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Tribal Perspectives & Principles

SPD Regional Planning Meeting
May 9, 2024

Quana Higgins, Acting Assistant for
Tribal and Regulatory Affairs

Office of the Assistant Secretary of the
Army for Civil Works



Assistant Secretary of the Army (Civil Works)

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Overview



- Introduction
- Federal Trust Responsibility
- USACE and Tribal Nations
- What You Need to Know As Planners



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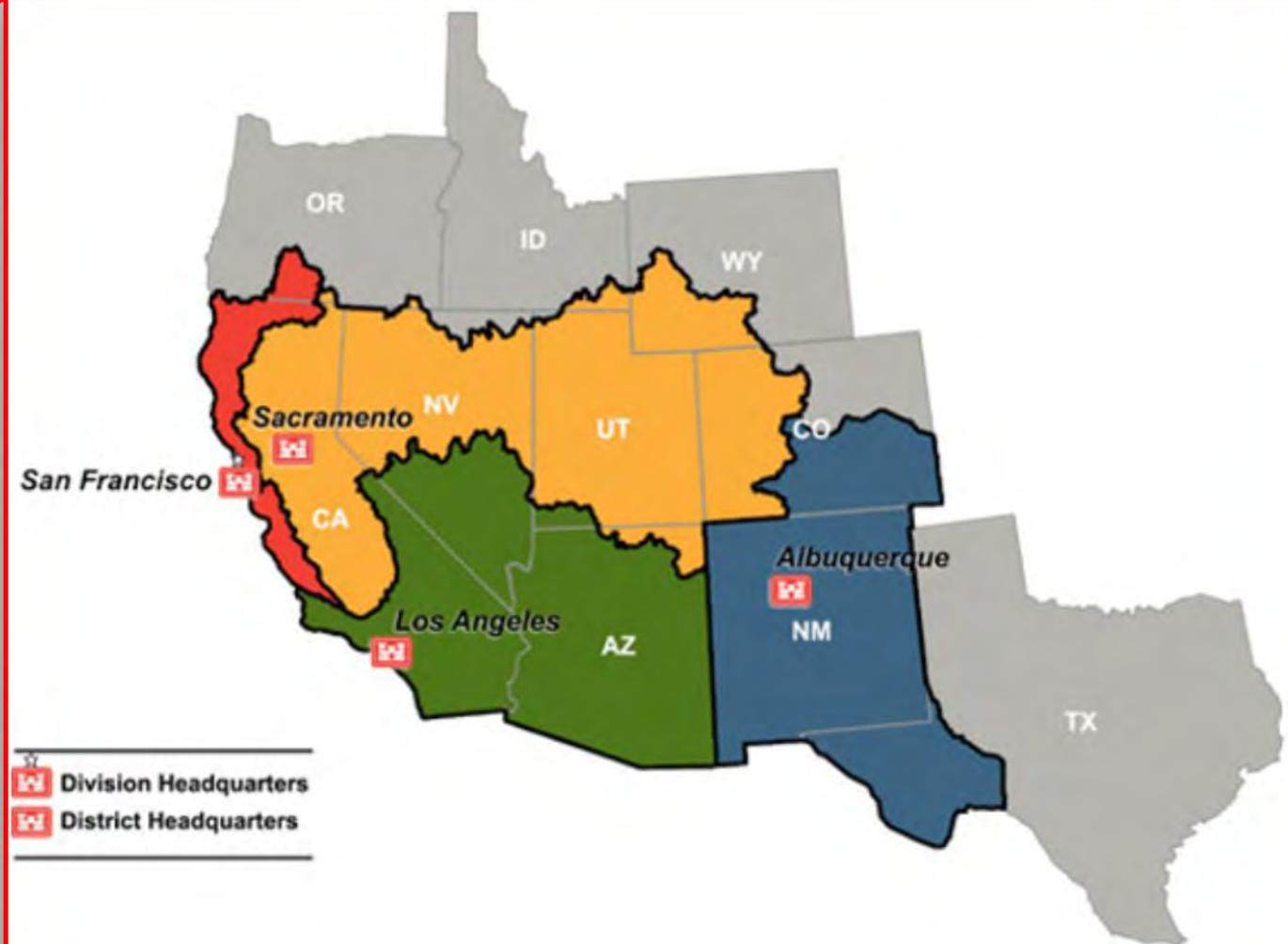
Pre-1492

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WHERE WE ARE — U.S. ARMY CORPS OF ENGINEERS





1790

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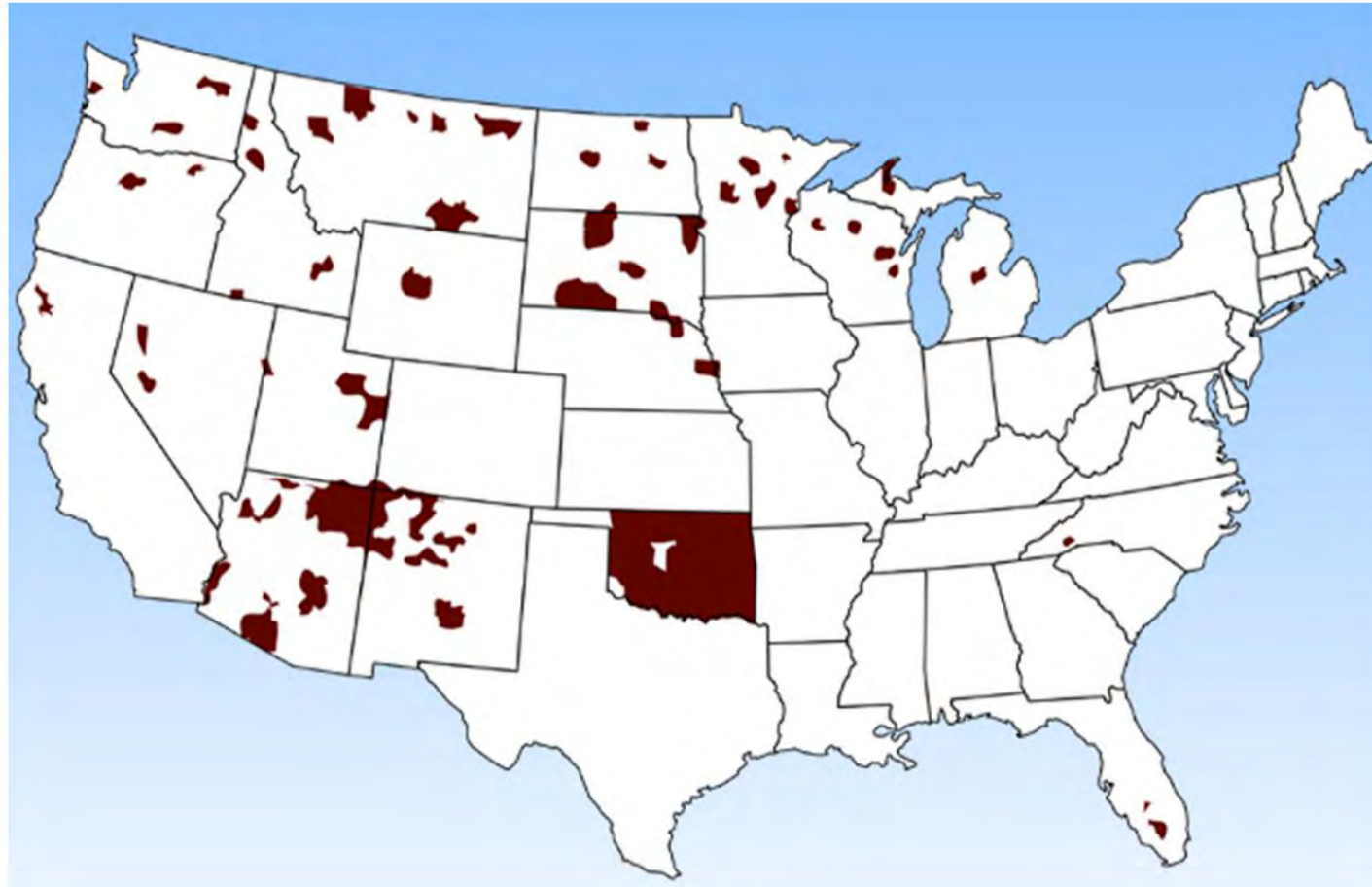
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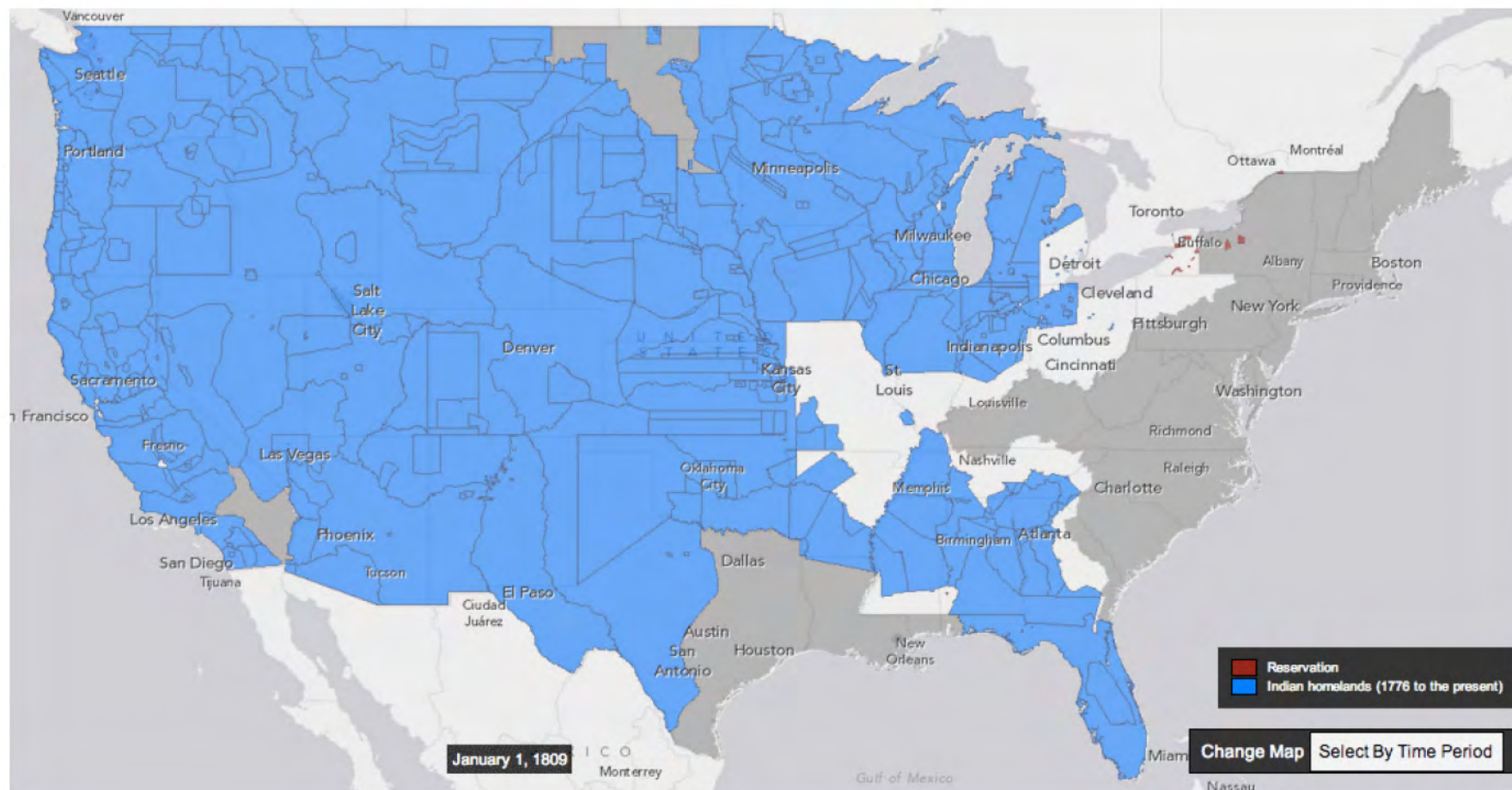
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1890







How Do We Affect Tribes?

☐ Civil Works

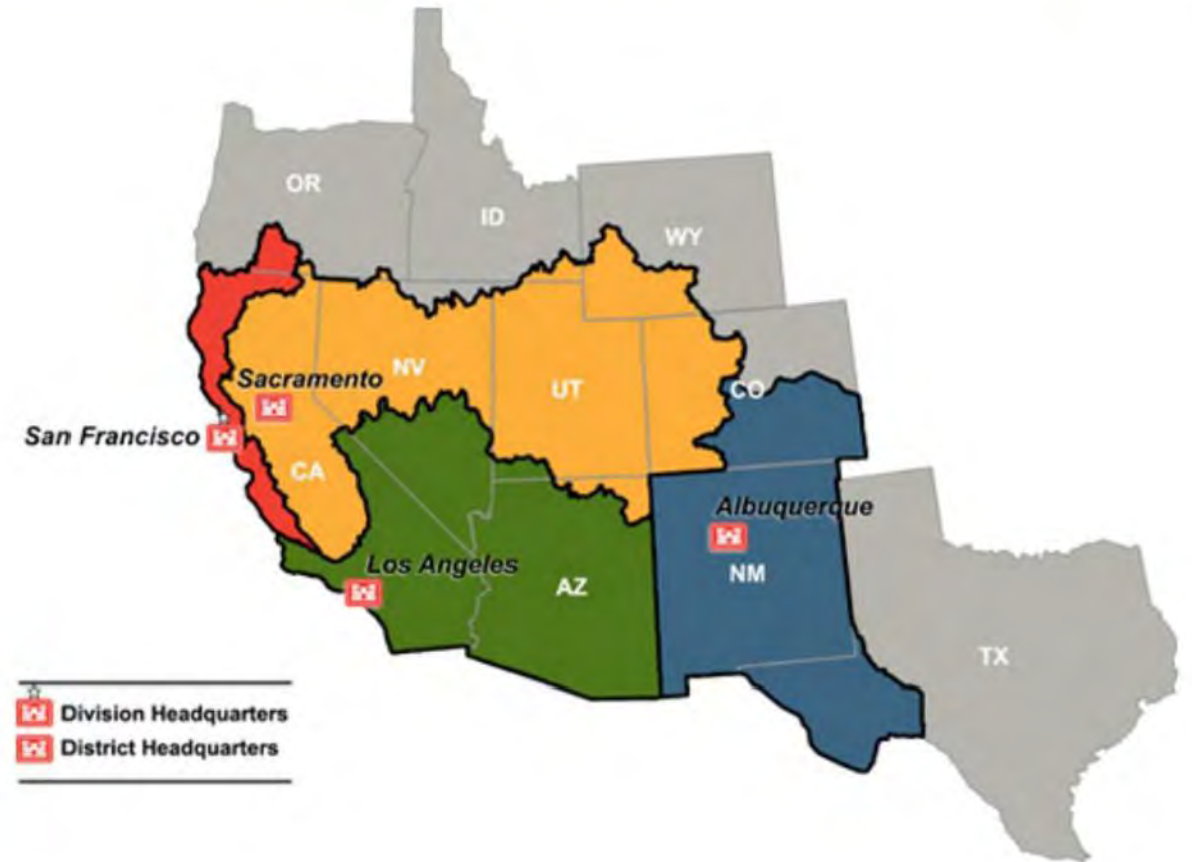
- ✓ Flood Risk Management
- ✓ Navigation
- ✓ Ecosystem Restoration
- ✓ Water Supply
- ✓ Hydropower
- ✓ Regulatory

☐ Military Program

- ✓ Noise from flyovers
- ✓ Access to sacred sites
- ✓ Environmental restoration (FUDS, DERP, etc.)
- ✓ Base re-alignment and closure

☐ Changes in Policy

- ❖ Rulemaking actions: Definition of Waters of the U.S., Natural Disaster Procedures, Appendix C, PR&G





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Ongoing Policy Development



- Proposed Rulemaking
 - Appendix C Recission
 - Agency Specific Procedures
- Co-Management of USACE-Owned Lands
- Indigenous Knowledge Policy Statement
- Tribal Consultation Best Practices Guide



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Federal Trust Responsibility

- Broadly defined: support & encourage tribal self-government, self-determination, and economic prosperity
- Specifically defined: faithfully perform tasks expressly set forth in federal treaties



Trust Doctrine Origins & Evolution

- Treaties, 1787-1871
- Case Law
 - Duty of protection
 - Congressional plenary power
 - Remedy under law
- Statutes
- Executive pronouncements



Federal Indian Policy

Removal Period (1778–1849)

US Constitution, ratified 1788

Article 1, Section 8, Clause 3, asserts that Congress shall have the power, "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes"

Article VI, Clause 2, where the constitution states that treaties are the **"supreme law of the land"**





Tribal Treaties



- **Supreme law of the land**
- Not diminished by passage of time or non-use
- Express rights: land reservation and non-property interests in the land (hunting, fishing, gathering, and grazing rights)
- Implied rights: Winters doctrine
- Congressional abrogation
- **Non-ratified treaties & Executive Order** tribes & non-federally recognized tribes

<https://treaties.okstate.edu/>

Important POC:

Sarafina Maraschino (she/her/hers)
Tribal Liaison | Office of Counsel
San Francisco District





Federal Indian Policy



Approximate Dates	Era	Effect
1492 – 1778	Colonization	English Crown and newly forming US Government recognized Tribes as inherently sovereign nations
1778 – 1849	Removal	Treaty making exchanging land for rights/services; forceful removal despite SCOTUS decisions
1848 – 1886	Reservation	No more treaties; federal criminal jurisdiction in Indian Country
1887 – 1933	Allotment & Assimilation	Dawes Act broke up tribal lands into individual allotments; Indian boarding schools
1934 – 1952	Reorganization	Dawes Act repealed, Tribes allowed to organize and adopt federally approved constitutions
1953 – 1970	Termination	Process to dissolve Tribe's political status, take land out of trust and imposed state laws
1970 – Present	Self-Determination	Regaining of rights, mutual consensus through robust and meaningful consultation



Cochiti Lake History



- Initial discussions on need for project – 1930s
- Project authorization – Flood Control Act of 1948
- Project construction – 1965-1975
- Authority for recreation added after construction – “Golden Triangle”



Construction of Cochiti Lake is not a single, isolated issue. It was complicated by a number of other circumstances, which all converged and culminated in ways that were just incredibly devastating and in the most tragic way led to our fight for survival.

- Regis Pecos, Cochiti Pueblo



REGIS PECOS*



The History of Cochiti Lake from the Pueblo Perspective

ABSTRACT

In the last 30 years, Cochiti Pueblo has been in a fight for their survival culturally, politically, legally, economically, and environmentally. The construction of Cochiti Lake, one of the largest man made lakes in the United States, built by the U.S. Corps of Engineers, devastated nearly all of the available agricultural lands, destroyed the majority of traditional summer homes, drastically changed the ecosystem, and desecrated cherished places of worship. To make matters worse, a few years after closure of the gates that created Cochiti Lake, seepage occurred and put under water the remaining agricultural lands of the Pueblo, creating wetlands and transforming the world of Cochiti overnight. The Cochiti lost their agricultural way of life and have suffered profound consequences as a result.

https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1024&context=uc_rio_chama



Cochiti Pueblo – Looking Forward

- 2003: [Reconciliation Ceremony](#) – Apology from Albuquerque Commander to the children of the Cochiti Pueblo
- 2008: Cochiti Pueblo signed an [historic agreement](#) with the Corps to participate in the overall management of the Cochiti Lake area
- 2011: Development of the Native American Perspectives Course
- 2014: [Returned](#) land to Cochiti Pueblo



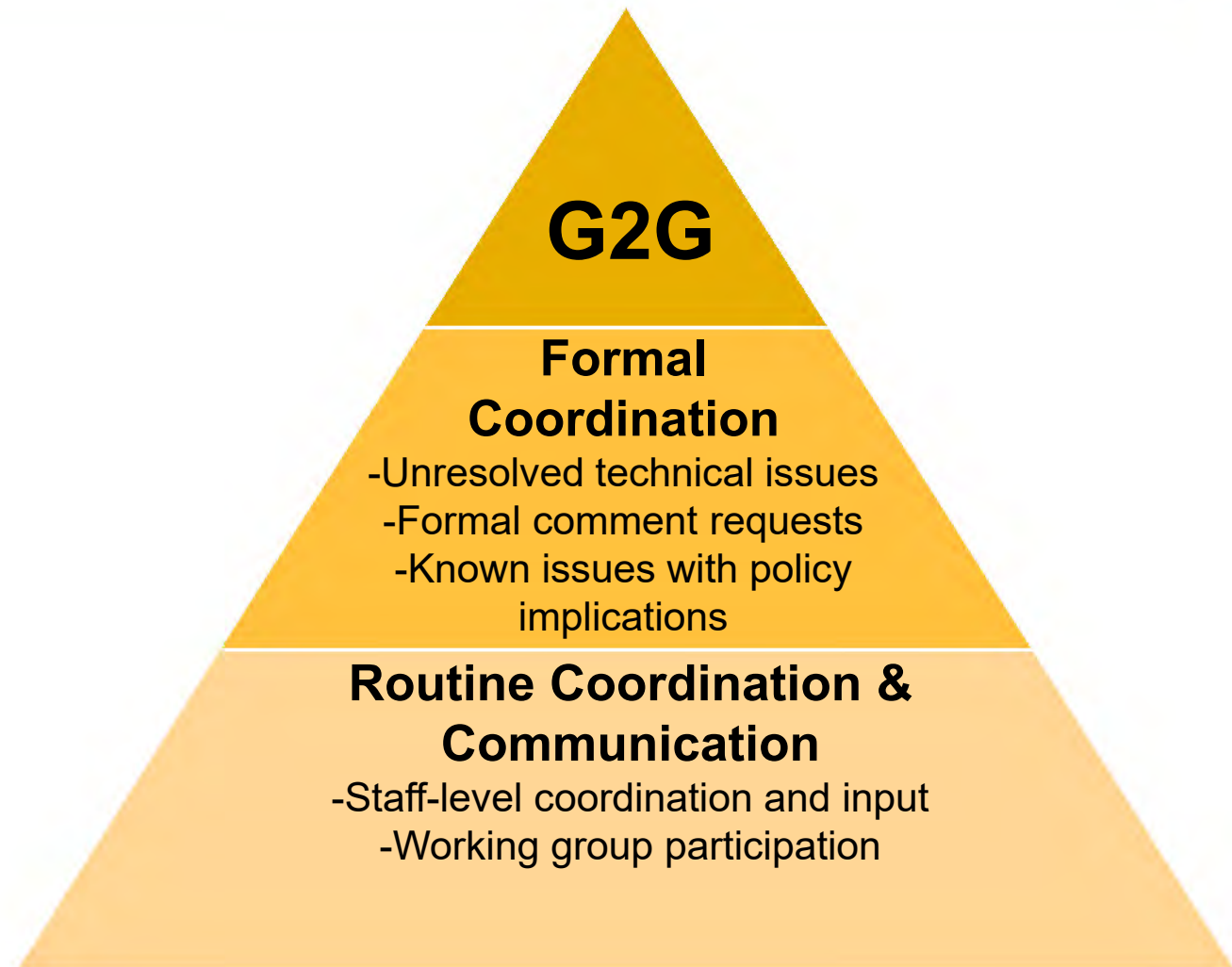
Real opportunity in 2025...

“The relationship that we have with our Corps today, as compared to say 10-12 years ago, is like night and day ... Working together has made all the difference for both of us,” Gov. Suina, Cochiti Pueblo, 2014



USACE & Tribal Nations

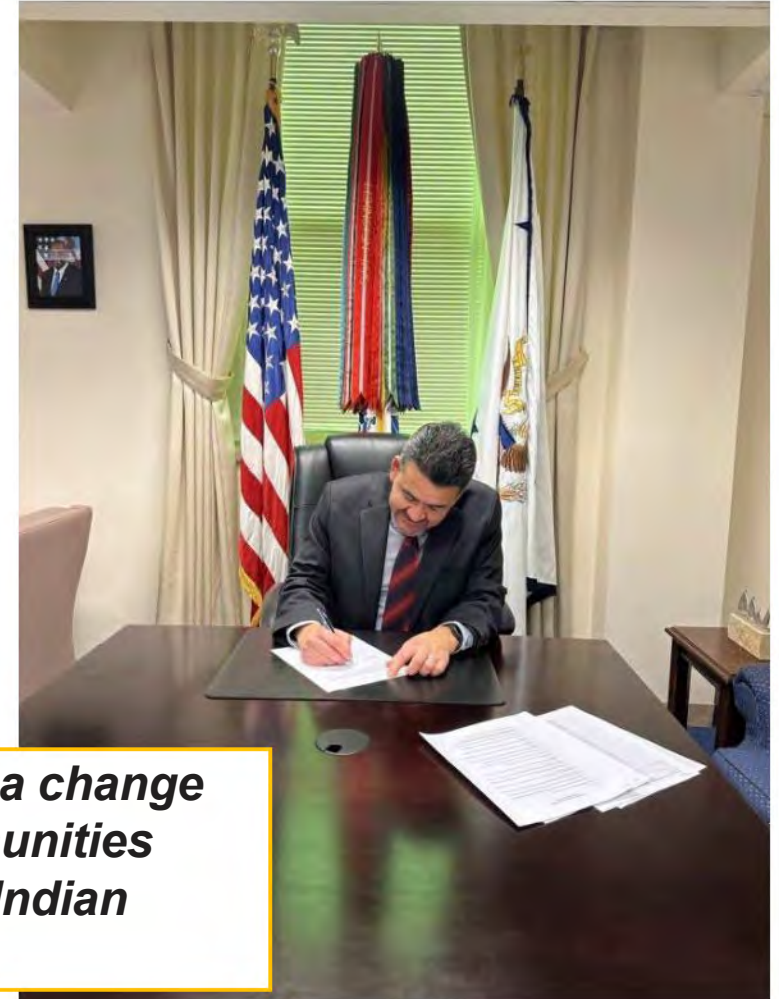
- Updates to the Tribal Consultation Policy
- USACE Tribal Policy Principles
- Roles and Responsibilities





USACE Tribal Consultation Policy 2023

- Signed 5 December 2023, replaces policy from 2012
- Improve tribal relationships, collaboration, and coordination in stewardship of Nation's water resources across USACE Civil Works mission areas
- Developed with extensive tribal input and consultation



“Through this policy and our actions, we are continuing a change of culture at USACE to be more inclusive of Tribal communities and better use our authorities to meet the challenges in Indian country.” – HON Michael Connor, ASA(CW)



Tribal Feedback Themes



- Distinction between Consultation and Coordination
- Knowledge and protection of tribal treaty rights (expressed and reserved)
- Incorporation and protection of Indigenous Knowledge (or Indigenous Traditional Ecological Knowledge)
- Training and consistency
- Early and pre-decisional





Pre-Decisional Consultation

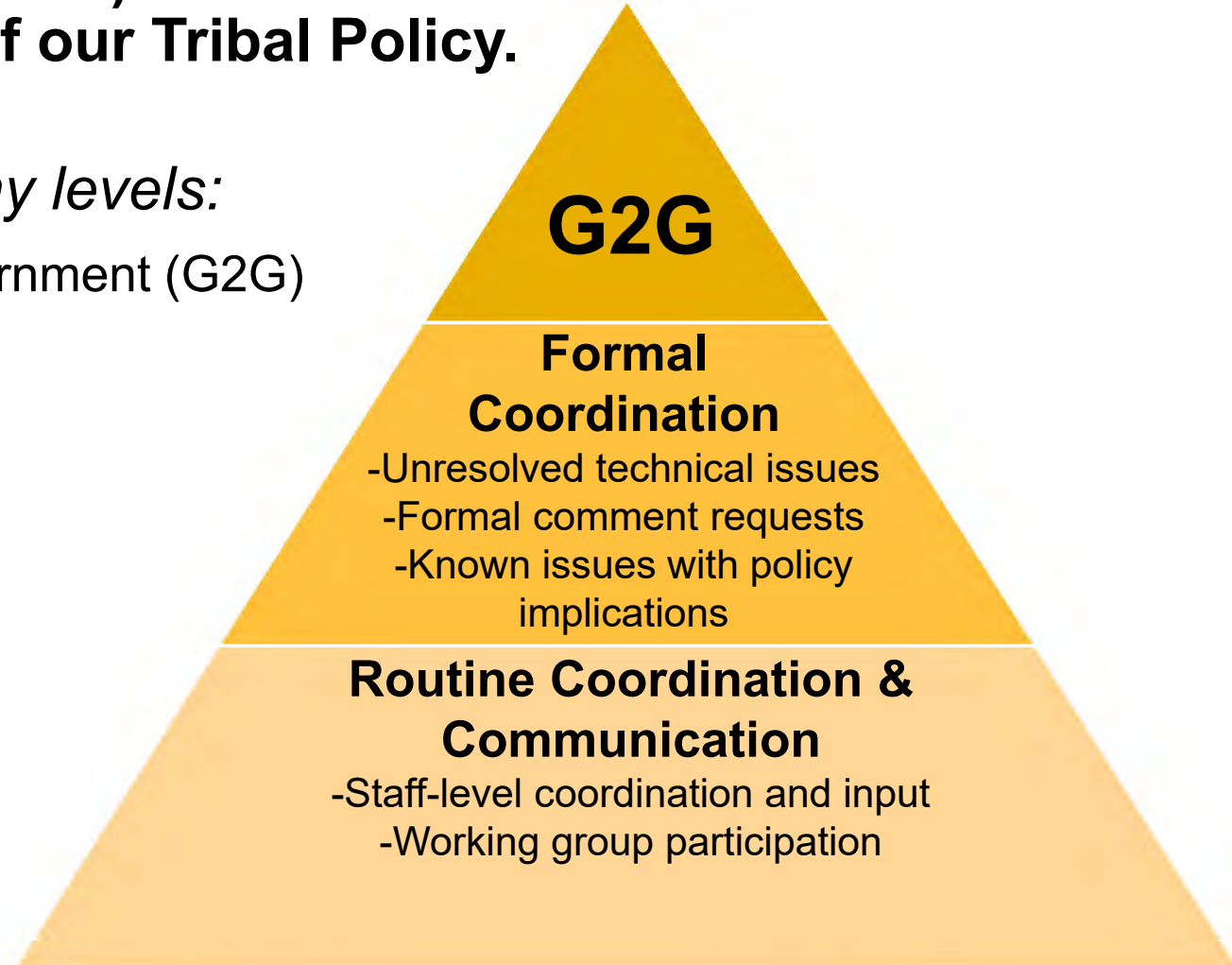
Engaging Tribes early (pre-decisional) is foundational to mutual respect and the implementation of our Tribal Policy.

Tribal communication occurs at many levels:

- Leadership Level – Government-to-Government (G2G) or Nation-to-Nation
- Policy level
- Technical staff level

Tribal Consultation is NOT:

- Announcing a decision to Tribes
- Minor or informal interactions with tribal members
- Check the box exercise





Critical Updates to the Policy

- Applies to all Civil Works programs and authorities
- Consult on any USACE Civil Works actions with tribal implications; primarily driven by tribal interest – not a unilateral USACE determination
- Clarifies that USACE does not have the authority to abrogate a treaty right
- Enhanced focus on collaboration, partnership, and incorporating Indigenous Knowledge into federal decision making



Critical Updates to the Policy



- Accountability – increased documentation and required follow up when tribal input is provided
- Consistency and Education – promote across MSCs/Districts, provide greater training to USACE staff engaging with Tribes
- Enhanced focus on coordination, collaboration, and consultation that is SEPARATE from the public and other governmental agencies



USACE Tribal Policy Principles



1. Tribal Sovereignty

meet trust obligations, protect trust resources, and obtain Tribal views of trust and treaty responsibilities.

2. Trust Responsibility

meet trust obligations, protect trust resources, and obtain Tribal views of trust and treaty responsibilities.

3. Government-to-Government

ensure that Corps leaders and Tribal leaders meet as governments and recognize that Tribes have the right to be treated in accordance with principles of self-determination.

4. Pre-Decisional Consultation

involve Tribes collaboratively, before and throughout decision making process.

5. Self Reliance, Capacity Building, and Growth

search for ways to involve Tribes in programs, projects, and other activities that build economic capacity and manage Tribal resources while preserving cultural identities.

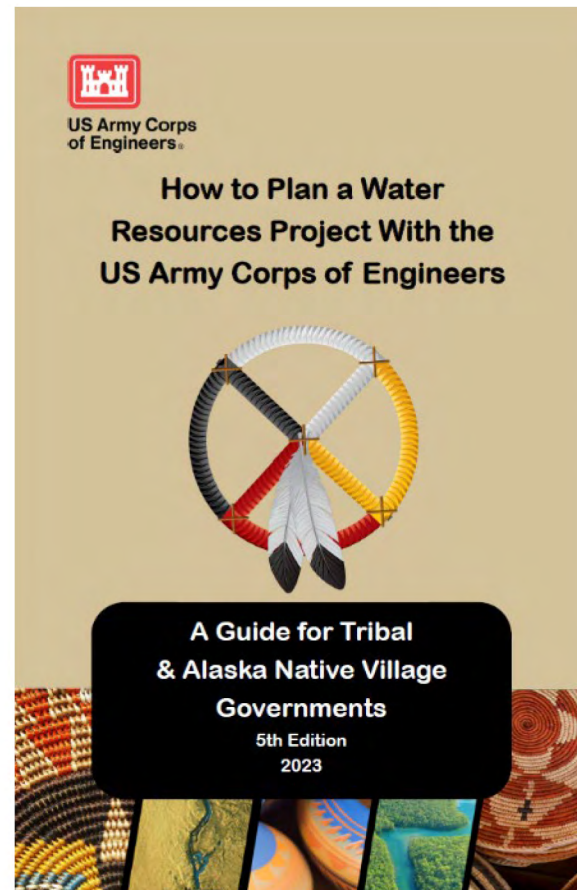
6. Natural and Cultural Resources

preserve and protect trust resources and consider the potential effects of Corps programs on natural and cultural resources.



What Planners Need to Know

- Consultation Requirements
- Tribal Nations Program
- How We Can Partner with Tribal Nations





Consultation Requirements

G2G is overarching compared to statutorily required consultations

- Treaty reserved rights
- Executive Order 13175: consultation required regarding regulations, proposed legislation, or policy statements that may have substantial effects on tribes
- “Meaningful” under the plain meaning
- Regarding non-federally recognized tribes

Laws that trigger consultation:

- National Historic Preservation Act of 1966 (NHPA)
- National Environmental Policy Act of 1970 (NEPA)
- Native American Graves Repatriation Act of 1990 (NAGPRA)
- Archaeological Resources Protection Act of 1979 (ARPA)
- American Indian Religious Freedom Act of (AIRFA)



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USACE Tribal Nations Program



Command

- Consultation/G2G
- Communications
- Culture Change

Civil Works

- TPP Application
- CAP/FPMS/PAS
- Tribal Consultation
- Guidance Development
- Emergency Response
- Indigenous Knowledge Integration

Tribal Nations Program

- Define Tribal Program Budget and Deliverables
- Community of Practice
- Operationalizing Tribal Policies
- Tribal Liaison/Consultation
- EO 13175 Annual Report
- *Tribal Nations Technical Center of Expertise*

Engineering

- Indigenous Knowledge Integration

Operations

- Co-Management
- Tribal Coordination
- TPP Application (Cooperative Agreements)
- Tribal Training

Regulatory

- Delegated Consultation with Tribes
- Indigenous Knowledge Implementation
- Tribal Training

Counsel

- Application of Policy
- Risk Management
- Tribal Expertise Development

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Civil Works Partnering Authorities

Continuing Authorities Program

- Planning, design, and construction of small-scale water resources projects
- Ecosystem restoration, flood risk management, coastal storm risk, erosion protection, etc.
- First \$100k of study is federally funded + cost share waiver for federally recognized Tribes (\$648k in FY24)

Planning Assistance to States

- Comprehensive water resources planning and technical services
- Watershed Assessments, drought resiliency plans
- 100% Federal (Tribes considered disadvantaged communities)

Floodplain Management Services

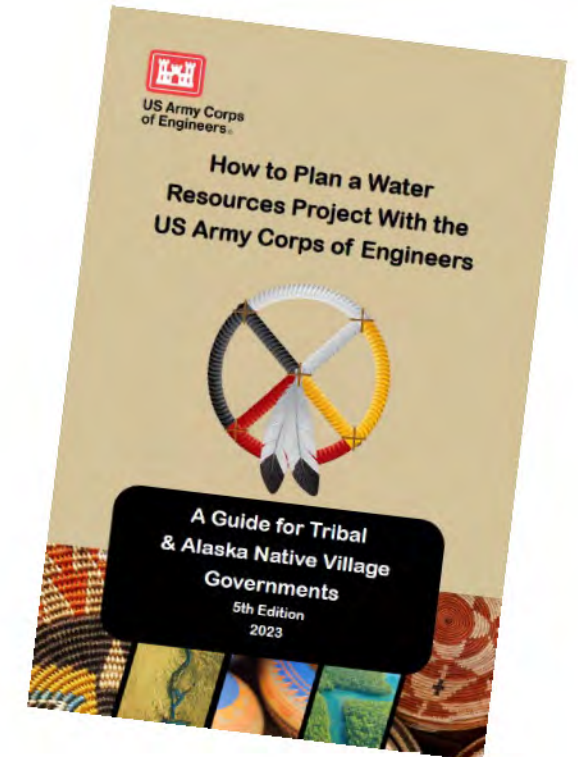
- Planning and technical services
- Floodplain mapping, emergency action plans, floodplain management plans
- 100% Federal



Tribal Partnership Program



- **Section 203 WRDA 2000, as amended**
 - Water-related planning activities - study, design, and construction (with caveats)
 - Includes flood risk management including erosion control, environmental restoration and protection, and preservation of natural and cultural resources; watershed assessments and planning activities/technical assistance
 - Non-Traditional Water Resources Development Projects
 - Benefits federally recognized Indian Tribes that are located primarily within Indian country (including lands within the jurisdictional area of an Oklahoma Tribe) or in proximity to Alaska Native Villages
- **Cost Sharing:**
 - Technical studies - 100% Federal
 - Feasibility study – First \$200K Federal, then 50% federal/50% non-federal
 - Watershed Assessments 75% federal/25% non-federal
 - In-kind credits can be 100% of non-Federal share
- **Ability to Pay:**
 - Per capita income less than the per capita income of 2/3 of the counties in the U.S.
 - Applies to all phases of TPP
 - Implementation procedures: EGM 23-04
- **Adjusted Waiver – Section 1156 of WRDA 1986, as amended**
 - Applies to feasibility and construction phases (once per phase)
 - Waiver limit amended to include annual inflation adjustment (Section 135 WRDA 2020)
 - FY24 Adjusted Waiver: \$648,000
 - \$1.5M Federal can be increased by waived amount





Tribal Partnership Program

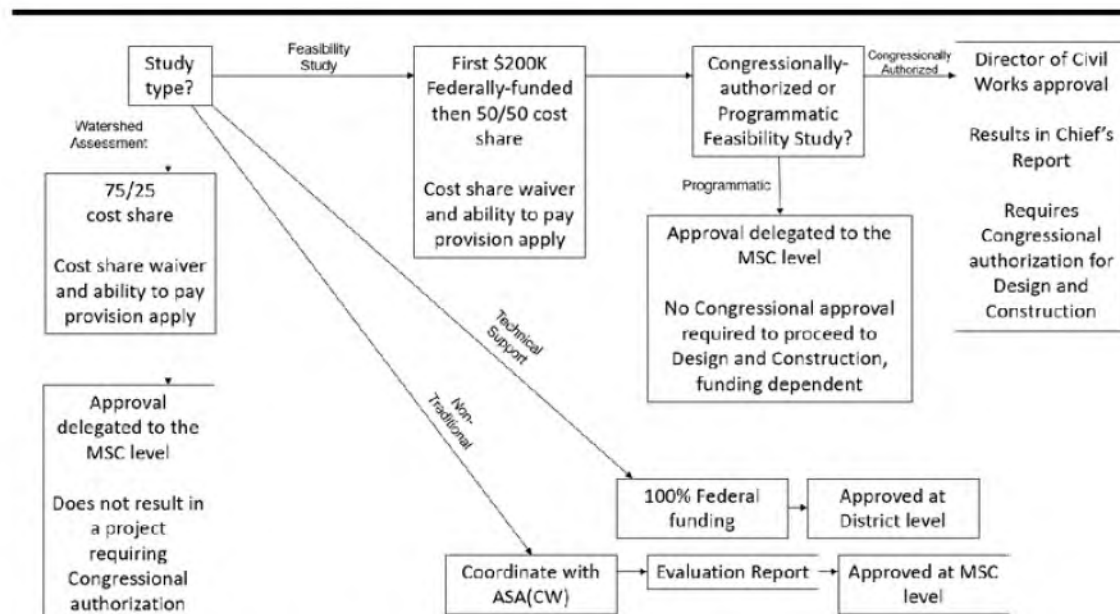


Figure 2-1. Flow chart: study types authorized by the Tribal Partnership Program

Table 2-2

Final report package check list for Tribal Partnership Program studies

	Feasibility report for Congressional authorization	Feasibility report for programmatic implementation ¹	Watershed assessments	Technical assistance, water-related planning activities, or feasibility-like reports
District transmittal memo with recommendation and request for MSC approval	X	X	X	
District transmittal memo to MSC with recommendation				X
Decision document submittal package checklist	X	X	X	
Final report	X	X	X	
Project guidance memorandum	X	X	X	
Proposed Chief's Report	X			
Proposed responses to Independent External Peer Review (if applicable)	X	X		
Report summary	X	X	X	
Project fact sheet or placemat	X	X	X	X
Certification of District Legal Review	X	X	X	
Review summary (District Quality Control, Agency Technical Review, and if applicable, Independent External Peer Review)	X	X	X	
Cost certification and total project cost summary	X	X		
Finding of No Significant Impact or Record of Decision ²	X	X		
Project briefing slide deck	X	X	X	
Tribal partner Letter of Intent	X	X		
Tribal partner self-certification of financial capability	X	X		
Tribal partner self-certification of real estate acquisition	X	X		



Tribal Partnership Program

- Engineering Pamphlet [1105-2-64](#)
- Effective 22 Feb 2024
- Includes sweeping changes from [WRDA 2022](#)
- Overarching guidance for TPP
 - Includes planning, design, and construction
 - Overview of the program
 - Key concepts and terms
 - Guiding principles
 - Project management requirements
 - Submittal requirements
- Organized by TPP work product

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Appendixes



Tribal Partnership Program



Considerations for All TPP Projects:

- The federal objective of all TPP studies is to substantially benefit Indian tribes.
- We are making a determination on whether the projects are feasible and includes the appropriate cost sharing for the purpose the project most closely aligns.
- Feasible = technically feasible; the economic, environmental, and social benefits to the Tribal Nation outweigh the costs; project is cost-effective; and the project is environmentally acceptable.



Lower Brule Sioux Tribe: Natural Resources Preservation and Ecosystem Restoration



Non-Traditional Water Resources Projects

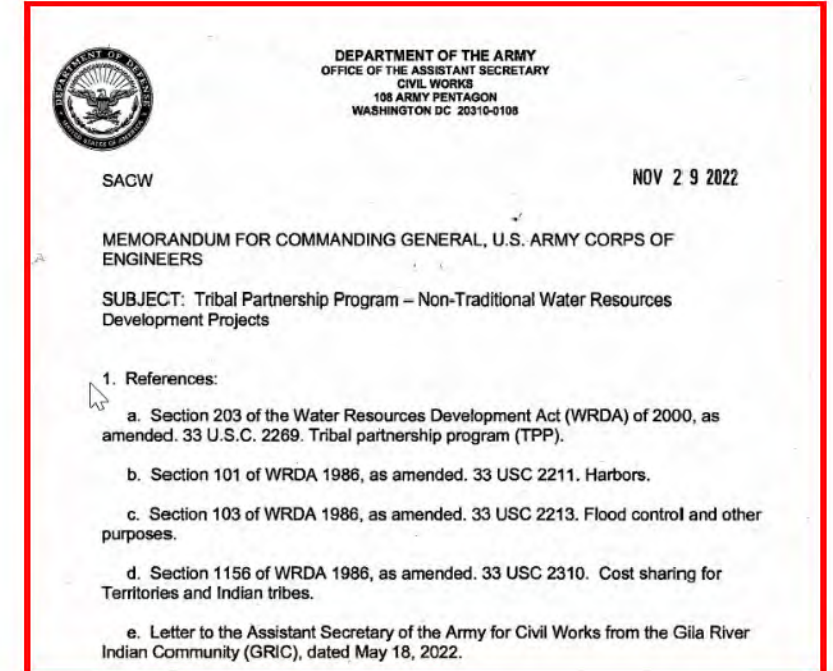
Requirements:

- Must be related to a water resource
- Aligns with Corps capabilities and core competency
- Project must remain under the \$26,000,000 programmatic limit

USACE Centers of Expertise

<https://www.usace.army.mil/About/Centers-of-Expertise/>

Project that do not meet requirements will be elevated ASA(CW) for decision





Non-Traditional Water Resources Projects



Chapter 9

- Non-traditional element examples:
 - Local Service Facilities in navigation projects;
 - Interior drainage (i.e. – 800 cfs rule);
 - Ecosystem restoration where cost attributed to LERRDs may exceed traditional USACE projects.
- Elevation Process
 - Issue Paper: describe proposed study/project and how it fits the program, and proposed project purpose, cost share, and coordination with other federal agencies
 - TPP Program Manager and Chief of Planning coordinate request through the appropriate RIT
 - If in alignment with the Program, the ASA(CW) will confirm project purpose and cost share



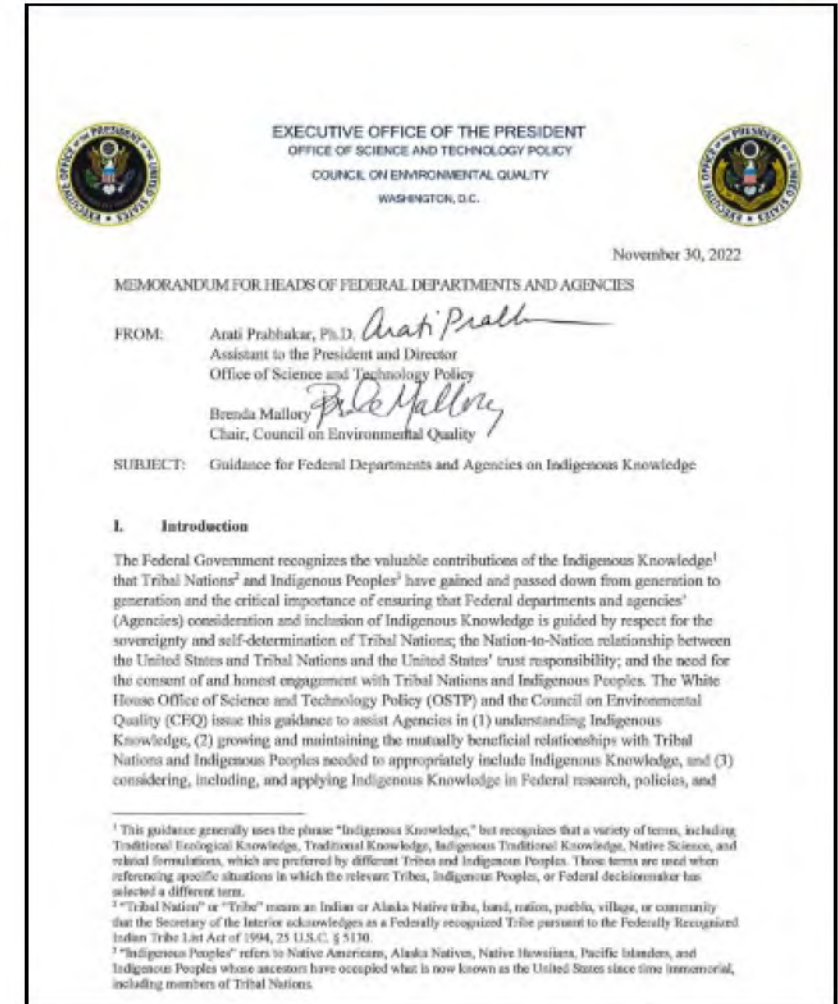


Use of Indigenous Knowledge



- ✓ *Honest discussions up front during scoping:*
tools keep culturally sensitive information safe or weighing of risks of disclosing this information
- ✓ Incorporated into General Planning Principles for Program
- ✓ Process added for identification, where and how IK was used to drive decision-making
- ✓ Scope of work can be developed and applied for Work In Kind

Upcoming ASA(CW) Policy Statement...



<https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>