

NATIONAL FOREST LAND USE PLANNING:  
THE LEGAL REQUIREMENTS AND CULTURAL NEEDS OF AMERICAN INDIANS

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1/ A paper presented at the Society of American Foresters/Canadian Institute of Forestry Convention, held in Anchorage, Alaska, on September 18-22, 1994.

For several thousand years aboriginal peoples lived on the lands of the North American continent using natural resources to provide all the necessary elements for their civilization. There were as many 4,000 clans or bands of distinct social groups speaking different languages and maintaining different life ways. Soon to follow European contact and settlement was the formation of a new country with new laws to govern the land. Some of these American laws were incompatible with Indian cultures and had far reaching affects on the ancient life ways of indigenous peoples. Laws over the past 30 years, and our recent USDA Forest Service policies, addressing American Indians and Alaska Natives, now provide modern tools and opportunities for managers to accommodate the cultural and traditional Indian land uses of centuries past.

## INTRODUCTION

Laws applying to cultures on the North American continent prior to European contact were Indian laws established and enforced by the sovereign powers of the respective group or culture. When settlement by people from other nations began, the Indian (aboriginal) title to the territory was recognized, to varying degrees, by those arriving nations. In modern times, the U.S. Constitution, laws made from it and treaties signed by the United States are collectively the supreme laws of the land. These laws and regulations embody the management principles aimed at caring for public lands and serving needs and interests of the American public.

### Cultural Needs of Tribal Governments

The whole of America was at one time Indian Country. Land purchases made by the U.S. from European countries did not always result in obtaining clear title to the land. The Louisiana Purchase for example was not a purchase of land title from France, it was a purchase of the power to govern and to tax (Getches and Wilkinson, 1986). The same holds true for purchases made from England, Mexico and Spain. Therefore, lands within the Louisiana Purchase were still owned by Indian nations, until extinguished by treaty with the United States. Extinguishment of Indian title made it possible to incorporate land into the public domain. The legal instrument utilized by the United States to

extinguish Indian title to the land was a treaty between the two sovereign powers. Treaties between the U.S. and Indian tribes involving grants or cessions of land should not be viewed as ordinary land transactions where the seller conveys all rights in property sold (Cohen, 1945).

Today, Indian Tribal Governments operate in two worlds, one with traditional values and practices, the other, with all the aspects of the modern business world. Tribal Governments have specific needs to be a part of the UDSA Forest Service planning processes. Most tribal governments have elders or culture and heritage committees who review proposed projects that are to be implemented on National Forest System (NFS) lands. Tribal governments have a need to be notified early in our pre-project planning efforts. The best means is by personal contact or telephone call, followed up by a letter. Tribal governments are often working with several other federal and state agencies and a letter on

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<sup>2</sup>/ Les McConnell, Tribal Governments Staff Assistant, USDA Forest Service, Pacific Northwest Region, Portland, Oregon.

Forest Service stationery may be just one of many pieces of correspondence in a tribe's daily mail. Tribal governing bodies also have a need to access NFS lands for cultural ceremonies and celebrations. Events such as these require planning in terms of seasonal uses for certain special forest products (other than timber). There is one example of a tribal government regulating the gathering of firewood from NFS land through a written agreement with a local National Forest Office. This tribe actually issues the permits to tribal members for gathering firewood on NFS lands. In this instance, tribal governing bodies would need to be a part of the planning process defining those designated firewood gathering areas. In general, there is a need for Tribal Governments to be able to consult with and inform federal land managers in instances where aboriginal lands are subject to a federal action or undertaking.

### Cultural Needs Of Individual Indian People

In contrast to the above examples, individual Indian interests include, but are not limited to: cultural, spiritual or religious activities; and allotments of land. There are no treaties or executive orders that contain reference to spiritual or religious interests, hence no fiduciary or trust responsibility regarding spiritual or religious interests or sites. With specific regard to the term "cultural", most tribes and individuals view the concept of culture as including all aspects of their life way; a wholeistic or all inclusive existence. Many tribes and individuals now regard a treaty as a part of the "culture". Salmon for instance are referred to by Indian people in many different contexts: as a part of traditional and cultural subsistence food; possessing spiritual powers; having religious significance; for ceremonial purposes and for trade and commerce with other Indian Tribes and non-Indians (a commercial food). Other needs for use of public land include the following: 1) for sweat houses to participate in a traditional hygienic, spiritual or cultural activity; 2) Indian people relocated from their traditional home lands wanting to re-establish cultural ties with the land; 3) cultural exchanges between Indian groups or individuals; 4) ceremonial uses; 5) for health reasons; 6) to teach youth about the old ways; and 7) for personal or group religious purposes. Historically, traditional religious practices took place within a tribes' aboriginal territory. The term 'traditional use' indicates that natural resources or land are being used by Indian people for traditional cultural practices or activities.

Some sites of interest to Indian people today may not have been used on a continuous basis over time, yet are referred to as "sacred". These sites used in modern times are generally known as contemporary sites. These sites may be termed "sacred" by non-Indians and non-local Indian people depending upon the type of activity being applied to the land. It would be best to consult with Indian religious leaders to learn of the uses of the term sacred. Prior to a reaching a decision that would affect the manner in which land is used for Indian groups and individuals, weight should be given to the information from those peoples who traditionally lived or traveled in that area.

Protections arising out of the federal-Indian relationship which are unique to individual Indians usually focus on the traditional or usual religious beliefs and practices. The First Amendment of the

United States Constitution does not apply to Indian tribal governments and, a Supreme Court decision has held that it affords no protection against tribal regulation of tribal religious practices. However, courts have ruled that Indian religions are protected against state and federal incursions by the First Amendment (Holt and Forrester, 1990).

### LEGAL REQUIREMENTS AND CREATING THE PUBLIC DOMAIN:

After the Revolutionary War, the new United States of America established statutory laws and the Constitution to formalize the legal limits and responsibilities of the federal government. The Constitution recognizes three sovereign entities: federal, tribal and states of the Union. Along with this recognition of sovereignty, there was recognition of Indian title or aboriginal title to the land via exclusive use and occupancy of said land. As westward expansion continued into areas North and West of the Ohio River there was a need for land governing authorities in an area that was not yet settled nor had achieved statehood. To fulfill the need, the Northwest Ordinance was passed into law in 1787, two years before the U.S. Constitution was ratified by the Continental Congress. Article Three reads as follows:

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

Before the Forest Service was created by Congress, the U.S. Government had negotiated, signed and ratified 389 treaties with Indian Nations. Of these documents, 60 treaties contain provisions of reserved rights on what is now public domain or public lands. Federal agencies formed to administer lands had therefore inherited pre-existing obligations of the Executive Branch of government, i.e. the President. Four major acts of Congress provide federal agencies with legal requirements to protect and manage cultural resources: 1. National Historic Preservation Act of 1966 (P.L. 89-665, as amended, P.L. 91-423, P.L. 94-422, P.L. 94-458 and P.L. 96-515); 2. The American Indian Religious Freedom Act of 1978 (P.L. 95-341); 3. The Archeological Resources Protection Act of 1979 (P.L. 96-95); and 4. Native American Grave Protection and Repatriation Act [P.L. 101-601, 25 U.S.C. 3001-3013].

Most of these laws are accompanied by implementing regulations. Many are also supplemented by Forest Service policy designed to guide our operations in addressing tribal interests and rights. Item 3 of the Forest Service policy states: **"Administer programs and activities to address and be sensitive to traditional native religious beliefs and practices"**.

The Forest Service has an opportunity to assist with tribal efforts to maintain the cultural heritage of American Indians and Alaska Natives. This opportunity exists in our land management planning and practices. Meeting the needs of Indian people does not mean to the exclusion of non-Indians. It is not anticipated that different cultures would need to compete for public land occupancy or use. There are some regulatory requirements that limit the length of stay at certain locations on NFS lands. The Forest Service has many existing agreements for long term uses of public land, which include ski areas and camps for organizations like the Boy Scouts and other groups. Supporting these kinds of uses has not prevented the Forest Service from meeting its mission of "Caring for the Land and Serving People" (USDA Forest Service Mission, Vision and Guiding Principles, 1994).

Recent attention to American Indian and Alaska Native influence on management planning for

National Forests has surfaced the use of the term Trust Responsibility as it applies to these lands. There is no question that the United States (through the President) has a trust responsibility brought about by the Treaties, Executive Orders and Laws related to American Indians. Further, the welfare, land and resources owned by Indian people are intrusted to the United States Government. For some federal agencies, like the Bureau of Indian Affairs and the Indian Health Service, the application of

trust responsibility is clear because their mission centers around caring for the welfare, land and interests of Indians. For other agencies, including the Forest Service, the responsibility is not that clear since the term trust responsibility has yet to be defined in statute or other law.

Remaining consistent with a treaty or executive order depends not so much on whether the elements of the document are called trust responsibilities or rights and privileges, but on carrying out the intent of the law in a just and responsive way, and making a strong effort to adjust management of National Forests to accommodate the cultural needs of Indian Tribes and individuals.

### Consultation With Indian Groups

The Forest Service is obligated by several federal statutes to consult with the affected Indian tribe(s) regarding proposed actions. The best way to gain information about cultural needs is to conduct thorough consultation with the traditional tribal members, religious practitioners and elders from the local tribe. Consultation with those peoples should be done on a case by case basis. One way to actively support cultural uses of NFS lands is to enter into a written agreement with a tribe or tribal group. The most often used method to accommodate use of NFS lands is by issuing a Special Use Permit. This system is outlined in the Code of Federal Regulations (36 CFR 251) and the accompanying policy in the Forest Service Manual, (FSM 2700). Information obtained by consulting with Indian people regarding the requested use(s) of the land will assist in shaping the purpose, content and goals of the agreement. A priority should be assigned to those requests for exercising treaty rights and traditional uses at historic locations over requests for contemporary or non-traditional uses.

Consultation with Indian groups other than the tribal governing body applies to most instances where there is no express treaty issue. Some tribal governments make final decisions regarding the religious aspects of their culture, while others leave this subject area to religious leaders or tribal elders or even committees formed to address this sensitive subject. Consultation needs to be an active, affirmative process of talking to appropriate American Indian tribal governments; community groups and individuals. The information gathered needs to be incorporated into our planning documents throughout our decision making process. Consultation with Indian groups therefore, is a continuous activity; not a single event. Consultation is much more than mailing a letter requesting comments on a draft document. Our efforts should take place in pre-project planning before the general public involvement, consistent with our governmental relationships.

### Written Agreements

Written agreements can be a valuable resource management tool for both Tribes and federal agencies. Where uses include taking natural resources an agreement or written partnership would enable both governments (federal and tribal) to assure sufficient resources are available for harvest. Many of the resources gathered for cultural uses have no inventory; consequently, no sustained use management level has been evaluated. There are instances when a Tribe or its members rightfully require confidentiality or secrecy for gathering certain resources such as medicines or ceremonial objects. In these instances it may be best not to require a written agreement - or even any notice to the Forest Service.

Developing a written agreement for protecting sacred sites is another option for accommodating a need. This can be done with tribal governments or tribal members and traditional practitioners, depending upon the type of need or activity intended for NFS lands. Consultation is necessary here as well to address the potential that Indian groups may not be represented by the tribal council, as

individual Indian religious freedom is not a government to government issue. Many Indian reservations are comprised of anywhere from a single tribe to 18 or more tribes or bands of Indian peoples - all of whom may have separate religions or spiritual practices. Single tribe reservations often have more than one traditional religion still in practice. For these reasons, the Forest Service should maintain communications with tribal members, religious leaders and recognized practitioners.

Some requests for land use may affect former or existing uses or practices. Conversely, some of our management practices may affect access to sites or the manner in which tribes or groups continue to use the land. This subject is one of continuing debate even with the occasional uses of certain cultural sites on NFS lands. There are a few circumstances when the Forest Service must control access to sites. These would include circumstances like: public safety; law enforcement activities; fire prevention or control; criminal investigation; restrictions for wilderness areas; environmental damage prevention; and similar examples where the Forest Service has jurisdiction and authorities. Cultural interests and religious uses in and of themselves do not place a lien or encumbrance on the land title for lands managed or owned by the United States. Some sites are the subject of requests for special protection measures. For these, the Archaeological Resources Protection Act provides for specific protective actions and measures, where artifacts or similar resources exist and access to sites may be strictly controlled.

In all of the above examples, the Forest Service official responsible for the land management decision should be informed of any special circumstances and make decisions in support of, or to accommodate, traditional and cultural uses in a manner consistent with our duties and responsibilities. Forests and Districts that boarder other Forests, should maintain consistency in applying federal rules and regulations when receiving and acting on requests from Indian Tribes, groups or individuals for various uses of NFS lands.

## ACTIONS AND RESULTS

The laws, rules, regulations, manuals, hand books and desk guides are all a necessary part of our workings as a federal land manager. Some are intended to create consistency in our actions; provide protections for persons, lands and resources; others - to prevent errors of the past from recurring, still others are simple prohibitions for certain actions. We have responsibility to implement singular laws that may affect all Indian Nations, each of whom may view these laws differently as they may apply to their respective cultures and the lands once occupied by their ancestors. Our task then becomes one of making management decisions and implementing land use actions that best address our responsibilities while accommodating and remaining sensitive to the needs of the respective Indians and Alaska Natives to the fullest extent of the laws.

All the rules in our libraries assembled into a single room cannot grow a single tree. Which is another way of saying that the policies and legal requirements of the federal government have no effect until they are implemented. It is our completed projects that make a difference in the status and health of the National Forests. Our words are not tangible. Instead, they are just the beginning steps of a journey that will lead us toward comprehensive resource management. Our successes as federal land managers in meeting the cultural needs of Indian people are going to be found in our relationship with them; as individuals, as governments, as groups and leaders. That relationship must be one built on mutual trust, thought and action.

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