

Indian Tribal Treaty Rights and Consultation

TREATY RIGHTS AND CONSULTATION IN THE GMA

The Nez Perce, Umatilla, Warm Springs, and Yakama Indian tribes signed treaties with 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 Scenic Area Act make it clear that Congress intended to protect the rights and sovereign powers of the Indian tribes. Section 17(a)(1) of the Scenic Area Act states that nothing 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 the Scenic Area Act and its application do 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 treaty or other rights.
2. Indian tribal governments shall have an opportunity to review and comment on new uses that are proposed on lands, or in waters, where tribal members exercise treaty or other rights.
3. Project applicants shall consult Indian tribal governments that submit substantive comments about proposed uses that may affect or modify treaty or other rights.
4. Proposed uses that would affect or modify treaty or other rights of any Indian tribe shall be prohibited.

GMA Guidelines

Tribal Government Notice and Comment Period

1. Local governments shall send a notice to the four tribal governments when new uses are (1) proposed on public lands, or (2) proposed in or adjacent to the Columbia River or its tributaries that support anadromous or resident fish.

Public lands include lands owned by cities, counties, states, and the United States. Lands 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 also may require supplemental information and treaty rights protection plans.
3. New uses located in, or providing recreation river access to, 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. 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.
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.
5. Indian tribal governments shall have 20 calendar days from the date a notice is mailed to 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.

Tribal Government Consultation

1. 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.

2. 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.

3. 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.

The final decision shall integrate findings of fact that address 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.

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.
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 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 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 sites), including those yet to be selected by the U.S. Army Corps of Engineers within the Bonneville Pool 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 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.