

CULTURAL RESOURCES MANAGEMENT & TRIBAL CONSULTATION TOOLS THAT BUILD RANGE OPERATIONAL CAPACITY

Tuesday, August 14, 2018

3:30pm – 5:00pm

Room Midway 9

St. Louis, MO



Sustaining Military Readiness Conference
Restoring Readiness Through Planning and Partnerships



Session Panelists

Facilitators:

- Michelle Volkema, Deputy Federal Preservation Officer, DoD
- Alicia Sylvester, Senior Advisor and Liaison for Native American Affairs, DoD

Panelists:

- John McDonagh, Associate General Counsel, DoD Office of General Counsel for Environment, Energy, and Installations
- Kathleen McLaughlin, Deputy Federal Preservation Officer, Department of the Army
- Adrienne Velasquez, Cultural Resource Specialist, Air Force Civil Engineer Center
- Kate Kerr, Program Analyst, Advisory Council on Historic Preservation (ACHP)



Army Environmental Program Division



Legislative Mandate for Tribal Consultation

- **Treaties**
- **National Historic Preservation Act 1966 (NHPA)**
- **National Environmental Policy Act (1969)**
- **American Indian Religious Freedom Act 1978 (AIRFA)**
- **Archaeological Resources Protection Act 1979 (ARPA)**
- **Native American Graves Protection and Repatriation Act 1990 (NAGPRA)**
- **Religious Freedom Restoration Act 1993 (RFRA)**
- **36 CFR 800 (NHPA)**
- **40 CFR 1500-1508 (NEPA)**
- **E.O. 13007 (Indian Sacred Sites)**
- **32 CFR 229 (ARPA)**
- **43 CFR 10 (NAGPRA)**
- **E.O. 13175 (Consultation with Tribal Governments)**



Army Environmental Program Division



- **TYPES OF TRAINING**

- Maneuver
- Non-Vehicle
- Navigation
- Bivouac
- Digging/Earthworks
- Drop Zone

- **TYPE OF IMPACTS**

- Direct
- Indirect
- Cumulative
- Access



Consultation is always Pre-Decisional



- **Requires Consensus**
 - On tribal land
 - NHPA
 - NAGPRA
 - On agency lands
 - Tribal treaty rights
- **Requires Federal Agency take into consideration**
 - Off tribal lands
 - ARPA
 - NHPA
 - NAGPRA
 - AIRFA/EO 13007
 - RFRA
- **Federal Agency makes decision**

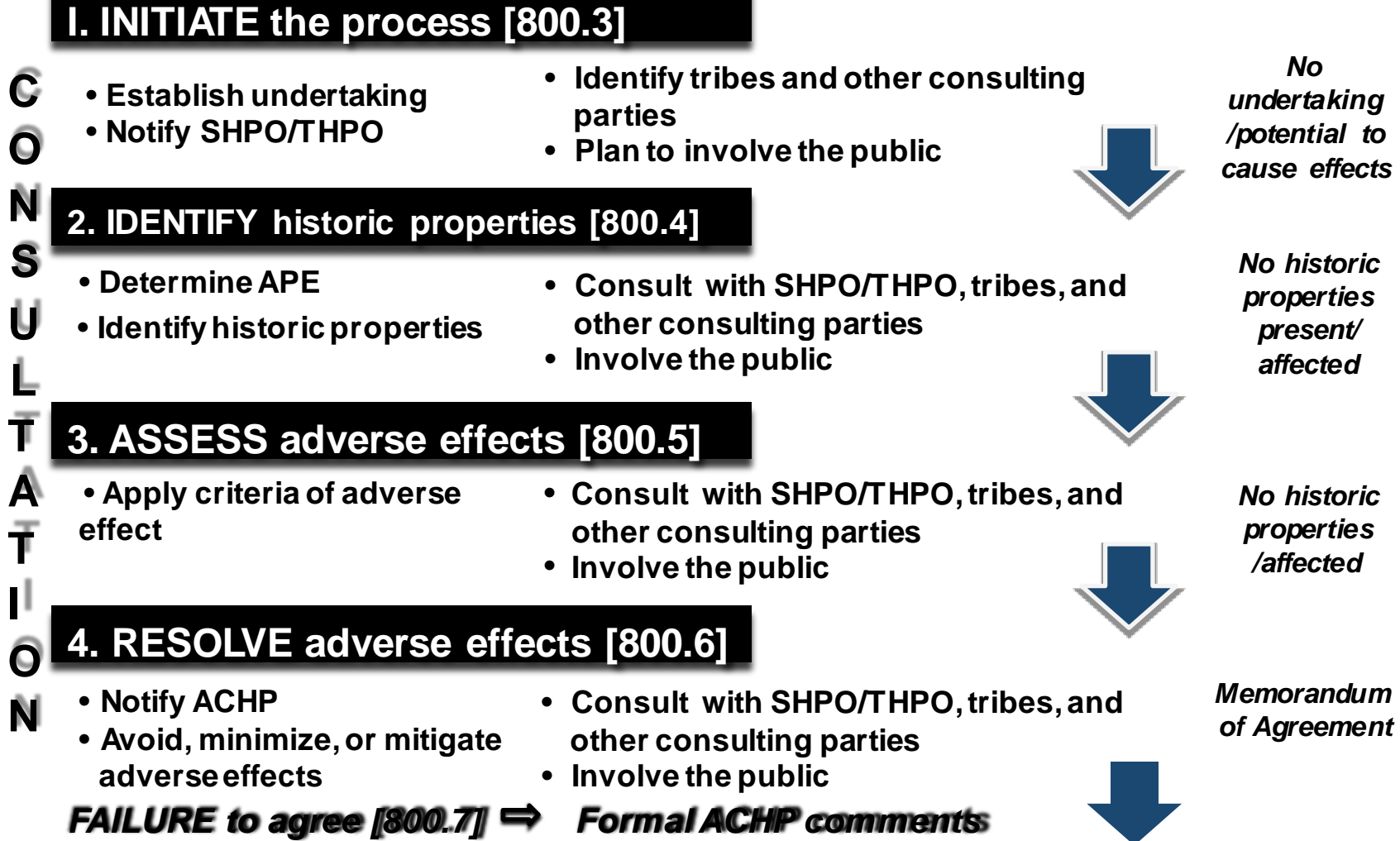


Consultation Requirements

- **How to consult?**
 - Invite consultation with tribes/NHO on undertakings that may affect protected tribal resources, tribal rights, or Indian lands
 - Invite consultation with Tribes on a government-to-government basis
 - Consult in accordance with requirements of applicable legislation and signed agreement documents
- **When to consult?**
 - Consult early to ensure **meaningful** consideration of comments with the **ability to affect the decision**
- **What tribes do NOT do**
 - Approve or disapprove a federal undertaking (unless effects on tribal lands or affecting tribal treaty rights on installation lands)



SECTION 106 PROCESS

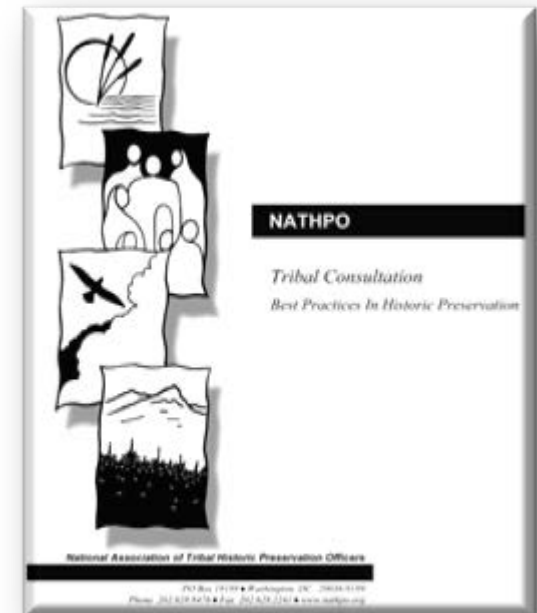




Tribal Consultation Best Practices



- **Coordinate compliance with all applicable statutes**
- **Early consultation (ASAP)**
- **Sensitivity to cultural values**
- **Do NOT get involved in tribal politics**
- **Respect treaty rights**
- **https://www.nps.gov/history/tribes/Quick_Guides.htm**





Federal Laws and Regulations Regarding Cultural Resources Management and Tribal Consultation

Presented by:

John McDonagh

Associate General Counsel, EE&I

U.S. Department of Defense



Tribal Consultation Obligation

Legal Roots

- **Federal Trust Responsibility**
- **Treaty Reserved Rights**
- **Laws –**
 - NHPA, ARPA, NAGPRA, AIRFA, RFA, NEPA
- **Executive Pronouncements**
 - EO's: Sacred Sites, Consultation, EJ, Preserve America, Cooperative Conservation
 - Pres. Memos on Gov't-to-Gov't Relations
- **DoD Tribal Consultation Policies**
 - DoDI 4710.02, DoD Interactions with Fed. Recognized Tribes (14 SEP 2006)
 - DoDI 4710.03, Consultation Policy with Native Hawaiian Orgs (15 OCT 2011)



National Historic Preservation Act of 1966, as amended (NHPA) 54 U.S.C. §§ 300101 *et seq.*

- *“The Congress finds and declares that –*
 - *“The spirit and direction of the Nation are founded upon and reflected in its historic heritage*
 - *“The historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people*
 - *“The increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development.”*



National Historic Preservation Act (continued)

- **NHPA § 106** (54 U.S.C. § 306108)
 - Federal agencies must *take into account the effects of their undertakings* on historic properties
 - Federal agencies must afford the Advisory Council on Historic Preservation (APHC) a reasonable opportunity to comment with regard to the undertaking

- **NHPA § 110** (54 U.S.C. §§ 306101-306114)
 - Federal agencies shall *establish preservation programs* for the identification, evaluation, and protection of historic properties



NHPA § 106 Consultation Attributes

- **Volume not sufficient:** The sheer volume of documents is not meaningful.
- **Boilerplate communications and recitals not sufficient:** *Pro forma* recitals are not adequate
- **Generalized info requests and meetings not sufficient:** Merely offering the consulting party an opportunity to gather and disclose info is not sufficient.
- **Arbitrary time limits and time limits of sole convenience to agency are not appropriate:** Consulting party entitled to be provided with adequate info and time to meaningfully participate.
- **Agency has independent duty to gather adequate historical/cultural site information:** Can't simply lay off burden on consulting party.



Archaeological Resources Protection Act (ARPA)

- **Trigger**
 - Excavation of any “*archeological resource*”
 - Material remains of human life at least 100 years old
 - On public or Indian lands
- **Obligations**
 - *Notify* tribes on permit terms
 - *Obtain tribal consent* if on Indian lands
- **Criminal enforcement possible**
 - Trafficking in archeological resources removed without a permit can lead to a felony conviction



National Environmental Policy Act (NEPA)

- **Purpose:** informed, transparent decision-making that considers environmental effects
- **Means:** written, public environmental analyses
- **Trigger:** proposal with biophysical effects not categorically excluded
- **Opportunities for Process Efficiency:** Integration and concurrent compliance w/ other statutes encouraged
- **Key Concept:** NEPA document (EIS or EAS) and consultation activities should *inform the decision*; not simply justify a pre-determined CoA



Native American Graves Protection and Repatriation Act (NAGPRA)

- **Trigger:**

- Intentional excavation or inadvertent discovery
- On Federal or Tribal lands
- Of Native American cultural items: human remains; funerary objects; sacred objects; objects of cultural patrimony

- **Obligations:**

- Stop work; protect site; consult
- Plan of action or comprehensive agreement
- *Yankton Sioux Tribe v. USACE*, 83 F.Supp.2d 1047



American Indian Religious Freedom Act (AIRFA)

- **Protect right to exercise traditional religions**
- **Act creates no veto power, new substantive rights, nor enforceable procedural duties**
- **Duty to:**
 - *Consult* with traditional religious leaders; and
 - “*Consider*” American Indian religious practices
- ***Lyng* case (485 US 455 (1988)) reduced import of the Act**



Religious Freedom Restoration Act (RFRA)

- **Trigger**
 - Substantial burden on the exercise of religion
- **Obligations**
 - Compelling government interest
 - Least restrictive means
- **But see *Navajo Nation* decision (9th Cir. 2008):** burden exists only if:
 - Religious activity penalized; *OR*
 - Coerced to act contrary to religious beliefs
- **Compare to *Comanche Nation v. U.S. Army* (W.D. Ok. 2008)**



E.O. 13007 – Indian Sacred Sites

(24 May 1996)

- **Obligations:**

- ***Provide notice of proposed actions*** that may limit access to or adversely affect sites
- ***Accommodate access*** to and ceremonial use of Indian sacred sites by Indian religious practitioners
- ***Avoid adversely affecting*** physical integrity of sacred sites



E.O. 13175 – Consultation and Coordination With Indian Tribal Govts.

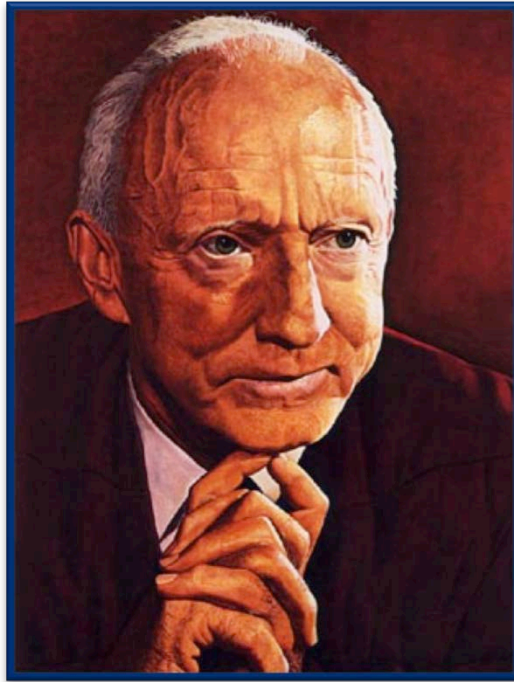
- **Obligations:**

- **Consult** regarding regulations, proposed legislation, or other policy statements that may have substantial effects on tribes
- **Use consensual mechanisms** to develop regulations and policies affecting:
 - Treaty rights
 - Tribal self-government
 - Tribal trust resources



Other Executive Orders

- **Preserve America – E.O. 13287**
 - Partner with Indian tribes to promote economic development through use of historic properties
- **Cooperative Conservation (E.O. 13352)**
 - Take account of tribal interests in land and other natural resources
 - Promote tribal participation in federal decision-making



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

--Justice Hugo Black

BACKUP SLIDES



Major Themes of Indian Law & Policy

- **Federal Power *over* Tribes:** Fed. Preemption
- **Federal Obligation *to* Tribes:** Fed. Trust Resp.
- **Tribal Sovereignty:** Control over Tribal lands, resources, affairs, and members
- **Tribal Reserved/Retained Rights:** Rights the Tribe retains that were not bargained or forcibly stripped away)



Meeting the Federal Trust Responsibility

- **Trust responsibility extends to *all federal agencies* and actions**
- **But *absent a specific obligation, duty is discharged by compliance with general laws* and regulations (i.e., those not aimed at Indians)**
- **Courts have, however, consistently upheld the trust responsibility as an *independent basis for federal action***



Federal Fiduciary Duty to Tribes

- **Fiduciary duty arises where federal officials have a *pervasive role in management of Indian resources***
- **Federal officials must:**
 - *Consult* with tribes to determine best use of resources
 - *Analyze* all relevant information
 - Make decisions based on *tribe's best interests*
 - Maintain and provide to the tribe an *accurate accounting* of all transactions



Treaty Rights

- **Treaties are the *supreme law of the land***
- **Treaty rights are *not diminished* by the passage of time or non-use**
- **Two basic categories of reserved TRs:**
 - **Express rights:** TRs *specifically articulated*
 - E.g., land reservation; hunting, fishing, gathering, and grazing rights
 - **Implied rights:** TRs not specifically articulated, but *necessary to make express reserved rights meaningful*
 - E.g., right to water.



The Upshot

- **Fiduciary duty of protection *not limited to specific statutory obligations***
- **Agencies have *broad discretion* to take fiduciary duty into consideration**
- **Discretion exercised to protect tribal lands, resources, and cultural properties *generally will be upheld***
- ***Obligation to consult* when tribal lands, resources, or cultural properties at risk**

Air Force Civil Engineer Center



Cultural Resource Management Tools for Range Managers – ICRMPs

Adrienne Velasquez
AFCEC/CZOE
14 Aug 2018



The Integrated Cultural Resources Management Plan



What is in the plan?

- **Inventory of cultural resources**
- **Summary of management activities**
- **List of major planned undertakings**
- **Potential conflicts between mission and resources**
- **Standard operating procedures**
- **Points of contact**



Integrated Cultural Resources Management Plan



How does it help us manage resources?

- **Focus on what's really important**
 - NR listed, eligible, and not-eligible properties
 - Programmatic approaches
- **Establish long-range plans for identification and evaluation of resources**
 - Develop attack plan for 100% survey efforts
 - Split into manageable parcels
- **Identify compliance survey and consultation needs**
 - Establish procedures for compliance
 - Set protocols for consultation with tribes and SHPOs



Identification and Evaluation of Cultural Resource on Ranges



What should be surveyed and when?

- **Planning level surveys**
 - Look in the obvious places
 - Use predictive models
 - Use systematic sampling strategies
- **Compliance survey (aka Section 106)**
 - Know your undertakings
 - Know your resources
 - Consult early and often
- **What are the benefits and risks of 100% survey**
 - Planning prevents mission delays
 - Prepare to communicate with stakeholders



Consultation with Tribes and SHPOs



Required or Recommended?

- **Federal agencies have broad leeway to manage cultural resources programs**
- **SHPOs and tribes vary on involvement in ICRMPs**
- **Concurrence is not required for DoD regulations**
- **Best practices:**
 - **Share relevant sections**
 - **Consult with tribes on tribal resources of concern**
 - **Consult with SHPOs on survey approach**
 - **Programmatic solutions**



Programmatic Solutions



How to get the most out of my ICRMP?

- **Streamline format and content – templates**
- **Include and regularly update inventory tables**
- **Integrate with GIS**
- **Include procedural agreements with tribes and SHPOs**
 - **Agreements on planning survey efforts (pPA or MOU)**
 - **Agreements on inadvertent discoveries (NAGPRA)**
 - **Agreements on consultation protocols (ITRP or PC)**



Key points



- **Focus on the big picture**
- **Plan and consult early in planning stages**
- **Use programmatic approaches**
- **Simplify and streamline ICRMP content**
- **Rely on CR and tribal expertise when needed**





How Range Managers Use Cultural Resource Management Tools – Programmatic Agreements

Presented by:

Katharine R. Kerr, Program Analyst
Advisory Council on Historic Preservation



The Basics of Section 106

- What is Section 106? What is a historic property?
 - Take into account the effects of actions on historic properties
 - Provide the ACHP with a reasonable opportunity to comment
- What is an undertaking?
 - Project, activity, or program
 - Financial assistance
 - Federal permit, license, or approval
- Does Section 106 apply? Every time?
 - Federal involvement
 - Activity may affect historic properties



Programmatic Agreements



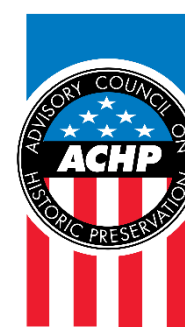
- What can it cover?
 - Programs
 - Complex or multiple undertakings
 - Prototypes
- Who participates in development?
 - Internal
 - External



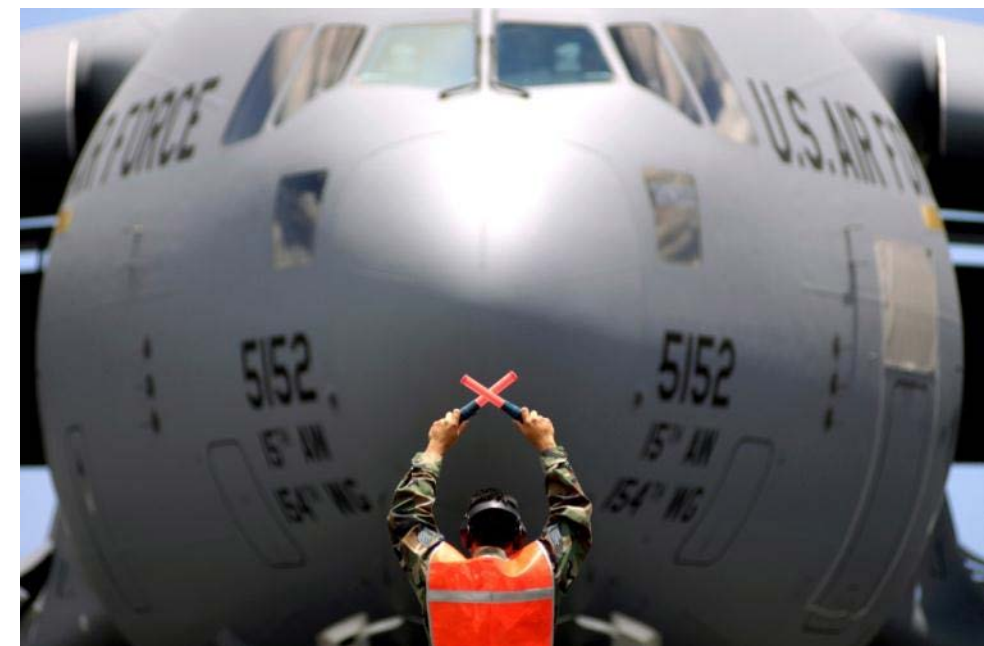
U.S. Army photo



Range Operations and Section 106



- Range type, function, activity
 - Open air
 - Live fire
 - Electronic combat
 - Combined arms
 - Maneuver
 - Airspace
- New range? Existing range?



U.S. Air Force photo/Tech. Sgt. Shane A. Cuomo



How can a PA make management and consultation more efficient?



- Range Control
- Exclusions
 - Activity
 - Location
- Transparency
- Predictability
- OPSEC



U.S. Marine Corps photo by Lance Cpl. Adam Montera/Released)



Tips and Next Steps Regarding PAs



- Internal “bridge” building
- Understand current training
 - Activities
 - Locations
 - Infrastructure
- Understand current inventory
 - Historic properties
 - Properties of traditional religious and cultural significance
- External “bridge” building



U.S. Army photo



How Range Managers Use Cultural Resource Management Tools – Tribal Consultation Protocol

Presented by:

Kathleen McLaughlin

Deputy Federal Preservation Officer, U.S. Army



Tribal Consultation Protocol – Key Features and How To Use It



- Tribal consultation protocols are meant to be general in nature and should focus on the relationship that will be maintained between the tribe and the installation for cultural and natural resources issues.
- A protocol should establish geographic and topical areas of concern (e.g. ground disturbance, discovery of human remains, protection of specific plant/mineral resources, or access to sacred sites).
- Establish protocols and processes for consultation which respect tribal customs as well as a formal mechanism for dispute resolution.
- Identify representatives with contact information and preferred manner of contact.
- Establish the duration, review, and renewal processes.



Tips and Next Steps Regarding Tribal Consultation Protocols



- Discussion of military impacts on sites
- Characterization of site types
- Incorporate sites into training scenarios to increase realism
- Train for cultural awareness to reduce cultural property infringement during engagement
- Staff rides to include tribal members
- Promote fencing, signage, and site hardening as appropriate
- Document opportunities for tribal members to interpret significant sites



Tribal Consultation Tools and Best Practices



TOOLS

- Consultation Protocol
- Programmatic Agreement for Routine Training Activities
- NAGPRA Comprehensive Agreement
- Access Agreements

BENEFITS

- Streamlines Compliance on Future Undertakings
- Strong Administrative Record
- Facilitates Training While Protecting Resources
- Strengthens Cross-cultural Communication Skills
- Good Public Relations and Improves Relationships With 'Neighbors'



Q & A with the Session Panelists



Sustaining Military Readiness Conference

Restoring Readiness Through Planning and Partnerships