



# Department of Defense Legacy Resource Management Program

PROJECT NUMBER (99-1881)

## **Executive Summary: TREATY-RESERVED RIGHTS ON DEPARTMENT OF DEFENSE LANDS**

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## EXECUTIVE SUMMARY

". . . The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." Treaty with the Yakima, 1855

### *Background and Purpose*

This report identifies Department of Defense (DoD) installation obligations arising from treaties and agreements negotiated by the United States and Indian nations between 1775 and 1954. The DoD installations are defined as those listed in the FY1999 Sikes Act Reporting Data, Defense Environmental Restoration Program Annual Report To Congress For Fiscal Year 1999 ("Sikes Report").

The DoD initiated this study to obtain information essential to efforts to uphold federal legal obligations to Indian tribes and to enhance DoD-tribal relationships.

This report identifies installations in the lower 48 states with legal obligations arising from rights expressly reserved by the tribes in their treaties with the United States. In general, these treaties recognize tribal members' rights to hunt, fish, gather, and otherwise continue longstanding use of lands now occupied by DoD installations. Treaty rights identified in this report exist unless consultation with a tribe, further historical or legal research, or a new United States Supreme Court interpretation of Indian treaty rights proves otherwise.

Treaty-reserved rights are not predicated upon federal recognition or past or present tribal ownership of land. For example, the courts have upheld the treaty rights of a small number of non-federally recognized tribes (*United States v. State of Washington*, 520 F.2d 676 [9<sup>th</sup> Cir. 1975]). Tribes possessing legally binding rights on DoD installations may therefore include the following:

- Tribes residing near the DoD installation, and
- Tribes that because of relocation now live far from the DoD installation.
- In both instances above, the tribes may or may not be federally recognized.
- In both instances, the tribes may or may not live on federally defined reservations.

Department of Defense responsibilities to tribes are derived from the federal trust doctrine, treaties, executive orders, agreements, statutes, policies, and other legal obligations

between the U.S. government and tribes. Treaty rights are only one component of federal government responsibilities to tribes.

### *Methodology*

A total of 488 treaties and agreements were reviewed and 78 were identified that created potential obligations for existing DoD installations. The geographical extent of the treaty-reserved rights was mapped to identify those rights that overlap with DoD lands (Appendix H lists all maps and treaty sources employed in this research).

The mapping revealed that 118 tribes negotiated 48 treaties that reserved rights on lands that may be occupied by DoD installations. Every treaty subsequently concluded by these 118 tribes was investigated to determine if later treaties extinguished or altered the rights reserved in the original 48 treaties. Next, court decisions were examined to determine the proper interpretation of phrases that possibly extinguished or limited the previously reserved rights (see Chapter Three for research methodology and Appendix E for a summary of pertinent court decisions).

To create the GIS application, maps of DoD installations, reservation lands and treaty land cessions were superimposed, the maps were then linked to relational databases. Users can query maps and data tables to identify tribal, treaty-ceded, aboriginal, and DoD installation lands or to obtain information on treaty-reserved rights applicable to a particular installation.

The study utilized materials publicly available between September 2000 and October 2001. New data and future court decisions on treaty issues may alter project findings.

## *Findings*

After eliminating 7 treaties that contained self-limiting provisions or were inapplicable to this project, 41 treaties containing reserved rights of potential concern to DoD installations remained under consideration. Twenty-two (22) of these treaties reserved rights matched to DoD locations. The remaining 19 reserved rights were of such wide geographical scope that it proved impossible to conclusively establish the boundaries of the rights and correlate them with a DoD installation.

Chapter Four, section one, summarizes information on the 22 treaties, which affect 58 installations in 12 states. In 17 of these 22 treaties, tribes reserved rights within the boundaries of lands ceded in the treaties. The identified DoD installations now occupy these lands.

The remaining 5 of these 22 treaties contain reserved rights that may extend beyond the ceded area of the treaty. For example, the 1855 Treaty with the Dwamish, Suquamish, etc., provides that the “right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purposes of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands” (12 Stat. 927, Article 5). Working from the assumption that these rights are to be practiced in part on ceded lands, installations located on the lands ceded in each of the 5 treaties were identified. The geographical limits of rights can only be definitively established by consultation with the tribes and further historical research, either of which may indicate other affected installations beyond the ceded land areas.

Chapter Four, section two, presents information on 19 treaties involving 52 tribes and/or tribal subunits who reserved rights of extensive and/or indeterminate boundaries. For example, it was not possible to accurately map the boundaries of the rights reserved in the Treaty with the Kiowa, etc., of 1837, which states that it is “understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the Great Prairie west of the Cross Timber to the western limits of the United States” (7 Stat. 533, Article 4). These 19 treaties vary in their intent and the reservation of rights. Some reserve rights associated with complex boundary lines set forth in the treaties. Others reserve rights in “usual and accustomed places,” for which, in contrast to the 5 treaties presented in Chapter Four, section one, no installations were located in the treaty-ceded lands. It is

important to note that federal courts have upheld the rights reserved in some of these treaties. Pertinent legal information is noted under the discussion of the respective treaties.

These treaties entailed a level of historical research and tribal consultation that was beyond the scope of this project. They may, upon further research, be found to affect DoD installations.

### *Further Research*

This report is not intended to provide a single, definitive source for DoD analysis of tribal treaty rights. Instead, the study adds to tools available to installation commanders to assist in meeting federal obligations to tribes and tribal members. A number of issues pertinent to the DoD-tribal relationship were beyond the inherent limitations of this study and could form the basis for future research.

This report presents information on Indian tribes with treaty-reserved rights only, and thus excludes tribes who did not explicitly reserve rights in their treaties, who did not enter into treaty relations with the United States, or whose negotiated treaties were not ratified by Congress. The DoD may also possess treaty on lands not listed in the Sikes Report.

This project focuses on explicitly reserved, land-based, usufructuary rights. It excludes additional rights deriving from treaty obligations or the federal trust relationship, such as:

- The protection and/or preservation of habitat as a component of meeting treaty obligations involving usufructuary rights.
- Consideration of the effects of installation activities on nearby tribal communities and/or the tribal reservation environment.
- Trust responsibilities extending to non-land based rights, such as air and water.
- Tribal access to federal lands provided for in public laws, executive orders, and judicial decisions.

Further research is needed to determine potential DoD obligations, such as those identified above, which were not within the scope of this project.

### *Report Structure and Content*

Chapter One reviews the history of treaty making and the role of the Department of War and later, the Department of Defense, in that history. It also briefly examines the Supreme

Court's procedures for interpreting Indian treaties. Chapter Two details the limitations of the study. Chapter Three presents the research methodology.

Chapter Four, section one, provides a state-by-state, installation-by-installation analysis of DoD treaty responsibilities. Chapter Four, section two, explains the nineteen (19) treaties that have not been conclusively mapped but which may, upon further research and tribal consultation, reveal DoD responsibilities. A tabular summary of the data is presented at the end of each section. The eight appendices, together with the GIS application, provide extensive information on the sources used to arrive at the results of this study