



## DoD INSTRUCTION 4710.02

### DoD INTERACTIONS WITH FEDERALLY RECOGNIZED TRIBES

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**Originating Component:** Office of the Under Secretary of Defense for Acquisition and Sustainment

**Effective:** September 24, 2018

**Releasability:** Cleared for public release. Available on the Directives Division Website at <http://www.esd.whs.mil/DD/>.

**Reissues and Cancels:** DoD Instruction 4710.02, "DoD Interactions with Federally-Recognized Tribes," September 14, 2006

**Approved by:** Ellen M. Lord, Under Secretary of Defense for Acquisition and Sustainment

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**Purpose:** In accordance with the authority in DoD Directives (DoDDs) 5134.01 and 4715.1E; DoD Instruction (DoDI) 4715.16; Executive Order (E.O.) 13175; and the September 23, 2004 Presidential Memorandum, this issuance establishes policy, assigns responsibilities, and provides procedures for DoD interactions with federally recognized tribes (referred to in this issuance as "tribes").

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## SECTION 1: GENERAL ISSUANCE INFORMATION

### 1.1. APPLICABILITY. This issuance applies to:

a. OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this issuance as the “DoD Components”).

b. All DoD operations, activities, and installations that require interactions with tribes.

### 1.2. POLICY. It is DoD policy that:

a. Any interaction between DoD and tribes, including implementation of DoD responsibilities, must comply with:

(1) Federal trust doctrine, treaties, and agreements between the U.S. Government and tribal governments.

(2) Federal statutes, regulations, Presidential memorandums, and E.O.s governing DoD interactions with tribes.

b. Relations between DoD and federally recognized tribal governments will be maintained in a manner that sustains the DoD mission and minimizes effects on protected tribal resources in accordance with DoDI 4715.16, E.O. 13175, the September 23, 2004 Presidential Memorandum, and other applicable federal laws or policies affecting American Indians and Alaska Natives.

c. Installation commanders fully integrate the principles and practices of meaningful consultation and communication with tribes in accordance with DoDI 4715.16, E.O. 13175, and the September 23, 2004 Presidential Memorandum.

d. Consideration is given to the significance that tribes give to protected tribal resources on protected land in accordance with, but not limited to, DoDI 4715.16; Section 229.7 of Title 32, Code of Federal Regulations (CFR); Part 800 of Title 36, CFR; Part 10 of Title 43, CFR; Sections 300101 et seq. of Title 54, United States Code (U.S.C.), also known and referred to in this issuance as the “National Historic Preservation Act of 1966,” as amended; and E.O. 13007.

**1.3. INFORMATION COLLECTIONS.** The annual collection of environmental management information from installations, referred to in Section 4, has been assigned report control symbol DD-AT&L(A,AR)2577 in accordance with the procedures in Volume 1 of DoD Manual 8910.01.

## SECTION 2: RESPONSIBILITIES

**2.1. UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND SUSTAINMENT (USD(A&S)).** The USD(A&S) establishes DoD policy for, and oversees DoD interactions with, tribes.

**2.2. ASSISTANT SECRETARY OF DEFENSE FOR ENERGY, INSTALLATIONS, AND ENVIRONMENT (ASD(EI&E)).** Under the authority, direction, and control of the USD(A&S), the ASD(EI&E):

- a. Develops additional policy and guidance for interacting with tribes, as needed.
- b. Distributes procedural guidance for DoD interactions with tribes.
- c. Enhances DoD Component understanding of tribal issues and concerns through education and training programs and outreach activities and responds to tribal government requests of OSD.
- d. Helps the DoD Components identify requirements of Presidential memorandums, E.O.s, statutes, and regulations governing DoD interactions with tribes.
- e. Assists the DoD Components with consultations and government-to-government relations with tribes and outreach to inform tribes about:
  - (1) Support and services for eligible organizations and activities outside DoD in accordance with DoDD 1100.20.
  - (2) The DoD Office of Small Business Programs in accordance with DoDI 4205.01.
- f. Oversees DoD Component implementation of this issuance, compliance with the guidance for consulting with tribes in Section 3, and compliance with the measures of merit in Section 4.
- g. Coordinates with other federal agencies and tribal organizations, as appropriate, on tribal issues of regional and national scope.

**2.3. DoD COMPONENT HEADS.** The DoD Component heads:

- a. Integrate the requirements of Presidential memorandums, E.O.s, statutes, and regulations regarding DoD interactions with tribes into their mission requirements.
- b. Plan, program, and budget for statutory and regulatory requirements applicable to interactions with tribes consistent with DoD guidance and fiscal policies and within available resources.

c. Develop and implement programs to monitor, achieve, and maintain compliance with this issuance, including compliance by installations and their tenant activities.

d. Consult with federally recognized tribal governments on a government-to-government basis on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands in accordance with Section 3 and the measures of merit in Section 4.

e. To the extent permitted by legal authority, provide information on opportunities for tribes to compete for requests for:

(1) Proposals or other potential contracting, subcontracting, and grant or cooperative agreement instruments.

(2) Surplus equipment and property.

(3) Education, training, or employment.

f. Promptly notify the DoD Senior Advisor and Liaison for Native American Affairs in the Office of the Assistant Secretary of Defense for Energy, Installations, and Environment (OASD(EI&E)) of tribal issues that have the potential to be elevated to OSD for resolution.

g. Assign tribal liaison responsibilities to staff at the headquarters level to coordinate tribal issues with the OASD(EI&E).

h. Collect annually installation-level data on the compliance measures of merit in Section 4 and report them to OASD(EI&E).

## **SECTION 3: GUIDANCE FOR CONSULTATION WITH FEDERALLY RECOGNIZED TRIBES**

### **3.1. WHEN TO CONSULT.** The DoD Components must consult with tribes:

a. Whenever proposing an action that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands. Installations should meet with tribes in their area, including tribes historically or culturally affiliated with the lands managed by the installation.

b. In accordance with the requirements in DoDI 4715.16; the September 23, 2004 Presidential Memorandum; Part 229 of Title 32, CFR; Section 306108 of Title 54, U.S.C.; Part 800 of Title 36, CFR; Chapter 32 of Title 25, U.S.C., also known and referred to in this issuance as the “Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)”; and Part 10 of Title 43, CFR.

c. In accordance with Section 161 of Public Law 108-199, Section 518 of Public Law 108-447, and E.O. 13175, the DoD Components must consult in a timely and good faith manner with Alaska Native corporations on any proposed action or policy that may have a substantial direct effect on corporate lands, waters, or other natural resources, or on the ability of an Alaska Native corporation to participate in a DoD or DoD Component program for which it may otherwise be eligible.

### **3.2. WHAT TO CONSULT ABOUT.**

a. Consultation pursuant to Paragraph 3.1. will be conducted for proposed actions, plans, or ongoing activities that may have the potential to significantly affect:

- (1) Land-disturbing activities.
- (2) Construction.
- (3) Training.
- (4) Over-flights.
- (5) Management of properties of traditional religious and cultural importance.
- (6) Protection of sacred sites from vandalism and other damage.
- (7) Access to sacred sites and treaty-reserved resources.
- (8) Disposition of cultural items in accordance with Part 10 of Title 43, CFR.
- (9) Land use decisions.
- (10) Business contracting matters.

(11) Tribal reserved treaty rights.

(12) Access to subsistence resources.

b. In consultation with tribes identified in Paragraph 3.2.a., the DoD Components must give tribes that have a cultural or historical affiliation with the lands encompassed by the installation an opportunity to consult on the development of a consultation protocol or standard process for consultation whenever issues arise between the tribe and the DoD Components.

c. If an agreement about the format of the consultation protocol cannot be reached, the protocol may be incorporated as a standard operating procedure within applicable documentation such as the installation Integrated Natural Resources Management Plan (INRMP) and/or the Integrated Cultural Resources Management Plan (ICRMP).

### **3.3. PLANNING THE TIMING OF CONSULTATION.**

a. The DoD Components must involve tribal governments early in the planning process for proposed actions that may have the potential to affect protected tribal rights, land, or resources.

(1) Early involvement means that a tribal government must have an opportunity to comment on a proposed action, criteria of adverse effects, and the area of potential effect in time for the tribal government to provide meaningful comments that may affect the decision.

(2) Installations should take advantage of the processes in Parts 1500 through 1508 of Title 40, CFR and E.O. 12898 to involve tribes in early planning.

b. The DoD Components must complete consultations before implementation of the proposed action. Consultation is considered complete when questions or concerns from the tribe(s) have been addressed; tribe(s) have indicated no concerns; tribe(s) have not responded to multiple invitations to consult conveyed via phone, e-mail, or certified mail; the DoD Component and the tribe(s) have not reached consensus on resolution of the tribe(s) concerns; or the DoD Component has given careful consideration to all available evidence and points of view, determined a final course of action, and notified the tribe(s).

c. The DoD Components should identify official points of contact before initiating consultation with tribes (or lineal descendants in the case of Part 10 of Title 43, CFR actions) that may have an interest in the matter under consultation. As tribal boundaries have shifted and tribes have migrated, tribes that seem far removed geographically may have interests in assets and actions at specific, present-day installations.

d. Consultation should take place at a time and location convenient for tribal representatives. DoD staff may find it necessary to negotiate the time and place for consultation, recognizing that many tribes do not have an operating budget that will pay for tribal representatives transportation and per diem, and that tribal representatives may have existing work, community, and family commitments.

e. DoD staff should consider several factors when scheduling the consultation.

(1) Consultation may require multiple meetings over a period of months, or may be dependent on culturally specific circumstances such as religious ceremonies conducted only at certain times of the year, availability of information sources, or certain natural resources cycles. The schedule of tribal government meetings must be considered in planning consultation meetings. Tribal representatives in consultation may need to go before a governing body that meets periodically to submit comments, request a particular course of action, or seek approval for a course of action.

(2) The DoD Components should initiate consultation early and allow time for follow-up discussions.

(3) If there is an urgent need for expeditious consultation, the DoD Component must make this known to tribal contacts and negotiate an expedited timetable.

### **3.4. WHO SHOULD BE INVOLVED IN CONSULTATION.**

a. Installation commanders must establish the initial consultation relationship with the tribe(s) that have a cultural or historic affiliation with installation lands.

(1) Follow-on consultation is at a level agreed to by the installation commander and tribal government leadership, and may be elevated to installation command by tribal governments if they deem it crucial.

(2) Each new installation commander must engage in this initial contact with tribe(s) culturally or historically affiliated with installation lands and which are involved in ongoing consultation with the installation or have regular and frequent interactions with the installation.

b. Installation commanders at installations that have ongoing consultation and coordination with tribes should assign a staff member of appropriate rank, with training in cultural communication and consultation, to serve as a tribal liaison. The installation tribal liaison should monitor turnover in tribal government and conduct outreach if there is new leadership for a tribe(s) engaged in ongoing consultation with the installation.

c. Installation personnel who conduct activities that may have the potential to affect protected tribal rights, land, or resources (e.g., U.S. Army Corps of Engineers, small business contracting, procurement, pest management, training range operations, natural resource management) may participate in training courses and workshops that:

(1) Are offered free to DoD Components, on request, at least once annually by OSD. Training information is available at [www.denix.osd.mil/na](http://www.denix.osd.mil/na).

(2) Raise their awareness of tribal culture and learn about local tribal issues—especially access, use, and privacy issues—that may be affected by military operations such as low-level flights and access to sacred sites.

d. Commanders and commanding officers play a prominent role in initiating government-to-government consultation between the installation and a tribal government. The presence and



signature of the installation commander and senior officer is appropriate at significant milestones such as:

- (1) Formal initiation of consultation.
- (2) Notification of final DoD decisions about proposed actions under consultation.
- (3) Completion of any agreement document that may result from consultation.
- (4) Tribal leadership presence at a consultation session.

e. Commanders and commanding officers may delegate follow-up consultation functions. Designated DoD staff at the local or regional level may negotiate details and engage in routine consultation with tribal government staff or other tribal representatives delegated by tribal authorities. Such follow-up consultation functions should be outlined within a consultation protocol or standard operating procedure regarding the working relationship between the installation and the tribe. Government-to-government consultation may not be delegated to consultants and contractors.

### **3.5. CONSIDERATIONS REGARDING TRIBAL PROTOCOLS.**

a. Culturally specific information obtained from a recognized leader or the designated representative of a tribe should be respected and considered as expert evidence or opinion.

b. When participating in a consultation, DoD staff should take into consideration and respect tribal protocols. In doing so, keep in mind that:

- (1) Tribal representatives may want to open a meeting with a traditional ceremony, although DoD representatives are not obligated to participate.
- (2) The installation may need to schedule meetings well in advance to enable the tribe to decide on appropriate attendees such as tribal elders, traditional religious leaders, and translators.
- (3) Tribal representatives may be reluctant to discuss culturally sensitive information outside of the tribe or at certain times of the year. They may need to clear information with traditional religious leaders or tribal council members before making commitments.
- (4) Tribal governments differ from each other in their organizational structures and corporate cultures. DoD representatives should be mindful that these differences may affect formal titles and forms of address (such as chief, governor, and chair) and other forms of protocol. Tribal representatives may be female or male, elected or not elected, and political or spiritual, and exhibit other variations from tribe to tribe.

c. Each tribe should be consulted with separately, unless affected tribes choose to act collectively. Tribes may act collectively or on their own initiative; however, coercing tribes to meet collectively does not constitute government-to-government consultation with those tribes.

**3.6. HOW TO ADDRESS CULTURALLY SENSITIVE INFORMATION.** During the consultation process, DoD representatives have an obligation to take into account confidentiality concerns raised by tribes. DoD recognizes that a tribe may wish to keep confidential some of the culturally sensitive information it provides during consultation. DoD representatives should:

- a. Assure tribes that DoD will make every reasonable effort, consistent with the law, to withhold from public disclosure any specific information that a tribe identifies as confidential, especially information related to sacred sites and other traditional cultural properties.
- b. Inform tribes that the DoD is required to provide public access to its records in accordance with Section 552 of Title 5, U.S.C. (also known as the “Freedom of Information Act”), except those records protected from disclosure by a statutory exemption.
- c. Encourage tribes to seek the advice of their own legal counsel before providing sensitive information to DoD.
- d. Make an effort to identify confidentiality concerns and agree on a process for dealing with culturally sensitive information as early as possible in the consultation process. In appropriate circumstances, consider the use of Consultation Protocol agreements, as authorized in accordance with Section 106 of the National Historic Preservation Act of 1966, and Part 800.2(c)(ii)(E) of Title 36, CFR to memorialize the agreed on process for handling culturally sensitive information.

**3.7. HOW TO RECORD THE RESULTS OF A CONSULTATION.**

- a. The DoD Components are encouraged to use agreements such as Consultation Protocol agreements, comprehensive agreements, memorandums of agreement, or memorandums of understanding between DoD and tribal governments, as appropriate, on issues of common interest to each party. The primary goal of formalized agreements with tribal governments is to foster relationships that facilitate military training and readiness while addressing issues of importance to tribes.
- b. Without including culturally sensitive information, the installation must document the consultation in writing and place it in the administrative record. In documenting the consultation, the installation should, to the extent legally permissible, avoid including culturally sensitive information in the administrative record. Although consent, approval, or formal agreement from tribal governments is not required to conclude the consultation process and proceed with a project on federal land, the record must show that DoD has given careful consideration to all the available evidence and points of view before determining a final course of action.
- c. The final decision should be placed in the administrative record of the consulting installation and circulated to all consulting parties. The decision should explain the reasoning as well as the data compiled, but exclude any direct reference to culturally sensitive information provided by tribes and information sensitive to the DoD mission.

## SECTION 4: COMPLIANCE MEASURES OF MERIT

**4.1. GENERAL.** The DoD Component heads must provide data regarding policy implementation and compliance with the NAGPRA to the OASD(EI&E) annually as part of the OASD(EI&E)'s environmental management review process. The OASD(EI&E) staff assesses the data and advises the DoD Components on how to enhance compliance.

**4.2. POLICY IMPLEMENTATION.** Data will be collected by the OASD(EI&E) annually on the number of installations that have incorporated a process for consultation with tribes either as part of an ICRMP or an INRMP, or as an independent process in which tribal interests have been identified. A process for consultation is required for an:

- a. ICRMP when tribes have a cultural or historical affiliation with the lands encompassed by the installation.
- b. INRMP where tribal treaty rights or other rights to natural resources may potentially be affected.

**4.3. NAGPRA DATA COLLECTION AND REPORTING.** The DoD Components will collect and report data to the OASD(EI&E) annually regarding the number of installations:

- a. That own or control any archaeological, historic, or ethnographic collections, including items held by a DoD contractor for the installation.
- b. That own or control any of the collections in Paragraph 4.3.a., where these items have been professionally evaluated for the presence of cultural items as defined in the NAGPRA. At a minimum, the person making the determination should meet the requirements of Appendix A of Part 61 of Title 36, CFR.
- c. With professionally evaluated cultural items.
- d. Retaining possession or control of the NAGPRA cultural items that do not fall within these categories:
  - (1) The cultural affiliation cannot be determined.
  - (2) Consultation is ongoing.
  - (3) No tribes have expressed an interest in the items for repatriation purposes. Pursuant to Section 10.7 of Title 43, CFR, this metric remains applicable to culturally affiliated items for which no written viable claim has been received.
  - (4) Repatriation is pending Federal Register Notice.

## GLOSSARY

### G.1. ACRONYMS.

ASD(EI&E)	Assistant Secretary of Defense for Energy, Installations, and Environment
CFR	Code of Federal Regulations
DoDD	DoD directive
DoDI	DoD instruction
E.O.	Executive order
ICRMP	Integrated Cultural Resources Management Plan
INRMP	Integrated Natural Resources Management Plan
NAGPRA	Native American Graves Protection and Repatriation Act of 1990
OASD(EI&E)	Office of the Assistant Secretary of Defense for Energy, Installations, and Environment
U.S.C.	United States Code
USD(A&S)	Under Secretary of Defense for Acquisition and Sustainment

**G.2. DEFINITIONS.** Unless otherwise noted, these terms and their definitions are for the purposes of this issuance.

**Alaska Native corporation.** Any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with Section 1601, *et seq.* of Chapter 33 of Title 43, U.S.C., also known and referred to in this issuance as the “Alaska Native Claims Settlement Act of 1971,” as amended.

**consultation.** Rarely a singular event but part of a process to inform a pending decision or course of action, it is information and opinion respectfully exchanged in both directions and likely involves different forms of communication, and must begin with a face-to-face dialogue. If agreed to by the tribe, ongoing daily business communications may be considered part of the consultation process and may include written, telephonic, and electronic communication.

**cultural items.** Defined in Section 3001(3) of the NAGPRA.

**Indian.** A member of a federally recognized tribe.

**Indian lands.** Any lands to which the title 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 in accordance with Part 229 of Title 32, CFR. Also applies to any lands conveyed in accordance with the “Alaska Native Claims Settlement Act of 1971,” as amended.

**meaningful consultation.** The DoD Component makes a good faith effort to engage the tribe(s) early enough in the planning process to consider potential effects of the proposed action or project on the tribe(s) and consider tribal input in the decision making process.

**professionally evaluated.** Items that have been examined and a finding made by a person who has professional training to make an authoritative determination. At a minimum, the person making the determination should meet the requirements of Appendix A of Part 61 of Title 36, CFR.

**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 E.O.s, including tribal trust resources.

**sacred sites.** Defined in E.O. 13007.

**tribal rights.** Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decision, E.O., or agreement, and that give rise to legally enforceable remedies.

**tribe.** A federally recognized Indian or Alaska Native tribe, band, pueblo, village, community or other tribal entity that the Secretary of Interior acknowledges to exist as an Indian tribal entity pursuant to the annual update to the Department of Interior list of Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs published in the Federal Register.

## REFERENCES

- Code of Federal Regulations, Title 32
- Code of Federal Regulations, Title 36
- Code of Federal Regulations, Title 40
- Code of Federal Regulations, Title 43, Part 10
- DoD Directive 1100.20, “Support and Services for Eligible Organizations and Activities Outside the Department of Defense,” April 12, 2004
- DoD Directive 4715.1E, “Environment, Safety, and Occupational Health (ESOH),” March 19, 2005
- DoD Directive 5134.01, “Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)),” December 9, 2005, as amended
- DoD Instruction 4205.01, “DoD Small Business Programs (SBP),” June 8, 2016
- DoD Instruction 4715.16, “Cultural Resources Management,” September 18, 2008
- DoD Manual 8910.01, Volume 1, “DoD Information Collections Manual: Procedures for DoD Internal Information Collections,” April 19, 2017
- Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” February 11, 1994, as amended
- Executive Order 13007, “Indian Sacred Sites,” May 24, 1996
- Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” November 6, 2000
- Presidential Memorandum, “Government-to-Government Relationship with Tribal Governments,” September 23, 2004<sup>1</sup>
- Public Law 108-199, Section 161, “Consolidated Appropriations Act for FY 2004,” January 23, 2004<sup>2</sup>
- Public Law 108-447, Section 518, “Consolidated Appropriations Act for FY 2005,” December 8, 2004<sup>3</sup>
- United States Code, Title 5, Section 552 (also known as the “Freedom of Information Act”)
- United States Code, Title 25, Chapter 32 (also known as the “Native American Graves Protection and Repatriation Act of 1990”)
- United States Code, Title 43, Chapter 33 (also known as the “Alaska Native Claims Settlement Act of 1971,” as amended)
- United States Code, Title 54 (also known as the “National Historic Preservation Act of 1966,” as amended)

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<sup>1</sup> Available at <https://www.gpo.gov/fdsys/pkg/PPP-2004-book2/pdf/PPP-2004-book2-doc-pg2177.pdf>

<sup>2</sup> Available at <https://www.gpo.gov/fdsys/pkg/PLAW-108publ199/html/PLAW-108publ199.htm>

<sup>3</sup> Available at <https://www.gpo.gov/fdsys/pkg/PLAW-108publ447/html/PLAW-108publ447.htm>