DoD American Indian/Alaskan Native Policy: Alaska Implementation Guidance

11 May 2001

DOD AMERICAN INDIAN AND ALASKA NATIVE (AI/AN) POLICY ALASKA IMPLEMENTATION GUIDANCE

I. Purpose:

This Guidance is designed to enhance the government-to-government working relationship between the Department of Defense (DoD) and Tribes in Alaska through implementation of the Department's American Indian and Alaska Native Policy in Alaska. This Guidance considers those situations and issues unique to Alaska's Tribes including application of trust responsibilities, renewable resources, land status and the logistics of working on a government-to-government basis with 229 Tribes dispersed throughout Alaska.

This Guidance recognizes that trust responsibilities are not limited to Tribal rights and resources associated with Indian Land, but extend to protected rights and resources off Indian Land as well.

This Guidance is designed to assist DoD agencies in identifying and initiating government-to-government consultation with affected Tribes. It is not intended to be a substitute for individual tribal protocols concerning specific DoD activities that result in consultation.

This Guidance follows the DoD Policy focus on protected tribal resources, tribal rights, and/or interests in Indian Land. Specifically, Federal law applicable to Alaska Natives are applied within the definition of key terms as used in the DoD Policy to establish what qualifies as tribal rights and resources, on or off Indian Land, and what qualifies as Indian Land in Alaska. This Guidance then establishes procedures for identifying and initiating government-to-government consultation for DoD activities affecting those rights, resources and interests.

II. Tribes In Alaska.

Tribes affected by this Guidance are defined by DoD as those Native entities within Alaska recognized and eligible to receive services from the Department of the Interior Bureau of Indian Affairs (BIA) and listed in the most recent Federal Register listing. Those tribes may be represented by traditional councils, or organized under the Indian Reorganization Act (IRA) as an IRA Council. Government-to-government relations will be conducted with Tribes and not with Native Corporations (Regional or Village) formed under the Alaska Native Claims Settlement Act (ANCSA), nor with other governments established under the Alaska State Constitution such as boroughs or first and second class cities which may represent Alaska Natives.

III. Tribal Rights and Protected Tribal Resources in Alaska

A. <u>DoD Definitions</u>

As defined by DoD Policy, Tribal rights are those legally accruing by virtue of inherent sovereign authority, unextinguished aboriginal title, treaties, statutes, judicial decisions, executive order or agreement that give rise to legally enforceable remedies.

As defined by DoD Policy, Protected Tribal Resources are those natural resources or properties of traditional or customary religious or cultural importance, either on or off Indian Land, retained by or reserved for Indian Tribes through treaties, statutes, judicial decisions or executive orders, including tribal trust resources.

B. Alaska Native Claims Settlement Act

In Alaska, all claims based on aboriginal right, title, use, occupancy of land or water, or based on statute or treaty of the United States relating to Native use or occupancy, were extinguished in 1971 by Congress in the Alaska Native Claims Settlement Act (ANCSA), 43 USC 1603(c). ANCSA also extinguished aboriginal title to all prior conveyances of public land and water areas in Alaska, 43 USC 1603(a). Finally, ANCSA extinguished aboriginal title in Alaska based on use and occupancy, including aboriginal hunting or fishing rights, 43 USC 1603(b).

Tribal rights and resources in Alaska are those based on congressionally recognized sovereignty or defined by subsequent Federal statutes, Executive Orders, or judicial opinions. This Guidance attempts to identify those interests unique to Alaska Natives.

The obligations and responsibilities in the DoD Policy do not depend solely on the existence of Indian Land in Alaska. DoD agencies in Alaska should focus their attention primarily upon Tribal rights and resources, and DoD's trust responsibility to protect those resources independent of their association with Indian Land.

C. Cultural, Religious and Historic Interests

Tribes have a protected interest in access to sacred sites, use and possession of sacred objects, and the exercise of traditional religions. These are protected under Executive Order 13007 (Indian Sacred Sites, 24 May 96).

Tribes also have a protected interest in identification and rightful disposition of funerary objects, sacred objects, and items of cultural patrimony that are in Federal possession or control. These are protected by the Native American Graves Protection and Repatriation Act (NAGPRA), 25 USC 3001-3013 and the Archeological Resources Protection Act (ARPA), 16 USC 470aa-ll. NAGPRA provides for the return of funerary objects, sacred objects and items of cultural patrimony from federally funded museums and from collections from Federal and Indian Lands. It also provides for repatriation of these items and of Native American human remains discovered on Federal and Indian Lands.

Under the National Historic Preservation Act (NHPA), 16 USC 470a-470w and 300 CFR 800, "tribal land" is defined as lands within the boundaries of a reservation or dependent Indian community. The Metlakatla Indian Community (MIC), as the only Federally recognized tribe in Alaska with such lands, may assume the role of the State Historic Preservation Officer (SHPO) with approval of the Secretary of the Interior, through the National Park Service, for activities on its tribal lands. If MIC does not assume the role of SHPO, it still has the right to be a consulting party on all Federal undertakings on its tribal lands. All other Federally recognized tribes in Alaska have the right to be consulting party for historic properties, or Federal undertakings which may affect historic properties, when the Tribe attaches religious and cultural significance to those properties.

Tribes have an interest in the National Environmental Policy Act (NEPA), 42 USC 4321-4347, scoping process under 40 CFR 1501.7(a)(i). Tribes also have an interest in the notice and comment process when tribal interests may be affected by a proposal (40 CFR 1503.1(a)(3), and as a cooperating agency when the proposed Federal activity will affect trust lands as defined in this guidance, under 40 CFR 1503.1(a)(2)(ii) and 1508.5.

Alaska Native individuals who dwell on the coast of the North Pacific Ocean or the Arctic Ocean have an interest in marine mammals for food, handicrafts or clothing. This interest is protected by the Marine Mammal Protection Act, 16 USC 1371(b).

Tribes have an interest in the taking of bald or golden eagle for religious purposes under the Bald Eagle Protection Act, 16 USC 668a.

IV. Indian Land in Alaska.

Indian Land, as defined by DoD Policy, is land held in trust by the United States for the benefit of a tribe or Native individual, or held by such tribe or individual subject to restriction by the United States against alienation.

A. Alaska Native Land Meeting the DoD Definition of Indian Land:

1. The Metlakatla Indian Community Federal Reservation on Annette Island.

This reservation is held in trust by the United States. 25 USC 495.

2. Individual Native Allotments under the Alaska Allotment Act

Under the Alaska Allotment Act, Alaska Natives not residing on a reservation were allotted land of the United States to be held in trust by the United States, but for the sole benefit and use of the Native allottee. The Act authorized the BIA to manage the program. The BIA could convey the land free of trust to the allottee after 25 years or upon a determination that the allottee could manage the land. Various methods of alienation were also authorized but with BIA approval. See Appendix A for statutory citations.

Under these authorities the BIA issued Native Allotment Certificates. Under the Indian Self-Determination Act, 25 USC 450j, BIA contracted out with Regional Nonprofit Corporations to monitor these allotted trust lands.

ANCSA, 43 USC 1603c (1971), extinguished all interests in land based on federal statute at that time. Therefore, Natives covered by ANCSA, or their descendants, are not eligible for further allotment. 43 USC 1617. However, allotments existing in 1971 continue to be valid because of express language in ANCSA, 43 USC 1617, recognizing then existing (1971) allotments but precluding further allotments to ANCSA eligible Natives. Subsequently, in the Alaska National Interest Lands Conservation Act (ANILCA), Public Law 96-487, 1980, 16 USC 3101-3126, Congress amended ANCSA to approve Native allotment applications pending on or before the enactment of ANCSA. 43 USC 1634.

In summary, Indian Land in Alaska for DoD Policy purposes includes existing Native allotments under the above authorities only so long as held in trust by the United States subject to restriction on alienation. Once BIA has approved alienation or issues the land in fee simple, the allotment ceases to be Indian Land.

3. Townsite Lots under Native Townsite Act.

In 1926 Congress authorized the Federal townsite trustee to issue restricted deeds in trust to Alaska Natives living in Federal townsites. In 1948, Congress authorized the townsite trustee to issue unrestricted deeds upon approval by BIA. In 1976, Congress repealed the Townsite Act. See Appendix A for citations.

Any restricted Townsite deeds held by Alaska Natives, which have not been alienated with approval of BIA are still held in trust and may be Indian Land. DoD policy would, therefore, apply to interests in that land. The majority of lots in Alaska Towns, outside the rail belt, have restricted deeds.

B. Alaska Native Land Not Meeting the DOD Definition of Indian Land

1. ANCSA Land, 43 USC 1601.

This includes surface and subsurface estates held by the 12 for-profit Regional ANCSA Corporations under 43 USC 1606, and the surface estates of Native Village Corporations under 43 USC 1607. The village corporations are for-profit.

2. ANCSA Village Corporation Land Transferred to Tribes

In 1934, Congress authorized BIA to create Indian Reorganization Act (IRA) land held in trust, 25 USC 463-465. However, ANCSA, 43 USC 1603c (1971), extinguished all IRA interests in land based on federal statute.

In recent years, several ANCSA village corporations have been deeding their land to Tribes located in the same village, often with the same membership. Because these deeds originated from corporate fee land, they are not held in trust by the United States and do not qualify as Indian Land within the DOD Policy definition. A trust relationship is not recreated by transfer to the Tribes because the land does not qualify as a "dependent Indian community" within the meaning of 18 USC 1151[1], and is, therefore, not Indian Country. *Alaska v. Native Village of Venetie Tribal Government*. Supreme Court No. 96-1577 (1998).

V. Subsistence

Under the Alaska National Interest Lands Conservation Act (ANILCA), Public Law 96-487, 1980, 16 USC 3101-3126, Congress granted a subsistence preference for individual Alaska Natives on Native land and for both Native and non-native rural residents on public land. 16 USC 3111(a)(1). The preference means that when it is necessary to restrict taking of fish and wildlife, subsistence uses shall be given priority over other consumptive uses. 16 USC 3112. For definitions, see Appendix B.

While Congress acknowledged the importance of subsistence to all rural Alaska residents, it noted that the continuation of the opportunity for subsistence uses is essential to the Native physical, economic, traditional, and cultural existence. 16 U.S.C. 3111(a)(1).

Because Natives may enjoy a subsistence preference on both Native Land (as defined by ANILCA) and public land in Alaska, DoD agencies must determine whether their activities may have the potential to significantly affect renewable resources relied upon for subsistence.

VI. Trust Responsibility in Alaska.

In the Federally Recognized Indian Tribe List Act of 1994, P.L. 103-454, Congress declared that the United States has a trust responsibility to recognized Indian Tribes, maintains a government-to-government relationship with those tribes and recognizes the sovereignty of those tribes. Federally recognized Tribes in Alaska participate in that trust relationship with the United States.

The Federal trust obligation of the United States to the tribes in Alaska applies to Tribal Rights and Protected Tribal Resources as described in this Guidance. It also applies to Indian Land meeting the DOD definition, as defined in this Guidance, held in trust by the United States, such as the Metlakatla Reservation and existing Native allotments.

There is no trust obligation with respect to land held under ANCSA or land held by Tribes, which was transferred from ANSCA corporations. However, there is a trust obligation for identified protected tribal rights and resources that may exist on those lands. There is no trust obligation by virtue of aboriginal title, which was extinguished by ANCSA.

---

[1] 18 USC 151 defines Indian Country to include reservations, dependent Indian communities and Indian allotments with unextinguished title.

VII. Government-to-Government Relations

DoD components will consult on a government-to-government basis with Tribes concerning DoD activities which may have the potential to affect the above described tribal rights and resources, on or off Indian Land, and interests in Indian Land. This consultation is not satisfied by compliance with general existing statutory public participation requirements, but requires separate consultation with the tribe on identified tribal interests. Consultation Procedures, set forth below, describe how DoD components will identify those interests.

The DoD recognizes that there are other governments or government agencies representing Alaska Natives, which are affected by DoD activities. Consultation with Tribes is intended to supplement and not replace consultation with these other governments and government agencies as necessary. The DoD also recognizes that while consultation with ANCSA Corporations as landowners may be necessary, ANCSA Corporations are not tribal governments. The DoD in Alaska must take into consideration the interests of all governments affected by DoD activities.

If a DoD activity does not have a potential to affect an identified tribal right, resource, or interest in Indian Land, as described in this Guidance, consultation with the tribe on a government-to-government basis is not required for that activity.

It is the responsibility of the DoD component to identify potential effects to known tribal rights and resources and initiate consultation early in the planning process with affected Tribes. It is anticipated that Tribes will assist the DD in this effort by identifying rights, protected resources, or interests in Indian Land that may be affected by the DoD activity. The Tribal response to the DoD component should provide the information necessary to determine whether government-to-government consultation is necessary. However, if it is determined that consultation is not required, this Guidance does not relieve the DoD of its responsibility to communicate with tribal members as affected members of the public under other public participation requirements.

Native Regional Nonprofit Associations under contract with BIA for protecting the trust resources of Native allotment holders will also be consulted when in the performance of their contractual trust responsibilities, but such Native Associations will not be considered governments.

VIII. Consultation Procedures

Requirement. Notification and consultation is triggered when a proposed DoD action "may have the potential to significantly affect protected tribal rights or "Indian Land" as described in this guidance. Because of extensive renewable resources, cultural, and religious interests in Alaska, which are not limited to Indian Land, notification of any DoD activity will be provided to Tribes in the area potentially affected by the activity.

Notification. Notification letters may be prepared by agency staff members, but will be signed by the installation commander or equivalent agency director. The notification letter may designate a Native Liaison, Project Manager or other management level individual to coordinate logistics for potential consultation. The notification letter will notify the prospective affected Tribe of the proposed DoD activity and request the Tribe to identify what Tribal rights, protected resources, or interest in Indian Land may be affected. If the Tribe identifies any such interests, consultation will be required. If the Tribe does not respond within a reasonable period after notification, (typically, 30-60 days depending on the project) the DoD component may proceed with the activity, but should continue to make reasonable efforts to receive a Tribal response by telephone or email before making a decision to proceed. Proceeding without consultation under this Protocol does not relieve the DoD of other consultation requirements established by law. Each service in Alaska may format its own notification procedures within these guidelines.

Consultation. If consultation is required as set forth in Section VII, the DoD installation or component and the Tribe will establish a consultation process setting forth representatives, an agenda of issues to be discussed, logistics, schedules, procedures, etiquette and any other such matters relevant to the proposed DoD activity. The DoD component may also need to advise other affected Federal agencies of its requirement for Tribal consultation.

IX. Consistency Clause

This guidance is designed to be used in companion with the DoD policy and guidance. For issues not covered by this Alaska specific guidance, DoD components in Alaska will follow general DoD guidance

X. Protocol

When tribal chiefs/presidents enter an installation for the purposes of government-to-government consultation they will be afforded the protocol of an official government visitor.

XI. Contracts, Cooperative Agreements, Training and Surplus

Alaskan DoD installation commanders, through their contracting officers, personnel officers, Native liaison officers and project managers etc., shall, to the extent permitted by DoD authorities, provide information on opportunities for Federally recognized Alaska Tribes to compete for request for proposals or other potential contracting, subcontracting, grant or cooperative agreement instruments, surplus equipment and property, as well as education, training or employment, available to the Tribes.

XII. Roles, Responsibilities and Dispute Resolution

Primary responsibility for implementing the DoD AI/AN policy rests with installation commanders. Such commanders are encouraged to create Native Liaison Officer (NLO) positions to carry-out the policy and this Alaska Guidance on behalf of the installation, such as establishing a consultation process, and to act as ambassador to the tribes for the installation. The Alaskan Command (ALCOM) established a NLO to perform these duties as well as coordinate policy implementation with Alaska DoD components in order to avoid duplicative efforts and seek consistent approaches. NLO positions have also been created in 11AF (611 ASG), AKNG and USACEAK.

Every effort will be made to resolve disputes in Alaska. Whenever there is a dispute between a DoD agency representative and a Tribal representative with regard to whether a protected Tribal right, resource, or interest in Indian Land exist; or if consultation does not result in agreement between the consulting representatives, the Tribe may present the matter to the installation commander and the tribal leader for resolution. If it cannot be resolved at that level, the installation commander will notify the Tribal leader that the issue(s) may be forwarded to ALCOM, if not resolved in theatre, it will be forwarded higher through service channels, and, if not resolved there on to DUSD-ES/EQ for further resolution.

NASchwartz

Norton A. Schwartz
Lieutenant General, USAF
Commander, Alaskan Command

May 11, 2001
Date

Appendix A

Alaska Allotment Act, 34 Stat. 197, 17 May 1906 (repealed 1971)

-25 USC 334 authorizes a land allotment from lands of the United States to natives not residing on a reservation.

-25 USC 348 declares that such land is held in trust by the United States for 25 years for the sole use and benefit of the native allottee. Removal of restricted status on Native allotments occurs when the allottee petitions the Secretary of the Interior and such request is approved, usually by the BIA.

-25 USC 349 authorizes the Secretary of Interior (BIA) to issue a fee simple to the Native allottee upon determination that he can manage his own affairs.

-25 USC 379 authorizes the adult heir of a deceased native allottee to sell the land free of trust upon approval by BIA.

-25 USC 392 grants to BIA authority to consent to alienation by the allottee by deed, will, lease or other form of conveyance. Approval of transfer by will to heirs will not remove the restrictions on alienation.

-25 USC 404 authorizes an allottee or heir to sell the land upon petition and with approval by BIA. Such sale will result in fee simple to the purchaser.

Native Townsite Act, 44 Stat. 629, 25 May 1926 (repealed 1976)

-In 1891, former 43 USC 732 was enacted authorizing townsite patents in Alaska.

-In 1926, former 43 USC 733 was enacted authorizing Indian and Eskimo land to be set-aside in trust as tracts within the townsite patent.

-In 1948, 43 USC 737 was enacted to authorize the townsite trustee to remove deed restrictions upon petition by Alaska Natives for tracts within the townsite patent, upon approval by BIA. This terminates the trust relationship.

-In 1976, Public Law 94-579 repealed 43 USC 732 and 733, but allowed existing townsites to remain.

Appendix B
ANILCA Definitions:

'Public land' is defined as Federal lands, title to which is in the United States, after December 2, 1980, except selections by the State of Alaska under the Statehood Act or other Federal law, and selections of a Native Corporations under ANCSA. 16 USC 3102(2).

'Native land' for ANILCA purposes includes land owned by Native Corporations and any native group. 16 USC 3102(11).

'Subsistence' is the traditional use of wild renewable resources for direct or family consumption as food, shelter, fuel, clothes, tools or transportation, and the making of handcrafts out of non-edible byproducts of fish and wildlife. 16 USC 3113.

'Rural,' while not defined by statute, has been judicially defined as those areas with a population center of 2500 people or less. *Kenaitize Indian Tribe v. Alaska,* 860 F.2d 312 (9th Cir. 1988).