

How Tribal Consultation Training Supports the Mission of My Range

Sustaining Military Readiness Conference
Thursday, August 16, 2018, 1:00 – 5:00 pm
Workshop Summary

Facilitator

Alicia Sylvester, OASD(EI&E), Incoming Senior Advisor and Liaison for Native American Affairs

Panelists

Alicia Sylvester, OASD(EI&E), Incoming Senior Advisor and Liaison for Native American Affairs

John McDonagh, Associate General Counsel, EE&I, Department of Defense

Justin Buller, Associate General Counsel, Department of the Army

Workshop Summary

Alicia Sylvester: Workshop goals and Speaker Introduction

Alicia Sylvester, OASD(EI&E): Government-to-Government Consultation With Federally Recognized Tribes

- Definition of consultation – a process of seeking, discussing, and considering the views of tribes (Secretary of the Interior quote). From the DoD American Indian and Alaska Native Policy – “...single most important element of consultation is to initiate the dialogue with potentially affected Tribes before decisions affecting Tribal interests are made...”
- Not just an event or a meeting, it’s a government-to-government *process* that may or may not involve agreement
- Standards are defined in federal law, DoD and Component policy, executive pronouncements, and court decisions
- Origins in tribal sovereignty are outlined in the U.S. Constitution
- May involve a high level of formality, at least initially
 - Leaders of the two governments or their designees meet to review a proposed action or proposed or issue related to ongoing operations
 - Conducted at the installation level and should be part of an overall effort to build and sustain effective working relationships with affiliated tribes
- Needs to be initiated as early as possible in the planning stages for a MILCON project or other major proposed action
 - Plan to give the affiliated tribe(s) a minimum of 30 days to respond to an invitation to consult or to provide comment on a proposed project
- Must be initiated with each affiliated tribe individually; tribal consortia can be involved only when tribes authorize their participation
- Informal consultation – ongoing dialogue between staff level contacts in the two governments that may involve meetings, emails, or calls to establish ground rules and processes for future and ongoing discussions
- How federal agencies view consultation – be thorough, provide details, be friendly, demonstrate concern, and focus on outcomes from the meeting
- How tribes view consultation – listening is important, exchange views and ideas, ensure an opportunity to provide meaningful input on decisions and plans, mutual understanding between consulting parties is an important outcome
- Location – select multiple venues for consultation meetings, including tribal or neutral sites
- Tribal participation – all affiliated tribes that have an interest should participate; no tribe can represent the interests of another unless they have expressly requested the tribe speak on their behalf; assume that any consultation with state recognized tribes will be separate from consultation with federally recognized tribes
- Planning a consultation – ask questions and research the tribe(s) to learn about their cultural practices and traditions and take them into consideration when planning the agenda; provide tribes

How Tribal Consultation Training Supports the Mission of My Range

with full information before the meeting and give them time to review it; alternate facilitators between military and tribal leaders

- DoD has tools and tips regarding consultation on www.denix.osd.mil/na -- send Alicia Sylvester your feedback on content recommendations for the site

John McDonagh, DoD Office of General Counsel: Origins of Federal Trust Responsibility to American Indian and Alaska Native Tribes

- The history of tribes in what is now the U.S. dates back many, many centuries
- To begin to understand how tribes view interactions with the Federal Government and the Military requires awareness of what they have experienced and lost
 - “Where you stand depends on where you sit...”
- Major themes of Indian Law and Policy
 - Federal power over tribes – federal preemption
 - Federal obligation to tribes – Federal Trust Responsibility
 - Tribal Sovereignty – control over tribal lands and resources, members; implies control of a land base
 - Tribal reserved/retained rights – rights that were not bargained for or forcibly taken from the tribes
- These themes represent a series of pendulum swings between periods of tribal sovereignty and assimilation of Indian tribes
 - First contact in the 1400s; Treaty making era in the 18th and 19th centuries; the Allotment Act of 1887 and era up until the 1930s when the land base of tribes essentially vanished; Indian Reorganization Era of the 1930s and 1940s; the Termination Era of the 1950s and 1960s when recognition of many tribes was taken away; and the Self-Determination Era from the 1970s to the present day.
- The “Doctrine of Discovery” set out in decrees from the Pope in the late 1400s established the position that those attempting to settle on the continent could take what they wanted as they pleased and whatever bad result befell the indigenous people from resisting the arrival of the Europeans was their own fault.
 - Manifest Destiny – the predominant idea of “progress” that would come with Westward expansion and absorption of Indian lands
- The Marshall Trilogy of three cases under Chief Justice Marshall
 - Established the premise in U.S. law that tribes were “domestic dependent nations” and stand “as a ward to his guardian.”
 - Paternalism evolved as the underlying premise of federal doctrine governing relationships with Indian tribes – the duty of protection
 - Initially, tribes were displaced by waves of immigrants and pushed onto smaller and increasingly fractured land bases
 - Currently, government efforts related to tribes are intended to be focused on protecting tribal lands, resources, graves, and cultural properties
 - What are tribal resources? – tribal lands in trust (46+m acres on reservations; nearly 9m acres of allotted lands); off-reservation reserved rights to hunt, fish, gather; other legal obligations involve protecting tribal religious interests, ceremonial activities, and supporting repatriation of remains as required under the Native American Graves Protection and Repatriation Act
 - Fiduciary Duty – where federal officials have a “pervasive role in management of Indian resources” they must consult with tribes about the best use of resources, analyze all relevant information, make decisions based on the *tribe’s* best interests, and maintain and provide the tribe an accounting of all financial transactions

How Tribal Consultation Training Supports the Mission of My Range

- Treaty Rights – treaties are the supreme law of the land; tribes' rights are NOT diminished by time OR by non-use; express rights are specifically articulated in a treaty; implied rights are necessary to make express reserved rights meaningful (e.g., the right to water make the right to fish meaningful).

Alicia Sylvester, OASD(EI&E): Overview of Federal Indian Law and Policy – The Changing Role of the Military

- The history of laws and policy in summary form to help highlight the impacts of the laws and policies on contemporary American Indian people with whom your installation may interact
- Treaties – 1776 to 1887 – the Federal Government signed over 400 treaties with Indian tribes as sovereign entities, then they violated the terms and promises in every one of them over time.
- Trade and Intercourse Acts from 1790 to 1834 – prohibited non-Indians from owning Indian lands; made trade with Indians subject to federal regulation and licenses; authorized the appointment of Indian agents.
- Indian Removal Act of 1830 – authorized the forcible removal of tribal members from lands in the Southeast. Army personnel acting as Indian agents led the “relocation” along multiple “Trails of Tears” westward to modern day Oklahoma. Thousands of men, women, and children died along these forced march routes.
- End of Treaty Making – 1871 – the Federal Government ended treaty making because tribes had been forced to cede lands and move to reservations. The vast majority of formerly Indian lands were now controlled by settlers or the Federal Government.
- Movement to Reservations – 1830 – 1887 – forced removal in the Plains and Midwest led to violent confrontations, massacres of peaceful encampments, and the significant loss of life on all sides (tribal, military, state militia)
- Force Assimilation and Erosion of Indigenous Rights – 1871 to 1928 – the focus of the era was on “killing the Indian, saving the man” or removing all evidence of tribal culture within the lives of tribal people. A prime expression of this effort was Indian boarding schools; tribal children were taken from their families at a very early elementary school age and forced to attend schools across the country, wear uniforms, and not allowed to speak their native languages or engage in traditional religious or cultural practices.
- General Allotment Act of 1887 – the division of Indian lands into individual holdings, the Act gave the Federal Government the authority to allot reservation land to Indians located on the land in varying amounts for heads of families and their children. Allotted lands were frequently the poorest and least productive lands in the tribe’s holdings. The most productive lands had been declared “surplus” by the Federal Government and opened to homesteading by or sale to non-Indians. Tribal members expected to farm the allotted lands were not educated in farming techniques nor were they given agricultural equipment. Requirements that allotted lands would be taxed after 25 years were not well understood by tribal members, leaving many vulnerable to losing the land through delinquent taxes or by foreclosure. The resulting mix of landowners over time evolved into a patchwork of Indian and non-Indian owners of lands on reservations, with Indian landholdings reduced from an estimated 150 million acres in 1887 to 50 million acres in 1937. Today, half of the population living on reservations is non-Indian.
- Indian Reorganization Act of 1934 – Prior to 1924, Indians became citizens by accepting allotments; this Act extended citizenship to all Native people, including Alaska Natives.
- Terminations and Restrictions Era from 1953-1968 – approximately 100 tribes terminated; Indians left reservations in large numbers, many moving to urban areas; government-to-government relationships did not exist; and DoD expanded its reach across the country and in/near tribal lands in many parts of the country

How Tribal Consultation Training Supports the Mission of My Range

- Self-Determination Era – 1968-1982 – President Nixon advocated for Indian rights and supported autonomy for tribes in managing their own affairs
- **Native Americans in the Military** – Native people have served in every war since the American Revolution. Currently, they volunteer to serve at a rate nearly three times that of any other ethnic group. Their service honors the country.

Alicia Sylvester, OASD(EI&E): Overview of American Indian Cultures and Concepts

- Culture – integrated patterns of human behavior that include thought, language, and action. Unique way a group experiences and expresses how they fit in the world; helps members set priorities; continuous expressions that have a remembered past
- Encompasses gender, religion, age, physical ability, military service, ethnicity, shared language, shared values, social structures, and more
- Key elements of American Indian cultures – consensus; influence of the past on the present; humility in how to relate to natural surroundings; reverence for ancestors; importance of children and ancestors; link between individual health and well-being and the environment that may affect how tribal members view DoD's actions and plans. Storytelling is a primary means of instructing younger generations and sharing history.
- Subsistence – living off the resources available is not the same as being impoverished. It has physical, spiritual, historic, and cultural dimensions – especially important in the Northwest U.S. and Alaska
- Culturally important sites – can include burial places, historic trails, travel corridors, subsistence gathering areas. Knowledge of these areas generally cannot be shared with outsiders
- Spiritual expressions – prayer is an important part of daily life; a tribal person would not take an important action without first praying; focus is on the future and existing in harmony with the universe
- Communication styles -- honor and respect differences. Oral communication involves speaking from the heart and expressing interest in building relationships in contrast to a government/military approach which is more likely to speak to facts, focus on the present, and be task-oriented.
 - Written communication – tends to be brief in comparison to military tendency to provide volumes of information using specialized language
 - Non-verbal communication – silence is a sign of respect and consideration of your remarks, but not necessarily agreement

John McDonagh, DoD Office of General Counsel: Laws and Regulations Regarding Tribal Consultation

- National Historic Preservation Act
 - Trigger: federal undertaking anywhere in the U.S. that may affect a Register-eligible property
 - Obligations: consult with any tribe that attaches religious/cultural significance to the property, taking into account the effect of the undertaking
- Archeological Resources Protection Act
 - Trigger: Excavation of “archeological resources” – material remains of human life at least 100 years old
 - Obligations: notify tribes; consult on permit terms; obtain tribal consent if removal is on Indian lands
 - Criminal enforcement is possible if resources are removed without a permit
- Native American Graves Protection and Repatriation Act
 - Trigger: intentional excavation or inadvertent discovery on federal or tribal lands of Native American cultural items (human remains, funerary objects, sacred objects)
 - Obligations: stop work, protect site, consult with tribe; develop a plan of action

How Tribal Consultation Training Supports the Mission of My Range

- American Indian Religious Freedom Act
 - Protects the right to exercise traditional religions; creates no veto power or new substantive rights, nor is it enforceable. The duty is to consult with traditional religious leaders and consider their practices
- National Environmental Policy Act
 - Purpose: informed, transparent decision-making that considers environmental effects through publicly available, written environmental analyses
 - Trigger: proposal with biophysical effects not categorically excluded
 - Responsibilities to tribes: invite tribes to participate in scoping, discuss conflicts with tribal land use plans and potential effects on tribal lands, provide notice of hearings and meetings
- Religious Freedom Restoration Act
 - Trigger: substantial burden on the exercise of religion
 - Obligations: compelling government interest must be articulated and least restrictive means to accomplish project must be used
 - Court decisions make clear that the burden exists only if the religious activity has been penalized or if the tribal people were coerced to act contrary to their religious beliefs. Difficult to demonstrate this definition of burden under the law
- Executive Order 13175 – Consultation and Coordination With Indian Tribal Governments
 - Signed in November 2000
 - Requires federal agencies consult with tribes regarding regulations, proposed legislation, or other policy measures that may affect tribes. Agencies must aim to secure consensus on regulations and policies that affect treaty rights, tribal self-government, and tribal trust resources
- Executive Order 13007 – Indian Sacred Sites
 - Signed in 1996
 - Federal agencies are obligated to provide notice of proposed actions that may limit access to or adversely affect sites; agencies must accommodate access to and ceremonial use of Indian sacred sites by religious practitioners
- United Nations Declaration on the Rights of indigenous Peoples
 - Indigenous peoples petitioned the U.N. for recognition of individual and collective human rights to self-determination, protection of the environment, and sustained relationship to traditionally used lands, waters, seas, and other resources
 - Says that countries must consult in good faith and obtain “free, prior, and informed consent” before taking actions that affect indigenous people
 - U.S. adopted the non-binding declaration in 2010, recognizing its moral and political force. Expect that tribes with which you consult will be aware of it and may invoke it in consultation meetings.

John McDonagh, DoD Office of General Counsel: DoD and Component Tribal Consultation Policies

- DoDI 4710.02 – DoD Interactions With Federally Recognized Tribes (2006)
 - Formalizes DoD’s 1998 American Indian/Alaska Native Policy
 - Establishes principles and practices of “meaningful” consultation
 - Consult on all proposed actions with potential to significantly affect tribes
 - Consult on Installation Cultural Resource Management Plans and Installation Natural Resource Management Plans
 - Develop and memorialize tribe-specific processes for consultation
 - Consult early so that the tribe’s input can be considered when decisions are made about the proposed project

How Tribal Consultation Training Supports the Mission of My Range

- Update to the Instruction is anticipated by the end of 2018 which will provide additional direction regarding: when to consult, whom to consult, how to consult, and how to record information about consultations
- DoDI 4710.03 – Consultation With Native Hawaiian Organizations (2011)
 - Establishes policies/responsibilities for consultation with NHOs
 - Recognizes special status afforded NHOs in federal laws, regulations, and policy
 - DoD is the only federal agency with an NHO consultation policy
- Component policies – echo and align with priorities in DoDI 4710.02
 - Army – AR200-1 and Secretary of the Army Policy Memorandum from 2012
 - Navy – SECNAVINST 11011-14A (2005)
 - Marine Corps – MCO P5090.2A (2009)
 - Air Force – AFI 90-2002 (2014)
- Key elements of DoD guidelines on maintaining the confidentiality of information about Indian Sacred Sites – new DASD(ENV) memo released March 2018
 - Don't request information regarding sacred sites unless absolutely necessary and instruct consultants and contractors to do the same
 - Where the potential for a sacred site exists, collect information in the most general possible terms – plan actions to avoid the area of sensitivity
 - When necessary to collect information about a sacred site, consult orally, document that the consultation took place
 - In response to disclosure requests, NHPA Section 304 and/or ARPA Section 9 may provide legal authority to withhold sensitive information. The duty to withhold information is non-discretionary if statutory prerequisites are met
- Key confidentiality provisions in Section 304 of the National Historic Preservation Act
 - Limited authority for an agency to withhold information – when releasing may cause significant invasion of privacy; cause risk of harm to the historic property; or impede use of a traditional religious site by practitioners
 - If these requirements are met, the agency can withhold information regarding the historic resource's location, character, and ownership
- Key confidentiality provisions in Section 9 of the Archeological Resources Protection Act
 - Section 9 requires that managers responsible for protecting archeological resources hold information about the location and nature of the resources confidential unless providing the information would further the purposes of the statute and not create a risk of harm for the resources

Justin Buller, Office of General Counsel, Department of the Army: Case Study: Carlisle Indian Industrial School on the site of the Carlisle Barracks, PA

- Site of school that housed up to 10,000 American Indian and Alaska Native students from the 1870s to World War I.
 - Students were taken from their families and transported to the school. The students were forced to speak English and abandon all practices of their tribal cultures and were forced to wear school uniforms
 - Out of the 10,000 students who attended, approximately 150 graduated
 - Sadly, the site of the school includes the graves of students who died while attending the school, many from sicknesses for which they had no immunity. The manner and cause of death for many others is not known
- The Army has successfully returned the remains of several of these young people to their families and tribes. The Army continues to consult with some tribes and families listed among the records for the school.

Alicia Sylvester: facilitator wrap up