the Agency:

> Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government.

The following is an illustrative selection of some tools that are available for direct federal implementation:

- Communications with Tribes
- Establishment of Tribal\EPA Environmental Agreements (TEAs) which identify Tribal priorities and help with budget development
- Development of Regional and National Environmental Work plans based on TEAS.
- Development of Regional strategies so that DI is consistent with Tribal priorities.
- Training of management and regional staff

Below, are several success stories which document instances in which direct implementation is occurring successfully:

- Many Regions assist with the regulation of Drinking Water Sources and of underground injection wells that can affect drinking water, surface water and ground water sources.

- Region 8 provides staff to visit reservations and to provide compliance and enforcement services under the Underground Storage Tank Program of the Resource Conservation and Recovery Act.

- On the Colville Indian Reservation, Region 10, in conjunction with the Tribe, has established federal water quality standards and is issuing discharge (NPDES) permits for the navigable waters within the exterior boundaries of the reservation.

## G. Protocol for EPA Interactions with Tribes

There is not one set of rules that can guide EPA management and staff to successful interactions with Tribes. Rather there are general considerations which should be reviewed before communicating with Tribes and/or visiting Indian Country. Various organizations within the Agency may wish to put into place guidelines on protocol. These guidelines would cover such items as who should call the Tribal Chair, who should be contacted at a reservation before an EPA representative visits, who should sign correspondence with a Tribe, and how Tribal/EPA meetings should be conducted. For an example of a regional protocol guideline, please see the attached Region 8 Policy.

According to Terry Williams, the first Director of EPA's American Indian Environmental Office (AIEO), problems sometimes arise in situations in which non-Indians are interacting with Tribes, and the following facts exist:

1) The non-Indian has inaccurate knowledge about Indian-U.S. history; and

2) Both sides fear unknown factors regarding the other.

Williams stated that it is his belief that most Americans intrinsically value fairness, and that given the right tools and context, they would be more supportive to Indian governments. The importance of open communication between Tribal and State and federal government representatives has been repeatedly stressed, by Indian and non-Indian leaders. With better communication, better understanding and partnerships will result.

While all Tribes are unique and differ in leadership and the stage of development of their governmental and economic infrastructure, they still can be approached. What is most important for non-Indians to do is to approach all Tribes with respect and sincerity about forging a relationship.

EPA staff that work with Tribes on a regular basis offer the following reflections on their experiences interacting with Tribes:

- Some Tribes have two tiers of government (legal/political and traditional/actual). In other words, the titular head is not always the decision-maker. This is particularly true with more traditional governments such as the Pueblos.
- Indian people have been hurt by government initiatives so many times before that they are often skeptical of new proposals. Relationship building, education and time are needed to overcome this.
- EPA has its own culture that can impede communication when others don't understand the vocabulary, the philosophy and/or the methods.

- It is important to remember that environmental protection issues are not the only areas of concern Tribal governmental leaders face. Most Tribal governments deal with significant unemployment, education, health, welfare, jurisdictional, etc. issues. Additionally, keep in mind that in many instances, Tribal governments are under-staffed.
- Indian leaders (particularly Tribal chairmen, chiefs, governors, Presidents) are extremely concerned about the lives of their people on a micro level. It is not uncommon for a leader to sit by the bedside of a terminally sick member and deal with members on a family or individual level. This concern often results in differences between Tribal, State, and federal standards regarding government approved risk. While EPA may find 1/1,000 is an acceptable risk, to Indian people, each member of a small Tribe is vitally important and therefore, the Tribe may find the EPA risk standard unacceptable.

## V. National Work Groups and Committees

### A. Tribal Operations Committee

In order to improve communications and build stronger partnerships with the Tribes, the Agency established the Tribal Operations Committee (TOC) in February 1994. The TOC is comprised of 19 Tribal Leaders or their environmental program managers (the Tribal Caucus) and EPA's Senior Leadership Team, including the Administrator, the Deputy Administrator, and the Assistant and Regional Administrators. The TOC meets on a regular basis to discuss implementation of the environmental protection programs for which EPA and the Tribes share responsibility as co-regulators. All Tribes are encouraged to communicate with the members of the TOC Tribal Caucus. Although the TOC is an important and effective vehicle for enhancing communications between EPA and the Tribes, it is not a substitute for Agency consultation with individual Tribes in accordance with the Administration policy of working with Indian Tribes on a government-to-government basis.

### B. Agency Indian Program Senior Managers

This group is chaired by the Assistant Administrator for Water and includes a Senior Manager designated by each Assistant Administrator and Regional Administrator and the Director of the American Indian Environmental Office. This group meets once a month via teleconference to discuss pressing and/or nationally significant issues, policy and program direction, and to exchange information between Headquarters and Regions. The group was established to help the Agency meet the Administrator's high expectations for progress on strengthening the Agency's Indian program and to help identify any program weaknesses.

### C. National Indian Work Group

The role of the National Indian Work Group (NIWG) was initially defined in the 1984 *Indian Policy Implementation Guidance*. The NIWG is chaired by the Director of the American

Indian Environmental Office and is composed of representatives from Regional and Program Offices, generally the Indian Coordinator. The NIWG was established to facilitate and coordinate efforts to: identify and resolve policy and programmatic barriers to working directly with Indian Tribes; to implement comprehensive Tribal environmental programs; to identify priority Tribal projects; and to perform other services in support of the Agency managers in implementing the Indian Policy. The NIWG holds regular bi-weekly conference calls and usually meets at least once each year.

### D. National Indian Law Work Group

The National Indian Law Work Group (NILW) is the counterpart to the National Indian Work Group for addressing legal issues that arise in the course of developing and implementing the Agency's Indian program. The NILW is composed of lawyers and some policy staff from EPA's Regional Counsel and Program Offices, the Office of General Counsel, and the American Indian Environmental Office, and from the Department of Justice who work on federal Indian law issues. The NILW meets once a month via teleconference to discuss pressing and/or nationally significant Indian law issues related to environmental protection and to exchange information on common issues and problems. Also, the NILW usually meets once each year.

### E. American Indian Advisory Council

The American Indian Advisory Council (AIAC) is a Special Emphasis Program Council organized under the Office of Civil Rights. The central purpose of AIAC is to serve as an advisory group to the Administrator of EPA to recommend actions that address concerns of American Indians in the EPA workforce, and of the Indian Tribes for which EPA acts as trustee. Membership is open to all employees of EPA who share AIAC's beliefs.

### F. National Environmental Justice Advisory Council Indigenous Peoples Subcommittee

The National Environmental Justice Advisory Council (NEJAC) was charted as a Federal Advisory Committee in 1993. The Council has 25 representatives from key environmental justice constituencies, including community-based groups, business and industry, academic and educational institutions, Tribal governments, State and local governments, non-governmental organizations, and environmental organizations. The Council has six Subcommittees, one of which is the Indigenous Peoples Subcommittee. This Subcommittee has eight members with a diversity of backgrounds, such as Tribal government, indigenous grassroots groups and environmental organizations, Tribal business and industry, academia, and State government. This Subcommittee is primarily focused on reviewing Agency actions to address environmental justice and developing recommendations for bringing about environmental justice in Indian country.

### G. Other EPA Advisory Councils with Tribal Representation

EPA has numerous Federal Advisory Councils that have been chartered to address various environmental issues, from the Grand Canyon Visibility Transport Commission to the Common Sense Initiative. Many of these advisory councils have now appointed at least one Tribal representative, but some groups still lack Tribal representation. These stakeholder forums offer an additional mechanism for obtaining general Tribal input on a variety of EPA issues.

## VI. Regional Programs and Operations

Federally-recognized Tribes reside in nine of the Agency's ten Regions (Region III is the exception). Each of these nine Regions has appointed a Regional Indian Coordinator, and some of the Regions have established an Indian Program office. Most of the Regions have a Regional Indian Work Group which acts as a Regional counterpart to the National Indian Work Group. Some Regions employ field staff to work directly with the Tribes in their development and implementation of environmental programs. These field staff are sometimes referred to as Indian Environmental Liaisons, Circuit Riders, or Senior Environmental Employees, depending on the Region. Most of the Regions have also establish a Regional counterpart to the Tribal Operations Committee. Some Regions have a formal Regional Tribal Operations Committee (RTOC) comprised of Tribes residing within that Region, while others have instituted regular meetings between Tribal Leaders and the Region's senior management. Some Regions have both an RTOC and regular all-Tribes meetings.

## VII. Tribal Operations in Other Selected Federal Departments/Agencies

### A. White House Domestic Policy Council

The Domestic Policy Council has established a Working Group on American Indians and Alaska Natives to coordinate across the federal executive branch efforts to address key issues affecting Indian Country. The Working Group is chaired by the Secretary of Interior and is composed of Secretary and Assistant Secretary level representatives from each of the federal departments/agencies with responsibility for American Indian and Alaska Native issues. The Working Group has five subgroups, including one on the Environment and Natural Resources which is co-chaired by the Director of the EPA American Indian Environmental Office and the Assistant Secretary for the Bureau of Indian Affairs.

### B. White House Council on Environmental Quality

The Council on Environmental Quality (CEQ) is primarily responsible for overseeing the implementation of the National Environmental Policy Act (NEPA) and coordinating environmental issues across the federal executive branch. Thus, CEQ plays an important role in the protection of Tribal environments, since the responsibility for this protection is shared by many federal departments and agencies. Also, issues regarding the implementation of NEPA have played a prominent role in the management of Tribal environments. In recent years, CEQ has been working with EPA to strengthen the Tribal role under NEPA and to ensure Tribal consultation when a federal department of agency has the lead in developing NEPA documents.

### C. Department of Interior

The Department of Interior (DOI) has multiple Offices and Bureaus that have significant responsibilities to Indian Tribes. Primarily, the Bureau of Indian Affairs has the lead for the federal executive on general Indian issues. In addition, the Office of American Indian Trust has the primary responsibility for overseeing the federal government's trust obligations, and the Assistant Solicitor for Indian Affairs has the primary role of furthering Indian legal issues and protecting Indian rights. Also, many of the land use and natural resource bureaus and offices at DOI have responsibilities for issues that affect Tribal environments, such as the Bureau of Land Management, the Office of Surface Mining, the Fish and Wildlife Service, and the National Park Service.

### D. Department of Justice

The Department of Justice (DOJ) plays a unique role in the protection of Tribal environments and natural resources. Generally, DOJ will be requested by an agency referral to file a law suit on behalf of another federal agency, such as EPA or DOI, or to defend such agencies against a suit. In the context of Tribal environments, EPA and/or DOI have the option to request that DOJ take an enforcement action, when such an action is warranted by law, against a pollution source causing environmental harm to Tribal resources. Given that most Tribal environmental programs are in the early stages of development, this alternative method, as opposed to Tribal enforcement, offers a potentially powerful tool for ensuring the protection of Tribal environments. In order to handle litigation requests related to Indian Tribes, DOJ established an Indian Resources Section within the Environment and Natural Resources Division. The Environmental Defense, Environment Enforcement and General Litigation sections also play key roles in the Environmental and Natural Resources Division with regard to environmental litigation involving Tribes. Also, DOJ recently established the Office of Tribal Justice to coordinate litigation strategies relating to Tribes and to better promote issues of federal Indian law.

In June 1995, the Attorney General issued the DOJ Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes. The purpose of this policy is:

> To reaffirm the Department's recognition of the sovereign status of federally recognized Indian Tribes as domestic dependant nations and to reaffirm adherence to the principles of government-to-government relations; to inform Department personnel, other federal agencies, federally recognized Indian Tribes, and the public of the Department's working relationship with federally recognized Indian Tribes; and to guide the Department in its work in the field of Indian affairs.

### E. Department of Health and Human Services (ANA, IHS)

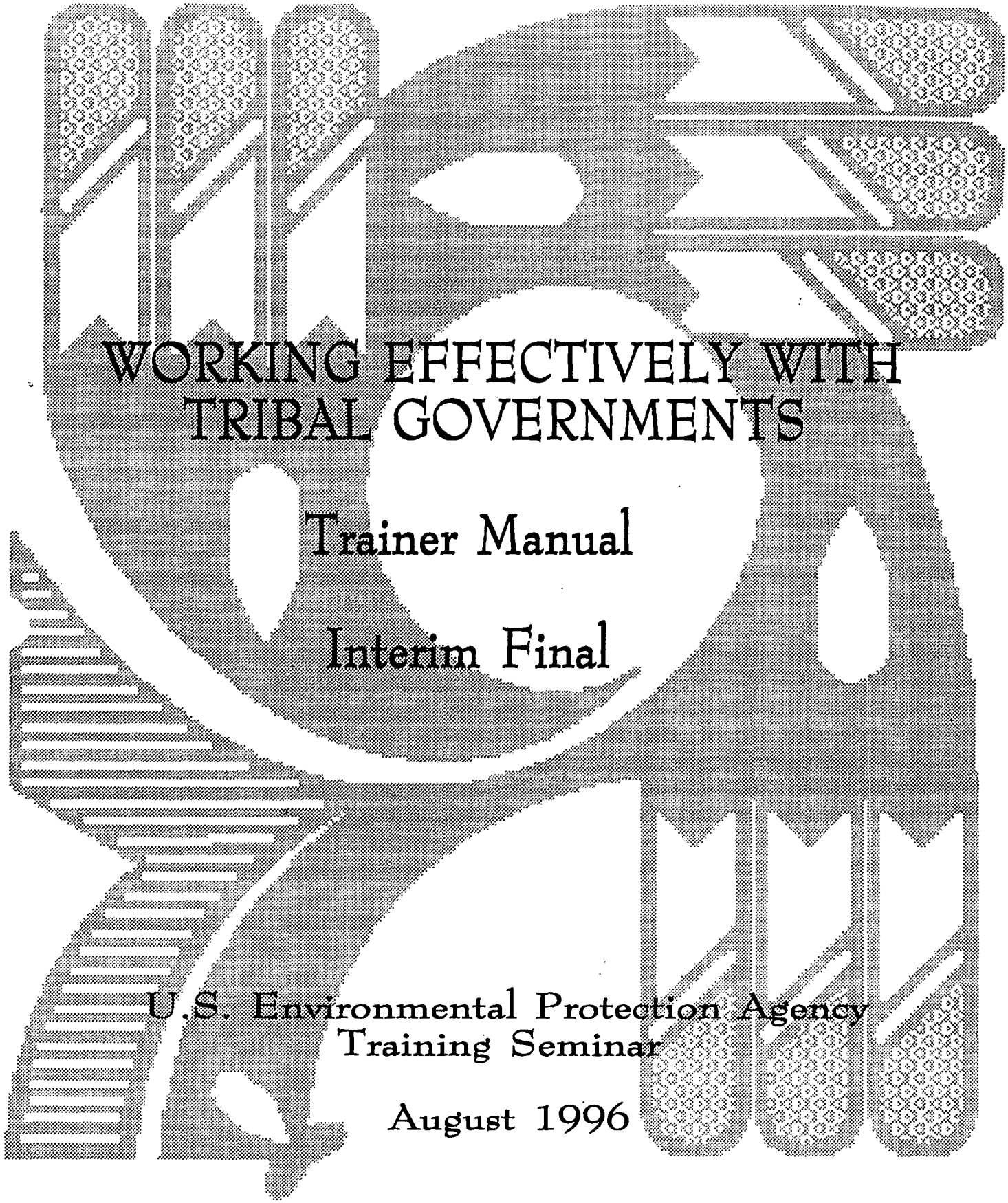
The Department of Health and Human Services (HHS) has two Offices which specifically handle Indian issues. The Indian Health Service (IHS) with is a public health service designed exclusively to address Indian health issues. As part of many Indian treaties, the federal government guaranteed health care to Indian people in exchange for peace, friendship, and land. IHS has the primary responsibility of caring out these treaty and trust obligations. Among other services provided, IHS operates numerous hospitals throughout Indian Country. The Administration for Native Americans (ANA) is a general Indian service organization that primarily manages various Tribal grant programs. Most importantly to EPA, is the ANA grant program for Improving the Capability of Indian Tribal Governments to Regulate Environmental Quality. This program is similar to the Agency's General Assistance Program in that it is meant to assist Tribes in developing their overall capacity to implement environmental programs.

### F. Department of Defense

The Department of Defense (DOD), like DOI, has many activities related to its mission that affect Indian lands. Many DOD facilities, such as military bases, bombing ranges, overflight areas, and laboratories are located on or adjacent to Indian lands. In order to begin addressing some of the environmental harms that have resulted from these facilities, DOD now manages a Tribal grant program for the Mitigation of Environmental Impacts to Indian Lands Due to Department of Defense Activities. In addition to actual facilities, Tribes are also heavily impacted by actions taken by the Corp of Engineers. Many Tribes have been adversely impacted by Corp projects such as the construction of dams that result in the flooding of reservations and ceded territory and the issuance of dredge and fill permits for wetlands within the Tribes watershed.

### G. Department of Agriculture

The United States Department of Agriculture (USDA) has taken some important strides in fulfillment of its federal trust responsibilities to the Indian Nations. In recent years, the USDA has dramatically increased outreach and program delivery to reservation residents. For instance, within the Rural Development Mission Area (formerly known as "Farmers Home Administration"), home ownership programs have been modified to better meet the needs of Native Americans living on trust lands. Increased emphasis has been placed on loan assistance and leveraging funds, Tribal government consultation regarding housing development issues, and the introduction of culturally-correct housing design. Additionally, increased emphasis has been placed on economic development activities and programs on Tribal reservations. Finally, the USDA continues to work with other federal departments in cooperative efforts designed to meet the needs of Tribal governments (examples of this can be seen in inter-agency agreements, etc.).



# WORKING EFFECTIVELY WITH TRIBAL GOVERNMENTS

## Trainer Manual

## Interim Final

U.S. Environmental Protection Agency
Training Seminar

August 1996

## INTRODUCTION:

Overview of Training Session - This Training Session is Designed to Provide the Following:

- Overview of Native American communities and cultures,
- Overview of federal Indian law and policy,
- Overview of Tribal culture, protocol, and the importance of Tribal consultation, and
- Overview of environmental protection of Indian lands

***(Overhead A)***
***(Overhead B)***

Introduce yourself.

Although the training follows, for the most part, the format of the participant text, it does not always. For instance, although Tribal culture, protocol, and Tribal consultation issues are discussed throughout the text, the training session will discuss these issues separately.

## CHAPTER ONE: OVERVIEW OF NATIVE AMERICAN COMMUNITIES AND CULTURES

1. Discuss U.S. Environmental Protection Agency (EPA): Overall Mission and Implementation

- Mission: To protect human health and the environment.
- Implementation of national statutes and regulations through delegation and authorization to Tribes and States, direct federal implementation, and cooperative agreements.

2. Discuss the number of federally-recognized Tribes and land base.

- Map

***(This can be found at: the Appendix)***

3. Definitions of Common Vernacular (See Participant Manual). Define and Discuss:

a. Native American

- Native Americans are comprised of Indians, Native Alaskans, and Native Hawaiians. The term Native American, American Indian, and Indigenous Peoples, however, are often used interchangeably to refer to the people, cultures, and communities of the first Americans, including Alaskan Natives and Native Hawaiians.

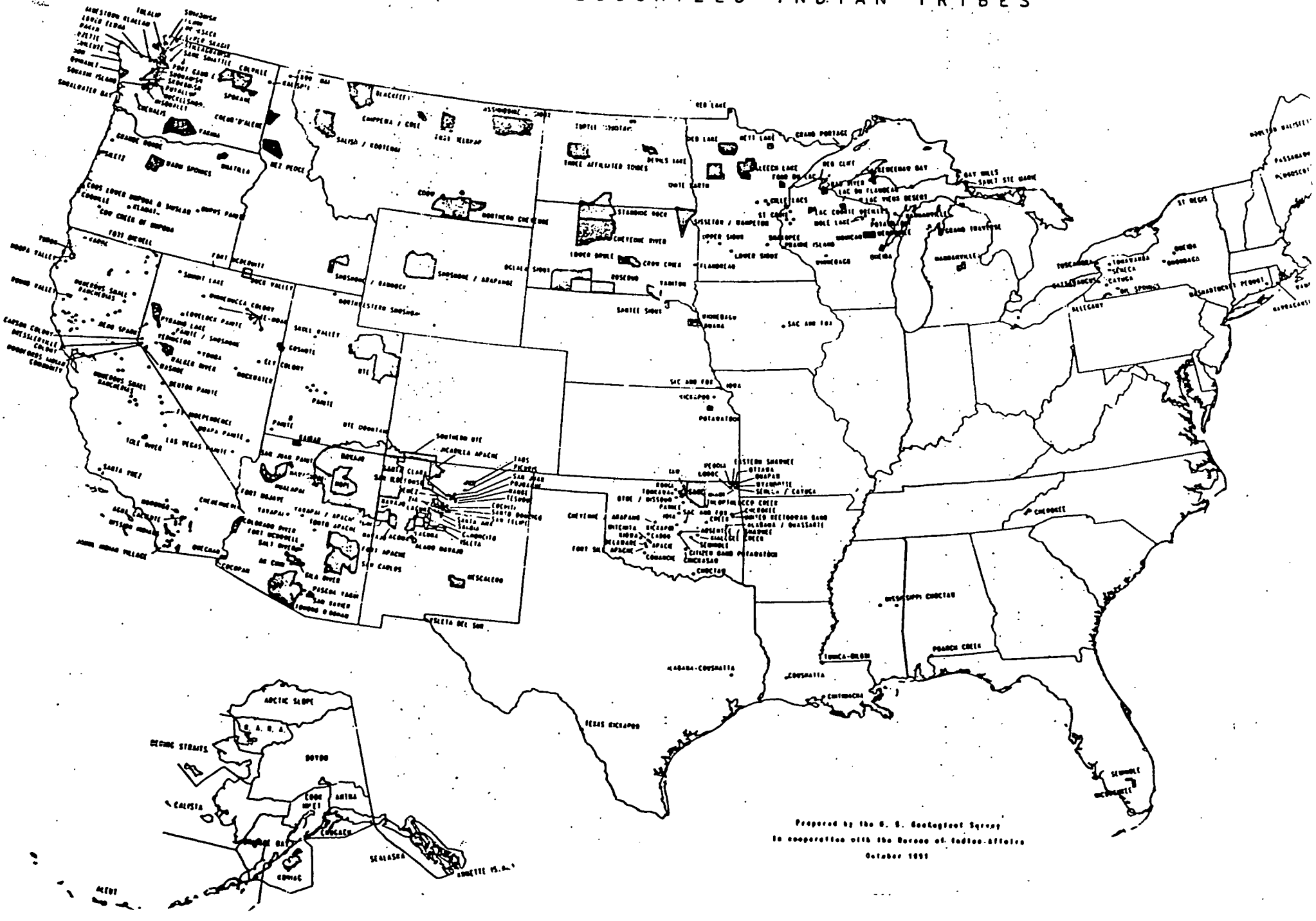
***(This can be found at: the Participant Manual, page 2)***
***(Overhead C)***

- Also discuss:
- Legal Definition
- Tribal Definition

***(This can be found at: the Participant Manual, page 2 - 3)***

b. Federally-Recognized Tribes

# FEDERALLY RECOGNIZED INDIAN TRIBES



Prepared by the U. S. Geological Survey
in cooperation with the Bureau of Indian Affairs
October 1991

Discuss with Trainees the five considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a "Tribe" or "band" -- as identified by the *Handbook of Federal Indian Law*. Note: The five considerations are listed in the participants' manual.

***(This can be found at: the Participant Manual, page 3 - 4)***
***(Overhead D)***

c. Break

Remind participants that information regarding Tribal culture, protocol, and the importance of Tribal consultation will be discussed later.

Have each participant introduce him/herself to the class. Encourage participants to also indicate background (i.e. where they work, how long they have worked with Tribes). This introduction exercise will assist participants in networking with each other.

## CHAPTER TWO: OVERVIEW OF FEDERAL INDIAN LAW AND POLICY

*(Begin with Overhead E)*

1. Indian Country

See below.

2. Reservations

- The terms "Indian Country" and "Reservation" are often confused with each other.
- The term "reservation" refers to land that is "reserved" for Tribes. EPA considers any lands validly set apart for the use of Tribes to be reservations.

*(This can be found at: the Participant Manual, page 19)*

- The term "Indian Country", on the other hand, is a significant legal term and includes Indian reservations, dependent Indian communities, Indian allotment lands, and trust lands.

*(This can be found at: the Participant Manual, page 17-19*
*(Overheads F and G)*

3. Allotments

- Within the allotment system, the reservations of affected Tribes were divided into individual parcels called allotments. Each member of affected Tribes was allotted a homestead of 160 acres (the actual acreage might vary) which, in many instances, Tribal members were meant to farm. The allotment system was utilized as an assimilation tool, and it was believed that by discouraging or disallowing the traditional "communal" type of land use, privatization of land ownership would force Tribal members to become quickly assimilated into the non-Indian culture.

- In regions containing significant amounts of allotment land (i.e. Region 6 --Oklahoma- ), it will be important for the Trainer to go into much greater depth.

*(These points can be found at: the Participant Manual, page 19 - 20)*

4. Trust lands

- Significant portions of Indian land are held in trust for the Indian Tribes by the federal government. Within these trust lands, Indians hold the beneficial title, and the United States holds fee simple title. These lands

are sometimes referred to as trust lands.
As trustee, the United States is obligated to use its integrity and ability to look after the best interests of the Tribal members.

- Part of the protection provided by the trust relationship includes protecting the land interests of the Tribes.
- In many instances, the federal government also remains the trustee for allotted lands.
- In purchasing land from the Indian Tribes through use of the Treaties, the U.S. government committed itself to providing certain services to the Indians as part of the payment for the land. Depending on the particular arrangements, these services sometimes included support for Tribal government, as well as education, social and medical services.
- Trust obligations continue today.

***(These points can be found at: the Participant Manual, page 20)***

5. Rancheria

See participants' manual for points of emphasis.

***(This can be found at: the Participant Manual, page 20 - 21)***

6. Dependent Indian Communities

The creation of "Indian Communities" were often a direct result of various assimilationist policies and allotment programs of the federal government.

- At various points in United States history, the federal government attempted to assimilate Tribal people into the non-Indian society. Many of these attempts resulted in the loss of Tribal governmental power, loss of significant Tribal land bases, and the forced privatization of many remaining lands.
- With Tribal governmental power significantly diminished and remaining land bases divided into "allotments"" for privatization purposes, those Tribes affected by assimilationist policies were dramatically changed.
- In many instances, Tribal members were often forced to live in fixed communities, rather than in the traditionally scattered sites within the general Tribal jurisdictional area.
- Sometimes, Tribal members were separated from the rest of their Tribe by significant areas of land -- and in these instances, different bands of Indians ended up in the same community. Many of these communities remain today and are considered to be a part of Indian Country.

***(These points can be found at: the Participant Manual, page 21)***

7. Colony

- The concept of "Indian Colonies" was designed to promote assimilation of Tribal members into the non-Indian society.
- Colonies were most often established in Nevada and California to provide land where Indians could be permanently located.
- Colonies are often considered to be "Indian Country."
- Ask Trainees if they can identify any examples of Indian Colonies.
    - Reno-Sparks Indian Colony and Yerington Colony of Nevada, and the Elem Indian Colony in California.

***(These points can be found at: the Participant Manual, page 21)***

8. Ceded Territory

- Off-reservation lands in which Tribes have retained treaty rights to hunt, fish, and gather other resources.

***(This can be found at: the Participant Manual, page 22)***

- Discuss the nature of trust responsibility regarding a Tribe's treaty right in ceded territory.

9. Changing Times and Federal Policies. Briefly discuss:

- Era of the Earliest Treaties.
- Removal period
- Treaties v. Agreements.
- Era of Allotment and Assimilation.
- Indian Reorganization.
- Termination Era
- Self-Determination Era.

***(These points can be found at: the Participant Manual, page 22 - 26)***
***(Overhead H)***

10. Indian Country: Selected Legal Doctrines -- A Discussion of Federal Indian Law

- Ask people to jot down several words about federal Indian law. After a minute, ask for volunteers. As you respond, try to be positive.

- Federal Indian Law: Is U.S. federal law regarding the federal treatment of Tribal governments, laws, resources, and people.

***(This can be found at: the Participant Manual, page 27)***

Ask for a list of some Federal Indian Law sources.

- Federal Indian Law draws from:
- International Law (i.e. Treaty issues)
- Indian-U.S. Treaties and Agreements
- The U.S. Constitution
- Congressional Statutes
- Court Decisions
- Executive Orders
- Federal Regulations

***(These points can be found at: the Participant Manual, page 27)***

- Note: The Scope of Federal Indian Law is very broad. It includes: international law, property, tax, administrative, estates, torts, business, etc.

***(These points can be found at: the Participant Manual, page 27)***

11. Break

- According to the text, you are roughly in the middle of Chapter Two. Although the remainder of Chapter Two will be discussed later, Tribal culture, protocol, and Tribal consultation will be discussed next.

**EPA INTERACTIONS WITH TribES: TribAL CULTURE, PROTOCOL AND THE IMPORTANCE OF TribAL CONSULTATION:**

1. Please note to participants that, generally, problems arise in situations in which non-Indians are interacting with Tribes, and the following facts exist:

    1) The non-Indian has inaccurate knowledge about Indian-U.S. history

    2) Both sides fear unknown factors regarding the other.

***(This can be found at: the Participant Manual, page 51)***

2. The importance of open communication between Tribal and State and federal government representatives has been repeatedly stressed, by Indian and non-Indian leaders. With better communication, better understanding and partnerships will result.

- Remind participants that there is not one set of rules that can guide EPA management and staff to successful interactions with Tribes. Instead, there are general considerations which should be reviewed before communicating with Tribes and/or visiting Indian Country.

3. With this said, this would be a good time to introduce the Tribal Panelists. Set-aside a significant block of time for this part of the training -- this portion of the training is very important.

(Suggested time allotment: two to two and one half hours (or more) for panel discussion and question/answer period).

**The Tribal Panel:**

*Tribal Panelists should be representative of the Tribes from the Region -- i.e. It maybe inappropriate to have Tribal panelists who are members of Tribes that are located outside of the Region -- Tribes are unique, and it is important for participants to be trained by Tribal leaders who are from the same Region as the participants.*

*Make sure that Panelists are not all from the same Tribe. Each Tribe is different from all others -- it is important for participants to hear a variety of Tribal viewpoints from the various Tribes within their Region.*

*Prior to the Training Session, the instructor should meet with the Tribal panelists and get appropriate individual background information. This will allow the instructor to offer a more informative panel introduction to participants.*

*Panelists should be enrolled Tribal members who are recognized Tribal governmental leaders &/or Tribal environmental program leaders.*

*Prior to the Training Session, the instructor should consult with Tribal panelists. Instructor should explain the purposes of the Training. During the consultation process, the instructor should ask Tribal panelists what issues they believe will be important to address, etc. (This information will be helpful to the instructor when planning the training.). The instructor should explain that the Training Manual does not address Tribal Cultural issues because it is hoped that the Tribal panel will be addressing those issues. Tribal panelists may wish to also discuss Tribal consultation issues, "hot" Tribal environmental program issues, Tribal governmental systems, etc.*

*Trainer may wish to video-tape the Tribal panel discussion. The tape could be used as a future teaching tool.*

3. Are Tribes a homogeneous group?

- No. Discuss.
- Emphasize that each Tribal Nation has separate governments, customs, languages, religions, etc.
- Tribal panelists should be involved in this discussion.

***(These points can be found at: the Participant Manual, page 9)***
***(Overhead I)***

4. Do Tribes have any significant sovereign governmental powers?

- Yes. Under U.S. Law, Tribes generally retain all power which they have not given up in treaties and has not been taken away by an act of Congress.
- Discuss.
- Tribal panelists should be involved in this discussion.

***(This can be found at: the Participant Manual, page 9 - 10)***

5. At the conclusion of the Panel Discussion, give participants a listing of all Tribes located within their own Region. Include the names of the elected Tribal leader (Chairman/Governor/etc.) of each Tribe, as well as the name of the Tribal environmental contact. Also include addresses and phone numbers of appropriate Tribal contact people. Finally, list the name and phone number of the EPA Regional Tribal Coordinator. This information will greatly assist communication between EPA and Tribal governments.

***Regional Indian Coordinators can compile the information for the Trainer.***

6. Various organizations within the Agency may wish to put into place guidelines on protocol. These guidelines would cover such items as who should call the Tribal Chair, who should be contacted at a reservation before an EPA representative visits, who should sign correspondence with a Tribe, and how Tribal/EPA meetings should be conducted.

8. For an example of a regional guideline, please see the attached Region 8 guidelines (See Appendix). Take time to go over it with the class. Discuss it in detail. If the Region has its own set of guidelines, discuss those. Include Tribal panelists in the discussion.

9. Note: EPA staff that work with Tribes on a regular basis offer the following reflections on their experiences interacting with Tribes (Discuss; include Tribal panelists in the discussion):

- Some Tribes have two tiers of government (legal/political and traditional/actual). In other words, the titular head is not always the decision-maker. This is particularly true with more traditional governments such as the Pueblos.

- Indian people have been hurt by government initiatives so many times before that they are often skeptical of new proposals. Relationship building, education and time are needed to overcome this.

- EPA has its own culture that can impede communication when others don't understand the vocabulary, the philosophy and/or the methods.

- It is important to remember that environmental protection issues are not the only areas of concern Tribal governmental leaders face. Most Tribal governments deal with significant unemployment, education, health, welfare, jurisdictional, etc. issues. Additionally, keep in mind that in many instances, Tribal governments are under staffed.

- Indian leaders (particularly Tribal chairmen, chiefs, governors, Presidents) are extremely concerned about the lives of their people on a micro level. It is not uncommon for a leader to sit by the bedside of a terminally sick member and deal with members on a family or individual level. This concern often results in differences

between Tribal, State, and federal standards regarding government approved risk. While EPA may find 1/1,000 is an acceptable risk, to Indian people, each member of a small Tribe is vitally important and therefore, the Tribe may find the EPA risk standard unacceptable.

***(These points can be found at: the Participant Manual, page 51-50)***

Ask participants if they have any reflections that they would like to share. Discuss.

10. Break

- Encourage participants to meet with the Tribal panelist during the break.
- When training continues, Chapter Two discussion will resume.

## CHAPTER TWO: -- CONTINUED

1. Sovereignty

a. Introduce this topic by asking class to raise their hands if they consider this an important concern of the Indian Tribes.

- Tribal sovereignty and sovereign governmental rights are of the utmost importance to the Tribal Nations.

b. Discuss the summary of sovereign Tribal governmental powers, as stated in the *Handbook of Federal Indian Law* by Felix Cohen, pages 241-242 (1982) (First note the significance of the Handbook):

> "1. [A]n Indian Tribes possesses, in the first instance, all the powers of any sovereign state.
>
> 2. [C]onquest renders the Tribe subject to the legislative power of the United States and, in substance terminate the external powers of sovereignty of the Tribe, for example, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the Tribe.
>
> 3. [T]hese powers are subject to qualification by treaties and express legislation of Congress. Save as expressly qualified, full powers of internal sovereignty are vested in Indian Tribes and in their duly constituted organs of government."

***(These points can be found at: the Participant Manual, page 3 - 4)***
***(Also refer to Overhead D)***

c. Emphasize that Indian Tribes generally have all the powers of self-government of any sovereign except insofar as those powers have not been modified by treaty or repealed by an act of Congress.

***(This can be found at: the Participant Manual, page 27)***

- Why is sovereignty so important?

  It ensures self-government, and preservation of Tribal culture, and control over the future of the Tribe. Discuss.
- It distinguishes Indians as a "political" group rather than simply a racial or ethnic minority. Discuss.

***(These points can be found at: the Participant Manual, page 27 - 29)***
***(Overhead J)***

2. The federal-Indian trust relationship and the federal trust responsibility:

***(Begin With Overhead K)***

a. Explain that the Federal-Indian Trust relationship is one of the most important doctrines of federal Indian law. Yet it was not created by any single document, nor is its scope defined in any one place.

***(This can be found at: the Participant Manual, page 29 - 30)***

b. The federal trust responsibility arises from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian Tribes.

***(This can be found at: the Participant Manual, page 29 - 30)***

c. Overall, the trust responsibility relates to the United States' unique legal and political relationship with Indian Tribes.

***(This can be found at: the Participant Manual, page 29 - 30)***

d. The trust relationship relates directly to the development and implementation of federal policy.

***(This can be found at: the Participant Manual, page 29 - 30)***

e. The trust responsibility requires that the federal government consider the best interests of the Tribes in its dealings with them and when taking actions that may affect them.

***(This can be found at: the Participant Manual, page 29 - 30)***

f. The trust responsibility includes the protection of the sovereignty of each Tribal government.

***(This can be found at: the Participant Manual, page 29 - 30)***

g. Congress has the power to define the scope of the trust responsibility.

***(This can be found at: the Participant Manual, page 29 - 30)***

h. It is a special governmental trust, in which the U.S.Congress and the agents of the government charged with carrying out the laws, are the *fiduciaries* and the Tribes are the *beneficiaries*.

***(This can be found at: the Participant Manual, page 29 - 30)***

i. As a fiduciary, the U.S. must meet stringent standards of good faith and due diligence. These standards apply to actions impacting the Tribes. For example: The federal government must meet these standards in protecting and managing Indian lands and natural resources. Discuss this in greater depth. Have Trainees break into small groups to discuss how the EPA can meet its trust responsibilities to the Tribes within their own Regions.

***(This can be found at: the Participant Manual, page 29 - 30)***

j. Questions?

3. Treaties and Treaty Rights:

a. Treaties:
- Overall Class discussion --

***(This can be found at: the Participant Manual, page 30 - 32)***
***(Overhead L)***

Points of suggested emphasis:

Worcester v. Georgia, 31 U. S. 515, 559 (1832) quote:

The words "treaty" and "nation" are words of our language, selected in out diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are applied to all in the same sense.

***(This can be found at: the Participant Manual, page 31)***
***(Overhead M)***

- Treaties should be interpreted in favor of Indians

***(This can be found at: the Participant Manual, page 31 - 32)***
***(Overhead N)***

- Time does not diminish effect of Treaties.

***(This can be found at: the Participant Manual, page 32)***

- Treaties remain relevant.

***(This can be found at: the Participant Manual, page 32)***

b. What are Treaties?

Treaties are an international legal device utilized to document agreements between sovereign governments.

***(This can be found at: the Participant Manual, page 30)***

c. Explanation of the validity of Treaties, today.

- U.S. Courts have abided by principles of International Law when interpreting treaties.
    - Thus, any ambiguities are usually interpreted in the favor of the weaker party. In the case of Indians, because the negotiations were often held in foreign languages, such as English, and the cultural traditions were different, such as the concept of land ownership, the courts have traditionally given the Indians the best possible interpretation.

***(These points can be found at: the Participant Manual, page 30 - 32)***

- A breach or violation of treaty terms does not nullify the entire treaty.
    - Many people unfamiliar with Indian history and Indian law fail to support Indian treaty rights because they believe that a breach or violation of any part of the treaty on the part of the United States has somehow nullified them.

***(These points can be found at: the Participant Manual, page 32)***

- Generally, Congress must specifically and directly repeal a treaty by legislation to invalidate it.
- Age alone has not invalidated treaties.

d. Current significance of Treaties.

- Ask Trainees what significance they feel the Treaties hold today.
- Discuss, and also emphasize the following points:
- Treaties are significant to all Tribes, even to those Tribes that did not enter into treaty relations with the federal government, because they acknowledge the sovereign nature of Tribal governments and reserve for Indian Tribes critical rights and access to lands and resources.
    - First, they established a pattern of legal and political interaction based on negotiation between two sovereigns.
    - Second, treaties form the foundation of international as well as federal Indian law affecting all Tribal governments.
    - Finally, even though some Tribes did not formally enter into a treaty with the United States government, subsequent dealings through executive orders or legislation generally have been based

on a series of consultations and negotiations between a Tribe and the federal government, similar to the treaty process.

- Treaties are still the "law of the land." In 1979, the U.S. Supreme Court ruled in Washington v. Washington State Commercial Passenger Fishing Association, that "A treaty, including one between the United States and an Indian Tribe, is essentially a contract between two sovereign nations..."
- Treaties protect inherent sovereign rights held by Tribal governments, including land, resources, hunting, fishing and gathering rights, as well as governmental powers.

***(These points can be found at: the Participant Manual, page 32)***

e. Ask students to discuss when the Tribes in their own Regions entered into Treaties.

f. Today, although the United States no longer makes treaties with the Indian Tribes today, the federal government continues to consult with Indian Nations and to work on a government-to-government basis with Tribes on a wide variety of issues, including: human health and environmental protection, management of Tribal land and resources, economic development, and education.

***(This can be found at: the Participant Manual, page 31)***

g. What did treaties do?

Through treaties, Indian Nations granted certain lands and rights to the United States and reserved certain lands (reservations) and rights for themselves. This is important because it supports the concept of inherent sovereignty.
Tell Trainees that the concept of sovereignty will be discussed in greater detail later.

***(This can be found at: the Participant Manual, page 31)***

4. Jurisdictional Issues:

***(Begin with Overhead O)***

a. Tribal governments can exercise jurisdiction to regulate their own affairs as well as activities occurring within their territory.

***(This can be found at: the Participant Manual, page 33 & 48)***

b. Please note: Often, Tribes applying for EPA grants or program authorization, must deal with a significant number of jurisdictional issues -- including authority over non-member activities on fee lands and authority to regulate off-reservation Indian Country.

***(This can be found at: the Participant Manual, page 32 - 34)***

- Tribal authority over Tribal members and lands is generally unchallenged.

***(This can be found at: the Participant Manual, page 49)***

- Tribal authority over non-Indians and non-Indian lands within reservations is often controversial, bringing forward both difficult political and legal issues.
    - This is frequently a source of friction between Tribes and States.
    - As a result, Tribes generally are cautious while interacting with States.

***(These points can be found at: the Participant Manual, page 28 & 32 - 34 & 48 - 50)***

c. Does the EPA recognize Tribal authority over non-Indians and non-Indian lands within reservation borders? Discuss.

- EPA's analysis of jurisdiction over activities of non-Indians on fee lands is based on the Supreme Court's opinion in Montana v. United States.
    - The Montana case established that "a Tribe may . . . retain inherent powers to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe."
    - In determining whether a Tribe has jurisdiction over an activity, EPA conducts a fact-specific analysis which assesses whether there are actual or potential effects of the regulated activity on the Tribe, that are serious and substantial, recognizing that environmental activities generally have serious impacts on human health and welfare.

*(These points can be found at: the Participant Manual, page 32 - 34 & 48 - 50)*

d. Discuss the EPA's recent approval of the Confederated Salish and Kootenai Tribes' application for program application under Section 303 of the Clean Water Act (Water Quality Standards).

*(This can be found at: the Participant Manual, page 49)*

e. Please note: Congress has broad authority over Tribal affairs and may, by statute, delegate federal authority to a Tribe.

- Such a delegation could provide a federal statutory source of Tribal authority that would not depend on the Tribe's inherent authority.

- In the case, United States v. Mazurie, 419 U.S. 544 (1975), the Supreme Court examined whether the Federal government can "delegate Federal authority" to Tribal governments over non-Indians within reservation boundaries. The issue was raised in the Mazurie case within the context of the regulation of alcoholic beverages in Indian Country in the 1970s. The Court found that Congress may delegate federal authority to regulate the sale of alcoholic beverages in Indian Country by non-Indians even though the activity occurred on fee land within the boundaries of the reservation.

- Relevance today: The Agency is currently deliberating the appropriate interpretation of the Clean Air Act as to whether or not it is a delegation of federal authority to eligible Tribes to regulate all air sources within the exterior boundaries of an Indian reservation.

*(These points can be found at: the Participant Manual, page 32 - 34 & 48 - 50)*

## CHAPTER THREE: OVERVIEW OF ENVIRONMENTAL PROTECTION ON INDIAN LANDS

1. U.S. Environmental Protection Agency (EPA): Overall Mission and Implementation -- Briefly discussed at beginning of course, now go into more depth.

2. EPA's Policy for the Administration of Environmental Programs on Indian Reservations (Indian Policy).

- Read key sections of the Indian Policy Statement to the Trainees. Have Trainees discuss how the Policy Statement is applicable in everyday dealings with the Tribes located in the Region.

***(These points can be found at: the Appendix)***
***(Overheads P & Q)***

- In-Class Exercise:
  - Break participants into nine groups.
  - Each group review one of the nine principles of the Indian Policy.
  - At the conclusion of 20 minutes (suggestion:), have a spokesperson from each group, report to the class the implications the principle may have on everyday work.

- Additional points:
  - Issued in 1984 and reaffirmed in 1994
  - Recognizes the government-to-government relationship between the Agency and Tribal governments
  - Recognizes Tribes as the most appropriate party for regulating Tribal environments where they can demonstrate the authority and capability to do so.

***(This can be found at: the Participant Manual, page 38)***

3. EPA serves federally-recognized Tribes, but in some instances may also provide funding and technical assistance to non-federally recognized Tribes through the Environmental Justice program.

***(This can be found at: the Participant Manual, page 38)***

4. EPA statutes which have been amended specifically to allow for EPA authorization of Tribal programs. Ask participants if they can name the statutes:

- Safe Drinking Water Act, 1986
- Clean Water Act, 1987
- Clean Air Act, 1990

***(This can be found at: the Participant Manual, page 38)***
***(Overhead R)***

5. In several instances, EPA has reasoned that even though Congress hasn't specifically provided for Tribal assumption of environmental programs in legislation, the Agency has the discretion to allow for Tribal programs. Two acts, where the opportunity to apply for environmental programs has been extended to Indian Tribes by this method are:

- Resource Conservation and Recovery Act
- Toxic Substance Control Act

***(This can be found at: the Participant Manual, page 39)***
***(Overhead S)***

In addition, three other EPA statutes allow for a limited Tribal role similar to the State's role. These are:

- Federal Insecticide, Fungicide, and Rodenticide Act
- Emergency Response and Community Right-to-Know Act
- Comprehensive Environmental Recovery, Compensation, and Liability Act

***(This can be found at: the Participant Manual, page 39)***
***(Overhead T)***

6. Ask participants which Tribes within their Regions are authorized to regulate their own programs.

- Note: As of July 1996, approximately 100 Tribes had received eligibility to administer grant programs which are intended to build capacity and to assist Tribes in developing EPA programs. Overall, many Tribes intend to eventually implement and assume enforcement responsibility for various EPA programs.

***(This can be found at: the Participant Manual, page 39)***

7. Ask participants to name some of the Tribal environmental efforts currently being done with the EPA. Discuss.

Note, these efforts include:

- Application for EPA program development grants
- Tribal employment of environmental technical staff
- Staff training provisions designed to enhance employee environmental capacity
- Acquisition of necessary equipment
- Adoption of necessary laws and codes
- Development of EPA approved programs designed to protect surface and drinking water, air quality, and land, through establishing solid waste management programs
- Tribal resources monitoring
- Construction and improvement of wastewater treatment facilities
- Development of Tribal Environmental Agreements

***(This can be found at: the Participant Manual, page 39)***

- Ask Trainees:
  - Why do you think that Tribes may not have a substantive environmental program? Do you think that it may be because the Tribe lack technical training? - adequate resource dollars? -Other reasons?

- Instructor : Note that currently, EPA is developing strategies to help fill this gap in protection.

- Participants should briefly discuss what their own regions are doing.

8. Briefly, state and explain the general principles for implementing EPA's programs in Indian Country (It is cautioned that various federal statutes may use of define terms (e.g., reservations) that will control the applicability of a particular statutue in Indian Country):

1. EPA has been granted authority by Congress to ensure that environmental programs designed to protect human health and the environment are carried out across the United States.

2. Both States and Tribes may apply for environmental programs.

3. Consistent with federal Indian law and federal policy, Tribal

governments may have control over regulating environmental quality within their own territory.

4. Generally, in the absence of an EPA approved Tribal program in Indian country, the federal government has jurisdiction.

5. EPA has a federal trust responsibility in implementing Federal environmental statutes.

***(These points can be found at: the Participant Manual, page 40)***

9. Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments:

- Have class read the memorandum.
- Discuss how the memorandum is applicable to the discussion re the EPA Indian Policy Statement.
- Answer any questions Trainees may have.

***(This can be found at: the Participant Manual, page 40 & the Appendix)***

10. Break.
After break, Training will focus on national Tribal programs (building Tribal capability: EPA grants and associated activities).

***(As a preview of coming events, show the participants Overhead U)***

11. What does capability building entail? Note: capability building is sometimes referred to as "capacity building".

***(Begin with Overhead V)***

- It entails providing Tribes with grants, information, technical assistance, and infrastructure towards Tribal administration of environmental programs.

***(Overhead W)***

- Although there are a variety of grants available to Tribes under specific programs, a significant source for Tribal program building capability is through grants provided under the General Assistance Program (GAP) Act.

***These points can be found at: the Participant Manual, page 45)***

12. What are the objectives of the GAP?

*(Overhead X)*

- The GAP objectives are to provide funds to federally-recognized Tribal governments to build capacity to administer environmental programs and to provide technical assistance from EPA in the development of multi-media programs.

- GAP provides Tribes with an opportunity to build a core environmental program and prioritize environmental problems. Once Tribes identify priority problems they can select other EPA grants or programs to pursue.

***(These points can be found at: the Participant Manual, page 45)***

13. What can Tribes do with GAP funds?

- Capability building activities eligible for funding under GAP include: planning, hiring staff, monitoring, and assessing environmental resources and pollution threats.

***(This can be found at: the Participant Manual, page 45)***

14. What are Tribal/EPA Environmental Agreements, and why do we use them?

*(Overhead Y)*

What are they?

- TEAs are designed to assist the Tribes and EPA regions to develop a multi-year plan identifying Tribal program priorities, as well as to clarify which regulatory programs the Tribes may be interested in assuming.

Why do we use them?

- As part of the Agency's efforts to strengthen its Tribal operations, the Agency recognized a fundamental need to better understand the Tribes environmental conditions and management objectives. To accomplish this, the Administrator called for the establishment of Tribal/EPA Environmental Agreements (TEAs) in her July 14, 1994 Memorandum on Strengthening Tribal Operations.

***(These points can be found at: the Participant Manual, page 45 - 46)***

15. In order to receive program specific grants in a manner similar to States, Tribes generally must go through an eligibility process referred to as "Treatment in the same manner as a State" (TAS).

***(This can be found at: the Participant Manual, page 47 - 48)***

a. What are the criteria for a Tribe to qualify for TAS? Discuss. Generally the criteria are as follows:

- The Tribe must be federally-recognized.
- The Tribe must have or be able to exercise substantial governmental powers.
- The Tribe must have jurisdiction over the area in question.
- The Tribe must have the financial, physical and human resource capability to effectively implement a program.

***(These points can be found at: the Participant Manual, page 48)***
***(Overhead Z)***

b. What is the "TAS Simplification Rule"?

Under this rule, EPA eliminated the need to meet all four criteria each time the Tribe applies for a program. Once a Tribe has been deemed eligible for one EPA program, it need only establish that it has jurisdiction and capability for each subsequent program. If the Tribe does not have capability, it must have a plan for acquiring capability over time. This is required because each program requires different skills and activities necessary to provide protection that meets the requirements of the statutes and regulations.

***(These points can be found at: the Participant Manual, page 48)***
***(Overhead AA)***

16. Tribal Operations Action Memorandum:

***(Overhead BB)***

- Have Trainees read the Tribal Operations Action Memorandum.
- Discuss the memo, emphasizing the applicability of many of the items within this section (See above).
- Please note: It will be important to discuss each of the points:

- Establishment of Tribal/EPA Environmental Agreements (TEAS)
- Establishment of Program and Regional Work plans based on TEAS
- Implementation of Management and Compliance Activities
- Review of Program and Regional Indian Program Organization -- and where necessary modification of the organization to strengthen Tribal operations
- Insurance that an Effective EPA/Tribal Liaison Capacity Exists to Provide Direct Field Assistance to Tribes
- Provision of Training to EPA Management and Staff on How to Work Effectively with Tribal Governments
- Enhanced Communications with Tribes
- Use of Available Discretion to Consolidate Issuance and Administrative Requirements of Grants
- Investment of Resources into Tribal Operations.

17. Discuss the Template. Indicate to the class that copies of the Template are available. Explain each of the guiding principles:

a. As these Agreements are developed, all principles included in the Agency's Indian Policy shall apply. This includes recognition of a trust responsibility, government-to-government relationship, and Tribal sovereignty.

b. The government-to-government relationship shall be directly between the Agency and a specific Tribe.

c. The Agreement shall be implemented to promote stability in funding, employment, capacity building, infrastructure development, and other such factors that lead to long-term program implementation for the Tribes.

d. These Agreements are being developed with the understanding that the long-term goal is to address, implement, and maintain, where deemed necessary by the Tribe, the full range of EPA's activities.

e. While implementing the Agreement, the Agency is committed to on-going, timely and open communications with the Tribe. All efforts will be made to provide timely advice on available grants and other sources of available funding, training and on-going meetings that affect Tribes. This also includes a timely transfer of state of the art technology as the Tribes seek to build capacity.

f. This Agreement is intended to promote flexibility while addressing the

needs of the Tribe and can be revisited as appropriate to ensure common sense approaches.

g. The principles of environmental justice shall apply to this Agreement. In general these principles call for the Agency to assure that Tribes are afforded all opportunities afforded to States, including procedures for Tribal participation into agency decision making. In addition, environmental justice principles call for a recognition of Tribal cultural concerns such as subsistence needs and traditional uses of natural resources.

***(These points can be found at: the Participant Manual, page 46)***

Questions re the Template?
Questions re the principles?

Note to Instructor: Take a lot of time on this. TEAs are one of the most important tools EPA can utilize to work effectively with the Tribes.

18. Discuss (generally) Performance Partnership Grants.

- What are they & for what purpose were PPGs designed?

  Are they available for Tribal use?

- What are the benefits of PPGs?

- How are TEAs associated with PPGs?

***(These points can be found at: the Participant Manual, page 47)***

19. Can a Tribe assume an environmental program?

- Tribal governments by virtue of their inherent sovereignty can exercise Tribal authority to regulate their own affairs as well as activities occurring within their territory.

***(This can be found at: the Participant Manual, page 47)***
***(Overhead CC)***

20. Explain how a Tribe could assume primacy for Federal Environmental Programs.

- EPA acting under the statutory authority provided by Congress, establishes standards relating to pollution, a system for enforcement of these standards, and upon request of a Tribe or State, authorizes eligible Tribes or States to established and enforce its own or the federal environmental standards.

***(This can be found at: the Participant Manual, page 47)***

- As Tribes move to develop enforceable environmental protection programs within Indian Country they typically undertake the following steps:

    - 1. Establish the necessary statutory framework by passing Tribal environmental codes;

    - 2. Draft the necessary regulations; and

    - 3. If one does not already exist, establish an administrative body which can ultimately seek Tribal administrative or judicial sanctions to enforce the Tribal law.

***(These points can be found at: the Participant Manual, page 47)***

21. Have the class break into small groups and discuss possible reasons that a Tribe may not assume total responsibility for EPA programs. Afterward, have the class share group ideas.

- Based upon a variety of factors, often including program costs, technical expertise and assistance availability, and maintenance costs, Tribal governments may select certain prioritized activities to fulfill, but not go as far as to take on the entire regulatory program.

***(This can be found at: the Participant Manual, page 50)***

22. When Tribes decide not to fulfill certain activities under EPA's programs or not to apply for entire programs, EPA undertakes implementation. The term used for EPA implementing its own programs is "direct implementation".

- The Agency's Indian Policy clearly identifies Direct Implementation as a responsibility of the Agency.

***(This can be found at: the Participant Manual, page 50)***
***(Overhead DD)***

23. Have the class break into groups again. Have groups identify issues which may arise within the context of direct federal implementation. Have groups identify tools which can be utilized by the EPA for better implementation efforts. Have groups identify possible solutions for better implementation techniques. Note: Similar discussion can be found in the participant manual; to facilitate better discussion, make sure that class members do not look at the manual during this exercise.

(This exercise can also be used to capability building and program authorization. It would be recommended that this approach also be utilized during the session.)

24. As a class, share group ideas. Discuss.

25. Note to the Trainer: If participants identify barriers such as:

- Tribes may not want EPA to directly implement programs in their territory for various reasons.
- Lack of baseline data on Tribal environmental needs
- Insufficient training for EPA staff to work effectively with Tribes

then work with the class, together, to identify how the tools (see below) may be utilized to break down those barriers.

26. The following is an illustrative selection of some tools that are available for direct federal implementation:

- Communications with Tribes
- Establishment of Tribal\EPA Environmental Agreements (TEAs) which identify Tribal priorities and help with budget development
- Development of Regional and National Environmental Work plans based on TEAS.
- Development of regional strategies so that DI is consistent with Tribal priorities.
- Training of management and regional staff

***(This can be found at: the Participant Manual, page 50)***

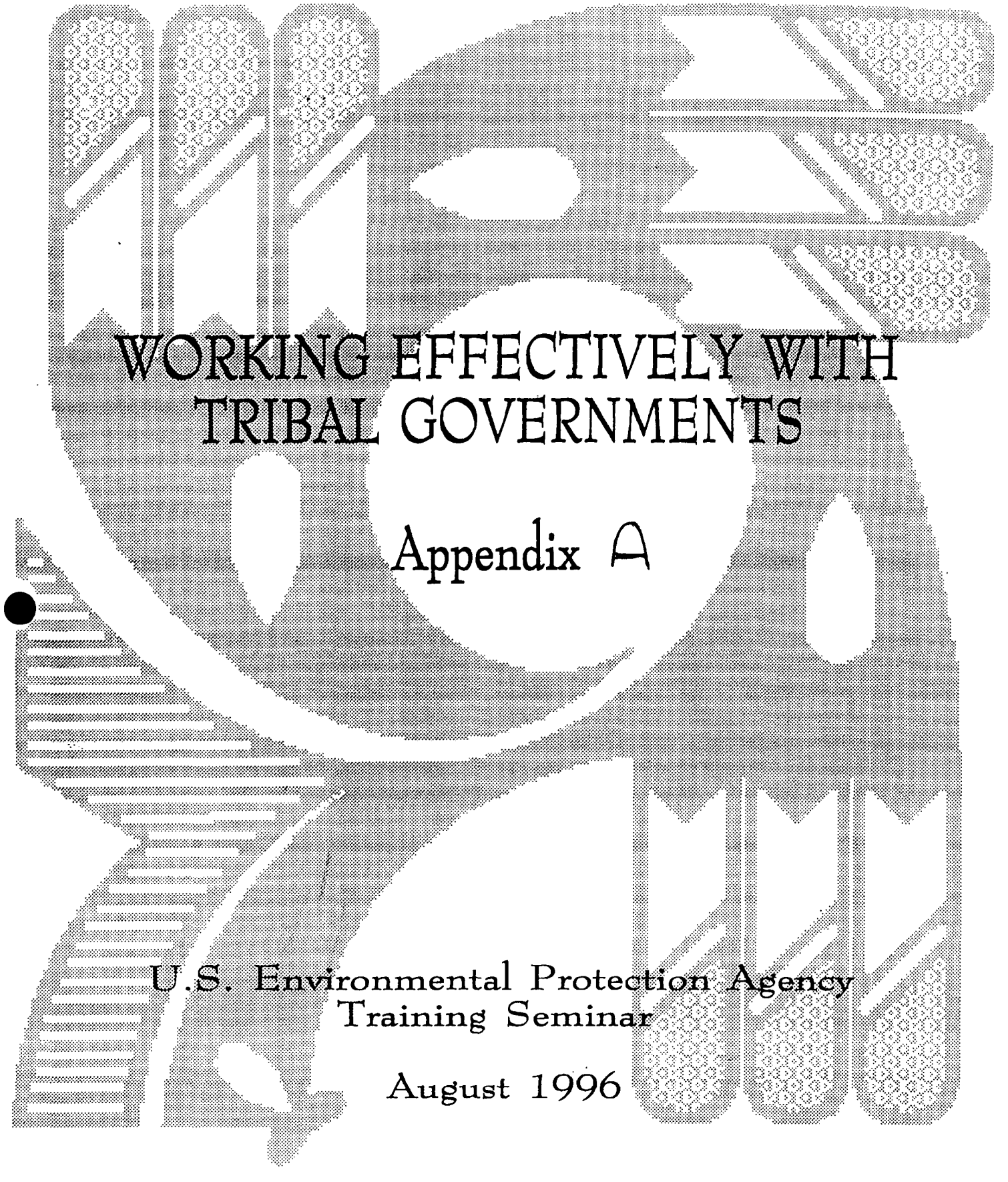
27. Below, are several success stories which document instances in which direct implementation is occurring successfully:

- Many Regions assist with the regulation of Drinking Water Sources and of underground injection wells that can affect drinking water, surface water and ground water sources.

- Region 8 provides staff to visit reservations and to provide compliance and enforcement services under the Underground Storage Tank Program of the Resource Conservation and Recovery Act.

- On the Colville Indian Reservation, Region 10, in conjunction with the Tribe, has established federal water quality standards and is issuing discharge (NPDES) permits for the navigable waters within the exterior boundaries of the reservation.

***(This can be found at: the Participant Manual, page 51)***



# WORKING EFFECTIVELY WITH TRIBAL GOVERNMENTS

## Appendix A

U.S. Environmental Protection Agency
Training Seminar

August 1996

# APPENDIX


| | PAGE |
|---|---|
| President Clinton's April 19, 1994 Memorandum: Government-to-Government Relations with Native American Tribal Governments | 1 |
| EPA Policy for the Administration of Environmental Programs on Indian Reservations | 2 |
| Federal, Tribal, and State Roles in the Protection and Regulation of Reservation Environments (Concept Paper) | 5 |
| Tribal Operations Action Memorandum (July 1994) | 8 |
| Memorandum of Understanding Among the Bureau of Indian Affairs, Environmental Protection Agency, Housing and Urban Development, and Indian Health Service | 11 |
| Final Tribal/EPA Agreements (TEAs) Template | 22 |
| Publication of Regulation Simplifying EPA's Process for Qualifying Indian Tribes for Program Approval (i.e. "TAS" Simplification) | 25 |
| Tribal Operations Committee Charter | 35 |

THE WHITE HOUSE

WASHINGTON

April 29, 1994

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Government-to-Government Relations with Native American Tribal Governments

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

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

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.

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

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

(d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

William J. Clinton

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 1 4 1994

MEMORANDUM

SUBJECT: EPA Indian Policy

THE ADMINISTRATOR

TO: All Employees

In 1984, EPA became the first Federal agency to adopt a formal Indian Policy (copy attached). EPA is proud of that Policy, which has provided the framework for our developing partnership with Tribes. Since 1984 Agency programs have changed and several of our statutes have been amended to address Tribal needs. Nevertheless, the core principle of the Policy, a commitment to working with Federally recognized tribes on a government-to-government basis to enhance environmental protection, has been reaffirmed by President Clinton and remains the cornerstone of EPA's Indian program. Accordingly, therefore, I formally reaffirm the EPA Indian Policy.

The challenge for EPA today is to implement its Policy effectively. Previous administrations have addressed implementation, both in a 1984 Policy Implementation Guidance and a 1991 Concept Paper. We must now update and strengthen these documents and our implementation programs to reflect the goals and values of our long-term vision and strategic agenda. A key element for successfully implementing the Indian Policy must be a commitment to fully institutionalize the Policy into the Agency's planning and management activities.

On March 7, Martha Prothro, formerly Deputy Assistant Administrator for Water, joined my staff to assist in developing our Tribal Programs. I have asked Martha and Bill Yellowtail, Regional Administrator, EPA Region VIII, to form a team of Agency leaders to make recommendations on EPA/Tribal relations and the implementation of the Policy. The work of this group should help the Agency develop the best structure and adopt the best strategies for implementing the goals of the Policy. The team will work with Tribal representatives, including the Tribal Operations Committee and others, in drafting new implementation guidance. This guidance will provide a blueprint for transforming the Policy's vision into a reality for federally recognized Indian Tribes, including Alaskan Tribes.

This is an exciting opportunity for us to develop a stronger partnership with Tribal governments in protecting the environment. I ask all of you to help make this effort a great success.

Carol M. Browner

Attachment

# EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

## INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

## POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Wher the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 10 1991

MEMORANDUM

THE ADMINISTRATOR

SUBJECT: EPA/State/Tribal Relations

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Associate Administrators
Staff Office Directors

Earlier this year I shared with you my views concerning EPA's Indian Policy, its implementation and its future direction. I would now like to further emphasize my commitment to the Policy by endorsing the attached paper that was coordinated by Region VIII on EPA/State/Tribal Relations.

This paper was prepared to formalize the Agency's role in strengthening tribal governments' management of environmental programs on reservations. The paper notes that the differences between the interests of tribal and state governments can be very sensitive and sometimes extend well beyond the specific issues of environmental protection. It reaffirms the general approach of the Agency's Indian Policy and recommends the strengthening of tribal capacity for environmental management. I believe the Agency should continue its present policy, making every effort to support cooperation and coordination between tribal and state governments, while maintaining our commitment to environmental quality.

I encourage you to promote tribal management of environmental programs and work toward that goal.

Please distribute this document to states and tribes in your region.

William K. Reilly

Attachment

cc. Headquarters Program Office Directors
Regional Office Directors

# FEDERAL, TRIBAL AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS

A Concept Paper

## I. BACKGROUND

William Reilly, in his first year as EPA Administrator, reaffirmed the 1984 EPA Indian Policy and its implicit promise to protect the environment of Indian reservations as effectively as the Agency protects the environment of the rest of the country. The EPA Indian Policy is premised on tribal self-determination, the principle that has been set forth as federal policy by Presidents Nixon, Reagan, and Bush. Self-determination is the principle recognizing the primary role of tribal governments in determining the future course of reservation affairs. Applied to the environmental arena in the EPA Indian Policy, this principle looks to tribal governments to manage programs to protect human health and the environment on Indian reservations.

## II. TRIBAL, STATE AND FEDERAL EXPECTATIONS

The Agency is sensitive to the fact that tribal and state governments have serious and legitimate interests in the effective control and regulation of pollution sources on Indian reservations. EPA shares these concerns and, moreover, has a responsibility to Congress under the environmental statutes to assure that effective and enforceable environmental programs are developed to protect human health and the environment throughout the nation, including Indian reservations.

Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining reservation land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others. For these reasons, Indian tribes have insisted that tribal governments be recognized as the proper governmental entities to determine the future quality of reservation environments.

State governments, in turn, recognize that the environmental integrity of entire ecosystems cannot be regulated in isolation. Pollution in the air and water, even the transportation of hazardous materials in everyday commerce, is not restricted to political boundaries. Accordingly, state governments claim a vital interest in assuring that reservation pollution sources are effectively regulated and, in many cases, express an interest in managing reservation environmental programs themselves, at least for non-Indian sources located on the reservations. In addition, some state officials have voiced the concerns of various non-Indians who live or conduct business within reservation boundaries, many of whom believe that their environmental or business interests would be better represented by state government than by the tribal government.

Although the Agency hears these particular concerns expressed most often through tribal and state representatives, respectively, the Agency is aware that most of these concerns are shared by both tribes and states. For example, tribal governments are not alone in holding the view that future generations depend on today's leaders to manage the environment wisely. Many state officials argue the same point with the same level of conviction as tribal leaders. Conversely, tribal governments share with states the awareness that individual components of whole ecosystems cannot be regulated without regard to management of the other parts. Tribal governments have also shown themselves to share the states' sensitivity to the concerns and interests of the entire reservation populace, whether those interests are the interests of Indians or non-Indians. In the Agency's view, tribes and states do not differ on the importance of these goals. Where they differ at all, they differ on the means to achieve them.

EPA fully shares with tribes and states their concerns for preservation of the reservation as a healthy and viable environment, for rational and coordinated management of entire ecosystems, and, thirdly, for environmental management based on adequate input both from regulated businesses and from the populace whose health the system is designed to protect. Moreover, the Agency believes that all of these interests and goals can be accommodated within the framework of federal Indian policy goals and federal Indian law.

## III. EPA POLICY

The EPA Indian Policy addresses the subject of state and tribal roles within reservation boundaries as follows:

1) First, consistent with the President's policy, the Agency supports the principle of Indian self-government:

"In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments."

2) Second, the Agency encourages cooperation between state, tribal and local governments to resolve environmental issues of mutual concern:

"Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the best interests of both."

## IV. PRINCIPLES AND PROCEDURES FOR EPA ACTION

EPA program managers will be guided by the following principles and procedures regarding tribal and state roles in the management of programs to protect reservation environments.

1. The Agency will follow the principles and procedures set forth in the EPA Policy for the Administration of Environmental Programs on Indian Reservations and the accompanying Implementation Guidance, both signed on November 8, 1984.

2. The Agency will, in making decisions on program authorization and other matters where jurisdiction over reservation pollution sources is critical, apply federal law as found in the U.S. Constitution, applicable treaties, statutes and federal Indian law. Consistent with the EPA Indian Policy and the interests of administrative clarity, the Agency will view Indian reservations as single administrative units for regulatory purposes. Hence, as a general rule, the Agency will authorize a tribal or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation. Where, however, a tribe cannot demonstrate jurisdiction over one or more

reservation sources, the Agency will retain enforcement primacy for those sources. Until EPA formally authorizes a state or tribal program, the Agency retains full responsibility for program management. Where EPA retains such responsibility, it will carry out its duties in accordance with the principles set forth in the EPA Indian Policy.

3. Under both authorized and EPA-administered programs for reservations, the Agency encourages cooperation between tribes and states, acting in the spirit of neighbors with a mutual self-interest in protecting the environmental and the health and welfare of the reservation populace. Such cooperation can take many forms, including notification, consultation, sharing of technical information, expertise and personnel, and joint tribal/state programming. While EPA will in all cases be guided by federal Indian law, EPA Indian Policy and its broad responsibility to assure effective protection of human health and the environment, the Agency believes that this framework allows flexibility for a wide variety of cooperative agreements and activities, provided that such arrangements are freely negotiated and mutually agreeable to both tribe and state. The Agency will not act in such a manner as to force such agreements.

4. The Agency urges states to assist tribes in developing environmental expertise and program capability. The Agency has assisted in funding state environmental programs for two decades, with the result that, today, state governments have a very capable and sophisticated institutional infrastructure to set and enforce environmental standards consistent with local state needs and policies. As the country now moves to develop an infrastructure of tribal institutions to achieve the same goals, state governments can play a helpful and constructive role in helping to develop and support strong and effective tribal institutions. The State of Wisconsin has worked with the Menominee Tribe to develop a joint tribal/state RCRA program that can serve as a model of mutually beneficial cooperation for other states and tribes.

5. The Agency urges tribes to develop an Administrative Procedures Act (APA) or other means for public notice and comment in the tribal rule-making process. Many tribes now working with EPA to develop environmental standards and regulatory programs have already taken the initiative in establishing such techniques for obtaining community input into tribal decision-making. Such tribes have enacted APAs and held public meetings to gather input from both Indian and non-Indian residents of the reservation prior to setting tribal environmental standards for their reservations. The Agency generally requires states and tribes to provide for adequate public participation as a prerequisite for approval of state or tribal environmental programs. The Agency believes that public input into major regulatory decisions is an important part of modern regulatory governance that contributes

significantly to public acceptance and therefore the effectiveness of regulatory programs. The Agency encourages all tribes to follow the example of those tribes that have already enacted an APA.

6. Where tribal and State governments, managing regulatory programs for reservation and state areas, respectively, may encounter transboundary problems arising from inconsistent standards, policies, or enforcement activities, EPA encourages the tribal and state governments to resolve their differences through negotiation at the local level. EPA, in such cases, is prepared to act as a moderator for such discussions, if requested. Where a statute such as the Clean Water Act designates a conflict-resolution role for EPA in helping to resolve tribal/state differences, EPA will act in accordance with the statute. Otherwise, EPA will respond generally to such differences in the same manner that EPA responds to differences between states.

## V. CONCLUSION

The Agency believes that where an ecosystem crosses political boundaries, effective regulation calls for coordination and cooperation among all governments having a regulatory role impacting the ecosystem. Many differences among tribes and states, like differences among states, are a natural outgrowth of decentralized regulatory programs; these differences are best resolved locally by tribes and states acting out of mutual concern for the environment and the health of the affected populace. EPA actions and decisions made in carrying out its role and responsibilities will be consistent with federal law and the EPA Indian Policy. Within this framework, the Agency is convinced that the environmental quality of reservation lands can be protected and enhanced to the benefit of all.

UNITED STATES ENVIRO
WASHINGTON, D.C. 20460

JUL 14 1994

OFFICE OF
THE ADMINISTRATOR

**MEMORANDUM**

**SUBJECT:** Announcement of Actions for Strengthening EPA's Tribal Operations

**TO:** Assistant Administrators
General Counsel
Inspector General
Associate Administrators
Regional Administrators
Staff Office Directors

Over the last five months a team of Senior EPA managers and a workgroup of EPA staff have been working to identify ways to strengthen Tribal operations throughout the Agency. I would like to thank those who worked on the team for your time and valuable contributions. Thanks also to all of you for your support for improving EPA's Indian program and increasing the Agency's ability to assist Tribes in the development and implementation of their environmental protection programs.

Attached is a document outlining steps we should implement promptly throughout the Agency. Although many of you are already working to improve specific areas of Tribal operations, additional steps are needed to address critical gaps in Tribal environmental protection and to improve our government-to-government partnership with Tribes. We can make significant progress within the next year, while continuing to search for additional opportunities to strengthen EPA's Indian program. When our new Office of Indian Affairs begins operation this fall, it will assist in carrying out this action agenda, as well as. developing, coordinating and promoting broad, longer-term activities for Tribal environmental protection.

I ask each of you to continue to make this effort a high priority.

Carol M. Browner

Attachments

# TRIBAL OPERATIONS ACTION MEMORANDUM
## July 12, 1994

To help improve communications and understanding between EPA and Tribes, Administrator Browner has established a new EPA/Tribal Operations Committee (TOC), which includes 18 Tribal representatives. At the Committee's first meeting, on February 17, 1994, the Administrator, in order to respond to Tribal recommendations, authorized a group of senior managers from EPA Headquarters and Regions to develop recommendations, in consultation with the Tribal members of the TOC, on ways to strengthen EPA's Tribal environmental programs and daily operations, pursuant to the implementation of the 1984 Indian Policy. This team of EPA managers has worked on a variety of issues over the last five months.

On May 26, 1994, at the Second National Tribal Conference on Environmental Management in Cherokee, North Carolina, Administrator Browner announced her intent to create a new Office of Indian Affairs and set October 1994, as the target date for it to begin operations. Although this Office will have the lead for coordinating certain activities, most of the responsibility for developing and implementing Tribal environmental protection programs will remain with the Regions and Headquarters Program Offices. Therefore, we need not wait until the establishment of the Office to promptly begin the implementation of the following actions.

The following action items are intended to strengthen EPA's Indian program by supplementing current activities. Although a Federal Register notice will invite public review and comment on the functions of the new Office of Indian Affairs (some of which are similar to the actions described below), EPA need not delay its efforts to strengthen Tribal operations. The public may have additional ideas about actions we should take and there may be refinements in our thinking. However, consultation with the Tribal Operations Committee members and responses received to a mailing to Tribal Leaders in June suggest we are generally on the right track.

Recognizing that many of these actions are new or were not previously identified as priorities, each Assistant and Regional Administrator will need to make some difficult resource allocation decisions to provide the necessary people and resources to begin to meet the challenge of strengthening EPA's Tribal operations. Each Assistant and Regional Administrator, in proceeding in the implementation of the following actions, would benefit greatly from the experience and working knowledge of the Headquarters Program and Regional Indian Coordinators (the National Indian Work Group) and from consultation with the Tribal representatives to the Tribal Operations Committee. These individuals have a great deal of information on Tribal needs and priorities.

In order to document and measure the Agency's progress and successes on strengthening the implementation of Tribal environmental protection and to facilitate early feedback on that progress, each Assistant and Regional Administrator will be asked to report, within 6 months from the issuance of this memorandum, to the Administrator on the status of his/her implementation efforts.

1) **Tribal Environmental Workplans:** In order for EPA and Tribes to plan for and respond effectively to Tribal environmental problems, the Agency and Tribes need to establish a base description of the types of environmental problems and priorities Tribes face and then formulate specific workplans for responding to the problems. To facilitate and support such a cooperative EPA/Tribal effort, each Regional Administrator should promptly begin to work with Tribes to develop environmental workplans, to include the Tribes' plans to manage authorized environmental programs and/or their need for federal technical assistance, education and implementation and management of environmental protection. Each Regional Administrator has the flexibility to determine, in consultation with Tribes, the most appropriate way to develop these workplans.

2) **EPA Regional and Program Indian Workplans:** To focus and facilitate Program and Regional efforts for effective Tribal environmental protection, each Assistant and Regional Administrator should begin to establish strategies for achieving the goals outlined in the Tribal environmental workplans. These Workplans should include the specific program implementation and management activities, technical assistance and education that will be undertaken by each Region and National Program Office. While these plans should address the problems identified in the Tribal workplans, they may be developed at the same time, in close consultation with the Tribal plans, so as to ensure the completion of Regional and National Program plans prior to the FY 1997 budget development process. The plans may be flexible and allow for future revisions as more is learned about the Tribes' environmental problems and priorities.

3) **EPA Implementation, Management and Compliance Activities:** In response to concerns that numerous gaps may exist in Tribal environmental protection, each Assistant and Regional Administrator, in close consultation with Tribes, should take immediate steps to increase implementation and management of and ensure compliance with environmental programs. Although the Agency should encourage Tribal implementation and management, where such Tribal environmental programs do not exist, the Agency, in carrying out its statutory and trust responsibilities, must work, in partnership with Tribes, on a government to government basis, to ensure the protection of Tribal human health, natural resources and environments. Although EPA retains final authority over and responsibility for its actions, the EPA Indian Policy recognizes Tribal governments as the most appropriate authority for managing Tribal environments and the Agency should accord great deference to Tribal priorities and environmental goals when carrying out these activities.

4) **Program and Regional Organization:** To strengthen the Indian program within the Regions and Headquarters Program Offices and to ensure greater consistency in the work performed by those offices, each Assistant and Regional Administrator should begin to review and, where necessary, modify the organization and/or management of the Indian program within his/her office. Each Region and Program Office has different responsibilities and/or workloads for Tribal operations and, therefore, some may require more resources than others. However, at a minimum, each Assistant and Regional

Administrator with responsibilities for Tribal activities should consider assigning a professional, full-time, to serve as Indian Coordinator, and report back to the new Office on status of this position. The Indian Coordinators must have the necessary procedures and support to assure full and effective communication with program staff throughout the organization. In addition, each Assistant and Regional Administrator should begin to address any need for additional staff to carry out critical activities related to the Agency's Indian program.

5) **Field Assistance for Tribes:** In order to supply the necessary assistance to Tribes for program development, authorization, operation and/or management, and to work with the Tribes to determine EPA implementation and management responsibilities, each Regional Administrator should ensure that there is an effective EPA/Tribal liaison capacity (ie. Indian Environmental Liaisons or other appropriate EPA field presence), to provide direct field assistance to the Tribes. As much as possible, this capacity should be carried out by staff from Indian Country and who have experience in the environmental field working with Tribal governments, communities, organizations and/or environmental staff.

6) **Training of EPA Staff:** It is important that EPA employees have the necessary sensitivity, knowledge and understanding of Indian affairs to facilitate communication between EPA and Tribal representatives. The Office of Indian Affairs, once established, will promote and coordinate training on Indian issues for Agency managers and staff. In the interim, Assistant and Regional Administrators are encouraged to provide training that moves the Agency in the direction of better understanding of Indian issues. This training could cover the EPA Indian Policy, EPA's Indian program activities, Tribal sovereignty and jurisdiction, Tribal environmental needs and activities, the role of Tribal individuals and organizations and cultural differences that may affect EPA's working relationship with Tribes.

7) **Communication with Tribes:** To promote and facilitate communication between EPA and Tribal governments, pursuant to the 1984 Indian Policy and Executive Order 12875, and between EPA and Tribal members and/or organizations, in keeping with the spirit of Environmental Justice, Assistant and Regional Administrators should include Tribes in decision-making and program management activities that affect them. Communication and requests for Tribal input should occur early in any Agency process that may affect Tribes and full consideration should be given to the policies, priorities and concerns of the affected Tribe(s) and/or, where appropriate, affected Tribal members.

8) **Grant Flexibility and Streamlining:** Given that most Tribes have a small environmental staff (if any) to manage various program-specific grants, in order to increase the efficient use of limited resources, each Assistant and Regional Administrator should, to the extent

allowed by law, use available discretion to consolidate issuance and administration of grants to Tribes and allow for both program operation and program development.[1]

9) **Resource Investment in Tribal Operations:** Some encouraging first steps have already been taken to increase resources for Tribal operations in the FY 1996 budget. High priority was established for increasing support for Tribal operations at the Annual Planning meeting in April. However, to begin immediately strengthening the Indian program and to implement the new activities outlined in this memorandum, resources must be invested in FY 1994 and FY 1995 for: 1) staff assistance in the development of Tribal environmental workplans (FTE and travel); 2) Tribal capacity building, environmental program development, authorization and management (primarily grant funding); 3) EPA implementation and management activities (FTE, travel and AC&C support); and 4) technical assistance and related support, as needed by the Tribes (FTE, travel and AC&C support). These additional investments, will require a shift in Headquarters Program and Regional priorities to place greater emphasis on Tribal operations. Recognizing that we cannot immediately resolve all problems or address all Tribal environmental needs, each Assistant and Regional Administrator should allocate resources within their discretion and authority to constitute a significant commitment to strengthening Tribal environmental protection.

---

[1] While recognizing that the primary objective of the General Assistance Program (GAP) is to develop Tribal environmental capacity, the new Office of Indian Affairs will be asked to consider using, to the extent allowed by law, any flexibility in the current GAP for program implementation, where funding such implementation would be impractical on a program by program basis. In consultation with Assistant and Regional Administrators, the Office will consider whether EPA should support statutory changes in granting authorities to create more opportunities for Tribal block grants and to explicitly allow for the use of GAP, where practical, for program implementation. However, even if the use of GAP is expanded, program-specific funding and responsibility for technical assistance, implementation, management or other related activities would still need to continue and also expand.

**MEMORANDUM OF UNDERSTANDING**
**AMONG THE**
**BUREAU OF INDIAN AFFAIRS**
**ENVIRONMENTAL PROTECTION AGENCY**
**HOUSING & URBAN DEVELOPMENT**
**AND**
**INDIAN HEALTH SERVICE**

## I. Statement of Purpose

The Bureau of Indian Affairs (BIA), the Environmental Protection Agency (EPA), the Department of Housing & Urban Development (HUD) and the Indian Health Service (IHS), all have responsibilities and interests pertaining to the protection of the environment and human health as it relates to pollution control on Indian lands. It is the purpose of this Memorandum of Understanding (MOU) to identify areas of mutual interest and responsibility of the four agencies and to encourage the coordination of the agencies' respective activities to promote the most efficient and integrated utilization of resources. It is anticipated that the Regional and Area Offices of the respective signatory agencies may desire to develop more specific MOUs pursuant to the general agreements established in this document

## II. Findings

### A. Scope of Respective Authorities

All of the agencies have interest in the effects on human health and the environment from pollutants. As a result, each agency conducts or supports environmental health activities in one or more of the following areas:

Air Quality Management
Radiation Hazard Identification and Mitigation
Water Quality and Critical Habitat Management
  Surface Water, Ground Water & Drinking Water Protection
Underground Storage Tanks
Hazardous Materials Management, Emergency Response and
  Community Right-to-Know
Solid Waste Management

Pesticides & Toxic Substance Use and Management and Endangered Species Protection

B. Description of Agency Mission

**(It is to be noted that BIA, HUD, and IHS are neither regulatory nor enforcement agencies on environmental matters while EPA is.)**

1. BIA's programs are associated with Indian trust resources and include environmental quality through the authority of the trust, and the National Environmental Policy Act of 1969, which establishes procedures that are binding on all Federal agencies. The primary requirement is that an Environmental Impact Statement (EIS) be prepared for every major Federal action significantly affecting the quality of the human environment. BIA must also apply the Council on Environmental Quality's (CEQ) regulations and the Department of the Interior's implementation procedures. BIA is responsible for assuring that all of its projects comply with all applicable statutes, whether or not projects are Federally initiated or EPA has enforcement authority. BIA must also comply with all laws related to cultural resources and threatened and endangered species.

2. EPA has regulatory and enforcement authority on Indian reservations and authority to expend financial resources on Indian lands under various environmental statues. Statutes authorizing EPA actions on Indian lands include the Clean Air Act (CAA), Clean Water Act (CWA), the Emergency Planning and Community Right to Know Act (EPCRA), Federal Insecticide, Fungicide and Rodenticide Act

(FIFRA), Resource Conservation and Recovery Act (RCRA), Safe Drinking Water Act (SDWA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as amended, and the Toxic Substances Control Act (TSCA). EPA expects that the Clean Air Act will be amended in 1990 to include authority to treat tribes as states for air quality purposes and to authorize the Administrator to promulgate rules implementing this authority. EPA will either retain its appropriate environmental management authorities or authorize Tribal governments on Indian lands to administer their own regulatory programs on a case by case basis depending upon the language of the particular statute and tribal capability with appropriate consideration for the special needs of tribal governments. The programs will be operated in a manner consistent with the provisions of the EPA Indian Policy and Implementation Guidance which were issued on November 8, 1984. EPA is also responsible for NEPA compliance for its projects on Indian lands.

3. HUD provides financial and technical assistance, under the United States Housing Act of 1937 as amended, in the development and management of low income housing in Indian and Alaska Native areas. This includes funding for appropriate sanitation facilities for HUD assisted housing projects. HUD conducts a Community Development Block Grant (CDBG) program which is available to tribes. For its projects on Indian lands, HUD insures the compliance of Indian Housing Authority (IHA) with all requirements of NEPA, Section 1091 of the Stuart B. McKinney, Homeless Assistance Amendments Act, the Clean Water Act, and the

requirements to ban lead in water plumbing and distribution pipes contained in the Safe Drinking Water Act.

4. IHS has the primary responsibility for improving the health of and preventing disease and injuries among the American Indian and Alaska Native population through the development and implementation of a comprehensive environmental health program on Indian lands. The Division of Environmental Health (DEH) of the IHS conducts activities dealing with air pollution, community injury prevention, emergency operations, epidemiology, food protection, hazardous materials, home and community health, institutional environmental health, occupational health, operation and maintenance assistance, radiation, recreational sanitation, safety, vector control, waste disposal (including solid waste), and water supply. These activities include surveys, technical assistance, investigations, sampling, training, control and construction. The DEH may carry out these activities directly, or the tribes may undertake them with the assistance of IHS, under the Indian Self-Determination Act, P.L. 93-638 as amended. The purpose of the IHS Sanitation Facilities Construction Program (authorized by P.L. 86-121, the Indian Sanitation Facilities Act and reaffirmed by P.L.100-713, the Indian Health Care Amendments of 1988) is to take direct action to provide sanitation facilities that improve the health status of Native Americans. These facilities can include water supply, sewage treatment or solid waste management systems. IHS does not operate or maintain community water, sewage or solid waste facilities, but provides training and technical

assistance and may provide the necessary equipment in conjunction with new facilities or major renovation projects for Indian tribes to perform these activities. IHS prepares NEPA compliance documents for its projects on Indian lands.

C. Areas of Primary Mutual Interest

Listed below are specific program areas of special interest to BIA, EPA, HUD and IHS. General responsibilities are outlined under each area.

1. Air Quality Management

a. BIA - Technical Assistance, Coordination with EPA/Tribes
   - Provides some funding for Air Monitoring

b. EPA - Provides technical assistance and training for planning and management activities
   - Provides monitoring and assessment of air quality on Indian lands
   - Provides Section 105 (Clean Air Act) grant assistance to tribes and demonstration grants for Indoor Radon Abatement
   - Provides assistance in implementing the Prevention of Significant Deterioration on Indian Lands

c. HUD - IHA Compliance with Tribal or Local Construction Standards which Includes Assuring Wood or Coal Stoves Meet Appropriate Air Quality Standards

d. IHS - Investigation of Potential Health Problems, Monitoring, Technical Assistance, Compliance with Local Construction Standards

e. Potential Overlap

- Technical Assistance (BIA, EPA, IHS)
- Monitoring (EPA, IHS, BIA)

2. Radiation Hazard Identification and Mitigation

a. BIA - Technical Assistance, Coordination with EPA/Tribes, Monitors Radionuclides in BIA Operated Systems, Considers Potential Problems such as Radon in Home Design

- Conducts Studies in accordance with the Radon Abatement Act of 1988

b. EPA - Tribes may be Included in the National Household Radon Survey

- May Provide Canisters & Technical Assistance for Tribes or IHS to Conduct Radon Surveys As Resources Permit
- Provides Consultation on Appropriate Radon Remediation Activities
- Provides Assistance in Monitoring of Radionuclides in Water and Radioactive Releases in General
- Provides Training to Tribes and other agencies in Radon Remediation
- Provides Technical Assistance and

Consultation on Releases of Radioactive materials

c. HUD
- Considers EPA/IHS Recommendations for Site Approval
- Considers EPA/IHS Recommendations on Radon.
- Develops a Policy Based on EPA Guidelines to Prevent Harm to Human Health from Radon Exposure

d. IHS
- Assistance in Radon Surveys of Homes on Reservations
- Provides Technical Assistance on All Radiation Issues
- Conducts Surveys of IHS owned facilities in accordance with the Radon Abatement Act of 1988
- Assistance in Monitoring of Natural Radiation Sources
- Performs Compliance Testing of Radiation Equipment in Health Care Facilities
- Provides Training
- Assists Tribes in initial Monitoring of Radionuclides in Water

e. Potential Overlap
- Technical Assistance (BIA, EPA, IHS)
- Radon Surveys (EPA, IHS)

- Radon Abatement Surveys (BIA, IHS)
- Monitor Radionuclides in Water (EPA, IHS, BIA)

3. Water Quality and Critical Habitat Management

Water Supply Systems, Waste Water Treatment, Surface Water, Groundwater and Drinking Water Protection and Critical Habitat Management

a. BIA -

General Activities

- Sampling, Testing and Monitoring of Surface Water and Ground Water for Water Quantification Studies, for Uses Including Livestock, Wildlife, Instream Flow, Municipal, Industrial Recreation, Religious, Cultural and Diversionary Trespass Issues
- Operation and Maintenance (O&M) for BIA Facilities
- WSS and WWT for BIA School/Agency Facilities
- Provides Training to Tribes for Water Management
- Provides Technical Assistance and Consultation on Tribal Jurisdictional Issues

Safe Drinking Water Act

- Inventory and Maintenance of Water Supplies for BIA School/Facilities

- Coordinate with EPA and other Agencies on Underground Injection Control Direct Implementation Programs

Clean Water Act

- Technical Assistance to Tribes in Defining a Scope of Work as Part of an Application for EPA 106 Funds
- Assists Tribes in Obtaining EPA Section 402 and 404 Permits
- Develops Best Management Practices (BMPs) for Control of Non-Point Source Pollution on Trust Lands

b. EPA -

General Activities

- Assist Tribes in Developing Tribal Capacity to Regulate
- Direct Implementation for Tribes not Meeting Statutory Requirements for Treatment as a State or not Seeking Authorization to Implement EPA Programs in Balance with other Agency Priorities
- Training of Tribal Staff in Water Quality Monitoring Procedures
- Maintenance of Ground Water and Surface Water Quality Data
- Provide Funds for Demonstration Projects

Safe Drinking Water Act

- Regulates Public Water Systems (PWS) or authorizes Tribes Treated as States to Assume Primary Enforcement Responsibility and can Provide Tribal Grants to Tribes Treated as States
- Sole Source Aquifer Protection
- Underground Injection Control Program Implementation: Authorizes Tribes Treated as States to Assure Primary Enforcement Responsibility and Can Provide Tribal Grants to Tribes Treated as States
- Well Head Protection
- Works With Tribes in Developing Safe Drinking Water Programs

Clean Water Act

- National Pollutant Discharge Elimination System (NPDES) Permits
- Clean Lakes Programs
- Enforcement & Regulation of Surface Water Standards
- Wetlands Protection
- Section 401 Permit and License Certification
- Non-Point Source Pollution Prevention
- Works with Tribes in the Development of Tribal Water Quality Programs and Authorizes

Tribes Treated as States to Carry out Appropriate Functions

- Award Tribes Treated as States 106 Water Quality Management Grants
- Waste Water Treatment System Construction Grants

c. HUD -

General Activities

- Funds On-Site Sanitation Systems for HUD Assisted Housing Through Housing Authorities
- Water and Sewage Project Funding through CDBG Program
- Provides Funds to IHS under Agreement with HUD and the Housing Authorities for Construction of Off-site Sanitation Facilities Which May Include Equipment for Operation and Maintenance Activities
- Bans Lead in Water and Distribution Pipes, Solder and Flux in HUD Assisted Property
- Requires Funded Housing Projects to comply with Wetlands Provisions of the Clean Water Act

d. IHS -

General Activities

- Off-site Sanitation Facilities

Construction for HUD Homes

- Construction of Sanitation Facilities for BIA Housing Improvement Program (HIP), Tribally Funded Programs, and Existing Homes (On and Off-Site Facilities)
- Well Construction
- Technical Assistance for On-site Water and Sewer Facilities
- Assist Tribes in Obtaining EPA Permits
- Technical Assistance to Tribes to Address Provisions of SDWA & CWA
- Training of Homeowners
- Conducts Special Studies Such as Utility Rate Studies
- Provides Technical Assistance in the Establishment of O & M Organizations, As Well As, Equipment and Tools for O&M
- Surveys of Indian and BIA Water and Waste Water Systems
- Maintenance of Data System for Sanitation Facilities

<u>Safe Drinking Water Act</u>

- Design and Construction of Drinking Water Facilities, Distribution and Storage Facilities for Domestic Use
- Training of Tribal Staff in Operation and

Maintenance of Sanitation Facilities

Clean Water Act

- Design and Construct Waste Water Collection, Treatment and Disposal Facilities for Domestic Use
- Training of Tribal Staff in O&M of Sanitation Facilities

e. Potential Overlap

- Water Quality Testing as Appropriate or Required (BIA, EPA, IHS)
- Funding Wastewater Facilities (EPA, HUD, IHS,)
- Funding of Domestic Drinking Water Facilities (HUD, IHS)
- Assistance in Obtaining Additional Sources of Funding (BIA, EPA, IHS)
- Technical Assistance to Address Provisions of SDWA and CWA (BIA, EPA, IHS)
- Assist Tribes in Obtaining EPA Section 402 and 404 Permits (BIA, EPA, IHS)
- Assist Tribes in Identifying BMPs for Protection of Water Quality/Water Supplies (BIA, EPA, IHS)
- Critical Habitat Management (BIA, EPA)
- Maintenance of Water Quality Data (BIA, EPA, IHS)

- Assist Tribes in Applying for EPA Grant Programs (BIA, EPA, IHS)

4. Underground Storage Tanks

a. BIA - Inventory Underground Storage Tanks (UST) Owned or operated by BIA

- Monitoring of EPA's UST Pilot Projects

b. EPA - Implement Subtitle I of RCRA

- Leaking Underground Storage Tank Trust Fund Supported Enforcement and Corrective Action Activities

c. HUD - None

d. IHS - Inventory of UST Owned or operated by IHS

- Monitor EPA's UST Pilot Projects and UST Corrective Actions (with EPA and Tribes)

e. Potential Overlap

- Inventory of UST's (BIA, EPA, IHS)

- Monitoring of EPA's UST Pilot Projects and UST Corrective Actions (BIA, EPA, IHS)

5. Hazardous Materials Management, Emergency Response and Community Right-to-Know

a. BIA - Technical Assistance, Surveys, Testing, Monitoring, Facilitate Non-National Priority List (NPL) Cleanup, Emergency Response

b. EPA - Enforcement, NPL Cleanups, Emergency Response, Pre-remedial Evaluation, Cooperative Agreements with Tribes, Technical

Assistance

- Delegation of Hazardous Waste Programs to Qualified Tribes
- Training of Tribal Staff
- Provides Technical Assistance to Tribes Including Consultation Concerning the Development of Tribal Implementation of the Emergency Planning and Community Right to Know Act.
- Conducts Community Relations Activities at Superfund Sites

c. HUD
- Require the Indian Housing Authority, Their Contractors and Agents on HUD Assisted Housing Projects to Comply with Local Standards Which Could Include Disposal of Some Hazardous Materials

d. IHS
- Technical Assistance
- Surveys & Testing
- Emergency Response which is Limited to such Activities as Identification, some Monitoring, Surveillance, etc.
- Identifying and Monitoring Hazardous Waste Streams in Health Care Facilities Including Infectious Waste Disposal
- Training of IHS and Tribal Staff Regarding Hazardous Materials, Including the Community

and Worker Right-To-Know Laws

e. Potential Overlap

- Technical Assistance (BIA, EPA, IHS)
- Testing and Site Assessment (BIA, EPA, IHS)
- Emergency Response (BIA, EPA, IHS)
- Cooperation on Operation and Maintenance of Superfund Remedies (BIA, EPA, IHS)

6. Solid Waste Management

a. BIA - Technical Assistance to Tribes (usually tribally owned and operated facilities)
- Operates Sites at Some BIA Facilities

b. EPA - Sets National Standards for Sanitary Landfills Design and Operation
- Technical Assistance and Training
- Technical Assistance on Solid Waste Management
- Technical Assistance on Solid Waste Program and Regulation Development
- Limited Grant Support for Tribal Solid Waste Management Planning

c. HUD - Solid Waste Project Funding Through Community Development Block Grants
- Funding for Pro Rata Share of Solid Waste Facilities to Serve HUD Assisted Housing Projects

d. IHS - Assists Tribes in Development of Solid Waste

Management Plans

- Provides Funding as Resources Permit for Solid Waste Projects
- Assists Tribes in Identifying and Obtaining Funds from Other Sources
- Surveys of Solid Waste Disposal Sites Including BIA Operated Sites
- Surveys of Solid Waste Management Needs
- Training and Technical Assistance in the Operation of Solid Waste Management Projects

e. Potential Overlap

- Technical Assistance (BIA, EPA, IHS)
- Solid Waste Management Plan Assistance (BIA, EPA, IHS)
- Funding of Solid Waste Projects (HUD, IHS)

7. Pesticides & Toxic Substance Use and Management

a. BIA - Approvals for the use of Restricted Use Pesticides, Training of Pesticide Applicators, Review of Pesticide Use Patterns, and Ensure Protection of Endangered Species

- Asbestos Surveys and Remedial Action in BIA School

b. EPA - Regulation of Pesticides and Chemical Substances

- Cooperative Agreements Grants to Qualified Indian Organizations and Individual Tribes where Required Authorities Exist for Enforcement and Pesticide Applicator Certification
- Grants to Remove Asbestos from Indian Schools
- Training for Enforcement Inspectors
- Endangered Species Protection Compliance, Groundwater Protection, and Agricultural Worker Protection

c. HUD
- Require IHA to comply with Lead-Based Paint Hazard Elimination Rule of June 6, 1988 and Section 1088 of the McKinney Amendments Act of 1988

d. IHS
- Asbestos Monitoring in IHS and Tribal Facilities as Appropriate
- Remedial Action in IHS Facilities
- Technical Assistance Regarding Pesticide Usage and Disposal and Endangered Species Protection

e. Potential Overlap
- Asbestos (BIA, EPA, IHS)
- Pesticides (BIA, EPA)
- Endangered Species Protection Groundwater Protection, Worker Protection (EPA, BIA, IHS)

## III. Interagency Actions

The following actions are agreed to:

1. BIA, EPA, HUD, and IHS will work cooperatively with each other at Headquarters and in the Regions/Areas, and in close consultation with tribal governments, to coordinate environmental programs affecting Indian lands. Where applicable, and within the constraints of available resources, each agency will:

   a. Participate in headquarters, regional and local level information exchanges to keep abreast of the other agencies' program activities and regulations and notify other agencies of its own program activities, regulations and future plans.

   b. Cooperate in providing program services to tribal governments.

   c. Provide training and technical assistance to each other and to Tribal representatives in the area of each agency's special expertise.

   d. Collaborate on overlapping responsibilities.

   e. Coordinate to the greatest extent possible and integrate where feasible, the provision of funding assistance to tribal governments, where the funding authorities of the four agencies are combined or complementary.

2. BIA, EPA, HUD, and IHS will continue to identify and develop

coordination in these areas of environmental protection. Supplemental agreements or actions specific to program coordination in each of the above areas may be prepared, as appropriate. Potential overlap areas may be addressed at the area/region or headquarters levels.

3. BIA, EPA, HUD, and IHS will encourage and educate their staffs in the use and implementation of the terms of this MOU. Where applicable, tribal and/or state agencies may be included as signatories to supplemental agreements.

## IV. Duration of Agreement

This MOU shall continue in effect until BIA, EPA, HUD or IHS provides written notice of termination. Notice shall be given to the other parties at least thirty (30) days in advance of the termination date. This document may be updated and periodically amended with the concurrence of all parties. This document does not cancel any previous MOUs or Agreements.

## V. Reports

No routine reports are required. However, quarterly meetings will be called by BIA at headquarters and held among the parties to discuss implementation of this MOU. Additional meetings may be called as necessary by any signatory agency. Minutes will be taken and distributed. Where appropriate, BIA may also call quarterly meetings at the Area/Regional where all parties are in agreement

that such meetings would be beneficial. Minutes of those meetings will also be taken.

Eddie F. Brown — NOV 19 1990
Assistant Secretary - Indian Affairs — Date

JAN 15 1991
Deputy Administrater - Environmental Protection Agency — Date

6/21/91
Assistant Secretary for Public and Indian Housing — Date

13 May 91
Director, Indian Health Service — Date

6/13/91
Acting Assistant Secretary for Community Planning and Development — Date

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 20 1995

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Final ~~EPA~~/Tribal Agreements Template

FROM: Terry Williams, Director
American Indian Environmental Office

TO: Assistant Administrators
Regional Administrators
General Counsel
Regional Counsel

The attached EPA/Tribal Agreement Template was developed in response to the Administrator's July 14, 1994 Tribal Operations Action Memorandum which called for the establishment of workplans between the Regions and Tribes. These "workplans" are now referred to as "Agreements" in part -- to reflect the need for development by partnership, flexibility and revisitation.

The Template was developed due to many comments that a general framework was needed to provided a common set of principles and consistent factors to include in the Agreements. Discussions held at the last National Indian Workgroup meeting, attended by EPA Headquarters, Regional and Tribal representatives to the Tribal Operations Committee, were the basis of an initial draft. A review period was held on that draft and comments have been addressed in the final document.

Regions have been asked to submit schedules and proposed approaches for completing these Agreements. For this reason, as well as to promote flexibility, we do not establish a due date in this Template for completing the Agreements.

Tribes have raised concerns that the Agreements must be established respecting their sovereignty and legal status. I believe that these types of concerns should be addressed on an individual basis in the Agreements with language worked out directly between the Regional Administrators and the Tribes.

I believe these Agreements are a critical next step to further developing environmental protection in Indian country. It is our hope that the attached Template will assist both EPA and the Tribes in developing Agreements that effectively evaluate the need for Tribal program development in a consistent manner as well as that provide a benchmark against which to measure progress over time.

If my office can be of further assistance, please do not hesitate to call me at (202) 260-7939 or staff can call Caren Rothstein at (202) 260-9872.

cc: National Indian Workgroup Members
Headquarters Indian Workgroup Members
Tribal Operations Committee Tribal representatives

# TEMPLATE FOR EPA/TRIBAL ENVIRONMENTAL AGREEMENTS

March 17, 1995

## PREAMBLE/INTRODUCTION

On July 14, 1994, the EPA Administrator issued an Action Directive to the Agency which called for prompt action under nine specific areas that would enhance Tribal environmental operations. One such area was the development of Tribal specific "workplans" to be established between the Regions and the Tribes. These plans were to allow for maximum flexibility so that Tribal specific needs could be accommodated. During initial deliberations on how to move forward with these plans, it was decided that rather than being "workplans" these were more appropriately defined as "Agreements".

Further, in order to promote consistency between the various Regional approaches, the following Template was developed as a tool for establishing Agreements. The Template was developed based on discussions between EPA and Tribal representatives to the Tribal Operations Committee.

## EPA/TRIBAL AGREEMENT -- TEMPLATE

The following Agreement entered into by EPA and (Name of Tribe), is intended to serve as a planning tool which can clearly identify the Tribe's environmental objectives, expected outcomes, expectations for resources, as well as, implementation and management assistance from EPA. This Agreement should establish the Tribes environmental objectives over the next 3-4 years, but should be viewed as a flexible document that can be changed to meet Tribal need. It will be revisited periodically to keep it current, expand it into the future and to review progress.

## PURPOSE FOR ESTABLISHING EPA/TRIBAL AGREEMENTS

1. To promote strong environmental protection in Indian country including Alaska Native lands.

2. To implement the Agency policy which promotes a government-to-government relationship and recognition of Tribal sovereignty in environmental protection of treaty resources.

3. To provide an understanding of Tribal environmental need and to identify the areas under which each Tribe intends to assume program responsibility. (Help address jurisdictional issues.)

4. To cooperatively develop, implement, and maintain comprehensive Tribal environmental programs that include a full range of environmental programs.

5. To build environmental capacity in order for Tribes to operate programs over the long run.

6. To identify areas where EPA will need to plan for and carry out direct implementation.

7. To include Tribes in Agency planning while addressing specific Tribal problems and other matters of concern to Tribes.

8. To build equal partnerships and work collectively as Tribes establish priorities for environmental protection.

9. To enhance and foster communications between EPA and the Tribes and to clarify expectations.

GUIDING PRINCIPLES

In establishing this Agreement the following principles are agreed to:

1. As these Agreements are developed, all principles included in the Agency's Indian Policy shall apply. This includes recognition of a trust responsibility for environmental protection, government-to-government relationship, and Tribal sovereignty.

2. The Government-to-Government Relationship shall be directly between EPA and (Name of Tribe.)

3. The Agreement shall be implemented to promote stability in funding, employment, capacity building, infrastructure development and other such factors that lead to long-term program implementation for the Tribe.

4. These Agreements are being developed with the understanding that the long-term goal is to address, implement and maintain, where deemed necessary by the Tribe, the full range of EPA's activities and programs.

5. While implementing this Agreement, the Agency is committed to on-going, timely and open communications with the Tribe. All efforts will be made to provide timely advice on available grants and other sources of available funding, training and on-going meetings that affect Tribes.

This also includes a timely transfer of state of the art technology as the Tribe seeks to build capacity.

6. This Agreement is intended to promote flexibility while addressing the needs of the Tribe and can be revisited as appropriate to ensure common sense approaches.

7. The principles of environmental justice shall apply to this Agreement. In general these principles call for the Agency to assure that Tribes are afforded all of the opportunities afforded States, including procedures for Tribal participation into Agency decision making. In addition, environmental justice principles call for a recognition of Tribal cultural concerns such as subsistence needs and traditional uses of natural resources.

GENERAL AGREEMENT ON REGIONWIDE TRIBAL ISSUES

The following factors have been identified as issues that all Regions are experiencing and a Regional approach is need to address them in this Agreement:

1. Emergency response;
2. Grant flexibility;
3. Process for communication;
4. A method for monitoring progress;
5. Resolution of issues that arise where State and/or Tribes have not demonstrated adequate jurisdiction; and
6. Language to ensure that the trust responsibility is adhered to.

PLANNING AND BUDGET CYCLES

1. Identify resources needed from EPA in an aggregated format including: dollars, workyears, travel, (include a menu of resources.)

2. Identify schedule for submitting grant applications and other such planning information.

3. Identify how stable source of funding will be provided including resources from EPA and from the Tribe. Project specific funding can be used to get started, but sources of long-term program implementation funding should be identified.

4. Explain in detail the linkage between long-term goals and short-term resource needs so that the Agency can pursue adequate resource needs to assist with these longer-term objectives, without focusing on the year-to-year fluctuations on the budget.

5. Updated key information for national budget development on rolling schedules should be submitted annually based on the Agreement while maintaining key activities that lead to fulfillment of longer term goals.

(NAME OF TRIBE)/EPA SPECIFIC ACTION PLAN

1. Describe Tribe's goals, objectives and desired outcomes.

2. Identify short-term resource needs (FY 95 & 96).

3. Identify long-term goals through (FY 98) if possible.

4. Identify goals for program assumption and the year in which the Tribe intends to apply for program assumption.

5. Identify direct implementation needs from EPA.

6. Provide methods for implementing the program -- including enforcement on the reservation and for treaty resources of the reservation. This would include an identification of contributions made by EPA, Tribe and other Federal agencies. Areas in which the Tribe may wish to pursue working with the State and with Tribal consortia may be included.

7. List specific Tribal priorities in addition to general program assumption such as developing Tribal codes, carrying on monitoring, developing a profile of Tribal resources, etc.....

8. Identify training the Tribe feels it needs to help with program implementation.

9. Define the Tribe's cultural, resource, and technical expertise, including current staffing and future staffing needs.

10. Provide a method for monitoring progress.

ATTACHMENT I

25

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 16 1994

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Publication of Regulation Simplifying EPA's Process for Qualifying Indian Tribes for Program Approval

FROM: Richard E. Sanderson
Director
Office of Federal Activities

TO: Addressees

The regulation designed to simplify EPA's process for qualifying Indian tribes for program approval (the so-called "treatment-as-a-state" or TAS regulation) was published in the Federal Register on December 14, 1994. Copies of the regulation and a summary thereof are attached. We request that the Regional Indian Program Coordinators transmit copies to the tribes in their regions.

A companion regulation simplifying the process for Indian tribes to qualify for financial assistance was published in the Federal Register on March 23, 1994.

This is the culmination of an effort which began in 1992 when an intra-agency workgroup determined that the process for qualifying Indian tribes for financial assistance and program authorization was burdensome and unnecessarily complex. This new process should make it easier for tribes to obtain EPA approval to assume the role Congress envisioned for them under the environmental statutes.

This action completes all activities in the Office of Federal Activities relating to the Indian program which has now been transferred to the American Indian Environmental Office within the Office of Water. It also fulfills our commitment to Bob Perciasepe, the Assistant Administrator for Water, to complete this project and we are complying with the request of Terry Williams, the new Director of the American Indian Environmental Office, to transmit the regulation.

My sincere appreciation to Marshall Cain, who led the effort, and to all of you who worked so diligently on these regulations over an extended period of time.

Addressees:

Workgroup Representatives
Agency Steering Committee Representatives
Regional Indian Program Coordinators
Regional Indian Law Attorneys Workgroup
Headquarters Indian Program Coordinators
Federal Inter-Agency Indian Discussion Group
American Indian Environmental Office
Tribal Operations Committee
Office of Congressional and Legislative Affairs (Martha Wofford)

Attachments:

# SUMMARY
# "Treatment-as-a-State" Regulation
# U.S. Environmental Protection Agency

The Final Rule under the Clean Water and Safe Drinking Water Acts is designed to simplify EPA's process for qualifying Indian tribes for program approval. It was developed because the Agency process for approving Indian tribes for "Treatment as a State" (TAS) under various programs has proven to be burdensome and offensive to tribes.

## Background

The Clean Water, Safe Drinking Water, and Clean Air Acts authorize EPA to treat Indian tribes as states for purposes of certain types of grant awards and program authorization. The only statutory requirements are that a tribe be federally recognized, have a governing body carrying out substantial duties and powers, and have adequate jurisdiction and capability to carry out the proposed activities. The Agency has promulgated regulations for implementing this authority under the Water Acts and has proposed regulations under the Air Acts.

## Changes to Existing Process

### A. Elimination of separate "TAS" approval

None of the statutes compel the use of a formal TAS or other prequalification process separate from approval of the request for a grant or program approval. However, the Agency initially chose to implement provisions of the Clean Water and Safe Drinking Water Acts by establishing a formal prequalification process under which tribes can seek eligibility under these statutes. Under the regulation, current regulations would be amended to eliminate TAS review as a separate step in the processing of a tribal application for program approval. Under the new, simplified process, the Agency will ensure compliance with statutory requirements as an integral part of the process of reviewing program approval applications.

### B. Minimize use of the term "treatment-as-a-state"

The term "treatment-as-a-state" is somewhat misleading and may be offensive to tribes. To the extent possible, the rule amends existing regulations so as to discontinue use of the term "treatment as a state;" however, since this phrase is included in several statutes, its continued use is sometimes necessary.

C. Establish uniform requirements for "recognition" and "governmental" requirements under each statute.

As a general rule, the "recognition" and "governmental" requirements are essentially the same under the Clean Water, Safe Drinking Water, and Clean Air Acts. The new process will reflect this by establishing identical requirements for making this showing under each statute. Moreover, the fact that a tribe has met the "recognition" or "governmental functions" requirements under the Clean Air Act or either of the Water Acts will establish that it meets those requirements under all three statutes.

D. Eliminate unnecessary and/or duplicative requirements and expedite the process regarding the establishment of tribal jurisdiction.

Because a tribe may have jurisdiction over, and capability to carry out, certain activities (e.g., protection of the quality of a particular lake for the Clean Lakes program under the Clean Water Act), but not others (e.g., waste management on a portion of the reservation far removed from any lakes), the new process does not foreclose the Agency from making a specific determination that a tribe has adequate jurisdictional authority and administrative and programmatic capability before it approves each tribal program.

The portion of existing regulations on jurisdictional determination under which governments comment on tribal jurisdiction will be altered under the regulation:

(1) for approvals of all Drinking Water regulatory programs and most Clean Water programs under existing regulations, EPA will not authorize a state to operate a program without determining that the state has adequate authority to carry out those actions required to run the program. This applies also to a tribe seeking approval, and ensures that a close analysis of the legal basis of a tribe's jurisdiction will occur before program authorization. Accordingly, a separate TAS jurisdictional review is not needed to verify that a tribe meets the statutory requirement, and is therefore eliminated for all programs under the Safe Drinking Water Act, and for the Clean Water Act's 404 and NPDES programs. This change will have the effect only of eliminating duplicative requirements;

(2) for the Water Quality Standards program, there is no review of tribal authority as part of the program approval process. Accordingly, for that program, a comment process will be retained. However, the Agency emphasizes that comments must be offered in a timely manner and specifies that where no timely comments are offered, the Agency will conclude that there is no objection to the tribal applicant's jurisdictional assertion.

EPA will no longer be required, by regulation, to consult with the Department of the Interior although it may, in its discretion, seek additional information from the tribe or the commenting party, and may consult as it sees fit with other federal agencies prior to making a decision as to tribal jurisdictional authority.

To encourage the expeditious resolution of tribal jurisdictional matters, the rule notes that once the Agency makes a jurisdictional determination in response to a tribal application regarding any EPA program, it will ordinarily make the same determination for other programs unless a subsequent application raises different legal issues. By contrast, however, a determination that a tribe has inherent jurisdiction to regulate activities in one medium might not conclusively establish its jurisdiction over activities in another medium.

Under the new approval process, as under the old, the Agency will continue to retain authority to limit its approval of a tribal application to those land areas where the tribe has demonstrated jurisdiction. This would allow EPA to approve the portion of a tribal application covering certain areas, while withholding approval of the portion of the application addressing those land areas where tribal authority has not been satisfactorily established.

E. Establish consistency among programs and flexibility in requirements for establishing tribal capability

EPA will continue to make a separate determination of tribal capability for each program for which it approves a tribe. However, the Safe Drinking Water Act and Clean Water Act regulations will be amended to conform to the CWA grant regulations, which do not specifically prescribe the material a tribe must submit to establish capability. Ordinarily, the inquiry EPA will make into the capability of any applicant, tribal or state for a grant or program approval, would be sufficient to enable the Agency to determine whether a tribe meets the statutory capability requirement.

governmental relations, Nitrogen ide, Ozone, Reporting and rdkeeping requirements, Volatile nic compounds. Note: Incorporation ference of the State Implementation for the State of California was oved by the Director of the Federal ster on July 1, 1982.

ted: November 28, 1994.

Wise,

*g Regional Administrator*

rt 52, chapter I, title 40 of the Code ederal Regulations is amended as ws:

**T 52—[AMENDED]**

The authority citation for part 52 inues to read as follows:

thority: 42 U.S.C. 7401–7671q.

**part F—California**

Section 52.220 is amended by ng paragraphs (c) (186)(i)(D)(2) and )(i)(A)(2) to read as follows:

220 Identification of plan.

* * * * *

) * * *

86) * * *

) * * *

)) * * * *

) Rule 103, adopted on June 4, 1991.

* * * * *

94) * * *

) * * *

\) * * *

:) Rule 59, adopted on September 15, 2.

* * * * *

Doc. 94–30742 Filed 12–13–94; 8:45 am]

NG CODE 6560–60–P

---

CFR Parts 123, 124, 131, 142, 144, , 233, and 501

–6119–9]

2020–AA20

**lan Tribes; Eligibility for Program horization**

NCY: Environmental Protection ncy (EPA).

ION: Final rule.

MARY: This action amends ulations addressing the role of Indian es so as to make it easier for tribes btain EPA approval to assume the Congress envisioned for them under tain environmental statutes. Three A regulatory statutes address the al role specifically by authorizing A to treat tribes in a manner similar hat in which it treats states: The an Water Act (CWA), the Safe Drinking Water Act (SDWA), and the Clean Air Act (CAA). All three statutes specify that, in order to receive such treatment, a tribe must be federally recognized and possess a governing body carrying out substantial duties and powers. In addition, each requires that a tribe possess civil regulatory jurisdiction to carry out the functions it seeks to exercise. Finally, all three require that a tribe be reasonably expected to be capable of carrying out those functions.

The Agency initially chose to implement provisions of the Clean Water and Safe Drinking Water Acts regarding Indian tribes by establishing a formal prequalification process under which tribes can seek eligibility under these statutes. This prequalification process has in the past been referred to as approval for "treatment as a state" ("TAS"). Tribes that obtain such approval then become eligible to apply for certain grants and program approvals available to states.

The Agency's "TAS" prequalification process has proven to be burdensome, time-consuming and offensive to tribes. Accordingly, EPA has adopted a new policy to improve and simplify the process and this regulation implements the new policy. To the extent possible, the Agency plans to use the same process in future regulations regarding determinations of tribal eligibility.

As of the effective date of this regulation, it is the intent of EPA to follow the new process in making determinations on tribal eligibility for program authorization. With respect to pending "TAS" applications for program authorization, the Agency will utilize the information contained in such applications to determine tribes' eligibility and tribes will be requested to supplement such applications only to the extent necessary to determine program eligibility

EFFECTIVE DATE: December 14, 1994.

FOR FURTHER INFORMATION CONTACT: C. Marshall Cain, Office of Federal Activities (2251), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 260–8792.

SUPPLEMENTARY INFORMATION:

Background

In order to simplify and streamline the process of assessing tribal eligibility for program authorization while still ensuring full compliance with all applicable statutes, on March 23, 1994, EPA published in the Federal Register (59 FR 13819) a notice of proposed rulemaking to amend regulations governing the process whereby Indian tribes become eligible to assume a role in implementing the environmental statutes on tribal land comparable to the role states play on state land.

EPA recognizes that tribes are sovereign nations with a unique legal status and a relationship to the federal government that is significantly different than that of states. EPA believes that Congress did not intend to alter this when it authorized treatment of tribes "as States;" rather, the purpose was to reflect an intent that, insofar as possible, tribes should assume a role in implementing the environmental statutes on tribal land comparable to the role states play on state land.

The proposals set forth in the proposed rule involved the following:

1. Elimination of "TAS" review as a separate step in the process. No statute compels the use of a formal "TAS" or other prequalification process separate from approval of the underlying request for program approval. The only requirements imposed by statute are that, to be eligible for program authorization, a tribe must be federally recognized, have a governing body carrying out substantial duties and powers, and have adequate jurisdiction and capability to carry out the proposed activities. Thus, EPA may authorize a tribal program without formally designating the tribe as "eligible for TAS," so long as the Agency establishes that the tribe meets the applicable statutory requirements. In other words, the Agency can ensure compliance with statutory mandates without requiring tribes to undergo a discrete, formal process of seeking "TAS" approval.

Accordingly, EPA is amending its regulations to eliminate "TAS" review as a separate step in the processing of a tribal application for program approval. Under the new, simplified process, the Agency will ensure compliance with statutory requirements as an integral part of the process of reviewing program approval applications. To the extent that this rule or preamble conflicts with the language of previous rules and preambles, the language herein shall be controlling.

2. Discontinuance of use of the term "treatment as a state." To the extent possible, the rule amends existing regulations so as to discontinue use of the term "treatment as a state"; however, since the phrase is included in several statutes, its continued use may sometimes be necessary.

3. Simplified determination as to "recognition" and "government." A tribe typically establishes recognition by showing its inclusion on the list of federally recognized Tribes published by the Secretary of the Interior in the Federal Register. A tribe establishes that

it meets the governmental duties and powers requirement with a narrative statement describing the form of the tribal government and the types of functions it performs, and identifying the sources of the tribe's governmental authority.

As a general rule, the "recognition" and "governmental" requirements are essentially the same under the Clean Water, Safe Drinking Water and Clean Air Acts. The new process will reflect this by establishing identical requirements for making this showing under each statute. Moreover, the fact that a tribe has met the recognition or governmental functions requirement under either of the Water Acts or the Clean Air Act will establish that it meets those requirements under both statutes. To facilitate review of tribal applications, EPA will request that tribal applications inform EPA whether a tribe has been approved for "TAS" (under the old process) or deemed eligible to receive authorization (under the revised process) for any other program.

A tribe that has not done so may establish that it has been federally recognized by simply stating in its program authorization application that it appears on the list of federally recognized tribes that the Secretary of the Interior publishes periodically in the Federal Register. If the tribe notifies EPA that it has been recognized but does not appear on this list because the list has not been updated, EPA will seek to verify the fact of recognition with the Department of the Interior.

A tribe that has not yet made its initial "governmental" showing can do so by certifying that it has a government carrying out substantial functions. A tribe will be able to make the required certification if it is currently performing governmental functions to promote the public health, safety, and welfare of its population. Examples of such functions include, but are not limited to, levying taxes, acquiring land by exercise of the power of eminent domain, and exercising police power. Such examples should be included in a narrative statement supporting the certification, (1) describing the form of tribal government and the types of essential governmental functions currently performed, and (2) identifying the legal authorities for performing those functions (*e.g.*, tribal constitutions or codes). It should be relatively easy for tribes to meet this requirement without submitting copies of specific documents unless requested to do so by the Agency.

4. Simplified jurisdictional analysis. A tribe may have jurisdiction over, and capability to carry out, certain activities (*e.g.*, protection of the quality of a particular lake for the Clean Lakes program under the Clean Water Act), but not others (*e.g.*, waste management on a portion of the reservation far removed from any lakes). For this reason, EPA believes that the Agency must make a specific determination that a tribe has adequate jurisdictional authority and administrative and programmatic capability before it approves each tribal program. This will ensure that tribes meet the statutory requirements Congress has established as prerequisites to tribal eligibility for each particular program.

The portion of the jurisdictional determination under which governments comment on tribal jurisdiction will be substantially altered under this Rule. These changes are outlined below.

For approvals of all Drinking Water regulatory programs and most Clean Water programs under existing regulations, EPA will not authorize a state to operate a program without determining that the state has adequate authority to carry out those actions required to run the program. *See e.g.* 40 CFR 142.10 (PWS), 145.24 (UIC). This applies also to a tribe seeking program approval, and ensures that a close analysis of the legal basis of a tribe's jurisdiction will occur before program authorization.

Accordingly, a separate "TAS" jurisdictional review is not needed to verify that a tribe meets the statutory jurisdictional requirement and, therefore, will be eliminated for all programs under the Safe Drinking Water Act, and for the Clean Water Act's 404 and NPDES programs. This change will have the effect only of eliminating duplicative requirements. In no case can a tribe receive program approval until the Agency has received full and adequate input concerning the scope and extent of the tribe's jurisdiction. Moreover, EPA will expect each tribe seeking program approval to provide a precise description of the physical extent and boundaries of the area for which it seeks regulatory authority. This description should ordinarily include a map and should identify the sources or systems to be regulated by the tribe.

However, for the Water Quality Standards program, there is no review of tribal civil regulatory authority as part of the standards approval process under section 303(c) of the Clean Water Act. Accordingly, for that program, a comment process will be retained. However, the Agency wishes to clarify the operation of that process by reiterating that comments must be offered in a timely manner, and, further, by specifying that where no timely comments are offered, the Agency will conclude that there is no objection to the tribal applicant's jurisdictional assertion. Moreover, to raise a competing or conflicting claim a comment must clearly explain the substance, basis, and extent of its objections. Finally, when questions are raised concerning a tribe's jurisdiction, EPA may, in its discretion, seek additional information from the tribe or the commenting party, and may consult as it sees fit with other federal agencies prior to making a determination as to tribal jurisdictional authority, but is not required to do so. Henceforth, EPA will no longer be required, by regulation, to consult with the Department of the Interior.

Finally, the Agency notes that certain disputes concerning tribal jurisdiction may be relevant to a tribe's authority to conduct activities and obtain program approval under several environmental statutes. For example, if a tribe and a state or another tribe disagree as to the boundary of a particular tribe's reservation, each time the tribe seeks to assert authority over the disputed area, the dispute will recur. The Agency recognizes that its determinations regarding tribal jurisdiction apply only to activities within the scope of EPA programs. However, it also believes that, once it makes a jurisdictional determination in response to a tribal application regarding any EPA program, it will ordinarily make the same determination for other programs unless a subsequent application raises different legal issues. Thus, for example, once the Agency has arrived at a position concerning a boundary dispute, it will not alter that position in the absence of significant new factual or legal information. By contrast, however, a determination that a tribe has inherent jurisdiction to regulate activities in one medium might not conclusively establish its jurisdiction over activities in another medium. See generally Discussion of inherent tribal authority in Water Quality Standards Regulation, 56 FR 64877–64879.

Under the new approval process, as under the old, the Agency will continue to retain authority to limit its approval of a tribal application to those land areas where the tribe has demonstrated jurisdiction. This would allow EPA to approve the portion of a tribal application covering certain areas, while withholding approval of the portion of an application addressing those land areas where tribal authority has not been satisfactorily established. See, *e.g.* 53 FR 37395, 37402 (September 26, 1988) (SDWA); 54 FR 14353, 14355

(April 11, 1989) (Clean Water Act Grants); 54 FR 39097, 39102 (September 12, 1989) (Clean Water Act Water Quality Standards); 58 FR 8171, 8176 (February 11, 1993) (Clean Water Act section 404); 58 FR 67966, 67972 (Clean Water Act NPDES) (December 22, 1993).

5. More flexible requirements to establish capability. EPA must continue to make a separate determination of tribal capability for each program for which it approves a tribe. However, the Safe Drinking Water Act, Water Quality Standards, Section 404, and NPDES regulations will be amended to conform to the CWA grant regulations, which do not specifically prescribe the material a tribe must submit to establish capability. Ordinarily, the inquiry EPA will make into the capability of any applicant, tribal or state, for a grant or program approval will be sufficient to enable the Agency to determine whether a tribe meets the statutory capability requirement. See, *e.g.*, 40 CFR part 31 (grant regulations applicable to states and tribes); 40 CFR 142.3 (Public Water System primary enforcement responsibility requirements at parts 141, 142 apply to tribes); § 145.1(h) (Underground Injection Control requirements of parts 124, 144, 145, and 146 that apply to states generally apply to tribes).

Nevertheless, EPA may request that the tribe provide a narrative statement or other documents showing that the tribe is capable of administering the program for which it is seeking approval. In evaluating tribal capability, EPA will consider:

(1) The tribe's previous management experience;

(2) Existing environmental or public health programs administered by the tribe;

(3) The mechanisms in place for carrying out the executive, legislative and judicial functions of the tribal government;

(4) The relationship between regulated entities and the administrative agency of the tribal government which will be the regulator; and

(5) The technical and administrative capabilities of the staff to administer and manage the program.

EPA recognizes that certain tribes may not have substantial experience administering environmental programs; a lack of such experience will not preclude a tribe from demonstrating capability, so long as it shows that it has the necessary management and technical and related skills or submits a plan describing how it will acquire those skills.

The notice of proposed rulemaking invited public comments on the proposed amendments, which would be considered before adoption of a final rule. The public comment period closed on May 23, 1994.

## Analysis of Comments

A total of seven commenters responded to the solicitation of comments during the public comment period. Of these, four expressed support for the proposed changes in varying degrees, one of whom expressed strong support and others supported the changes generally but disagreed with certain aspects or had specific recommendations for other changes. One commenter did not express support or opposition but urged EPA to continue to stress that tribes should enact water quality programs similar to current state water quality programs. Another commenter, while not explicitly supporting the proposed amendments, urged that they be extended to include two other programs under the Safe Drinking Water Act. A final commenter opposed one aspect of the simplification process as it related to state review of tribal applications. These comments, suggested changes, and the EPA responses thereto, are set forth below.

*Comment:* Consistent with the EPA Indian Policy and sound administrative practice, EPA should recognize tribal authority over all environmental matters within reservation boundaries, without requiring tribes to demonstrate their inherent authority.

*Response:* EPA recognizes the importance of comprehensive management of reservation environments. However, EPA does not have the legal authority to expand the scope of tribal jurisdiction. Consequently, EPA must continue to analyze each tribal claim of jurisdiction in light of appropriate statutory and common law principles to ensure that the tribe in fact has adequate authority to carry out the functions it proposes to undertake.

*Comment:* EPA is to be commended for eliminating the state opportunity to comment on tribal jurisdictional assertions for all SDWA programs and for the Clean Water Act Section 404 and NPDES programs. However, since tribes cannot comment on state jurisdictional assertions in any programs, in fairness EPA should also eliminate state opportunity to comment on tribal jurisdictional assertions regarding Water Quality Standards.

*Response:* EPA continues to believe that it has the legal authority to approve a tribal Water Quality Standards program only upon a determination that the tribe has adequate authority to operate that program, and that state comments may be useful to the Agency in making that determination.

*Comment:* EPA could further simplify the TAS process by providing that, when EPA reviews a new TAS application for a tribe that has already obtained TAS approval for one program, EPA will rely on the jurisdictional assertions in the prior approval to establish jurisdiction for a subsequent program. Where the earlier jurisdictional assertions do not establish jurisdiction adequately for the subsequent application, EPA would notify the tribe of any deficiencies and the tribe could then supplement or amend the original jurisdictional statement.

*Response:* EPA agrees with the commenter that this would simplify the process. However, EPA believes that it should look in the first instance to each tribal applicant's views as to its own jurisdiction. Thus a tribe that believes it is appropriate to provide more information regarding jurisdiction on a subsequent application than it provided on a previous one should be able to do so directly, without waiting for EPA to determine, after it begins processing an application, that more information is needed. EPA believes that under the current proposal, a tribe that wishes to use the process described by the commenter could do so by expressly incorporating the earlier jurisdictional assertion into a subsequent application.

In addition, the jurisdictional approach the Agency has determined the Clean Air Act allows it to follow differs substantially from the approach it follows under the Water Acts. For this reason, EPA does not believe it would be appropriate to establish a process under which a tribe would assume that, unless advised to the contrary, a jurisdictional assertion that was adequate under the Clean Air Act would also be adequate under one of the Water Acts.

*Comment:* States should be able to comment on the jurisdictional assertions contained in tribal grant applications. Also, states should not be totally bypassed in decisions to approve tribal regulatory programs.

*Response:* As stated in the Federal Register notice amending the EPA financial assistance regulations for tribes, EPA has extensive experience awarding grants to tribes, and has concluded that it is fully capable of evaluating grant applications to ensure adequate tribal jurisdiction without seeking comments from states. EPA agrees that it should obtain information from states concerning tribal applications for program approval, and

proposed regulatory changes would ensure that this occurs.

*Comment:* One commenter, while supporting the intent of the proposed revisions, urged that (1) EPA regulations relating to Section 401 Certification (40 CFR part 121) be amended to expressly include Indian tribes so as to facilitate tribal involvement in the section 401 process, to resolve disagreements between tribes and states and to resolve disputes between tribes as well; (2) an apparent inconsistency in the definition of "State" in § 122.2 (which references Indian tribes that have obtained approval of their NPDES program but not their WQS program) be changed so that water quality standards set by approved tribes will be protected in NPDES permits under §§ 122.44, 124.53 and similar provisions; and (3) the regulations for the dispute resolution mechanism, 40 CFR 131.7, be revised to expressly authorize the use of this process for resolving disputes between two or more tribes that have differing standards for common bodies of water.

*Response:* (1) EPA believes it is unnecessary to amend the 401 regulations in Part 121 through the present TAS revisions rule in order to clarify that tribes have the authority to provide 401 certifications once they have approved water quality standards (WQS). It is EPA's position that tribes clearly have 401 authority once they receive approval of their WQS as specified in 40 CFR 131.4(c).

(2) EPA also does not believe that changes are necessary to the definition of "State" in § 122.2. The intent of EPA's regulations was to require the *permitting authority (whether EPA or an* authorized NPDES State) to issue permits which comply with all applicable water quality standards (including WQS approved by EPA for an Indian tribe). EPA interprets its regulations to require that all NPDES permits comply with applicable and EPA approved tribal WQS regardless of whether the tribe has been authorized as a permitting authority for the NPDES program. EPA's new regulatory provision in 40 CFR 124.51(c) supports the tribes' 401 certification authority and reads as follows: "As stated in 40 CFR 131.4, an Indian Tribe that is qualified for Treatment as a State for purposes of the WQS program is likewise qualified for treatment as a State for purposes of State certification of WQS pursuant to section 401(a)(1) of the Act [Clean Water Act] and Subpart D of this part." The preamble of the final NPDES rule at 58 FR 67967 (December 10, 1993) discusses this new provision in more depth.

In addition, the recent EPA guidance concerning EPA's implementation of the NPDES and sludge management programs with respect to Federal Indian Reservations (FIRs) specifies that "In situations where a State is the upstream NPDES permitting authority and downstream FIR Tribal WQS have been approved by EPA, the State will provide notice of the preparation of a draft permit to the affected Tribe pursuant to CWA sections 401 and 402. Under CWA sections 402(b)(3) and 40 CFR 124.12(a), the upstream NPDES state must provide an opportunity for public hearing on the issuance of the draft permit where there is significant public interest in so doing. Under CWA section 402(b)(5), the affected Tribe may submit written recommendations to the permitting State and EPA, and the failure to accept the recommendations and the reasons for doing so. EPA can object to the upstream State permit where EPA believes that the reasons for rejecting the recommendations are inadequate." Therefore, this guidance reflects EPA's general view that applicable tribal WQS are to be reflected in all water quality-based NPDES permit limits. When the Part 122–124 regulations refer to WQS of a "State," this also refers to Indian tribes with EPA approved WQS.

(3) EPA previously responded to comments regarding the scope of the dispute resolution mechanism on the rule allowing tribes to establish WQS (56 FR 64876, December 12, 1991). At that time, OW commented that the rule was written in this manner because Section 518 of the Clean Water Act specified that a dispute resolution mechanism be developed to resolve disputes arising between a tribe and a state. OW further commented that EPA believes the requirements that the State standards provide for protection of downstream standards in § 131.10(b) of the WQS Regulation, supported by a 25 year history of informal negotiation of issues between states, provides sufficient basis for resolving disputes between two states or two tribes. 56 FR 64888–64889. Further comments on this issue are beyond the scope of this rule and, therefore, EPA declines to revisit it at this time.

*Comment:* Although the proposed regulation would simplify the TAS process for a number of programs, it would not apply expressly to wellhead protection programs or sole source aquifer demonstration programs under the Safe Drinking Water Act. The Agency should consider seriously the inclusion of these important programs under the new regulation as well.

*Response:* EPA does not believe that it would be appropriate to expand the scope of the regulation at this stage of its development. However, as pointed out previously in the Summary of this regulation, to the extent possible, the Agency plans to use the new process in future regulations regarding determinations of tribal eligibility.

## Conclusion

Accordingly, based on the comments received and the analysis of those comments as set forth above, EPA believes that the proposed regulatory amendments as published in the Federal Register on March 23, 1994 (59 FR 13819) should be adopted as a final rule as discussed above and set forth below.

## Executive Order 12866

Under Executive Order 12866, [58 FR 51735 (October 4, 1993)] the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

## Regulatory Flexibility Act

Pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), EPA certifies that this rule will not have a significant economic impact on a substantial number of small entities because it merely revises existing procedural requirements for Indian tribes by making them simpler and less burdensome; Indian tribes are not considered small entities under this rulemaking for RFA purposes.

**Paperwork Reduction Act**

The proposed regulations contain no new or additional information collection activities and, therefore, no information collection request will be submitted to the Office of Management and Budget for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

**List of Subjects**

*40 CFR Part 123*

Administrative practice and procedure, Confidential business information, Environmental protection, Hazardous substances, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control, Water supply.

*40 CFR Part 124*

Administrative practice and procedure, Air pollution control, Environmental protection, Hazardous substances, Indian lands, Reporting and recordkeeping requirements, Sewage disposal, Waste treatment and disposal, Water pollution control, Water supply

*40 CFR Part 131*

Environmental protection, Reporting and recordkeeping requirements, Water pollution control.

*40 CFR Part 142*

Environmental protection, Administrative practice and procedure, Chemicals, Indians—lands, Radiation protection, Reporting and recordkeeping requirements, Water supply

*40 CFR Part 144*

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Indians—lands, Reporting and recordkeeping requirements, Surety bonds, Water supply.

*40 CFR Part 145*

Environmental protection, Indians—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water supply.

*40 CFR Part 233*

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

*40 CFR Part 501*

Administrative practice and procedure, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Sewage disposal.

Dated: November 18, 1994.

Fred Hansen,

*Acting Administrator*

For the reasons set forth in the preamble, 40 CFR parts 123, 124, 131, 142, 144, 145, 233, and 501 are amended as follows:

## PART 123—STATE PROGRAM REQUIREMENTS

1. The authority citation for part 123 continues to read as follows:

**Authority:** Clean Water Act, 33 U.S.C. 1251 *et seq.*

**§ 123.1 [Amended]**

2. Section 123.1(h) is amended by removing the phrase "treated as a State."

**§ 123.21 [Amended]**

3. In § 123.21 paragraph (a)(1) is amended by revising the phrase "eligible for treatment as a state in accordance with § 123.33(e)" to read "in accordance with § 123.33(b)".

4. In § 123.21 paragraph (b)(2) is amended by removing the phrase "for treatment as a State" both times they appear and by revising the text "§ 123.33(e)" to read "§ 123.33(b)"

**§ 123.22 [Amended]**

5. In § 123.22 paragraph (g) is amended by removing the phrase "for treatment as a State" and by revising the text "§ 123.33(e)" to read "§ 123.33(b)".

**§ 123.31 [Amended]**

6. The heading of § 123.31 is amended by revising the phrase "for treatment of Indian Tribes as States" to read "for eligibility of Indian Tribes."

7. In § 123.31 paragraph (a) is amended by removing the phrase "a State for purposes of making the Tribe."

8. In § 123.31 paragraph (a)(4) is amended by removing all language following "in a manner consistent with the terms and purposes of the Act and applicable regulations, of an effective NPDES permit program."

**§ 123.32 [Amended]**

9. The heading of § 123.32 is amended by removing "for treatment as a State."

10. In § 123.32 the introductory text is amended by removing the phrase "for treatment as a State."

11. In § 123.32 paragraph (b) introductory text is amended by revising the words "This statement shall" to read "This statement should."

12. In § 123.32 paragraph (c) is amended by revising the phrase "a copy of all documents" to read "copies of those documents" and by revising the phrase "support the Tribe's assertion" to read "the Tribe believes are relevant to its assertion."

13. In § 123.32 paragraph (d) introductory text is amended by revising the phrase "The statement shall include" to read "The statement should include."

14. In § 123.32 paragraph (d)(1) is amended by revising the words "including, but not limited to," to read "which may include."

15. In § 123.32 paragraph (e) is amended by revising the phrase "a Tribal request for treatment as a State" to read "a Tribe's eligibility."

16. In § 123.32 paragraph (f) is revised to read as follows:

**§ 123.32 Request by an Indian Tribe for a determination of eligibility.**

* * * * *

(f) If the Administrator or his or her delegatee has previously determined that a Tribe has met the prerequisites that make it eligible to assume a role similar to that of a state as provided by statute under the Safe Drinking Water Act, the Clean Water Act, or the Clean Air Act, then that Tribe need provide only that information unique to the NPDES program which is requested by the Regional Administrator.

**§ 123.33 [Amended]**

17. The heading of § 123.33 is amended by removing the phrase "for treatment as a State."

18. In § 123.33 paragraph (a) is amended by removing the phrase "for treatment as a State."

19. In § 123.33 paragraphs (b), (c), (d), and (e) are removed and paragraph (f) is redesignated as paragraph (b).

## PART 124—PROCEDURES FOR DECISIONMAKING

1. The authority citation for part 124 continues to read as follows:

**Authority:** Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.*, Clean Water Act, 33 U.S.C. 1251 *et seq.*, Clean Air Act, 42 U.S.C. 7401 *et seq.*

**§ 124.2 [Amended]**

2. In § 124.2 the definition of "State" is amended by revising the phrase "an Indian Tribe treated as a State" to read "an Indian Tribe that meets the statutory criteria which authorize EPA to treat the Tribe in a manner similar to that in which it treats a State"

**§ 124.51 [Amended]**

3. In § 124.51 paragraph (c) is amended by revising the phrase "is qualified for treatment as a State" to

read "meets the statutory criteria which authorize EPA to treat the Tribe in a manner similar to that in which it treats a State" and by revising the phrase "likewise qualified for treatment as a State" to read "likewise qualified for such treatment."

## PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

**§ 131.3 [Amended]**

2. In § 131.3 paragraph (j) is amended by revising the phrase "qualify for treatment as States for purposes of water quality standards" to read "to be eligible for purposes of a water quality standards program".

**§ 131.4 [Amended]**

3. In § 131.4 paragraph (c) is amended by revising the phrase "qualifies for treatment as a State" in both places that it appears to read "is eligible to the same extent as a State"

**§ 131.7 [Amended]**

4. In § 131.7 paragraph (b)(2) is amended by revising the phrase "qualifies to be treated as a State" to read "is eligible to the same extent as a State".

**§ 131.8 [Amended]**

5. The heading of § 131.8 is amended by revising the phrase "to be treated as States for purposes of water quality standards" to read "to administer a water quality standards program".

6. In § 131.8 paragraph (a) introductory text is amended by revising the phrase "treat an Indian Tribe as a State for purposes of the water quality standards program" to read "accept and approve a tribal application for purposes of administering a water quality standards program".

7. In § 131.8 paragraph (b) introductory text is amended by revising the phrase "for treatment as states for purposes of water quality standards" to read "for administration of a water quality standards program".

8. In § 131.8 paragraph (b)(2) introductory text is amended by revising the word "shall" to read "should"

9. In § 131.8 paragraph (b)(3) introductory text is amended by revising the word "shall" to read "should".

10. In § 131.8 paragraph (b)(3)(ii) is amended by removing the semi-colon and adding to the end of the paragraph the phrase "and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and".

11. Section 131.8(b)(3)(iii) is removed.

12. In § 131.8 paragraph (b)(3)(iv) is redesignated as (b)(3)(iii).

13. In § 131.8 paragraph (b)(4) introductory text is amended by revising the word "shall" to read "should".

14. In § 131.8 paragraph (b)(4)(i) is amended by revising the phrase "including, but not limited to" to read "which may include".

15. In § 131.8 paragraph (b)(5) is amended by revising the phrase "request for treatment as a State," to read "application".

16. In § 131.8 paragraph (b)(6) is amended by revising the phrase "qualified for treatment as a State" to read "qualified for eligibility or 'treatment as a state'" and by removing the second occurrence of the phrase "treatment as a State".

17. In § 131.8 paragraphs (c) introductory text, (c)(1) and (c)(2) introductory text are amended by removing the words "for treatment as a State".

18. In § 131.8 paragraph (c)(4) is amended by revising the phrase "after consultation with the Secretary of the Interior, or his designee" to read "after due consideration".

19. In § 131.8 paragraph (c)(5) is amended by revising the words "has qualified to be treated as a State for purposes of water quality standards and that the Tribe may initiate the formulation and adoption of water quality standards approvable under this part" to read "is authorized to administer the Water Quality Standards program".

## PART 142—NATIONAL PRIMARY DRINKING WATER REGULATIONS IMPLEMENTATION

1. The authority citation for part 142 continues to read as follows:

Authority: 42 U.S.C. 300g, 300g-1, 300g-2, 300g-3, 300g-4, 300g-5, 300g-6, 300j-4, and 300j-9.

**§ 142.2 [Amended]**

2. In § 142.2 the definition of "State" is amended by revising the phrase "or an Indian Tribe treated as a State," to read "or an eligible Indian tribe"

**§ 142.3 [Amended]**

3. In § 142.3 paragraph (c) is amended by revising the phrase "be designated by the Administrator for treatment as a State" to read "meet the statutory criteria at 42 U.S.C. 300j-11(b)(1)"

**Subpart H—Indian Tribes**

4. The heading for subpart H of part 142 is revised to read as set forth above.

**§ 142.72 Requirements for Tribal eligibility.**

5. The heading of § 142.72 is revised to read as set forth above.

6–7 Section 142.72 is amended by revising the introductory text and paragraph (d) to read as follows.

**§ 142.72 Requirements for Tribal eligibility**

The Administrator is authorized to treat an Indian Tribe as eligible to apply for primary enforcement responsibility for the Public Water System Program if it meets the following criteria:

* * * * *

(d) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of administering (in a manner consistent with the terms and purposes of the Act and all applicable regulations) an effective Public Water System program

* * * * *

**§ 142.76 [Amended]**

8. The heading of § 142.76 is amended by revising the phrase "of treatment as a State" to read "of eligibility"

9. Section 142.76 is amended by revising in the introductory text the phrase "qualifies for treatment as a State pursuant to" to read "meets the criteria of."

10. In § 142.76 paragraph (b) introductory text is amended by revising the word "shall" to read "should"

11. In § 142.76 paragraph (c) is amended by revising the word "all" to read "those" and by revising the phrase "support the Tribe's asserted jurisdiction" to read "the Tribe believes are relevant to its assertions regarding jurisdiction"

12. In § 142.76 paragraph (d) introductory text is amended by revising the word "shall" to read "should"

13. In § 142.76 paragraph (d)(1) is amended by revising the words "including, but not limited to" to read "which may include"

14. In § 142.76 paragraph (e) is amended by revising the phrase "a Tribal request for treatment as a State to read "a Tribe's eligibility"

15. In § 142.76 paragraph (f) is revised to read as follows:

**§ 142.76 Request by an Indian tribe for a determination of eligibility.**

* * * * *

(f) If the Administrator has previously determined that a Tribe has met the prerequisites that make it eligible to assume a role similar to that of a state as provided by statute under the Safe Drinking Water Act, the Clean Water Act, or the Clean Air Act, then that Tribe need provide only that information unique to the Public Water System program (paragraph (c), (d)(5) and (6) of this section).

§ 142.78 [Amended]

16. The heading of § 142.78 is amended by removing the phrase "for treatment as a State".

17. In § 142.78 paragraph (a) is amended by removing the words "for treatment as a State submitted pursuant to § 142.76"

18. In § 142.78 paragraphs (b), (c) and (d) are removed and paragraph (e) is redesignated as (b) and amended by revising the language "If the Administrator determines that a Tribe meets the requirements of § 142.72, the Indian Tribe is then eligible to apply for" to read "A tribe that meets the requirements of § 142.72 is eligible to apply for"

## PART 144—UNDERGROUND INJECTION CONTROL PROGRAM

1. The authority citation for part 144 continues to read as follows:

Authority: Safe Drinking Water Act, 42 U.S.C. 300f *et seq*; Resource Conservation and Recovery Act, 42 U.S.C. 6902 *et seq*.

2. Section 144.3 is amended by adding the definition of "eligible Indian tribe" in alphabetical order to read as follows:

144.3 Definitions.

* * * * *

*Eligible Indian Tribe* is a Tribe that meets the statutory requirements established at 42 U.S.C. 300j-11(b)(1).

* * * * *

## PART 145—STATE UIC PROGRAM REQUIREMENTS

1 The authority citation for part 145 continues to read as follows:

Authority: 42 U.S.C. 300f *et seq*.

145.1 [Amended]

2. In § 145.1 paragraph (h) is amended by adding the word "eligible" between "an" and "Indian Tribes" in the first sentence; and by removing the second sentence.

Subpart E—Indian Tribes

3. The heading of subpart E of part 145 is revised to read as set forth above.

145.52 Requirements for Tribal eligibility.

4. The heading of § 145.52 is revised to read as set forth above.

5–6. Section 145.52 is amended by revising the introductory text and paragraph (d) to read as follows:

145.52 Requirements for Tribal eligibility.

The Administrator is authorized to treat an Indian Tribe as eligible to apply for primary enforcement responsibility for the Underground Injection Control Program if it meets the following criteria:

* * * * *

(d) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of administering (in a manner consistent with the terms and purposes of the Act and all applicable regulations) an effective Underground Injection Control Program.

* * * * *

§ 145.56 [Amended]

7. The heading of § 145.56 is amended by revising the phrase "of treatment as a State" to read "of eligibility"

8. In § 145.56 the introductory text is amended by revising the phrase "qualifies for treatment as a State pursuant to" to read "meets the criteria of."

9. In § 145.56 paragraph (b) introductory text is amended by revising the word "shall" to read "should"

10. In § 145.56 paragraph (c) is amended by revising the word "all" to read "those," and by revising the phrase "support the Tribe's asserted jurisdiction" to read "the Tribe believes are relevant to its assertions regarding jurisdiction"

11. In § 145.56 paragraph (d) introductory text is amended by revising the word "shall" to read "should"

12. In § 145.56 paragraph (d)(1) is amended by revising the words "including, but not limited to" to read "which may include."

13. In § 145.56 paragraph (e) is amended by revising the phrase "a Tribal request for treatment as a State" to read "a Tribe's eligibility".

14. In § 145.56 paragraph (f) is revised to read as follows:

§ 145.56 Request by an Indian Tribe for a determination of eligibility.

* * * * *

(f) If the Administrator has previously determined that a Tribe has met the prerequisites that make it eligible to assume a role similar to that of a State as provided by statute under the Safe Drinking Water Act, the Clean Water Act, or the Clean Air Act, then that Tribe need provide only that information unique to the Underground Injection Control program (§ 145.76(c) and (d)(6)).

§ 145.58 [Amended]

15. The heading of § 145.58 is amended by removing the phrase "for treatment as a State".

16. In § 145.58 paragraph (a) is amended by removing the phrase "for treatment as a State submitted pursuant to § 145.56".

17. In § 145.58 paragraphs (b), (c), and (d) are removed and paragraph (e) is redesignated as paragraph (b) and amended by revising the language "If the Administrator determines that a Tribe meets the requirements of § 145.52, the Indian Tribe is then eligible to apply for" to read "A tribe that meets the requirements of § 145.52 is eligible to apply for"

## PART 233—404 STATE PROGRAM REGULATIONS

1. The authority citation for part 233 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq*.

Subpart G—Eligible Indian Tribes

2. The heading of subpart G of part 233 is revised to read as set forth above.

§ 233.60 Requirements for eligibility.

3. The heading of § 233.60 is revised to read as set forth above.

4. Section 233.60 introductory text is amended by removing the words "a State for purposes of making the Tribe"

§ 233.61 Determination of Tribal eligibility.

5. The heading of § 233.61 is revised to read as set forth above.

6. In § 233.61 the introductory text is amended by revising the phrase "that it qualifies for treatment as a State pursuant to Section 518 of the Act" to read "that it meets the statutory criteria which authorize EPA to treat the Tribe in a manner similar to that in which it treats a State"; by revising the word "shall" in the last sentence to read "should."

7. In § 233.61 paragraph (b) introductory text is amended by revising the word "shall" to read "should".

8. In § 233.61 paragraph (c)(2) is amended by adding at the end of the paragraph before the semicolon "which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority".

9. Section 233.61 (c)(3) is removed.

10. In § 233.61 paragraph (d) introductory text is amended by revising the word "shall" to read "may".

11. In § 233.61 paragraph (d)(1) is amended by revising the words "including, but not limited to" to read "which may include".

12. In § 233.61 paragraph (e) is amended by revising the words "request for treatment as a State" to read "application".

13. In § 233.61 paragraph (f) is amended by adding the words "for eligibility or" between "has met the

requirements" and "for treatment as a State.'"

**§ 233.62 [Amended]**

14. The heading of § 233.62 is amended by removing the phrase "for treatment as a State".

15. In § 233.62 paragraph (a) is amended by removing the phrase "for treatment as a State".

16. In § 233.62 paragraphs (b), (c), (d), and (e) are removed.

17. In § 233.62 paragraph (f) is redesignated as paragraph (b).

## PART 501—STATE SLUDGE MANAGEMENT PROGRAM REGULATIONS

1. The authority citation for part 501 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

**§ 501.11 [Amended]**

2. In § 501.11 (a)(1) remove the phrase "eligible for treatment as a state" and revise the text "§ 501.24(e)" to read "§ 501.24(b)".

3. In § 501.11(b)(2) remove the phrase "for treatment as a State" both times it appears and revise the text "§ 501.24(e)" to read "§ 501.24(b)".

**§ 501.12 [Amended]**

4. In § 501.12(g) remove the phrase "for treatment as a State" and revise the text "§ 501.24(e)" to read "§ 501.24(b)".

**§ 501.22 [Amended]**

5. The heading of § 501.22 is amended by revising the phrase "for treatment of Indian Tribes as States" to read "for eligibility of Indian Tribes."

6. In § 501.22 paragraph (a) introductory text is amended by removing the phrase "a State for purposes of making the Tribe."

7. In § 501.22 paragraph (a)(4) is amended by removing the last two sentences.

**§ 501.23 [Amended]**

8. The heading of § 501.23 is amended by removing the phrase "for treatment as a State".

9. In § 501.23 the introductory text is amended by removing the phrase "for treatment as a State."

10. In § 501.23 paragraph (b) introductory text is amended by revising the word "shall" to read "should."

11. In § 501.23 paragraph (c) is amended by revising the phrase "a copy of all documents" to read "copies of those documents" and by revising the phrase "support the Tribe's assertion" to read "the Tribe believes are relevant to its assertion."

12. In § 501.23 paragraph (d) introductory text is amended by revising the word "shall" to read "should."

13. In § 501.23 paragraph (d)(1) is amended by revising the words "including, but not limited to" to read "which may include."

14. In § 501.23 paragraph (e) is amended by revising the phrase "a Tribal request for treatment as a State" to read "a Tribe's eligibility."

15. In § 501.23 paragraph (f) is revised to read as follows:

**§ 501.23 Request by an Indian Tribe for a determination of eligibility.**

* * * * *

(f) If the Administrator or her delegatee has previously determined that a Tribe has met the prerequisites that make it eligible to assume a role similar to that of a state as provided by statute under the Safe Drinking Water Act, the Clean Water Act, or the Clean Air Act, then that Tribe need provide only that information unique to the sludge management program which is requested by the Regional Administrator.

**§ 501.24 [Amended]**

16. The heading of § 501.24 is amended by removing the phrase "for treatment as a State."

17. In § 501.24 paragraph (a) is amended by removing the words "for treatment as a State."

18. In § 501.24 paragraphs (b), (c), (d), and (e) are removed and paragraph (f) is redesignated as paragraph (b).

[FR Doc. 94-30401 Filed 12-13-94; 8:45 am]
BILLING CODE 6560-50-P

---

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Parts 611, 675, and 676

[Docket No. 941241-4341; I.D. 112394B]

### Foreign Fishing; Groundfish Fishery of the Bering Sea and Aleutian Islands; Limited Access Management of Federal Fisheries in and Off of Alaska

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Interim 1995 specifications of groundfish, associated management measures, and closures.

**SUMMARY:** NMFS issues interim 1995 initial total allowable catches (ITACs) for each category of groundfish and specifications for prohibited species bycatch allowances for the groundfish fishery of the Bering Sea and Aleutian Islands management area (BSAI). NMFS is also closing specified fisheries consistent with the interim 1995 groundfish specifications. The intended effect is to conserve and manage the groundfish resources in the BSAI.

**EFFECTIVE DATE:** January 1, 1995, until the effective date of the final 1995 initial specifications.

**ADDRESSES:** The preliminary 1995 Stock Assessment and Fishery Evaluation (SAFE) Report may be requested from the North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510, 907-271-2809

**FOR FURTHER INFORMATION CONTACT:** Ellen R. Varosi, NMFS, 907-586-7228

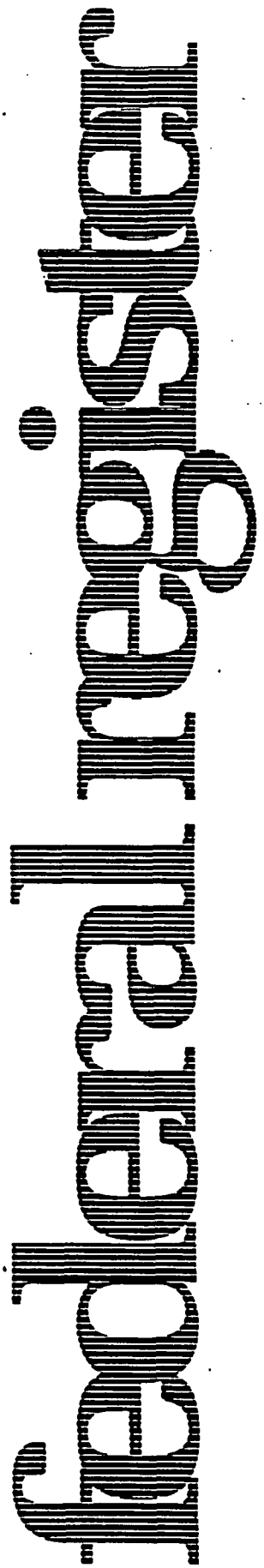
**SUPPLEMENTARY INFORMATION:** Groundfish fisheries in the BSAI are governed by Federal regulations (50 CFR 611.93 and parts 675 and 676) that implement the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP). The FMP was prepared by the North Pacific Fishery Management Council (Council) and approved by NMFS under the Magnuson Fishery Conservation and Management Act.

The FMP and implementing regulations require NMFS, after consultation with the Council, to specify for each calendar year the total allowable catch (TAC) for each target species and the "other species" category (§ 675.20(a)(2)). Regulations under § 675.20(a)(7)(i) further require NMFS to publish and solicit public comment on amounts of proposed annual TACs and ITACs for each target species, apportionments of each TAC, prohibited species catch (PSC) allowances under § 675.21(b), and seasonal allowances of pollock TAC. The Council, at its September 1994 meeting, based on the recommendations of its Scientific and Statistical Committee (SSC) and other information, approved preliminary initial specifications for 1995, as detailed below. NMFS is publishing these specifications in today's proposed rule section of the Federal Register

**Preliminary TAC Specifications**

The Council developed its TAC recommendations (Table 1) based on the preliminary acceptable biological catches (ABCs) as adjusted for other biological and socioeconomic considerations, including maintaining the total TAC in the required optimum yield range of 1.4-2.0 million metric tons (mt). Each of the Council's recommended TACs for 1995 is equal to or less than the final 1995 ABC for each species category. Therefore, NMFS finds that the recommended TACs are consistent with the biological condition of groundfish stocks. The preliminary

13813




Wednesday
March 23, 1994

Part III

# Environmental Protection Agency

40 CFR Parts 35 and 130
Indian Tribes: Eligibility of Indian Tribes for Financial Assistance; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 35 and 130

[FRL-4728-5]

## Indian Tribes: Eligibility of Indian Tribes for Financial Assistance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Amendments to interim final rule.

**SUMMARY:** The Clean Water Act contains provisions which authorize EPA to treat Indian tribes in substantially the same manner in which it treats states for purposes of various types of financial assistance. This action contains amendments to the interim final regulations implementing that authority for financial assistance programs. The purpose of these regulatory amendments is to make it easier for tribes to obtain EPA approval to assume the role Congress envisioned for them under this statute.

**EFFECTIVE DATES:** The amendments to the interim final rule are effective March 23, 1994. EPA will accept comments on these amendments until May 23, 1994.

**ADDRESSES:** Comments must be mailed (in duplicate, if possible) to C. Marshall Cain, Office of Federal Activities (A-104), Environmental Protection Agency, 401 M Street, SW., Washington, DC. 20460.

The docket for this rule and copies of the public documents submitted will be available for public inspection and copying at a reasonable fee at EPA Headquarters Library, Public Information Reference Unit, room 2904, 401 M Street, telephone (202) 260-5926.

**FOR FURTHER INFORMATION CONTACT:** C. Marshall Cain, Office of Federal Activities, U.S. Environmental Protection Agency, 401 M Street, SW., Washington DC 20460, telephone (202) 260-8792.

**SUPPLEMENTARY INFORMATION:** This preamble is organized according to the following outline:

I. Introduction
II. Regulations Governing Eligibility of Indian Tribes
A. The Existing Process
1. Recognition and a Government
2. Jurisdiction and Capability
3. Comment Process
4. Subsequent Tribal Applications
B. Workgroup Examination of Process
III. Revisions to the Process in Light of Statutory Requirements
A. Simplified Determination as To Recognition and Government
B. Case by Case Review of Jurisdiction and Capability
1. Simplified Jurisdictional Analysis
2. Capability
IV. Summary of Revised Process
V. Executive Order 12866
VI. Regulatory Flexibility Act
VII. Paperwork Reduction Act

## I. Introduction: Statutory and Regulatory Background

Under its American Indian Policy, EPA works directly with tribal governments as "sovereign entities with primary authority and responsibility for the reservation populace." At the time the Policy was adopted in 1984, the environmental statutes which EPA administers generally did not explicitly address the role of tribes in environmental management, but provided for a joint state and federal role in environmental management. Subsequently, three EPA regulatory statutes have been amended to address the tribal role specifically by authorizing EPA to treat tribes in a manner similar to that in which it treats states: the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), and the Clean Air Act (CAA).[1]

EPA recognizes that tribes are sovereign nations with a unique legal status and a relationship to the federal government that is significantly different than that of states. EPA believes that Congress did not intend to alter this when it authorized treatment of tribes "as States;" rather, the purpose of the statutory amendments was to reflect an intent that, insofar as possible, tribes should assume a role in implementing the environmental statutes on tribal land comparable to the role states play on state land.

All three regulatory statutes specify that, in order to receive such treatment, a tribe must be federally recognized and possess a governing body carrying out substantial duties and powers. 33 U.S.C. 1377 (e), (h) (CWA); 42 U.S.C. 300j-11 (SDWA); 42 U.S.C. 7601(d) (CAA). In addition, although there are some variations in language among the three statutes, each requires that a tribe possess civil regulatory jurisdiction to carry out the functions it seeks to exercise.[2] Finally, all three require that a tribe be reasonably expected to be capable of carrying out those functions.

The Agency initially chose to implement provisions of the Clean Water and Safe Drinking Water Acts regarding Indian tribes by establishing a formal prequalification process under which tribes can seek eligibility under these statutes. This prequalification process has in the past been referred to as approval for "treatment as a state" ("TAS"). Tribes that obtain such approval then become eligible to apply for certain grants and program approvals available to states.[3]

## II. Regulations Governing Eligibility of Indian Tribes

### *A. The Existing Process*

The Agency has promulgated five regulations that utilize the "TAS" process to date: (1) Safe Drinking Water Act National Drinking Water Regulations and Underground Injection Control Regulations for Indian Lands, 53 FR 37395 (September 26, 1988), codified at 40 CFR parts 35, 124, 141, 142, 143, 144, 145, and 146; (2) Indian Tribes: Water Quality Planning and Management, 54 FR 14353 (April 11, 1989), Comprehensive Construction Grant Regulation Revision, 55 FR 27092 (June 29, 1990) (governing grant programs under the CWA), codified at 40 CFR parts 35 and 130; (3) Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 FR 64876 (December 12, 1991), codified at 40 CFR part 131; (4) Clean Water Act, section 404 Tribal Regulations, 58 FR 8171 (February 11, 1993), codified at 40 CFR parts 232 and 233; and (5) Treatment of Indian Tribes as States for Purposes of sections 308, 309, 401, 402, and 405 of the Clean Water Act ("NPDES") Rule, 58 FR 67966 (December 22, 1993), codified at 40 CFR parts 122, 123, 124 and 501.

---

[1] In addition, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund"), which is primarily a response, rather than a regulatory statute, has also been amended to authorize EPA to treat tribal governments in substantially the same way it treats states with respect to selected provisions of the statute.

[2] Under the Clean Water Act, the tribe must propose to carry out functions that "pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation." 33 U.S.C. 1377(e)(2). Under the Clean Air Act, "the functions to be exercised by the Indian tribe [must] pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. 7601(d)(2)(B). Under the SDWA, the tribe must propose to exercise functions "within the area of the Tribal Government's jurisdiction." 42 U.S.C. 300j-11 (b)(1)(B).

[3] By contrast, the provision of CERCLA authorizing EPA to afford a tribal government "substantially the same treatment as a State" does not establish any specific criteria a tribe must meet to qualify for such treatment. 42 U.S.C. 9626. EPA has established, by regulation, the criteria of recognition, a government, and jurisdiction, but has not adopted a formal prequalification process under CERCLA. See 40 CFR 300.515(b). The Agency is developing regulations pertaining to the treatment of American Indian tribes under the Clean Air Act.

Under all of these regulations, before a tribe can obtain financial assistance available to states or obtain approval to operate a program which states are authorized to operate on state lands, the tribe must first formally qualify for "treatment as a state." To qualify, a tribe must submit an application establishing that it is federally recognized, has a governing body carrying out substantial duties and powers, and has adequate jurisdiction and capability to carry out the proposed activities. Once a tribe obtains "TAS" approval, it is eligible to apply for financial assistance and program approval.

1. Recognition and Government

A tribe typically establishes recognition by showing its inclusion on the list of federally recognized Tribes published by the Secretary of the Interior in the **Federal Register**. A tribe establishes that it meets the governmental duties and powers requirement with a narrative statement describing the form of the tribal government and the types of functions it performs, and identifying the sources of the tribe's governmental authority.

2. Jurisdiction and Capability

To establish jurisdiction under the CWA grant regulations, a tribe must submit a statement signed by a tribal legal official explaining the legal basis for the Tribe's regulatory authority over its water resources. The CWA grant regulations do not require that a tribe submit any specific materials to establish capability.

The other regulations specify that a tribe must submit various specific documents to establish jurisdiction, including: a map or legal description of the area over which the tribe claims jurisdiction; a statement by a tribal legal official describing the basis, nature, and subject matter of the tribe's jurisdiction; copies of all documents supporting the jurisdictional assertions; and a description of the locations of the systems or sources the tribe proposes to regulate. Similarly, to establish capability a tribe must submit a narrative statement describing tribal capability to administer an effective program, and certain specific, listed materials in support of that statement.

3. Comment Process

Upon receiving a "TAS" application under these regulations, EPA notifies all "appropriate governmental entities,"[4] as to the substance of and basis for the jurisdictional assertions in the application, and invites comment on those assertions. Where comments raise a competing or conflicting jurisdictional claim, the Agency must consult with the Department of the Interior before making a final decision on the tribe's application.

In practice, this comment process has sometimes led to delays in the processing and approval of tribal applications. Indeed, it has proven to be the single portion of "TAS" review most responsible for delays. The comment process also has created a perception that states have an oversight role in EPA's treatment of Indian tribes, which some tribes find objectionable, particularly since tribes have typically not been asked to offer their views on the scope and extent of state jurisdiction.

4. Subsequent Tribal Applications

The regulations require a separate "treatment as a state" application for each program for which the tribe seeks such treatment. However, after an initial approval, applications for each additional program need provide only that additional information unique to the additional program.

*B. Workgroup Examination of Process*

The Agency's "TAS" prequalification process has proven to be burdensome, time-consuming and offensive to tribes. Accordingly, in 1992 EPA established a working group to focus on ways of improving and simplifying that process. The Agency formally adopted the Workgroup's recommendations as Agency policy by Memorandum dated November 10, 1992. That Memorandum explicitly recognized that the policies it adopted would require amendments to existing regulations. The purpose of this regulation is to amend existing financial assistance regulations under the Clean Water Act in order to implement the new policy. To the extent possible, the Agency plans to use the same process in future regulations regarding determinations of tribal eligibility.

## III. Revisions to the Process in Light of Statutory Requirements

No statute compels the use of a formal "TAS" or other prequalification process separate from approval of the underlying request for a grant or program approval. The only requirements imposed by statute are that, to be eligible for financial assistance and/or program authorization, a tribe must be federally recognized, have a governing body carrying out substantial duties and powers, and have adequate jurisdiction and capability to carry out the proposed activities. Thus, EPA may authorize a tribal program or grant without formally designating the tribe as "eligible for TAS," so long as the Agency establishes that the tribe meets applicable statutory requirements. In other words, the Agency can ensure compliance with statutory mandates without requiring tribes to undergo a discrete, formal process of seeking "TAS" approval.

Accordingly, EPA is amending its regulations to eliminate "TAS" review as a separate step in the processing of a tribal application for a grant. Under the new, simplified process, the Agency will ensure compliance with statutory requirements as an integral part of the process of reviewing grant applications. To the extent that this rule or preamble conflicts with the language of previous rules and preambles, the language herein shall be controlling. EPA will also, as far as possible, discontinue use of the term "treatment as a state;" however, since this phrase is included in several statutes, its continued use may sometimes be necessary.

*A. Simplified Determination as to Recognition and Government*

As a general rule, the recognition and governmental requirements are essentially the same under the Clean Water and Safe Drinking Water Acts. The new process will reflect this by establishing identical requirements for making this showing under each statute. Moreover, the fact that a tribe has met the recognition or governmental functions requirement under either of the Water Acts will establish that it meets those requirements under both statutes. To facilitate review of tribal applications, EPA therefore requests that tribal applications inform EPA whether a tribe has been approved for "TAS" (under the old process) or deemed eligible to receive funding or authorization (under the revised process) for any other program.

A tribe that has not done so may establish that it has been federally recognized by simply stating in its grant or program authorization application that it appears on the list of federally recognized tribes that the Secretary of the Interior publishes periodically in the **Federal Register**. If the tribe notifies EPA that it has been recognized but does not appear on this list because the

[4] The Agency defines this to include contiguous states, other tribes, and federal land agencies responsible for management of lands contiguous to the reservation. (Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations; Final Rule. 56 FR 64875, 64884 (December 12, 1991)). In response to public comments, EPA has considered, but decided against, providing interested political subdivisions of states, including local governments and water districts, the opportunity to comment on tribal jurisdictional assertions. *Id.*

list has not been updated. EPA will seek to verify the fact of recognition with the Department of the Interior.

A tribe that has not yet made its initial governmental showing can do so by certifying that it has a government carrying out substantial governmental functions. A tribe will be able to make the required certification if it is currently performing governmental functions to promote the public health, safety, and welfare of its population. Examples of such functions include, but are not limited to, levying taxes, acquiring land by exercise of the power of eminent domain, and exercising police power. Such examples should be included in a narrative statement supporting the certification. (1) Describing the form of tribal government and the types of essential governmental functions currently performed, and (2) identifying the legal authorities for performing those functions (e.g., tribal constitutions or codes). It should be relatively easy for tribes to meet this requirement without submitting copies of specific documents unless requested to do so by the Agency.

*B. Case by Case Review of Jurisdiction and Capability*

A tribe may have jurisdiction over, and capability to carry out, certain activities (e.g., protection of the quality of a particular lake for the Clean Lakes program under the Clean Water Act), but not others (e.g., waste management on a portion of the reservation far removed from any lakes). For this reason, EPA believes that the Agency must make a specific determination that a tribe has adequate jurisdictional authority and administrative and programmatic capability before it approves each tribal program. This will ensure that tribes meet the statutory requirements Congress has established as prerequisites to tribal eligibility for each particular program.

1. Simplified Jurisdictional Analysis

The portion of the jurisdictional determination under which governments comment on tribal jurisdiction will be substantially altered under this Rule. These changes are outlined below.

Comments will no longer be sought from "appropriate governmental entities" with regard to tribal grant applications. The Agency now has extensive experience awarding grants to tribes and is capable of evaluating tribal grant applications to ensure that a tribe has adequate jurisdiction to receive grants.

A separate "TAS" jurisdictional review is not needed to verify that a tribe meets the statutory jurisdictional requirement. This change will have the effect only of eliminating duplicative requirements.

Finally, the Agency notes that certain issues concerning tribal jurisdiction may be relevant to a tribe's authority to conduct activities. For example, if a tribe and a state or another tribe disagree as to the boundary of a particular tribe's reservation, each time the tribe seeks to assert authority over the disputed area, the dispute will recur. The Agency recognizes that its determinations regarding tribal jurisdiction apply only to activities to be carried out within the scope of the grant. However, it also believes that, once it makes a jurisdictional determination in response to a tribal application regarding any EPA program, it will ordinarily make the same determination for other programs unless a subsequent application raises different legal issues. Thus, for example, once the Agency has arrived at a position concerning a boundary dispute, it will not alter that position in the absence of significant new factual or legal information.

Under the new approval process, as under the old, the Agency will continue to retain authority to limit its approval of a tribal application to those land areas where the tribe has demonstrated jurisdiction. This would allow EPA to approve the portion of a tribal application covering certain areas, while withholding approval of the portion of an application addressing those land areas where tribal authority has not been satisfactorily established. See, e.g., 53 FR 37395, 37402 (September 26, 1988) (SDWA); 54 FR 14353, 14355 (April 11, 1989) (Clean Water Act Grants); 54 FR 39097, 39102 (September 12, 1989) (Clean Water Act Water Quality Standards); 58 FR 8171, 8176 (February 11, 1993) (Clean Water Act section 404); 58 FR 67966, 67972 (Clean Water Act NPDES) (December 22, 1993).

2. Capability

EPA must continue to make a separate determination of tribal capability for each program for which it approves a tribe. However, the Safe Drinking Water Act, Water Quality Standards, and section 404 regulations would be amended to conform to the CWA grant regulations, which do not specifically prescribe the material a tribe must submit to establish capability. Ordinarily, the inquiry EPA will make into the capability of any applicant, tribal or state, for a grant or program approval would be sufficient to enable the Agency to determine whether a tribe meets the statutory capability requirement. See, e.g., 40 CFR part 31 (grant regulations applicable to states and tribes); 40 CFR 142.3 (Public Water System primary enforcement responsibility requirements at parts 141, 142 apply to tribes); 145.1(h) (Underground Injection Control requirements of parts 124, 144, 145, and 146 that apply to states generally apply to tribes).

Nevertheless, EPA may request that the tribe provide a narrative statement or other documents showing that the tribe is capable of administering the program for which it is seeking approval. In evaluating tribal capability, EPA will consider: (1) The tribe's previous management experience; (2) existing environmental or public health programs administered by the tribe; (3) the mechanisms in place for carrying out the executive, legislative and judicial functions of the tribal government; (4) the relationship between regulated entities and the administrative agency of the tribal government which will be the regulator; and (5) the technical and administrative capabilities of the staff to administer and manage the program.

EPA recognizes that certain tribes may not have substantial experience administering environmental programs; a lack of such experience will not preclude a tribe from demonstrating capability, so long as it shows that it has the necessary management and technical and related skills or submits a plan describing how it will acquire those skills.

IV. Summary of Revised Process

Under the new process, tribes will continue to seek grants under the authority of statutes authorizing EPA to treat eligible tribes in a manner similar to that in which it treats states. For instance, tribes seeking approval of an NPDES or Wetlands permits program will comply with the applicable provisions of 40 CFR parts 123 or 233. However, tribes will now generally be required to submit only a single application to demonstrate eligibility for the grant, without the need for a separate application for "TAS." EPA will verify that the tribe meets all statutory prerequisites for eligibility in the process of reviewing the single tribal application.

EPA believes that the changes outlined in this notice will simplify and streamline the process of assessing tribal eligibility while still ensuring full compliance with all applicable statutes. The Agency expects that the new process will reduce the burdens and barriers to tribes of participating in environmental management.

**V. Executive Order 12866**

OMB has reviewed this action under the terms of Executive Order 12886.

**VI. Regulatory Flexibility Act**

EPA did not develop a Regulatory Flexibility Analysis for the amendments in this rule. This is because they are exempt from notice and comment rulemaking under section 553(a)(2) of the Administrative Procedure Act (5 U.S.C. 553(a)(2)) and therefore are not subject to the analytical requirements of sections 603 and 604 of the Regulatory Flexibility Act (RFA) (5 U.S.C. 603 and 604).

**VII. Paperwork Reduction Act**

The proposed regulations contain no new or additional information collection activities and, therefore, no information collection request will be submitted to the Office of Management and Budget for review in compliance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

**List of Subjects**

*40 CFR Part 35*

Environmental protection, Air pollution control, Coastal zone, Grant programs-environmental protection, Grant programs-Indians, Hazardous waste, Indians, Intergovernmental relations, Pesticides and pests, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

*40 CFR Part 130*

Environmental protection, Grant programs-environmental protection, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: March 10, 1994.

**Carol M. Browner,**

*Administrator.*

For the reasons set forth in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

## PART 35—STATE AND LOCAL ASSISTANCE

### Subpart A—Financial Assistance for Continuing Environmental Programs

1. The authority citation for subpart A of part 35 continues to read as follows:

**Authority:** Secs. 105 and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7405 and 7601(a)); Secs. 106, 205(g), 205(j), 208, 319, 501(a), and 518 of the Clean Water Act, as amended (33 U.S.C. 1256, 1285(g), 1285(j), 1288, 1361(a) and 1377); secs. 1443, 1450, and 1451 of the Safe Drinking Water Act (42 U.S.C. 300j-2, 300j-9 and 300j-11); secs. 2002(a) and 3011 of the Solid Waste Disposal Act, as amended by the Resource Conservation, and Recovery Act of 1976 (42 U.S.C. 6912(a), 6931, 6947, and 6949); and secs. 4, 23, and 25(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136(b), 136(u) and 136w(a).

2. Section 35.105 is amended by adding a definition of *Eligible Indian Tribe* in alphabetical order and by revising the definition of "State" to read as follows:

**§ 35.105 Definitions.**

* * * *

*Eligible Indian Tribe* means for purposes of the Clean Water Act, any federally recognized Indian Tribe that meets the requirements set forth at 40 CFR 130.6(d).

* * * * *

*State* means within the context of Public Water Systems Supervision and Underground Water Source Protection grants or of financial assistance programs under the Clean Water Act, one of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territories of the Pacific Islands or an eligible Indian Tribe.

* * * * *

**§ 35.115 [Amended]**

3. Section 35.115 is amended by revising the phrase "Indian Tribes treated as States" in paragraphs (b), (d), and (f) to read "eligible Indian Tribes" and paragraph (g) is amended by revising the phrase "Indian Tribe treated as a State" to read "eligible Indian Tribe".

**§ 35.155 [Amended]**

4. In § 35.155 paragraph (c) is amended by revising the phrase "Indian Tribes treated as States" to read "eligible Indian Tribes".

**§ 35.250 [Amended]**

5. Section 35.250 is amended by revising the phrase "Indian Tribes treated as States" to read "eligible Indian Tribes."

**§ 35.255 [Amended]**

6. Section 35.255(b) is amended by revising the phrase "Indian Tribes treated as States" to read "eligible Indian Tribes".

**§ 35.260 [Amended]**

7. In § 35.260 paragraph (a) is amended by revising the phrase "Indian Tribes treated as States" to read "eligible Indian Tribes" and paragraph (b) is amended by revising the phrase "Indian Tribe treated as a State" to read "eligible Indian Tribe".

**§§ 35.265, 35.365 and 35.755 [Amended]**

8. Sections 35.265(a), 35.365(a)(1), 35.755(a), and 35.755(b)(1) are amended by revising the phrase "requirements for treatment as a State in accordance with 40 CFR 130.6(d) and 130.15" to read "requirements set forth at 40 CFR 130.6(d)".

**§§ 35.350 and 35.750 [Amended]**

9. Sections 35.350 introductory text and 35.750 are amended by revising the phrase "Indian Tribes treated as States" to read "eligible Indian Tribes".

**§ 35.400 [Amended]**

10. Section 35.400 is amended by revising the phrase "Indian Tribes treated as States for" to read "eligible Indian Tribes under".

**§ 35.1605–9 [Amended]**

11. Section 35.1605–9 is amended by revising the phrase "treated as a State" in the heading to read "set forth at 40 CFR 130.6(d)" and by revising the phrase "set forth for treatment as a State in accordance with 40 CFR 130.6(d) and 130.15" to read "set forth at 40 CFR 130.6(d)".

**§ 35.1620–1 [Amended]**

12. Section 35.1620–1 (c) is amended by revising the phrase "treated as States" in the paragraph heading to read "eligible Indian Tribe" and by revising the phrase "Indian tribe treated as a State" to read "eligible Indian Tribe".

**§ 35.415 [Amended]**

13. Section 35.415(a)(1) is amended by removing the words "—Treatment of Indian Tribes as States".

**§ 35.450 [Amended]**

14. Section 35.450 is amended by revising the phrase "Indian Tribes treated as States for" to read "eligible Indian Tribes under".

**§ 35.465 [Amended]**

15. Section 35.465(a)(1) is amended by removing the words "—Treatment of Indian Tribes as States".

## PART 130—WATER QUALITY PLANNING AND MANAGEMENT

1. The authority citation for part 130 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et. seq.*

**§ 130.1 [Amended]**

1. Section 130.1(a) is amended by revising the phrase "Indian Tribe

treated as a State" to read "eligible Indian Tribe".

§ 130.6 [Amended]

2. Section 130.6(d) introductory text is amended by revising the phrase "may be treated as a State" to read "is . . . eligible".

§ 130.15 [Amended]

3. Section 130.15 is amended by revising the phrase "for treatment as a State" in the heading to read "for Indian tribes"; by removing the phrase "for treatment as a State" from paragraph (a); by removing paragraphs (b), (c), and (d); and by removing the paragraph designation "(a)" from the remaining text.

[FR Doc. 94-6382 Filed 3-22-94; 8:45 am]

BILLING CODE 6560-60-P

# TRIBAL OPERATIONS COMMITTEE

# CHARTER

*This charter sets forth the basic operating goals, principles and operating procedures for the TOC*

## MISSION STATEMENT

In a manner consistent with the U.S. Environmental Protection Agency (EPA) Indian Policy, EPA's trust responsibility, environmental laws, regulations, policies and guidance, the mission of the Tribal Operations Committee (TOC) is to advance the protection and improve the conditions of Tribal health and the environment in Indian Country. The relationship between TOC and EPA will not substitute for the government-to-government relationship between EPA and Tribal governments.

## BACKGROUND

EPA Administrator, Carol M. Browner, convened the first TOC meeting on February 17, 1994. At this first meeting, tribal representatives of the TOC presented three recommendations: 1) Reaffirm the 1984 EPA Indian Policy and the EPA State/Tribal Concept Paper on jurisdiction; 2) Establish a National EPA Indian Environmental Office; and 3) Increase funding for tribal environmental programs. In response to these recommendations, Administrator Browner announced the formation of an EPA Senior Leadership Team[1] for tribal operations. The role of the team was to assist in developing: (1) strategic planning and budget recommendations; (2) updated implementation guidance for EPA's Indian policy, and (3) organizational recommendations. The TOC met several times during 1994 which resulted in the establishment of the American Indian Environmental Office (AIEO), reaffirmation of the 1984 EPA Indian Policy (Attachment 1), and the July 14, 1994 Action Memorandum (Attachment 2), and increased funding for Indian programs.

---

[1]Martha Prothro, Special Counsel on Indian Affairs, and Bill Yellowtail, EPA Region 8, Regional Administrator, were appointed as co-chairs of the senior leadership team.

## PART 1. Goals

The goals of the TOC are to improve EPA environmental programs by:

(1) building tribal environmental capacity and infrastructure to support implementation of on-going tribal environmental programs;

(2) promoting assumption of federal environmental programs by tribal governments consistent with federal law where tribes desire to be treated in a manner like a state;

(3) advancing strong environmental protection for all Tribes by developing national environmental strategies on issues of importance to the Tribes and EPA;

(4) assisting with EPA's development of Indian Program budget priorities and management functions at every level within EPA;

(5) promoting continued education at every level of EPA on Tribal sovereignty issues, the principles of Indian law and Tribes as co-regulators;

(6) supporting increased tribal access to EPA programs, funding, technical assistance, training and information; and

(7) assisting EPA to develop and maintain open dialogue among Indian Tribes and EPA.

## PART 2. Role of the TOC

The TOC, comprised of both EPA Senior Management, including AIEO and Tribal Leaders, who are EPA's environmental co-regulators, will provide input into EPA "operational" decision- making affecting Indian Country.

The Tribal representatives of the TOC will be referred to as the Tribal Caucus. The Tribal Caucus elects their own chairperson, vice-chairperson and secretary from among their member representatives. The Chairperson of the Tribal Caucus serves as the Co-Chair with the Administrator presiding over the full TOC membership.

The Tribal Caucus will work with EPA work groups, such as the National Indian Work Group (NIWG), the EPA Indian Attorneys Work Group, etc., by identifying national Indian environmental policies and issues for discussion and resolution on how EPA can improve their program delivery and implementation.

The Tribal Caucus will work on a regular basis with the AIEO as it oversees the implementation of the EPA Indian Policy and develops policy and guidance for EPA to provide environmental protection for Indian tribes

Individual tribes can put forth issues through their Tribal representative or through a government-to-government relationship with the EPA. The TOC does not preclude a tribe from exercising their sovereignty and forming their own relationship with EPA.

The TOC will identify issues to be placed on each meeting agenda, and as necessary develop issue papers for consideration of pertinent concerns to the Tribes. Tribal Caucus may assist EPA to determine when broad Tribal input is appropriate rather than just TOC input.

## PART 3. Membership

### Section 1. Tribal Representatives

In February 1994, EPA Administrator Carol Browner invited eighteen tribal representatives to serve on the Tribal Operations Committee. There were two methods by which tribal representatives were originally confirmed to the Tribal Caucus. Administrator Browner asked the Regional Administrators to identify the tribal representatives. In some regions, the Regional Administrator identified and appointed the tribal representatives. In other regions, the Regional Administrators requested Tribes to delegate their representatives and these representatives were confirmed by the Administrator.

Since the establishment of the Tribal Caucus, the number of tribal representatives to the Tribal Caucus was increased from 18 to 19 on March 30, 1995, with the addition of one representative (Montana) in Region VIII. There are 19 Tribal TOC members from nine EPA regions. The regional Tribal representation is as follows:

Region 1 - 1
Region II - 1
Region IV - 1
Region V - 2
Region VI - 2
Region VII - 1
Region VIII - 3 (one member from Montana)
Region IX - 4 (one member from Navajo Nation)
Region X - 4 (two members from Alaska)

Tribes in each region will determine the method of selection of representatives and alternates and EPA Regions will provide assistance to tribes in the selection process.

Notification of appointments or resignations of Tribal representatives to the TOC shall be made by the Regional Administrator through a letter to the Co-chairs of the TOC and the Director of the American Indian Environmental Office.

TOC membership is limited to federal officials and elected Tribal officials or their designated or authorized employees.

Regular Attendance. All Tribal Caucus representatives and/or their alternates must strive to attend all meetings on a regular basis. However, no more than three consecutive meetings can be missed by any one Tribal Representative or their alternate. Attendance on conference calls is encouraged by all Tribal Caucus representatives or their alternates.

Alternates. The recognized Tribal representative will inform his or her alternate of any meeting in which they will be absent or unable to attend. All alternates will have the same voting rights as the regular Tribal Caucus Representative in the absence of the regular Tribal Caucus Representatives.

Length of Term of Tribal Caucus Members: The length of term for Tribal Caucus members shall be determined by the Tribes of the Regions.

**Section 2. EPA Membership**:

Membership to the TOC shall be composed of the following senior managers:

Administrator
Deputy Administrator
AIEO Director
Chief Financial Officer
Regional Administrator of Lead Region on Indian Programs
Regional Administrator of Backup Region on Indian Programs
Regional Administrators.
Assistant Administrator for Administration and Resource Management
Assistant Administrator, Office of Water
Assistant Administrator, Office of Air and Radiation
Assistant Administrator, Office of Prevention, Pesticide & Toxic Substances
Assistant Administrator, Office of Solid Waste & Emergency Response
Assis0tant Administrator, Office of Enforcement & Compliance Assurance
Assistant Administrator, Office of Research & Development
Assistant Administrator, Office of Policy, Planning & Evaluation
Assistant Administrator, Office of International Activities
General Counsel
Inspector General
Associate Administrator, Office of Regional Operations & State/Local Relations

Associate Administrator, Office of Congressional & Legislative Affairs
Associate Administrator, Office of Communication Education & Public Affairs

**PART 4. Tribal Caucus Officers**

**Section 1.** The officers of the Tribal Caucus shall be: Chairperson, Vice-Chairperson, and Secretary.

**Section 2. Selection of Officers.**

The selection of Officers shall be held every year at a regular meeting of the Tribal Caucus. Nominations must be made by a Tribal Caucus member in writing. Officers shall be elected by a majority vote of the 19 tribal representatives to the Tribal Caucus. Officers shall hold office for one year or until their successors are elected. Thirty days advance notice of any pending election and nominations of officers shall be provided to each Tribal Caucus representative.

Nomination and election processes will be initiated and coordinated by the AIEO in consultation with the Officers of the Tribal Caucus.

**Section 3. Duties of Tribal Caucus Officers:**

(a) Chairperson. Presides at meetings of the Tribal Caucus and co-chairs TOC meetings; facilitates consensus of the TOC on national tribal environmental issues; may convene the Tribal Caucus as a separate subcommittee from the TOC to accomplish goals and objectives; serves as ex-officio member of subcommittees and work groups; delegates issues to smaller work groups of the Tribal Caucus; Facilitates the consensus of the Tribal Caucus at EPA Regional and National Indian Workgroup meetings, participates on various EPA work groups and committees.

(b) Vice Chairperson. The Vice Chairperson presides at meetings in the absence of the Chairperson, assumes and discharges all the duties of the Chairperson.

(c) Secretary. Responsible for creating a written record of all meetings and teleconferences of the Tribal Caucus and discussions of the Tribal Caucus; transmits this information to EPA and to the Tribal Caucus; may receive assistance from AIEO to help distribute in a timely manner to the Tribal Caucus members; and may delegate responsibilities to tribal staff.

PART 5. Meetings

Section 1. Regular Meetings

Four quarterly meetings will be held, one of which shall be the Annual meeting. The Annual meeting may be held in conjunction with the Annual Agency Planning Meeting where the Tribal Caucus members participate in priority setting and budget formulation for the upcoming fiscal year. Of these four quarterly meetings the full TOC will meet twice, the Tribal Caucus and the NIWG will meet at least once and the AIEO and the Tribal Caucus will meet as a fourth meeting. AIEO will provide administrative and technical support to the Tribal Caucus for all meetings.

TOC meetings are solely for the purpose of exchanging views, information or advice relating to management or implementation of federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

Section 2. Special Meetings.

Special meetings may be called by the Chairperson of the Tribal Caucus or the Director of the AIEO with concurrence of the Co-chairperson of the TOC.

Section 3. Conduct of Meetings

Tribal customs, practices and manner shall govern the order of the meeting for all TOC meetings. The Tribal Caucus shall strive for consensus decision making as a means to formally establish the position of the Tribal Caucus.

Section 4. Conference Calls.

AIEO will arrange conference calls for the Tribal Caucus on a regular basis to support Tribal Caucus activities.

PART 6. Quorum

A majority of the full membership of the Tribal Caucus shall constitute a quorum for all Tribal Caucus meetings. The lack of a quorum at a meeting shall not prevent those present from proceeding with discussions and consensus-building on environmental issues that will affect Tribes.

**PART 7. Subcommittees and Work Groups of the Tribal Caucus**

The Tribal Caucus may establish subcommittees or work groups, when necessary, to facilitate the purpose and goals of the Tribal Caucus. EPA representatives may be asked to participate in these work groups to lend their technical expertise. A lead person will be designated to oversee the subcommittee or work group. The lead person will be responsible for ensuring the group and/or committee carries out their assigned task and will place the item on the next Tribal Caucus meeting for discussion and report. The AIEO will communicate all issues and concerns of any subcommittees or work groups to the full TOC. The AIEO will coordinate between Tribal Caucus work groups and EPA work groups undertaking similar activities.

**PART 8. Amendments**

This charter may be amended at a full TOC meeting. Amendments must be accepted by a majority of the total membership of the Tribal Caucus. Any Tribal Caucus member may propose an amendment. Any proposed amendment must be submitted in writing 30 days prior to the next meeting to the Chairperson of the Tribal Caucus to be distributed to all members of the TOC and placed on the agenda for the next TOC meeting.

**Part 9. Certification**

We hereby certify that the foregoing Tribal Operations Committee Charter was adopted at a duly called meeting of the Tribal Operations Committee, held on the 11th day of April, 1996, where a quorum was present.

Dated this 11 day of APRIL, 1996.

Chairperson, Tribal Caucus

Administrator, Environmental Protection Agency

# WORKING EFFECTIVELY WITH TRIBAL GOVERNMENTS

## Appendix B

U.S. Environmental Protection Agency
Training Seminar

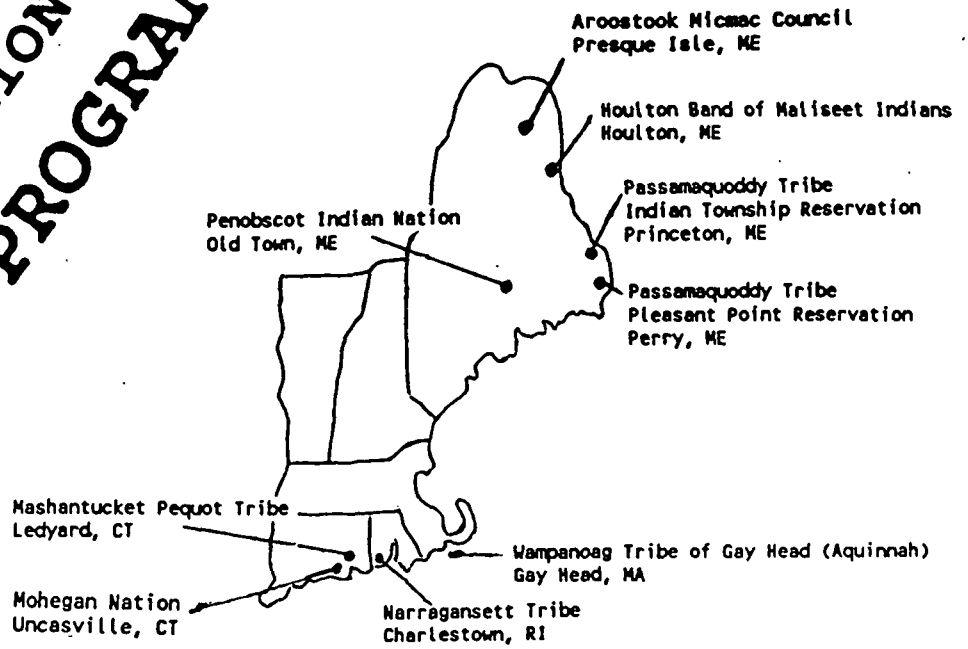
August 1996

# APPENDIX B


| | PAGE |
|---|---|
| EPA Indian Program Information/Contact Sheets | 3 |
| New England Indian Workgroup (NEIWG) | 4 |
| Spencer Phips Proclamation (1755) | 5 |
| Kezogmomna Alaimihot--Indian Prayers | 5B* |
| Trade and Intercourse Act (July 22, 1790) | 6 |
| Indian Citizenship Act (June 2, 1924) | 6B |
| Treaty of Ghent (December 24, 1814) | 7 |
| Passamaquoddy Treaties with Massachusetts (February, 1795 and January, 1834) | 13 |
| Termination Policy Acts (House Concurrent Resolution 108, August 1, 1953 and Public Law 280, August 15, 1953) | 15 |
| Indian Self-Determination and Education Assistance Act (January 4, 1975) | 16 |
| Rhode Island and Maine Indian Land Claims Settlement Acts | 17 |
| Connecticut (Mashantucket Pequot) Indian Land Claims Settlement Act | 28 |
| Massachusetts Indian Land Claims Settlement Act | 30 |
| Mohegan Nation Land Claims Settlement | 33 |
| Water Rights Discussion (Cohen) | 35 |
| The Federal Acknowledgement Process Guidance | 37 |
| Background of United South and Eastern Tribes (USET) | 42 |
| Passamaquoddy Tribal Trust Lands Maps | 43 |


B = BACK SIDE

# U.S. EPA REGION I INDIAN PROGRAM




| TRIBAL GOVERNMENT | POPULATION | LAND AREA | F.R. |
|---|---|---|---|
| Narragansett Tribe | 2150 | 2693 | 83 |
| Maliseet (Houlton Band) | 582 | 804 | 76 |
| Passamaquoddy Tribe Indian Township Government | 1156 | 28526 | 76 |
| Passamaquoddy Tribe Pleasant Point Government | 1848 | 2073 | 76 |
| Passamaquoddy Tribe (Joint Land Holdings) | ----- | 118978 | |
| Penobscot Indian Nation | 2076 | 116028 | 76 |
| Mashantucket Pequot ** | 383 | 1845.15 | 83 |
| Wampanoag Tribe (Aquinnah) | 801 | 531.6 | 87 |
| Micmac Tribe (Aroostook Band) | 1159 | *875 (in Trust Process) | 91 |
| Mohegan Nation | 1185 | 240.5 +(835 in Trust Process) | 94 |

1/8/97

| | | | |
|---|---|---|---|
| **TOTALS** | **11,340** | **271,719.25** | |

# NEW ENGLAND TRIBES/RESERVATIONS

**LAST UPDATED 9/11/96** (EPA-out) RTPMAINHUB.INTERNET:" address"

| TRIBE | CONTACTS |
|---|---|
| **HOULTON BAND OF MALISEET INDIANS**<br>Route 3 - Box 450<br>Houlton, ME 04730<br>**PHONE:** 207/532-4273 x40<br>1/800/545-8524 **FAX:** 207/532-2660 | Clair Sabattis, Chief<br><br>Environmental Contacts:<br>* Sharri Venno, Director of EPA Planning Grant<br>"env.planning@ainop.com" |
| **NARRAGANSETT INDIAN TRIBE**<br>PO Box 268<br>Charlestown, RI 02813<br>**PHONE:** 401/364-1105<br>**FAX:** 401/364-1104<br>**EM:** 401/364-1117 | George Hopkins, Chief "c/o Randy Noka, First Councilman"<br><br>Environmental Contacts:<br>* Greg Soder, Director of Natural Resources,"GREG@MAIL.BBSNET.COM"<br>Kathy Maxwell, Environmental Specialist<br>Chris Coutu, Wetlands Specialist; Dinalyn Spears, Biologist |
| **PASSAMAQUODDY TRIBE OF INDIANS**<br>**INDIAN TOWNSHIP RESERVATION**<br>PO Box 301<br>Princeton, ME 04668<br>**PHONE:** 207/796-5635 **FAX:** 207/796-5256 | John Stevens, Tribal Governor<br><br>Environmental Contacts:<br>* Veronica Smith, Tribal Planner,(5611) [on EPA-Groupwise]<br>Julie Coffin, Water Quality Specialist |
| **PASSAMAQUODDY TRIBE OF INDIANS**<br>**PLEASANT POINT RESERVATION**<br>PO Box 343<br>Perry, ME 04667<br>**PHONE:** 207/853-2600 **FAX:** 207/853-6039 | Cliv Dore, Tribal Governor<br><br>Environmental Contacts:<br>Lt. Gov. Rick Doyle, " HEIDIL@NEMAINE.COM"<br>* Heidi Leighton, Env. Planner Bill Howard, Env. Engineer,(284): |
| **PENOBSCOT INDIAN NATION**<br>6 River Rd.<br>Indian Island Reservation<br>Old Town, ME 04468<br>**PHONE:** 207/827-7776<br>**FAX:** 207/827-1137 | Francis Mitchell, Tribal Governor<br><br>Environmental Contacts:<br>* John Banks, Dir. of Natural Resources,(330) [990-2613-h)<br>Daniel Kusnierz, Water Quality Spec.(361) "PINWATER@MINT.NET"<br>Tammis Coffin, Water Resource Planner,(360); Wayne Mitchell, L.U. |
| **MASHANTUCKET PEQUOT TRIBAL NATION**<br>Tribal Office<br>Indiantown Rd.- PO Box 3060<br>Mashantucket, CT 06339-3060<br>**PHONE:** 860-572-6740<br>**FAX:** 860-572-6745 | Richard (Skip) Hayward, Chairman<br><br>Environmental Contacts:<br>"102035.3057@compuserv.com"<br>Jeff Skinner, Asst. Dir./Natural Resources Protection<br>* Valerie Ferry, Compliance Officer |
| **WAMPANOAG TRIBE OF GAY HEAD**<br>Blackbrook Road<br>Gay Head, MA 02535<br>**PHONE:** 508/645-9265<br>**FAX:** 508/645-3790 | Beverly Wright, Chairperson<br><br>Environmental Contacts: "NATRES@VINEYARD.NET"<br>* Matthew Vanderhoop, Director of Natural Resources<br>Philippe Jordi, Planner |
| **AROOSTOOK BAND OF MICMACS**<br>PO Box 772<br>Presque Isle, ME 04769<br>**PHONE:** 207/764-1972<br>**FAX:** 207/764-7667<br>**MACK:** 207/764-7219<br>**FAX (MACK and JUDITH):** 207/764-7768 | Mary Philbrook, Chief<br><br>Environmental Contact: "2123610@mcimail.com"<br>Health Dept./759 Main Street 7219<br>Mack Ayotte, Administrator; Judith Boudman, Environmental Health 6968<br>* Fred Corey, Environmental Planner; Tony Murphy, Env. Health Assistant;<br>Roger Paul, Env. Plan. Assit. |
| **MOHEGAN TRIBE**<br>P.O. Box 488<br>Uncasville, CT 06382<br>**PHONE:** 860/848-5600/6100<br>**FAX:** 860/848-6115 | Roland Harris, Tribal Chairman<br><br>Environmental Contact:<br>* Dr. Norman Richards 860/848-6112 "Norman Richards@8608486115"<br>Melissa Fawcett 860/848-6108 |
| | * **R-TOC: PRIMARY ENVIRONMENTAL CONTACT** |

## Tribal Operations, Strategic Planning, Office of Ecosystem Protection

James G. Sappier(CSP), Regional Indian Program Manager, 617-565-3935, F-4940, "SAPPIER.JAMES@EPAMAIL.EPA.GOV"
Terry Regan (CSP), Regional Indian Program Specialist, 617-565-3529, F-4940, "REGAN.TERRY@EPAMAIL.EPA.GOV"
Darren Ranco (CSP), Tribal Liaison, 617-565-4976, F-3346, "RANCO.DARREN@EPAMAIL.EPA.GOV"
Deborah Falcone (CSP), Env. Tech. Coord. 617-565-3428, F-4940, "FALCONE.DEBORAH@EPAMAIL.GOV"

**EPA-TRIBE COORDINATORS:**

Micheal Kenyon(CAA), EPA-Pequot Coordinator, 617-565-3524/F4940,"KENYON.MICHEAL@EPAMAIL.EPA.GOV"
Micheal Kenyon(CAA), EPA-Maliseet Coordinator,617-565-3524/F4940,"KENYON.MICHEAL@EPAMAIL.EPA.GOV"
Jerry Healey(CAA), EPA-Micmac Coordinator, 617-565-3602/F4940, "HEALEY.JEROME@EPAMAIL.EPA.GOV"
Jerry Healey(CAA), EPA-Passamaquoddy I.T. Coordinator, 617-565-3602/F4940, "HEALEY.JEROME@EPAMAIL.EPA.GOV"
Jerry Healey(CAA), EPA-Passamaquoddy PL.PT. Coordinator, 617-565-3602/F4940, "HEALEY.JEROME@EPAMAIL.EPA.GOV"
Eleanor Kwong(CRI), EPA-Narragansett Coordinator, 617-565-3604/F4940, "KWONG.ELEANOR@EPAMAIL.EPA.GOV"
Mark Sceery(CCT), EPA-Mohegan Coordinator, 617-565-4866/F4940, "SCEERY.MARK@EPAMAIL.EPA.GOV"
William Nuzzo(CSP) EPA-Wampanoag Coordinator, 617-565-3485/F4940, "NUZZO.WILLIAM@EPAMAIL.EPA.GOV."
Terry Regan(CSP) EPA-Penobscot Coordinator, 617-565-3529/F4940, "REGAN.TERRY@EPAMAIL.EPA.GOV"

TRIBES.LST

# INDIAN WORK GROUP EPA-NEW ENGLAND

REGION I JFK FED. BLDG. ONE CONGRESS STREET
BOSTON, MASS. 02203-2211 (NEIWG-97) CHG'D12-20-96

| | | |
|---|---|---|
| James Sappier (CSP) | **Indian Program Manager**<br>Tribal Operations, SP-OEP | 565-3935 |
| Darren Ranco (CSP) | **Tribal Liaison**<br>Tribal Operations, SP-OEP | 565-4976 |
| Terry Regan (CSP) | **I-Program Spec./Coor-PN**<br>Tribal Operations, SP-OEP | 565-3529 |
| Jerry Healey (CAA) | **I-Program Coor-ABMI, PIT, PPP**<br>Office of Ecosystem Protection | 565-3602 |
| Mike Kenyon (CAA) | **I-Program Coor-HBMI,MP**<br>Office of Ecosystem Protection | 565-3524 |
| Eleanor Kwong (CRI) | **I-Program Coordinator-NIT**<br>Office of Ecosystem Protection | 565-1154 |
| Mark Sceery (CCT) | **I-Program Coordinator-MN**<br>Office of Ecosystem Protection | 565-4866 |
| Bill Nuzzo (CSP) | **Indian Program Coordinator-WTGH**<br>Office of Environmental Protection | 565-3485 |
| James M. Bryson (CPT) | Air, Pesticides and Toxics<br>Office of Ecosystem Protection | 565-3836 |
| Robert Koethe (CPT) | Air, Pesticides and Toxics<br>Office of Ecosystem Protection | 565-3491 |
| Eugene Benoit (CPT) | Toxics and Radiation Assessment<br>Office of Ecosystem Protection | 565-2899 |
| Mary Beth Smuts (CPT) | Toxics and Radiation<br>Office of Ecosystem Protection | 565-3232 |
| Louise House (HIO) | ATSDR - Waste Management<br>Office of Site Remediation & Restoration | 223-5590 |
| Bud Plunkett (SPP) | Emergency Response<br>Office of Environmental Stewardship | 565-9007 |
| Henry Burrell (MGM) | Chief, Grants<br>Office of Administration & Management | 565-3839 |
| Paul Trevino (MGM) | Grants Specialist<br>Office of Administration & Management | 565-3843 |
| Elizabeth Higgins-Congram (RAA) | Environmental Review<br>Office of Regional Administrator | 565-3422 |
| Sharon Wells (RCA) | General Law Office<br>Office of Regional Counsel | 565-3445 |
| Paul Bryan (CSP) | Strategic Planning<br>Office of Ecosystem Protection | 565-9349 |
| Joe De Cola (SPP) | Solid Waste<br>Office of Solid Waste | 565-3276 |
| Don Cooke (CAQ) | Air Quality Planning<br>Office of Ecosystem Protection | 565-3508 |
| Sandra Fancieullo (CME) | NonPoint Source Pollution Control<br>Office of Ecosystem Protection | 565-4426 |
| Eric Hall (SEW) | Water Technical<br>Office of Environmental Stewardship | 565-3592 |
| Tim Williamson (RCA) | General Law Office<br>Office of Regional Counsel | 565-9016 |

| | | |
|---|---|---|
| Tom Olivier | Legal/Regulatory | 565-1146 |
| (SEL) | Office of Environmental Stewardship | |
| Molly Magoon | Air Technical-Mobile | 565-3220 |
| (SEA) | Office of Environmental Stewardship | |
| Arthur Clark | Quality Assurance | 860-4374 |
| (EQA) | Office-Env. Measurement & Evaluation | |
| Rodney Elloitt | Environmental Justice | 565-9056 |
| (RAA) | Office of Regional Administrator | |
| Anne Fenn | Federal Facilities Program | 565-3927 |
| (SFF) | Office of Environmental Stewardship | |
| Douglas Corb | NPDES Permitting | 565-4433 |
| (CME) | Office of Environmental Protection | |
| Georgia Bishop | Human Resources Development | 565-9051 |
| (MHR) | Office of Administration & Management | |
| Peg Nelson | Regional Manager | 565-3298 |
| (LIB) | Library | |
| Indira Balkissoon | ME & VT Superfund Section | 573-9123 |
| (CPT) | Office of Ecosystem Protection | |
| Christine Williams | Federal Facilities | 573-5736 |
| (HBT) | Office of Site Remediation & Restoration | |
| Norman Willard | Toxic Assessment/Waste Reduction | 565-3702 |
| (SPT) | Office of Environmental Stewardship | |
| Barbara White | Waste Management | 573-3525 |
| (MIO) | Office of Administration & Management | |
| Maureen McClelland | Toxologist | 565-3543 |
| (CCT) | Office of Ecosystem Protection | |
| Robert Hillger | Regional Scientist | 565-3397 |
| (RAA) | Office of Regional Administrator | |
| Mark Stein | Office of Regional Council | 565-3169 |
| (RCA) | | |
| Toni Bandowicz | Legal/Regulatory | 565-3316 |
| (SEL) | Office of Environmental Stewardship | |
| Elissa Tonkin | ADR Specialist | 565-1154 |
| (SEE) | Office of Environmental Stewardship | |
| Robert Adler | Ground Water | 565-9306 |
| (CRI) | RI-Office of Ecosystem Protection | |
| Jane Downing | EPA-Massachusetts | 565-4877 |
| (CMA) | State Programs & Multimedia | |
| John Hackler | EPA-Connecticut | 565-3564 |
| (CCN) | State Programs & Multimedia | |
| Steve Silva | EPA-Maine | 565-3519 |
| (CME) | State Programs & Multimedia | |
| Robert Mendoza | EPA-Rhode Island | 565-3575 |
| (CRI) | State Programs & Multimedia | |

5

By His HONOUR

# *SPENCER PHIPS*, Esq;

Lieutenant-Governour and Commander in Chief, in and over His Majesty's Province of the *Massachusetts-Bay* in *New-England*.

# A PROCLAMATION.

WHEREAS the Tribe of *Penobscot* Indians have repeatedly in a perfidious Manner acted contrary to their solemn Submission unto His Majesty long since made and frequently renewed;

I have therefore, at the Desire of the House of Representatives, with the Advice of His Majesty's Council, thought fit to issue this Proclamation, and to declare the Penobscot Tribe of Indians to be Enemies, Rebels and Traitors to His Majesty King *GEORGE* the Second: And I do hereby require His Majesty's Subjects of this Province to embrace all Opportunities of pursuing, captivating, killing and destroying all and every of the aforesaid Indians.

*AND WHEREAS* the General Court of this Province have voted that a Bounty or Incouragement be granted and allowed to be paid out of the Publick Treasury, to the marching Forces that shall have been employed for the Defence of the *Eastern* and *Western* Frontiers, from the *First* to the *Twenty-fifth* of this Instant *November*;

I have thought fit to publish the same; and I do hereby Promise, That there shall be paid out of the Province-Treasury to all and any of the said Forces, over and above their Bounty upon Inlistment, their Wages and Subsistence, the Premiums or Bounty following, viz.

For every Male *Penobscot* Indian above the Age of Twelve Years, that shall be taken within the Time aforesaid and brought to *Boston*, *Fifty Pounds*.

For every Scalp of a Male *Penobscot* Indian above the Age aforesaid, brought in as Evidence of their being killed as aforesaid, *Forty Pounds*.

For every Female *Penobscot* Indian taken and brought in as aforesaid, and for every Male Indian Prisoner under the Age of Twelve Years, taken and brought in as aforesaid, *Twenty-five Pounds*.

For every Scalp of such Female Indian or Male Indian under the Age of Twelve Years, that shall be killed and brought in as Evidence of their being killed as aforesaid, *Twenty Pounds*.

Given at the Council-Chamber in *Boston*, this Third Day of *November* 1755, and in the Twenty-ninth Year of the Reign of our Sovereign Lord *GEORGE* the Second, by the Grace of GOD of *Great-Britain*, *France* and *Ireland*, KING, Defender of the Faith, &c.

*By His Honour's Command,*
J. Willard, Secr.

S. Phips.

*GOD* Save the KING.

*BOSTON*: Printed by *John Draper*, Printer to His Honour the Lieutenant-Governour and Council. 1755.

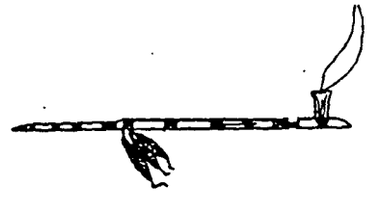
# KEZOGMOMNA ALAIMIHOT
# THE LORD'S PRAYER

## Micmac

Notjinen Oasog epin, tjiptog
teloisin
megitetemeg Oasog ntlitanen,
tjiptog
ignemoieg ola nemoleg
oletesnen, Natel
Oasog eigig teli sgatasgig,
tjiptog
elp ninen teli sgatoleg
magamigeg
eimeg. Telamogopnigel
esemiegel ap
nige gisgog tlamogtetj ninonal
penegnmoiegel, teli
apigsigtagatjig
oegaioinametjig, ap gil
Nisgamtli
apigsigtoin eloeooltieg,
mlgeninmetj
oinsotil mogtigalin
gesinogamgel,
ointjigel gogel tjiglatoin.
Ntliatj.

## Ojibwa

Nossinan ishpiming gijigong-
ebiian.
Apegish kitchitwawendaming
kid ijinikasowin.
Apegish bi-dagwishinomagak kid
ogimawiwin.
Enendaman apegish ijiwebak,
tibishko gijigong me go gaie
aking.
Mijishinam nongom gijigak nin
pakwejiganiminan minik eioiang
endasso-gijigak.
Bonigidetawishinam gaie ga-iji-
nishkiigoian,
Eji-bonigidetawangidwa gi-iji-
nishkiiiangidjig.
Kego gaie ijiwijishigangen
gagwedibeningewining.
Midagwenamawishinam dash
maianadak.
Mege-ing.



## Penobscot

**BURNURWURBSKEK**

K'mitanqsena, spomkik eyan,
wewselmoquotch eliwisian,
amante neghe
petsiwewitawekpane
ketepeltamohanganeck;

eli kiktanguak
ket'letamohangan;
spomkik tali yo nampikik
petchikiktanguatetche.

Mamaline yo pemighisgak
etaskiskue n'taponmena,
yopahatchi aneheldamawihek
kessi kakanwihiolek'pan,
eli nyona kisi
aneheldamahoket
kekanwiak'tepanik;
mosak ketali tchikiktawighek
tamambautchi
saghihunmihinam'ke,
ulahamist'ke saghehusuhamine
mematchikil.

Nialetc.

## Passamaquoddy

Nmihtaqs, spomkik eyin,
komac kcitpot kwisowon.

Mecimite knihkanapeksin.

Tan elipawatomon
mecimite kisi leyic,
skitkimiq nakate spomkik.

Miline pemkiskahk
ntopanomon.

Onheltomuwine
ntolakmiksowakononnul,
talute nilun eli
onheltomukot tan yuhk
kisi wapoleyowinokot.

Wicuhkemine skat
ntowapoli peciyahtiwnewin.

Sami kil knihkaneyaw,
kinson, naka komac kocitpos,

toke nakate askomiw.

Niyalic.

## Maliseet

Kmihtaqson spomkik eyin
komac kcitpot qisuwon;
mecimite knihkanapeksin
tan eli pawatomon,
mecimite kisi leyic skitkomiq
tahalu spomkik.

Miline pemkiskahk ntopanomon;
onheltomuwine
ntolahkomiksuwakononnul
tahalu nilun eli onheltomuwokot
tan yuth kisi wapoleyuwinomoq;
wicuhkemine skat towapoli.
peciyahtiwnewin.

. . .

Sami kil knihkani kinson,
naka kehkcitposiyin,
tokec naka askomiw.

. . .

Nitleyic.

## MALISEET-ENGLISH

OUR FATHER, there
in the future world
very holy is your name;
always be the leader
the way you wanted,
always the way
you wanted on earth
as in the future world.
Give us today our bread;
forgive us the sins
we keep on doing
just as we the way forgive
those who did hurt
our feelings;
help us not to do wrong
deliver us from evil.
For you are the most powerful,
and the holiest,
now and forever.
Amen

JJP

## 13. Trade and Intercourse Act

July 22, 1790

*Unrest on the frontiers threatened the peace of the young nation, and President Washington and Secretary of War Knox called on Congress to provide legislation to prevent further outrages. Congress replied in July 1790 with the first of a series of laws "to regulate trade and intercourse with the Indian tribes." These laws, which were originally designed to implement the treaties and enforce them against obstreperous whites, gradually came to embody the basic features of federal Indian policy.*

*An Act to regulate trade and intercourse with the Indian tribes.*

SECTION 1. *Be it enacted* . . . , That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose; which superintendent, or other person so appointed, shall, on application, issue such license to any proper person, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the President of the United States for the time being, for the use of the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as now are, or hereafter shall be made for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons by them licensed as aforesaid, shall be governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe. And no other person shall be permitted to carry on any trade or intercourse with the Indians without such license as aforesaid. No license shall be granted for a longer term than two years. *Provided nevertheless*, That the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper.

SEC. 2. *And be it further enacted*, That the superintendent, or person issuing such license, shall have full power and authority to recall all such licenses as he may have issued, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds as he may have taken, immediately on the breach of any condition in said bond: *Provided always*, That if it shall appear on trial, that the person from whom such license shall have been recalled, has not offended against any of the provisions of this act, or the regulations prescribed for the trade and intercourse with the Indian tribes, he shall be entitled to receive a new license.

SEC. 3. *And be it further enacted*, That every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

SEC. 4. *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

SEC. 5. *And be it further enacted*, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

SEC. 6. *And be it further enacted*, That for any of the crimes or offences aforesaid, the like proceedings shall be had for apprehending, imprisoning or bailing the offender, as the case may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offences against the United States.

SEC. 7. *And be it further enacted*, That this act shall be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer.

[*U.S. Statutes at Large*, 1:137-38.]

## 134. Indian Citizenship Act

June 2, 1924

*In 1924 Congress granted citizenship to all Indians born within the United States who were not yet citizens.*

*An Act To authorize the Secretary of the Interior to issue certificates of citizenship to Indians.*

*Be it enacted* . . . , That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

[*U.S. Statutes at Large*, 43:253.]

Treaty Series, No. 109
8 Statutes at Large, 218-23

# 33

## GREAT BRITAIN : DECEMBER 24, 1814

*The Treaty of Ghent. Treaty of Peace and Amity, signed at Ghent December 24, 1814. Original in English.*
*Submitted to the Senate February 15, 1815. Resolution of advice and consent February 16, 1815. Ratified by the United States February 17, 1815. Ratified by Great Britain December 31, 1814. Ratifications exchanged at Washington February 17, 1815. Proclaimed February 18, 1815.*

### Treaty of Peace and Amity between His Britannic Majesty and the United States of America.

His Britannic Majesty and the United States of America desirous of terminating the war which has unhappily subsisted between the two Countries, and of restoring upon principles of perfect reciprocity, Peace, Friendship, and good Understanding between them, have for that purpose appointed their respective Plenipotentiaries, that is to say, His Britannic Majesty on His part has appointed the Right Honourable James Lord Gambier, late Admiral of the White now Admiral of the Red Squadron of His Majesty's Fleet; Henry Goulburn Esquire, a Member of the Imperial Parliament and Under Secretary of State; and William Adams Esquire, Doctor of Civil Laws: And the President of the United States, by and with the advice and consent of the Senate thereof, has appointed John Quincy Adams, James A. Bayard, Henry Clay, Jonathan Russell, and Albert Gallatin, Citizens of the United States; who, after a reciprocal communication of their respective Full Powers, have agreed upon the following Articles.

#### Article the first.

There shall be a firm and universal Peace between His Britannic Majesty and the United States, and between their respective Countries, Territories, Cities, Towns, and People of every degree without exception of places or persons. All hostilities both by sea and land shall cease as soon as this Treaty shall have been ratified by both parties as hereinafter mentioned. All territory, places, and possessions whatsoever taken by either party from the other during the war,

or which may be taken after the signing of this Treaty, excepting only the Islands hereinafter mentioned, shall be restored without delay and without causing any destruction or carrying away any of the Artillery or other public property originally captured in the said forts or places, and which shall remain therein upon the Exchange of the Ratifications of this Treaty, or any Slaves or other private property; And all Archives, Records, Deeds, and Papers, either of a public nature or belonging to private persons, which in the course of the war may have fallen into the hands of the Officers of either party, shall be, as far as may be practicable, forthwith restored and delivered to the proper authorities and persons to whom they respectively belong. Such of the Islands in the Bay of Passamaquoddy as are claimed by both parties shall remain in the possession of the party in whose occupation they may be at the time of the Exchange of the Ratifications of this Treaty until the decision respecting the title to the said Islands shall have been made in conformity with the fourth Article of this Treaty. No disposition made by this Treaty as to such possession of the Islands and territories claimed by both parties shall in any manner whatever be construed to affect the right of either.

ARTICLE THE SECOND.

Immediately after the ratifications of this Treaty by both parties as hereinafter mentioned, orders shall be sent to the Armies, Squadrons, Officers, Subjects, and Citizens of the two Powers to cease from all hostilities: and to prevent all causes of complaint which might arise on account of the prizes which may be taken at sea after the said Ratifications of this Treaty, it is reciprocally agreed that all vessels and effects which may be taken after the space of twelve days from the said Ratifications upon all parts of the Coast of North America from the Latitude of twenty three degrees North to the Latitude of fifty degrees North, and as far Eastward in the Atlantic Ocean as the thirty sixth degree of West Longitude from the Meridian of Greenwich, shall be restored on each side:—that the time shall be thirty days in all other parts of the Atlantic Ocean North of the Equinoctial Line or Equator:—and the same time for the British and Irish Channels, for the Gulf of Mexico, and all parts of the West Indies:—forty days for the North Seas for the Baltic, and for all parts of the Mediterranean:—sixty days for the Atlantic Ocean South of the Equator as far as the Latitude of the Cape of Good Hope:—ninety days for every other part of the world South of the Equator, and one hundred and twenty days for all other parts of the world without exception.

ARTICLE THE THIRD.

All Prisoners of war taken on either side as well by land as by sea shall be restored as soon as practicable after the Ratifications of this Treaty as hereinafter mentioned on their paying the debts which they may have contracted during their captivity. The two Contracting Parties respectively engage to discharge in specie the advances which may have been made by the other for the sustenance and maintenance of such prisoners.

ARTICLE THE FOURTH.

Whereas it was stipulated by the second Article in the Treaty of Peace[1] of one thousand seven hundred and eighty three between His Britannic Majesty and the United States of America that the boundary of the United States should comprehend "all Islands within twenty leagues of any part of the shores of the United States and lying between lines to be drawn due East from the points where the aforesaid boundaries between Nova Scotia on the one part and East Florida on the other shall respectively touch the Bay of Fundy and the Atlantic Ocean, excepting such Islands as now are or heretofore have been within the limits of Nova Scotia," and whereas the several Islands in the Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Menan in the said Bay of Fundy, are claimed by the United States as being comprehended within their aforesaid boundaries, which said Islands are claimed as belonging to His Britannic Majesty as having been at the time of and previous to the aforesaid Treaty of one thousand seven hundred and eighty three within the limits of the Province of Nova Scotia: In order therefore finally to decide upon these claims it is agreed that they shall be referred to two Commissioners to be appointed in the following manner: viz: One Commissioner shall be appointed by His Britannic Majesty and one by the President of the United States, by and with the advice and consent of the Senate thereof, and the said two Commissioners so appointed shall be sworn impartially to examine and decide upon the said claims according to such evidence as shall be laid before them on the part of His Britannic Majesty and of the United States respectively. The said Commissioners shall meet at S$^{t}$ Andrews in the Province of New Brunswick, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall by a declaration or report under their hands and seals decide to which of the two Contracting parties the several

[1] Document 11.

Islands aforesaid do respectively belong in conformity with the true intent of the said Treaty of Peace of one thousand seven hundred and eighty three. And if the said Commissioners shall agree in their decision both parties shall consider such decision as final and conclusive. It is further agreed that in the event of the two Commissioners differing upon all or any of the matters so referred to them, or in the event of both or either of the said Commissioners refusing or declining or wilfully omitting to act as such, they shall make jointly or separately a report or reports as well to the Government of His Britannic Majesty as to that of the United States, stating in detail the points on which they differ, and the grounds upon which their respective opinions have been formed, or the grounds upon which they or either of them have so refused declined or omitted to act. And His Britannic Majesty and the Government of the United States hereby agree to refer the report or reports of the said Commissioners to some friendly Sovereign or State to be then named for that purpose, and who shall be requested to decide on the differences which may be stated in the said report or reports, or upon the report of one Commissioner together with the grounds upon which the other Commissioner shall have refused, declined or omitted to act as the case may be. And if the Commissioner so refusing, declining, or omitting to act, shall also wilfully omit to state the grounds upon which he has so done in such manner that the said statement may be referred to such friendly Sovereign or State together with the report of such other Commissioner, then such Sovereign or State shall decide ex parte upon the said report alone. And His Britannic Majesty and the Government of the United States engage to consider the decision of such friendly Sovereign or State to be final and conclusive on all the matters so referred.

ARTICLE THE FIFTH.

Whereas neither that point of the Highlands lying due North from the source of the River S[t] Croix, and designated in the former Treaty of Peace[1] between the two Powers as the North West Angle of Nova Scotia, nor the North Westernmost head of Connecticut River has yet been ascertained; and whereas that part of the boundary line between the Dominions of the two Powers which extends from the source of the River S[t] Croix directly North to the abovementioned North West Angle of Nova Scotia, thence along the said Highlands which divide those Rivers that empty themselves into the River S[t] Lawrence from those which fall into the Atlantic Ocean to the

[1] Document 11.

North Westernmost head of Connecticut River, thence down along the middle of that River to the forty fifth degree of North Latitude, thence by a line due West on said latitude until it strikes the River Iroquois or Cataraquy, has not yet been surveyed: it is agreed that for these several purposes two Commissioners shall be appointed, sworn, and authorized to act exactly in the manner directed with respect to those mentioned in the next preceding Article unless otherwise specified in the present Article. The said Commissioners shall meet at S$^{t}$ Andrews in the Province of New Brunswick, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall have power to ascertain and determine the points above mentioned in conformity with the provisions of the said Treaty of Peace of one thousand seven hundred and eighty three, and shall cause the boundary aforesaid from the source of the River S$^{t}$ Croix to the River Iroquois or Cataraquy to be surveyed and marked according to the said provisions. The said Commissioners shall make a map of the said boundary, and annex to it a declaration under their hands and seals certifying it to be the true Map of the said boundary, and particularizing the latitude and longitude of the North West Angle of Nova Scotia, of the North Westernmost head of Connecticut River, and of such other points of the said boundary as they may deem proper. And both parties agree to consider such map and declaration as finally and conclusively fixing the said boundary. And in the event of the said two Commissioners differing, or both, or either of them refusing, declining, or wilfully omitting to act, such reports, declarations, or statements shall be made by them or either of them, and such reference to a friendly Sovereign or State shall be made in all respects as in the latter part of the fourth Article is contained, and in as full a manner as if the same was herein repeated.

ARTICLE THE SIXTH.

Whereas by the former Treaty of Peace[1] that portion of the boundary of the United States from the point where the forty fifth degree of North Latitude strikes the River Iroquois or Cataraquy to the Lake Superior was declared to be "along the middle of said River into Lake Ontario, through the middle of said Lake until it strikes the communication by water between that Lake and Lake Erie, thence along the middle of said communication into Lake Erie, through the middle of said Lake until it arrives at the water communication into the Lake Huron; thence through the middle of said Lake to the water communication between

[1] Document 11.

that Lake and Lake Superior:" and whereas doubts have arisen what was the middle of the said River, Lakes, and water communications, and whether certain Islands lying in the same were within the Dominions of His Britannic Majesty or of the United States: In order therefore finally to decide these doubts, they shall be referred to two Commissioners to be appointed, sworn, and authorized to act exactly in the manner directed with respect to those mentioned in the next preceding Article unless otherwise specified in this present Article. The said Commissioners shall meet in the first instance at Albany in the State of New York, and shall have power to adjourn to such other place or places as they shall think fit. The said Commissioners shall by a Report or Declaration under their hands and seals, designate the boundary through the said River, Lakes, and water communications, and decide to which of the two Contracting parties the several Islands lying within the said Rivers, Lakes, and water communications, do respectively belong in conformity with the true intent of the said Treaty of one thousand seven hundred and eighty three. And both parties agree to consider such designation and decision as final and conclusive. And in the event of the said two Commissioners differing or both or either of them refusing, declining, or wilfully omitting to act, such reports, declarations, or statements shall be made by them or either of them, and such reference to a friendly Sovereign or State shall be made in all respects as in the latter part of the fourth Article is contained, and in as full a manner as if the same was herein repeated.

ARTICLE THE SEVENTH.

It is further agreed that the said two last mentioned Commissioners after they shall have executed the duties assigned to them in the preceding Article, shall be, and they are hereby, authorized upon their oaths impartially to fix and determine according to the true intent of the said Treaty of Peace[1] of one thousand seven hundred and eighty three, that part of the boundary between the dominions of the two Powers, which extends from the water communication between Lake Huron and Lake Superior to the most North Western point of the Lake of the Woods;—to decide to which of the two Parties the several Islands lying in the Lakes, water communications, and Rivers forming the said boundary do respectively belong in conformity with the true intent of the said Treaty of Peace of one thousand seven hundred and eighty three, and to cause such parts of the said boundary as require it to be surveyed and marked. The said Commissioners

[1] Document 11.

shall by a Report or declaration under their hands and seals, designate the boundary aforesaid, state their decision on the points thus referred to them, and particularize the Latitude and Longitude of the most North Western point of the Lake of the Woods, and of such other parts of the said boundary as they may deem proper. And both parties agree to consider such designation and decision as final and conclusive. And in the event of the said two Commissioners differing, or both or either of them refusing, declining, or wilfully omitting to act, such reports, declarations or statements shall be made by them or either of them, and such reference to a friendly Sovereign or State shall be made in all respects as in the latter part of the fourth Article is contained, and in as full a manner as if the same was herein repeated.

ARTICLE THE EIGHTH.

The several Boards of two Commissioners mentioned in the four preceding Articles shall respectively have power to appoint a Secretary, and to employ such Surveyors or other persons as they shall judge necessary. Duplicates of all their respective reports, declarations, statements, and decisions, and of their accounts, and of the Journal of their proceedings shall be delivered by them to the Agents of His Britannic Majesty and to the Agents of the United States, who may be respectively appointed and authorized to manage the business on behalf of their respective Governments. The said Commissioners shall be respectively paid in such manner as shall be agreed between the two contracting parties, such agreement being to be settled at the time of the Exchange of the Ratifications of this Treaty.[1] And all other expenses attending the said Commissions shall be defrayed equally by the two parties. And in the case of death, sickness, resignation, or necessary absence, the place of every such Commissioner respectively shall be supplied in the same manner as such Commissioner was first appointed; and the new Commissioner shall take the same oath or affirmation and do the same duties. It is further agreed between the two contracting parties that in case any of the Islands mentioned in any of the preceding Articles, which were in the possession of one of the parties prior to the commencement of the present war between the two Countries, should by the decision of any of the Boards of Commissioners aforesaid, or of the Sovereign or State so referred to, as in the four next preceding Articles contained, fall within the dominions of the other

[1] See the note regarding Article 8.

party, all grants of land made previous to the commencement of the war by the party having had such possession, shall be as valid as if such Island or Islands had by such decision or decisions been adjudged to be within the dominions of the party having had such possession.

ARTICLE THE NINTH.

The United States of America engage to put an end immediately after the Ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom they may be at war at the time of such Ratification, and forthwith to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities. Provided always that such Tribes or Nations shall agree to desist from all hostilities against the United States of America, their Citizens, and Subjects upon the Ratification of the present Treaty being notified to such Tribes or Nations, and shall so desist accordingly. And His Britannic Majesty engages on his part to put an end immediately after the Ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom He may be at war at the time of such Ratification, and forthwith to restore to such Tribes or Nations respectively all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities. Provided always that such Tribes or Nations shall agree to desist from all hostilities against His Britannic Majesty and His Subjects upon the Ratification of the present Treaty being notified to such Tribes or Nations, and shall so desist accordingly.

ARTICLE THE TENTH.

Whereas the Traffic in Slaves is irreconcilable with the principles of humanity and Justice, and whereas both His Majesty and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavours to accomplish so desirable an object.

ARTICLE THE ELEVENTH.

This Treaty when the same shall have been ratified on both sides without alteration by either of the contracting parties, and the Ratifications mutually exchanged, shall be binding on both parties, and the Ratifications shall be exchanged at Washington in the space of four months from this day or sooner if practicable.

In faith whereof, We the respective Plenipotentiaries have signed this Treaty, and have thereunto affixed our Seals.

Done in triplicate at Ghent the twenty fourth day of December one thousand eight hundred and fourteen.

| | |
|---|---|
| GAMBIER. | [Seal] |
| HENRY GOULBURN | [Seal] |
| WILLIAM ADAMS. | [Seal] |
| JOHN QUINCY ADAMS | [Seal] |
| J. A. BAYARD | [Seal] |
| H. CLAY. | [Seal] |
| JONA RUSSELL | [Seal] |
| ALBERT GALLATIN | [Seal] |

## NOTES

It is stated in the final clause that this treaty was executed in triplicate. However, there are two signed originals in the treaty file and a third is bound in a volume of papers relating to the negotiations (D. S., Ghent, etc.). The following explanatory paragraph is from the letter of the American plenipotentiaries of December 25, 1814, to the Secretary of State (American State Papers, Foreign Relations, III, 733):

> To guard against any accident which might happen in the transmission of a single copy of the treaty to the United States, the British plenipotentiaries have consented to execute it in triplicate; and, as the treaty with the British ratification may be exposed to the same danger, the times for the cessation of hostilities, the restoration of captures at sea, and the release of prisoners, have been fixed, not from the exchange of ratifications, but from the ratification on both sides, without alteration by either of the contracting parties. We consented to the introduction of this latter provision at the desire of the British plenipotentiaries, who were willing to take a full, but were unwilling to incur the risk of a partial, ratification, as the period from which the peace should be considered as concluded.

It was on February 11, 1815, that the Treaty of Ghent reached this country, according to the following statement from Niles' Weekly Register, VII, 393:

> The British sloop of war Favorite arrived at New-York on Saturday evening last [February 11, 1815]—passengers Mr. *Carrol*, one of the secretaries to our ministers at *Ghent*, and Mr. *Baker*, secretary to the British legation to the United States. The former with a copy of the TREATY OF PEACE concluded and signed by the British commissioners at Ghent on the 24th December, and the latter with the same ratified by the prince regent, and which being approved by the president and senate, is *immediately* to be communicated by him to the British fleets and armies in this quarter of the globe.

On the evening of February 13 the Secretary of the Mission at Ghent, Christopher Hughes, jr., arrived at Annapolis with another original of the treaty; it appears that Carroll (and doubtless Hughes also) reached Washington on February 14 (the Daily National Intelligencer, February 15 and 16, 1815).

On the back cover page of one of the two originals in the file there is written a duplicate of the United States instrument of ratification signed by Madison and under the Great Seal, but lacking the usual attest.

The file of this treaty includes the British instrument of ratification of December 31, 1814, the attested Senate resolution of February 16, 1815, and also the certificate of the exchange of ratifications mentioned below in the note regarding Article 8.

The original proclamation has not been found; but it was published at the time, *e. g.*, Niles' Weekly Register, VII, 397–400; and see also Richardson, I, 560.

### Note Regarding Article 8

An agreement regarding the payment of the Commissioners was made when the ratifications were exchanged; it was to the effect that such payment should be made on the same principles as those observed in respect of the Jay Treaty (Document 16). The terms of the agreement were embodied in the certificate of the exchange of ratifications as follows:

> This is to certify that on the seventeenth day of February one thousand eight hundred and fifteen, at eleven o'Clock P. M. the Honourable James Monroe, Acting Secretary of State of the United States, delivered and exchanged a ratified Copy of a Treaty, signed at Ghent on the twenty fourth day of December last between His Britannic Majesty and the United States of America for a like copy on the part of His said Britannic Majesty.
>
> At the same time Mr Monroe expressed the willingness of the Government of the United States to arrange the payment of the Commissioners to be appointed in pursuance of the Treaty on the same principles as were observed in carrying into Execution the Treaty of one thousand seven hundred and ninety four between the same Powers, that is, the expense to be equally borne by the two Governments, to which arrangement the Undersigned consented.
>
> In witness whereof the Undersigned has hereunto set his hand and seal of arms at Washington this seventeenth day of February, one thousand eight hundred and fifteen.
>
> [Seal] Anthony St Jno Baker.

### Note Regarding the Alternat

In this treaty the *alternat* was not observed as it has since been; His Britannic Majesty was named before the United States of America, and the British plenipotentiaries signed above those of the United States.

It appears that verbal representations on the point were made by Monroe at the time of the exchange of ratifications; the following is extracted from his letter to John Quincy Adams of March 13, 1815 (D. S., 7 Instructions, U. S. Ministers, 390–91):

> In the treaty lately concluded at Ghent, Great Britain takes a priority over the United-States, as is presumed, in both instruments; she does so, in that received here, and it is inferred that she does it in that received by her government, from the circumstance that she holds that rank in the ratification of the Prince Regent. Great-Britain takes the first rank as a power, and our Ministers likewise sign under those of Great-Britain. This though comparatively an inferior object, is not unimportant. It was, there is no doubt, lost sight of in the very important object

of peace. In all other treaties between the United-States and other powers, the Ministers of each party sign in the same line. This was done in the Treaty of peace with Great-Britain, and in the subsequent Treaties with her government. In the Treaty with France in 1803., the United-States took rank in the instrument delivered to this government, which was reciprocated in that delivered to the government of France. In the Treaty with Spain in 1795., Mr Pinckney signed before the Prince of the Peace; the United-States had rank likewise, over Spain, in the instrument delivered to them. It is understood, that in treaties between all powers, this principle of equality is generally, if not invariably recognized and observed. In the exchange of ratifications it was thought proper to advert to these circumstances, that neither this Treaty or those which preceded it, might *become a precedent, establishing a relation between the United-States and Great-*Britain, differing from that which exists between them and other powers. As the governments of Europe attach much importance to this circumstance, it is one to which we ought not to continue, to be altogether inattentive. It is a mortifying truth that concessions, however generous the motive, seldom produce the desired effect. They more frequently inspire improper pretensions in the opposite party. It may be presumed that Mr Baker will communicate the substance of my remarks to him on this subject to his government. They were made with that calculation. Should a suitable opportunity present itself, it may have a good effect, that you should explain to the British government, the sentiments of The President on it.

Bangor - January, 1834

RESOLVE on the report of Alexander Campbell and others, a committee in behalf of this Commonwealth, to negotiate and settle any misunderstanding or difference with the Passamaquoddy Indians and those of other tribes connected with them.

February 10, 1795

Whereas, by a resolve of the general court passed on the 26th day of June last, Alexander Campbell, John Allan and George Stillman were appointed a committee, in behalf of this Commonwealth, to negotiate and settle any misunderstanding, dispute, or difference which may subsist between this Commonwealth and the Passamaquoddy Indians and those of other tribes connected with them, with full power and authority to lay out and assign to the said Indians, any tract of unlocated land belonging to this Commonwealth, in the County of Washington, not exceeding ten thousand acres, and also to purchase any particular spot of ground or tract of land for the use and convenience of said Indians, provided, however, that such purchase shall not exceed the sum of five hundred pounds.

And whereas, the said committee have exhibited to the general court, in their present session, an agreement made and signed on the 29th day of September last, by and between them in behalf of this Commonwealth, and the chiefs of the Passamaquoddy tribe of Indians and others connected with them, which agreement is in the words following, to wit:

To all people to whom this present agreement shall be made known, we Alexander Campbell, John Allan and George Stillman, Esquires, a committee appointed and authorized by the general court of the Commonwealth of Massachusetts, to treat with and assign certain lands to the Passamaquoddy Indians and others connected with them, agreeable to resolve of said general court, on the twenty-sixth of June, in the year of our Lord, one thousand seven hundred and ninety-four, of the one part, and the subscribing chiefs and others for themselves, and in behalf of said Passamaquoddy tribe and others connected with them, of the other part: witnesseth, that the said committee, in behalf of the Commonwealth aforesaid, and in consideration of the said Indians relinquishing all their rights, title, interests, claim or demand, on any land or lands lying and being

within the said Commonwealth of Massachusetts; and also engaging to be peaceable and quiet inhabitants of said Commonwealth, without molesting any other of the settlers of the Commonwealth aforesaid in any way or means whatever: in consideration of all which, the committee aforesaid for and in behalf of the Commonwealth aforesaid, do hereby assign and set off to the aforesaid Indians, the following tract or parcel of land lying and being within the Commonwealth of Massachusetts, viz: all those lands lying and being in Schoodic River, between the falls at the head of the tide, and the falls below the forks of said river where the north branch and west branch parts; being fifteen in number, containing one hundred acres more or less: also Township No. 2 in the first range surreyed by Mr. Samuel Titcomb, in the year of our Lord, one thousand seventeen hundred and ninety-four, containing about twenty-three thousand acres more or less; being bounded as follows, easterly by Tomer's River and Township No. One first range; northerly by Township No. Two second range; westerly by Township No. Three first range; southerly by the west branch of Schoodic River and Lake; and also Lire's Island lying in front of said township, containing ten acres more or less; together with one hundred acres of land lying on Nemcass Point adjoining the west side of said township; also Pine Island lying to the westward of said Nemcass Point, containing one hundred and fifty acres, more or less; also assign and set off to John Baptist Lacote, a French gentleman, now settles among the said Indians, one hundred acres of land, as a settler in Township No. One first range, lying at the falls as the carrying place on the north branch of Schoodic River, to be entitled to have said land laid out to him in the same manner as settlers in new townships are entitled; also assign to said Indians the privilege of fishing on both branches of the river Schoodic without hinderance or molestation and the privilege of passsing the said river over the different carrying places thereon: all which islands, townships, tracts or parcels of land and privileges being marked with a cross, thus X, on the plan taken by Mr. Samuel Titcomb, with the reservation of all pine trees fit for masts on said tract of land to government; they making said Indians a reasonable compensation therefore; also assign and set off to said Indians ten acres of land more or less at Pleasant Point, purchased by said committee in behalf of said Commonwealth, of John Frost, being bounded as follows, viz: beginning at a stake to eastward of the dwelling house, and running north twenty-five degrees west fifty-four rods; from thence running north fifty-six degrees east thirty-eight rods to the bay; from thence by the shore to the first bound; also a privilege of setting down at the carrying place at West Quoddy between the Bay of West Quoddy and the Bay of Fundy, to contain fifty acres. The said islands, tracts of land and privileges to be confirmed by the Commonwealth of Massachusetts to the said Indians and their heirs forever. In testimony of all which, we, the said Alexander Campbell, John Allan and George Stillman, the

committee aforesaid, and in behalf of the Commonwealth aforesaid, and the chiefs and other Indians aforesaid, in behalf of themselves and those connected with them as aforesaid, have hereunto set our hands and seals at Passamaquoddy, the twenty-ninth day of September, in the year of our Lord one thousand seven hundred and ninety-four.

| | | | |
|---|---|---|---|
| Alex. Campbell | Seal | Francis Joseph Neptune "X" (his mark) | Seal |
| J. Allen | Seal | John Neptune "X" (his mark) | Seal |
| George Stillman | Seal | Piel Neptune "X" (his mark) | Seal |
| | | Joseph Neptune "X" (his mark) | Seal |
| | | Piel Denny "X" (his mark) | Seal |
| | | Jonale Denny "X" (his mark) | Seal |
| | | Joseph Tomas "X" (his mark) | Seal |

Signed and sealed in presence of:
Samuel Titcomb,
Jno. Frost, Jun'r.

Be it therefore Resolved, That the said agreement be and it is hereby ratified and confirmed, on the part of the Commonwealth, and that there be allowed and paid out of the treasury of this Commonwealth, to the said committee, the sum of two hundred pounds, being the consideration paid to the above named John Frost, for a tract of land on Pleasant Point, purchased by the said committee, ten acres of which more or less, as in the before recited agreement, is hereby appropriated for the accommodation of the said Indians, said sum to be paid to the said committee, on their depositing in the secretary's office a deed from the said John Frost, of the said tract of land on Pleasant Point, duly executed and acknowledged; and, whereas, there now remains for the disposition of government, ninety acres more or less of the above mentioned lot of land, on Pleasant Point.

Resolved, that the treasurer of this Commonwealth be and he is hereby authorized and empowered, to lease the said remaining ninety acres for one year or for term of years, in such manner and on such considerations, as he may judge will be most for the advantage of the Commonwealth.

law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. . . .

The Attorney General or his assistants shall represent the United States in all claims presented to the Commission. . . .

[*U.S. Statutes at Large*, 60:1049-56.]

## 143. House Concurrent Resolution 108

August 1, 1953

*In the Eighty-third Congress a fundamental change was made in Indian policy. House Concurrent Resolution 108 declared it to be the policy of the United States to abolish federal supervision over the tribes as soon as possible and to subject the Indians to the same laws, privileges, and responsibilities as other citizens of the United States. As a result of this resolution the government began the process of "termination," which aroused strong opposition on the part of the Indians.*

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it

*Resolved by the House of Representatives (the Senate concurring),*

That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potowatamie Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota. It is further declared to be the sense of Congress that, upon the release of such tribes and individual members thereof from such disabilities and limitations, all offices of the Bureau of Indian Affairs in the States of California, Florida, New York, and Texas and all other offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution.

[*U.S. Statutes at Large*, 67:B132.]

## 144. Public Law 280

August 15, 1953

*Tribal self-determination and tribal relations with the federal government were significantly changed by Public Law 280 of the Eighty-third Congress, which extended state jurisdiction over offenses committed by or against Indians in the Indian country.*

*An Act To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.*

. . . . SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

| "State of | Indian country affected |
|---|---|
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State, except the Menominee Reservation |

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. . . ."

[*U.S. Statutes at Large*, 67:588-90.]

ıgs, into a final report. Within six months fter the reports of the investigating task orces, the Commission shall submit its final eport, together with the recommendations hereon, to the President of the Senate and he Speaker of the House of Representatives. The Commission shall cease to exist six nonths after submission of said final report ıut not later than June 30, 1977. All records ınd papers of the Commission shall thereıpon be delivered to the Administrator of the ieneral Services Administration for deposit in the Archives of the United States.

(b) Any recommendation of the Commission involving the enactment of legislation shall be referred by the President of the Senate or the Speaker of the House of Representatives to the appropriate standing committee of the Senate and House of Representatives, respectively, and such committees shall make a report thereon to the respective house within two years of such referral.

[*U.S. Statutes at Large*, 88:1910–13.]

## 170. Indian Self-Determination and Education Assistance Act

January 4, 1975

*One result of the drive for Indian participation in federal programs affecting Indians was this act, which provided that tribes could contract to run education and health programs themselves. The second part of the act provided more Indian control of schools educating Indian children.*

*An Act to provide maximum Indian participation in the Government and education of Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes* (P.L. 93–638).

. . .

### CONGRESSIONAL FINDINGS

SEC. 2. (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

### DECLARATION OF POLICY

SEC. 3. (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being. . . .

## TITLE I—INDIAN SELF-DETERMINATION ACT

SEC. 101. This title may be cited as the "Indian Self-Determination Act."

### CONTRACTS BY THE SECRETARY OF THE INTERIOR

SEC. 102. (a) The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 (48 Stat. 596), as amended by this Act, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto: *Provided, however*, That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further*, That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days, (2) provide to the extent practicable assistance to the tribe or tribal organization to overcome his stated objections, and (3) provide the tribe with a hearing, under such rules and regulations as he may promulgate, and the opportunity for appeal on the objections raised. . . .

### CONTRACTS BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

SEC. 103. (a) The Secretary of Health, Education, and Welfare is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954 (68 Stat. 674), as amended. . . .

### GRANTS TO INDIAN TRIBAL ORGANIZATIONS

SEC. 104. (a) The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for—

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

(2) the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter

into a contract or contracts pursuant to section 102 of this Act and the additional costs associated with the initial years of operation under such a contract or contracts;

(3) the acquisition of land in connection with items (1) and (2) above: *Provided*, That in the case of land within reservation boundaries or which adjoins on at least two sides lands held in trust by the United States for the tribe or for individual Indians, the Secretary of Interior may (upon request of the tribe) acquire such land in trust for the tribe; or

(4) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe.

(b) The Secretary of Health, Education, and Welfare may, in accordance with regulations adopted pursuant to section 107 of this Act, make grants to any Indian tribe or tribal organization for—

(1) the development, construction, operation, provision, or maintenance of adequate health facilities or services including the training of personnel for such work, from funds appropriated to the Indian Health Service for Indian health services or Indian health facilities; or

(2) planning, training, evaluation or other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 103 of this Act. . . .

EFFECT ON EXISTING RIGHTS

SEC. 110. Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

## TITLE II—THE INDIAN EDUCATION ASSISTANCE ACT

SEC. 201. This title may be cited as the "Indian Education Assistance Act."

PART A—EDUCATION OF INDIANS IN PUBLIC SCHOOLS

SEC. 202. The Act of April 16, 1934 (48 Stat. 596), as amended, is further amended by adding at the end thereof the following new sections:

"SEC. 4. The Secretary of the Interior shall not enter into any contract for the education of Indians unless the prospective contractor has submitted to, and has had approved by the Secretary of the Interior, an education plan, which plan, in the determination of the Secretary, contains educational objectives which adequately address the educational needs of the Indian students who are to be beneficiaries of the contract and assures that the contract is capable of meeting such objectives: *Provided*, That where students other than Indian students participate in such programs, money expended under such contract shall be prorated to cover the participation of only the Indian students.

"SEC. 5 (a) Whenever a school district affected by a contract or contracts for the education of Indians pursuant to this Act has a local school board not composed of a majority of Indians, the parents of the Indian children enrolled in the school or schools affected by such contract or contracts shall elect a local committee from among their number. Such committee shall fully participate in the development of, and shall have the authority to approve or disapprove programs to be conducted under such contract or contracts, and shall carry out such other duties, and be so structured, as the Secretary of the Interior shall by regulation provide. . . .

"SEC. 6. Any school district educating Indian students who are members of recognized Indian tribes, who do not normally reside in the State in which such school district is located, and who are residing in Federal boarding facilities for the purposes of attending public schools within such district may, in the discretion of the Secretary of the Interior, be reimbursed by him for the full per capita costs of educating such Indian students." . . .

[*U.S. Statutes at Large*, 88:2203–14.]



## 171. Passamaquoddy Tribe v. Morton

January 20, 1975

*A major issue in the claims of Indians in the eastern states was whether section 4 of the Indian Trade and Intercourse Act of 1790 (often mistakenly called the Nonintercourse Act), which prohibited cessions of Indian lands except under a federal treaty, applied to them. If it did, then land cessions made to eastern states after 1790 were invalid. When the Department of the Interior refused to take up the Passamaquoddies' case because it claimed it had no trust responsibility toward the tribe, the Indians sued Secretary Morton. The decision of Judge Edward T. Gignaux, which supported the Indian position, began a new period in the history of the eastern tribes.*

. . . . [The plaintiffs'] basic position is that the Nonintercourse Act applies to all Indian tribes in the United States, including the Passamaquoddies, and that the Act establishes a trust relationship between the United States and the Indian tribes to which it applies, including the Passamaquoddies. Therefore, they say, defendants may not deny plaintiffs' request for litigation on the sole ground that there is no trust relationship between the United States and the Tribe. In opposition, defendants and intervenor [the State of Maine] contend that only those Indian tribes which have been "recognized" by the Federal Government by treaty, statute or a consistent course of conduct are entitled to the protection of the Nonintercourse Act and, since the Passamaquoddies have not been "federally recognized," the Act is not applicable to them. Defendants and intervenor also deny that the Nonintercourse Act creates any trust relationship between the United States and the Indian tribes to which it applies. . . .

The rules of statutory interpretation by which this Court must be guided in determining the applicability of the Nonintercourse Act to the Passamaquoddies are summarized in United States v. New England Coal and Coke Co., 318 F. 2d 138 (1st Cir. 1963), as follows:

> In matters of statutory construction the duty of this court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed. Unless the contrary appears, it is presumed that statutory words are used in their ordinary sense. . . .

Defendants have rejected plaintiffs' request for assistance on the ground that no trust relationship exists between the United States and the Passamaquoddies. The Court disagrees. In the only decided cases to treat this issue, the Court of Claims has, in a series of decisions during the last ten years, definitively held that the Nonintercourse Act imposes a trust or fiduciary obligation on the United States to protect land owned by all Indian tribes covered by the statute. . . .

These Court of Claims decisions are consistent with an unbroken line of Supreme Court decisions which, from the beginning, have defined the fiduciary relationship between the Federal Government and the Indian tribes as imposing a distinctive obligation of trust upon the Government in its dealings with the Indians. . . .

In view of the foregoing, the conclusion must be that the Nonintercourse Act establishes a trust relationship between the United States and the Indian tribes, including the Passamaquoddies, to which it applies. The Court holds that the defendants erred in denying plaintiffs' request for litigation on the sole ground that no trust relationship exists between the United States and the Passamaquoddy Indian Tribe.

[388 *Federal Supplement* 654–55, 660, 662–63.]

# CHAPTER 19—INDIAN CLAIMS SETTLEMENTS WITH STATES

## SUBCHAPTER I—RHODE ISLAND INDIAN CLAIMS SETTLEMENT

### PART A—GENERAL PROVISIONS

Sec.


1701. Congressional findings and declaration of policy.
1702. Definitions.
1703. Rhode Island Indian Claims Settlement Fund; establishment.
1704. Option agreements to purchase private settlement lands.
  (a) Acceptance of option agreement assignments; reasonableness of terms and conditions.
  (b) Amount of payment.
  (c) Limitation on option fees.
  (d) Application of option fee.
  (e) Retention of option payment.
1705. Publication of findings; approval of prior transfers and extinguishment of claims and aboriginal title involving Narragansett Tribe and town of Charlestown, Rhode Island.
1706. Findings by Secretary.
1707. Purchase and transfer of private settlement lands.
  (a) Determination by Secretary; assignment of settlement lands to State Corporation.
  (b) Moneys remaining in fund.
  (c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes.
1708. Applicabililty of State law.
1709. Preservation of Federal benefits.
1710. Authorization of appropriations.
1711. Limitation of actions; jurisdiction.
1712. Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island.


### PART B—TAX TREATMENT


1715. Exemption from taxation.
  (a) General exemption.
  (b) Income-producing activities.
  (c) Payments in lieu of taxes.
1716. Deferral of capital gains.




## SUBCHAPTER II—MAINE [illegible]

Sec.


1721. Congressional findings and declaration of policy.
1722. Definitions.
1723. Approval of prior transfers and extinguishment of Indian title and claims of Indians within State of Maine.
  (a) Ratification by Congress; personal claims unaffected; United States barred from asserting claims on ground of noncompliance of transfers with State laws or occurring prior to December 1, 1873.
  (b) Aboriginal title extinguished as of date of transfer.
  (c) Claims extinguished as of date of transfer.
  (d) Effective date; authorization of appropriations; publication in Federal Register.
1724. Maine Indian Claims Settlement and Land Acquisition Funds in the United States Treasury.
  (a) Establishment of Maine Indian Claims Settlement Fund; amount.
  (b) Apportionment of settlement fund; administration; investments; limitation on distributions; quarterly investment income payments; expenditures for aged members; cessation of trust responsibility following Federal payments.
  (c) Establishment of Maine Indian Claims Land Acquisition Fund; amount.
  (d) Apportionment of land acquisition fund; expenditures for acquisition of land or natural resources; trust acreage; fee holdings; interests in corpus of trust for Houlton Band following termination of Band's interest in trust; agreement for acquisitions for benefit of Houlton Band: scope, report to Congress.
  (e) Acquisitions contingent upon agreement as to identity of land or natural resources to be sold, purchase price and other terms of sale; condemnation proceedings by Secretary; other acquisition authority barred for benefit of Indians in State of Maine.
  (f) Expenditures for Tribe, Nation, or Band contingent upon documentary relinquishment of claims.
  (g) Transfer limitations of section 177 of this title inapplicable to Indians in State of Maine; restraints on alienation as provided in section; transfers invalid ab initio except for: State and Federal condemnations, assignments, leases, sales, rights-of-way, and exchanges.
  (h) Agreement on terms for management and administration of land or natural resources.

1724. Indian Claims Settlement and Land Acquisition Funds in the United States Treasury—Continued
Condemnation of trust or restricted land or natural resources within Reservations: substitute land or monetary proceeds as medium of compensation; condemnation of trust land without Reservations: use of compensation for reinvestment in trust or fee held acreage, certification of acquisitions; State condemnation proceedings: United States as necessary party, exhaustion of State administrative remedies, judicial review in Federal courts, removal of action.
(j) Federal condemnation under other laws; deposit and reinvestment of compensatory proceeds.
1725. State laws applicable.
(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State.
(b) Jurisdiction of State of Maine and utilization of local share of funds pursuant to the Maine Implementing Act; Federal laws or regulations governing services or benefits unaffected unless expressly so provided; report to Congress of comparative Federal and State funding for Maine and other States.
(c) Federal criminal jurisdiction inapplicable in State of Maine under certain sections of Title 18; effective date: publication in Federal Register.
(d) Capacity to sue and be sued in State of Maine and Federal courts; section 1362 of Title 28 applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments.
(e) Federal consent for amendment of Maine Implementing Act; nature and scope of amendments; agreement respecting State jurisdiction over Houlton Band Lands.
(f) Indian jurisdiction separate and distinct from State civil and criminal jurisdiction.
(g) Full faith and credit.
(h) General laws and regulations affecting Indians applicable, but special laws and regulations inapplicable, in State of Maine.
(i) Eligibility for Federal financial benefits; Federal tax considerations: similar treatment and reservation lands.
1726. Tribal organization.
1727. Implementation of Indian Child Welfare Act.
(a) Petition for assumption of exclusive jurisdiction; approval by Secretary.
(b) Consideration and determination of petition by Secretary.
(c) Actions or proceedings within existing jurisdiction unaffected.



1727. Implementation of Indian Child Welfare Act.
(d) Reservations within section 1903(10) of this title.
(e) Indian tribe within section 1903(8) of this title. State jurisdiction over child welfare unaffected.
(f) Assumption determinative of exclusive jurisdiction.
1728. Federal financial aid programs unaffected by payments under subchapter.
(a) Eligibility of State of Maine for participation without regard to payments to designated Tribe, Nation, or Band under subchapter.
(b) Eligibility of designated Tribe, Nation, or Band for benefits without regard to payments from State of Maine except in considering actual financial situation in determining need of applicant.
(c) Availability of settlement or land acquisition funds not income or resources or otherwise used to affect federally assisted housing programs or Federal finanical assistance or other Federal benefits.
1729. Deferral of capital gains.
1730. Transfer of tribal trust funds held by the State of Maine.
1731. Other claims discharged by this subchapter.
1732. Limitation of actions.
1733. Authorization of appropriations.
1734. Inseparabililty of provisions.
1735. Construction.
(a) Law governing; special legislation.
(b) General legislation.

## SUBCHAPTER I—RHODE ISLAND INDIAN CLAIMS SETTLEMENT

### PART A—GENERAL PROVISIONS

### § 1701. Congressional findings and declaration of policy

Congress finds and declares that—

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

PART B—TAX TREATMENT

## § 1715. Exemption from taxation

### (a) General exemption

Except as otherwise provided in subsections (b) and (c) of this section, the settlement lands received by the State Corporation shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation.

### (b) Income-producing activities

The exemption provided in subsection (a) of this section shall not apply to any income-producing activities occurring on the settlement lands.

### (c) Payments in lieu of taxes

Nothing in this subchapter shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

(Pub.L. 95-395, Title II, § 201, as added Pub.L. 96-601, § 5(a), Dec. 24, 1980, 94 Stat. 3498.)

### Historical Note

**Effective Date.** Section 5(b) of Pub.L. 96-601 provided that: "The amendment made by subsection (a) [enacting this part] shall take effect on September 30, 1978."

**Legislative History.** For legislative history and purpose of Pub.L. 96-601, see 1980 U.S. Code Cong. and Adm.News, p. 7218.

### Library References

Taxation ⇐181.

C.J.S. Taxation §§ 212, 258.

## § 1716. Deferral of capital gains

For purposes of Title 26, any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as an involuntary conversion within the meaning of section 1033 of Title 26.

(Pub.L. 95-395, Title II, § 202, as added Pub.L. 96-601, § 5(a), Dec. 24, 1980, 94 Stat. 3499.)

### Historical Note

**Effective Date.** Section effective Sept. 30, 1978, see section 5(b) of Pub.L. 96-601, set out as an Effective Date note under section 1715 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 96-601, see 1980 U.S. Code Cong. and Adm.News, p. 7218.





# SUBCHAPTER II—MAINE INDIAN CLAIMS SETTLEMENT

## § 1721. Congressional findings and declaration of policy

(a) Congress hereby finds and declares that:

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe are asserting claims for possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law, including, but without limitation, the Trade and Intercourse Act of 1790 (1 Stat. 137), or subsequent reenactments or versions thereof.

(2) The Indians, Indian nations, and tribes and bands of Indians, other than the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, that once may have held aboriginal title to lands within the State of Maine long ago abandoned their aboriginal holdings.

(3) The Penobscot Nation, as represented as of the time of passage of this subchapter by the Penobscot Nation's Governor and Council, is the sole successor in interest to the aboriginal entity generally known as the Penobscot Nation which years ago claimed aboriginal title to certain lands in the State of Maine.

(4) The Passamaquoddy Tribe, as represented as of the time of passage of this subchapter by the Joint Tribal Council of the Passamaquoddy Tribe, is the sole successor in interest to the aboriginal entity generally known as the Passamaquoddy Tribe which years ago claimed aboriginal title to certain lands in the State of Maine.

(5) The Houlton Band of Maliseet Indians, as represented as of the time of passage of this subchapter by the Houlton Band Council, is the sole successor in interest, as to lands within the United States, to the aboriginal entity generally known as the Maliseet Tribe which years ago claimed aboriginal title to certain lands in the State of Maine.

(6) Substantial economic and social hardship to a large number of land owners, citizens, and communities in the State of Maine, and therefore to the economy of the State of Maine as a whole, will result if the aforementioned claims are not resolved promptly.

(7) This subchapter represents a good faith effort on the part of Congress to provide the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians with a fair and just settlement of their land claims. In the absence of congressional action, these land claims would be pursued through the courts, a process which in all likelihood would consume many years and thereby promote hostility and uncertainty in the State of Maine to the ultimate detriment of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of



87

Maine.

(8) The State of Maine, with the agreement of the Passamaquoddy Tribe and the Penobscot Nation, has enacted legislation defining the relationship between the Passamaquoddy Tribe, the Penobscot Nation, and their members, and the State of Maine.

(9) Since 1820, the State of Maine has provided special services to the Indians residing within its borders, including the members of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. During this same period, the United States provided few special services to the respective tribe, nation, or band, and repeatedly denied that it had jurisdiction over or responsibility for the said tribe, nation, and band. In view of this provision of special services by the State of Maine, requiring substantial expenditures by the State of Maine and made by the State of Maine without being required to do so by Federal law, it is the intent of Congress that the State of Maine not be required further to contribute directly to this claims settlement.

(b) It is the purpose of this subchapter—

(1) to remove the cloud on the titles to land in the State of Maine resulting from Indian claims;

(2) to clarify the status of other land and natural resources in the State of Maine;

(3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe, and the Penobscot Nation, and

(4) to confirm that all other Indians, Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein.

(Pub.L. 96–420, § 2, Oct. 10, 1980, 94 Stat. 1785.)

### Historical Note

**References in Text.** The Trade and Intercourse Act of 1790 (1 Stat. 137), referred to in subsec. (a)(1), is Act July 22, 1790, c. 33, 1 Stat. 137, which is not classified to the Code.

**Short Title.** Section 1 of Pub.L. 96–420 provided: "That this Act [which enacted this subchapter] may be cited as the 'Maine Indian Claims Settlement Act of 1980'."

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

### Library References

United States ⇐105. C.J.S. United States §§ 143, 155.

## § 1722. Definitions

For purposes of this subchapter, the term—

(a) "Houlton Band of Maliseet Indians" means the sole successor to the Maliseet Tribe of Indians as constituted in aboriginal times in what is now the State of Maine, and all its predecessors and successors in



October 10, 1980, as to lands within the United St[illegible]y the Houlton Band Council of the Houlton Band of Maliseet I[illegible]

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resources, including but without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights;

(c) "Land Acquisition Fund" means the Maine Indian Claims Land Acquisition Fund established under section 1724(c) of this title;

(d) "laws of the State" means the constitution, and all statutes, regulations, and common laws of the State of Maine and its political subdivisions and all subsequent amendments thereto or judicial interpretations thereof;

(e) "Maine Implementing Act" means section 1, section 30, and section 31, of the "Act to Implement the Maine Indian Claims Settlement" enacted by the State of Maine in chapter 732 of the public laws of 1979;

(f) "Passamaquoddy Indian Reservation" means those lands as defined in the Maine Implementing Act;

(g) "Passamaquoddy Indian Territory" means those lands as defined in the Maine Implementing Act;

(h) "Passamaquoddy Tribe" means the Passamaquoddy Indian Tribe, as constituted in aboriginal times and all its predecessors and successors in interest. The Passamaquoddy Tribe is represented, as of October 10, 1980, by the Joint Tribal Council of the Passamaquoddy Tribe, with separate councils at the Indian Township and Pleasant Point Reservations;

(i) "Penobscot Indian Reservation" means those lands as defined in the Maine Implementing Act;

(j) "Penobscot Indian Territory" means those lands as defined in the Maine Implementing Act;

(k) "Penobscot Nation" means the Penobscot Indian Nation as constituted in aboriginal times, and all its predecessors and successors in interest. The Penobscot Nation is represented, as of October 10, 1980 by the Penobscot Nation Governor and Council;

(l) "Secretary" means the Secretary of the Interior;

(m) "Settlement Fund" means the Maine Indian Claims Settlement Fund established under section 1724(a) of this title; and

(n) "transfer" includes but is not limited to any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance; and transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and any act, event, or circumstanc

...ror of land or natural resources.

96–420, § 3, Oct. 10, 1980, 94 Stat. 1786.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

## § 1723. Approval of prior transfers and extinguishment of Indian title and claims of Indians within State of Maine

#### (a) Ratification by Congress; personal claims unaffected; United States barred from asserting claims on ground of noncompliance of transfers with State laws or occurring prior to December 1, 1873

(1) Any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, and any transfer of land or natural resources located anywhere within the State of Maine, from, by, or on behalf of any Indian, Indian nation, or tribe or band of Indians, including but without limitation any transfer pursuant to any treaty, compact, or statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including but without limitation the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, Sec. 4, 1 Stat. 137, 138), and all amendments thereto and all subsequent reenactments and versions thereof, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer: *Provided however,* That nothing in this section shall be construed to affect or eliminate the personal claim of any individual Indian (except for any Federal common law fraud claim) which is pursued under any law of general applicability that protects non-Indians as well as Indians.

(2) The United States is barred from asserting on behalf of any Indian, Indian nation, or tribe or band of Indians any claim under the laws of the State of Maine arising before October 10, 1980, and arising from any transfer of land or natural resources by any Indian, Indian nation, or tribe or band of Indians, located anywhere within the State of Maine, including but without limitation any transfer pursuant to any treaty, compact, or statute of any State, on the grounds that such transfer was not made in accordance with the laws of the State of Maine.

(3) The United States is barred from asserting by or on behalf of any individual Indian any claim under the laws of the State of Maine arising from any transfer of land or natural resources located anywhere within the State of Maine from, by, or on behalf of any individual Indian, which occurred prior to December 1, 1873, including but without limitation any transfer pursuant to any treaty, compact, or statute of any State.



To the extent that any transfer of land or natural [redacted]s described in subsection (a)(1) of this section may involve land or [redacted]al resources to which the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, or any other Indian, Indian nation, or tribe or band of Indians had aboriginal title, such subsection (a)(1) of this section shall be regarded as an extinguishment of said aboriginal title as of the date of such transfer.

#### (c) Claims extinguished as of date of transfer

By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians or any of their members or by any other Indian, Indian nation, tribe or band of Indians, or any predecessors or successors in interest thereof, arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including but without limitation claims for trespass damages or claims for use and occupancy, shall be deemed extinguished as of the date of the transfer.

#### (d) Effective date; authorization of appropriations; publication in Federal Register

The provisions of this section shall take effect immediately upon appropriation of the funds authorized to be appropriated to implement the provisions of section 1724 of this title. The Secretary shall publish notice of such appropriation in the Federal Register when such funds are appropriated.

(Pub.L. 96–420, § 4, Oct. 10, 1980, 94 Stat. 1787.)

### Historical Note

**References in Text.** The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, Sec. 4, 1 Stat. 137, 138), referred to in subsec. (a)(1), is not classified to the Code.

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S Code Cong. and Adm.News, p. 3786.

### Library References

Indians ⇐10.

C.J.S. Indians §§ 19, 28 et seq.

## § 1724. Maine Indian Claims Settlement and Land Acquisitior Funds in the United States Treasury

#### (a) Establishment of Maine Indian Claims Settlement Fund; amount

There is hereby established in the United States Treasury a fund to b known as the Maine Indian Claims Settlement Fund in which $27,000,00 shall be deposited following the appropriation of sums authorized by sectio 1733 of this title.



61

(1) One-half of the principal of the settlement fund shall be held in trust by the Secretary for the benefit of the Passamaquoddy Tribe, and the other half of the settlement fund shall be held in trust for the benefit of the Penobscot Nation. Each portion of the settlement fund shall be administered by the Secretary in accordance with reasonable terms established by the Passamaquoddy Tribe or the Penobscot Nation, respectively, and agreed to by the Secretary: *Provided,* That the Secretary may not agree to terms which provide for investment of the settlement fund in a manner not in accordance with section 162a of this title, unless the respective tribe or nation first submits a specific waiver of liability on the part of the United States for any loss which may result from such an investment: *Provided, further,* That until such terms have been agreed upon, the Secretary shall fix the terms for the administration of the portion of the settlement fund as to which there is no agreement.

(2) Under no circumstances shall any part of the principal of the settlement fund be distributed to either the Passamaquoddy Tribe or the Penobscot Nation, or to any member of either tribe or nation: *Provided, however,* That nothing herein shall prevent the Secretary from investing the principal of said fund in accordance with paragraph (1) of this subsection.

(3) The Secretary shall make available to the Passamaquoddy Tribe and the Penobscot Nation in quarterly payments, without any deductions except as expressly provided in section 1725(d)(2) of this title and without liability to or on the part of the United States, any income received from the investment of that portion of the settlement fund allocated to the respective tribe or nation, the use of which shall be free of regulation by the Secretary. The Passamaquoddy Tribe and the Penobscot Nation annually shall each expend the income from $1,000,000 of their portion of the settlement fund for the benefit of their respective members who are over the age of sixty. Once payments under this paragraph have been made to the tribe or nation, the United States shall have no further trust responsibility to the tribe or nation or their members with respect to the sums paid, any subsequent distribution of these sums, or any property or services purchased therewith.

**(c) Establishment of Maine Indian Claims Land Acquisition Fund; amount**

There is hereby established in the United States Treasury a fund to be known as the Maine Indian Claims Land Acquisition Fund in which $54,500,000 shall be deposited following the appropriation of sums authorized by section 1733 of this title.





The principal of the land acquisition fund shall be apportioned as follows:

(1) $900,000 to be held in trust for the Houlton Band of Maliseet Indians;

(2) $26,800,000 to be held in trust for the Passamaquoddy Tribe; and

(3) $26,800,000 to be held in trust for the Penobscot Nation.

The Secretary is authorized and directed to expend, at the request of the affected tribe, nation or band, the principal and any income accruing to the respective portions of the land acquisition fund for the purpose of acquiring land or natural resources for the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians and for no other purpose. The first 150,000 acres of land or natural resources acquired for the Passamaquoddy Tribe and the first 150,000 acres acquired for the Penobscot Nation within the area described in the Maine Implementing Act as eligible to be included within the Passamaquoddy Indian Territory and the Penobscot Indian Territory shall be held in trust by the United States for the benefit of the respective tribe or nation. The Secretary is also authorized to take in trust for the Passamaquoddy Tribe or the Penobscot Nation any land or natural resources acquired within the aforesaid area by purchase, gift, or exchange by such tribe or nation. Land or natural resources acquired outside the boundaries of the aforesaid areas shall be held in fee by the respective tribe or nation, and the United States shall have no further trust responsibility with respect thereto. Land or natural resources acquired within the State of Maine for the Houlton Band of Maliseet Indians shall be held in trust by the United States for the benefit of the band: *Provided,* That no land or natural resources shall be so acquired for or on behalf of the Houlton Band of Maliseet Indians without the prior enactment of appropriate legislation by the State of Maine approving such acquisition: *Provided further,* That the Passamaquoddy Tribe and the Penobscot Nation shall each have a one-half undivided interest in the corpus of the trust, which shall consist of any such property or subsequently acquired exchange property, in the event the Houlton Band of Maliseet Indians should terminate its interest in the trust.

(4) The Secretary is authorized to, and at the request of either party shall, participate in negotiations between the State of Maine and the Houlton Band of Maliseet Indians for the purpose of assisting in securing agreement as to the land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band. Such agreement shall be embodied in the legislation enacted by the State of Maine approving the acquisition of such lands as required by paragraph (3). The agreement and the legislation shall be limited to:

...ne Maine Implementing Act for land or natural resou... held in trust for the Passamaquoddy Tribe or Penobscot Nation;

(B) provisions limiting the power of the State of Maine to condemn such lands that are no less restrictive than the provisions of this subchapter and the Maine Implementing Act that apply to the Passamaquoddy Indian Territory and the Penobscot Indian Territory but not within either the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation;

(C) consistent with the trust and restricted character of the lands, provisions satisfactory to the State and the Houlton Band concerning:

(i) payments by the Houlton Band in lieu of payment of property taxes on land or natural resources held in trust for the band, except that the band shall not be deemed to own or use any property for governmental purposes under the Maine Implementing Act;

(ii) payments of other fees and taxes to the extent imposed on the Passamaquoddy Tribe and the Penobscot Nation under the Maine Implementing Act, except that the band shall not be deemed to be a governmental entity under the Maine Implementing Act or to have the powers of a municipality under the Maine Implementing Act;

(iii) securing performance of obligations of the Houlton Band arising after the effective date of agreement between the State and the band.'

(D) provisions on the location of these lands.

Except as set forth in this subsection, such agreement shall not include any other provisions regarding the enforcement or application of the laws of the State of Maine. Within one year of October 10, 1980, the Secretary is directed to submit to the appropriate commitees of the House of Representatives and the Senate having jurisdiction over Indian affairs a report on the status of these negotiations.

**(e) Acquisitions contingent upon agreement as to identity of land or natural resources to be sold, purchase price and other terms of sale; condemnation proceedings by Secretary; other acquisition authority barred for benefit of Indians in State of Maine**

Notwithstanding the provisions of sections 257 and 258a of Title 40, the Secretary may acquire land or natural resources under this section from the ostensible owner of the land or natural resources only if the Secretary and the ostensible owner of the land or natural resources have agreed upon the identity of the land or natural resources to be sold and upon the purchase price and other terms of sale. Subject to the agreement required by the preceding sentence, the Secretary may institute condemnation proceedings in order to perfect title, satisfactory to the Attorney General, in the United



thority to acquire lands or natural resources in trust ... ans or Indian nations, or tribes, or bands of Indians ... State of Maine.

**(f) Expenditures for Tribe, Nation, or Band contingent upon documentary relinquishment of claims**

The Secretary may not expend on behalf of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians any sums deposited in the funds established pursuant to the subsections (a) and (c) of this section unless and until he finds that authorized officials of the respective tribe, nation, or band have executed appropriate documents relinquishing all claims to the extent provided by sections 1723, 1730, and 1731 of this title and by section 6213 of the Maine Implementing Act, including stipulations to the final judicial dismissal with prejudice of their claims.

**(g) Transfer limitations of section 177 of this title inapplicable to Indians in State of Maine; restraints on alienation as provided in section; transfers invalid ab initio except for: State and Federal condemnations, assignments, leases, sales, rights-of-way, and exchanges**

(1) The provisions of section 177 of this title shall not be applicable tc (A) the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Banc of Maliseet Indians or any other Indian, Indian nation, or tribe or band o Indians in the State of Maine, or (B) any land or natural resources ownec by or held in trust for the Passamaquoddy Tribe, the Penobscot Nation, o the Houlton Band of Maliseet Indians or any other Indian, Indian nation o tribe or band of Indians in the State of Maine. Except as provided in sub sections (d)(4) and (g)(2) of this section, such land or natural resources shal not otherwise be subject to any restraint on alienation by virtue of beinj held in trust by the United States or the Secretary.

(2) Except as provided in paragraph (3) of this subsection, any transfer o land or natural resources within Passamaquoddy Indian Territory or Penob scot Indian Territory, except (A) takings for public uses consistent with th Maine Implementing Act, (B) takings for public uses pursuant to the laws o the United States, or (C) transfers of individual Indian use assignments fron one member of the Passamaquoddy Tribe or Penobscot Nation to anothe member of the same tribe or nation, shall be void ab initio and without an validity in law or equity.

(3) Land or natural resources within the Passamaquoddy Indian Territc ry or the Penobscot Indian Territory or held in trust for the benefit of th Houlton Band of Maliseet Indians may, at the request of the respectiv tribe, nation, or band, be—

(A) leased in accordance with sections 415 to 415d of this title;

(B) leased in accordance with sections 396a to 396g of this title;

(C) sold in accordance with section 407 of this title;

(D) subjected to rights-of-way in accordance with sections 323 to 32 of this title;

if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary for deposit in the land acquisition fund for the benefit of the affected tribe, nation, or band, as circumstances require, so long as payment does not exceed 25 per centum of the total value of the interests in land to be transferred by the tribe, nation, or band; and

(F) sold, only if at the time of sale the Secretary has entered into an option agreement or contract of sale to purchase other lands of approximate equal value.

**(h) Agreement on terms for management and administration of land or natural resources**

Land or natural resources acquired by the secretary in trust for the Passamaquoddy Tribe and the Penobscot Nation shall be managed and administered in accordance with terms established by the respective tribe or nation and agreed to by the Secretary in accordance with section 450f of this title, or other existing law.

**(i) Condemnation of trust or restricted land or natural resources within reservations: substitute land or monetary proceeds as medium of compensation; condemnation of trust land without Reservations: use of compensation for reinvestment in trust or fee held acreage, certification of acquisitions; State condemnation proceedings: United States as necessary party, exhaustion of State administrative remedies, judicial review in Federal courts, removal of action**

(1) Trust or restricted land or natural resources within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. In the event that the compensation for the taking is in the form of substitute land to be added to the reservation, such land shall become a part of the reservation in accordance with the Maine Implementing Act and upon notification to the Secretary of the location and boundaries of the substitute land. Such substitute land shall have the same trust or restricted status as the land taken. To the extent that the compensation is in the form of monetary proceeds, it shall be deposited and reinvested as provided in paragraph (2) of this subsection.

(2) Trust land of the Passamaquoddy Tribe or the Penobscot Nation not within the Passamaquoddy Reservation or Penobscot Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. The proceeds from any such condemnation shall be deposited in the land acquisition fund established by subsection (c) of this section and shall be reinvested in acreage within unorganized or unincorporated areas of the State of Maine. When the proceeds are reinvested in land whose acreage does not exceed that of the land taken, all the land shall be acquired in trust. When the proceeds are invested in land whose acreage exceeds the acreage of the land taken, the respective tribe or nation shall designate, with the approval of the United States, and within thirty days of such reinvestment, that portion of the land acquired by the reinvestment, not to exceed the area taken, which shall be acquired in trust. The land not acquired in



shall certify, in writing, to the Secretary of State of
location, boundaries, and status of the land acquire

(3) The State of Maine shall have initial jurisdiction over condemnati proceedings brought under this section. The United States shall be a nec sary party to any such condemnation proceedings. After exhaustion of State administrative remedies, the United States is authorized to seek ju cial review of all relevant matters in the courts of the United States a shall have an absolute right of removal, at its discretion, over any acti commenced in the courts of the State.

**(j) Federal condemnation under other laws; deposit and reinvestment of compensatory proceeds**

When trust or restricted land or natural resources of the Passamaquoc Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians condemned pursuant to any law of the United States other than this s chapter, the proceeds paid in compensation for such condemnation shall deposited and reinvested in accordance with subsection (i)(2) of this secti

(Pub.L. 96–420, § 5, Oct. 10, 1980, 94 Stat. 1788.)

[1]So in original. Probably should be semicolon.

### Historical Note

**References in Text.** Sections 415 to 415d of this title, referred to in subsec. (g)(3)(A), in the original read "the Act of August 9, 1955 (69 Stat. 539), as amended", which enacted sections 415 to 415d of this title and amended section 396 of this title.

**Legislative History.** For legislative his and purpose of Pub.L. 96–420, see 1980 Code Cong. and Adm.News, p. 3786.

### West's Federal Forms

Actions by United States or officers thereof, see §§ 1069 to 1072.
Enforcement and review of decisions and orders of administrative agencies, see § 851 et
Jurisdiction and venue in the district courts, matters pertaining to, see §1000 et seq.

### Library References

United States ⇐113. C.J.S. United States §§ 155, 156, 160 et

## § 1725. State laws applicable

**(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State**

Except as provided in section 1727(e) and section 1724(d)(4) of this t all Indians, Indian nations, or tribes or bands of Indians in the Stat Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, their members, and any lands or natural resources owned by any such I an, Indian nation, tribe or band of Indians and any lands or natura sources held in trust by the United States, or by any other person or en for any such Indian, Indian nation, tribe, or band of Indians shall be sul to the civil and criminal jurisdiction of the State, the laws of the State,

**(b) Jurisdiction of State of Maine and utilization of local share of funds pursuant to the Maine Implementing Act; Federal laws or regulations governing services or benefits unaffected unless expressly so provided; report to Congress of comparative Federal and State funding for Maine and other States**

(1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

(2) Funds appropriated for the benefit of Indian people or for the administration of Indian affairs may be utilized, consistent with the purposes for which they are appropriated, by the Passamaquoddy Tribe and the Penobscot Nation to provide part or all of the local share as provided by the Maine Implementing Act.

(3) Nothing in this section shall be construed to supersede any Federal laws or regulations governing the provision or funding of services or benefits to any person or entity in the State of Maine unless expressly provided by this subchapter.

(4) Not later than October 30, 1982, the Secretary is directed to submit to the appropriate committees of the House of Representatives and the Senate having jurisdiction over Indian affairs a report on the Federal and State funding provided the Passamaquoddy Tribe and Penobscot Nation compared with the respective Federal and State funding in other States.

**(c) Federal criminal jurisdiction inapplicable in State of Maine under certain sections of Title 18; effective date; publication in Federal Register**

The United States shall not have any criminal jurisdiction in the State of Maine under the provisions of sections 1152, 1153, 1154, 1155, 1156, 1160, 1161, and 1165 of Title 18. This provision shall not be effective until sixty days after the publication of notice in the Federal Register as required by section 1723(d) of this title.

**(d) Capacity to sue and be sued in State of Maine and Federal courts; section 1362 of Title 28 applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments**

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; and section 1362 of Title 28 shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: *Provided, however,* That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and em-



(2) Notwithstanding the provisions of section 372 [illegible]e 31, the Secretary shall honor valid final orders of a Federal, St[illegible] territorial court which enters money judgments for causes of action which arise after October 10, 1980, against either the Passamaquoddy Tribe or the Penobscot Nation by making an assignment to the judgment creditor of the right to receive income out of the next quarterly payment from the settlement fund established pursuant to section 1724(a) of this title and out of such future quarterly payments as may be necessary until the judgment is satisfied.

**(e) Federal consent for amendment of Maine Implementing Act; nature and scope of amendments; agreement respecting State jurisdiction over Houlton Band Lands**

(1) The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penobscot Nation: *Provided,* That such amendment is made with the agreement of the affected tribe or nation, and that such amendment relates to (A) the enforcement or application of civil, criminal or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions; (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation; or (C) the allocation of jurisdiction between tribal courts and State courts..

(2) Notwithstanding the provisions of subsection (a) of this section, the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the band or its members

**(f) Indian jurisdiction separate and distinct from State civil and criminal jurisdiction**

The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.

**(g) Full faith and credit**

The Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial proceedings of each other.

**(h) General laws and regulations affecting Indians applicable, but special laws and regulations inapplicable, in State of Maine**

Except as otherwise[1] provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States

...ribe of Band of Indians, Indian lands, Indian reservat...
...n country, Indian territory or land held in trust for Indians, and ...nich affects or preempts the civil, criminal, or regulatory jurisdictio... the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

**(i) Eligibility for Federal financial benefits; Federal tax considerations; similar treatment and reservation lands**

As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be treated in the same manner as other federally recognized tribes for the purposes of Federal taxation and any lands which are held by the respective tribe, nation, or band subject to a restriction against alienation or which are held in trust for the benefit of the respective tribe, nation, or band shall be considered Federal Indian reservations for purposes of Federal taxation.

(Pub.L. 96–420, § 6, Oct. 10, 1980, 94 Stat. 1793.)

[1]So in original. Probably should be "otherwise".

**Historical Note**

**Codification.** "Section 3727 of Title 31" was substituted in subsec. (d)(2), for "section 3477 of the Revised Statutes, as amended" on the authority of Pub.L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, section 1 of which enacted Title 31, Money and Finance.

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

**West's Federal Forms**

Jurisdiction and venue in district courts, matters pertaining to, see § 1000 et seq.

**Library References**

Indians ⇐27(2), 32, 38(2).
C.J.S. Indians §§ 8, 11, 16 et seq., 67 et seq., 79.

## § 1726. Tribal organization

(a) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this subchapter and the Maine Implementing Act. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall each file with the Secretary a copy of its organic governing document and any amendments thereto.



extended the Houlton Band of Maliseet Indians, ... citizen of the United States may be considered a ... of the Houlton Band of Maliseets, except persons who, as of Octobe... 1980, are enrolled members on the band's existing membership roll, and direct lineal descendants if such members. Membership in the band shall be subject to such further qualifications as may be provided by the band in its organic governing document or amendments thereto subject to the approval of the Secretary.

(Pub.L. 96–420, § 7, Oct. 10, 1980, 94 Stat. 1795.)

**Historical Note**

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

**Library References**

Indians ⇐32. C.J.S. Indians §§ 11, 67 et seq.

## § 1727. Implementation of Indian Child Welfare Act

**(a) Petition for assumption of exclusive jurisdiction; approval by Secretary**

The Passamaquoddy Tribe or the Penobscot Nation may assume exclusive jurisdiction over Indian child custody proceedings pursuant to the Indian Child Welfare Act of 1978 (92 Stat. 3069) [25 U.S.C.A § 1901 et seq.]. Before the respective tribe or nation may assume such jurisdiction over Indian child custody proceedings, the respective tribe or nation shall present to the Secretary for approval a petition to assume such jurisdiction and the Secretary shall approve that petition in the manner prescribed by section 108(a)–(c) of said Act [25 U.S.C.A § 1918(a)–(c)].

**(b) Consideration and determination of petition by Secretary**

Any petition to assume jurisdiction over Indian child custody proceedings by the Passamaquoddy Tribe or the Penobscot Nation shall be considered and determined by the Secretary in accordance with sections 108(b) and (c) of the Act [25 U.S.C.A. § 1918(b) and (c)].

**(c) Actions or proceedings within existing jurisdiction unaffected**

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction.

**(d) Reservations within section 1903(10) of this title**

For the purposes of this section, the Passamaquoddy Indian Reservation and the Penobscot Indian Reservation are "reservations" within section 4(10) of the Act [25 U.S.C.A. § 1903(10)].

**Jurisdiction over child welfare unaffected**

For the purposes of this section, the Houlton Band of Maliseet Indians is an "Indian tribe" within section 4(8) of the Act [25 U.S.C.A. § 1903(8)], provided, that nothing in this subsection shall alter or effect the jurisdiction of the State of Maine over child welfare matters as provided in section 1725(e)(2) of this title.

**(f) Assumption determinative of exclusive jurisdiction**

Until the Passamaquoddy Tribe or the Penobscot Nation has assumed exclusive jurisdiction over the Indian child custody proceedings pursuant to this section, the State of Maine shall have exclusive jurisdiction over Indian child custody proceedings of that tribe or nation.

(Pub.L. 96–420, § 8, Oct. 10, 1980, 94 Stat. 1795.)

**Historical Note**

**References in Text.** The Indian Child Welfare Act of 1978 (92 Stat. 3069), referred to in subsec. (a), is Pub.L. 95–608, Nov. 8, 1978, 92 Stat. 3069, as amended, which is classified principally to chapter 21 (section 1901 et seq.) of this title. For complete classification of this Act to the Code see Short Title note set out under section 1901 of this title and Tables volume.

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

**Library References**

Indians ⇐27(2).

C.J.S. Indians §§ 8, 16 et seq.

## § 1728. Federal financial aid programs unaffected by payments under subchapter

**(a) Eligibility of State of Maine for participation without regard to payments to designated Tribe, Nation, or Band under subchapter**

No payments to be made for the benefit of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians pursuant to the terms of this subchapter shall be considered by any agency or department of the United States in determining or computing the eligibility of the State of Maine for participation in any financial aid program of the United States.

**(b) Eligibility of designated Tribe, Nation, or Band for benefits without regard to payments from State of Maine except in considering actual financial situation in determining need of applicant**

The eligibility for or receipt of payments from the State of Maine by the Passamaquoddy Tribe and the Penobscot Nation or any of their members pursuant to the Maine Implementing Act shall not be considered by any department or agency of the United States in determining the eligibility of or computing payments to the Passamaquoddy Tribe or the Penobscot Nation or any of their members under any financial aid program of the United States: *Provided*, That to the extent that eligibility for the benefits of such a financial aid program is dependent upon a showing of need by the applicant,



**(c) Availability of settlement or land acquisition fund income or resources or otherwise used to affect federally assisted housing programs or Federal financial assistance or other Federal benefits**

The availability of funds or distribution of funds pursuant to section 1724 of this title may not be considered as income or resources or otherwise utilized as the basis (1) for denying any Indian household or member thereof participation in any federally assisted housing program, (2) for denying or reducing the Federal financial assistance or other Federal benefits to which such household or member would otherwise be entitled, or (3) for denying or reducing the Federal financial assistance or other Federal benefits to which the Passamaquoddy Tribe or Penobscot Nation would otherwise be eligible or entitled.

(Pub.L. 96–420, § 9, Oct. 10, 1980, 94 Stat. 1795.)

**Historical Note**

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

## § 1729. Deferral of capital gains

For the purpose of subtitle A of Title 26, any transfer by private owners of land purchased or otherwise acquired by the Secretary with moneys from the land acquisition fund whether in the name of the United States or of the respective tribe, nation or band shall be deemed to be an involuntary conversion within the meaning of section 1033 of Title 26.

(Pub.L. 96–420, § 10, Oct. 10, 1980, 94 Stat. 1796.)

**Historical Note**

**Legislative history.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

**Library References**

Internal Revenue ⇐3188.

## § 1730. Transfer of tribal trust funds held by the State o Maine

All funds of either the Passamaquoddy Tribe or the Penobscot Natio held in trust by the State of Maine as of October 10, 1980, shall be trans ferred to the Secretary to be held in trust for the respective tribe or natio and shall be added to the principal of the settlement fund allocated to tha tribe or nation. The receipt of said State funds by the Secretary shall cor stitute a full discharge of any claim of the respective tribe or nation, it predecessors and successors in interest, and its members, may have agains the State of Maine, its officers, employees, agents, and representatives, aris

natic execute general releases of all claims against the State of Main, icers, employees, agents, and representatives, arising from the administration or management of said State funds.

(Pub.L. 96–420, § 11, Oct. 10, 1980, 94 Stat. 1796.)

### Historical Note

**Codification.** "October 10, 1980," was substituted for "the effective date of this Act".

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

## § 1731. Other claims discharged by this subchapter

Except as expressly provided herein, this subchapter shall constitute a general discharge and release of all obligations of the State of Maine and all of its political subdivisions, agencies, departments, and all of the officers or employees thereof arising from any treaty or agreement with, or on behalf of any Indian nation, or tribe or band of Indians or the United States as trustee therefor, including those actions now pending in the United States District Court for the District of Maine captioned United States of America against State of Maine (Civil Action Nos. 1966–ND and 1969–ND).

(Pub.L. 96–420, § 12, Oct. 10, 1980, 94 Stat. 1796.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

## § 1732. Limitation of actions

Except as provided in this subchapter, no provision of this subchapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, or to grant implied consent to any Indian, Indian nation, or tribe or band of Indians to sue the United States or any of its officers with respect to the claims extinguished by the operation of this subchapter.

(Pub.L. 96–420, § 13, Oct. 10, 1980, 94 Stat. 1797.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

### Library References

United States ⇐125(6). C.J.S. United States § 181.



There is hereby authorized to be appropriated $81,500 the fiscal year beginning October 1, 1980, for transfer to the funds e ed by section 1724 of this title.

(Pub.L. 96–420, § 14, Oct. 10, 1980, 94 Stat. 1797.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

## § 1734. Inseparability of provisions

In the event that any provision of section 1723 of this title is held invalid, it is the intent of Congress that the entire subchapter be invalidated. In the event that any other section or provision of this subchapter is held invalid, it is the intent of Congress that the remaining sections of this subchapter shall continue in full force and effect.

(Pub.L. 96–420, § 15, Oct. 10, 1980, 94 Stat. 1797.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

## § 1735. Construction

#### (a) Law governing; special legislation

In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this subchapter should emerge, the provisions of this subchapter shall govern.

#### (b) General legislation

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

(Pub.L. 96–420, § 16, Oct. 10, 1980, 94 Stat. 1797.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 96–420, see 1980 U.S. Code Cong. and Adm.News, p. 3786.

# CHAPTER 19—INDIAN CLAIMS SETTLEMENTS WITH STATES

## SUBCHAPTER I—RHODE ISLAND INDIAN CLAIMS SETTLEMENT

### PART A—GENERAL PROVISIONS


Sec.

1701. Congressional findings and declaration of policy.
1702. Definitions.
1703. Rhode Island Indian Claims Settlement Fund; establishment.
1704. Option agreements to purchase private settlement lands.
  (a) Acceptance of option agreement assignments; reasonableness of terms and conditions.
  (b) Amount of payment.
  (c) Limitation on option fees.
  (d) Application of option fee.
  (e) Retention of option payment.
1705. Publication of findings; approval of prior transfers and extinguishment of claims and aboriginal title involving Narragansett Tribe and town of Charlestown, Rhode Island.
1706. Findings by Secretary.
1707. Purchase and transfer of private settlement lands.
  (a) Determination by Secretary; assignment of settlement lands to State Corporation.
  (b) Moneys remaining in fund.
  (c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes.
1708. Applicabililty of State law.
1709. Preservation of Federal benefits.
1710. Authorization of appropriations.
1711. Limitation of actions; jurisdiction.
1712. Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island.


### PART B—TAX TREATMENT


1715. Exemption from taxation.
  (a) General exemption.
  (b) Income-producing activities.
  (c) Payments in lieu of taxes.
1716. Deferral of capital gains.




## SUBCHAPTER II—MAINE INDIAN CLAIMS SETTLEMENT


Sec.

1721. Congressional findings and declaration of policy.
1722. Definitions.
1723. Approval of prior transfers and extinguishment of Indian title and claims of Indians within State of Maine.
  (a) Ratification by Congress; personal claims unaffected; United States barred from asserting claims on ground of noncompliance of transfers with State laws or occurring prior to December 1, 1873.
  (b) Aboriginal title extinguished as of date of transfer.
  (c) Claims extinguished as of date of transfer.
  (d) Effective date; authorization of appropriations; publication in Federal Register.
1724. Maine Indian Claims Settlement and Land Acquisition Funds in the United States Treasury.
  (a) Establishment of Maine Indian Claims Settlement Fund; amount.
  (b) Apportionment of settlement fund; administration; investments; limitation on distributions; quarterly investment income payments; expenditures for aged members; cessation of trust responsibility following Federal payments.
  (c) Establishment of Maine Indian Claims Land Acquisition Fund; amount.
  (d) Apportionment of land acquisition fund; expenditures for acquisition of land or natural resources; trust acreage; fee holdings; interests in corpus of trust for Houlton Band following termination of Band's interest in trust; agreement for acquisitions for benefit of Houlton Band: scope, report to Congress.
  (e) Acquisitions contingent upon agreement as to identity of land or natural resources to be sold, purchase price and other terms of sale; condemnation proceedings by Secretary; other acquisition authority barred for benefit of Indians in State of Maine.
  (f) Expenditures for Tribe, Nation, or Band contingent upon documentary relinquishment of claims.
  (g) Transfer limitations of section 177 of this title inapplicable to Indians in State of Maine; restraints on alienation as provided in section; transfers invalid ab initio except for: State and Federal condemnations, assignments, leases, sales, rights-of-way, and exchanges.
  (h) Agreement on terms for management and administration of land or natural resources.

Maine Indian Claims Settlement and Land Acquisition Funds in the United States Treasury—Continued
(i) Condemnation of trust or restricted land or natural resources within Reservations: substitute land or monetary proceeds as medium of compensation; condemnation of trust land without Reservations: use of compensation for reinvestment in trust or fee held acreage, certification of acquisitions; State condemnation proceedings: United States as necessary party, exhaustion of State administrative remedies, judicial review in Federal courts, removal of action.
(j) Federal condemnation under other laws; deposit and reinvestment of compensatory proceeds.
1725. State laws applicable.
(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State.
(b) Jurisdiction of State of Maine and utilization of local share of funds pursuant to the Maine Implementing Act; Federal laws or regulations governing services or benefits unaffected unless expressly so provided; report to Congress of comparative Federal and State funding for Maine and other States.
(c) Federal criminal jurisdiction inapplicable in State of Maine under certain sections of Title 18; effective date: publication in Federal Register.
(d) Capacity to sue and be sued in State of Maine and Federal courts; section 1362 of Title 28 applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments.
(e) Federal consent for amendment of Maine Implementing Act; nature and scope of amendments; agreement respecting State jurisdiction over Houlton Band Lands.
(f) Indian jurisdiction separate and distinct from State civil and criminal jurisdiction.
(g) Full faith and credit.
(h) General laws and regulations affecting Indians applicable, but special laws and regulations inapplicable, in State of Maine.
(i) Eligibility for Federal financial benefits; Federal tax considerations: similar treatment and reservation lands.
1726. Tribal organization.
1727. Implementation of Indian Child Welfare Act.
(a) Petition for assumption of exclusive jurisdiction; approval by Secretary.
(b) Consideration and determination of petition by Secretary.
(c) Actions or proceedings within existing jurisdiction unaffected.



1727. Implementation of Indian Child Welfare Act.
(d) Reservations within section 1903(10) of th
(e) Indian tribe within section 1903(8) of this ... ., State jurisdiction over child welfare unaffected.
(f) Assumption determinative of exclusive jurisdiction.
1728. Federal financial aid programs unaffected by payments under subchapter.
(a) Eligibility of State of Maine for participation without regard to payments to designated Tribe, Nation, or Band under subchapter.
(b) Eligibility of designated Tribe, Nation, or Band for benefits without regard to payments from State of Maine except in considering actual financial situation in determining need of applicant.
(c) Availability of settlement or land acquisition funds not income or resources or otherwise used to affect federally assisted housing programs or Federal finanical assistance or other Federal benefits.
1729. Deferral of capital gains.
1730. Transfer of tribal trust funds held by the State of Maine.
1731. Other claims discharged by this subchapter.
1732. Limitation of actions.
1733. Authorization of appropriations.
1734. Inseparabililty of provisions.
1735. Construction.
(a) Law governing; special legislation.
(b) General legislation.

## SUBCHAPTER I—RHODE ISLAND INDIAN CLAIMS SETTLEMENT

### PART A—GENERAL PROVISIONS

### § 1701. Congressional findings and declaration of policy

Congress finds and declares that—

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

...ave title a desire to remove all clouds on titles resulting from ...ian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

(Pub.L. 95-395, § 2, Sept. 30, 1978, 92 Stat. 813.)

### Historical Note

**Short Title.** Section 1 of Pub.L. 95-395 provided: "That this Act [which enacted this subchapter] may be cited as the 'Rhode Island Indian Claims Settlement Act'."

For short title of Pub.L. 96-420 which enacted subchapter II of this chapter as the Maine Indian Claims Settlement Act of 1980, see section 1 of Pub.L. 96-420, set out as a Short Title note under section 1721 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

### Library References

United States ⇐105. C.J.S. United States §§ 143, 155.

## § 1702. Definitions

For the purposes of this subchapter, the term—

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. No. 75-0006 (D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C.A. No. 75-0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 1704 and 1707 of this title;

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State of Rhode Island to the State Corporation pursuant to legislation as described in section 1706 of this title;

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;



(h) "settlement agreement" means the Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 1706 of this title; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

(Pub.L. 95-395, § 3, Sept. 30, 1978, 92 Stat. 813.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

## § 1703. Rhode Island Indian Claims Settlement Fund; establishment

There is hereby established in the United States Treasury a fund to be known as the Rhode Island Indian Claims Settlement Fund into which $3,500,000 shall be deposited following the appropriation authorized by section 1710 of this title.

(Pub.L. 95-395, § 4, Sept. 30, 1978, 92 Stat. 814.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

## § 1704. Option agreements to purchase private settlement lands

### (a) Acceptance of option agreement assignments; reasonableness of terms and conditions

The Secretary shall accept assignment of reasonable two-year option agreements negotiated by the Governor of the State of Rhode Island or his designee for the purchase of the private settlement lands: *Provided,* That the terms and conditions specified in such options are reasonable and that the total price for the acquisition of such lands, including reasonable costs of acquisition, will not exceed the amount specified in section 1703 of this title. If the Secretary does not determine that any such option agreement is unreasonable within sixty days of its submission, the Secretary will be deemed to have accepted the assignment of the option.

**(b) Amount of payment**

for any option entered into pursuant to subsection (a) of this section shall be in the amount of 5 per centum of the fair market value of the land or natural resources as of the date of the agreement and shall be paid from the fund established by section 1703 of this title.

**(c) Limitation on option fees**

The total amount of the option fees paid pursuant to subsection (b) of this section shall not exceed $175,000.

**(d) Application of option fee**

The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase of the defendant's land or natural resources is completed in accordance with the terms of the option agreement.

**(e) Retention of option payment**

The payment for each option may be retained by the party granting the option if the property transfer contemplated by the option agreement is not completed in accordance with the terms of the option agreement.

(Pub.L. 95-395, § 5, Sept. 30, 1978, 92 Stat. 814.)

**Historical Note**

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

**Library References**

Indians ⇐10. C.J.S. Indians §§ 19, 28 et seq.

## § 1705. Publication of findings; approval of prior transfers and extinguishment of claims and aboriginal title involving Narragansett Tribe and town of Charlestown, Rhode Island

(a) If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication—

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically ap-



of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) of this section may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) of this section shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to this section, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

(Pub.L. 95-395, § 6, Sept. 30, 1978, 92 Stat. 815.)

**Historical Note**

**References in Text.** The Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, referred to in subsec. (a)(1), is not classified to the Code.

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

## § 1706. Findings by Secretary

Section 1705 of this title shall not take effect until the Secretary finds—

(a) that the State of Rhode Island has enacted legislation creating or authorizing the creation of a State chartered corporation satisfying the following criteria:

(1) the corporation shall be authorized to acquire, perpetually manage, and hold the settlement lands;

(2) the corporation shall be controlled by a board of directors, the majority of the members of which shall be selected by the Indian Corporation or its successor, and the remaining members of which shall be selected by the State of Rhode Island; and

(3) the corporation shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island but which shall establish minimum standards for the safety of persons and protection of wildlife and fish stock; and

(b) that State of Rhode Island has enacted legislation authorizing the conveyance to the State Corporation of land and natural resources that substantially conform to the public settlement lands as described in paragraph 2 of the Settlement Agreement.

(Pub.L. 95-395, § 7, Sept. 30, 1978, 92 Stat. 816.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

## § 1707. Purchase and transfer of private settlement lands

### (a) Determination by Secretary; assignment of settlement lands to State Corporation

When the Secretary determines that the State Corporation described in section 1706(a) of this title has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 1704 of this title and assign the private settlement lands thereby purchased to the State Corporation.

### (b) Moneys remaining in fund

Any moneys remaining in the fund established by section 1703 of this title after the purchase described in subsection (a) of this section shall be returned to the general Treasury of the United States.





Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: *Provided, however,* That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however,* That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

(Pub.L. 95-395, § 8, Sept. 30, 1978, 92 Stat. 816.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

### Library References

Indians ⇐10. C.J.S. Indians §§ 19, 28 et seq.

## § 1708. Applicability of State law

Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

(Pub.L. 95-395, § 9, Sept. 30, 1978, 92 Stat. 817.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

### Library References

Indians ⇐27(2), 32, 38(2). C.J.S. Indians §§ 8, 16 et seq., 17, 67 et seq., 79.

## § 1709. Preservation of Federal benefits

Nothing contained in this subchapter or in any legislation enacted by the State of Rhode Island as described in section 1706 of this title shall affect or otherwise impair in any adverse manner any benefits received by the State of Rhode Island under the Federal Aid in Wildlife Restoration Act of Septem-

(. -395, § 10, Sept. 30, 1978, 92 Stat. 817.)

### Historical Note

**References in Text.** The Federal Aid in Wildlife Restoration Act of September 2, 1937, referred to in text, is Act Sept. 2, 1937, c. 899, 50 Stat. 917, as amended, which is classified generally to chapter 5B (section 669 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 669 of Title 16 and Tables volume.

The Federal Aid in Fish Restoration Act of August 9, 1950, referred to in text, is Act Aug. 9, 1950, c. 658, 64 Stat. 430, as amended, which is classified generally to chapter 10B (section 777 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 777 of Title 16 and Tables volume.

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

## § 1710. Authorization of appropriations

There is hereby authorized to be appropriated $3,500,000 to carry out the purposes of this subchapter.

(Pub.L. 95-395, § 11, Sept. 30, 1978, 92 Stat. 817.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

## § 1711. Limitation of actions; jurisdiction

Notwithstanding any other provision of law, any action to contest the constitutionality of this subchapter shall be barred unless the complaint is filed within one hundred and eighty days of September 30, 1978. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Rhode Island.

(Pub.L. 95-395, § 12, Sept. 30, 1978, 92 Stat. 817.)

### Historical Note

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

### West's Federal Forms

Affirmative defenses, statute of limitations, see § 2109 et seq.
Jurisdiction and venue in the district courts, matters pertaining to, see § 1000 et seq.

### Library References

Federal Courts ⇐195.

C.J.S. Federal Courts § 30.



claims and aboriginal title outside tow harlestown, Rhode Island and involving other Ind. Rhode Island

(a) Except as provided in subsection (b) of thi section—

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 1705 of this title), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: *Provided,* That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

(Pub.L. 95-395, § 13, Sept. 30, 1978, 92 Stat. 817.)

### Historical Note

**References in Text.** The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), referred to in subsec. (a)(1), is not classified to the Code.

**Legislative History.** For legislative history and purpose of Pub.L. 95-395, see 1978 U.S. Code Cong. and Adm.News, p. 1948.

PART B—TAX TREATMENT

## § 1715. Exemption from taxation

### (a) General exemption

Except as otherwise provided in subsections (b) and (c) of this section, the settlement lands received by the State Corporation shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation.

### (b) Income-producing activities

The exemption provided in subsection (a) of this section shall not apply to any income-producing activities occurring on the settlement lands.

### (c) Payments in lieu of taxes

Nothing in this subchapter shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

(Pub.L. 95-395, Title II, § 201, as added Pub.L. 96-601, § 5(a), Dec. 24, 1980, 94 Stat. 3498.)

### Historical Note

**Effective Date.** Section 5(b) of Pub.L. 96-601 provided that: "The amendment made by subsection (a) [enacting this part] shall take effect on September 30, 1978."

**Legislative History.** For legislative history and purpose of Pub.L. 96-601, see 1980 U.S. Code Cong. and Adm.News, p. 7218.

### Library References

Taxation ⇐181.

C.J.S. Taxation §§ 212, 258.

## § 1716. Deferral of capital gains

For purposes of Title 26, any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as an involuntary conversion within the meaning of section 1033 of Title 26.

(Pub.L. 95-395, Title II, § 202, as added Pub.L. 96-601, § 5(a), Dec. 24, 1980, 94 Stat. 3499.)

### Historical Note

**Effective Date.** Section effective Sept. 30, 1978, see section 5(b) of Pub.L. 96-601, set out as an Effective Date note under section 1715 of this title.

**Legislative History.** For legislative history and purpose of Pub.L. 96-601, see 1980 U.S. Code Cong. and Adm.News, p. 7218.





SUBCHAPTER II—MAINE INDIAN CLAIMS SETTLEMENT

## § 1721. Congressional findings and declaration of policy

(a) Congress hereby finds and declares that:

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe are asserting claims for possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law, including, but without limitation, the Trade and Intercourse Act of 1790 (1 Stat. 137), or subsequent reenactments or versions thereof.

(2) The Indians, Indian nations, and tribes and bands of Indians, other than the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, that once may have held aboriginal title to lands within the State of Maine long ago abandoned their aboriginal holdings.

(3) The Penobscot Nation, as represented as of the time of passage of this subchapter by the Penobscot Nation's Governor and Council, is the sole successor in interest to the aboriginal entity generally known as the Penobscot Nation which years ago claimed aboriginal title to certain lands in the State of Maine.

(4) The Passamaquoddy Tribe, as represented as of the time of passage of this subchapter by the Joint Tribal Council of the Passamaquoddy Tribe, is the sole successor in interest to the aboriginal entity generally known as the Passamaquoddy Tribe which years ago claimed aboriginal title to certain lands in the State of Maine.

(5) The Houlton Band of Maliseet Indians, as represented as of the time of passage of this subchapter by the Houlton Band Council, is the sole successor in interest, as to lands within the United States, to the aboriginal entity generally known as the Maliseet Tribe which years ago claimed aboriginal title to certain lands in the State of Maine.

(6) Substantial economic and social hardship to a large number of land owners, citizens, and communities in the State of Maine, and therefore to the economy of the State of Maine as a whole, will result if the aforementioned claims are not resolved promptly.

(7) This subchapter represents a good faith effort on the part of Congress to provide the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians with a fair and just settlement of their land claims. In the absence of congressional action, these land claims would be pursued through the courts, a process which in all likelihood would consume many years and thereby promote hostility and uncertainty in the State of Maine to the ultimate detriment of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of

(d) Savings provision.
(e) Effective date; notice.
1754. Mashantucket Pequot Settlement Fund.
(a) Establishment and administration.
(b) Expending of Fund; private settlement lands; economic development plan; acquisition of land and natural resources.
(c) Transfer of private settlement land as involuntary conversion.
(d) Documentation of relinquishment of tribal claims.
(e) Authorization of appropriation.
1755. State jurisdiction over reservation.
1756. Practice and procedure.
(a) Constitutionality.
(b) Jurisdiction.
(c) Removal of actions.
(d) Jurisdictional acts; implied consent to sue the United States.
1757. Restriction against alienation.
1758. Extension of Federal recognition and privileges.
(a) Applicability of United States laws and regulations.
(b) Filing of organic governing document and amendments.
(c) Eligibility for services and benefits.
1759. General discharge and release of State of Connecticut.
1760. Separability of provisions.

SUBCHAPTER V—MASSACHUSETTS INDIAN LAND CLAIMS SETTLEMENT

1771. Congressional findings and declaration of policy.
1771a. Gay Head Indian claims settlement fund.
1771b. Approval of prior transfers and extinguishment of aboriginal title and claims of Gay Head Indians.
1771c. Conditions precedent to Federal purchase of settlement lands.
1771d. Purchase and transfer of settlement lands.
1771e. Jurisdiction over settlement lands; restraint on alienation.
1771f. Definitions.
1771g. Applicability of State law.
1771h. Limitations of action; jurisdiction.
1771i. Eligibility.

SUBCHAPTER VI—FLORIDA INDIAN (SEMINOLE) LAND CLAIMS SETTLEMENT

1772. Findings and policy.
1772a. Definitions.
1772b. Findings by the Secretary.
1772c. Approval of prior transfers and extinguishment of claims and aboriginal title involving Florida Indians.
1772d. Special provisions for Seminole Tribe.
1772e. Water rights compact.
1772f. Judicial review.
1772g. Revocation of settlement.
1773. Congressional findings.
(a) Findings.
(b) Purpose.
1773a. Resolution of Puyallup tribal land claims.
(a) Relinquishment.
(b) Exception for certain lands.
(c) Personal claims.
1773b. Settlement lands.
(a) Acceptance by Secretary.
(b) Contamination.
(c) Lands described.
(d) Reservation status.
(e) Authorization of appropriations.
1773c. Future trust lands.
1773d. Funds to members of Puyallup Tribe.
(a) Payment to individual members.
(b) Permanent trust fund for tribal members.
1773e. Fisheries.
1773f. Economic development and land acquisition.
(a) Economic development and land acquisition fund.
(b) Foreign trade.
(c) Blair project.
1773g. Jurisdiction.
1773h. Miscellaneous provisions.
(a) Liens and forfeitures.
(b) Eligibility for Federal Programs; trust responsibility.
(c) Permanent trust fund not counted for certain purposes.
(d) Tax treatment of funds and assets.
1773i. Actions by the Secretary.
1773j. Definitions.

SUBCHAPTER VIII—SENECA NATION (NEW YORK) LAND CLAIMS SETTLEMENT

1774. Findings and purposes.
(a) City of Salamanca and congressional villages.
(b) Purpose.
1774a. Definitions.
1774b. New leases and extinguishment of claims.
(a) New leases.
(b) Extinguishment of claims.
(c) Effective date of leases and relinquishments.
1774c. Responsibilities and restrictions.
(a) Seneca Nation.
(b) Lessees.
(c) United States.
(d) State.
1774d. Settlement funds.
(a) In general.
(b) Funds provided by United States.
(c) Funds to be provided by the State.
(d) Time of payments.
(e) Limitation.
1774e. Conditions precedent to payment of United States and State funds.
1774f. Miscellaneous provisions.
(a) Liens and forfeitures, etc.
(b) Eligibility for government programs.
1774h. Authorization of appropriations.

SUBCHAPTER IX—MOHEGAN NATION (CONNECTICUT) LAND CLAIMS SETTLEMENT

1775. Findings and purposes.
(a) Findings.
(b) Purposes.
1775a. Definitions.
1775b. Action by Secretary.
(a) In general.
(b) Publication by Secretary.
(c) Effect of publication.
(d) Extinguishment of claims.
(e) Transfers.
(f) Limitation.
(g) Statutory construction.
1775c. Conveyance of lands to the United States to be held in trust for the Mohegan tribe.
(a) In general.
(b) Consultation.
1775d. Consent of United States to State assumption of criminal jurisdiction.
(a) In general.
(b) Statutory construction.
1775e. Ratification of Town Agreement.
(a) In general.
(b) Approval of Town Agreement.
1775f. General discharge and release of obligations of State of Connecticut.
1775g. Effect of revocation of State Agreement.
(a) In general.
(b) Right of Mohegan Tribe to reinstate claim.
1775h. Judicial review.
(a) Jurisdiction.
(b) Deadline for filing.

SUBCHAPTER X—CROW BOUNDARY SETTLEMENT

1776. Findings and purpose.
(a) Findings.
(b) Purpose.
1776a. Definitions.
(b) Ratification of Settlement Agreement.
(c) Modification of Settlement Agreement.
(d) Enforcement of the Settlement Agreement.
1776c. Settlement terms and conditions and extinguishment of claims.
(a) Property within parcel number 1.
(b) Property within parcel number 2.
(c) Property within parcel number 3 and parcel number 4.
(d) Exchange of public lands.
(e) Crow Tribal Trust Fund.
1776d. Establishment and administration of Crow Tribal Trust Fund.
(a) Establishment of Crow Tribal Trust Fund.
(b) Contributions to Crow Tribal Trust Fund.
(c) Investment.
(d) Distribution of interest.
(e) Use of interest for economic development.
(f) Limitation.
1776e. Eligibility for other Federal services.
1776f. Exchanges of land or minerals.
(a) In general.
(b) Ownership by non-Indians.
1776g. Applicability.
(a) In general.
(b) Approval of releases and waivers.
1776h. Escrow funds.
(a) In general.
(b) Establishment of Suspension Accounts.
(c) Contributions to the Suspension Accounts.
(d) Limitation.
(e) Investment.
(f) Withdrawals and termination.
1776i. Fort Laramie Treaty of 1868.
1776j. Satisfaction of claims.
1776k. Authorization of appropriations.



## SUBCHAPTER I—RHODE ISLAND INDIAN CLAIMS SETTLEMENT

### PART A—GENERAL PROVISIONS

### § 1701. Congressional findings and declaration of policy

#### HISTORICAL AND STATUTORY NOTES

**Short Title**

For short title of Pub.L. 100-95, which enacted subchapter V of this chapter as the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, see section 1 of Pub.L. 100-95, set out as a note under section 1771 of this title.

#### NOTES OF DECISIONS

**State regulation or control** 1

1. State regulation or control

Property tax assessed and levied by State against natural gas pipeline was not preempted by federal statutes or regulations to extent that pipeline owned by non-Indian entity ran through Indian reservation trust lands; regulation of right-of-way grants across reservation lands was at best tangentially related to property tax on pipeline sitting in existing right-of-way, and al-

Option agreements to purchase private settlement lands

LIBRARY REFERENCES

C.J.S. Indians § 67 et seq.

## § 1705. Publication of findings; approval of prior transfers and extinguishment of claims and aboriginal title involving Narragansett Tribe and town of Charlestown, Rhode Island

LIBRARY REFERENCES

C.J.S. Indians § 67 et seq.

## § 1707. Purchase and transfer of private settlement lands

LIBRARY REFERENCES

C.J.S. Indians § 67 et seq.

## § 1708. Applicability of State law

LIBRARY REFERENCES

C.J.S. Indians §§ 5, 54 et seq.

NOTES OF DECISIONS

Jurisdiction over tribe 1
Regulatory powers of tribe 3
Waiver of sovereign immunity 2

1. Jurisdiction over tribe

Rhode Island Indian Claims Settlement Act section, providing that settlement land shall be subject to civil and criminal laws and jurisdiction of State of Rhode Island, was valid conferral of jurisdiction, despite Narragansett Tribe's claim that until federal recognition occurred after effective date of Act, Tribe had no jurisdiction to relinquish; Tribe did not surrender jurisdiction upon entering into settlement which formed basis of Settlement Act but, rather, Tribe, state and town came to agreement to ask Congress, among other things, to grant jurisdiction to state and, in any event, Tribe's retained sovereignty predated federal recognition. State of R.I. v. Narragansett Indian Tribe, C.A.1 (R.I.) 1994, 19 F.3d 685.

Statute which confers state jurisdiction over Indian tribal settlement lands cannot confer jurisdiction over the tribe itself. Maynard v. Narragansett Indian Tribe, D.R.I.1992, 798 F.Supp. 94.

2. Waiver of sovereign immunity

Indian tribe's surrender of right to sue for lands not included in settlement of tribe's claim of superior and aboriginal title to lands within state did not result in surrender of tribe's sovereign immunity from suit relating to territorial or extraterritorial actions and, thus, Indian tribe possessed sovereign immunity from suit brought by abutting landowner for alleged trespass, absent any explicit congressional authorization to contrary. Maynard v. Narragansett Indian Tribe, C.A.1 (R.I.) 1993, 984 F.2d 14.

Statute conferring state jurisdiction over Indian tribal settlement lands does not waive or abrogate tribe's sovereign immunity; provision does not expressly and clearly state such waiver or abrogation. Maynard v. Narragansett Indian Tribe, D.R.I.1992, 798 F.Supp. 94.

3. Regulatory powers of tribe

Statute conferring state jurisdiction over Indian tribal settlement lands does not abrogate tribe's civil regulatory powers; statute subjects settlement lands to state criminal and civil laws, but not all laws, meaning there must be some laws which do not apply to settlement lands. Maynard v. Narragansett Indian Tribe, D.R.I. 1992, 798 F.Supp. 94.

## § 1711. Limitation of actions; jurisdiction

WEST'S FEDERAL FORMS

Affirmative defenses, statute of limitations, see § 2112 et seq.





C.J.S. Indians § 67 et seq.

SUBCHAPTER II—MAINE INDIAN CLAIMS SETTLEMENT

## 1721. Congressional findings and declaration of policy

HISTORICAL AND STATUTORY NOTES

roostook Band of Micmacs Settlement Act

Pub.L. 102-171, Nov. 26, 1991, 105 Stat. 1143, rovided that:

Section 1. Short Title.

"This Act may be cited as the 'Aroostook and of Micmacs Settlement Act'.

Sec. 2. Congressional findings and declaration of policy.

"(a) Findings and policy.—Congress hereby nds and declares that:

"(1) The Aroostook Band of Micmacs, as represented as of the time of passage of this Act by the Aroostook Micmac Council, is the sole successor in interest, as to lands within the United States, to the aboriginal entity generally known as the Micmac Nation which years ago claimed aboriginal title to certain lands in the State of Maine.

"(2) The Band was not referred to in the Maine Indian Claims Settlement Act of 1980 [this subchapter] because historical documentation of the Micmac presence in Maine was not available at that time.

"(3) This documentation does establish the historical presence of Micmacs in Maine and the existence of aboriginal lands in Maine jointly used by the Micmacs and other tribes to which the Micmacs could have asserted aboriginal title but for the extinguishment of all such claims by the Maine Indian Claims Settlement Act of 1980.

"(4) The Aroostook Band of Micmacs, in both its history and its presence in Maine, is similar to the Houlton Band of Maliseet Indians and would have received similar treatment under the Maine Indian Claims Settlement Act of 1980 if the information available today had been available to Congress and the parties at that time.

"(5) It is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefited from inclusion in the Maine Indian Claims Settlement Act of 1980.

"(6) Since 1820, the State of Maine has provided special services to the Indians residing within its borders, including the members of the Aroostook Band of Micmacs. During this same period, the United States provided few special services to the Band and repeatedly denied that it had jurisdiction over or responsibility for the Indian groups in Maine. In view of this provision of special services by the State of Maine, requiring substantial expenditures by the State of Maine and made by the State of Maine without being required to do so by Federal law, it is the intent of Congress that the State of Maine not be required further to contribute directly to this settlement.

"(b) Purpose.—It is the purpose of this Act to—

"(1) provide Federal recognition of the Band;

"(2) provide to the members of the Band the services which the United States provides to Indians because of their status as Indians; and

"(3) place $900,000 in a land acquisition fund and property tax fund for the future use of the Aroostook Band of Micmacs; and

"(4) ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs.

"Sec. 3. Definitions.

"For the purposes of this Act:

"(1) The term 'Band' means the Aroostook Band of Micmacs, the sole successor to the Micmac Nation as constituted in aboriginal times in what is now the State of Maine, and all its predecessors and successors in interest. The Aroostook Band of Micmacs is represented, as of the date of enactment of this Act [Nov. 26, 1991], as to lands within the United States, by the Aroostook Micmac Council.

"(2) The term 'Band Tax Fund' means the fund established under section 4(b) of this Act.

"(3) The term 'Band Trust Land' means land or natural resources acquired by the Secretary of the Interior and held in trust by the United States for the benefit of the Band.

"(4) The term 'land or natural resources' means any real property or natural resources, or any interest in or right involving any real property or natural resources, including (but not limited to) minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights.

"(5) The term 'Land Acquisition Fund' means the fund established under section 4(a) of this Act.

"(6) The term 'laws of the State' means the constitution, and all statutes, regulations, and common laws of the State of Maine and its political subdivisions and all subsequent amendments thereto or judicial interpretations thereof.

## SUBCHAPTER IV—CONNECTICUT INDIAN LAND CLAIMS SETTLEMENT

### § 1751. Congressional findings

The Congress finds that—

(a) there is pending before the United States District Court for the District of Connecticut a civil action entitled "Western Pequot Tribe of Indians against Holdridge Enterprises Incorporated, et al., Civil Action Numbered H76-193 (D. Conn.)," which involves Indian claims to certain public and private lands within the town of Ledyard, Connecticut;

(b) the pendency of this lawsuit has placed a cloud on the titles to much of the land in the town of Ledyard, including lands not involved in the lawsuit, which has resulted in severe economic hardships for the residents of the town;

(c) the Congress shares with the State of Connecticut and the parties to the lawsuit a desire to remove all clouds on titles resulting from such Indian land claims;

(d) the parties to the lawsuit and others interested in the settlement of Indian [illegible] within the State of Connecticut have reached an agreement which [illegible] of the United States and the

) the Western Pequot Tribe, as represented as of October 18, 1983 ...antucket Pequot Tribal Council, is the sole successor in interes ...original entity generally known as the Western Pequot Tribe which y... claimed aboriginal title to certain lands in the State of Connecticut; and

(f) the State of Connecticut is contributing twenty acres of land owned by the State of Connecticut to fulfill this subchapter. The State of Connecticut will construct and repair three sections of paved or gravel roadways within the reservation of the Tribe. The State of Connecticut has provided special services to the members of the Western Pequot Tribe residing within its borders. The United States has provided few, if any, special services to the Western Pequot Tribe and has denied that it had jurisdiction over or responsibility for said Tribe. In view of the provision of land by the State of Connecticut, the provision of paved roadways by the State of Connecticut, and the provision of special services by the State of Connecticut without being required to do so by Federal law, it is the intent of Congress that the State of Connecticut not be required to otherwise contribute directly to this claims settlement.

(Pub.L. 98-134, § 2, Oct. 18, 1983, 97 Stat. 851.)

HISTORICAL AND STATUTORY NOTES

Short Title

Section 1 of Pub.L. 98-134 provided: "That this Act [enacting this subchapter] may be cited as the 'Mashantucket Pequot Indian Claims Settlement Act'."

## § 1752. Definitions

For the purposes of this subchapter—

(1) The term "Tribe" means the Mashantucket Pequot Tribe (also known as the Western Pequot Tribe) as identified by chapter 832 of the Connecticut General Statutes and all its predecessors and successors in interest. The Mashantucket Pequot Tribe is represented, as of October 18, 1983, by the Mashantucket Pequot Tribal Council.

(2) The term "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resources, including without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights.

(3) The term "private settlement lands" means—

(A) the eight hundred acres, more or less, of privately held land which are identified by a red outline on a map filed with the secretary of the State of Connecticut in accordance with the agreement referred to in section 1751(d) of this title, and

(B) the lands known as the Cedar Swamp which are adjacent to the Mashantucket Pequot Reservation as it exists on October 18, 1983. Within thirty days of October 18, 1983, the secretary of the State of Connecticut shall transmit to the Secretary a certified copy of said map.

(4) The term "settlement lands" means—

(A) the lands described in sections 2(a) and 3 of the Act To Implement the Settlement of the Mashantucket Pequot Indian Land Claims as enacted by the State of Connecticut and approved on June 9, 1982, and

(B) the private settlement lands.

(5) The term "Secretary" means the Secretary of the Interior.

(6) The term "transfer" means any transaction involving, or any transaction the purpose of which was to effect, a change in title to or control of any land or natural resources, and any act, event, or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources, including any sale, grant, lease, allotment, partition, or conveyance, whether pursuant to a treaty, compact, or statute of a State or otherwise.

(7) The term "reservation" means the existing reservation of the Tribe as defined by chapter 824 of the Connecticut General Statutes and any settlement lands taken in trust by the United States for the Tribe.

HISTORICAL ...

...nces in Text

The provisions of the Connecticut General Statutes relating to the Mashantucket Pequot Indians are set out in chapter 824 (C.G.S.A. § 47-57 et seq.) of the General Statutes.

## § 1753. Extinguishment of aboriginal titles and Indian claims

(a) Approval and ratification of prior transfers

Any transfer before October 18, 1983, from, by, or on behalf of the Tribe or any of its members of land or natural resources located anywhere within the United States, and any transfer before October 18, 1983, from, by, or on behalf of any Indian, Indian nation, or tribe or band of Indians of land or natural resources located anywhere within the town of Ledyard, Connecticut, shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including without limitation the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137, 138), and all amendments thereto and all subsequent reenactments and versions thereof, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer.

(b) Extinguishment of title

By virtue of the approval and ratification of a transfer of land or natural resources effected by subsection (a), any aboriginal title held by the Tribe or any member of the Tribe, or any other Indian, Indian nation, or tribe or band of Indians, to any land or natural resources the transfer of which was approved and ratified by subsection (a) shall be regarded as extinguished as of the date of such transfer.

(c) Extinguishment of claims

By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, any claim (including any claim for damages for trespass or for use and occupancy) by, or on behalf of, the Tribe or any member of the Tribe or by any other Indian, Indian nation, or tribe or band of Indians, against the United States, any State or subdivision thereof or any other person which is based on—

(1) any interest in or right involving any land or natural resources the transfer of which was approved and ratified by subsection (a) of this section, or

(2) any aboriginal title to land or natural resources the extinguishment of which was effected by subsection (b) of this section,

shall be regarded as extinguished as of the date of any such transfer.

(d) Savings provision

Nothing in this section shall be construed to affect or eliminate the personal claim of any individual Indian (except for Federal common law fraud claim) which is pursued under any law of general applicability that protects non-Indians as well as Indians.

(e) Effective date; notice

(1) This section shall take effect upon the appropriation of $900,000 as authorized under section 1754(e) of this title.

(2) The Secretary shall publish notice of such appropriation in the Federal Register when the funds are deposited in the fund established under section 1754(a) of this title.

(Pub.L. 98-134, § 4, Oct. 18, 1983, 97 Stat. 852.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Trade and Intercourse Act of 1790 (1 Stat. 137), referred to in subsec. (a), is Act July 22, 1790, c. 33, 1 Stat. 137, which is not classified to the Code.

## § 1754. Mashantucket Pequot Settlement Fund

(a) Establishment and administration

There is hereby established in the United States Treasury an account to be known as ...ashantucket Pequot Settlement Fund (hereinafter referred to in th... section as the

Expending of Fund; private settlement lands; economic develop. acquisition of land and natural resources

(1) The Secretary is authorized and directed to expend, at the request of the Tribe, the Fund together with any and all income accruing to such Fund in accordance with this subsection.

(2) Not less than $600,000 of the Fund shall be available until January 1, 1985, for the acquisition by the Secretary of private settlement lands. Subsequent to January 1, 1985, the Secretary shall determine whether and to what extent an amount less than $600,000 has been expended to acquire private settlement lands and shall make that amount available to the Tribe to be used in accordance with the economic development plan approved pursuant to paragraph (3).

(3)(A) The Secretary shall disburse all or part of the Fund together with any and all income accruing to such Fund (excepting the amount reserved in paragraph (2)) according to a plan to promote the economic development of the Tribe.

(B) The Tribe shall submit an economic development plan to the Secretary and the Secretary shall approve such plan within sixty days of its submission if he finds that it is reasonably related to the economic development of the Tribe. If the Secretary does not approve such plan, he shall, at the time of his decision, set forth in writing and with particularity, the reasons for his disapproval.

(C) The Secretary may not agree to terms which provide for the investment of the Fund in a manner inconsistent with section 162a of this title, unless the Tribe first submits a specific waiver of liability on the part of the United States for any loss which may result from such an investment.

(D) The Tribe may, with the approval of the Secretary, alter the economic development plan subject to the conditions set forth in subparagraph (B).

(4) Under no circumstances shall any part of the Fund be distributed to any member of the Tribe unless pursuant to the economic development plan approved by the Secretary under paragraph (3).

(5) As the Fund or any portion thereof is disbursed by the Secretary in accordance with this section, the United States shall have no further trust responsibility to the Tribe or its members with respect to the sums paid, any subsequent expenditures of these sums, or any property other than private settlement lands or services purchased with these sums.

(6) Until the Tribe has submitted and the Secretary has approved the terms of the use of the Fund, the Secretary shall fix the terms for the administration of the portion of the Fund as to which there is no agreement.

(7) Lands or natural resources acquired under this subsection which are located within the settlement lands shall be held in trust by the United States for the benefit of the Tribe.

(8) Land or natural resources acquired under this subsection which are located outside of the settlement lands shall be held in fee by the Mashantucket Pequot Tribe, and the United States shall have no further trust responsibility with respect to such land and natural resources. Such land and natural resources shall not be subject to any restriction against alienation under the laws of the United States.

(9) Notwithstanding the provisions of section 257 of Title 40 and section 258a of Title 40, the Secretary may acquire land or natural resources under this section from the ostensible owner of the land or natural resources only if the Secretary and the ostensible owner of the land or natural resources have agreed upon the identity of the land or natural resources to be sold and upon the purchase price and other terms of sale. Subject to the agreement required by the preceding sentence, the Secretary may institute condemnation proceedings in order to perfect title, satisfactory to the Attorney General, in the United States and condemn interests adverse to the ostensible owner.

(c) Transfer of private settlement land as involuntary conversion

For the purpose of subtitle A of the Internal Revenue Code of 1954 [26 U.S.C.A. § 1 et seq.], any transfer of private settlement lands to which subsection (b) of this section



(d) Documentation of relinquishment of tribal claims

The Secretary may not expend on behalf of the Tribe any sums deposited in the Fund established pursuant to subsection (a) of this section unless and until he finds that authorized officials of the Tribe have executed appropriate documents relinquishing all claims to the extent provided by sections 1753 and 1759 of this title, including stipulations to the final judicial dismissal with prejudice of its claims.

(e) Authorization of appropriation

There is authorized to be appropriated $900,000 to be deposited in the Fund.

(Pub.L. 98-134, § 5, Oct. 18, 1983, 97 Stat. 853.)

HISTORICAL AND STATUTORY NOTES

References in Text

Subtitle A of the Internal Revenue Code of 1954, referred to in subsec. (c), is set out in section 1 et seq. of Title 26, Internal Revenue Code.

§ 1755. State jurisdiction over reservation

Notwithstanding the provision relating to a special election in section 406 of the Act of April 11, 1968 (82 Stat. 80; 25 U.S.C. 1326) [25 U.S.C.A. § 1326], the reservation of the Tribe is declared to be Indian country subject to State jurisdiction to the maximum extent provided in title IV of such Act [25 U.S.C.A. § 1321 et seq.].

(Pub.L. 98-134, § 6, Oct. 18, 1983, 97 Stat. 855.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Act of April 11, 1968, referred to in text, is Pub.L. 90-284, Apr. 11, 1968, 82 Stat. 73. Title IV of that Act is classified to subchapter III (§ 1321 et seq.) of chapter 15 of this title. Section 406 of that Act is classified to section 1326 of this title.

§ 1756. Practice and procedure

(a) Constitutionality

Notwithstanding any other provision of law, the constitutionality of this subchapter may not be drawn into question in any action unless such question has been raised in—

(1) a pleading contained in a complaint filed before the end of the one-hundred-and-eighty-day period beginning on October 18, 1983, or

(2) an answer contained in a reply to a complaint before the end of such period.

(b) Jurisdiction

Notwithstanding any other provision of law, exclusive jurisdiction of any action in which the constitutionality of this subchapter is drawn into question is vested in the United States District Court for the District of Connecticut.

(c) Removal of actions

Any action to which subsection (a) of this section applies and which is brought in the court of any State may be removed by the defendant to the United States District Court for the District of Connecticut.

(d) Jurisdictional acts; implied consent to sue the United States

Except as provided in this subchapter, no provision of this subchapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, or to grant implied consent to any Indian, Indian nation, or tribe or band of Indians to sue the United States or any of its officers with respect to the claims extinguished by the operation of this subchapter.

(Pub.L. 98-134, § 7, Oct. 18, 1983, 97 Stat. 855.)

'ubject to subsection (b) of this section, lands within the reservation v ar- rust by the Secretary for the benefit of the Tribe or which are si restraint against alienation at any time after October 18, 1983, shall je to the laws of the United States relating to Indian lands, including section 177 of this title.

(b) Notwithstanding subsection (a) of this section, the Tribe may lease lands for any term of years to the Mashantucket Pequot Housing Authority, or any successor in interest to such Authority.

(Pub.L. 98-134, § 8, Oct. 18, 1983, 97 Stat. 855.)

## § 1758. Extension of Federal recognition and privileges

### (a) Applicability of United States laws and regulations

Notwithstanding any other provision of law, Federal recognition is extended to the Tribe. Except as otherwise provided in this subchapter, all laws and regulations of the United States of general application to Indians or Indian nations, tribes or bands of Indians which are not inconsistent with any specific provision of this subchapter shall be applicable to the Tribe.

### (b) Filing of organic governing document and amendments

The Tribe shall file with the Secretary a copy of its organic governing document and any amendments thereto. Such instrument must be consistent with the terms of this subchapter and the Act to Implement the Settlement of the Mashantucket Pequot Indian Land Claim as enacted by the State of Connecticut and approved June 9, 1982.

### (c) Eligibility for services and benefits

Notwithstanding any other provision of law, the Tribe and members of the Tribe shall be eligible for all Federal services and benefits furnished to federally recognized Indian tribes as of October 18, 1983.

(Pub.L. 98-134, § 9, Oct. 18, 1983, 97 Stat. 855.)

## § 1759. General discharge and release of State of Connecticut

Except as expressly provided herein, this subchapter shall constitute a general discharge and release of all obligations of the State of Connecticut and all of its political subdivisions, agencies, departments, and all of the officers or employees thereof arising from any treaty or agreement with, or on behalf of the Tribe or the United States as trustee therefor.

(Pub.L. 98-134, § 10, Oct. 18, 1983, 97 Stat. 856.)

## § 1760. Separability of provisions

In the event that any provision of section 4 of this Title is held invalid, it is the intent of Congress that the entire subchapter be invalidated. In the event that any other section or provision of this subchapter is held invalid, it is the intent of Congress that the remaining sections of this subchapter shall continue in full force and effect.

(Pub.L. 98-134, § 11, Oct. 18, 1983, 97 Stat. 856.)

## SUBCHAPTER V—MASSACHUSETTS INDIAN LAND CLAIMS SETTLEMENT

### § 1771. Congressional findings and declaration of policy

The Congress hereby finds and declares that—

(1) there is pending before the United States District Court for the District of Massachusetts a lawsuit that involves Indian claims to certain public lands within the town of Gay Head, Massachusetts;

(2) the pendency of this lawsuit has resulted in severe economic hardships for the [illegible] Head by clouding the titles to much of the land in the

(3) the Congress shares with the Commonwealth of Mass[illegible] om such parties to the lawsuit a desire to remove all clouds on titles t[illegible] Indian land claim;

(4) the parties to the lawsuit and others interested in settlement of Indian land claims within the Commonwealth of Massachusetts executed a Settlement Agreement which, to become effective, requires implementing legislation by the Congress of the United States and the General Court of the Commonwealth of Massachusetts;

(5) the town of Gay Head has agreed to contribute approximately 50 percent of the land involved in this settlement;

(6) the State of Massachusetts has agreed to provide up to $2,250,000 to be used for the purchase of land to be held in trust by the Secretary for the use and benefit of the Wampanoag Tribal Council of Gay Head, Inc.; and

(7) the Secretary has acknowledged the existence of the Wampanoag Tribal Council of Gay Head, Inc. as an Indian tribe and Congress hereby ratifies and confirms that existence as an Indian tribe with a government to government relationship with the United States.

(Pub.L. 100-95, § 2, Aug. 18, 1987, 101 Stat. 704.)

#### HISTORICAL AND STATUTORY NOTES

**Effective Date**

Section 11 of Pub.L. 100-95 provided that:

"(a) In general.—Except as provided in subsection (b), this Act [enacting this subchapter and enacting a provision set out as a note under this section] shall take effect upon the date of enactment [Aug. 18, 1987].

"(b) Exception.—Section 4 [section 1771b of this title] shall take effect upon the date on which the title of all of the private settlement lands provided for in this Act to the Wampanoag Tribal Council of Gay Head, Inc. is transferred. The fact of such transfer, and the date thereof, shall be certified and recorded by the Secretary of the Commonwealth of Massachusetts."

**Short Title**

Section 1 of Pub.L. 100-95 provided that: "This Act [enacting this subchapter and enacting a provision set out as a note under this section] may be cited as the 'Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987.'"

#### LIBRARY REFERENCES

Indians ⇐10.
Public Lands ⇐3.

C.J.S. Indians §§ 4 et seq., 80, 67 et seq.
C.J.S. Public Lands § 37 et seq.

### § 1771a. Gay Head Indian claims settlement fund

#### (a) Fund established

There is hereby established within the Treasury of the United States a fund to be known as the "Wampanoag Tribal Council of Gay Head, Inc. Claims Settlement Fund". Amounts in the fund shall be available to the Secretary to carry out the purposes of this subchapter.

#### (b) Authorization for appropriation

There is hereby authorized to be appropriated $2,250,000 for such fund to remain available until expended.

#### (c) State contribution required

Amounts may be expended from the fund only upon deposit by the State of Massachusetts into the fund of an amount equal to that amount to be expended by the United States so that both the United States and the State of Massachusetts bear one-half of the cost of the acquisition of lands under section 1771d of this title.

(Pub.L. 100-95, § 3, Aug. 18, 1987, 101 Stat. 704.)

#### HISTORICAL AND STATUTORY NOTES

**Effective Date**

Section effective Aug. 18, 1987, see section [illegible] 100-95 set out as a note under

LIBRARY REFERENCES

...ns ⇐10.
Public Lands ⇐3.

C.J.S. Indians § 80, 67 et seq.
C.J.S. Public Lands § 87 et seq.

## § 1771b. Approval of prior transfers and extinguishment of aboriginal title and claims of Gay Head Indians

### (a) Approval of prior transfers

(1) Any transfer before August 18, 1987, of land or natural resources now located anywhere within the United States from, by, or on behalf of the Wampanoag Tribal Council of Gay Head, Inc., or (2) any transfer before August 18, 1987, by, from, or on behalf of any Indian, Indian nation, or tribe or band of Indians, of any land or natural resources located anywhere within the town of Gay Head, Massachusetts, including any transfer pursuant to any statute of the State, and the incorporation of the town of Gay Head, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe or band of Indians (including the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof). Any such transfer and any transfer in implementation of this subchapter, shall be deemed to have been made with the consent and approval of Congress as of the date of such transfer.

### (b) Extinguishment of aboriginal title

Any aboriginal title held by the Wampanoag Tribal Council of Gay Head, Inc. or any other entity presently or at any time in the past known as the Gay Head Indians, to any land or natural resources the transfer of which is consented to and approved in subsection (a) of this section is considered extinguished as of the date of such transfer.

### (c) Extinguishment of claims arising from prior transfers or extinguishment of aboriginal title

Any claim (including any claim for damages for use and occupancy) by the Wampanoag Tribal Council of Gay Head, Inc., the Gay Head Indians, or any other Indian, Indian nation, or tribe or band of Indians against the United States, any State or political subdivision of a State, or any other person which is based on—

(1) any transfer of land or natural resources which is consented to and approved in subsection (a) of this section or

(2) any aboriginal title to land or natural resources the transfer of which is consented to and approved in subsection (b)

is extinguished as of the date of any such transfer.

### (d) Personal claims not affected

No provision of this section shall be construed to offset or eliminate the personal claim of any individual Indian which is pursued under any law of general applicability that protects non-Indians as well as Indians.

(Pub.L. 100-95, § 4, Aug. 18, 1987, 101 Stat. 706.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137, 138), referred to in subsec. (a), is not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

Effective Date

Section effective upon the date on which the title of all of the private settlement lands provided for in this subchapter to the Wampanoag Tribal Council of Gay Head, Inc. is transferred, with the fact of such transfer, and the date thereof, to be certified and recorded by the Secretary of the Commonwealth of Massachusetts, see section 11(b) of Pub.L. 100-95, set out as a note under section 1771 of this title.

LIBRARY REFERENCES

...dians ⇐10.

C.J.S. Indians § 67 et seq.

## 1771c. Conditions precedent to Federal purchase of settlement ...

### (a) Initial determination of State and local action

No action shall be taken by the Secretary under section 1771d of this title before the Secretary publishes notice in the Federal Register of the determination by the Secretary that—

(1) the Commonwealth of Massachusetts has enacted legislation which provides that—

(A) the town of Gay Head, Massachusetts, is authorized to convey to the Secretary to be held in trust for the Wampanoag Tribal Council of Gay Head, Inc. the public settlement lands and the Cook lands subject to the conditions and limitations set forth in the Settlement Agreement; and

(B) the Wampanoag Tribal Council of Gay Head, Inc. shall have the authority, after consultation with appropriate State and local officials, to regulate any hunting by Indians on the settlement lands that is conducted by means other than firearms or crossbow to the extent provided in, and subject to the conditions and limitations set forth in, the Settlement Agreement;

(2) the Wampanoag Tribal Council of Gay Head, Inc., has submitted to the Secretary an executed waiver or waivers of the claims covered by the Settlement Agreement all claims extinguished by this subchapter, and all claims arising because of the approval of transfers and extinguishment of titles and claims under this subchapter, and

(3) the town of Gay Head, Massachusetts, has authorized the conveyance of the public settlement lands and the Cook Lands to the Secretary in trust for the Wampanoag Tribal Council of Gay Head, Inc.

### (b) Reliance upon the Attorney General of Massachusetts

In making the findings required in subsection (a) of this section, the Secretary may rely upon the opinion of the Attorney General of the Commonwealth of Massachusetts.

(Pub.L. 100-95, § 5, Aug. 18, 1987, 101 Stat. 706.)

HISTORICAL AND STATUTORY NOTES

Effective Date

Section effective Aug. 18, 1987, see section 11(a) of Pub.L. 100-95, set out as a note under section 1771 of this title.

LIBRARY REFERENCES

Indians ⇐10.
Public Lands ⇐3.

C.J.S. Indians § 67 et seq.
C.J.S. Public Lands § 87 et seq.

## § 1771d. Purchase and transfer of settlement lands

### (a) Purchase of private settlement lands

The Secretary is authorized and directed to expend, at the request of the Wampanoag Tribal Council of Gay Head, Inc., $2,125,000 to acquire the private settlement lands. At the request of the Wampanoag Tribal Council of Gay Head, Inc., the Secretary shall not purchase lots 705, 222, and 528 of the private settlement lands, but, at the request of the Wampanoag Tribal Council of Gay Head, Inc., the Secretary shall acquire in lieu thereof such other lands that are contiguous to the remaining private settlement lands. Upon the purchase of such contiguous lands, those lands shall be subject to the same restrictions and benefits as the private settlement lands.

### (b) Payment for survey and appraisal

The Secretary is authorized and directed to cause a survey of the public settlement lands to be made within 60 days of acquiring title to the public settlement lands. The Secretary shall reimburse the Native American Rights Fund and the Gay Head Taxpayers Association for an appraisal of the private settlement lands done by Paul O'Leary dated May 1, 1987. Such funds as may be necessary may be withdrawn from the Fund established in section 1771a(a) of this title and may be used for the purpose of ... and providing reimbursement for the appraisal.

(c) Acquisition of additional lands

The Secretary shall expend, at the request of the Wampanoag Tribal Council of Gay Head, Inc., any remaining funds not required by subsection (a) or (b) of this section to acquire any additional lands that are contiguous to the private settlement lands. Any lands acquired pursuant to this section, and any other lands which are hereafter held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to this subchapter, the Settlement Agreement and other applicable laws. Any after acquired land held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to the same benefits and restrictions as apply to the most analogous land use described in the Settlement Agreement.

(d) Transfer and survey of land to Wampanoag Tribal Council

Any right, title, or interest to lands acquired by the Secretary under this section, and the title to public settlement lands conveyed by the town of Gay Head, shall be held in trust for the Wampanoag Tribal Council of Gay Head, Inc. and shall be subject to this subchapter, the Settlement Agreement, and other applicable laws.

(e) Proceedings authorized to acquire or to perfect title

The Secretary is authorized to commence such condemnation proceedings as the Secretary may determine to be necessary—

(1) to acquire or perfect any right, title, or interest in any private settlement land, and

(2) to condemn any interest adverse to any ostensible owner of such land.

(f) Public settlement lands held in trust

The Secretary is authorized to accept and hold in trust for the benefit of the Wampanoag Tribal Council of Gay Head, Inc. the public settlement lands as described in section 1771f(7) of this title immediately upon the effective date of this Act.

(g) Application

The terms of this section shall apply to land in the town of Gay Head. Any land acquired by the Wampanoag Tribal Council of Gay Head, Inc., that is located outside the town of Gay Head shall be subject to all the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts.

(h) Spending authority

Any spending authority (as defined in section 651(c)(2) of Title 2 provided in this section shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

(Pub.L. 100-95, § 6, Aug. 18, 1987, 101 Stat. 706.)

HISTORICAL AND STATUTORY NOTES

References in Text

The effective date of this Act, referred to in subsec. (f), is the effective date of Pub.L. 100-95. See section 11 of Pub.L. 100-95, set out as a note under section 1771 of this title.

Effective Date

Section effective Aug. 18, 1987, see section 11(a) of Pub.L. 100-95, set out as a note under section 1771 of this title.

LIBRARY REFERENCES

Indians ⇐10.
Public Lands ⇐3.

C.J.S. Indians § 67 et seq.
C.J.S. Public Lands § 37 et seq.

## § 1771e. Jurisdiction over settlement lands; restraint on alienation

(a) Limitation on Indian jurisdiction over settlement lands

The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and

(b) Subsequent holder bound to same terms and conditions

Any tribe or tribal organization which acquires any settlement land or other land that may now or in the future be owned by or held in trust for any Indian entity in the town of Gay Head, Massachusetts, from the Wampanoag Tribal Council of Gay Head, Inc. shall hold such beneficial interest to such land subject to the same terms and conditions as are applicable to such lands when held by such council.

(c) Reservations of right and authority relating to settlement lands

No provision of this subchapter, shall affect or otherwise impair—

(1) any authority to impose a lien or temporary seizure on the settlement lands as provided in the State Implementing Act;

(2) the authority of the Secretary to approve leases in accordance with the Act entitled "An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases", approved August 9, 1955 (25 U.S.C. 415 et seq.); or

(3) the legal capacity of the Wampanoag Tribal Council of Gay Head, Inc. to transfer the settlement lands to any tribal entity which may be organized as a successor in interest to Wampanoag Tribal Council of Gay Head, Inc. or to transfer—

(A) the right to use the settlement lands to its members,

(B) any easement for public or private purposes in accordance with the laws of the Commonwealth of Massachusetts or the ordinances of the town of Gay Head, Massachusetts, or

(C) title to the West Basin Strip to the town of Gay Head, Massachusetts, pursuant to the terms of the Settlement Agreement.

(d) Exemption from State assessment

Any land held in trust by the Secretary for the benefit of the Wampanoag Tribal Council of Gay Head, Inc. shall be exempt from taxation or lien or "in lieu of payment" or other assessment by the State or any political subdivision of the State to the extent provided by the Settlement Agreement: *Provided, however,* That such taxation or lien or "in lieu of payment" or other assessment will only apply to lands which are zoned and utilized as commercial: *Provided further,* That this section shall not be interpreted as restricting the Tribe from entering into an agreement with the town of Gay Head to reimburse such town for the delivery of specific public services on the tribal lands.

(Pub.L. 100-95, § 7, Aug. 18, 1987, 101 Stat. 707.)

HISTORICAL AND STATUTORY NOTES

References in Text

The State Implementing Act, referred to in subsec. (c)(1), means legislation enacted by the Commonwealth of Massachusetts conforming to the requirements of this subchapter and the requirements of the Massachusetts Constitution. See section 1771f(11) of this title.

An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases, approved August 9, 1955, referred to in subsec. (c)(2), is Act Aug. 9, 1955, c. 615, 69 Stat. 539, as amended, which enacted section 415 to 415d of this title and amended section 396 of this title. For complete classification of this Act to the Code, see Tables.

Effective Date

Section effective Aug. 18, 1987, see section 11(a) of Pub.L. 100-95, set out as a note under section 1771 of this title.

LIBRARY REFERENCES

Indians ⇐10.
Public Lands ⇐3.

C.J.S. Indians §§ 67 et seq., 90 et seq.
C.J.S. Public Lands § 37 et seq.

## § 1771f. Definitions

For the purposes of this Act:

(1) Cook lands

... the lands described in paragraph (5) of the

(2) Wampanoag Tribal Council of Gay Head, Inc.

The term "Wampanoag Tribal Council of Gay Head, Inc." means th ntity recognized by the Secretary of the Interior as having a government to government relationship with the United States. The Wampanoag Tribal Council of Gay Head, Inc. is the sole and legitimate tribal entity which has a claim under the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137), to land within the town of Gay Head. The membership of the Wampanoag Tribal Council of Gay Head, Inc., includes those 521 individuals who have been recognized by the Secretary of the Interior as being members of the Wampanoag Tribal Council of Gay Head, Inc., and such Indians of Gay Head ancestry as may be added from time to time by the governing body of the Wampanoag Tribal Council of Gay Head, Inc.: *Provided*, That nothing in this section shall prevent the voluntary withdrawal from membership in the Wampanoag Tribal Council of Gay Head, Inc., pursuant to procedures established by the Tribe. The governing body of the Wampanoag Tribal Council of Gay Head, Inc. is hereby authorized to act on behalf of and bind the Wampanoag Tribal Council of Gay Head, Inc., in all matters related to carrying out this subchapter.

(3) Fund

The term "fund" means the Wampanoag Tribal Council of Gay Head, Inc. Claims Settlement Fund established under section 1771a of this title.

(4) Land or natural resources

The term "land or natural resources" means any real property or natural resources or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish.

(5) Lawsuit

The term "lawsuit" means the action entitled Wampanoag Tribal Council of Gay Head, and others versus Town of Gay Head, and others (C.A. No. 74-5826-McN (D.Mass.)).

(6) Private settlement lands

The term "private settlement lands" means approximately 177 acres of privately held land described in paragraph 6 of the Settlement Agreement.

(7) Public settlement lands

The term "public settlement lands" means the lands described in paragraph (4) of the Settlement Agreement.

(8) Settlement lands

The term "settlement lands" means the private settlement lands and the public settlement lands.

(9) Secretary

The term "Secretary" means the Secretary of the Interior.

(10) Settlement Agreement

The term "Settlement Agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts, Indian Land Claims," executed as of November 22, 1983, and renewed thereafter by representatives of the parties to the lawsuit, and as filed with the Secretary of the Commonwealth of Massachusetts.

(11) State implementing act

The term "State implementing act" means legislation enacted by the Commonwealth of Massachusetts conforming to the requirements of this subchapter, and the requirements of the Massachusetts Constitution.

(12) Transfer

The term "transfer" includes—

(A) any sale, grant, lease, allotment, partition, or conv.

(B) any transaction the purpose of which is to effect a sale, grant, lease, allotment, partition, or conveyance, or

(C) any event or events that resulted in a change of possession or control of land or natural resources.

(13) West Basin Strip

The term "West Basin Strip" means a strip of land along the West Basin which the Wampanoag Tribal Council is authorized to convey, under paragraph (11) of the Settlement Agreement, to the town of Gay Head.

(Pub.L. 100-95, § 8, Aug. 18, 1987, 101 Stat. 708.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137, 138), referred to in par. (1), is not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

Effective Date

Section effective Aug. 18, 1987, see section 11(a) of Pub.L. 100-95, set out as a note under section 1771 of this title.

LIBRARY REFERENCES

Indians ⇐10.
Public Lands ⇐3.

C.J.S. Indians § 67 et seq.
C.J.S. Public Lands § 37 et seq.

## § 1771g. Applicability of State law

Except as otherwise expressly provided in this subchapter, or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

(Pub.L. 100-95, § 9, Aug. 18, 1987, 101 Stat. 709.)

HISTORICAL AND STATUTORY NOTES

References in Text

The State Implementing Act, referred to in text, means legislation enacted by the Commonwealth of Massachusetts conforming to the requirements of this subchapter and the requirements of the Massachusetts Constitution. See section 1771f(11) of this title.

Effective Date

Section effective Aug. 18, 1987, see section 11(a) of Pub.L. 100-95, set out as a note under section 1771 of this title.

LIBRARY REFERENCES

Indians ⇐10.
Public Lands ⇐3.

C.J.S. Indians § 5, 54 et seq.
C.J.S. Public Lands § 37 et seq.

## § 1771h. Limitations of action; jurisdiction

Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this subchapter, shall be barred unless the complaint is filed within thirty days after August 18, 1987. Exclusive original jurisdiction over any such action and any proceedings under section 1771d(e) of this title is hereby vested in the United States District Court of the District of Massachusetts.

(Pub.L. 100-95, § 10, Aug. 18, 1987, 101 Stat. 710.)

## HISTORICAL AND STATUTORY NOTES

**Effective Date**

Section effective Aug. 18, 1987, see section 11(a) of Pub.L. 100-95, set out as a note under section 1771 of this title.

## LIBRARY REFERENCES

| | |
|---|---|
| Indians ⇐10. | C.J.S. Indians § 13 et seq. |
| Public Lands ⇐3. | C.J.S. Public Lands § 87 et seq. |

### § 1771i. Eligibility

For the purpose of eligibility for Federal services made available to members of federally recognized Indian tribes, because of their status as Indians, members of this tribe residing on Martha's Vineyard, Massachusetts, shall be deemed to be living on or near an Indian reservation.

(Pub.L. 100-95, § 12, Aug. 18, 1987, 101 Stat. 710.)

## HISTORICAL AND STATUTORY NOTES

**Effective Date**

Section effective Aug. 18, 1987, see section 11(a) of Pub.L. 100-95, set out as a note under section 1771 of this title.

## LIBRARY REFERENCES

| | |
|---|---|
| Indians ⇐10. | C.J.S. Indians § 67 et seq. |
| Public Lands ⇐3. | C.J.S. Public Lands § 87 et seq. |

### 4h. Authorization of appropriations

There is authorized to be appropriated such sums as may be necessary to carry out this subchapter.

(Pub.L. 101–503, § 10, Nov. 3, 1990, 104 Stat. 1297.)

## SUBCHAPTER IX—MOHEGAN NATION (CONNECTICUT) LAND CLAIMS SETTLEMENT

### § 1775. Findings and purposes

#### (a) Findings

Congress finds the following:

(1) The Mohegan Tribe of Indians of Connecticut received recognition by the United States pursuant to the administrative process under part 83 of title 25 of the Code of Federal Regulations.

(2) The Mohegan Tribe of Indians of Connecticut is the successor in interest to the aboriginal entity known as the Mohegan Indian Tribe.

(3) The Mohegan Tribe has existed in the geographic area that is currently the State of Connecticut for a long period preceding the colonial period of the history of the United States.

(4) Certain lands were sequestered as tribal lands by the Colony of Connecticut and subsequently by the State of Connecticut.

(5) The Mohegan Tribe of Indians of Connecticut v. State of Connecticut, et al (Civil Action No. H–77–434, pending before the United States District Court for the Southern District of Connecticut) relates to the ownership of certain lands within the State of Connecticut.

(6) Such action will likely result in economic hardships for residents of the State of Connecticut, including residents of the town of Montville, Connecticut, by encumbering the title to lands in the State, including lands that are not currently the subject of the action.

(7) The State of Connecticut and the Mohegan Tribe have executed agreements for the purposes of resolving all disputes between the State of Connecticut and the Mohegan Tribe and providing a settlement for the action referred to in paragraph (5).

(8) In order to implement the agreements referred to in paragraphs (5) and (6) of section 1775a of this title that address matters of jurisdiction with respect to certain offenses committed by and against members of the Mohegan Tribe and other Indians in Indian country and matters of gaming-related development, it is necessary for the Congress to enact legislation.

(9) The town of Montville, Connecticut, will—

(A) be affected by the loss of a tax base from, and jurisdiction over, lands that will be held in trust by the United States on behalf of the Mohegan Tribe; and

(B) serve as the host community for the gaming operations of the Mohegan Tribe.

(10) The town of Montville and the Mohegan Tribe have entered into an agreement to resolve issues extant between them and to establish the basis for a cooperative government-to-government relationship.

#### (b) Purposes

The purposes of this subchapter are as follows:

(1) To facilitate the settlement of claims against the State of Connecticut by the Mohegan Tribe.

(2) To facilitate the removal of any encumbrance to any title to land in the State of Connecticut that would have resulted from the action referred to in subsection (a)

HISTORICAL AND STATUTORY NOTES

**Short Title**

Section 1 of Pub.L. 103–377 provided that: "This Act [enacting this subchapter] may be cited as the 'Mohegan Nation of [redacted] Land Claims Settlement Act of 1994'."

LIBRARY REFERENCES

Indians ⇐10.
C.J.S. Indians §§ 80, 67 to 80.
WESTLAW Topic No. 209.

### § 1775a. Definitions

As used in this subchapter:

#### (1) Lands or natural resources

The term "lands or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resources, including any right or interest in minerals, timber, or water, and any hunting or fishing rights.

#### (2) Mohegan Tribe

The term "Mohegan Tribe" means the Mohegan Tribe of Indians of Connecticut, a tribe of American Indians recognized by the United States pursuant to part 83 of title 25, Code of Federal Regulations, and the State of Connecticut pursuant to section 47–59a(b) of the Connecticut General Statutes.

#### (3) Secretary

The term "Secretary" means the Secretary of the Interior.

#### (4) State

The term "State" means the State of Connecticut.

#### (5) State Agreement

The term "State Agreement" means the Agreement between the Mohegan Tribe and the State of Connecticut, executed on May 17, 1994, by the Governor of the State of Connecticut and the Chief of the Mohegan Tribe, that was filed with the Secretary of State of the State of Connecticut.

#### (6) Town Agreement

The term "Town Agreement" means the agreement executed on June 16, 1994, by the Mayor of the town of Montville and the Chief of the Mohegan Tribe.

#### (7) Transfer

The term "transfer" includes any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which is to effect a sale, grant, lease, allotment, partition, or conveyance, or any event that results in a change of possession or control of land or natural resources.

(Pub.L. 103–377, § 3, Oct. 19, 1994, 108 Stat. 3502.)

### § 1775b. Action by Secretary

#### (a) In general

The Secretary is authorized to carry out the duties specified in subsection (b) of this section at such time as the Secretary makes a determination that—

(1) in accordance with the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), the State of Connecticut has entered into a binding compact with the Mohegan Tribe providing for class III tribal gaming operations (as defined in section 4(8) of such Act (25 U.S.C. 2703(8)));

(2) [redacted] compact has been approved by the Secretary pursuant to section 11(d)(8)

(3) pursuant to transfers carried out pursuant to the State Agreement United States holds title to lands described in exhibit B of the State Agreement in trust for the Mohegan Tribe to be used as the initial Indian reservation of the Mohegan Tribe.

(b) Publication by Secretary

If the Secretary makes a determination under subsection (a) of this section that the conditions specified in paragraphs (1) through (3) of that subsection have been met, the Secretary shall publish the determination, together with the State Agreement, in the Federal Register.

(c) Effect of publication

(1) In general

Upon the publication of the determination and the State Agreement in the Federal Register pursuant to subsection (b) of this section, a transfer, waiver, release, relinquishment, or other commitment made by the Mohegan Tribe in accordance with the terms and conditions of the State Agreement shall be in full force and effect.

(2) Approval by the United States

(A) The United States hereby approves any transfer, waiver, release, relinquishment, or other commitment carried out pursuant to paragraph (1).

(B) A transfer made pursuant to paragraph (1) shall be deemed to have been made in accordance with all provisions of Federal law that specifically apply to transfers of lands or natural resources from, by, or on behalf of an Indian, Indian nation, or tribe of Indians (including the Act popularly known as the "Trade and Intercourse Act of 1790"; section 4 of the Act of July 22, 1790 (1 Stat. 137, chapter 33)). The approval of the United States made pursuant to subparagraph (A) shall apply to the transfer beginning on the date of the transfer.

(d) Extinguishment of claims

(1) In general

Subject to subsections (f)(2) and (g) of this section, the following claims are hereby extinguished:

(A) Any claim to land within the State of Connecticut based upon aboriginal title by the Mohegan Tribe.

(B) Any other claim that the Mohegan Tribe may have with respect to any public or private lands or natural resources in Connecticut, including any claim or right based on recognized title, including—

(i) any claim that the Mohegan Tribe may have to the tribal sequestered lands bounded out to the Tribe in 1684, consisting of some 20,480 acres lying between the Thames River, New London bounds, Norwich bounds, and Colchester bounds;

(ii) any claim that the Mohegan Tribe may have based on a survey conducted under the authority of the Connecticut General Assembly in 1736 of lands reserved and sequestered by the General Assembly for the sole use and improvement of the Mohegan Indian Tribe; and

(iii) any claim that the Mohegan Tribe may have based on any action by the State carried out in 1860 or 1861 or otherwise made by the State to allot, reallot, or confirm any lands of the Mohegan Tribe to individual Indians or other persons.

(2) Approval by the United States

An extinguishment made pursuant to this subsection shall be deemed to have been made in accordance with all provisions of Federal law that specifically apply to transfers of lands or natural resources from, by, or on behalf of an Indian, Indian [redacted]de and

(e) Transfers

Subject to subsection (g) of this section, any transfer of lands or nat[illegible]sources located within the State of Connecticut, including any such transfer made pursuant to any applicable Federal or State law (including any applicable t[illegible]eaty), made by, from, or on behalf of the Mohegan Tribe or any predecessor or successor in interest of the Mohegan Tribe shall be deemed to be in full force and effect, as provided in subsection (c)(1) of this section.

(f) Limitation

(1) In general

Except as provided in paragraph (2) and subject to subsection (g) of this section, by virtue of the approval by the United States under this section of a transfer of land or the extinguishment of aboriginal title, any claim by the Mohegan Tribe against the United States, any State or political subdivision of a State, or any other person or entity, by the Mohegan Tribe, that—

(A) arises after the transfer or extinguishment is carried out; and

(B) is based on any interest in or right involving any claim to lands or natural resources described in this section, including claims for trespass damages or claims for use and occupancy,

shall, beginning on the date of the transfer of land or the extinguishment of aboriginal title, be considered an extinguished claim.

(2) Exception

The limitation under paragraph (1) shall not apply to any interest in lands or natural resources that is lawfully acquired by the Mohegan Tribe or a member of the Mohegan Tribe after the applicable date specified in paragraph (1).

(g) Statutory construction

(1) Aboriginal interests

Nothing in this section may be construed to extinguish any aboriginal right, title, interest, or claim to lands or natural resources, to the extent that such right, title, interest, or claim is an excepted interest, as defined under section 1(a) of the State Agreement.

(2) Personal claims

Nothing in this section may be construed to offset or eliminate the personal claim of any individual Indian if the individual Indian pursues such claim under any law of general applicability.

(Pub.L. 103-377, § 4, Oct. 19, 1994, 108 Stat. 3502.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), referred to in subsec. (a)(1), (2), is Pub.L. 100-497, Oct. 17, 1988, 102 Stat. 2467, as amended, which is classified generally to chapter 29 (section 2701 et seq.) of this title. Section 4(8) of such Act is classified to section 2703(8) of this title. Section 11(d)(8) of such Act is classified to section 2710(d)(8) of this title. For complete classification of this Act to the Code, see section 1 of Pub.L. 100-497, set out as a Short Title note under section 2701 of this title, and Tables.

The Trade and Intercourse Act of 1790, referred to in subsec. (c)(2)(B), (d)(2), is Act July 22, 1790, c. 33, 1 Stat. 137, which is not classified to the Code.

§ 1775c. Conveyance of lands to the United States to be held in trust for the Mohegan Tribe

(a) In general

Subject to the environmental requirements that apply to land acquisitions covered under part 151 of title 25, Code of Federal Regulations (or any subsequent similar regulation), the Secretary shall take such action as may be necessary to facilitate the conveyance to the United States of title to lands described in exhibits A and B of the [illegible]st for the use and [illegible] lands shall be held by the United States in [illegible] Mohegan Tribe.

(b' 'ion

,eral

The Secretary shall consult with the appropriate official of the town of Montville concerning any tract of land subject to exhibit B of the State Agreement but not specifically identified in such exhibit with respect to the impact on the town resulting from—

(A) the removal of the land from taxation by the town;

(B) problems concerning the determination of jurisdiction; and

(C) potential land use conflicts.

(2) Statutory construction

Nothing in this subchapter may affect the right of the town of Montville to participate, under any applicable law, in decisionmaking processes concerning the acquisition of any lands by the Federal Government to be held in trust for the Mohegan Tribe.

(Pub.L. 103-377, § 5, Oct. 19, 1994, 108 Stat. 3504.)

## § 1775d. Consent of United States to State assumption of criminal jurisdiction

### (a) In general

Subject to subsection (b) of this section, the consent of the United States is hereby given to the assumption of jurisdiction by the State of Connecticut over criminal offenses committed by or against Indians on the reservation of the Mohegan Tribe. The State shall have such jurisdiction to the same extent as the State has jurisdiction over such offenses committed elsewhere within the State. The criminal laws of the State shall have the same force within such reservation and Indian country as such laws have elsewhere within the State.

### (b) Statutory construction

#### (1) Effect on concurrent jurisdiction of the Mohegan Tribe

The assumption of criminal jurisdiction by the State pursuant to subsection (a) of this section shall not affect the concurrent jurisdiction of the Mohegan Tribe over matters concerning such criminal offenses.

#### (2) Statutory construction

The assumption of criminal jurisdiction by the State pursuant to subsection (a) of this section shall not be construed as a waiver of the jurisdiction of the United States under section 1153 of Title 18.

(Pub.L. 103-377, § 6, Oct. 19, 1994, 108 Stat. 3505.)

## § 1775e. Ratification of Town Agreement

### (a) In general

Notwithstanding any other provision of law, the consent of the United States is hereby given to the Town Agreement and the Town Agreement shall be in full force and effect.

### (b) Approval to Town Agreement

The Secretary shall approve any subsequent amendments made to the Town Agreement after October 19, 1994 that are—

(1) mutually agreed on by the parties to the Town Agreement; and

(2) consistent with applicable law.

(Pub.L. 103-377, § 7, Oct. 19, 1994, 108 Stat. 3505.)

## § 1775f. General discharge and release of obligations of State of Connecticut

Except as expressly provided in this subchapter, the State Agreement, or the Town

)fficers, or employees of the State of Connecti...

ent with, or on behalf of, the Mohegan Tribe or the United States as trustee for the Mohegan Tribe.

(Pub.L. 103-377, § 8, Oct. 19, 1994, 108 Stat. 3505.)

## § 1775g. Effect of revocation of State Agreement

### (a) In general

If, during the 15-year period beginning on the date on which the Secretary publishes a determination pursuant to section 1775b(b) of this title, the State Agreement is invalidated by a court of competent jurisdiction, or if the gaming compact described in section 177b(a)(1) of this title or any agreement between the State of Connecticut and the Mohegan Tribe to implement the compact is invalidated by a court of competent jurisdiction—

(1) the transfers, waivers, releases, relinquishments, and other commitments made by the Mohegan Tribe under section 1(a) of the State Agreement shall cease to be of any force or effect;

(2) section 1775b of this title shall not apply to the lands or interests in lands or natural resources of the Mohegan Tribe or any of its members, and the title to the lands or interests in lands or natural resources shall be determined as if such section were never enacted; and

(3) the approval by the United States of prior transfers and the extinguishment of claims and aboriginal title of the Mohegan Tribe otherwise made under section 1775b of this title shall be void.

### (b) Right of Mohegan Tribe to reinstate claim

#### (1) In general

If a State Agreement or compact or agreement described in subsection (a) of this section is invalidated by a court of competent jurisdiction, the Mohegan Tribe or its members shall have the right to reinstate a claim to lands or interests in lands or natural resources to which the Tribe or members are entitled as a result of the invalidation, within a reasonable time, but not later than the later of—

(A) 180 days after the Mohegan Tribe receives written notice of such determination of an invalidation described in subsection (a) of this section; or

(B) if the determination of the invalidation is subject to an appeal, 180 days after the court of last resort enters a judgment.

#### (2) Defenses

Notwithstanding any other provision of law, if a party to an action described in paragraph (1) reinstates the action during the period described in paragraph (1)(B)—

(A) no defense, such as laches, statute of limitations, law of the case, res judicata, or prior disposition may be asserted based on the withdrawal of the action and reinstatement of the action; and

(B) the substance of any discussions leading to the State Agreement may not be admissible in any subsequent litigation, except that, if any such action is reinstated, any defense that would have been available to the State of Connecticut at the time the action was withdrawn—

(i) may be asserted; and

(ii) is not waived by anything in the State Agreement or by subsequent events occurring between the withdrawal action and commencement of the reinstated action.

(Pub.L. 103-377, § 9, Oct. 19, 1994, 108 Stat. 3506.)

## 775h. Judicial review

### (a) Jurisdiction

Notwithstanding any other provision of law, during the period beginning on October 19, 1994 and ending on the date that is 180 days after such date, the United States District Court for the Southern District of Connecticut shall have exclusive jurisdiction over any action to contest the constitutionality of this subchapter or the validity of any agreement entered into under the authority of this subchapter or approved by this subchapter.

### (b) Deadline for filing

Effective with the termination of the period specified in subsection (a) of this section, no court shall have jurisdiction over any action to contest the constitutionality of this subchapter or the validity of any agreement entered into under the authority of this subchapter or approved by this subchapter, unless such action was filed prior to the date of termination of the period specified in subsection (a) of this section.

(Pub.L. 103-377, § 10, Oct. 19, 1994, 108 Stat. 3507.)

# Chapter Ten

# WATER RIGHTS

*Table of Contents*


| | Page |
|---|---|
| SECTION A. INTRODUCTION | 575 |
| SECTION B. THE WINTERS DOCTRINE | 578 |
| 1. Source of the Right | 578 |
| 2. Basis of the Right | 580 |
| 3. Indian Reserved Rights Compared to Reserved Water Rights on Federal Public Lands | 581 |
| 4. Scope of the Right | 585 |
| 5. Measure of the Right | 588 |
| 6. Priority of the Right | 590 |
| 7. Change in Place or Nature of Use | 592 |
| 8. Transfer of Indian Rights | 593 |
| SECTION C. FEDERAL PROTECTION OF INDIAN WATER RIGHTS | 596 |
| SECTION D. ADJUDICATORY JURISDICTION | 599 |
| SECTION E. REGULATORY JURISDICTION | 604 |


## A. Introduction

In the West today there is no more critical problem than that of water scarcity.[1] The population growth of the last few decades and the need to develop the West's significant energy resources have intensified the competition for the finite supply of water. Many of the streams in the western United States have been fully or over claimed by public entities and private parties. In some areas, particularly the southwest, groundwater sources are being depleted at rates exceeding recharge.[2]

Indians and Indian tribes have well established rights to large, but for the most part unquantified, amounts of water. These rights are based on the concept that the establishment of Indian reservations meant not only that the land was reserved or confirmed but also that the right to sufficient water to fulfill the purposes of the reservation was reserved.[3] The Supreme Court first articulated this doctrine in *Winters v. United States*[4] in 1908 and reaffirmed

[1] Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 804 (1976).

[2] *See generally* NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE—FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 8-9 (Washington: Government Printing Office, 1973).

[3] *See generally* Pelcyger, *The Winters Doctrine and the Greening of Reservations*, 4 J. CONTEMP. L. 19 (1977); Ranquist, *The Winters Doctrine and How it Grew, etc.*, 1975 B.Y.U.L. REV. 639. *See also* P. MAXFIELD, M. DIETERICH, & F. TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 203-39 (Boulder: Rocky Mountain Mineral Law Foundation, 1977); Bloom, *Indian "Paramount" Rights to Water Use*, 16 ROCKY MTN. MIN. L. INST. 669 (1971); Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES LAW. 237 (1975); Dellwo, *Indian Water Rights — The Winters Doctrine Updated*, 6 GONZ. L. REV. 215 (1971); Hundley, *The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle*, 9 W. HIST. Q. 455-82 (1978); Pelcyger, *Indian Water Rights: Some Emerging Frontiers*, 21 ROCKY MTN. MIN. L. INST. 743 (1976); Veeder, *Indian Prior and Paramount Rights Versus State Rights*, 51 N.D.L. REV. 107 (1974); Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MTN. MIN. L. INST. 631 (1971); Veeder, *Winters Doctrine Rights, etc.*, 26 MONT. L. REV. 149 (1965); Note, *Indian Reserved Water Rights: The Winters of Our Discontent*, 88 YALE L.J. 1689 (1979). On water rights in general, see NAT'L WATER COMM'N, *supra* note 2; 1-3 W. HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES (Washington: Government Printing Office, 1971-1977); F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW (Springfield, Va.: National Technical Information Service, 1971) (National Water Comm'n Legal Study No. 5); 1-7 WATERS AND WATER RIGHTS (R. Clark ed.) (Indianapolis: The Allen Smith Co., 1967-1976) [hereinafter cited as WATERS AND WATER RIGHTS].

[4] 207 U.S. 564 (1908).

it in 1963 in *Arizona v. California.*[5] *Cappaert v. United States*[6] contains the Court's most succinct and lucid statement of the governing principles of reserved water rights:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.
>
> . . . .
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.[7]

Indian reserved water rights are property rights that are predicated on federal law and are not dependent on state substantive law.[8]

Indian water rights cannot be understood apart from the prior appropriation system, recognized in one form or another in all of the mainland western states.[9] The doctrine of prior appropriation developed as settlers streamed west following the discovery of gold in California in 1848. They

> quickly realized that the riparian doctrine of water rights that had served well in the humid regions of the East would not work in the arid lands of the West. Other settlers coming into the intermountain area, the vast basin and range country which lies between the Rocky Mountains on the east and the Sierra Nevada and Cascade Ranges on the west, were forced to the same conclusion.[10]

---

[5] 373 U.S. 546, 600 (1963). Reserved rights are not unique to Indians, but apply to some non-Indian federal lands including national forests, monuments, parks, and military reservations. United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546, 601 (1963), *decree entered*, 376 U.S. 340 (1964). *See* Sec. B3 *infra*.

[6] 426 U.S. 128 (1976).

[7] *Id.* at 138-39 (citations omitted). *Cappaert* involved the water rights of the Devil's Hole National Monument. Although the statement quoted in the text has general application to Indian reservations, there are several important differences between Indian reservations and other federal reserved rights. *See* Sec. B3 *infra*.

[8] 426 U.S. at 145; Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976); Winters v. United States, 207 U.S. 564, 577 (1908). In some instances, Indian water rights may derive from sources other than the creation of reservations. *See* Sec. B, note 10 *infra*.

[9] The doctrine first received judicial acceptance in Irwin v. Phillips, 5 Cal. 140 (1855), and was applied in Atchison v. Peterson, 87 U.S. (20 Wall.) 507, 513 (1874).

[10] California v. United States, 438 U.S. 645, 653 (1978). *See also* Jennison v. Kirk, 98 U.S. 453 (1879).

The doctrine of prior appropriation was first recognized in local customs, laws, and judicial decisions of the early mining camps. Beginning in 1866 Congress adopted a policy of deferring to these local laws.[11] In 1877 Congress enacted the Desert Land Act,[12] which was interpreted as providing that state law controlled the water rights of recipients of federal land patents.[13] Consequently, no United States patent to private lands carries with it any federally defined water right.[14] By virtue of the Desert Land Act, waters on the public domain were opened to appropriation under the laws of the various states and territories.[15]

Under the riparian system, followed primarily in eastern states,[16] "the owner of land that is riparian to a waterbody, has the right to have that waterbody continue to stand or flow along his land, subject to the right of other riparian owners to make reasonable use of the waters."[17] The respective rights of riparian owners are correlative. Use does not create, and disuse does not diminish, a riparian right, and no advantage is gained by priority in the date of use. In the event of shortage, the available supply is distributed equitably among all the riparian owners.[18]

---

[11] Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C. § 51), *as amended by* Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (codified at 43 U.S.C. § 661). These two statutes expressly confirmed acquisition of water rights in accordance with local customs, and made clear that water rights acquired in this manner were valid against both the federal government and all federal grantees. *See* California v. United States, 438 U.S. 645, 656 (1978); Broder [redacted]ater Co., 101 U.S. 274, 276 (1879); Jennison v. Kirk, 98 U.S. 453 (1879). *See also* 1 W. HUTCHINS, *supra* note 3, at 172-75; Ranquist, *supra* note 3, at 642-45. For a general discussion of the development of state water rights law, see 1 WATERS AND WATER RIGHTS, *supra* note 3, §§ 15-19.

[12] Ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321-323, 325, 327-329).

[13] *See* Federal Power Comm'n v. Oregon, 349 U.S. 435, 446-48 (1955); California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 160-63 (1935).

[14] By its terms the Desert Land Act did not purport to affect rights to the use of water from navigable sources. § 1, 19 Stat. at 377 (codified as amended at 43 U.S.C. § 321). In practice, however, rights to use water from navigable streams have been acquired in the same manner as rights from non-navigable sources, although such rights may be subject to the government's navigation servitude. *See* Op. Sol. Int., June 25, 1979, at 4-11 (M 36914); C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 155 (Mineola, N.Y.: The Foundation Press, Inc., 1980).

[15] California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). The 1866, 1870, and 1877 Acts, discussed in notes 11, 14 *supra*, had no effect on the water rights of federal reservations, however. Cappaert v. United States, 426 U.S. 128, 143-45 (1976); Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955). *Cf.* United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703 (1899) (states may control waters on federal lands unless superior rights of federal government are involved).

[16] In some western states, including California, Oregon, and Washington, the riparian and prior appropriation doctrines coexist. *See* 2 W. HUTCHINS, *supra* note 3, at 6-14.

[17] 7 WATER AND WATER RIGHTS, *supra* note 3, § 610.

[18] Apart from the arid western states, the riparian rights doctrine, which originated in English feudal land law, is the prevailing system of water law in the United States. Riparian water rights attach to the land adjoining bodies of water. Appropriative water rights attach to the use of an amount of water on a specific piece of land, not necessarily bordering on the body of water. Generally, under the riparian doctrine the right of a person to make use of the water that flows through his or her land is part of his or her interest in the land. An owner may insist upon the ordinary flow of the water, undiminished in quantity and unpolluted in quality except as it may be diminished necessarily by the corresponding rights of other riparians. Riparian rules are directly contrary to the appropriation doctrine. *See* 6-A AMERICAN LAW OF PROPERTY § 28.55 (A. Casner ed.) (Boston: Little, Brown & Co., 1954); 1 WATERS AND WATER RIGHTS, *supra* note 3, §§ 16, 18-22.

By contrast, water rights acquired under the prior appropriation system are limited in quantity to the amount of water claimed at the date of appropriation and to the amount actually applied to beneficial use. Unlike riparian rights, appropriative rights may be abandoned, or forfeited for non-use for a period of years set by state statutes. In times of shortage, the holders of "junior" rights, those with later priority dates, must forego their use of water from a particular water source in favor of senior appropriators on the same water course.[19]

Indian reserved water rights differ significantly from both riparian and appropriative rights. They are not based on appropriation and actual beneficial use and they are not lost by non-use. Sufficient water is reserved to fulfill the purposes for which a reservation was established. The priority of the water right is no later than the date on which a reservation was established [20] which, in the case of most Indian reservations in the West, is earlier than the priority of most non-Indian water rights. Thus, a reservation established in 1865 which starts putting water to use for agricultural purposes in 1981 under its reserved rights has, in times of shortage, a priority that is superior to any non-Indian water right with a state law priority acquired after 1865. Unlike riparian rights, Indian reserved rights are not ratably reduced in times of shortage. For these reasons, Indian rights are generally prior and paramount to rights derived under state law.[21]

### *B. The Winters Doctrine*

#### *1. Source of the Right*

In the leading case of *Winters v. United States,*[1] the Supreme Court held that the right to use the waters of the Milk River was impliedly reserved in the agreement establishing the Fort Belknap Reservation in Montana. The United States brought suit on behalf of itself and the affected Indians to enjoin upstream appropriations by non-Indians who claimed rights to use the waters of the Milk River under the prior appropriation law of Montana. The case turned upon the construction of an 1888 agreement by which the Indians relinquished a portion of their lands and retained others for their reservation.[2] No treaty was involved.

---

[19] *See* Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 805 (1976).

[20] The water rights of tribes occupying their aboriginal lands, which the tribes later reserved or had confirmed by treaty, statute, executive order, or agreement, may date to pre-historic times. United States v. Adair, 478 F. Supp. 336, 350 (D. Or. 1979), *appeal pending;* United States v. Gila Valley Irrig. Dist., Globe Equity No. 59 (D. Ariz. 1935); 34 Op. Att'y Gen. 171, 176-77 (1924). *See* Antoine v. Washington, 420 U.S. 194, 196-97 (1975); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974); Pelcyger, 4 J. CONTEMP. L., *supra* note 3, at 19, 25 n.30. The aboriginal lands involved in Arizona v. California, 373 U.S. 546 (1963), *decree entered,* 376 U.S. 340 (1964), were not adjudicated an aboriginal priority, but the issue was not raised in that litigation. *See* Sec. B, text at notes 94-101 *infra.*

[21] *See* Bloom, *supra* note 3; Veeder, 16 ROCKY MTN. MIN. L. INST., *supra* note 3. Indian priorities in already over-appropriated waters have resulted in increasing pressure for the precise quantification of the Indian rights. *See, e.g.,* Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976); United States v. District Court for Eagle County, 401 U.S. 520 (1971).

[1] 207 U.S. 564 (1908).

[2] Ch. 213, 25 Stat. 113, 124.

# THE FEDERAL ACKNOWLEDGMENT PROCESS

## SOURCE OF THE SECRETARY'S AUTHORITY TO ACKNOWLEDGE INDIAN TRIBES

A number of statutes impose upon the Secretary of the Interior specific obligations to provide benefits and services to tribes and to honor and implement treaties. Before meeting these obligations, the Secretary must first identify which groups may receive such benefits and services. This is the basis of the Secretary's authority to acknowledge that certain Indian groups exist as tribes.

Specifically, among the authorities for the regulations in 25 CFR 83 governing the Acknowledgment process are:

> ***Section 465 of the Revised Statutes (25 U.S.C. 9)***, which authorizes the President to prescribe regulations "for carrying into effect the various provisions of any act relating to Indian affairs";
>
> ***Section 441 of the Revised Statutes (43 U.S.C. 1457)***, which charges the Secretary of the Interior "with the supervision of public business relating to ... Indians."
>
> ***Section 463 of the Revised Statutes (25 U.S.C. 2)***, which gives the Commissioner of Indian Affairs "management of all Indian affairs and of all matters arising out of Indian relations"; and
>
> ***Part 230, chapters 1 and 2 of the Department of the Interior's Department Manual***, which refer to delegations of authority made by the Assistant Secretary -- Indian Affairs to officials within the Bureau of Indian Affairs.

Congress, by appropriating funds for tribes acknowledged through the administrative process, has validated that process.

## HISTORICAL BACKGROUND

Since the early 19th century, individual unrecognized Indian groups have claimed their sovereignty when seeking Federal services or help in protecting their lands and resources, or defending their rights to tax or govern. These Indian groups, in doing so, were also seeking recognition or clarification of their government-to-government relationship with the United States as it applies to them.

In the course of more than 150 years, the methods for determining which of these groups were sovereign tribes varied from case to case, and recognition depended

variously on executive action, legislation or judicial decision. Before the 1930's, the standards used to decide how such determinations were to be made had never been codified; rather, standards were applied by shuffling case law, congressional legislation, and departmental policies and actions. Many groups seeking recognition were rejected. Others were left for decades without any determination being made. To remedy this situation, regulations (25 CFR 83) were codified in 1978, and the Federal Acknowledgment Project was established. The Bureau of Indian Affairs (BIA) then held 40 petitions from Indian groups requesting acknowledgement as tribes.

## CASE LAW

Underpinning the present Acknowledgment process are two lines of reasoning which can be identified in the case law concerning tribal status and Federal responsibility for Indian tribes. First, there are those decisions based on the actions of the Federal Government, including negotiating treaties or agreements, assigning Indian agents, or providing services, such as schools, etc. Second, there are those decisions based on the character of the Indian group itself -- its political organization, ancestry or territory. Most of these cases were argued before the 1934 passage of the Indian Reorganization Act (IRA).

### *A. Decisions Based on Government Action*

Before 1930, Supreme Court cases primarily dealt only with the question of whether a branch or government department had already acted toward a tribe as if it existed and in doing so recognized its sovereignty. The Court generally deferred to the "political branches" of the government, saying that Indian tribes were recognized because of actions of Congress or executive departments (*United States v. Holliday* (1865); *the Kansas Indians*, (1867); *United States v. Forty-three Gallons of Whiskey* (1876); *Tully v. United States* (1896); *United States v. Boyd* (1897); *Dobbs v. United States* (1898); *United States v. Sandoval* (1913); *United States v. Nice* (1916); *Perrin v. United States* (1914); *United States v. Candelaria* (1926)). As was more specifically determined in *United States v. Holliday, 70 U.S. 407* (1865):

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians then, by the Constitution of the United States, they are placed, for certain purposes, with the control of Congress.

The Supreme Court held, however, that there were limits to this power. Specifically, the Court stated in *United States v. Sandoval* (and reiterated in *United States v. Candelaria*) that, in terms of recognizing "distinctly Indian Communities" as Indian tribes, "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe."

The Supreme Court often found no need to do more than merely list the kinds of congressional or executive actions which had, in the mind of the Court, already recognized a tribe's existence. Decisions were based primarily on how an Indian group had been treated or identified by government agencies.

For example, Congress may have ratified a treaty, established a reservation, passed statutes specifically referring to a tribe as an existing entity, appropriated funds for the tribe's benefit, authorized tribal funds to be held in the Federal Treasury, directed government officials to exercise supervision over a tribe, or prohibited state taxation of a tribe. Similarly, the Executive may have sent an Indian agent to a reservation, acquired land for a tribe, established schools or other service institutions, supervised tribal contracts, established an agency office or superintendency and instituted legal suits on a tribes's behalf.

*B. Decisions Based on Tribal Character*

Perhaps more significant for understanding the present acknowledgment process is the second line of reasoning developed through decisions which considered the character of the Indian group. As early as 1867 (*The Kansas Indians*), the Court found that the Shawnee were a tribe because they still maintained "their tribal organization" and had "their own customs and laws by which they are governed." However, the most important of these decisions was clearly *Montoya v. United States* (1901), in which the Court stated: "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." This definition of tribe may be broken down into three separate considerations:

1. It is composed of Native Americans of common ancestry.

2. It functions as a community with a leadership exercising some political authority over them.

3. It presently inhabits or historically inhabited a particular territory.

Generally, neither Court decisions discussing tribal character nor those discussing government actions explored or analyzed the specific standards or actual procedures used by Congress, the Department of the Interior, or the BIA when determining whether an Indian group had existed as a tribe.

## CODIFICATION OF CASE LAW

Most frequently cited are the criteria set forth in the *Handbook of Federal Indian Law* (1942) by Felix Cohen, Assistant Solicitor in the Department of the Interior while John Collier was Commissioner of Indian Affairs. Cohen codified the interpretation and

criteria used by the executive branch in the 1930's to determine whether a group was recognized and entitled to organized tribal status under the Indian Reorganization Act of 1934. A series of Solicitor's opinions and memorandums had addressed this problem in instances where there were questions as to a group's status. The so-called Cohen Criteria, listed below, combine both lines of reasoning which had previously been applied in defining sovereign tribes -- consideration of the tribal character of the group and previous government actions treating it as a tribe. The criteria are:

1. That the group has had treaty relations with the United States;

2. That the group has been denominated a tribe by act of Congress or Executive order;

3. That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe;

4. That the group has been treated as a tribe or band by other Indian tribes; and

5. That the group has exercised political authority over its members, through a tribal council or other governmental forms.

In addition to the numbered criteria above, Cohen listed secondary factors. He stated:

> Other factors considered, though not conclusive, are the existence of special appropriation items for the group and the social solidarity of the group.
>
> Ethnological and historical considerations, although not conclusive, are entitled to great weight in determining the question of tribal existence.

The first three criteria reflect the weight given to previous executive and, particularly, congressional recognition. These and the fourth criterion indicated Federal action or other evidence identifying the group as a distinct band or tribe and not an integral part of another tribe. Criterion 5, concerning the group's exercise of political authority, and the secondary factors speak to the issue of tribal character which was defined in the 1901 *Montoya v. United States* decision and clarified in *United States v. Candelaria*.

## DEVELOPMENT OF THE PRESENT RECOGNITION PROCESS

The application of the Cohen Criteria sometimes appeared haphazard, as no well-defined process for requesting recognition as a tribe existed. In 1975, with an increasing number of requests for recognition coming in, the Department held in abeyance further acknowledgment decisions, pending the development of regulations

for a systematic and uniform procedure to acknowledge Indian tribes.

Two years later, on June 16, 1977, proposed regulations were published in the *Federal Register*. The amount of consultation and discussion with tribes and other interested groups on the Federal Acknowledgment process following the publication of the proposed regulations was unprecedented. More than 400 official meetings, discussions, and conversations were held with Federal and state agency representatives, tribal representatives, congressional staff members, as well as petitioners and their legal representatives. In addition, the Department received 60 written comments on the initial proposed regulations, and a national conference on Federal Acknowledgment was held and attended by approximately 350 representatives of tribes and other organizations. The Department received 34 additional comments after revised proposed regulations were published on June 1, 1978.

Final regulations were published September 1, 1978. They formulated uniform procedures within the Department for considering and deciding on requests for recognition, and spelled out exact criteria which an Indian group had satisfy to be acknowledged as a tribe. Such criteria apply all petitions for recognition, yet take into consideration variations in socio-cultural groups and their particular histories.

The criteria of the 1978 regulations used today rest essentially on what Cohen had referred to as the "ethnological criteria" of social solidarity and political authority, and, in addition, retain demonstration of ancestry, always a major element in earlier standards.

On the other hand, the criteria regarding previous Federal recognition were dropped, in part because the Supreme Court, in *Pasamaquoddy v. Morton* (1975), had held that the trust responsibility of the United States in relation to Indian tribes existed regardless of whether Federal actions had been taken which acknowledged the responsibility. Criteria requiring previous recognition were also dropped so that tribes with no previous Federal contact were not automatically excluded from consideration.

# BRANCH OF ACKNOWLEDGMENT AND RESEARCH

## ACKNOWLEDGMENT

*FUNCTION*: To make recommendations regarding the acknowledgment of unrecognized Indian groups seeking Federal Acknowledgment of their status as American Indian tribes under 25 CFR 83.

## THE PROCESS

*Receipt of petition (letter/resolution, undocumented)*:

1. Acknowledge receipt of petition and establish BAR contact
2. Publish notices of receipt in *Federal Register* and local newspaper(s)
3. Nofify Governor and Attorney General of receipt

*Preliminary Review for Obvious Deficiencies (OD Review)*:

4. Review documented petition for obvious deficiencies (OD review)
5. Notify petitioner of deficiencies
6. Provide technical advice to petitioner re correcting deficiencies

*Active Consideration Review (Case Work):*

7. Read entire petition in depth
8. Conduct research needed to verify and/or refute petition
9. Evaluate and analyze available evidence
10. Draft Technical Report
11. Draft Summary under the Criteria
12. Conduct in-house staff review of drafts
13. Finalize proposed finding

*Proposed Finding*:

14. Publish notice of proposed finding in Federal Register
15. Distribute proposed finding to petitioner and all interested parties
16. Review legal arguments and evidence submitted in response to finding
17. Draft final determination and summary under criteria
18. Conduct in-house staff review of draft
19. Finalize Final Determination
20. Route for approval

*Final Determination:*

21. Publish notice of Final Determination in Federal Register
22. Distribute Final Determination to petitioner and all interested parties
23. Notify petitioner and all interested parties when decision is final

*Request for Reconsideration of Decision:*

24. Review request and forward to appropriate office for decision

*Litigation of Decision*:

25. Provide technical support to SOL
26. Prepare Administrative Record for Court
27. Serve as Expert Witness if called

The Branch of Acknowledgment and Research utilizes an interdisciplinary approach to its review of petitions for Federal acknowledgment. Petition review is conducted independently by three professionals from the disciplines of Anthropology, Genealogy, and History.

## WHAT A BAR GENEALOGIST DOES

*Preliminary Review of Petition for Obvious Deficiencies (OD Review)*:

1. Reviews documented petition for obvious deficiencies to insure that petition contains information which BAR will need to process it.
2. Provides technical advice to petitioners' researchers regarding the research and preparation of genealogical material for the petition.

*Active Consideration Review (Case Work)*:

3. Reads and analyzes the entire petition in detail from a genealogical perspective.
4. Conducts research in Federal, State, and local repositories (both public and private) needed to verify information provided in petition.
5. Conducts such other research needed to clarify or expand upon important genealogical issues.
6. Evaluates and analyzes available evidence and other information to
   a. determine whether the petitioner's members are Indian and descend from the historic tribe(s);
   b. determine whether the petitioner's members meet the group's own membership requirements; and
   c. determine the extent to which the petitioner's members are enrolled in federally recognized tribes.
7. Writes draft technical report on available genealogical evidence.
8. Writes draft summary under criteria 83.7(d), (e), (f), and sometimes (g).
9. Participates in in-house staff review of drafts and provides necessary defense of factual basis for genealogical evidence and recommendation.
10. Completes whatever rewrites are necessary to finalize proposed finding
11. Reviews arguments and evidence submitted in response to finding
12. Writes draft Final Determination

*Litigation*:

13. Provides technical support to Solicitor
14. Participates in preparation of the Administrative Record for the Court.
15. Serves as Expert Witness if called.

*Administrative Area*:

16. Serves as staff person with administrative responsibility for all requests for

information arising from cases in assigned geographical area. (Genealogists currently have administrative responsibility for the NE and the SE.)

*Other activities*:

17. Provides technical expertise regarding genealogical issues.

## WHAT A BAR HISTORIAN DOES

Preliminary Review of Petition for Obvious Deficiencies (OD Review):

1. Reviews documented petition for obvious deficiencies to insure that petition contains information which BAR will need to process it.
2. Provides technical advice to petitioners' researchers regarding the research and preparation of historical material for the petition.

*Active Consideration Review (Case Work)*:

3. Reads and analyzes the entire petition in detail from a historical perspective.
4. Conducts research in Federal, State, and local repositories (both public and private) as necessary to verify information provided in petition.
5. Conducts such other research needed to clarify or expand upon important historical issues.
6. Evaluates and analyzes available evidence and other information to
   a. determine whether the petitioner has been identified from historical times until the present as an American Indian tribal entity.
   b. determine whether the petitioner has historically lived in a community viewed as American Indian and distinct from other populations in the area.
   c. determine whether the petitioner has maintained political influence or other authority over its members as an autonomous entity throughout history.
   d. determine whether the petitioner is the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.
7. Writes draft technical report on available historical evidence.
8. Writes draft summary under criteria 83.7(a), (b), (c), and (g).
9. Participates in in-house staff review of drafts and provides necessary defense of factual basis for historical evidence and recommendation.
10. Completes whatever rewrites are necessary to finalize proposed finding.
11. Reviews arguments and evidence submitted in response to finding.
12. Writes draft Final Determination.

*Litigation*:

13. Provides technical support to Solicitor.
14. Participates in preparation of the Administrative Record for the Court.
15. Serves as Expert Witness if called.

*Administrative Area*:

16. Serves as staff person with administrative responsibility for all requests for information arising from cases in assigned geographical area. (Historians currently have administrative responsibility for the Midwest and Southwest.)

*Other Activities*:

17. Provides technical expertise regarding historical issues.

## WHAT A BAR ANTHROPOLOGIST DOES

*Preliminary Review of Petition for Obvious Deficiencies (OD Review)*:

1. Reviews documented petition for obvious deficiencies to insure that petition contains information which BAR will need to process it.
2. Provides technical advice to petitioners' researchers regarding the research and preparation of anthropological material for the petition.

*Active Consideration Review (Case Work)*:

3. Reads and analyzes the entire petition in detail from an anthropological perspective.
4. Conducts research in Federal, State, and local respositories (both public and private), as well as the files and records of the petitioning group, as necessary to verify or supplement information provided in petition.
5. Conducts field research needed to verify, clarify or expand upon information provided in the petition regarding anthropological issues.
6. Evalutates and analyzes available evidence and other information to
   a. determine whether the petitioning group ahs lived and continues to live in a community separate from surrounding social groups and is identified by others as a distinct Indian community.
   b. determine whether the petitioner's members descend from a historical tribe or tribes.
   c. determine whether the petitioner historically maintained and continues to maintain formal and/or informal political influence or other authority over its members as an autonomous entity.
7. Writes draft technical report on available anthropological evidence.
8. Writes draft summary under criteria 83.7(a), (b), and (c).
9. Participates in in-house staff review of drafts and provides necessary evidence and recommendation.
10. Completes whatever rewrites are necessary to finalize proposed finding.
11. Reviews arguments and evidence submitted in response to finding.
12. Writes draft Final Determination.

*Litigation*:

13. Provides technical support to Solicitor.
14. Participates in preparation of the Administrative Record for the Court.
15. Serves as Expert Witness if called.

*Administrative Area*:

16. Serves as staff person with administrative responsibility for all requests for information arising from cases in assigned geographical area. (Anthropologists currently have administrative responsibility for the Northwest and Mid-Atlantic.)

*Other activities*:

17. Provides technical expertise regarding anthropological issues.

42

# BACKGROUND OF USET

The United South and Eastern Tribes, Inc. [USET] was originally formed in 1969 by the leadership of four tribes in the Southeast. Originally formed as the United Southeastern Tribes, the name was officially changed in 1978 to the United South and Eastern Tribes to better reflect the geographical spread of its membership.

The four original member Tribes, the Eastern Band of Cherokees, the Mississippi Band of Choctaws, the Miccosukee Tribe and the Seminole Tribe of Florida, felt that by uniting as an inter-tribal council on many issues and in dealing with the federal government there would be "Strength in Unity."

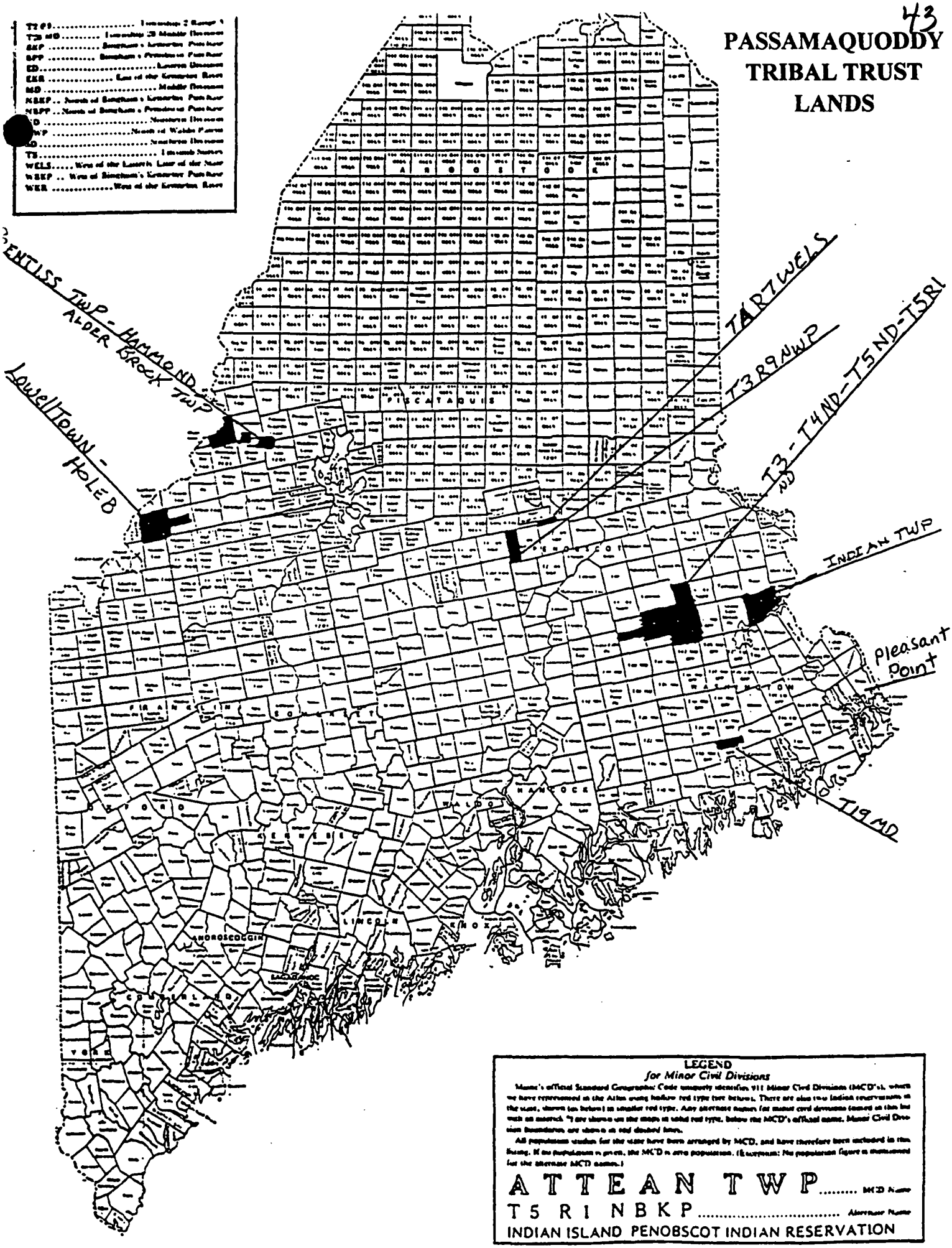
When those tribal leaders met in Cherokee, North Carolina, little did they realize that those concepts of unity would last as an example to many other tribal governments in this country. Nor did they realize that their membership would grow to its present size of twenty-three tribes. These federally-recognized tribes range from Maine to southern Florida and to eastern Texas, representing a population of more than 55,000.

The current membership is composed of the following tribes: the Eastern Band of Cherokee (North Carolina), Chitimacha Tribe of Louisiana, Mississippi Band of Choctaw, Coushatta Tribe of Louisiana, Miccosukee Tribe of Florida, Saint Regis Band of Mohawk Indians (New York), Passamaquoddy Pleasant Point (Maine), Passamaquoddy Indian Township (Maine), Penobscot Nation (Maine), Seminole Tribe of Florida, Seneca Nation of New York, Houlton Band of Maliseets (Maine), Poarch Band of Creek Indians (Alabama), Tunica-Biloxi Tribe of Louisiana, Narragansett Indian Tribe (Rhode Island), Mashantucket Pequot Tribe (Connecticut), Wampanoag Tribe of Gay Head (Aquinnah)(Massachusetts), Alabama-Coushatta Tribe of Texas, Oneida Nation of New York, Aroostook Band of Micmac (Maine), the Catawba Indian Nation of South Carolina, the Jena Band of Choctaw Indians of Louisiana, and the Mohegan Tribe of Connecticut.

As a non-profit inter-tribal organization USET serves two main purposes: it provides a forum for the exchange of information and ideas among the 23 USET Tribes; and, it provides a vehicle which allows these tribes to jointly receive contracts and grants from federal and state agencies, as well as the private sector.

FOR FURTHER INFORMATION CONTACT: Ms. Wanda Janes, Tribal Liaison Officer at (615) 872-7900.

# PASSAMAQUODDY TRIBAL TRUST LANDS




**LEGEND**

*for Minor Civil Divisions*

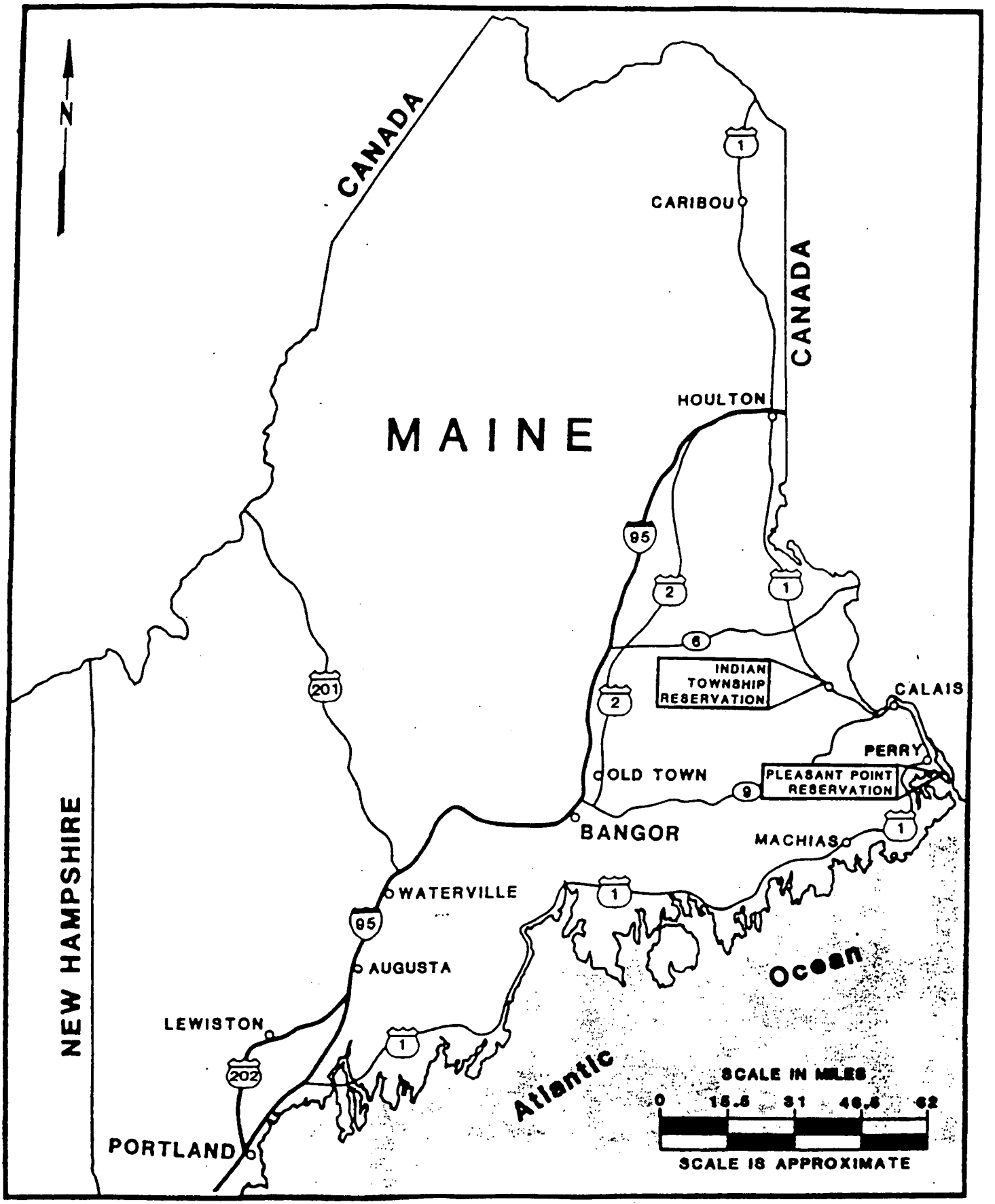
Maine's official Standard Geographic Code uniquely identifies 911 Minor Civil Divisions (MCD's), which we have represented on the Atlas using bullseye red type face letters. There are also two Indian reservations in the state, shown just below in smaller red type. Any alternate names for minor civil divisions found on this list such as municipal, "I are shown on the maps in solid red type, below the MCD's official name. Minor Civil Division boundaries are shown as red dashed lines.

All populations shown for the state have been arranged by MCD, and have therefore been included in this listing. If no population is given, the MCD is zero population. (Exception: No population figure is maintained for the alternate MCD names.)

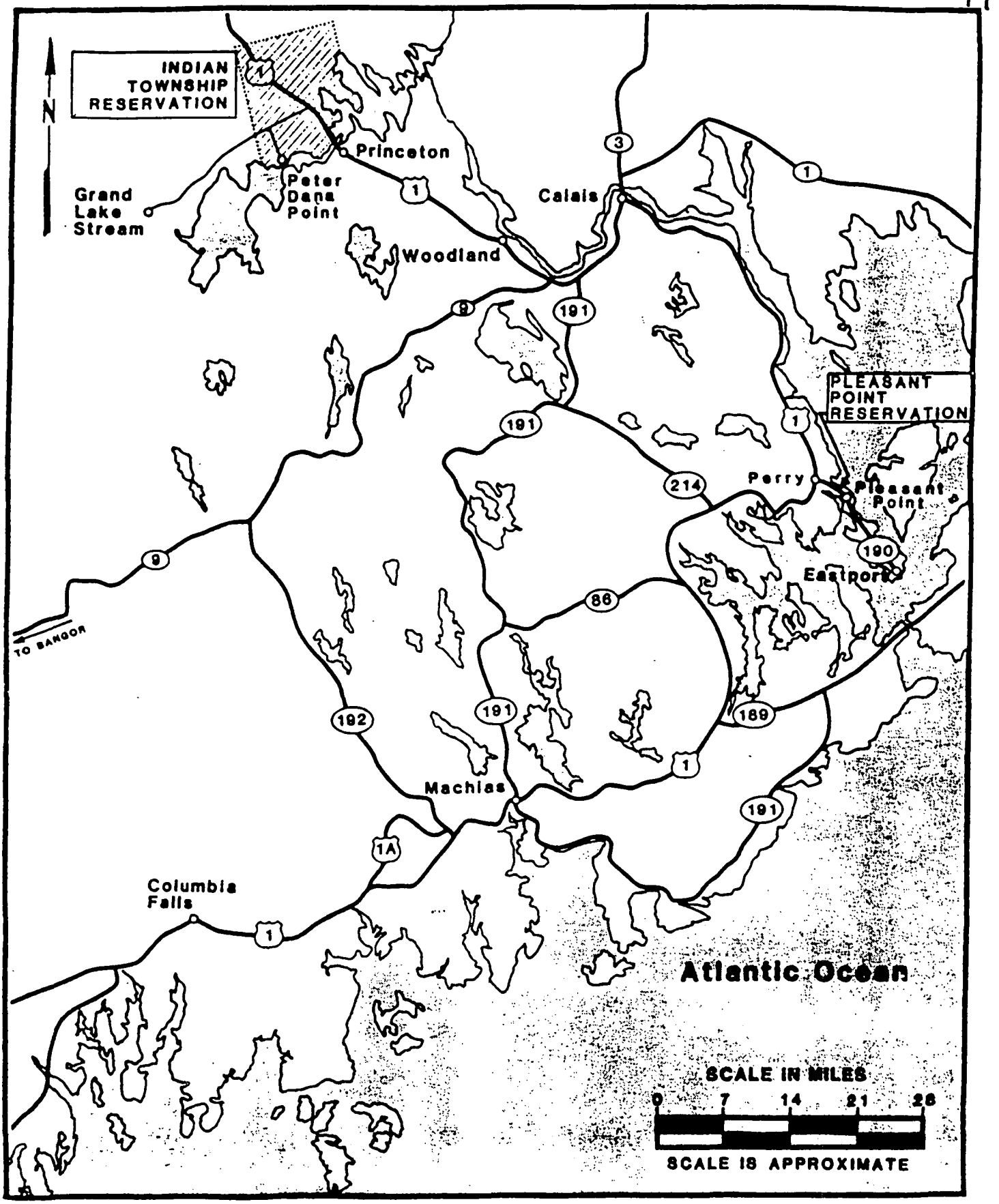
ATTEAN TWP ..... MCD Name

T5 R1 NBKP ..... Alternate Name

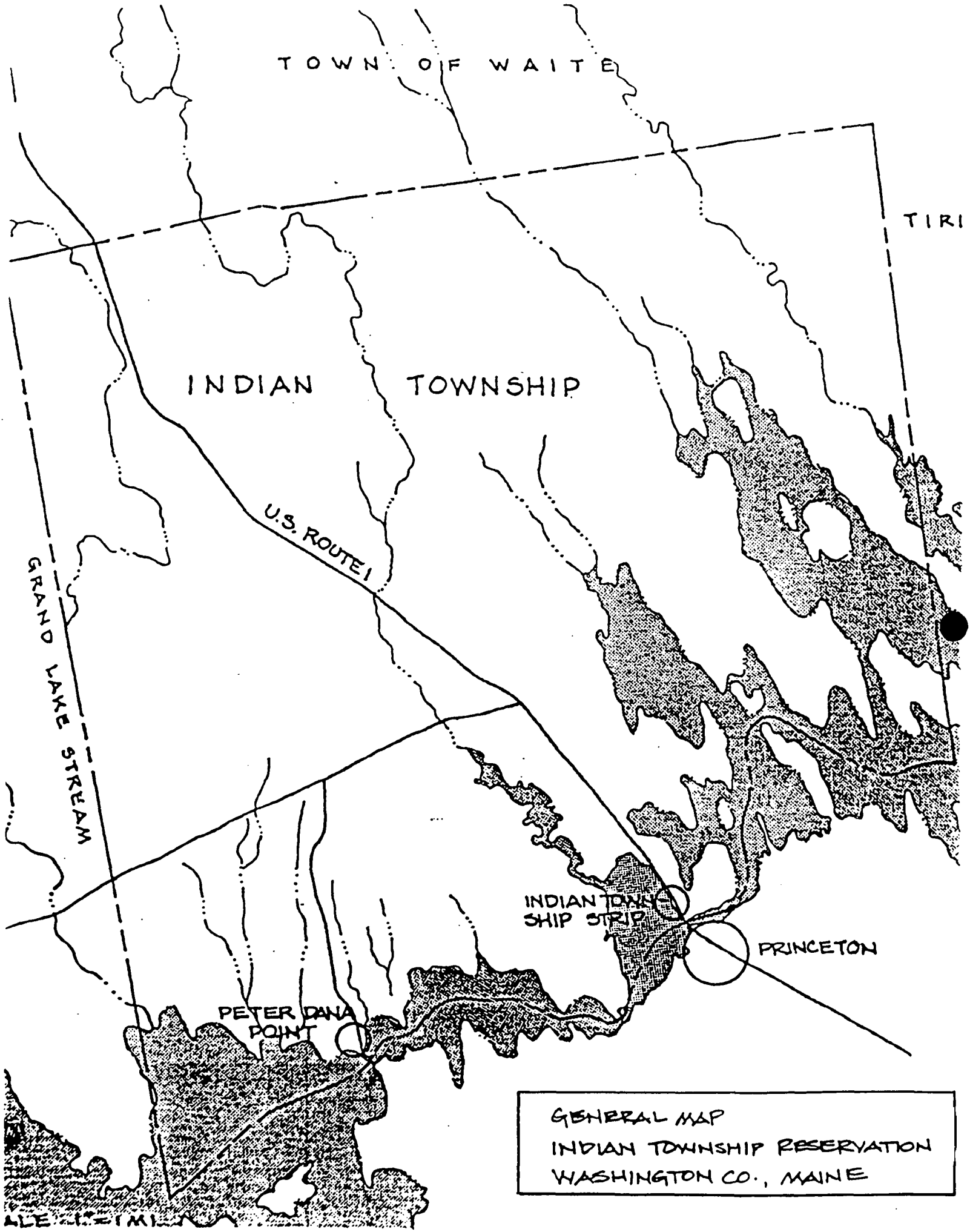
INDIAN ISLAND PENOBSCOT INDIAN RESERVATION



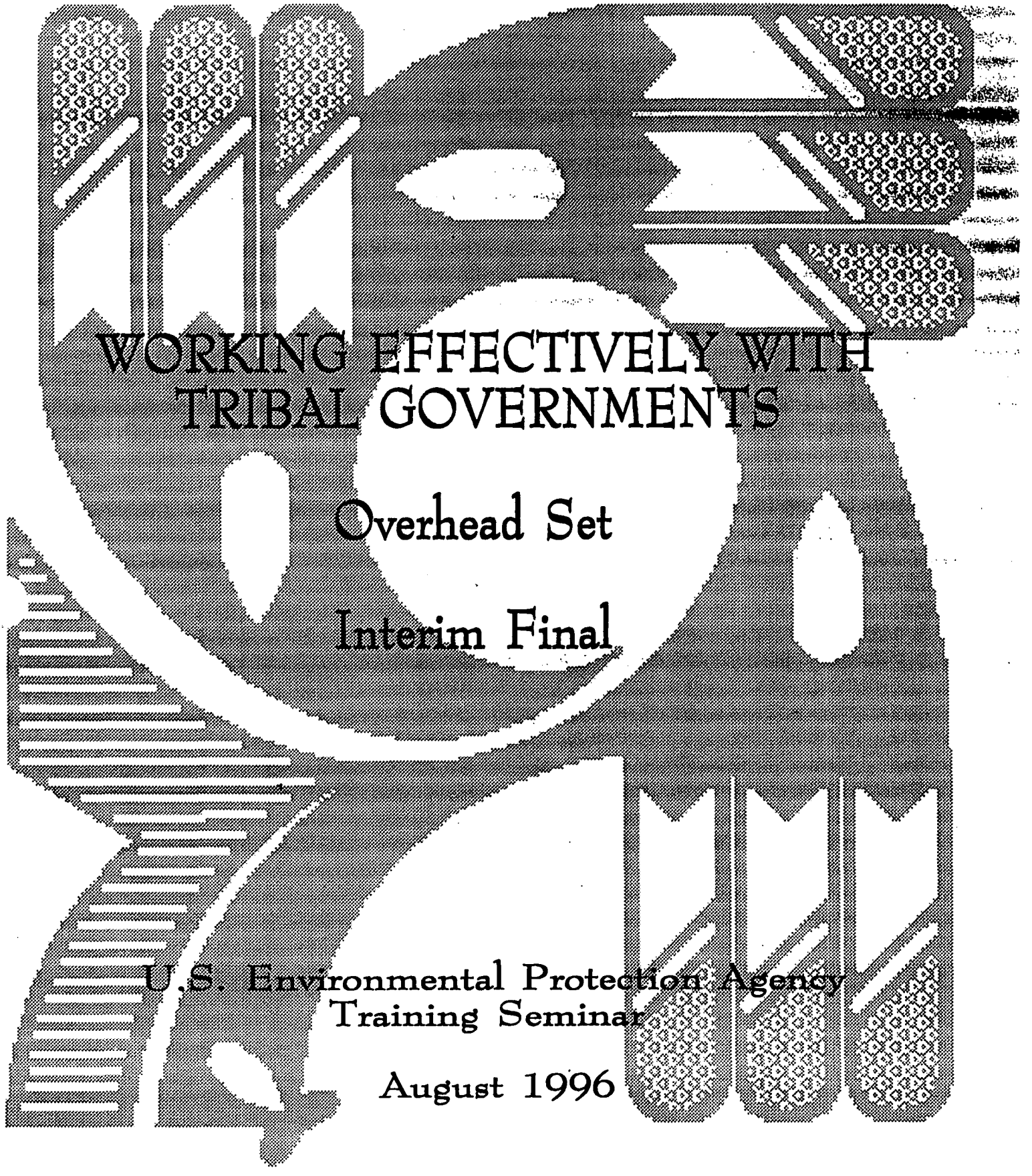

**Passamaquoddy Tribe Reservations Location Map**




**Passamaquoddy Tribe Reservations Location Map**




GENERAL MAP
INDIAN TOWNSHIP RESERVATION
WASHINGTON CO., MAINE



# WORKING EFFECTIVELY WITH TRIBAL GOVERNMENTS

## Overhead Set

## Interim Final

U.S. Environmental Protection Agency
Training Seminar

August 1996

## PURPOSE OF TRAINING

***Point 6 From the Administrator's July 15, 1994 Action Directive on Strengthening EPA's Tribal Operations:***

It is important that EPA employees have the necessary sensitivity, knowledge and understanding of Indian affairs to facilitate communication between EPA and Tribal representatives. The Office of Indian Affairs, once established, will promote and coordinate training on Indian issues for Agency managers and staff. In the interim, Assistant and Regional Administrators are encouraged to provide training that moves the Agency in the direction of better understanding of Indian issues. This training could cover the EPA Indian Policy, EPA's Indian program activities, Tribal sovereignty and jurisdiction, Tribal environmental needs and activities, the role of Tribal individuals and organizations and cultural differences that may affect EPA's working relationship with Tribes.

## GENERAL PURPOSE OF THE TRAINING

- To assist EPA staff and managers in implementing the EPA Policy for Administration of Environmental Programs on Indian Reservations.

- To provide adequate knowledge about Indian issues for EPA employees to work effectively with Native Americans Tribes and Alaska Natives.

- To develop an EPA group of trainers, who have experienced working with EPA's Indian Program, to deliver the training to other EPA employees whose work may call upon them to work with Tribes or affect Tribal resources and environmental management programs.

# ????WHAT'S A NATIVE AMERICAN???

*Indian???  Native Hawaiian????  Alaskan Native?????*

1) **Federal Definition**

2) **Tribal Definition**

**C**

## SUMMARY OF TRIBAL POWERS

**Perhaps the best summary of Tribal Powers may be found in the *Handbook of Federal Indian Law* where it states that Native American governmental Power relies upon three main principles:**

1. **[A]n Indian Tribe possesses, in the first instance, all the powers of any sovereign state.**

2. **[C]onquest renders the Tribe subject to legislative power of the United States and, in substance terminates the external powers of sovereignty of the Tribe, for example, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the Tribe.**

3. **[T]hese powers are subject to qualification by treaties and by express legislation from Congress. Save as expressly qualified , full powers of internal sovereignty are vested in Indian Tribes and in their duly constituted organs of government.**

# PROPERTY-RELATED VOCABULARY

INDIAN COUNTRY

RESERVATION

TRUST LANDS

FEE LAND

ALLOTMENT

RANCHERIA

DEPENDENT INDIAN COMMUNITIES

COLONY

CEDED TERRITORY

# ??????? INDIAN COUNTRY ????????

IT'S NOT JUST "RESERVATION"!!!!!

F

## DEFINITION OF "INDIAN COUNTRY, 18 U.S.C. SECTION 1151

The term "Indian Country" is often confused with the term "Indian Reservation." An Indian reservation is simply land, set aside for a Tribe or Tribes. Indian country, on the other hand, is a significant legal term which includes Indian reservations, dependent communities, Indian allottment lands, and trust lands.

## DEFINITION OF "INDIAN COUNTRY, 18 U.S.C. SECTION 1151 - Continued

It is defined at 18 U.S.C.A. Sec. 1151 as follows:

[T]he term "Indian Country", as used in this chapter, means all land within the limits of any Indian Reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (d) all Indian allotments, the Indian titles to which have not been extinguished , including right-of-way running through the same. Thus, Indian Country includes Indian Reservations, dependent Indian communities, Indian allotment lands, and trust.

# Chronology

| | |
|---|---|
| 1608 - 1830 | Earliest Treaties |
| 1830 - 1850 | Indian Removal Act |
| 1850 - 1871 | Reduction of Indian Land Base |
| 1887 - 1909 | Allotment Era |
| 1934 | Indian Reorganization Act |
| 1950 - 1970 | Termination: An Old Policy With A New Twist |
| 1970 to Present | Self-Determination Era |

# UNDERSTANDING NATIVE AMERICANS

A. Native Americans are Not a Homogeneous Group.

B. Indian Tribes Have Maintained Significant Government Powers.

C. There is a Unique Status of Tribal members With the Federal Government.

D. Native Americans Pay Federal Taxes.

E. Tribes Receive Services From the Federal Government.

## WHY IS SOVEREIGNTY SO IMPORTANT??????

- It ensures self-government, and preservation of Tribal culture, and control over the future of the Tribe.

- It distinguishes Indians as a "political" group rather than simply a racial or ethnic minority.

# THE FEDERAL-INDIAN TRUST RELATIONSHIP

1. The Federal trust responsibility arises from Indian treaties, statutes, executive orders, and historical relations between the United States and Indian Tribes.

2. Overall, the trust responsibility relates to the United States' unique legal and political relationship with Indian Tribes.

3. The trust relationship relates directly to the development and implementation of Federal policy.

## THE FEDERAL-INDIAN TRUST RELATIONSHIP- Cont.

4. The trust responsibility requires that the Federal government consider the best interests of the Tribes in its dealings with them and when taking actions that may affect them.

5. The trust responsibility includes the protection of the sovereignty of each Tribal government.

6. Congress has the power to define the scope of the trust responsibility.

## WHY ARE TREATIES SO IMPORTANT?????

- Treaties are significant to all Tribes, even those Tribes that did not enter into treaty relations with the Federal government, because they acknowledge the sovereign nature of Tribal governments, and reserve for Indian Tribes critical rights and access to lands and resources.

- Treaties support the concept of inherent sovereignty.

- They are the law of the land.

- Treaties protect inherent sovereignty rights held by Tribal governments including protecting land, resources, hunting, fishing and gathering rights, and governmental powers.

**L**

## MORE ON TREATIES:

"The words "treaty" and "nation" are words of our language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are applied to all in the same sense."

*Worcester v. Georgia,* 31 U.S. 515, 559 (1832)

***Chief Justice John Marshall, 1832***

**M**

# FEDERAL AND TRIBAL POWERS OVER INDIAN COUNTRY

***GENERAL RULE:***

**Generally, ambiguities within Indian treaties are interpreted in favor of Indians.**

**N**

# WHAT IS JURISDICTION?????

Jurisdiction generally relates to those powers that a government has over people and property within a distinct geographical basis.

O

# EPA INDIAN POLICY

- The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. The policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

- In 1984, EPA issued its "Policy for the Administration of Environmental Programs on Indian Reservations". The Policy recognizes the government-to-government relationship between the Agency and Tribal governments and recognizes Tribes as the most appropriate party for regulating Tribal environments where they can demonstrate capability to do so.

- EPA reaffirmed its Indian Policy in 1994.

o In April 1994, President Clinton issued the "Presidential Memorandum on Government to government Relations with Native American Tribal governments." Among other things the Memorandum specifically States the following:

> The United States government has a unique legal relationship with Native American Tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As the executive departments and agencies undertake activities affecting Native American Tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of Tribal sovereignty.

# NINE PRINCIPLES OF EPA's 1984 INDIAN POLICY

1. Work with Tribal governments on a one-to-one basis

2. Recognize Tribes as primary parties for setting standards, making policy, and managing programs for a reservation.

3. Take affirmative steps to encourage and assist Tribes in assuming regulatory and program management.

4. Take appropriate steps to remove existing legal and procedural impediments.

5. Assure that Tribal concerns and interests are considered whenever EPA's actions or decisions affect reservation environments.

Q

## NINE PRINCIPLES OF EPA's 1984 INDIAN POLICY- Cont.

6. Encourage cooperation between Tribal, State and local governments.

7. Work with other federal agencies to enlist interest and support in cooperative efforts.

8. Strive to assure compliance with environmental laws on Indian reservations.

9. Incorporate these Indian policy goals into EPA planning and management activities including budgeting.

## EPA STATUTES WHICH HAVE BEEN AMENDED SPECIFICALLY TO ALLOW FOR EPA AUTHORIZATION OF TRIBAL PROGRAMS

- Safe Drinking Water Act, 1986
- Clean Water Act, 1987
- Clean Air Act, 1990

**R**

## GAP-FILLING LEGISLATION

In several instances, EPA has reasoned that even though Congress hasn't specifically provided for Tribal assumption of certain environmental programs in legislation, the Agency has the discretion to allow for Tribal programs. Two Acts where the opportunity to apply for environmental programs has been extended to Indian Tribes by this method are:

Resource Conservation and Recovery Act

Toxic Substance Control Act

S

## OTHER LEGISLATION...

In addition, three other EPA statutes allow for a limited Tribal role similar to the State's role.

These Are:

Emergency Planning and Community Right to Know Act

Federal Insecticide, Fungicide and Rodenticide Act

Comprehensive Environmental Response, Compensation and Liability Act

T

## KEY RECENT EPA INITIATIVES

- In February 1994, Administrator Browner established a Tribal Operations Committee (TOC) to improve communications and build stronger partnerships with Tribes.

- In March 1994, the Administrator reaffirmed EPA's Indian Policy which recognizes the government-to-government relationship and Indian Tribal governments as the most appropriate parties to manage Tribal environments, where ever Tribes demonstrate ability to do so.

- In July 1994, Administrator Browner issued an Action Plan for the Agency's Indian Program which outlined a number of steps for immediate implementation throughout the Agency.

- In October 1994, the Administrator established the American Indian Environmental Office (AIEO) to oversee implementation of the Agency's Indian Policy and ensure that all EPA Headquarters and Regional Offices implement their parts of the Indian Program in a manner consistent with EPA's trust responsibilities.

## EPA'S THREE BASIC IMPLEMENTATION STRATEGIES

1. Capability Building

2. Program Authorization

3. Direct Implementation

# CAPABILITY ISSUES

**Capability building entails providing Tribes with grants, information, technical assistance, and infrastructure to enable Tribal administration of environmental programs.**

# GENERAL ASSISTANCE GRANTS PROGRAM

EPA has assisted Tribes with meeting their capability requirements through a variety of grants available under specific programs. One significant source available for Tribal program capability building is through the General Assistance Grant Program (GAP).

The objectives of the Program are to provide funds to federally-recognized Tribal governments to build capacity to administer environmental programs and to provide technical assistance from EPA in development of multi-media programs.

## GENERAL ASSISTANCE GRANTS PROGRAM - Cont.

Capability building activities eligible for funding under GAP include:

1. Planning
2. Hiring staff
3. Monitoring
4. Assessing resources
5. General infrastructure development

## TRIBAL/EPA ENVIRONMENTAL AGREEMENTS

- As designed by EPA in consultation with Tribal leaders and environmental directors, TEAs describe the past and current condition of a Tribe's environment, the Tribe's long-range environmental goals and near-term priorities for EPA assistance.

- These Agreements are intended to assist the Tribes and EPA, in developing a multi-year plans for Tribal assumption of environmental programs and EPA direct implementation of environmental programs in Indian country.

- The Administrator's July 1994 Action Plan for the EPA Indian Program makes TEAs the cornerstone from which Regions and National Program Managers are to build their Indian Programs.

- On March 20, 1995, AIEO issued a Template providing flexible guidance on developing TEAs for the Regions and Tribes.

Y

## ***Treatment in the Same Manner as a State - Eligibility Requirements***

As required by some statutes, EPA has established a process by which Tribes may "apply" for eligibility under various programs. The criteria are:

The Tribe must be federally-recognized.

The Tribe must have *jurisdiction* over the territory in question.

The Tribe must have or be able to exercise *substantial governmental powers.*

The Tribe must have the financial, physical and human resource *capability* to effectively implement a program

## WHAT IS THE "TAS SIMPLIFICATION RULE"?

- Under this rule, EPA eliminated the need to meet all four criteria each time the Tribe applies for a program. Once a Tribe has been deemed eligible for one EPA program, it need only establish that it has jurisdiction and capability for each subsequent program.

- If the Tribe does not have capability, it must have a plan for aquiring capability over time. This is required because each program requires different skills and activities necessary to provide protection that meets the requirements of the statutues and regulations.

**AA**

# TRIBAL OPERATIONS ACTION MEMORANDUM

In July 1994, Administrator Browner issued a Memorandum outlining steps for prompt implementation throughout the Agency in an effort to strengthen public health and environmental protection in Indian country and to improve EPA's government-to-government relationship with Tribes. These action items are as follows:

1. Establishment of Tribal/EPA Environmental Agreements (TEAs)

2. Establishment of Program and regional Work plans based on TEAs

3. Implementation of Management and Compliance Activities

4. Review of Program and Regional Indian Program Organization -- and where necessary modification of the organization to strengthen Tribal operations

**BB**

5. Insurance that an Effective EPA Tribal Liaison Capacity Exists to Provide Direct Field Assistance to Tribes.

6. Provision of Training to EPA managment and Staff on How to Work Effectively with Tribal Governments

7. Enhanced Communications with Tribes

8. Use of Available Discretion to Consolidate Issuance and Administrative Requirements of Grants

9. Investment of Resources into Tribal Operations

## TRIBAL PROGRAM AUTHORIZATION
## TRIBAL ASSUMPTIONOF PRIMACY FOR FEDERAL ENVIRONMENTAL PROGRAMS

- Tribal governments, by virtue of their Tribal sovereignty, can exercise Tribal authority to regulate their own affairs as well as activities occuring within their territory.

- EPA acting under statutory authority provided by Congress, establishes standards relating to pollution, a system for enforcement of these standards, and upon request of a Tribe or State, authorizes eligible Tribes or States to establish and enforce its own or Federal environmental standards.

**CC**

## TRIBAL PROGRAM AUTHORIZATION- Cont.

- As Tribes move to develop enforceable environmental protection programs within Indian country they typically undertake the following steps:

    1. establish the necessary statutory framework by passing Tribal environmental codes;

    2. draft the necessary regulations; and

    3. establish an administrative body which can ultimately seek Tribal administrative or judicial sanctions to enforce the Tribal law.

## DIRECT IMPLEMENTATION

### EPA Taking Action Itself

**Point # 3 of 1984 EPA Indian Policy:**

**". . .Until Tribal governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations, unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State government."**

**DD**