

*Under the Hood*  
of Federal Indian Law &  
Engaging with Tribes re ESG

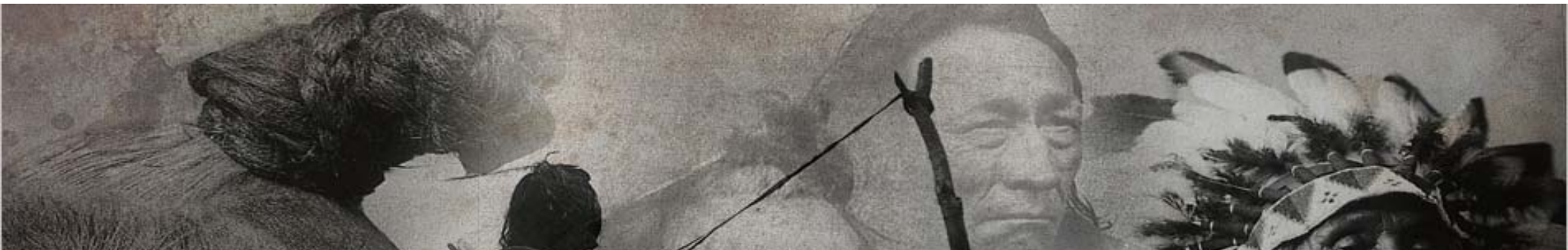
for Mining & Metallurgical Society of America - 2022

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# Disclosure

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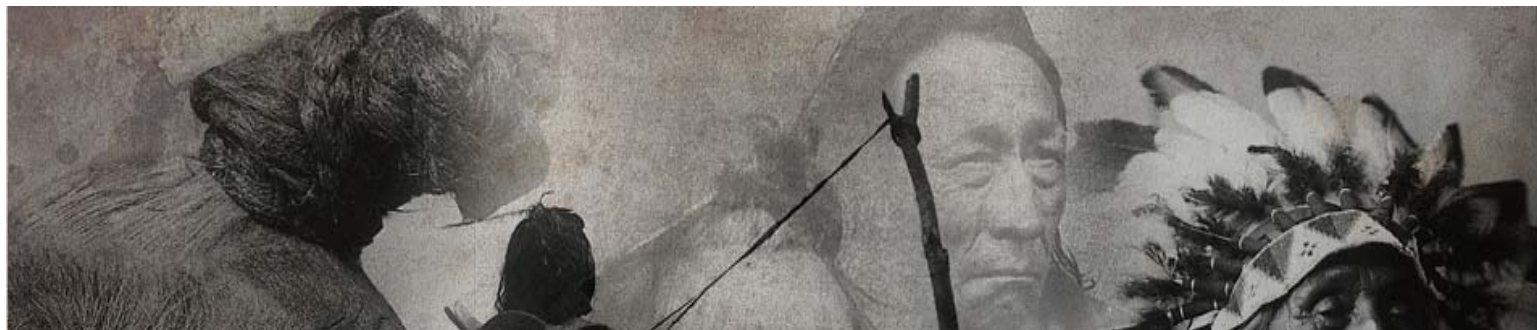




***Law* - Sovereignty, Treaties, Tribes, Reservations,  
Tribal Recognition, Jurisdiction, Land,  
Government to Government Tribal  
Consultation, Tribal Governance, Self  
Determination . . .**

**Versus**

***Reality/ESG* – Ancestral Lands, Aboriginal Lands,  
Ceded Lands, Tribal Activism,  
Litigation, Politics, Global Agenda (Free  
Prior and Informed Consent) . . .**



# Sovereignty

- 1500's
  - Italians & French – trade and commerce.
    - claimed no occupancy or possession of the land.
  - Spanish
    - claimed possession but recognized tribal land.
- 1600's
  - 1607 - colonization of Jamestown by English settlers.
    - claimed possession but recognized tribal land.
- 1700's
  - Colonies - 1776 - Declare Independence from Great Britain



# Treaties

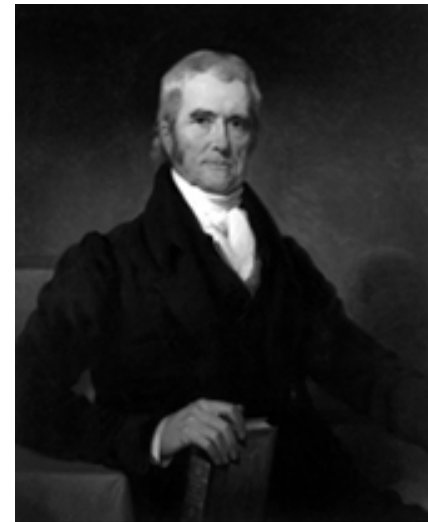
- 1778 - Treaty of Fort Pitt - Delaware Nation (Lenape's).
  - agreed in writing to pay for goods and services for safe passage
  - General Washington did not pay – first treaty to be broken
  - Tribe joined the British in the war.
- Treaty of Paris – 1783 - American independence.
- Treaties of Hopewell - 1785 and 1786 – Cherokee, Choctaw, & Chickasaw.
  - you are **“under the protection of the U.S. and no other sovereign.”**



Delaware River

Constitution – 1787 - Article I, Section 8: Congress shall have the power to regulate commerce with **Foreign Nations** and **States** and **Indian Tribes**.

- 1800's - "CONQUEST by LAW" – Marshall Trilogy – U.S. Supreme Court.
    - *Johnson v. McIntosh* - **Tribes cannot sell their land. It's not theirs to sell.**
    - *Cherokee Nation v. Georgia* – have the legal right to manage their own affairs, govern themselves . . . but, Tribes are neither States nor Nations.
    - *Worcester v. Georgia* - U.S. has the power to regulate Tribes. **Chief Justice Marshall termed tribes: "Domestic Dependent Nations."**
- THE END OF SOVEREIGN NATION STATUS**
- 1871 – U.S. ceased recognition of tribes as independent nations with whom the U.S. could contract by treaty.



# Domestic Dependent Nations

- Their sovereignty exists only at the sufferance of Congress, which has the power to modify or limit a tribe's authority (U.S. v Wheeler, 435 U.S. 313, 323 (1978)).
- Tribe's powers are plenary, but not absolute!
- The tribal-federal relationship is that of a "Ward to his Guardian".
- Lands are held in trust by the federal government (except certain Alaska Tribes).
- Congress can, by statute, abrogate the provisions of an Indian Treaty.
- Tribes (not Indians) have sovereign immunity – they are immune from suit unless consented to or granted a limited waiver of sovereign immunity or waived sovereign immunity; immunity extends when acting in official capacities.
- Self Determination
  - Tribes have sovereignty among their members, with limitations.
  - Tribes have the right to establish their own government, determine membership, enact legislation and establish law enforcement and courts.

# Tribes

- Colonies, Chapters, Clans, Groups, Pueblos, Alliances, Rancherias, Bands, Nations, Communities or in the case of Alaska – a Native Village.
- Tribes can be a tribal community in name only. The Tribe can consist of members, which culturally may be unrelated, but were combined by Congress for the acquisition of land, minerals, reduction in military strength, etc.
- Tribes control 57M subsurface acres of minerals; less than 10% of federal lands.



# Recognition

- Tribes were recognized by Treaties until Congress banned treaty making.
- Congress could terminate tribes until 1970 – ended by President Nixon.
  - 109 Tribes were terminated and federal responsibility and jurisdiction turned over to States; 12,000 Indians lost tribal affiliation; 2.5M acres removed.
- Congress enacted Public Law 103-454 in 1994  
Federally Recognized Indian Tribe List Act; 108 Stat. 4791, 4792.
  - Three ways to become recognized:
    - Act of Congress,
    - Administrative Procedures under 25 C.F.R., Part 83, or
    - Decision of a United States Court.
- 574 federally recognized Indian Tribes (Federal Register 1/29/2021).

# Jurisdiction

- Tribes are subject to federal jurisdiction . . .
- . . . except Public Law [PL] 280 (1953) Tribe's, with exceptions.
  - certain states have authority to assert state criminal and civil jurisdiction over tribal members, but cannot impose regulations or law.
  - some states ceded jurisdiction back to the federal government.
- States can recognize Tribes, but it has no federal applicability.
- Tribes (not Indians) can be immune from State Law.

# Tribal Governance

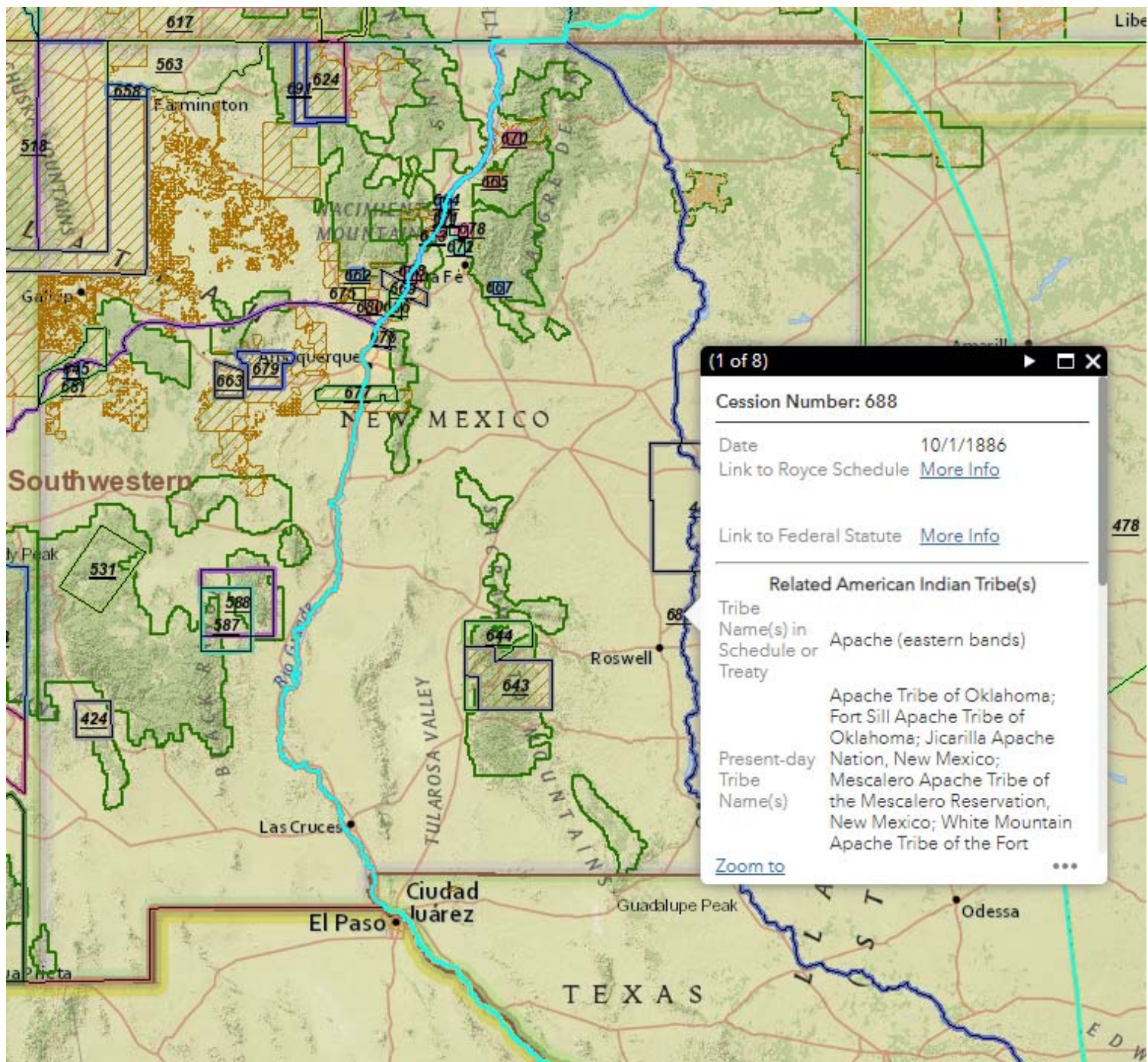
Can be organized either:

- **Indian Reorganization Act, Wheeler-Howard Act. 25 U.S.C. Section 461, et seq.**
  - **have the right to organize and adopt a constitution effective for all tribal members. Section 16 - 25 U.S.C. Section 476.**
  - **must be approved by a majority vote of tribal adult members.**
  - **can limit and/or reserve powers to members of the tribe as a whole, i.e., Tribal Council, General Counsel, etc.**
  
- **Tribal Law**
  - **have their own governing structure.**
  - **governing instruments may consist of tribal ordinances, resolutions, etc.**

# Land and “Indian Country”

- Fee Lands (surface and mineral)
  - Fee Lands, Off-Reservation – Not in Trust
  - Fee Lands, On Reservation – Not in Trust
  - Fee Lands, Previously Held in Trust
  - Fee Lands, Held in Trust
- Allotted Lands, Split-Estate Lands, Prior Patent - Split Estate Lands, Restricted Lands and Disputed Lands – and treaty land and treaty land claims.
- 1946 - Indian Claims Commission Act.
  - 850+ claims filed; **25% adjudicated.**
  - almost a billion \$ in payout - could not grant or restore land.
  - 1978. Congress terminated the Commission and transferred unresolved claims to the U.S. Court of Federal Claims.
- Numerous legislation/acts regarding land claims and awards, i.e., Nevada Native Nations Land Act regarding Northern Paiute and Western Shoshone - 2016.
- Reservations do not necessarily coincide with ancestral lands.





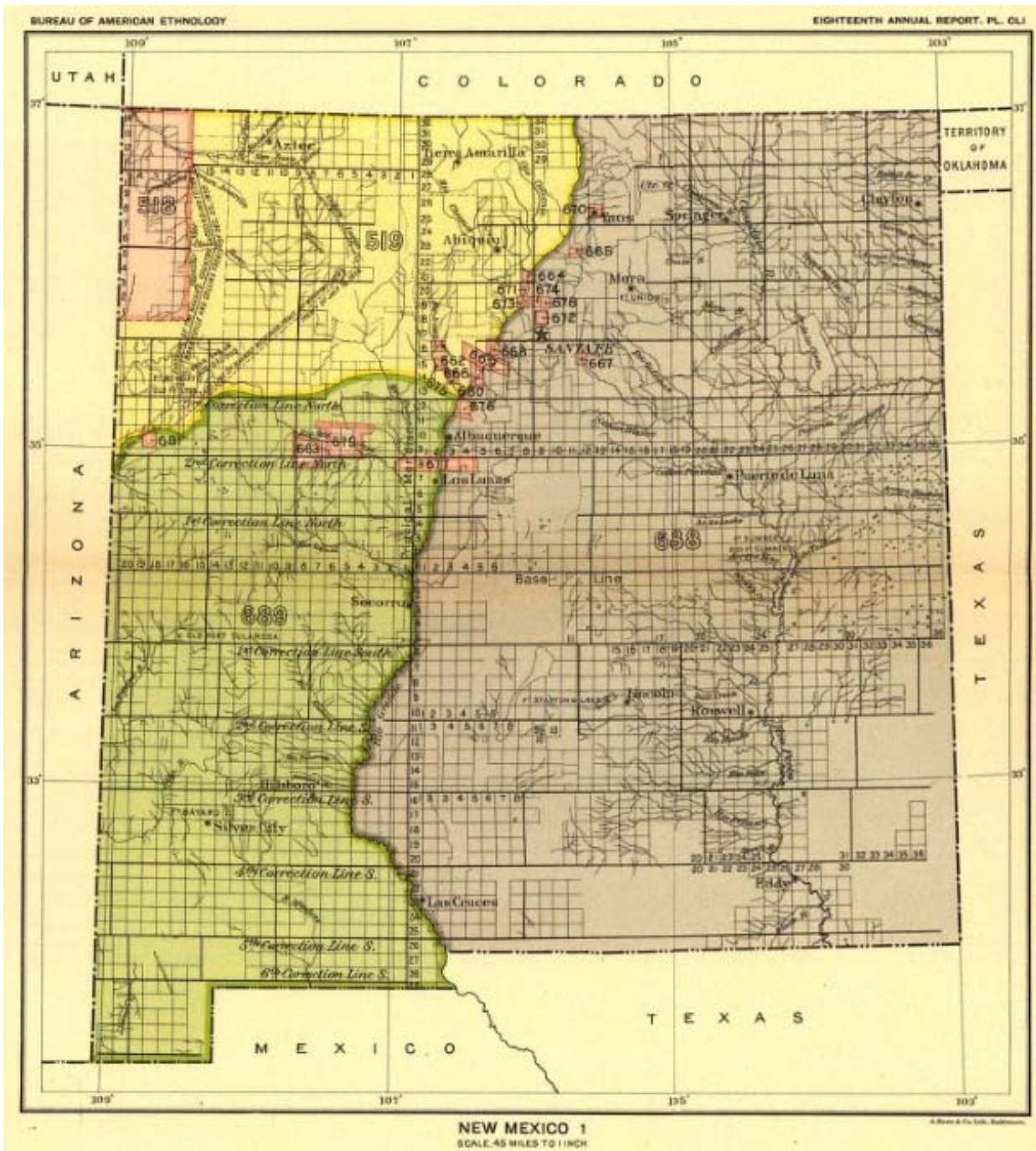
## U.S. Forest Service - Federal and Indian Lands and Land Cessions Viewer

Interactive mapping tool shows how Federal lands connect or overlap with current Tribal trust lands and lands Tribes exchanged with the Federal government prior to 1900

<https://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32>

**[Tribal Connections  
\(arcgis.com\)](https://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32)**





## Indian Land Cessions in the United States

Library of Congress  
Geography and Map Division  
Washington, D.C.  
20540-4650 USA

<https://www.loc.gov/item/13023487/>

# Tribal Rights – Consultation

## List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance

January 2009

*Note: This list was prepared by the White House – Indian Affairs Executive Working Group (WH-IAEWG), Consultation and Coordination Advisory Group (CACAG). It contains those federal Tribal consultation statutes, orders, regulations, policies, manuals, and protocols that specify procedures as to how Departments, agencies and bureaus are to carry out consultation. It also includes many of the laws, orders, regulations and policies requiring that government-to-government relationships with tribes be carried out however, it does not purport to be comprehensive or all encompassing.*

### Part I: Legal Authorities Requiring Consultation - Government-wide

#### A. Statutes Requiring Consultation – Government-wide:

##### 1. American Indian Religious Freedom Act (AIRFA) (16 U.S.C. 1996)

AIRFA establishes the policy of the federal government “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”

##### 2. Archeological Resources Protection Act of 1979. (ARPA) (16 U.S.C. 470aa-mm)

ARPA requires federal agencies to consult with tribal authorities before permitting archeological excavations on tribal lands (16 U.S.C. 470cc(c)). It also mandates the confidentiality of information concerning the nature and location of archeological resources, including tribal archeological resources. (Also refer to the ARPA implementing regulations concerning consultation.)

##### 3. National Historic Preservation Act (NHPA) (16 U.S.C. 470 et seq.)

In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A). (Section 101(d) (6) (B))

# Excerpts

- **National Historic Preservation Act**
  - Section 106 - Consultation - requires agencies to **initiate review** with Tribes.
  - Requires agencies consult with any tribe that **attaches religious and cultural significance**.
  - State Historic Preservation Officer (SHPO) consults with the agency.
  - Properties of significance to a tribe may be **located on ancestral, aboriginal, or ceded lands of that tribe**.
  - Agencies must make a reasonable/good-faith effort to identify tribes that may attach significance but may live away from the area of potential effect.
  - Section 101 (d) - Tribal Historic Preservation Officer (TIPO).
- **American Indian Religious Freedom Restoration Act**
  - **. . . to protect and preserve for Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . access to sites, use and possession of sacred objects, and the freedom to worship . . .**
  - Have to be deprived of a government benefit or coerced into violating religious beliefs.



# Consultation – States - excerpts

## STATES – New Mexico - example

- 2005 – Governor Richardson Executive Order 2005-03 – *Protection of Sacred Places and Repatriation*.
  - Memorandum – Implementation of E.O. 2005-03 NM Energy, Minerals and Natural Resources Department - Top Ten list of issues for consideration by Managers”.
- 2005 - Governor Richardson Executive Order 2005-056 - *Environmental Justice*.

# Compensatory Mitigation

- **President Obama - 2016**
  - **Compensatory mitigation policy in the BLM Land Management Policy 2.0 (issued Jan 2017).**
  - **Trump then issued several EOs related to energy independence and in 2018 BLM rescinded the compensatory mitigation policy.**
  - **Biden issued his EOs relating to climate change and energy justice.**
  - **July 2021, BLM rescinded the Trump recission.**
  - **September 2021, BLM reinstated BLM's Manual Section (MS-1794) and Handbook (H-1794-1) related to mitigation measures **including compensatory mitigation.****
    - **<https://www.blm.gov/policy/im-2021-046>**



### **Order No. 3403**

**Subject:** Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters

**Section 1. Purpose.** This Secretary's Order is issued by the Secretary of Agriculture and the Secretary of the Interior (Secretaries) to ensure that the Department of Agriculture and the Department of the Interior (Departments) and their component Bureaus and Offices are managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes including the Native Hawaiian Community; that such management is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States' unique trust obligation to federally recognized Indian Tribes and their citizens.

The Departments are responsible for the management of millions of acres of Federal lands and waters that were previously owned and managed by Indian Tribes. Those lands and waters contain cultural and natural resources of significance and value to Indian Tribes and their citizens, including sacred religious sites, burial sites, wildlife, and sources of indigenous foods and medicines. In addition, many of those lands and waters lie within areas where Indian Tribes have reserved the right to hunt, fish, gather, and pray pursuant to ratified treaties and agreements with the United States.

In managing Federal lands and waters, the Departments are charged with the highest trust responsibility to protect Tribal interests and further the nation-to-nation relationship with Tribes. The Departments recognize and affirm that the United States' trust and treaty obligations are an integral part of each Department's responsibilities in managing Federal lands. Tribal consultation and collaboration must be implemented as components of, or in addition to, Federal land management priorities and direction for recreation, range, timber, energy production, and other uses, and conservation of wilderness, refuges, watersheds, wildlife habitat, and other values. Further, in honoring these obligations, the Departments will benefit by incorporating Tribal expertise and Indigenous knowledge into Federal land and resources management.





# Reality - ESG

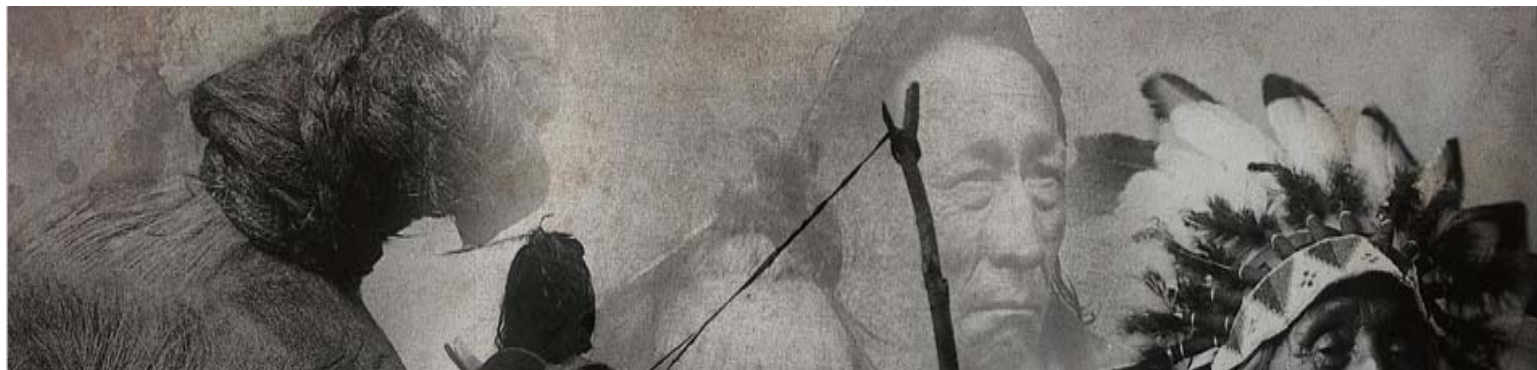
Land . . . . . Ancestral, Aboriginal, Ceded Lands

Statutes, Policies . . . . . Obtaining Explicit Consent

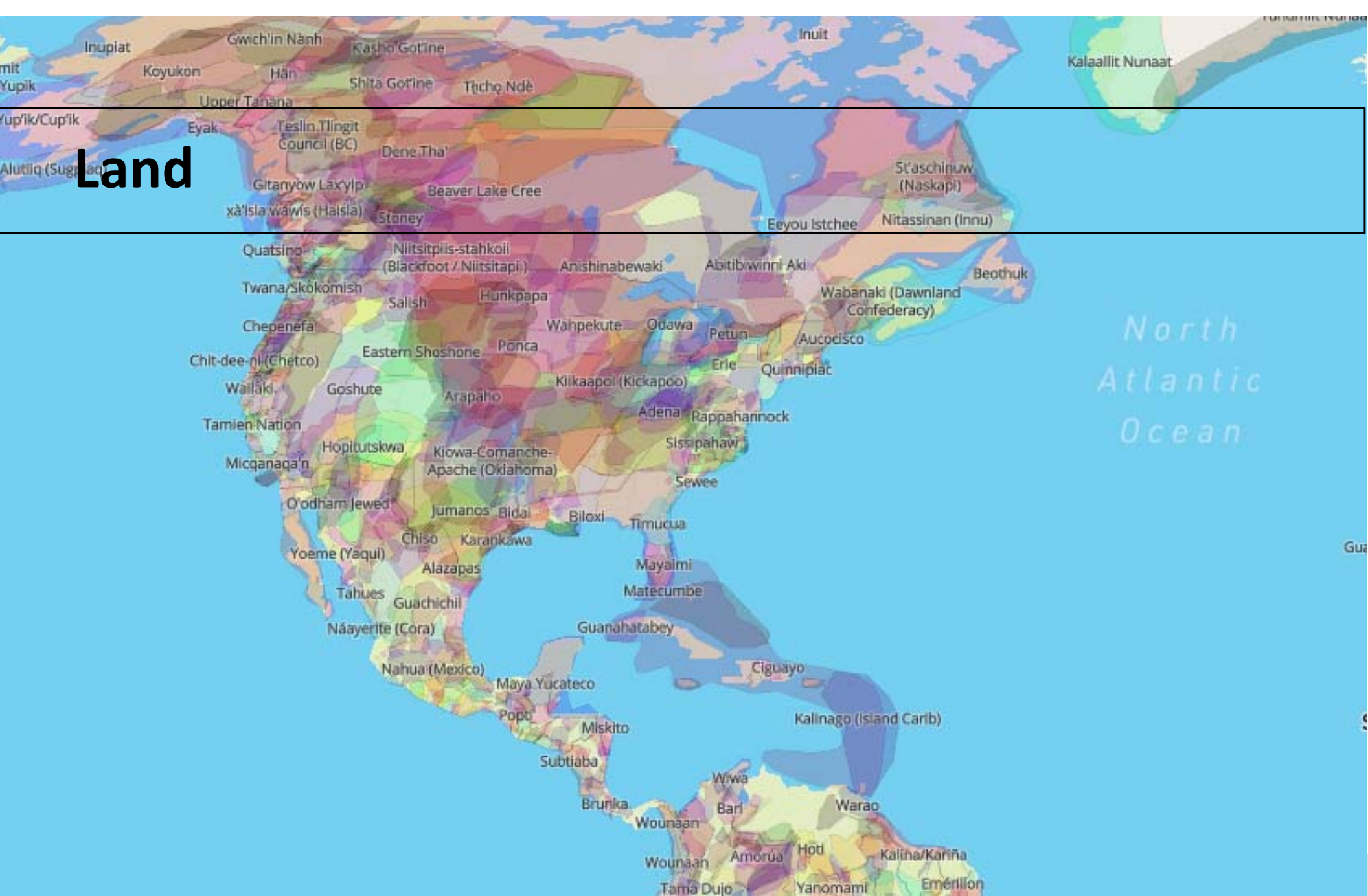
Consultation . . . . . Compensatory Mitigation

Tribal Activism . . . . . Enacting Treaty Rights

Local . . . . . Global

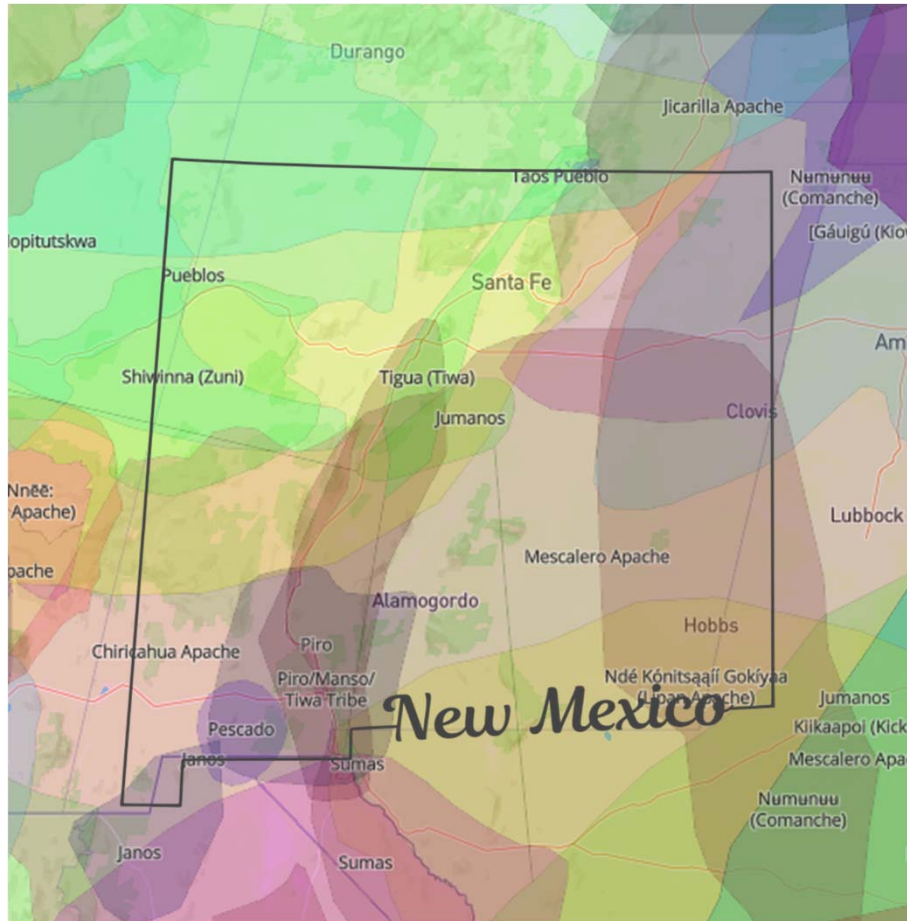






**Aboriginal/Ancstral Lands**  
[native-land.ca](http://native-land.ca)

# Ancestral Lands versus Reservations



# Statutes, Policies, Orders, Memorandums, Memorials, Guidelines . . .

- Do they accord any real rights?
- Supreme Court has acknowledged the difficulty of balancing competing priorities within a single agency.
  - *Congress is requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him/her both the responsibility for the supervision of the Indian Tribes and the commencement of projects in areas adjacent to reservation lands.*
  - *Is it realistic for the government to perform its obligation to represent Indian Tribes in litigation when Congress has obliged it to represent its interests?*
- What is the standing of Orders, Memorandum, Memorials, Guidelines . . .



# Tribal Activism

**American Indian Movement (AIM) in 1968 Minnesota - advocated for sovereignty and rights.**

**AIM - occupation of Alcatraz - 1969 to 1971; took over the former federal prison; 1973 - occupied Wounded Knee battle site at the Pine Ridge Reservation.**



**2021 – Protest in Reno, NV – Thacker Pass Lithium project**



**DAPL Protest**



**2021-Desert X Project**



**2017– Rose Parade, CA DAPL Protest**



**Keystone Pipeline protest**





# Global Pressure

- **United Nations Declaration on the Rights of Indigenous Peoples – UNDRIP - adopted September 13 2007.**
  - 144 in favor; 4 against (Australia, Canada, New Zealand & U.S.)
    - These 4 have since expressed support for the Declaration.
- **Free, Prior, and Informed Consent**
  - **no storage or disposal of hazardous materials** shall take place in the **lands or territories** of Indigenous Peoples without their Free, Prior and Informed Consent. Art 29.
  - right to . . . restitution, if not possible just, fair and equitable compensation for **lands, territories and resources which have been confiscated, taken, occupied, used or damaged** without Free, Prior and Informed Consent. Art. 28.
  - shall consult and cooperate in order to obtain Free, Prior, and Informed Consent **before adopting and implementing legislation or administrative measure that affect them.** Art. 13.

# Conclusion

- **Get to know your Tribe** – if you know one Tribe, you know one Tribe . . . that's all you know . . . and even then you don't know much.
- **Don't make assumptions.**
- **Know the Statutes, etc. & get appropriate Indian legal counsel.**
- **Have an open mind.**
- **Don't give up** – all sides are working through these tough, uncertain, unclear times.
- **Build relationships.**

A close-up, black and white photograph of a Native American man's face, showing his eye, nose, and mouth. He has a serious expression and is wearing a beaded necklace.

## QUESTIONS TO PONDER

- 1. Will the benefits that come from mining be equitably shared among all parties?**
- 2. Can we be environmentally smart, culturally aware, and economically prosperous without trading one problem for another?**

# The End

