



*Preserving America's Heritage*

## **TRIBAL TREATY RIGHTS IN THE SECTION 106 PROCESS**

### **Treaties**

From 1778 to 1871, the federal government's relations with Indian tribes were defined and conducted largely through the treaty-making process. These treaties recognized the sovereignty of Indian tribes. They also established unique sets of rights, benefits, and conditions for the treaty-making tribes that agreed to cede millions of acres of their homelands to the United States in return for recognition of property rights in land and resources and federal protections.

Through treaty-making, Indian tribes granted land and other natural resources to the United States, while retaining all rights not expressly granted. These rights are also known as "reserved rights." Treaties with Indian tribes cover a wide variety of subjects, including rights reserved by tribes relating to natural resources, such as the right to hunt, fish, and gather both on land ceded or given up by tribes, and on land retained by tribes. Although the treaty-making era ended in 1871, federal treaties with Indian tribes ratified by the Congress remain the law.

Under the U.S. Constitution, treaties are part of the supreme law of the land, with the same legal force and effect as federal statutes. Treaties bind both the federal government and the signing Indian tribe or tribes, and generally constitute recognition of rights to lands and resources, as well as rights to fish, hunt, and gather. As such, the federal government has an obligation to honor and respect tribal rights and resources that are protected by treaties. This means that federal agencies are bound to give effect to treaty language and, accordingly, must ensure that federal agency actions do not conflict with tribal treaty rights. Integrating consideration of tribal treaty rights into agency decision-making processes is also consistent with the federal government's trust responsibility to federally recognized Indian tribes.

After the treaty-making era ended, agreements between Indian tribes and the federal government were instead generally memorialized through other sources of law, including federal legislation such as land claims settlement acts, and in some cases, through executive orders.

### **Tribal treaty rights in the Section 106 process**

It is not uncommon for Indian tribes to raise treaty rights concerns during Section 106 consultations. All federal agencies as well as applicants for federal funding or approvals should be aware that treaty rights can and do extend to federal, state, and private lands depending on the language of the treaty.

It is important to understand that treaty rights impose substantive restraints on federal agency decision making and may limit or modify an agency's ability to consider certain alternatives or other actions in the Section 106 context. Therefore, it makes good sense, early in project planning, to determine if a proposed undertaking might impact treaty-protected rights. The answers to the following questions could help make such a determination:

- Do treaties exist within the geographic area to be affected by the proposed project?

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- What treaty rights exist in the specific geographic area?
- What resources do the treaty rights cover?
- How might the undertaking affect treaty rights?

The federal agency is responsible for determining how or what actions may be necessary to resolve any potential conflict or concern regarding impacts to treaty rights. These analyses are often complex and depend on the context and circumstances of the particular situation. This guidance is not intended to offer legal or policy advice concerning how to conduct such an analysis but rather to suggest that such an analysis take place prior to proceeding with a Section 106 review process. Federal agencies should be prepared to explain to consulting parties how consideration of treaty rights may affect its decision making.

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