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MEMORANDUM FOR

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SUBJECT: Army Policy Guidance for Implementing American Indian and Alaska Native
Policy

1. References:

- a. Department of Defense (DoD) Instruction 4710.02, 14 Sep 06, subject: DoD Interactions With Federally-Recognized Tribes, 14 Sep 06.
- b. Army Policy, 24 Oct 12, subject: American Indian and Alaska Native Interaction.
- c. Army Policy Guidance Tribal Consultation, June 2014 (enclosed).

2. Installations must insure implementation of DoD and Army policies, directed by references 1a and 1b. The Army Policy Guidance for Tribal Consultation (reference 1c) will assist installations to comply with the framework of laws, regulations, and policy requiring government-to-government consultation with Federally-recognized tribes.

3. The Office of the Assistant Chief of Staff for Installation Management point of contact for Cultural Resources questions is Ms. Kathleen McLaughlin at (571) 256-9726, email: kathleen.a.mclaughlin8.civ@mail.mil.

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EXECUTIVE SUMMARY

Preamble

The federal government formally recognizes over 565 American Indian governments and Alaska Native entities (hereinafter referred to as "tribes"). The unique position of these tribes in relation to the federal government is rooted in American history, law, and policy. Since the earliest days of the republic, the federal government recognized tribes as sovereign nations with inherent powers of self-government and set forth a legal relationship in the Constitution, as well as various treaties, statutes, executive orders, and court decisions. Because of this status, the federal government is considered to have a duty to respect tribal interests. This duty is referred to as the "Federal Trust Doctrine." Under the Federal Trust Doctrine, the United States, and individual agencies of the federal government, owes a fiduciary duty to tribes. The nature of that duty depends on the underlying substantive laws creating the duty. Responsibilities under the Federal Trust Doctrine can be divided into three broad areas:

Protecting trust property; protecting self-government; and providing services.

The U.S. Constitution (Article I, Section 8) grants Congress the power to regulate commerce with foreign nations, the states, and tribes. Treaties that were negotiated between tribes and the federal Government reserved rights for the tribes rather than conferred rights to them.

Federally-recognized tribes in the continental United States differ substantially from those of Alaska Natives. Some Indian tribes have trust lands, or reservations, associated with them. However, most Alaska Native lands are actually owned by the regional and village corporations rather than the tribe. Thus, consultation with representatives of these corporate entities may be required if there will be impacts to these native-owned lands.

Purpose

The purpose of this document is to provide guidance to U.S. Army installation Commanders and other Army personnel at the installation on consultation with tribes in compliance with Army and Department of Defense (DOD) policy, instructions, and guidance (References (a-d)), for meeting consultation requirements.¹

The federal requirements included in these guidelines are the National Historic Preservation Act (NHPA); the Native American Graves Protection and Repatriation Act

¹ This guidance document is intended only to improve the internal management of the Department of the Army and is not intended to, and does not grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural not otherwise granted or created under existing law. This guidance document shall not be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribes, or to preempt, modify or limit the exercise of any such right.

*Army Policy Guidance
Tribal Consultation
June 2014*

(NAGPRA); the National Environmental Policy Act (NEPA); the Archeological Resources Protection Act (ARPA); the Religious Freedom Restoration Act (RFRA); the American Indian Religious Freedom Act (AIRFA); Executive Order (EO) 13007, “Indian Sacred Sites”; and EO 13175, “Coordination and Consultation with Indian Tribal Governments” (References (e-l)).

Consultation proceedings should be designed to ensure the participation of tribal representatives early enough in the planning process to ensure that meaningful comments provided by the tribe may be given full and adequate consideration in the decision making process, and as appropriate, changes made to the project or mission footprint. All consultation should be developed in a manner that is consistent with federal laws and regulations that mandate such consultation. Installations should take advantage of the processes set forth in 40 CFR parts 1500-1508, “Council on Environmental Quality” (Reference (m)), EO 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (Reference (n)), and 36 CFR part 800, “Protection of Historic Properties” (Reference (o)), to involve tribes in early planning.

Legislative acts alone cannot resolve the numerous and diverse concerns of tribes with respect to their cultural heritage. Consultation provides tribes with the opportunity to voice their concerns through their consultation representatives. The end goal of consultation is the resolution of issues in a manner that respects tribal sovereignty and culture and that assists the Army in giving careful consideration to all the available evidence and points of view before making a final decision. Although consensus is a goal of consultation, consensus is not required unless the Army mission impacts tribal lands or treaty rights.

Tribes have a role in certain compliance actions in terms of consultation, review, and comment. The law does not compel tribal participation; the law compels Army to invite tribes to consult and to carry out consultation in good faith on a G2G basis. When tribes choose to participate in consultation, they do not have an approval authority over proposed actions or work products except when actions will affect resources on tribal lands or treaty rights.

Some tribes have been certified by the National Park Service (NPS) to act as the State Historic Preservation Officer (SHPO) on reservation lands; this office is known as the Tribal Historic Preservation Officer (THPO). A current list of THPO's is available through the National Association of Tribal Historic Preservation Offices (NATHPO). It is up to each tribal government to designate their representative for purposes of consulting on projects and undertakings on Army lands; this may be the THPO but might also be another tribal government representative.

These guidelines are not meant to present specific consultation procedures for every issue that may require consultation. They are intended to provide basic guidance to installation personnel on the major statutory requirements regarding consultation; discussions of

some of the major issues that may arise in consultation; tools that can be used to develop effective consultation procedures; and suggestions for integrating the consultation process into existing Army planning and operating procedures.

Relationship Building - Best Practices

Commands will ensure that installations meet their responsibilities to build stable and enduring relations with Federally-recognized tribes by fully integrating down to staff officers and civilian officials at the installation level, the principles and practices of meaningful consultation and communication with tribes in accordance with the Federal Trust Doctrine, treaties, agreements, legislation, and policy.

Senior Commanders (SC) and Garrison Commanders (GC) play a prominent role in government-to-government (G2G) consultation. SC/GC presence and signature is appropriate at significant milestones such as formal initiation of consultation, notification of final Army decisions about proposed actions under consultation, and completion of any agreement document that may result from consultation.

In conducting a G2G consultation, the SC/GC should:

- Afford tribal leaders the proper respect owed to the head of a sovereign government.
- Involve the Installation Protocol Officer as the G2G relationship is being developed.
- Coordinate compliance activities through the head of the tribal government.
- Fully integrate consultation with tribes into the installation's planning processes. Goals of initial and regularly scheduled G2G consultations include identifying Army and tribal staff members and establishing protocols for conducting and monitoring the process of staff-level consultations. The purpose of staff-level consultation is to provide a way for the installation cultural resource managers to share and obtain information regarding identification, care and treatment of affected sites with affiliated tribes.
- Do not make commitments that cannot be met. Be candid with the tribe about the limited protection for release of sensitive information, and about project planning and timelines.
- Document the installation's efforts for each undertaking. Notes, meeting minutes, written correspondence, telephone logs, and summaries of telephone conversations should be retained as part of the project administrative record.

*Army Policy Guidance
Tribal Consultation
June 2014*

- Conclude consultation before taking actions that could impact cultural or natural resources of importance to a tribe by notifying the appropriate head of the tribal government of Army's final decision.

SECTION 1: COMPLIANCE REQUIREMENTS

A number of federal laws and regulations affect tribal cultural resources and religious freedom. These laws include general federal environmental and cultural resources protection and preservation laws (NHPA, NEPA, and ARPA) and other federal laws that deal specifically with Native American human remains, cultural resources, and religious freedom (NAGPRA, AIRFA, and RFRA). These statutes differ in terms of the extent of consultation required and with whom consultation is either required or encouraged. It is recommended that consultation procedures with tribes be developed in consultation and inserted in the installation integrated cultural resources management plan (ICRMP).

Consultation requirements for each of these laws are summarized briefly below. The installation consultation representative(s) should become familiar with the specific consultation requirements for each of these laws as well as the overall process of consultation.

EO 13175, Consultation and Coordination with Indian Tribal Governments

This executive order charges agencies with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, and are responsible for strengthening the G2G relationship between the United States and tribes. In implementing this EO, consultation between the Army and tribes occurs on a G2G basis, and in an open, candid and respectful manner. This executive order is applicable whenever there is interaction between federal agencies and tribes.

National Historic Preservation Act of 1966 as Amended (NHPA)

The NHPA establishes the federal government's policy to provide leadership in the preservation of historic properties and to administer federally-owned or -controlled historic properties in a spirit of stewardship. The GC shall administer, manage and treat historic properties in accordance with the NHPA and its implementing regulations. The GC shall also identify, evaluate, and when appropriate, nominate historic properties for listing in the National Register of Historic Places, consistent with AR 200-1.

Installations shall consult with tribes in compliance with Section 101(d) (6), while carrying out their Section 106 responsibilities to take into account the proposed action's effect on historic properties. Consultation is required when historic properties of traditional religious or cultural importance to tribes may be affected by a specific proposed federal undertaking, whether or not the undertaking occurs on federal lands. Non-federally-recognized tribal groups may also participate in Section 106 consultation as a member of the interested public.

*Army Policy Guidance
Tribal Consultation
June 2014*

Consultation in the Section 106 process must provide the tribe a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance; articulate its views on the undertaking's effects on such properties; and participate in the resolution of adverse effects through a memorandum of agreement (MOA) or programmatic agreement (PA). If the Army is able to address the tribe's concerns through avoidance of the cultural resource, resulting in a no adverse effect determination, then there may not be a MOA or PA. The extent of consultation is determined project-by-project; there is no formal step-by-step process other than the procedures outlined in the Sec 106 regulations. Writing a letter to the tribe informing them of the installation's proposed undertaking and requesting their comment does not constitute a meaningful and good faith effort. It is highly unlikely that a tribe will respond in writing to a single letter. At a minimum, follow up all letters with phone calls to the tribal offices. Many tribes prefer to include some form of face-to-face meetings at some point in the consultation. Successful consultation means clearly communicating the installation's proposed undertaking and timeline and listening to and considering alternative viewpoints. If an undertaking on Army lands may affect properties having historical value to a tribe, such tribe may be a concurring party to any agreement document.

NHPA Section 101 (d) (2) also provides tribes who have had their historic preservation programs approved by the NPS, with the authority to assume SHPO functions for Army undertakings that may occur on tribal lands. The installation shall consult with the THPO, in lieu of the SHPO, regarding undertakings occurring on or affecting historic properties on tribal lands. If an Army undertaking on tribal lands may affect historic properties or properties of religious or cultural significance, then the THPO must be a signatory to any agreement document.

Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)

The intent of NAGPRA is to ensure the protection and the rightful disposition of Native American human remains and other cultural items located on federal or tribal lands and in the federal government's possession or control. NAGPRA mandates that installations summarize, inventory, and repatriate cultural items in the possession or control of the installation to lineal descendants or the culturally-affiliated tribes or Native Hawaiian organization (NHO). NAGPRA Section 2 and its implementing regulations, 43 CFR Part 10, provide a detailed definition of cultural items regulated under the Act, which include Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony.

In accordance with 43 CFR Part 10, the National NAGPRA office is designated to provide oversight in support of NAGPRA compliance. The National NAGPRA office, located within the Department of Interior – National Park Service (NPS), may review and

*Army Policy Guidance
Tribal Consultation
June 2014*

comment on the NAGPRA inventory and summary reports, notifications, identification processes, and proposed repatriation activities initiated by federal agencies. The NAGPRA Review Committee advises Congress on matters related to NAGPRA, including monitoring federal agencies' performance; making recommendations to facilitate dispute resolution; and compiling a record of culturally unidentifiable human remains that are in the possession or control of federal agencies, along with recommendations for their disposition. The NAGPRA Review Committee's recommendations or comments on federal agency actions are advisory in nature.

NAGPRA applies to all Army Commands, installations, and activities and places affirmative duties on the Army for the protection, inventory, and disposition of Native American cultural items. These requirements include existing collections that contain cultural items, as well as newly discovered cultural items. Ongoing compliance activities are associated with Section 3 compliance, determining disposition of culturally unidentified material and Future Applicability rule. Except where following the procedures outlined for culturally unidentifiable remains, all activities carried out to comply with NAGPRA and 43 CFR Part 10 shall only occur with tribes, NHO, and lineal descendants as defined in and provided for by NAGPRA. The GC will ensure compliance with NAGPRA (25 USC 3001 et.seq.) and its implementing regulation (43 CFR Part 10).

Sections 5 and 6: Pre-1990 Collections, Summaries, and Inventories

An installation must make a determination as to whether it has possession or control of existing archaeological or ethnographic collections. Collections may reside in installation displays, exhibits, museums, curatorial facilities on installation or at satellite installations, off-post museums and curation facilities or universities, or in a contractor's custody. NAGPRA specifies the disposition of cultural items within those collections that are in the possession or control of the United States and the Army, regardless of where such cultural items are currently housed.

NAGPRA Sections 5 and 6 require the Army to determine which cultural items are within its collections. Although the deadlines for completing inventories and summaries have passed, some cultural items may have been missed. In instances where compliance has not been met, installations should develop summaries and inventories for all cultural items that were collected prior to 16 November 1990, and initiate any follow-on NAGPRA consultation to complete their NAGPRA compliance responsibility. Potential cultural items discovered on federal lands after 16 November 1990, are covered under NAGPRA Section 3, which applies to inadvertent discoveries and intentional excavations, and a different process is followed.

The summary, inventory, and repatriation of cultural items that are in existing collections under Army possession or control shall occur in accordance with NAGPRA Sections 5, 6, and 7, and 43 CFR Part 10. The repatriation of cultural items is generally made to culturally affiliated tribes and NHO, however, recent amendments to the regulations at 43

*Army Policy Guidance
Tribal Consultation
June 2014*

CFR § 10.11 allow for other dispositions for culturally unidentifiable human remains. The GC must provide the National NAGPRA Program with a notice of inventory completion or notice of intent to repatriate which the National NAGPRA Program must publish in the Federal Register. Repatriation may not occur until at least 30 days after the notice is published in the Federal Register. However, repatriation must be made within 90 days of a request that satisfies the criteria stated in 43 CFR § 10.10. The procedures in 43 CFR § 10.10 (c) must be followed in situations where there are multiple tribes or NHOs requesting repatriation of the same cultural items, or when the items are indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States.

Section 3: Inadvertent Discoveries and Intentional Excavations

NAGPRA Section 3 covers inadvertent discoveries and intentional excavations of human remains and NAGPRA cultural items that are encountered on federal (or tribal) property after 16 November 1990. Planning activities that result in the intentional excavation of cultural items may be controversial. An on-going consultation program with concerned tribes will aid negotiations in these cases. Garrison Commanders and cultural resources staff should develop specific NAGPRA standard operating procedures (SOP), including the appropriate contacts for NAGPRA issues. Such procedures should include specific notification actions within the appropriate regulated time frame. Return of NAGPRA items cannot occur until specific compliance documents are completed, followed by applicable waiting periods. Inadvertently discovering cultural items has the potential to temporarily halt projects. Early resumption of the project or activity in the area of the inadvertent discovery of the cultural items may be allowed if a Comprehensive Agreement (CA) is in place that anticipates such situations and contains a recovery plan. Additional guidance on the preparation of plans of actions and compliance documents required for disposition can be found on the National NAGPRA web site or may be obtained from Installation HQ or HQDA.

In general, any time an installation is aware that their activities may impact human remains or NAGPRA cultural items (e.g., if work is being conducted near a site that has previously yielded human remains or other NAGPRA cultural items), NAGPRA mandates that certain procedures be followed. In all cases, contractors and Army personnel must follow the procedures outlined in NAGPRA Section 3(c) and 43 CFR §10.3 describing the procedures for the intentional archeological excavation of NAGPRA cultural items and human remains. If the GC determines that a planned activity may result in the excavation of cultural items, the following actions are required:

- (1) Prior to issuing approval or permits for such activities, the GC must notify in writing and initiate consultation with any known lineal descendant(s) or Indian tribes:
 - who are or are likely to be culturally affiliated with the human remains and other cultural items that are expected to be found;
 - on whose aboriginal lands the planned activity will take place; and

*Army Policy Guidance
Tribal Consultation
June 2014*

- who are believed to have a cultural relationship to the human remains and other cultural items that are expected to be found.

The written notification must:

- describe the planned activity, its general location, and the basis on which it was determined that human remains and other cultural items may be excavated;
- describe the basis for determining likely custody under 43 CFR 10.6, “Custody;” and
- propose a time and place for meetings or consultations.

Written notice should be followed by telephone contact if there is no response in 15 days.

(2) The purpose of consultation is to help the installation determine who is entitled to custody of the human remains and other cultural items under NAGPRA so that the disposition process can occur smoothly during the project, and to discuss the installation’s proposed treatment of the human remains and other cultural items. The GC must provide the following in writing to the consulting parties:

- a list of all lineal descendants and Indian tribes that are being, or have been, consulted; and
- provide additional documentation on the project as needed and requested to facilitate consultation.

The GC must request, as appropriate:

- name and address of the Indian tribe official who will act as the tribe’s representative in consultation;
- names and appropriate methods to contact lineal descendants;
- recommendations on how consultation should be conducted; and
- the kinds of cultural items that are considered to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

If the planned activity also requires consultation under section 106 of the NHPA, the installation should coordinate any consultation and agreements under NHPA with the requirements of NAGPRA.

(3) The installation must prepare, approve, and have GC sign a written POA.

Inadvertent Discoveries (43 CFR 10.4, 10.5 and 10.6)

If human or unidentifiable remains are found on Army property on land not previously designated as a cemetery, the area will be secured and the U.S. Army Criminal Investigative Division or other federal investigative organization will be notified immediately to determine if the remains are human and associated with a crime. If the remains are not human and not part of an archaeological site subject to NHPA, they may be disposed of properly. If the remains are human and associated with a crime, the Criminal Investigative Division or other federal investigative organization will direct all future actions regarding the remains. If the remains are human but not associated with a crime, a professionally qualified individual will determine if they are Native American or Native Hawaiian for applicability of NAGPRA. This event and associated details will be

*Army Policy Guidance
Tribal Consultation
June 2014*

forwarded through the chain of command to the Executive Director, Army National Military Cemetery Program (ANMC), in accordance with AR 290-5.

In general, when Native American human remains or funerary objects are encountered during undertakings on federal property, contractors and Army personnel must follow the procedures outlined in NAGPRA Section 3(d) and 43 CFR §10.4, describing requirements and procedures for the inadvertent discovery of NAGPRA cultural items. These steps are summarized below:

- (1) Stop work in the area around the discovery and protect the remains and other cultural items.
- (2) Immediately notify the NAGPRA POC identified in the installation's NAGPRA SOP of the discovery; this is usually the GC. (Note: Such situations would also require NHPA Section 106 consultation with the SHPO.
- (3) The NAGPRA POC certifies receipt of the notification within 3 days.
- (4) The NAGPRA POC immediately notifies tribes of the discovery. Notification is made by phone, followed by certified mail, return receipt requested. The notification should be mailed to known lineal descendant(s) and tribes:
 - who are or are likely to be culturally affiliated with the human remains and other cultural items;
 - on whose aboriginal lands the remains and cultural items were discovered (as judicially established by the Indian Claims Commission); and
 - who are reasonably known to have a cultural relationship to the human remains and other cultural items.
- (5) Consultation is initiated with the written notification. The written notification must propose a time and place for meetings or consultation.
- (6) The purpose of consultation is to help the installation determine who is entitled to custody of the human remains and other cultural items under NAGPRA so that the disposition process can be completed, and to discuss the installation's proposed treatment of the human remains and other cultural items pending disposition.

The GC must provide in writing to the consulting parties:

 - a list of all lineal descendants and tribes that are being, or have been, consulted; and
 - an indication that additional documentation will be provided on request.

The GC must request, as appropriate:

 - name and address of the tribal official who will act as the tribe's representative in consultation;
 - names and appropriate methods to contact lineal descendants;
 - recommendations on how consultation should be conducted; and

*Army Policy Guidance
Tribal Consultation
June 2014*

- the kinds of cultural items that are considered to be unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(7) The installation must prepare and approve through GC signature, a written POA.

(8) If remains are to be left in place, secure the site of discovery, and the disposition process does not continue further. The location of the burial will be tracked in the real property data base as a private cemetery or burial plot on government land, in accordance with AR 290-5.

(9) If remains are to be excavated, excavation or removal of the human remains and other cultural items must take place following the requirements of the Archaeological Resources Protection Act (ARPA, 16 U.S.C. 470aa et seq.) and its implementing regulations. This includes issuance of an excavation permit by the GC where required by ARPA.

(10) At least 30 days prior to transferring the human remains and other cultural items to the claimant entitled to custody; the installation must first publish a Notice of Intended Disposition. The Notice must:

- be published two times (at least a week apart) in a newspaper of general circulation in the area in which the human remains and other cultural items were discovered;
- be published two times (at least a week apart) in a newspaper of general circulation in the area or areas in which the affiliated tribal members now reside;
- provide information as to the nature and affiliation of the human remains and other cultural items; and
- solicit further claims to custody to be received within the 30 day period.

The installation must send copies of both publications of the notice and information on when and where it was published to the National NAGPRA Program.

(11) Disposition is the formal transfer of NAGPRA cultural items excavated or inadvertently discovered on federal lands after 16 November 1990, to the recognized claimants. In completing the disposition, the claimant formally accepts custody. Disposition should be documented, must be consistent with NAGPRA Section 3 (a), and 43 CFR §10.6, "Custody." Physical transfer may take place 30 days after the publication of the second Notice of Intended Disposition, as agreed upon by the claimant and the GC.

(12) In situations where cultural affiliation cannot be determined, all NAGPRA cultural items will be curated in accordance with federal standards (36 CFR Part 79).

(13) Installations should maintain all documentation, including records of the disposition, as permanent records in their administrative files.

*Army Policy Guidance
Tribal Consultation
June 2014*

Written Plans of Action

A written POA is designed to help the installation determine who is entitled to custody of any NAGPRA cultural items so that the disposition process can occur smoothly during the remainder of the project, and to discuss the installation's proposed treatment of the human remains and other cultural items prior to disposition. A POA must comply with the requirements of ARPA (16 U.S.C. 470aa et. seq.) and its implementing regulations as well as documenting the kinds of objects to be considered as cultural items; it must address the planned treatment, care, and handling, including traditional treatment of human remains and other cultural items by claimants; it must also address the planned archeological recording of the human remains and other cultural items, the kinds of analysis planned for each type of object, and the nature of reports to be prepared.

The written POA must also include:

- specific information used to determine custody of the human remains and other cultural items; and
- planned disposition of the human remains and other cultural items.

Custody must be determined in accordance with NAGPRA Section 3(a), and 43 CFR §10.6, "Custody."

Recovery from Non-Federal Lands

For cultural items recovered from non-federal lands as part of a federal project or using federal funds, Section 3 of NAGPRA does not apply. Such items will be considered a newly acquired collection and NAGPRA's Future Applicability Rule will apply, allowing the curatorial facility or museum with control of the cultural items to follow the process outlined under 43 CFR § 10.13. However, many states now have Native American grave protection laws that may apply if cultural items are recovered from state lands, so check if there is a state process that may apply.

Disposition Under NAGPRA

Legally authorized disposition of excavated Native American human remains under NAGPRA includes transfer of custody and repatriation. Both include relinquishment of legal control and custody to a lineal descendent, when the identity of the human remains is known or to a culturally affiliated tribe/NHO, when the identity of the human remains is unknown but a cultural affiliation determination can be made on a reasonable basis, using the totality of the circumstances. Reburial is not a disposition under NAGPRA. If reburial within the boundaries of an Army installation is requested by the appropriate claimant, the GC shall follow Army policy and guidance under AR 290-5, regarding such a request, and if re-interred on Army lands, the remains will be treated as a private cemetery or plot on Government-owned land.

Comprehensive Agreements

NAGPRA regulations encourage development of CA(s) which establish a process for executing standard consulting procedures in compliance with NAGPRA. CA(s) streamline consultation procedures by addressing all installation land management activities that could result in intentional excavation or inadvertent discovery of cultural items and should be developed where cultural items will likely be encountered during routine installation activities (43 CFR § 10.5(f)).

The GC may enter into CA(s) with tribes for the purposes of compliance with NAGPRA and 43 CFR Part 10. CA(s) should establish responsibilities and address all installation land management activities that could result in the intentional excavation or inadvertent discovery of cultural items, establish standard consultation procedures, and provide for the determination of custody, treatment, and disposition of cultural items. Such CA procedures and determinations should be incorporated by reference into any ICRMP prepared by the installation. However, CA(s) must be prepared independent of ICRMPs and such CA(s) shall not refer to or implement an ICRMP. Absent a CA, the GC shall ensure reasonable steps are taken to determine whether a planned activity may result in the intentional excavation or inadvertent discovery of cultural items from federally-owned or -controlled Army lands and follow the process outlined under intentional excavations.

American Indian Religious Freedom Act of 1978 (AIRFA), EO 13007, Indian Sacred Sites, and Religious Freedom Restoration Act (RFRA)

AIRFA

AIRFA applies the First Amendment guarantee of religious freedom to tribes' practice of traditional Native American religions. Installations will develop and implement procedures to protect and preserve tribal members' traditional Native American religious cultural rights and practices, and to accommodate access to and use of religious sites.

GC shall establish procedures to facilitate consultation with tribes, as appropriate to identify sites necessary for traditional religious practices and the time or season during which access is required. GC should accommodate, to the extent practicable and consistent with military training, security, and readiness requirements, tribal member access to sacred sites located on military installations and discuss with tribes the terms and restrictions on access necessary to ensure safety and national security and avoid impact to the military mission. The GC should assist in protecting the tribes' privacy in practicing religious rites and ceremonies.

An important element in complying with the meaning and intent of AIRFA is to consult with the traditional religious leaders of a tribe who may be different than those tribal

*Army Policy Guidance
Tribal Consultation
June 2014*

representatives an installation is used to dealing with on a daily basis in the conduct of its historic preservation responsibilities. This could be an issue if the traditional practitioners do not wish to be identified. During consultation with tribal government representatives, the installation should request that traditional religious leaders be made aware of the consultation. Tribal representatives will sometimes identify traditional religious leaders. Appointing an installation Liaison for Native American Affairs (LNAA) provides consistency in communicating with a tribe regardless of whether it is for AIRFA, NHPA, NAGPRA, EO 13007, EO 13175, EO 13287, or ARPA compliance purposes.

EO 13007, Indian Sacred Sites

EO 13007, effective 24 May 1996 provides direction to federal agencies on managing sites considered sacred by tribes' religious practitioners. Under EO 13007, the installation, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, must provide access and ceremonial use of tribal sacred sites; avoid adversely impacting those sites; and maintain the confidentiality of sacred site locations. It should be noted that tribes may be reluctant to divulge the location of sacred sites to installation personnel; however, tribes may be more agreeable to identifying larger areas in which they may practice traditional religious rites. The GC should be understanding of these privacy issues and open to suggestions by tribes for ways in which their need for privacy can be balanced with the installation's need for information.

“Sacred site” is defined in EO 13007 as any specific, discrete, narrowly delineated location on federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion, provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sacred sites can include, but may not be limited to, purification sites, healing sites, special floral, faunal, or mineral areas that contain resources used in religious ceremonies, vision quest sites such as caves or mountain tops, myth and legendary sites associated with certain geographical landforms, and historic sites associated with specific historic events.

Where needed, each installation must develop procedures to meet the sacred site access and protection requirements discussed above, as appropriate and compatible with mission. The procedures must also provide reasonable notice to tribes of actions that may impact the integrity of sacred sites. Installation actions under EO 13007 will comply with EO 13175, “Consultation and Coordination with Indian Tribal Governments.”

RFRA

Government agencies should not substantially burden religious exercise without a compelling Government interest and may only do so by using the least restrictive means of furthering that compelling interest. The SC/GC shall make a reasonable and good faith effort to contact and consult with tribes whose members perform religious practices in an area that may be affected by a proposed Army activity. Conduct consultation when proposing an action that may substantially burden a tribe's exercise of religion.

Archaeological Resources Protection Act (ARPA) 1979/Antiquities Act 1906/Reservoir Salvage Act-Archeological and Historic Preservation Act 1974/36CFR79 1990

ARPA overlaps with and partially supersedes the Antiquities Act. It provides legal penalties for the unauthorized excavation, removal, damage, alteration, defacement, or the attempt of such acts, on any archaeological resource more than 100 years old on federal lands. ARPA defines an archeological resource as any material remains of past human life or activities that are of archeological interest. Such remains include but are not limited to pottery, basketry, bottles, weapons, projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of the foregoing items. Installations should notify tribes of possible harm to or destruction of sites having tribal religious or cultural importance. Tribal concerns should be addressed, consistent with the requirements of NHPA and NAGPRA, prior to issuance of an ARPA permit.

National Environmental Policy Act of 1969 as Amended (NEPA), and EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low- Income Populations

NEPA

NEPA establishes a decision-making process that provides for the systematic consideration of alternatives to a proposed action and examination of the direct, indirect, and cumulative environmental impacts associated with implementation of the proposed action. Typically, Army activities or actions that impact cultural resources will require some level of NEPA documentation in addition to the separate documentation and compliance requirements of the applicable cultural resources statute or regulation. An agency may use NEPA's process and document requirements to comply with its Section 106 obligations as long as the SHPO/THPO is notified of this, and regulation standards are met. Assessments under NEPA must consider the impacts of proposed federal actions on cultural resources and the impacts on tribes and other ethnic and social communities to whom the cultural resources may have importance.

*Army Policy Guidance
Tribal Consultation
June 2014*

The installation should seek the participation of interested tribes and other members of the interested public including non-recognized tribal groups, as appropriate, in the NEPA decision-making process, for actions that may affect:

- Traditional cultural and historic resources and historic properties as referenced in NHPA Section 101(d) (6);
- Sites containing cultural items as defined by NAGPRA Section 2(3);
- Archeological sites of religious or cultural significance according to ARPA [16 USC 470cc(c)];
- Sacred sites whose access is protected under the AIRFA; or
- Reservation lands or off-reservation treaty rights.

The SC/GC may accept oral history from traditional religious cultural leaders of tribes, as historical documentation for purposes of defining traditional cultural properties, sacred sites, or cultural items. The SC/GC shall insure that, if available, multiple lines of evidence are considered and analyzed in reaching a final decision on such issues. Impacts to treaty rights and resources important in sustaining tribal activities such as plant harvesting, hunting, fishing, and water rights should, as appropriate, also be considered in the NEPA process.

EO 12898, Environmental Justice

Each federal agency must make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health, environmental, economic and social effects of its programs, policies, and activities on minority and low-income populations, particularly when such analysis is required by NEPA. The EO emphasizes the importance of NEPA's public participation process, directing that each federal agency shall provide opportunities for community input in the NEPA process. Agencies are further directed to identify potential effects and mitigation measures in consultation with affected communities.

SECTION 2: TRIBAL CONSULTATION

This section acknowledges the special legal relationship between the federal Government and tribes and outlines the protocols for appropriate tribal consultation. The Army is committed to building stable and enduring G2G relations with tribes and recommends that each installation develop consultation protocols with interested tribes.

Tribal Consultation Guidance

Consultation is a process to ensure meaningful and timely input by tribal officials into any project, program, or other undertaking that may have the potential to affect tribal interests, trust resources or treaty reserved rights. Consultation is always a dialogue, with information and opinion respectfully exchanged in both directions. The following guidance is designed to facilitate the consultation process and to make it more productive.

- Pre-decisional consultation will be an integral part of Army planning and implementation.
- Tribes will be offered the opportunity to consult regarding activities with the potential to affect cultural or natural resources of importance to them. Such consultation will include individual projects, programs, promulgation of regulations, etc.
- Consultation will be primarily conducted at the installation level, unless there is a request for HQ or HQDA input, or if HQDA determines input is necessary.
- Identify official points-of-contact prior to initiating consultation with tribes (or lineal descendants in the case of NAGPRA actions) that may have an interest in the matter under consultation. Tribal boundaries have shifted and tribes have migrated, so that tribes which seem far removed geographically may have an interest in traditional assets and actions at specific present-day Army installations.
- In the absence of individualized consultation protocols, potentially affected tribal leaders will be contacted by letter sufficiently early in the review process to allow pre-decisional consultation. The THPO or Tribal Historic Preservation office should be copied on every invitation to consult. If the installation has an up-to-date signed consultation protocol with a tribe, follow the stipulations within the protocol.
- The SC/GC will ensure that all tribes with an interest in a particular activity are contacted and their comments taken into consideration.

*Army Policy Guidance
Tribal Consultation
June 2014*

- The SC/GC is expected to play a prominent role in G2G consultation. SC/GC presence and signature is appropriate at significant milestones such as formal initiation of consultation, notification of final Army decisions about proposed actions under consultation, and signature of any agreement document that may result from consultation.
- The SC/GC may delegate follow-up consultation functions. Designated Army staff at the local or regional level may negotiate details and engage in routine consultation with tribal government staff persons or others delegated by tribal authorities.
- Consultation should also include appropriate internal stakeholders so that suggested project alternatives with potential mission ramifications can be included in the discussion.
- It may be necessary to negotiate the time and place for consultation, recognizing that many tribes do not have an operating budget that will pay for representatives' transportation and per diem and tribal representatives may have existing work, community, and family commitments. Consultation should take place at a time and in a location convenient for tribal representatives.
- Scheduling consultation is dependent upon several factors. Consultation may require multiple meetings over a period of months or it may be dependent upon culturally-specific circumstances such as religious ceremonies conducted only at certain times of the year, availability of information sources, or certain natural resources cycles. Start early, and allow plenty of time. If the Army has an urgent need for expeditious consultation, let this fact be known to tribal contacts and negotiate an expedited timetable.
- Culturally specific information obtained from a tribe is to be respected and addressed as appropriate.
- It is necessary to take into consideration and respect tribal traditions, such as:
 - Tribal representatives may want to open a meeting with a traditional ceremony, although Government representatives are under no obligation to participate in religious activities.
 - The installation may need to schedule meetings well in advance to enable the tribe to decide upon appropriate attendees such as tribal elder(s), traditional religious leader(s), and translators.
 - Tribal representatives may be reluctant to discuss culturally sensitive information outside of the tribe, or at certain times of year, or information may need to be cleared with traditional religious leader(s) or tribal council

*Army Policy Guidance
Tribal Consultation
June 2014*

- members prior to a tribal representative making a final decision or commitment.
- Tribal governments differ from each other in their organizational structures and corporate cultures. Army representatives should be mindful that this affects formal titles and forms of address such as “Chief”, “Governor”, “Chairman”, and adhere to other forms of protocol. Tribal representatives may be female or male, elected or appointed, political or spiritual leaders, and exhibit other variations from tribe to tribe.
- Each tribe should be consulted separately, unless they choose to act collectively.
- All documents resulting from a consultation effort that affect Army resources, staff, or lands, shall be staffed through the appropriate HQ for technical and legal review and concurrence prior to execution.
- Proof of consultation should be documented in writing (with sensitive information omitted) and placed in the administrative record. Although consent, approval, or formal agreement from tribal governments is not required to conclude the consultation process and to proceed with a project on federal land, the record must show that Army has given careful consideration to all the available evidence and points of view, before making the final decision.
- The decision should be placed into the administrative record and circulated to all consulting parties. It should explain the reasoning as well as the data compiled, but exclude any direct reference to culturally sensitive information provided by tribes or information deemed by the security personnel to be sensitive to the Army mission.

Tribal Consultation Protocols

Consultation procedures or written protocols may be developed and implemented at the local level with tribal input. As tribes have a variety of government organizations and customs, it may be necessary to develop separate protocols for each tribe with an interest in cultural or natural resources on the installation. These may be developed as an MOU under NHPA, to be signed by the SC/GC and the authoritative tribal government representative.

The LNAA should take the lead in preparing tribal consultation protocols for installations requiring them. Tribal consultation protocols are not meant to be project specific. Protocols should be general in nature and should focus on the relationship that will be maintained between the tribe and the installation for cultural resources issues. While tribal consultation protocols may grant tribes additional rights to participate in or concur with decisions, these additional rights cannot abrogate the rights of other participants in any federal process and the Army makes the final determinations on Army actions.

*Army Policy Guidance
Tribal Consultation
June 2014*

At a minimum, tribal consultation protocols should:

- Specify the position title, roles, and responsibilities of Army and tribal staff in the consultation process, to include both tribal and installation points of contact as well as those of the GC and SC;
- Identify acceptable means for communication between tribal and Army representatives (i.e., mail, email, telephone, face-to-face meetings, etc.), including phone numbers and e-mail addresses, as appropriate;
- Establish mutually acceptable time frames for consultation and comment on pre-decisional installation actions;
- Establish geographic areas of concern to tribes as well as topical areas of concern (e.g. ground disturbance projects or protection of specific plant/mineral resource or access to sacred sites, etc.);
- Establish protocols and process for consultation which respect tribal customs; and
- Establish a formal mechanism for resolving disputes.

While a single tribal consultation protocol may be applicable to more than one tribe, an installation should recognize that tribal sovereignty requires separate protocols for each tribe. Tribal consultation protocols should be developed in consultation with tribes and may be jointly written between Army and tribal staff. Installation personnel that have a role in tribal consultation or the development of tribal consultation protocols should participate in training courses or workshops to raise their awareness of tribal culture and customs and local tribal issues such as access to and use of sacred sites, privacy, and the treatment of discovered human remains. Installations are encouraged to seek assistance in the preparation of tribal consultation protocols from Installation HQ, HQDA, or outside agencies such as the Advisory Council on Historic Preservation. The ACHP has developed *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*, which provides sound consultation advice on each step of the Section 106 process.

SECTION 3: ISSUES OF SPECIAL CONCERN

The information in this section is intended to illustrate some of the major issues of concern to tribes. An understanding of these issues should help Army representatives develop the consultation process so that consultation is meaningful and effective, and facilitates open communication and long-term, credible consultation relationships.

Public Disclosure and Confidentiality

Issue 1: *The protection of culturally sensitive information, such as archeological site locations, locations of sacred sites, and religious or other cultural practices.*

Representatives of tribes may be reluctant, unwilling, or even unable to provide information on sacred site locations or specific aspects of religious ceremonies or cultural traditions. This can be true with or without Army safeguards in place to ensure the information will be kept confidential. This issue of confidentiality may be particularly frustrating when the Army's desire for documentation brings tribal concerns for cultural privacy into conflict with federal requirements for public disclosure. In particular, the requirements of the Freedom of Information Act (FOIA) may require that the Army make available consultation documents upon request.

FOIA was enacted to ensure the public has access to information produced and maintained by federal agencies. With the exception of certain types of information that is specifically exempted, agency records are subject to disclosure to the public upon any request that properly identifies the records in question. The courts have defined "agency records" to include information created or maintained by an agency and within the agency's possession. An agency cannot be required to create a record in response to a request under FOIA, but it can be required to produce an index of the records that might satisfy the specifications of the request.

FOIA contains a specific exemption that precludes disclosure where another statute directs that a specific type of information be withheld. Of the statutes requiring consultation with Indian tribes, only the NHPA and the ARPA have express provisions for protecting information from disclosure. ARPA specifically refers to FOIA. Both of these laws refer primarily to information regarding the location and content of sites and historic properties. The non-disclosure provision of the NHPA covers information identifying traditional cultural properties. Additionally, EO 13007 states that "where appropriate," federal agencies shall maintain the confidentiality of sacred sites as defined in that EO.

Disclosure issues should be addressed at the beginning of the consultation process. If tribal representatives are concerned about disclosure issues, a possible solution to the problem would be to document the consultation process rather than its substance. The installation may document the times and locations of consultation meetings, names and addresses of participating representatives, and a list of issues discussed, while limiting

*Army Policy Guidance
Tribal Consultation
June 2014*

documentation of specific and detailed information such as site location or aspects of cultural traditions. Once information is on record, it could be subject to a request under FOIA, so the limits to be placed on documentation should be discussed early and openly in the consultation process. The installation should discuss these issues with tribal representatives and installation legal counsel to develop a means of protecting information that must be kept in confidence. During consultation, the installation should not request more information than is needed to discuss and resolve consultation issues. Often, using generalized locations of interest vice specific site locations can resolve potential conflicts in land use.

NAGPRA and Reburial Issues

Issue 2: *Repatriation in a culturally sensitive manner.*

Consultation is required under NAGPRA to determine the cultural affiliation of human remains and certain cultural items in existing collections that are in the possession or control of federal agencies. Consultation is also required for inadvertent discoveries and intentional excavations of human remains and certain cultural items on federal or tribal lands. In addition, consultation must be conducted to facilitate repatriation of human remains and NAGPRA cultural items. However, concerns regarding NAGPRA issues extend beyond simple identification, custody, and repatriation of human remains and cultural items.

Consultation is particularly important in repatriation cases to ensure proper respect of cultural traditions and sensitivities. It is important to note that most tribes had no cultural practice of disinterment and subsequent reburial of human remains, which has caused a dilemma concerning how to repatriate human remains. However, some tribes have developed policy and procedures for handling repatriation and reburial. Information on these policies and procedures should be requested by the installation before the need for consultation arises.

Issue 3: *Reburial of human remains.*

Reburial of human remains and other cultural items is often the form of treatment preferred by tribes for repatriated items, and often reburial is preferred to occur at or near the location (that is, usually the archeological site) where the remains were originally excavated. Reburial is not specifically required under NAGPRA; however the SC/GC may be faced with such requests upon repatriation. Allowing reburial on the installation of cultural items repatriated under NAGPRA would require protection of the reburial area from future damage.

Reburial of remains on Army property may only be authorized if those remains were originally recovered from within the Army installation's boundaries and were repatriated in compliance with NAGPRA and its implementing regulations. Reburial, if authorized, shall be restricted to an area within the external boundaries of the installation that will not

*Army Policy Guidance
Tribal Consultation
June 2014*

impact present or future Army missions. In addition to tribal consultation, a GC must consult with the installation Master Planner and the Real Estate Division prior to requesting approval from the ANMC Program for a tribe to rebury NAGPRA remains on Army land. If not previously designated as a cemetery, once remains are reinterred, these areas will be designated private cemeteries or plots on Government-owned land. In accordance with AR 290-5, the GC shall not establish new private cemeteries (including plots) without prior approval from the Executive Director, ANMC. All documentation related to such cases, including reinterment details, grave marker if applicable, and geospatial location, will be forwarded through the chain of command to the Executive Director, ANMC and maintained as permanent records.

Issue 4: *Neglecting to determine the full scope of installation NAGPRA responsibilities for lands that are not owned by the agency in fee-title (for example, leased or withdrawn property) but are under the installation's "control" through lease or other special use permit or circumstances.*

NAGPRA Section 3 inadvertent discovery or intentional excavation processes do not apply to lands that are owned by a state or private entity. However, most states have laws prescribing a process to follow when Native American human remains are discovered on state lands. Additionally, if a collection is acquired using federal funds, NAGPRA applies to that collection (e.g. a collection acquired from state ARNG lands using federal funds). In such cases, it is the responsibility of the museum curating the collection to comply with Sections 5 and 6 of NAGPRA (43 CFR §10.13). In cases where an installation is operating on withdrawn lands (e.g. U.S. Forest Service, or Bureau of Land Management lands), work with the federal agency that owns the lands to determine who has the lead for NHPA and NAGPRA issues.

Ceremonies/Access to Religious and Sacred Sites

Issue 5: *Maintaining reasonable access to religious and sacred sites and sites and resources necessary for other cultural ceremonies.*

Tribal concerns regarding religious practices are addressed under AIRFA and EO 13007, which ensures reasonable access for tribal religious practitioners to sacred objects and sites and natural resources that play important roles in religious and other cultural ceremonies. In some cases, specific sites or landforms may serve as integral components of tribal religious practices and may also require compliance with the NHPA as "traditional cultural properties." Certain natural resources, such as a particular plant species, may be necessary to fulfill religious or other ceremonial needs. Thus, tribal concerns not only involve the protection of such sites, objects, and resources, but also include retaining reasonable access to them. Even seasonal access restrictions to sites and resources may inhibit the practice of ceremonies that traditionally are held only at specific times of the year. Early consultation with tribes to outline mission compatible access to traditional cultural sites and resources is a best business practice. Consultation should be memorialized in an MOU that outlines the process to follow in assuring access.

Scientific Study and Photography of Human Remains

Issue 6: *Treatment of human remains in a culturally sensitive manner by limiting the study or display of human remains.*

Many tribes consider the scientific study of human remains, including photographic documentation, to be disrespectful and culturally insensitive. NAGPRA limits the initiation of new scientific research or other means of acquiring or preserving additional scientific data on human remains within an existing collection or for which repatriation has been requested. Under these circumstances, the regulations only allow for more extensive study in those cases where human remains and certain cultural items are indispensable to the completion of a specific scientific study, the outcome of which is of major benefit to the United States (43 CFR §10.10 (c)). If more extensive studies are desired, the installation must consult with the affiliated tribe or lineal descendant on this issue.

Tribes have also expressed concern regarding the documentation associated with human remains and cultural items, to include excavation records, photographs, site maps, and reports. Under 43CFR§10.3 (b) (1), excavations are to be carried out in accordance with 16 U.S.C. 470aa et. seq., ARPA, and its implementing regulations which require adequate documentation to further archaeological knowledge in the public interest. This requires production of a final report and curation in accordance with federal standards for all artifacts, samples, collections, and copies of records, data, photographs, and other documents resulting from work conducted. ARPA requires the application of scientific techniques such as controlled observations, measurements, collection and interpretation of data, but there is no legal requirement to use photography. Therefore, it is appropriate to consult with tribes to negotiate the methodology of recording scientific data. When carrying out an excavation under ARPA, keep in mind that the level of analysis of human remains, e.g. destructive analysis, is limited under NAGPRA and should be discussed with tribes as part of NAGPRA consultation. NAGPRA cultural items will be addressed in accordance with NAGPRA regulations.

Sharing Information and Products and Cultural Training and Education

Issue 7: *Inability of tribes to obtain reports and educational products.*

Consultation is a collaborative process. Consultation might be streamlined if installations provide copies of up-to-date ICRMP/INRMPs to tribes upon request. Such documents, including any master plans, etc, are helpful for tribes in determining the exact extent of participation in specific projects. Sensitive military or mission information should be redacted, as appropriate, prior to sharing such documents. Sharing such information, to include research and maps, would benefit all participants.

Developing and sharing documents relative to archaeological collections and research with tribes can help fulfill mitigation requirements as well as benefit the tribe by

*Army Policy Guidance
Tribal Consultation
June 2014*

providing research products for tribal use. Installations should consult with tribes to develop appropriate mitigation, being open to creative mitigation. Tribes may want mitigation to focus on resources within the region which could stimulate the general public's interest and understanding of the natural science, environment, and cultural history of the area, including Native American relations and influence in the area. These interests would be enhanced by providing educational features for both the public and students through exhibits and collections, displays of American Indian artifacts, hands-on activities, educational outreach programs related to regional resources and Native American history, and other interactive activities. The public would learn about the complexity and importance of regional ecosystems and come away with a better understanding of such ecosystems and the impact humans are having on these environments. These centers could link recreational activities such as bird watching, hiking, and fishing with endangered species by including a bird specialist with a bird watching group, including an interpretive trail on hikes in nearby educational facilities, or combining a youth fishing pond with educational information on the management of recreational fishing. In addition, the public could learn the story of the American Indians of the region through displays of artifacts and remains found in the area, as well as multi-media programs and other educational tools.

Issue 8: *Ensuring cultural awareness training is conducted.*

In accordance with DODI 4715.16 and 4710.02 (References (r) and (d)), installations should provide training to military, civilian, and contractor personnel to raise the awareness of historic preservation and tribal issues. Such training may include instruction on the types of cultural resources on the installation, relevant laws, potential enforcement actions for violations of laws and procedures to be followed in the case of inadvertent discoveries. Such training may be based upon an ethnographic study, cultural resource inventories, and research undertaken by the cultural resources program. Suggest consultation with tribes affiliated with the installation in order to obtain a tribal history and issues of concern to each specific tribe. Installations may want to request that tribes provide part of this training.

Tribal Regulations, Ordinances, Resolutions, and Protocols

Issue 9: *Numerous tribes have internal tribal regulations and other compliance policies that should be reviewed by the installation and followed, where appropriate, in consultation proceedings.*

Many tribes have developed regulations, ordinances, resolutions, and protocols for handling issues covered under specific federal cultural resource legislation. Such regulations and procedures may describe the relative authority of various tribal representatives, departments, or committees, as well as a process for consultation and preferred methods of resolving issues.

*Army Policy Guidance
Tribal Consultation
June 2014*

A new GC should meet with the LNAA to assess the status of the installation's tribal consultation relationship and request such information as appropriate. Existing tribal procedures will help ensure that the appropriate representatives, those who have the authority to negotiate and enter into consultation agreements on behalf of their constituencies, are invited to consult. Such procedures also may include specified time frames for the review of documentation that take into account regularly scheduled tribal council meetings.

Gaining familiarity with tribal procedures and protocols may help avoid time conflicts in consultation proceedings. Tribal documents may give information on the regularity and timing of council meetings at which tribal representatives would normally solicit comment on consultation. Tribal council meetings may provide the only or best opportunity for tribal representatives to gain tribal approval of consultation agreements. Developing an ongoing consultation relationship prior to a specific need for consultation also would help alleviate scheduling conflicts by addressing timing issues in advance.

Because consultation between the Army and tribes should be conducted on a G2G basis, it is imperative to be knowledgeable of tribal regulations, ordinances, resolutions, and protocols. Additionally, certain tribes have been delegated SHPO responsibilities for tribal land by the NPS in accordance with NHPA Section 101(d)(2). Such designation would impact installation's compliance procedures if proposed Army actions would affect tribal lands of such designated tribes.

Timing Issues

Issue 10: *Developing a consultation schedule that affords tribal representatives sufficient opportunity to consult.*

Planning and procedural issues may allow for consultation to occur over a period of months or even years. NAGPRA consultation for inadvertent discoveries made during an ongoing construction project, on the other hand, may require a much shorter time frame, perhaps a matter of days or weeks. The schedule for consultation should be developed mutually by Army and tribal representatives taking into consideration a variety of matters: (1) statutory requirements; (2) the complexity of the consultation issues; (3) Army and tribal schedule and fiscal constraints; and (4) Army and tribal standard operating procedures and protocols. Tribal representatives should be afforded time to adequately review the appropriate information and documentation and to allow their constituencies to reach consensus. These considerations should also extend to the distance and costs of travel that will be required by tribal representatives to attend consultation meetings and to make site visits. The consultation schedule that is developed must also fit into the overall project timetable, including fiscal, mission, and other legal constraints. Timing issues under NAGPRA can be addressed in CAs.

*Army Policy Guidance
Tribal Consultation
June 2014*

Payment for Consultation

Issue 11: *Tribal budgets and distance from an installation may impede regular consultation on installation projects.*

Official representatives of tribal governments receive federal funds to conduct tribal business and should not be provided additional “consulting” fees by installations for their participation in consultation. However, provision of invitational travel orders to tribal government representatives may be more cost effective than funding travel for the GC and staff to travel to meet with each individual tribe. Traditional religious practitioners and other traditional cultural authorities who are not salaried tribal government representatives may be allowed fees or honoraria, at the GC’s discretion and subject to fiscal and legal restraints. Funding travel for tribal members for the purpose of NAGPRA consultation is at the GC’s discretion; however, in all cases involving NAGPRA consultation, tribes should be encouraged to apply for consultation grants from the National NAGPRA Program. The guidance regarding travel funding applies equally to consultation with tribes under NHPA, AIRFA, EO 13007, EO 13175, EO 13287, and ARPA.

Special Note:

Consultation meetings to fulfill legislative and regulatory requirements are not subject to Deputy Secretary of Defense (DSD) Memorandum of 29 Sep 2012, *Implementation of Conference Oversight Requirements and Delegation of Conference Approval Authority*; per exemption 4(a) “meetings necessary to carry out statutory command and staff oversight functions [are not to be considered conferences].”

Appendix A

References

- (a) Secretary of the Army Policy on “American Indian and Alaska Native Policy,” October 24, 2012
- (b) Army Regulation 200-1 “Environmental Protection and Enhancement,” December 13, 2007
- (c) Secretary of Defense Policy on “Department of Defense American Indian and Alaska Native Policy,” October 20, 1998
- (d) Department of Defense Instruction on “DoD Interactions with Tribes,” September 14, 2006
- (e) Sections 470 through 470w-6 of title 16, United States Code, National Historic Preservation Act of 1966, as amended
- (f) Sections 3001 through 3013 of title 25, United States Code, Native American Graves Protection and Repatriation Act of 1990, as amended
- (g) Sections 4321 through 4370d of title 42, United States Code, National Environmental Policy Act of 1969, as amended
- (h) Sections 470aa through 470mm of title 16, United States Code, Archaeological Resources Protection Act
- (i) Sections 2000bb through 2000bb-4 of title 42, United States Code, Religious Freedom Restoration Act of 1993
- (j) Section 1996a of title 42, United States Code, American Indian Religious Freedom Act of 1978
- (k) Executive Order 13007, “Indian Sacred Sites,” May 24, 1996
- (l) Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” November 6, 2000
- (m) Title 40, Code of Federal Regulations, Parts 1500-1508, “Council on Environmental Quality,” current edition
- (n) Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” February 11, 1994
- (o) Title 36, Code of Federal Regulations, Part 800, “Protection of Historic Properties,” current edition
- (p) Title 43, Code of Federal Regulations, Part 10, “Native American Graves Protection and Repatriation Regulations,” current edition
- (q) Title 32, Code of Federal Regulations, Part 229, “Protection of Archeological Resources: Uniform Regulations,” current edition
- (r) Department of Defense Instruction on “Cultural Resources Management,” September 18, 2008

Appendix B

Definitions

1. **Indian.** A member of a tribe, as defined in (5) below.
2. **Indian Lands:** Any lands the title to which is either held in trust by the United States for the benefit of any Indian tribe or Indian, or held by an Indian tribe or Indian subject to restrictions by the United States against alienation (32 Code of Federal Regulations (CFR) part 229).
3. **Protected Tribal Resources:** Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by or reserved by or for Indian tribes through treaties, statutes, judicial decisions, or executive orders.
4. **Tribal Rights:** Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, un-extinguished aboriginal title, treaty, statute, judicial decision, Executive Order, or agreement, and that give rise to legally enforceable remedies.
5. **Tribe:** A Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the most current Department of Interior list of tribes published in the Federal Register (Section 1996a of 42 United States Code (U.S.C.)).