
CHAPTER

3

Indian Tribal Treaty Rights and Consultation

TREATY RIGHTS AND CONSULTATION IN THE GMA

The tribes that currently make up the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Indian Nation tribes signed treaties with the United States Congress in 1855. These treaties ceded to the United States legal title to millions of acres of land. They also reserved and guaranteed certain aboriginal rights exercised by Indian people since time immemorial. These legally protected rights belong to each Indian tribe and are regulated and enforced by the respective Indian tribal governments. The Indian tribal governments exercise inherent sovereign powers, as limited by treaty or act of Congress.

The language and legislative history of the [National Scenic Area Act](#) make it clear that Congress intended to protect the Treaty Reserved rights and sovereign powers of the [Indian Treaty Tribes](#). Section 17(a)(1) of the [National Scenic Area Act](#) states that nothing [in the Act](#) shall "affect or modify any treaty or other rights of any Indian tribe." Indian tribal governments were also ensured a role in the management processes established under the Scenic Area Act. Section 6(e) [states that the](#)

U.S. Secretary of Agriculture and the Gorge Commission must "exercise their responsibilities . . . in consultation with . . . Indian tribes." Additional language regarding tribal rights and roles appears in Sections 6(a)(3)(C), 8(d)(3), 9(b)(2)(D),

13(b), 17(a)(2), 17(a)(3), 17(a)(4),
17(a)(7), and 17(a)(8).

Indian treaty rights must be observed
by the Gorge Commission as well as
local and state governments, federal
agencies, and private citizens.-

Indian treaties provide that:

The exclusive right of taking fish in
the streams running through and
bordering said reservation is hereby
secured to said Indians, and at all
other usual and accustomed
stations in common with citizens of
the United States, and of erecting
suitable buildings for curing the
same; the privilege of hunting,
gathering roots and berries and
pasturing their stock on unclaimed
lands in common with citizens is
also secured to them. [Treaty with
the Cayuse, Walla Walla, and
Umatilla Tribes, 1855.]

This excerpt is similar to the language
in the treaties signed by the Nez Perce,
Warm Springs, and Yakama tribes.

"Usual and accustomed stations"
include the Columbia River and its
tributaries that support anadromous and
resident fish.

The courts have generally interpreted
"unclaimed lands" to mean all public
lands.

GMA Goal

Ensure that ~~implementation of~~ the National Scenic Area Act ~~and its application does~~ not affect or modify any treaty or other rights of any Indian tribe.

GMA Policies

1. Local governments shall notify the four Indian tribal governments when new uses are proposed on lands where tribal members exercise or could exercise treaty or other rights within the National Scenic Area.
2. Indian tribal governments shall have an opportunity to review, and comment and consult on new uses that are proposed on lands, or in waters, where the tribe determines where tribal members exercise or could exercise treaty or other rights exist..
3. Counties and Project applicants shall consult with Indian tribal governments that ~~submit substantive comments~~ request consultation about proposed uses that may affect or modify treaty or other rights.
4. Proposed development and uses that would affect or modify treaty or other rights of any Indian tribe shall be prohibited.

Commented [AH1]: The tribes are the best judge of whether an area is used or could be used for treaty reserved rights.

GMA Guidelines

Tribal Government Notice and Comment Period

1. Local governments shall send a notice to the four tribal governments ~~when for all~~ new review uses, requesting comments, recommendations, or concerns relating to the protection of treaty rights, including rights to access, hunt, fish, and gather, ~~that are~~ Are on (1) proposed on public lands, or (2) proposed in or adjacent to the Columbia River or its tributaries that support anadromous or resident fish, or (3) proposed on lands subject to laws protecting archaeological or cultural sites of significance to the tribes..

Public lands include lands owned by cities, counties, states, and the United States. Lands within the National Scenic Area including those adjacent to the Columbia River or its fishbearing tributaries are those lands that are situated directly between the Columbia River or its fishbearing tributaries and the closest public access point. Public access points include state highways and parks.

~~The wildlife inventory in the "Streams, Ponds, Lakes, and Riparian Areas" section (Part I, Chapter 4: Natural Resources) identifies all tributaries in the Scenic Area that support anadromous and resident fish.~~

2. Notices sent to the Indian tribal governments shall include a site plan. ~~As specified in guidelines 3 and 4 below, the notices and~~ also may require include supplemental information and a proposed treaty rights protection plans.

3. ~~Proposed~~ new uses and development uses or development located in, ~~or~~ providing recreation river access to, or on parcels that adjoin the Columbia River or its fishbearing

tributaries shall include the following supplemental information:

- A. The site plan map shall show adjacent river areas at least 1/2 mile upstream and downstream from the project site, the locations at which river access is planned, and the locations of all tribal fishing sites known to the project applicant.
 - B. ~~A description of the type of river access and uses proposed, estimated period when the development would be used, and anticipated levels of use (people, boats, and other uses) during peak-use periods. The site plan text shall include an assessment of the potential effects that new uses may have on Indian treaty rights. The assessment shall:~~
 - ~~(1) Describe the type of river access and uses proposed, estimated period when the development would be used, and anticipated levels of use (people, boats, and other uses) during peak-use periods.~~
 - ~~(2) List tribal commercial fishing seasons in the project vicinity, as established by the four treaty tribes.~~
 - ~~(3) List tribal ceremonial fishing seasons in the project vicinity.~~
 - ~~(4) Based on the above factors, assess the potential effects that the proposed uses may have on Indian treaty rights.~~
 - C. ~~Proposed treaty rights protection measures that will be used to avoid effects to Indian treaty rights. These measures may include reducing the size and modifying the location or design of the proposed uses, seasonal closures, stringent onsite monitoring, information signs, and highly visible buoys or other markers delineating fishing net locations.~~
4. ~~Notices shall include a treaty rights protection plan if new uses may affect Indian treaty rights. The protection plan shall specify measures that will be used to avoid effects to Indian treaty rights. These measures may include reducing the size and modifying the location or design of the proposed uses, seasonal closures, stringent onsite monitoring, information signs, and highly visible buoys or other markers delineating fishing net locations. At the same time that the county sends notice, the county shall offer to meet with or consult with the tribal government prior to making a decision on the proposed development. Offers to meet or consult with a tribal government shall include phone calls and electronic communication to tribal government chairs, chief administrative officers, and natural and cultural resource staff. The county shall make more than one attempt to contact a tribal government.~~
5. Indian tribal governments shall have 230 calendar days from the date a notice is mailed to request that the county or applicant consult with the tribal government regarding potential impacts to treaty rights. All substantive comments, recommendations, or concerns expressed by Indian tribal governments during the consultation meeting shall be recorded and resolved by the county or applicant through revisions to the project application, conditions or approval, and, if necessary, a treaty rights protection plan. The county and application shall keep

Commented [AH2]: Consider removing the applicant. Consultation is on a government to government basis. Applicants are not governments. Applicants can provide information, but it's not formal consultation.

Commented [AH3]: I presume this is intended to be "applicant." This further reinforces why consultation with the applicant is inappropriate, there is no way to ensure confidentiality. The counties are subject to public records laws including the authority to withhold information, private citizens are not.

confidential the tribal government's comments, recommendations, and concerns, and notes of the consultation and other information related to protection of treaty rights unless the tribal governments expressly authorize disclosure. The confidential information shall be submitted to the Gorge Commission in the event of an appeal.

5.6. Any time periods specified in a county ordinance to review an application shall stop when a tribal government requests consultation and shall not start again until the county or applicant meets with all tribal governments that requested consultation and the applicant submits all additional information and actions necessary to avoid effects to treaty rights to the satisfaction of the Indian tribal governments that requested consultation.

7. An Indian tribal government's choice to consult with the county or an applicant shall, in no way, be interpreted as a waiver of the tribe's sovereign immunity or waiver of any claim that the proposed use affects or modifies a treaty right or other tribal rights.

~~6. submit substantive written comments to the local government. Indian tribal governments must identify the treaty rights that exist in the project vicinity and explain how they would be affected or modified by the new uses.~~

~~7. —~~

~~8. Tribal Government Consultation~~

~~9. —~~

~~10. When substantive written comments are submitted to a local government in a timely manner, the project applicant shall offer to meet with the local government and the Indian tribal government that submitted comments within 10 calendar days. The 10-day consultation period may be extended upon agreement between the project applicant and the Indian tribal government.~~

~~Consultation meetings should provide an opportunity for the project applicant and tribal representatives to identify potential conflicts and explore options to eliminate them. The project applicant must demonstrate that his/her proposed use would not affect or modify treaty or other rights of any Indian tribe.~~

~~11.8. Any substantive comments, recommendations, or concerns expressed by Indian tribal governments during the consultation meeting shall be recorded and addressed by the project applicant in a treaty rights protection plan. The protection plan shall include measures to avoid effects to treaty and other rights of any Indian tribe.~~

~~12. The local government shall submit all protection plans to the Indian tribal governments. Indian tribal governments shall have 30 calendar days from the date a protection plan is mailed to submit written comments to the local government.~~

Conclusion of the Treaty Rights Protection Process

~~1. The local government shall decide whether the proposed uses would affect or modify any treaty or other rights of any Indian tribe.~~

~~2. —~~

~~3.1. The final decision shall integrate findings of fact that address the county and applicant's effort to meet with or consult with the tribal governments and any revisions and treaty rights protection plan resolving the Indian tribal governments' any substantive comments, recommendations, or concerns expressed by Indian tribal governments. If the final decision contradicts the comments, recommendations, or concerns of Indian tribal governments, the local government must justify how it reached an opposing conclusion.~~

Commented [AH4]: Has one of these ever been done in this forum?

4.2. The treaty rights protection process may conclude if the local government determines that the proposed uses would not affect or modify treaty or other rights of any Indian tribe. Uses that would affect or modify such rights shall be prohibited.

5.3. A finding by the local government that the proposed uses would not affect or modify treaty or other rights, or a failure of an Indian tribe to comment or consult on the proposed uses as provided in these guidelines, in no way shall be interpreted as a waiver by the Indian tribe of a claim that such uses adversely affect or modify treaty or other tribal rights.

TREATY RIGHTS AND CONSULTATION IN THE SMA

The Forest Service is responsible for consulting with Indian tribal governments at the government-to-government level. The purpose of this process is to ensure that management activities will not affect treaty rights, and to provide meaningful participation in the identification, evaluation, and protection of cultural resources.

Section 17 (Savings Provisions) of the Scenic Area Act contains several provisions regarding the need to avoid potential effects on treaty rights. Treaty rights are defined by the treaties of 1855

between Congress the United States and Indian tribal governments. These rights are not subject to negotiation. Potential effects to treaty rights must be avoided. The Forest Service has no authority to interpret or negotiate in the area of treaty rights.

Cultural resources are protected by the Scenic Area Act and the Historic Preservation Act of 1966. Indian tribal governments are identified as parties to be consulted during the inventory, evaluation, and protection of cultural resources.

SMA Goals

1. Protect treaty and other rights of the Indian tribal governments.
2. Provide for and execute a consultation process with Indian tribal governments.

SMA Policies

1. The Forest Service shall consult with the Indian tribal governments to determine the effect of all federal actions reviewed by the Forest Service on treaty rights. Reviewing agencies shall use the procedures defined by the Gorge Commission for the GMA for all non-federal actions.
2. The Forest Service shall establish a government-to-government consultation process between each Indian tribal government and the Forest Service, in accordance with the following:
 - A. The Scenic Area Manager shall be the agency official for the Forest Service, National Scenic Area, who is responsible for making decisions regarding treaty rights issues and potential effects on cultural resources.
 - B. The Indian tribal governments shall be the recognized entities for the purpose of authorizing decisions regarding treaty rights issues or potential effects to cultural resources.

- C. The Scenic Area Manager shall designate the Forest Service representative for the purpose of maintaining a continuing working relationship with the Indian tribal governments.
 - D. The Indian tribal government should designate representatives for the purpose of maintaining a continuing working relationship with the Forest Service, National Scenic Area.
3. A continuing working relationship between the Forest Service and the Indian tribal governments shall be established.
- A. The Forest Service shall enter into Memoranda of Understanding with each of the Indian tribal governments for the purpose of outlining consultation agreements, as provided for in Part I, Chapter 2: Cultural Resources.
 - B. The Memoranda of Understanding should identify key staff at each Indian tribal government to work with the Forest Service, National Scenic Area, designee.
 - C. The Memoranda of Understanding should establish procedures by which the Forest Service will consult with Indian tribal governments for proposed developments or changes in use.
 - D. The Memoranda of Understanding should establish the process by which the Forest Service will consult with Indian tribal governments for all proposed developments or changes in use that may have the potential to affect treaty rights or other uses.
 - E. The Memoranda of Understanding should establish the government-to-government process by which Indian tribal governments and the Forest Service, National Scenic Area, meet individually to identify potential treaty rights issues for potential developments or changes in use.
 - F. The Memoranda of Understanding should establish a mutually agreeable process by which meetings and decisions between the Indian tribal governments and the Forest Service, National Scenic Area, are documented.
4. Lands held in trust by the Secretary of Interior for Indian tribes or individual members of Indian tribes shall not be affected by any provisions of the Management Plan.
5. Lands acquired by the U.S. Army Corps of Engineers and administered by the Secretary of Interior for the benefit of Indian tribes and individual members of Indian tribes under Public Laws 14 and 100-581 (In-Lieu Treaty Fishing Access Sites), including those yet to be selected by the U.S. Army Corps of Engineers within the Bonneville and John Day Pools under the provisions of Public Law 100-581, Section 401(b)(1), shall not be affected by the SMA Management Plan for the Scenic Area.

6. New uses and development uses or development shall not affect or modify any treaty or other rights of the Indian tribal governments.
7. Any revisions or amendments to the Management Plan shall require consultation with the Indian tribal governments.
8. New developments or land use shall protect access to usual and accustomed tribal or Indian fishing sites or stations protected under treaty rights, and as established by court interpretations of those treaties.
9. Indian tribal governments shall be invited to participate in the planning of public recreation developments that could affect treaty rights.
10. Federal land management agencies shall not deny Indian tribal governments, or individual members of Indian tribes, access to any area on federal or state land that is traditionally used in connection with tribal treaty or ceremonial rights or for traditional uses.