

The Federal Trust Doctrine

What does it mean for DoD?

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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

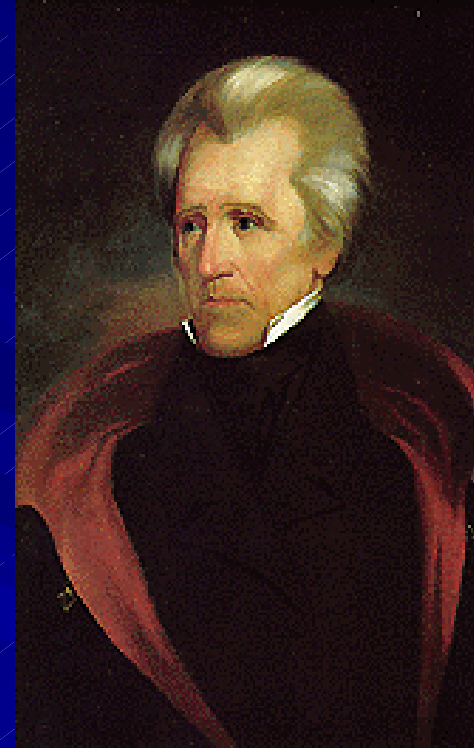
- Sacred Sites, EJ, Consultation

■ 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:

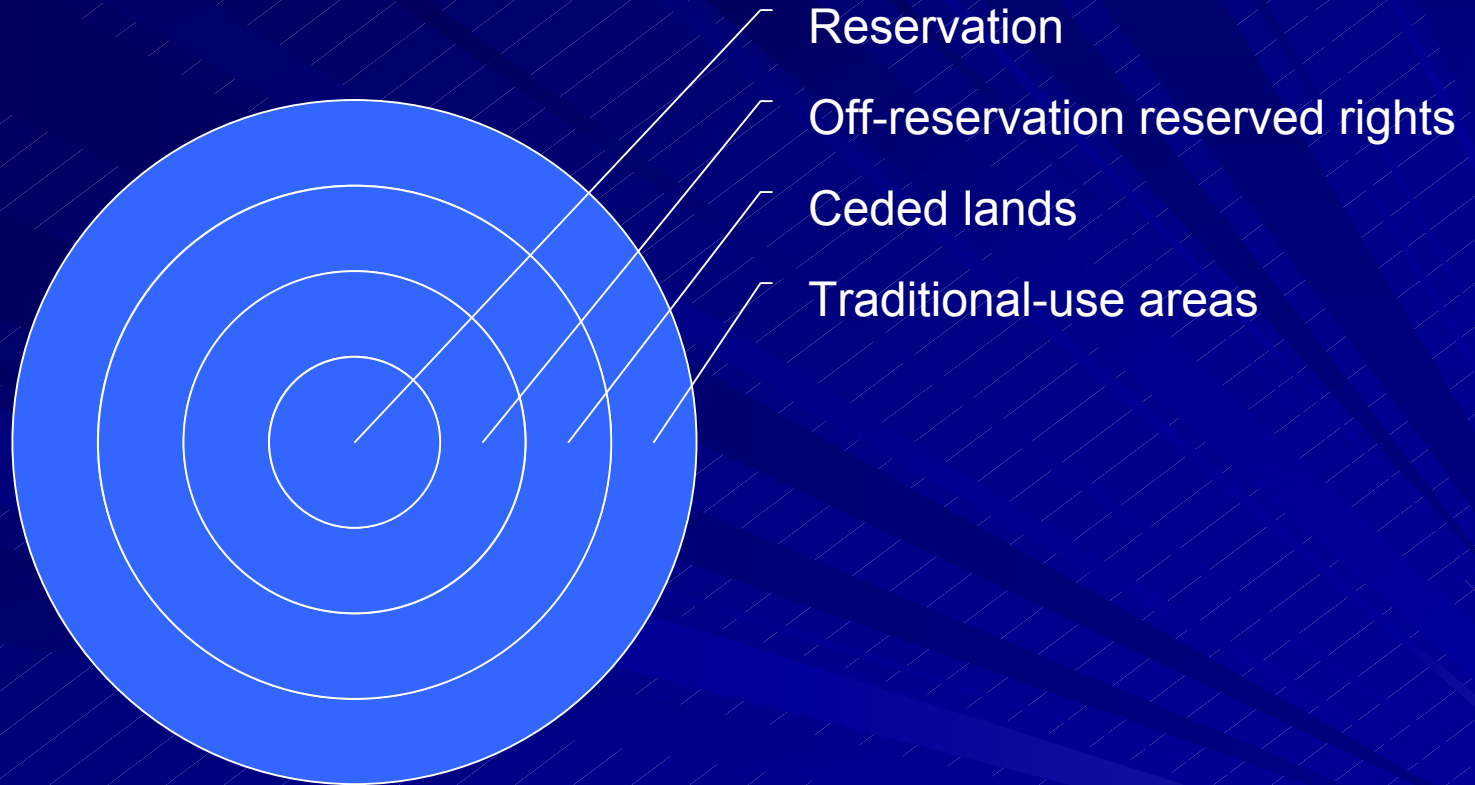
- Compliance with laws of general applicability may not be enough
- General trust responsibility may not be enforceable, but...
- Agency discretion in imposing greater level of protection likely to be sustained

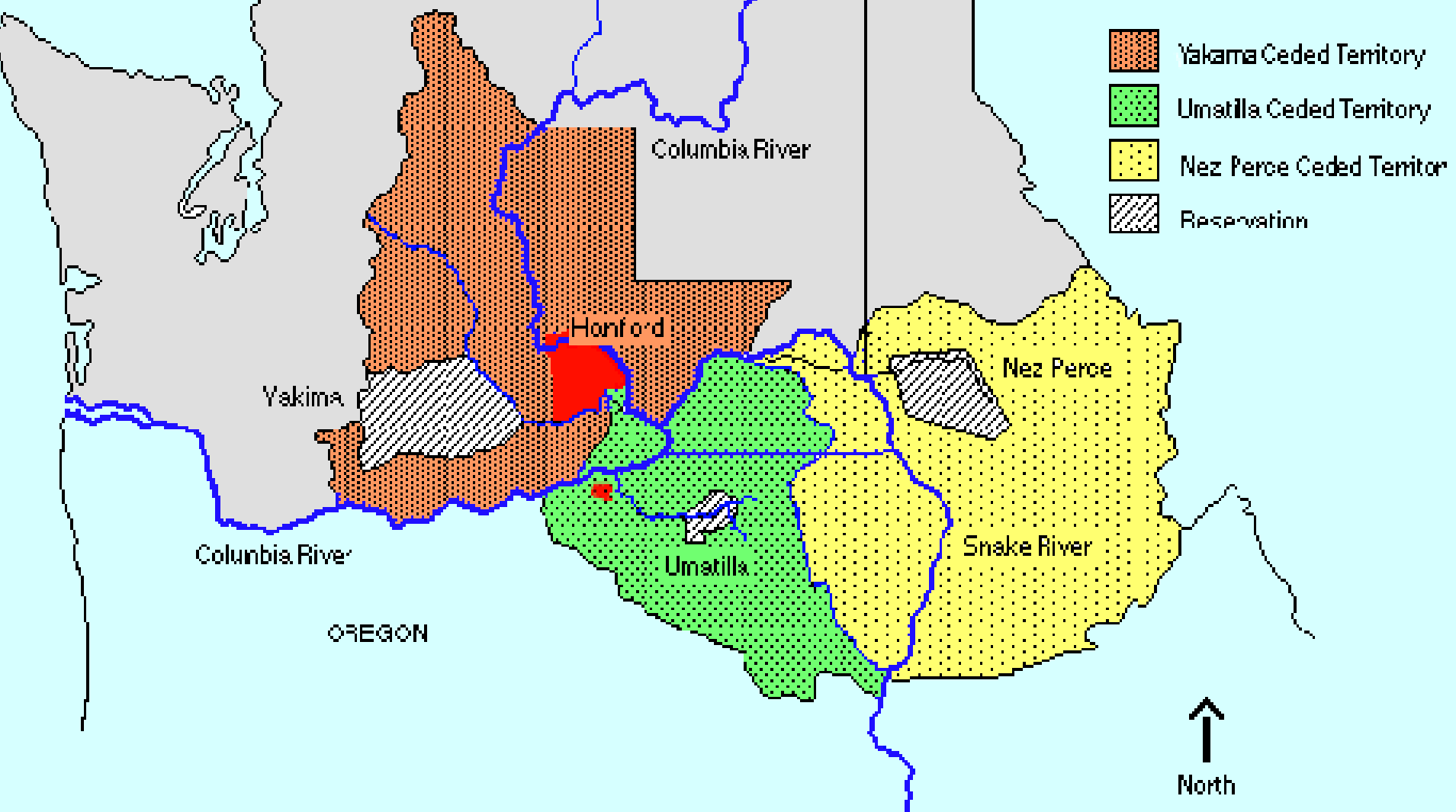
Exercising Discretion Consistent with the Duty

- ❖ 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