



2007 Council Member Training:

Tribal Treaty Rights, Native Customs Access and Other Rights of Western Pacific Indigenous Communities

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Purpose

- Give overview of federal obligations for fisheries management
- Highlight some regional differences
- Many distinctions important to individual tribes/communities and fishing agreements are not included
- Briefing book provides sources for additional information



Background

- ❑ Recognize tribes are governmental sovereigns; inherent in this sovereign authority ... power to make and enforce laws, administer justice, manage and control Indian land, exercise tribal rights and protect tribal trust resources.
- ❑ Recognize and respect ... consider ... the value of tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities.
- ❑ Sensitive to fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.



Background

- Because of unique government-to-government relationship between Indian tribes and the US ... need to **establish and maintain effective working relationships and mutual partnerships** to promote the conservation of sensitive species and their ecosystems ... focus on **cooperative assistance, consultation, sharing of information and creation of government-to-government partnerships** to promote healthy ecosystems.
- Departments (NMFS) **may work with intertribal organizations**, to the extent that such organizations are **authorized by their member tribes** to carry out resource management responsibilities.





Federal Tribal Obligations

- ❑ General federal obligations to tribes
- ❑ Specific obligations vary by region depending on tribal status
 - Federal-recognized treaty fishing rights
 - Federally recognized
 - Seeking Federal recognition
 - State recognition
- ❑ Tribal and indigenous involvement most active in PFMC, WPFMC, NPFMC





Definitions

➤ **Indian Tribe**

Any Indian tribe, band, nation, Pueblo, or other organized group or community acknowledged by the Federal government to constitute a tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994. Secretarial Order and DOC definition extended to include Alaska Native Villages (43 U.S.C. 1601 et seq.)

➤ **Tribal government**

The recognized government of an Indian tribe and any affiliated or component Band government of such tribe that has been determined eligible for specific services by Congress or officially recognized by inclusion in 25 CFR part 83.

➤ **Tribal officials**

Elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations



Definitions

➤ Policies that have tribal implications

Regulations, legislative comments or proposed legislation, and other policy statements or actions that have **substantial direct effects** on the **relationship**, or on the **distribution of power and responsibilities** between the Federal government and Indian tribes

➤ Agency

Any authority of the United States that is an “agency” under 44 U.S. C. 3502(1), other than those considered to be independent regulatory agencies under 44 U.S.C. 3502(5)

➤ Tribal Trust Resources

Natural resources, on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.



Federal Tribal Policies

- ❑ **Presidential Memorandum for the Heads of Executive Departments and Agencies** (April 29, 1994)
 - ❑ **E.O. 13175 Consultation and Coordination with Indian Tribal Governments** (November 9, 2000)
 - ❑ **American Indian and Alaska Native Policy Dept. of Commerce** (March 30, 1995)
 - ❑ **Secretarial Order - American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act** (June 5, 1997)
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A Reminder

- ❑ EO 13175 and Presidential memorandum applies to **all departments and agencies** and **all federal-tribal interactions**
 - ❑ DOC policy applies to DOC relationship with Alaskan Natives and American Indians
 - ❑ The "Secretarial Order" (SO) applies to two departments:
 - Department of Commerce
 - Department of the Interior
 - ❑ The SO addresses department-tribal interactions and the Endangered Species Act
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E.O. 13175:

Consultation and Coordination with Indian Tribal Governments

- ❑ Establish regular and meaningful consultation and collaboration with **tribal officials** in the development of **policies that have tribal implications**.
- ❑ Strengthen government-to-government relationships.
- ❑ Reduce imposition of unfunded mandates.



Fundamental Principles

- ❑ (a) United States has a unique legal relationship with tribal governments.
- ❑ (b) Recognizes the right of tribes to self-government and the exercise of inherent sovereign powers over members and territory.
- ❑ (c) Recognizes right of tribes to self-government and supports tribal sovereignty and self-determination.



Formulating and implementing policies with tribal implications

Agencies shall:

- ❑ (1) encourage **development of tribal policies** to achieve objectives;
- ❑ (2) where possible, **defer to tribes to establish standards**;
- ❑ (3) in determining need for Federal standards, **consult with tribal officials as to need and alternatives that would limit scope** of Federal standards or otherwise **preserve the prerogatives and authority of tribes**.



Consultation

- Each agency shall have an **accountable process** to **ensure meaningful and timely input** by tribal officials in **development of regulatory policies** that have **tribal implications**.
- To extent practicable and permitted by law, no agency ... promulgate **regulation that**
 - **has tribal implications,**
 - **imposes substantial direct compliance costs** on tribal governments **or the tribe,**
 - **not required by statute** unless:
 - (1) funds for **direct costs** incurred by **tribal government or the tribe** are provided; **or**
 - (2) **prior** to formal **promulgation** of regulations tribes consulted and tribal impact statement prepared



American Indian and Alaska Native Policy

Dept. of Commerce (March 30, 1995)

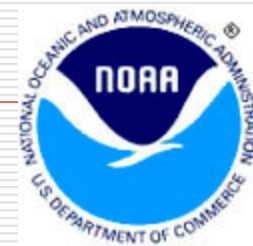
1. The Department will identify and take appropriate steps to remove any impediments to working directly and effectively with tribal governments.
2. The Department will work cooperatively with other federal departments and agencies, where appropriate, to further the goals of this policy.
3. The Department will work with tribes to achieve their goal of economic self-sufficiency.
4. The Department will internalize this policy to the extent that it will be incorporated into **ongoing and long-term planning and management processes**, as well as day-to-day operations.





Secretarial Order - American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

- Applies to Department of Commerce and Department of the Interior for implementing ESA
- Acknowledges trust responsibility and treaty obligations to Indian tribes and tribal members and government-to-government relationship in dealing with tribes.
- DoC/DoI carry out responsibilities under the ESA in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions.
- DoC/DoI “strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.”



Responsibilities – The 5 Principles

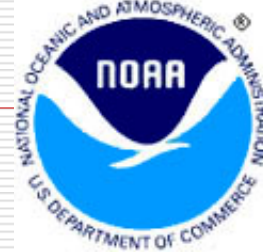
The Departments Shall:

1. **Work Directly with Indian Tribes** on Government-to-Government Basis to Promote Healthy Ecosystems
2. Recognize **Indian Lands Are Not** Subject to the Same Controls as **Federal Public Lands**
3. **Assist Tribes in Developing and Expanding Tribal Programs** so Healthy Ecosystems are Promoted and Conservation Restrictions are Unnecessary.
4. Be **Sensitive to Indian Culture, Religion, and Spirituality**
5. **Make Available** to Indian Tribes **Information** Related to Tribal Trust Resources and Indian Lands ... Shall Strive to **Protect Sensitive Tribal Information** from Disclosure.



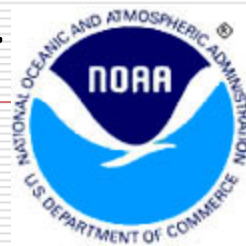
Principle 3: Healthy Ecosystems/ Conservation Restrictions Unnecessary

- Take affirmative steps to achieve common goals of **promoting healthy ecosystems, tribal self-government**, and government to government consultation
 - Offer and provide scientific and technical assistance and information...**cooperative management measures**
 - Shall **give deference to tribal conservation and management plans for tribal resources** that:
 - (a) **governs activities on Indian lands**, including tribally-owned fee lands;
 - (b) **address the conservation needs of listed species.**
 - Conduct government-to-government consultations to discuss extent to which **tribal resource management plans for tribal trust resources outside Indian lands** can be **incorporated into actions that address conservation needs of listed species.**
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Conservation Necessity Principles

- There are five conservation standards:
 - (i) The **restriction is reasonable and necessary** for the conservation of the species at issue;
 - (ii) The conservation purpose of the restriction **cannot be achieved by reasonable regulation of non-Indian activities**;
 - (iii) The measure is the **least restrictive alternative** available to achieve the required conservation purpose;
 - (iv) The **restriction does not discriminate** against Indian activities, either as stated or applied; and,
 - (v) **Voluntary tribal measures are not adequate** to achieve the necessary conservation purpose.



North Pacific



Fisheries

Management

Council



North Pacific FMC

- Status
 - 220+ federally-recognized Native villages
 - Metlakatla fishing rights established by E.O. (pre-statehood)
 - consultation obligations expanded with E.O. 13175
 - Primary Council-tribal issues
 - Halibut Subsistence Program
 - Salmon bycatch
 - Most issues indirectly Council related, e.g, MMPA, NEPA
 - No specific Council membership provisions
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MSA Provisions (section 305(i))

- Alaskan Community Development Programs
 - WP and NP Regional Marine Education and Training
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Alaska Community Development Quota Program (305(j))

- ❑ Specific to community, not “tribal” entities
 - ❑ Goals for western Alaskan communities:
 - provide eligible western Alaska villages with the opportunity to participate and invest in BSAI fisheries
 - Support economic development
 - Alleviate poverty and provide economic and social benefits
 - Achieve sustainable and diversified local economies.”
 - ❑ Provides for specific catch allocations among fisheries and programs
 - ❑ Specifies eligible villages and eligibility requirements for participating entities
 - ❑ Periodic plan performance evaluation
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WP and NP Regional Marine Education and Training (305(j))

- "...establish a pilot program for regionally-based **marine education and training programs** in the Western Pacific and the Northern Pacific to foster understanding, practical use of knowledge (including native Hawaiian, Alaskan Native, and other Pacific Islander-based knowledge), and technical expertise relevant to stewardship of living marine resources."
 - "...establish programs or projects that will **improve communication, education, and training on marine resource issues** throughout the region and increase scientific education for marine related professions among coastal community residents, including indigenous Pacific islanders, Native Hawaiians, Alaskan Natives, and other under-represented groups in the region.
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U.S./Canada

**Cape Alava
Queets River
Leadbetter Pt.**

Cape Falcon

Florence S. Jetty

Humbug Mt.

OR/CA Border

**Humboldt S. Jetty
Horse Mt.**

Pt. Arena

**Pt. Reyes
Pt. San Pedro
Pigeon Pt.**

Pt. Sur

U.S./Mexico



Pacific Fisheries Management Council

Pacific FMC

- Status
 - >25 tribes with Federally-recognized treaty tribal fishing rights (Puget Sound, WA Coast, Columbia River, California)
 - Many others federally-recognized
 - All FMPs involve tribal fishing rights (HMS?)
 - Council fisheries managed as part of larger group of fisheries
 - Council membership provision for treaty tribal member and alternate
-

Council fisheries one of many....

- Federal court mandated tribal/non-tribal allocations
 - US v WA, US v OR,
 - Hoh v Baldrige,
 - Klamath Consent Decree

 - Pacific Salmon Treaty

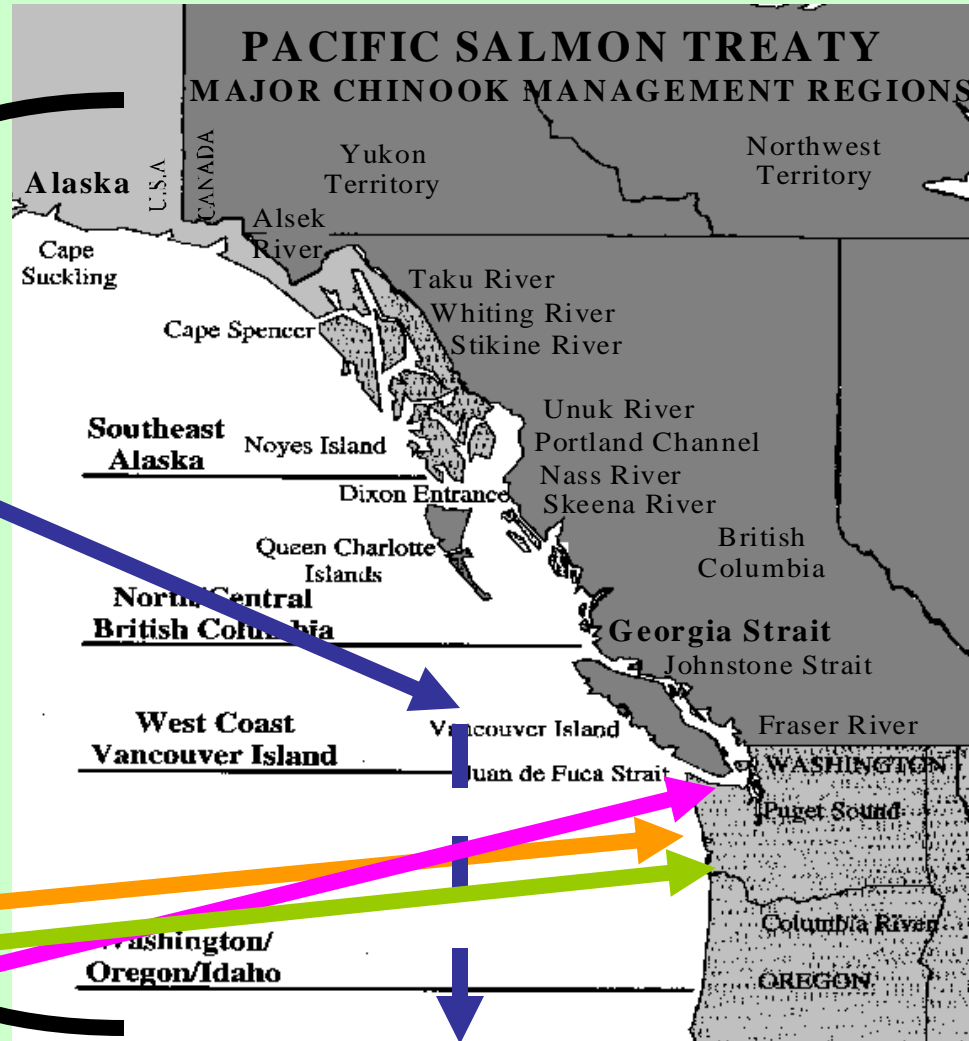
 - ESA standards and Secretarial Order
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Coastwide management coordination

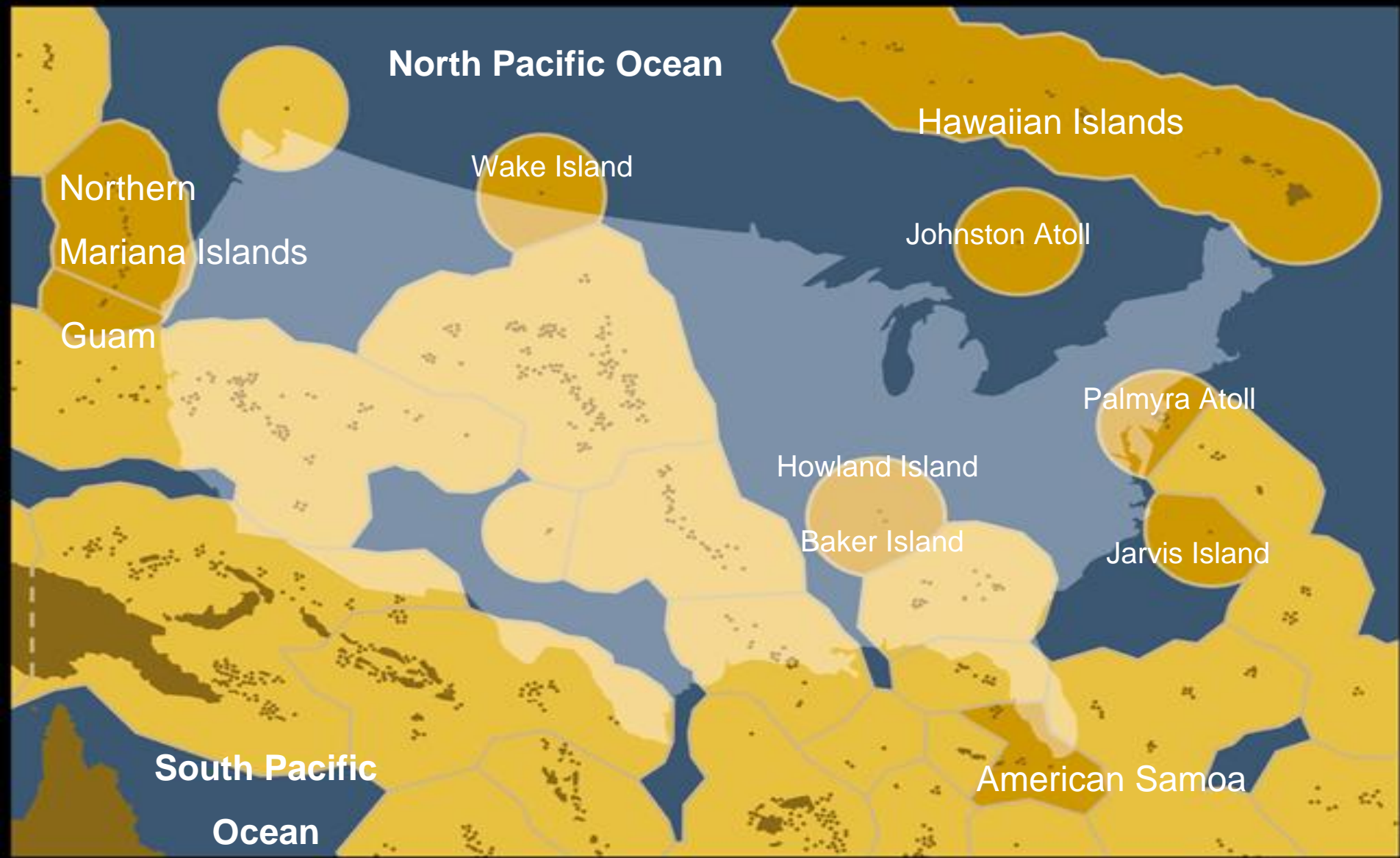
Coastwide: Pacific Salmon Treaty covers fisheries and protects stocks in Southeast Alaska, Canada, Wa., Or., & Idaho

Ocean: Pacific Fisheries Mgmt. Council schedules fisheries and protects stocks in Wa., Or. & Ca.

“Terminal” & “Extreme Terminal”: Wa. & tribes manage stocks and fisheries on the Washington Coast, Columbia River and in Puget Sound



Western Pacific Fisheries Management Council



Western Pacific FMC

- Hawaii, American Samoa, Guam, Northern Mariana Islands (NMI) and the uninhabited US islands of the Pacific
- Indigenous people defined differently
 - Hawaii: recognized by state, seeking federal status, descendants of inhabitants prior to 1778 (20%)
 - American Samoa: Deeds of Cession of 1900 (90%)
 - Guam: Organic Act of Guam, 1950 (40%)
 - Northern Mariana Islands: Covenant to establish a Commonwealth, 1986 (80%)
- 7 of 13 voting Council members are people of indigenous descent from communities of American Samoa, Guam and NMI

(Pacific Insular Areas contain unique historical, cultural, legal, political, and geographical circumstances which make fisheries resources important in sustaining their economic growth (MSA 2 (a) 10))

MSRA provisions

- Indigenous Provisions
 - Western Pacific Community Development Program (305(i))
 - Western Pacific Community Demonstration Project Program (305 note)
 - *Western Pacific Regional Marine Education and Training (305(j))*

 - Pacific Insular Area Fishing Agreements (204(e))
 - Applies to island areas except Hawaii
 - Authorizes foreign fishing within the EEZ at the request of the Governor of the island area
 - Revenues from agreement provided to island governments
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Western Pacific Community Development Program (305 (i))

- Provide access for Western Pacific communities to fisheries managed by the Council.
 - Develop criteria based on traditional fishing practices in or dependence on the fishery, the cultural and social framework relevant to the fishery and economic barriers to access to the fishery.
 - Notwithstanding any other provisions of this Act, the Council shall take into account traditional indigenous fishing practices in preparing any fishery management plan.
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Western Pacific Community Development Program Eligibility (305(i))

- ❑ Located within the Western Pacific Region; meet criteria developed by the Western Pacific Council, approved by the Secretary and published in the FR;
 - ❑ Community residents descended from aboriginal people indigenous to the area who conducted commercial or subsistence fishing using traditional fishing practices;
 - ❑ No previous harvesting or processing capability to support substantial participation in fisheries in the Western Pacific Region; and
 - ❑ Develop and submit a Community Development Plan to the Council and Secretary.
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Western Pacific Community Demonstration Project Program

(305, note)

- ❑ Secretary is authorized to make direct grants to eligible western Pacific communities, as recommended by the Council, to foster and promote indigenous fishing practices and enhance Western Pacific Region community-based fishing opportunities.
 - ❑ \$500,000/fiscal year.
 - ❑ CDPP Advisory Panel
 - ❑ Appropriate Federal agencies may provide technical assistance
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In Summary

- ❑ **Unique and distinctive relationship** between US and tribes defined by treaties, statutes, executive orders, judicial decisions, and agreements ... different than other relationships with Federal government.
 - ❑ Long-standing Congressional and Administrative policies promote self-government, self-sufficiency, self-determination, recognizing and endorsing fundamental **right of tribes to set own priorities and make decisions affecting their resources and distinctive ways of life.**
 - ❑ Circumstances differ widely and always changing
 - ❑ Effective working relationships and consultation processes are key
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