

7. Status of Alaska Natives

Tribal Members

Alaska Natives may be members of one of the federally recognized tribes in Alaska. To be a tribal member, an individual must be recognized by the tribe and included on the tribal membership list. It is up to the tribe to determine its membership.

United States Citizens

Alaska Natives are citizens of the United States and Alaska under the Citizenship Act of 1924.

ANCSA Shareholders

The ANCSA is historically the largest and one of the most complex aboriginal land settlements ever enacted by the U.S. Congress. The ANCSA provided that all U.S. citizens with one-fourth or more Alaska Indian, Eskimo, or Aleut blood living as the date of passage of the Act and enrolled to one of the 13 regions established under the Act, were qualified to become shareholders in one of 13 regional Alaska Native corporations and over 200 village corporations. This settlement directed the payment of \$962.5 million as compensation for lands previously lost and for those to which Aboriginal title was being extinguished by the Act, and confirmed fee simple title to 44 million acres to the corporations. Both the compensation and the land are administered by the corporations established by ANCSA. Collectively, Alaska Native shareholders are the largest private landowner in Alaska.

8. Tribal Sovereignty

Many of us have not had an opportunity to learn the facts about the unique political relationship between the United States and the American Indians/Alaska Native tribes. Sovereignty is the foundation upon which this relationship is built. The purpose of this section is to provide the reader with a basic understanding about the sovereign status of American Indian/Alaska Native tribes.

What is Sovereignty?

Sovereignty is an internationally recognized concept. A basic tenet of sovereignty is the power of a people to govern themselves.

Tribal Sovereignty

American Indian/Alaska Native tribal powers originate with the history of tribes managing their own affairs. Case law has established that tribes reserve the rights they had never given away.

Treaties

Treaties formalize a nation-to-nation relationship between the federal government and the tribes. Formal treaty-making ended in 1871.

Trust Responsibility

In treaties, tribes relinquished certain rights in exchange for promises from the federal government. Trust responsibility is the government's obligation to honor the trust inherent to these promises and to represent the best interests of the tribes and their members. It is important to understand the difference between the ethnological term "American Indian" and the political/legal term "American Indian." The protections and services provided by the United States for tribal members flow not from an individual's status as an American Indian in an ethnological sense, but because the person is a member of a tribe recognized by the United States, and with which the United States has a special trust relationship. This special trust relationship entails certain legally enforceable obligations and responsibilities.

United States Constitution

The U.S. Constitution recognizes tribes as distinct government. It authorizes the U.S. Congress to regulate commerce with "foreign nations, among the several states, and with the Indian tribes."

Court Precedence

Three 19th century U.S. Supreme Court opinions serve as a cornerstone to understanding the sovereign status of tribes. These cases are the most widely cited with respect to tribal sovereignty:

Johnson v. McIntosh concerned the validity of a tribal land grant made to private individuals; provided that tribes' right to sovereignty are impaired by colonialization but not disregarded.

Cherokee Nation v. Georgia involved an action brought against the state of Georgia by the Cherokee Nation which sought relief from state jurisdiction on tribal lands; described tribes as

“domestic, dependent nations,” and maintained that the federal-tribal relationship resembles “that of a ward to his guardian.”

Worcester v. Georgia concerned the application of Georgia state law within the Cherokee Nation; held that tribes do not lose their sovereign powers by becoming subject to the power of the United States; maintained that only Congress has plenary power over Indian tribes; and established that state laws do not apply in Indian Country.

Modifications in the Nation-to-Nation Relationship

Public Law 280 (1953)

Provides for states to assume general criminal and some civil jurisdiction over Indian reservations within their boundaries. Tribes retain limited criminal and general civil jurisdiction but because of a lack of resources have generally not fully assumed these responsibilities.

Indian Child Welfare Act (1978)

Establishes procedures state agencies and courts must follow in handling Indian child custody matters. Creates dual jurisdiction between states and tribes and defers heavily to tribal governments.

Indian Gaming Regulatory Act (1988)

Should a tribe decide to engage in casino gaming, this act requires the state to negotiate in good faith with the tribe to form a compact setting forth the terms of operation.

9. Consultation with Tribes and ANCSA Corporations

The Federal Trust Responsibility to Tribes

The “Tribal Trust Responsibility to American Indians and Alaska Natives” provides the basis for a relationship between the federal and tribal governments and references the United States Constitution, Congressional Acts, case law, Presidential Memorandums, Secretarial Orders, as well as policies across the federal government.

Some of these references include:

- Articles of Confederation: Article IX. The United States in Congress assembled shall also have sole and exclusive right and power of regulating ... the trade and managing all affairs with the Indians ...
- U. S. Constitution: Article I. Section 8 – Congress shall have Power ...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.
- U.S. Constitution: Article 6 ... This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land ...
- U. S. Supreme Court Decisions: The Marshall Trilogy- Johnson v Macintosh (1823); Cherokee Nation v Georgia (1831); Worcester v Georgia (1832)
- Executive Memorandum: Government-to-Government Relations with Native American Tribal Governments (1994)
- Executive Orders: 12875 – Enhancing the Intergovernmental Partnership; (1993) 13175 – Consultation and Coordination with Indian Tribal Governments (2000)
- Secretarial Order 3225 – Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206) (2001)
- The Native American Policy of the U.S. Fish and Wildlife Service (1994)
- DOI-Alaska Government-to-Government Policy (2001)
- Draft DOI Consultation Policy (Expected final by November, 2011)

Consultation Basics

Government-to-Government consultation is between the federal government and Federally Recognized Tribes. It encompasses a federal-tribal relationship - which involves verbal dialogue, various means of communication, teamwork, leadership on the part of both governments, and an agreed-upon process. This document answers 3 basic questions: 1) What is the definition of consultation; 2) What triggers consultation; and 3) How is meaningful consultation accomplished?

Definition

According to Webster’s dictionary, Consultation means to consult or confer. Consult means to ask for advice or to seek an opinion. It does not mean obtaining consent. As a working definition of Consultation for the purposes of USFWS guidance, consultation is defined as: A mutual, open, and direct two-way communication, conducted in good faith, to secure meaningful

participation in the decision-making process, as allowed by law. (USFWS Draft Tribal Consultation Guide 2/7/2010)

Activities That Initiate Consultation

The Department of Interior Policy on Consultation with Indian Tribes is currently being written and due for the Secretary of Interior's signature this August. In the meantime, we must draw from several sources to help guide us.

- Proposed federal actions that will have a substantial, direct effect on the resources or rights of the Tribe(s). When assessing what is subject to consultation, the Agency shall take into account the cultural and traditional activities of the Tribe that may be affected by the proposed action. (DOI Policy on Government to Government Relations with Alaska Native Tribes, 2001)
- Departmental regulations, rulemaking, policy, guidance, legislative proposal, grant funding, formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe, including but not limited to:
 - Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on Federally managed lands; or
 - The ability of the Indian Tribe to govern its members; or
 - The Indian Tribe's relationship with the Department; or
 - The distribution of responsibilities between the Department and Indian Tribes. (DOI Draft Tribal Consultation Policy, March 2011)

Basic Consultation Process

1. Offer the Tribe(s) the opportunity to consult, early (preferably before a document is drafted), in writing.
2. Provide ample information, if Tribe(s) is interested in consulting.
3. Have a meeting or series of meetings where the dialogue occurs.
4. Document in your own case file and track the consultation on the USFWS Region 7 Share Point site.
5. Cooperatively create decision memorandums OR simply notify the Tribe(s) of final decisions on a proposed action within a reasonable time.