

The Federal Trust Doctrine

What does it mean for DoD?

Report Documentation Page				Form Approved OMB No. 0704-0188	
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1. REPORT DATE 01 AUG 2008		2. REPORT TYPE N/A		3. DATES COVERED -	
4. TITLE AND SUBTITLE The Federal Trust Doctrine				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) DoD Office of General Counsel				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release, distribution unlimited					
13. SUPPLEMENTARY NOTES See also ADM002111. Department of Defense Conservation Conference. Held in Savannah, Georgia on August 22-27, 2004, The original document contains color images.					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT UU	18. NUMBER OF PAGES 16	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

Policy Overview

■ DoD will:

- meet its responsibilities to the tribes
- recognize tribal sovereignty
- consult before taking action
- manage its lands consistent with the protection of tribal lands, resources, and traditional cultural properties

Consultation “Triggers”

- Laws

- NHPA, ARPA, NAGPRA, NEPA

- Executive Orders

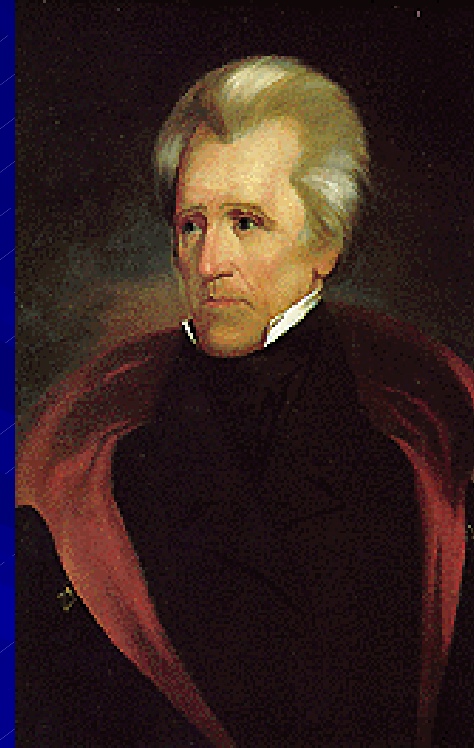
- Sacred Sites, EJ, Consultation

- Federal Trust Responsibility

The Protagonists



Chief Justice Marshall



President Jackson

William Wirt



Origins of the Indian Trust Responsibility

- ❖ Cherokee Nation v. Georgia (1831)
 - neither states nor foreign nations
 - “domestic dependent nations”
 - “in a state of pupilage”
 - stand as a “ward to his guardian”

Origins of the Indian Trust Responsibility

- ❖ Worcester v. Georgia (1832)
 - Tribes separate & distinct political communities
 - Tribes sovereign over lands retained
 - Treaties intended to ensure availability of sustainable, land-based, traditional existence
 - *Duty of protection* bargained for consideration for land cessions

The Duty of Protection

❖ Against what?

- Then: unrelenting pressure of immigrant intrusion
- Now: environmental and other threats to tribal lands, resources, burials, and TCPs

Satisfying the Duty of Protection

- ❖ Narrow view:
 - U.S. owes *general* trust responsibility to Indian tribes, but...
 - Absent a specific obligation, duty is discharged by compliance with general laws and regulations not aimed at Indians
- ❖ Query: What's become of the duty?

Satisfying the Duty of Protection

❖ Broader view:

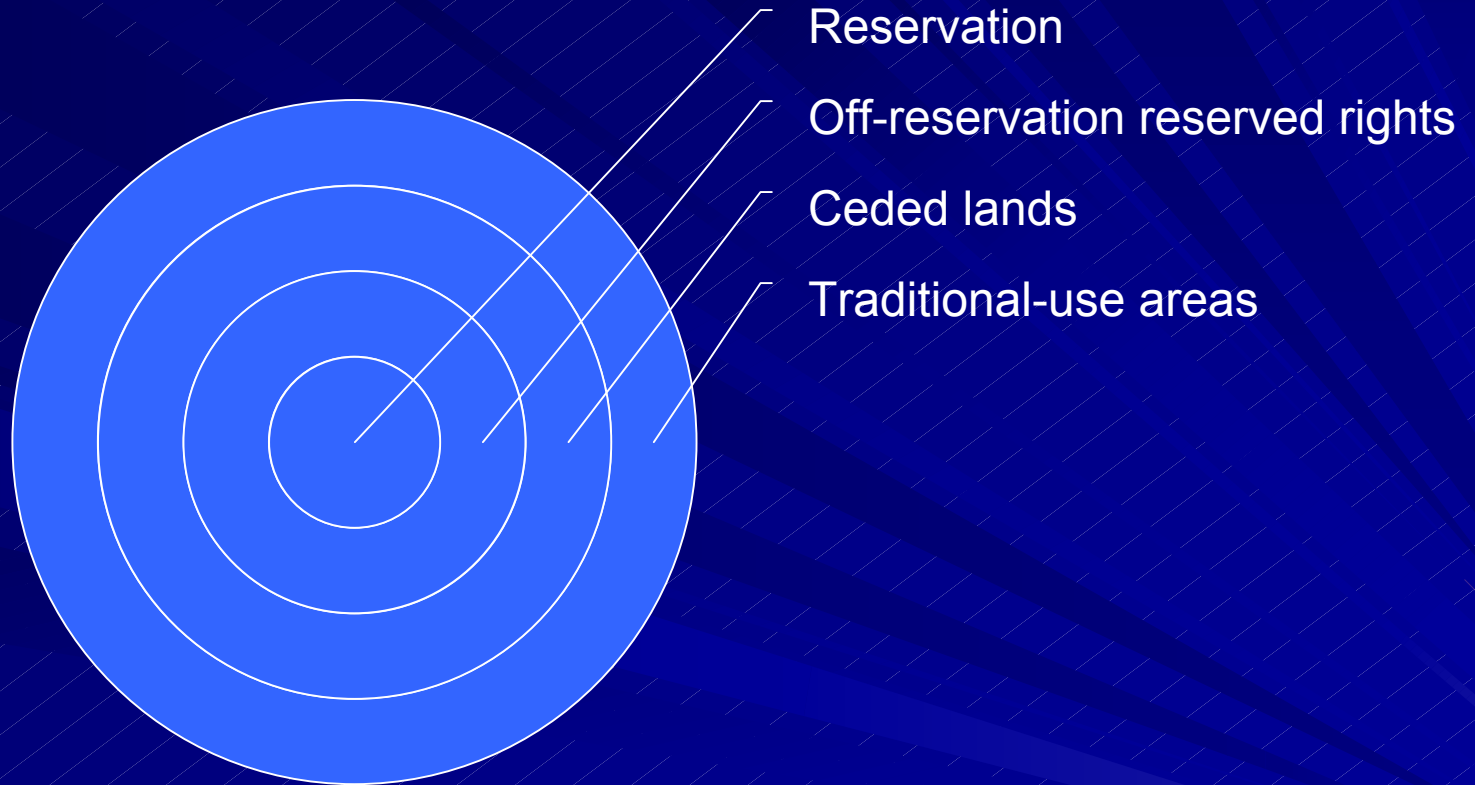
- Compliance with laws of general applicability may not be enough
- General trust responsibility may not be enforceable, but...
- Agency discretion in imposing greater level of protection likely to be sustained

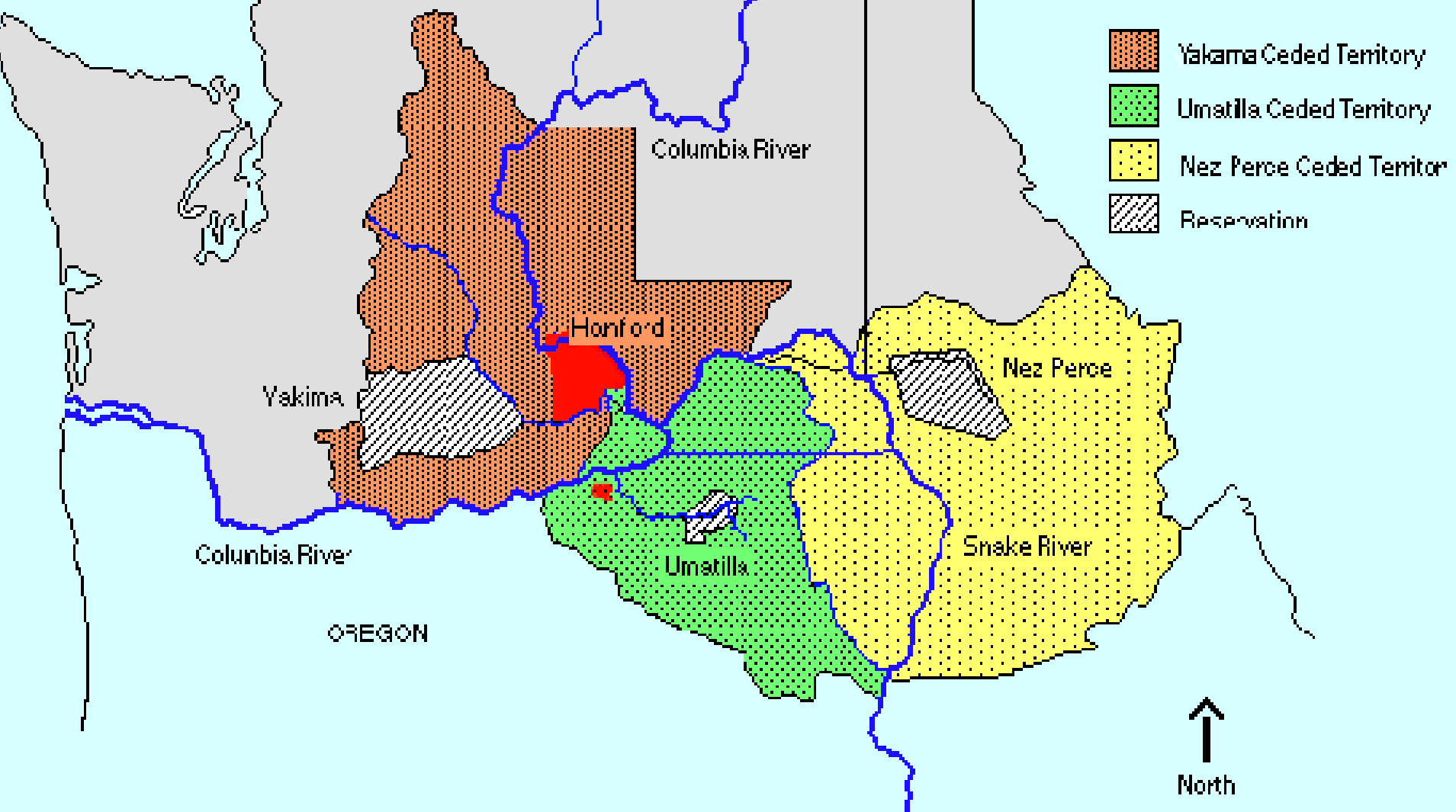
Exercising Discretion Consistent with the Duty

- ❖ Water diversions upriver from Pyramid Lake
- ❖ Effect of re-designating airshed on tribe's coal mining
- ❖ Coal leasing near No. Cheyenne reservation
- ❖ Navy ag out-leases and the Pyramid Lake cui-ui fishery

Exercising Discretion Consistent with the Duty

- ❖ Emergency regulation of commercial salmon fishing
- ❖ Timber sales on former Klamath reservation
- ❖ Corps permit for fish farm in Lummi U&A
- ❖ Expansion of open-pit gold mine in Little Rocky Mountains





Source: Adapted from Indian Treaty Boundaries, Portland Area Jurisdiction.
U.S. Department of the Interior, Bureau of Indian Affairs. January 1977.

CEDED TERRITORY AND RESERVATIONS OF AFFECTED INDIAN TRIBES

The Upshot

- ❖ Trust responsibility shared by all federal agencies
- ❖ Obligation to consult when tribal lands, resources, or cultural properties at risk
- ❖ Duty of protection not limited to specific statutory obligations
- ❖ Agencies have broad discretion to consider duty
- ❖ Discretion exercised to protect tribal resources will be upheld

“Great nations, like great men,
should keep their word.”

-- Justice Hugo Black