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Chapter 1. Introduction

1.1 Purpose

- A. The United States has a unique legal relationship with federally recognized Indian tribes established through and confirmed by the Constitution of the United States, treaties, statutes, Executive orders, and judicial decisions. In accordance with that relationship, the Bureau of Land Management (BLM) is charged with engaging in regular and meaningful consultation and collaboration with federally recognized tribes in the development of Federal policies and decisions that have tribal implications.
- B. This manual defines the policies, roles and responsibilities, and standards for BLM tribal relations and government-to-government tribal consultation within a comprehensive framework of those legal authorities affecting this relationship. This manual provides a reference source within the BLM Manual system that establishes policy governing BLM tribal relationships, including consultation, coordination, and trust responsibilities. Its purpose is to strengthen the BLM's tribal relations policies and procedures, including those related to the agency's trust responsibilities toward tribes. These policies encourage the establishment of ongoing relationships with federally recognized tribes (American Indians and Alaska Natives) through engagement in open, continuous, and meaningful consultation.
- C. This manual provides policy direction on the BLM's tribal consultation responsibilities across all BLM program areas.
- D. This manual and its accompanying handbook, H-1780-1, Improving and Sustaining BLM-Tribal Relations, replace policies previously established in MS-8120, Tribal Consultation Under Cultural Resources (December 2004), and H-8120-1, General Procedural Guidance for Native American Consultation (December 2004). These updated directives reflect key provisions of those authorities listed below which have been issued since the date of that manual and handbook release.
- E. This manual establishes policy direction regarding government-to-government consultation with Indian tribes regarding BLM decisions to ensure that it—
 1. Begins early in the life cycle of a proposed subject action;
 2. Directly involves the agency official who has delegated authority for disposition of the subject action;
 3. Recognizes the transparent and deliberative nature of consultation;
 4. Includes a reasonable and sustained effort to invite tribes to consult, which may include several invitations and/or other methods of offering engagement;

5. Is carried out in the context of an ongoing relationship involving regularly scheduled meetings and other forms of communications;
6. Communicates final decisions with a summary explanation of how tribal concerns were taken into account; and
7. Does not terminate with the decision or authorization itself, but rather continues to engage tribes regarding land and mineral resources, land uses, treatments, all forms of mitigation (including data recovery, interpretation, funding for tribal social/cultural programs, lease stipulations, operating plan conditions-of-approval, etc.), inspections and monitoring, reclamation requirements, disposition of receipts and collections, and dissemination of reports and information for the lands and resources affected.

1.2 Objectives

The objectives of this manual section are—

- A. To develop and maintain productive government-to-government tribal relationships at the field, district, state, and Washington office levels with federally recognized tribes within the framework of the legal authorities listed at section 1.3.
- B. To build long-term partnerships with tribal governments based on common interests in managing and protecting lands and resources important to Indian tribes and the American people.
- C. To encourage the exchange of information regarding tribal issues and resources across all BLM programs.
- D. To establish tribal consultation as a standard and routine BLM practice, rather than a supplemental work requirement.
- E. To ensure that BLM tribal consultation is consistent with departmental and national policy goals to—
 1. Collect, evaluate, apply, and protect sensitive and confidential information relating to tribal concerns in a consistent manner;
 2. Conduct timely, respectful, and meaningful two-way communication and consultation with tribes that—
 - a. Recognizes the ongoing BLM operational and fiduciary responsibility concerning Indian tribal trust minerals and other resource development on Indian trust lands.

- b. Ensures appropriate opportunity for tribal input regarding the management of non-trust assets on public lands managed by the BLM; and
 3. Foster positive relationships and trust between the BLM and tribes through collaborative stewardship in management of tribal and public land resources.
- F. To carry out policies and operational guidance designed to meet these goals based on tribal consultation principles expressed in the Department of the Interior’s Policy on Consultation with Indian Tribes and the Consultation Committee of the Interagency Working Group on Indian Affairs. This manual adopts consultation principles derived from Presidential Memorandum on Tribal Consultation (November 5, 2009) and Executive Order 13175 (November 6, 2000). These principles include—
1. Respect tribal sovereignty;
 2. Honor the government-to-government relationship;
 3. Acknowledge trust responsibility;
 4. Accept tribal self-determination and self-governance; and
 5. Regard consultation as an ongoing process.
- G. To establish a BLM tribal relations policy that recognizes each tribal government is unique in its views, concerns, and capacities. The BLM will endeavor to establish government-to-government relationships with each tribe that are responsive to the unique nature of each tribal government.
- H. To acknowledge that tribes have different interests and capacities and to commit to working collaboratively with tribes to develop consultation procedures that meet the needs and capabilities of both the BLM and tribes.

1.3 Authority

Federal government and Indian tribal relationships reflect the political and historical development of the Nation. The BLM’s legal and political government-to-government consultation process is an expression of such fundamental legal principles as trust relationship, reserved rights, plenary powers, and tribal sovereignty. H-1780-1, *Improving and Sustaining BLM-Tribal Relations*, Chapter II, *Legal Foundations of BLM-Tribal Relations*, explains the key legal concepts underpinning tribal relations that establish the broad parameters supporting tribal interaction. These legal tenets are further delineated in accordance with the following authorities and directives:

- A. *Treaties*. Treaties constitute negotiated settlements between sovereign parties and, as such, hold a unique status in defining Federal obligations toward Indian tribes. The United States entered into 367 treaties with tribes by 1871 that were ratified by the U.S.

Senate into public law. Under the treaties, tribes ceded significant portions of their aboriginal lands to the United States. Generally, in return, tribes reserved separate, isolated reservation lands under the treaties and retained certain rights to hunt, fish, graze animals, and gather resources on unoccupied lands ceded to the United States. These rights are known as “off-reservation treaty rights.”

B. *Laws* that serve as authorities for tribal consultation are—

1. The Act of April 8, 1864, Survey of Reservations (25 U.S.C. 176);
2. The Anti-Deficiency Act of 1870 (Pub. L. 97-258; 96 Stat. 923; 31 U.S.C. 1341);
3. Indian General Allotment Act of 1887 (R.S. Chap. 119; 24 Stat. 389; 25 U.S.C. 334);
4. Leases of Allotted Lands for Mining Purposes of 1909 (25 U.S.C. 396);
5. Mineral Leasing Act of 1920, as amended through Public Law 113-67 (30 U.S.C. 181);
6. Indian Reorganization Act (IRA) of 1934 (Pub. L. 73-383; 48 Stat. 984; 25 U.S.C. 461 et seq.);
7. Leases of Unallotted Lands for Mining Purposes of 1938 (25 U.S.C. 396a);
8. National Historic Preservation Act of 1966 (NHPA; Pub. L. 89-665; 80 Stat. 915; 54 U.S.C. 300101);
9. National Environmental Policy Act of 1969 (NEPA; Pub. L. 91-190; 83 Stat. 852; 42 U.S.C. 4321);
10. Alaska Native Claims Settlement Act of 1971 (Pub. L. 92-203; 85 Stat. 688; 43 U.S.C. 1601 et seq.);
11. Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638; 25 U.S.C. 450);
12. Federal Land Policy and Management Act of 1976 (FLPMA; Pub. L. 94-579; 90 Stat. 2743; 43 U.S.C. 1701);
13. American Indian Religious Freedom Act of 1978 (AIRFA; Pub. L. 95-341; 92 Stat. 469; 42 U.S.C. 1996);
14. Archaeological Resources Protection Act of 1979 (ARPA; Pub. L. 96-95; 93 Stat. 721; 16 U.S.C. 470aa);

15. Alaska National Interest Lands Conservation Act of 1980 (ANILCA; Pub. L. 96-487; 94 Stat. 2371; 16 U.S.C. 1602–1784);
16. Indian Mineral Development Act of 1982 (Pub. L. 97-384; 96 Stat. 1938; 25 U.S.C. 1601);
17. Native American Graves Protection and Repatriation Act of 1990 (NAGPRA; Pub. L. 101-601; 104 Stat. 3048; 25 U.S.C. 3001);
18. Religious Freedom Restoration Act of 1993 (Pub. L. 103-141; 107 Stat. 1488; 42 U.S.C. 2000bb); and
19. Tribal Forest Protection Act of 2004 (Pub. L. 108-278; 118 Stat. 868; 25 U.S.C. 3101 et seq.).

C. *Regulations* governing tribal consultation include—

1. 25 CFR 211, Leasing of Tribal Lands for Mineral Development;
2. 25 CFR 216, Surface Exploration, Mining, and Reclamation;
3. 25 CFR 224, Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self Determination Act;
4. 25 CFR 225, Oil and Gas, Geothermal, and Solid Mineral Agreements;
5. 25 CFR 900, Contracts Under the Indian Self-Determination and Education Assistance Act;
6. 25 CFR 1000, Annual Funding Agreements Under the Tribal Self-Governance Act Amendments to the Indian Self-Determination and Education Act;
7. 36 CFR 60, National Register of Historic Places;
8. 36 CFR 800, Protection of Historic Properties;
9. 40 CFR 1500, Purpose, Policy, and Mandate (of NEPA);
10. 43 CFR 7, Protection of Archaeological Resources;
11. 43 CFR 46, Implementation of the National Environmental Policy Act of 1969;
12. 43 CFR 1500, Council on Environmental Quality;
13. 43 CFR 1600, Planning, Programming, Budgeting;
14. 43 CFR 10, Native American Graves Protection and Repatriation Regulations;

15. 43 CFR 2650, Alaska Native Selections under the Alaska Native Claims Settlement Act;
16. 43 CFR 3000, Minerals Management: General;
17. 43 CFR 3160, Onshore Oil and Gas Operations (i.e., Oil and Gas Order No.1);
18. 43 CFR 3260, Geothermal Resources Operations;
19. 43 CFR 3400, Coal Management: General;
20. 43 CFR 3590, Solid Mineral (Other Than Coal) Exploration and Mining Operations;
21. 43 CFR 8365, Rules of Conduct; and
22. 43 CFR 9180, Cadastral Surveys.

D. *Executive Orders/Presidential Memoranda* addressing tribal relations include—

1. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 CFR 7629; February 16, 1994);
2. Presidential Memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments;
3. Executive Order 13007, Indian Sacred Sites (61 CFR 104; May 24, 1996);
4. Executive Order 13084, Consultation and Coordination with Indian Tribal Governments (63 CFR 96; May 14, 1998);
5. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (65 CFR 67249; November 6, 2000);
6. Presidential Memorandum of September 23, 2004, Memorandum on Government-to-Government Relationship with Tribal Governments;
7. Presidential Memorandum of November 5, 2009, Tribal Consultation;
8. Presidential Memorandum of April 16, 2010, A 21st Century Strategy for America's Great Outdoors; and
9. Executive Order 13592, Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities (3 CFR 13592; December 2, 2011).

E. Orders from the Secretary of the Interior include—

1. Secretarial Order 3087 (as amended), Organizational Restructuring of the Department of the Interior Minerals Management Functions (December 3, 1982);
2. Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997);
3. Secretarial Order 3215, Principles for the Discharge of the Secretary's Trust Responsibility (April 28, 2000);
4. Secretarial Order 3317, Department of the Interior Policy on Consultation with Tribes (December 1, 2011);
5. Secretarial Order 3323, Establishment of the America's Great Outdoors Program (September 12, 2012);
6. Secretarial Order 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries (August 20, 2014);
7. Secretarial Order 3336, Rangeland Fire Prevention, Management and Restoration (January 5, 2015).

1.4 Responsibility

A. *Delegation of Authority.* Part 235 of the Departmental Manual (DM) delegates authorities from the Secretary or Assistant Secretary of Land and Mineral Management to the BLM Director. BLM state directors are authorized to perform in their respective states the functions of the Director. It is the policy of the BLM that authorities for tribal consultation be delegated to the lowest organizational level possible, consistent with efficient program management. Even for large interstate projects, where environmental impact statements (EIS) may be prepared and approved at the Washington Office, state directors remain responsible for tribal consultation within their states. A decision by state directors to re-delegate the responsibility for tribal consultation to line officers (district managers and field managers) must be based on the following considerations:

1. The position to which delegation of decisionmaking authority is being considered has access to, on a regular basis, the knowledge and skills necessary to judiciously exercise the authority.
2. There is, or will be provisions for, adequate staff and funding at the level of re-delegation to carry out responsibilities inherent in the re-delegation.

3. There is, or will be provision for, access to all necessary data/information/records needed to carry out the delegated authorities.

An official who delegates an authority does not divest himself/herself of the power to exercise that authority. Delegation of an authority does not free that individual of the responsibility for actions taken pursuant to the delegation at the organizational level receiving that authority.

- B. *The Director and deputy directors*, through the tribal liaison officer, have responsibility for ensuring that BLM program-specific policies and operations are consistent with the policies and principles on tribal relations as expressed in part by Secretarial Order 3335, including government-to-government consultation, and are followed by state, district, and field office managers. On an annual basis, the Director must report to the Secretary on the results of his/her tribal consultation efforts in accordance with Secretarial Order 3317. Reporting is intended to be comprehensive and may include, but is not limited to, the scope of consultation efforts, the cost of these efforts, and the effectiveness of consultation activities.
- C. *Assistant directors*, acting through their respective divisions and staffs to the resource programs or administrative processes involved, are jointly responsible for developing the specific program- or process-related guidance, procedures, and directives needed to ensure that tribal consultation is carried out consistently in accordance with this manual among the BLM's various programs and offices.
- D. *The tribal liaison officer* is appointed by the Director to carry out the duties prescribed in Secretarial Order 3317. Such responsibilities include but are not limited to: enhancing communications with tribes; promoting cooperation between agencies when a Department of the Interior action with tribal implications arises; coordinating annual reports describing efforts to promote consultation with tribes; supporting/participating in the joint tribal-Federal mission to identify areas for improvements in the Department's consultation practices; and contributing to the development of annual work plans that specify priorities to improve the quality of consultation practices.
- E. *State directors and associate state directors* must develop and maintain a government-to-government relationship with tribes. State directors are charged with—
 1. Ensuring that tribal consultation responsibilities are accomplished;
 2. Developing agreements for communication within the framework of the Bureau's government-to-government relationship with tribes;
 3. Ensuring the development and use of sound technical information, policy guidance, and procedures as needed;

4. Coordinating tribal consultation with other Federal offices at state and regional levels where appropriate;
 5. Developing procedures to facilitate consultation when BLM-tribal consultation includes more than one field office; and
 6. Coordinating protocols that facilitate tribal consultation and tribal relations generally with other BLM state directors when the tribes involved consult with multiple BLM states.
- F. *District managers and field office managers (line officers)* are expected to establish ongoing government-to-government relationships with elected tribal officials and those members of tribal government authorized by the tribe to engage in government-to-government activities. Line managers must become familiar with any specific off-reservation treaty reserved rights that may affect local tribes' use and access to resources on public lands they manage. Given the complexity of laws, treaties, and other authorities, line managers must seek legal advice from Department of the Interior solicitors if legal questions arise regarding tribal rights affecting public lands or resources. Line officers are directly accountable for carrying out BLM policies and decisions within a geographically designated administrative unit. They are authorized to speak for the BLM and have delegated project-level decisionmaking authority and responsibility, including—
1. Administering lands and cultural, natural, and minerals resources programs in a manner consistent with Indian treaty rights, other applicable legal statutes, and the BLM's responsibility to work in partnership with Indian tribes on a government-to-government basis;
 2. Developing relationships and agreements to facilitate coordination and consultation when BLM-tribal consultation is limited to that particular field office;
 3. Seeking opportunities to develop partnerships with tribes under all appropriate BLM authorities;
 4. Facilitating tribal access to public lands for the purposes of religious use and other traditional uses, such as gathering natural resources, and avoiding unnecessary interference with traditional religious practices;
 5. Ensuring that Indian tribes are consulted to gather information relating to public land resources of interest to tribes (such as firewood collecting, grazing, water use, and plants and animals of traditional importance) and to ensure that land use planning takes such concerns and interests into account;

6. Initiating contact and consulting with tribes pursuant to the requirements of laws, Executive orders, regulations, guidance, and agreements cited in sections 1.3 and 1.5 and personally participating in key milestone meetings;
 7. Ensuring that potentially affected tribes, located inside and outside of field office boundaries, are consulted in order to identify their concerns to allow these concerns to be considered in specific BLM decisions;
 8. Ensuring that information on tribal issues receives good faith consideration during BLM decisionmaking and that information considered sensitive by a tribe is maintained as confidential to the extent legally permissible;
 9. Ensuring that the manner in which tribal concerns are considered and how these concerns are addressed in the decisionmaking process is communicated clearly to the affected tribes;
 10. Maintaining a professional staff capable of working cooperatively and effectively with tribal representatives so that proposed land use actions minimize adverse effects to lands or resources of importance to tribes to the extent permitted by law; and
 11. Ensuring that tribal mineral records, sensitive and confidential information related to sacred sites as defined in Executive Order 13007, and traditional religious or cultural practices on the public lands are protected from public disclosure to the extent permitted by law.
- G. *State, district, and field tribal liaisons* are responsible for providing professionally sound information, recommendations, and advice regarding coordination of all Bureau programs and activities with programs and interests of tribal governments. BLM tribal liaisons are charged with providing managers with timely and appropriate information on how best to engage in effective government-to-government consultation and ongoing relationships with tribes. A model position description for such a position can be found in appendix 3. Tribal liaison duties may include:
1. Advising line management on possible impacts of proposed agency actions and identifying potential preferred courses of action, where appropriate;
 2. Encouraging respectful ongoing communication between the BLM and tribes;
 3. Communicating issues and concerns raised by tribes during consultation to the project manager or other staff specialists;
 4. Assisting BLM specialists and concerned tribal staff to craft solutions to conflicts concerning natural and cultural resources;

5. Advising managers on conflicting or competing interests of various tribes regarding proposed land uses;
 6. Ensuring that tribal issues and concerns are appropriately considered and addressed in the NEPA review process;
 7. Documenting ongoing tribal consultation and providing it to project manager or line officer;
 8. Facilitating and providing staff support to all line officers engaged in government-to-government meetings or joint field trips;
 9. Providing line and project managers with information regarding traditional uses of public lands, tribal practices and beliefs, and locations on public lands that may be associated with such practices and beliefs;
 10. Working with tribes to develop and implement projects and programs of mutual interest that enhance opportunities for the education and training of tribal members; and
 11. Informing tribal youth of temporary seasonal employment opportunities, internships, or the New Pathways Program for careers in the BLM, as directed by human resources staff and field managers.
- H. *Project managers* ensure that affected tribes are invited to be cooperating agencies in preparing resource management plans (RMP) and EISs; as consulting parties under 36 CFR 800; or as interested parties for any project review. Project managers, in coordination with the appropriate line officer(s), facilitate tribal consultation for multi-jurisdiction projects such as interstate rights-of-way which may affect tribal use and access to public lands or resources of concern to tribes. Project managers, in coordination with tribal liaisons, facilitate government-to-government consultation with Indian tribes by promoting open and ongoing dialogue. They ensure that documentation of tribal consultation is maintained and complete in the administrative record. They provide final decision documents, accompanied by an explanation of why the agency did or did not make changes requested by tribes, to all line officers responsible for consulting with tribal partners.
- I. *Applicants* for BLM authorizations (permittees, lessees, licensees, grantees, etc.) may assist the BLM in carrying out its tribal consultation responsibilities. The appropriate use of applicants or their contractors will be determined by the BLM line manager, following BLM-tribal consultation. The BLM remains responsible for the government-to-government consultation outcomes and trust oversight of Indian minerals. Applicants, their employees, and contractors may not become involved in any aspects of tribal consultation in which BLM decisionmaking constitutes an inherently governmental function. However, applicants may assist the BLM in such consultation

support activities as gathering and analyzing data, preparing reports, facilitating field trip logistics, managing compilation of data and records as part of the administrative record, or other approved activities.

1.5 References

A. Existing BLM manual guidance is found in—

1. MS-1203, Delegation of Authority, (including annual updates);
2. MS-1601, Land Use Planning;
3. H-1790-1, National Environmental Policy Act;
4. MS-4100, Grazing Administration—Exclusive of Alaska;
5. MS-6100, National Conservation Lands Management;
6. MS-6220, National Monuments, National Conservation Areas, and Similar Designations;
7. MS-6250, National Scenic and Historic Trail Administration;
8. MS-6330, Management of BLM Wilderness Study Areas;
9. MS-6340, Management of Designated Wilderness Areas;
10. MS-6400, Wild and Scenic Rivers—Policy and Program Direction for Identification, Evaluation, Planning, and Management;
11. MS-8100, The Foundation for Managing Cultural Resources;
12. MS-8110, Identifying and Evaluating Cultural Resources;
13. MS-8130, Planning for Uses of Cultural Resources;
14. MS-8140, Protecting Cultural Resources;
15. MS-8150, Permitting Uses of Cultural Resources; and
16. MS-8170, Interpreting Cultural Resources for the Public.

B. Agreements pertinent to tribal relations include—

1. Memorandum of Understanding among the U.S. Department of Defense, U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Department of Energy, and the Advisory Council on Historic Preservation Regarding

Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (December 4, 2012);

2. Programmatic Agreement Among the Bureau of Land Management, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers regarding the Manner in which the BLM Will Meet its Responsibilities under the National Historic Preservation Act (February 9, 2012); and
3. Onshore Federal and Indian Energy and Mineral Lease Management Standard Operating Procedures (SOP) (signed by the DOI Assistant Secretary, PMB, on September 18, 2013, and amended on September 23, 2013).

C. Plans that address tribal relations include—

1. Department of the Interior, Environmental Justice Strategic Plan, 2012–2017.

1.6 Policy

The BLM's policy for tribal relations is based on the recognition of tribal sovereignty and tribal self-governance as reflected in Principle 1 of Secretarial Order 3335. The BLM recognizes each tribal government is unique and that different tribes have varying levels of staffing, expertise, and interests.

The BLM commits to building and sustaining an ongoing relationship with Indian tribes. Such a relationship is founded upon consultation regarding planning and project-specific issues as well as long-term personal and institutional relationships resulting from collaborative and cooperative programs of mutual interest as reflected in principle 4 of Secretarial Order 3335. Collaborative efforts include BLM education or employment opportunities for tribes and tribal members; joint training courses; management of natural and cultural resources; and exchanges of speakers and programs that increase cultural understanding.

The BLM affirms that government-to-government consultation is the official means for considering and incorporating tribal concerns into the BLM decisionmaking process. The BLM views consultation as a deliberative process that aims to create effective collaboration and informed land use decisions as addressed in principle 6 of Secretarial Order 3335. Those individuals who are knowledgeable about the matters at hand, who are authorized to speak for the agency, and who exercise delegated authority in the disposition and implementation of an agency action will represent the BLM in government-to-government consultation. BLM officials who have been delegated the authority to engage in government-to-government consultation include the Director, state directors, and their line officers.

The BLM engages in government-to-government consultation with elected tribal officials and those tribal members specifically delegated by elected tribal officials to engage in such

consultation and decisionmaking. Such a delegation may extend to such positions as Division Directors for Realty or Natural Resources or Tribal Historic Preservation Officers.

The BLM also acknowledges that ongoing less formal productive interactions may involve Federal and tribal officials, staff, tribal elders, and various specialists, contractors, and applicants. Such information sharing or exchanges may contribute much of the information needed to support plan and project decisionmaking. These interactions are necessary to ensure the free flow of information among all parties and to ensure that both tribal officials and Federal managers are well informed about a common set of facts, perspectives, and issues when they engage in formal government-to-government consultation. Successfully achieving both meaningful consultation and a strong government-to-government relationship often depends upon these informal, staff-to-staff working relationships.

A. *General.* Several general policies are related to all tribal consultation situations:

1. The BLM formally engages federally recognized Indian tribes on a government-to-government basis. These formal interactions are complemented by informal working relationships between BLM managers and tribal officials, and between BLM and tribal staffs.
2. The BLM conducts government-to-government consultation with Indian tribes to improve collaborative and informed Federal decisionmaking. The BLM understands government-to-government consultation to be an ongoing relationship between BLM officials and elected tribal officials that educates both parties and results in the best informed BLM land use decisions.
3. The BLM intends government-to-government consultation to be an open and ongoing dialogue between BLM line officers and elected tribal officials regarding both specific projects and general issues related to policy, planning, and other long-term concerns.
4. Information, opinions, or recommendations may be provided to the BLM from individual tribal members or traditional religious leaders. In cases where such recommendations conflict with positions taken by official tribal representatives, the BLM will defer to the opinions and positions adopted by the tribal governments involved. Comments received from individual tribal members that conflict with official tribal representatives will be treated as comments received from the public and handled accordingly by the BLM. Only where specified in particular statutes (e.g., NAGPRA gives legal precedence to lineal descendants) will the BLM consult with and give precedence to individuals other than tribal government representatives.
5. Only BLM line officers are authorized to speak for the agency and will exercise that delegated authority in the conduct of government-to-government consultation and decision-making.

6. The BLM consults with tribes for all actions where consultation is specifically required by statute, regulation, or policy and for any additional action that will have a substantial direct effect, including regulations, rulemaking, policy, guidance, or operational activities.
 7. The BLM understands that project-specific consultation between the BLM and tribal technical staff should be established early in the planning cycle and continues during project implementation and afterward during long-term monitoring and reclamation.
 8. The BLM shall amend and revise land use plans to be consistent with tribal land use and resource allocation plans (including Alaska Native village or regional corporation plans, as applicable) to the extent the tribal land use plans are not inconsistent with the purposes, policies, and programs of Federal laws and regulations applicable to the public lands per 43 CFR 1610.3-2.
 9. The BLM recognizes that it has a broad trust responsibility that in some cases includes a fiduciary duty related to Indian trust assets and property or interests reserved by or granted to Indian tribes or Indian individuals by treaty, statute, and Executive orders. The BLM also recognizes that Indian tribes may have reserved rights granted by treaties or authorized by specific legislations that apply to water, fish, wildlife, or vegetative resources.
 10. The BLM recognizes that Native Americans are knowledgeable sources and experts concerning their own cultures. They can provide unique insight and explanation of tribal history and land uses. When provided with such information, the BLM will take this into account when making decisions related to the identification, evaluation, treatment, and management of natural and cultural resources.
 11. The BLM recognizes Native American religious and cultural values as an important, living part of our Nation's heritage. The BLM commits to addressing and, where practicable, minimizing potential disruption of the traditional expression or maintenance of these values that might result from BLM land use decisions.
- B. *Compensation to Tribes.* The BLM traditionally contracts for services, including reports or studies, through the BLM acquisition and procurement procedures to obtain data and documentation on resources it manages or that may be affected by its decisions. Such contractual relationships will continue.

All contractual obligations to tribes, labor, and financial outlays spent by the BLM to carry out tribal consultation policies and procedures expressed within this manual and H-1780-1 will be governed by provisions of the Anti-Deficiency Act. This Act

prevents the incurring of obligations or the making of expenditures in excess of amounts available in appropriated funds.

Upon issuance of this manual and H-1780-1, Improving and Sustaining BLM-Tribal Relations, the BLM will allow an expansion of compensation to include Native American contributions of information, comments, or input into the BLM's decision-making processes. When it is in the BLM's best interest to do so and is necessary to obtain information needed for the BLM to make land use decisions, managers may provide, or require that land use applicants provide, financial compensation to Indian tribes to help defray their costs for consulting with the BLM regarding land use planning or authorizations. Such compensation may cover the costs of travel, per diem, time of tribal elders or officials. This comprehensive compensation policy incorporates the following considerations:

1. The BLM acknowledges that tribal information and perspectives may be important for managers to make robust and defensible decisions and that compensation may facilitate the decisionmaking process.
2. The BLM acknowledges that requests to tribes for consultation or information for the large number of land use authorizations processed annually can result in substantial administrative and personnel costs to tribes.
3. The BLM has the authority to implement policies and procedures to pay both for reports or investigations necessary to the decisionmaking process as well as to partially offset financial costs to tribes for government-to-government consultation. Thus, compensation may be provided for both professional products and for tribal participation in BLM decisionmaking processes.
4. Field offices that request products from tribes must do so using standard procurement instruments such as contracts or assistance agreements.
5. Compensation for government-to-government consultation is neither legally prohibited nor required, is at the discretion of the responsible manager, and is subject to the availability of appropriated funds.
6. Costs of providing compensation for consultation shall be charged to the benefitting subactivity.
7. Compensation must be approved by the field office manager in advance.
8. Compensation will only be provided to tribal representatives whose consultation expenses are not otherwise provided by their tribe.
9. When a field office manager decides to provide compensation for consultation, field offices are strongly encouraged to execute agreements with tribe(s) to

specify the level of compensation to be provided, to whom, and for what purpose (see H-1780-1, Improving and Sustaining BLM-Tribal Relations, Appendix 2, Implementation of BLM Policy Regarding Compensation to Native Americans for Products and Their Participation in the BLM's Decision-Making Processes).

10. Tribal compensation policies and procedures will be implemented so as not to unduly burden BLM field offices with administrative details.
 11. As provided for in sections 304(b) and 504(g) of the FLPMA, proponents may be required to provide funding to carry out consultation when it is necessary for the BLM to process the application. This may include (a) cost recovery agreement to reimburse BLM staff for their tribal consultation costs; (b) financial arrangements between the proponent and tribes to cover their costs for consultation; and/or (c) compensation to tribal experts for application review or other services that contribute information necessary for the BLM to make a well-informed decision.
 12. When the BLM requires a proponent to provide funding for tribal consultation or services, the BLM shall be explicit regarding what information it needs and shall specify reasonable limits and restrictions to the expenditures.
 13. If the BLM makes a reasonable and good faith effort to conduct government-to-government consultation with an Indian tribe, but the tribe refuses to respond unless receiving payment, the agency will still have met its obligation to consult and shall document this effort and continue.
- C. *Reburial of Native American Human Remains and Cultural Items on Public Land.* State directors may authorize the reburial of Native American human remains and cultural items, as defined in NAGPRA, on BLM public lands. Reburial may be authorized only after the NAGPRA process has concluded. When considering reburial requests, managers should comply with relevant NEPA and NHPA requirements as applicable and evaluate available legal and physical protections offered at the proposed location, future Bureau responsibilities, and accessibility for tribal members. Indian tribes will have expectations for future site protection against theft, disturbance, and such indirect impacts as erosion. Although reburial sites would not qualify as historic properties under NHPA or constitute archaeological resources under ARPA, they may be considered as sacred sites under Executive Order 13007 and/or “places of special interest” under NEPA. The BLM’s cultural staff will maintain records of such reburials as part of cultural resources site record databases.
- D. *Conclusion of Consultation.* The BLM line manager must determine that sufficient tribal consultation has occurred in accordance with time frames required to make a decision regarding land use planning or proposed actions on the public lands. Tribes that have participated in consultation must be notified of the basis for the BLM decision. The BLM must clearly explain how tribal input affected the final decision. While the BLM prefers that consensus be reached with tribes, this is not always

possible. Where the BLM was not able to accommodate tribal desires, a clear explanation must be provided explaining why this was not possible. Avenues for protest or appeal of the BLM's final decision must be explained. Correspondence shall make clear that, whether the tribe agrees with the BLM decision or not, the agency views tribal consultation as an open-ended relationship. In that spirit, BLM line managers shall ask tribes at the issuance of a decision if they wish to comment on future updating, monitoring, or reclamation tied to the planning or proposed action.

- E. *Performance Measures.* State, district, and field offices will create specific, measurable performance standards to ensure accountability of line officers in carrying out BLM tribal consultation policies. They will be uniform on a district or statewide basis. For all offices managing actions with tribal implications, line officers' annual performance evaluations (i.e., employee performance appraisal plans) must contain at least one critical element, or sub-element, pertaining to BLM-tribal relations.
- F. *Staffing.* State directors must ensure that each state's table of organization includes sufficient staff expertise in tribal relations and other resources to effectively carry out timely and responsive tribal consultation. Staff tribal liaisons must provide input to all agency programs whose actions may affect tribal interests. Simply assigning tribal relations duties to onboard staff specialists, such as cultural resource specialists, will often not allow sufficient time or expertise for the accomplishment of tasks and duties listed in section 1.4.G above in a legally defensible manner. On a statewide basis, at least one full-time equivalent tribal liaison position should be staffed by an individual with knowledge and experience related to local tribes' primary concerns, including socioeconomic concerns, environmental justice issues, cultural or treaty considerations, mineral trust concerns, and tribal customs and traditions. Tribal liaison positions may be located at the state, district, or field office level depending on where the work can be most effectively performed. Tribal liaison positions must be established for administrative units where tribal relations are pronounced and routinely have a bearing on agency decisionmaking processes. As discussed in section 1.6 B.11 above, where justifiable, state directors and field office managers shall utilize cost recovery agreements to the maximum extent possible to defray the costs of tribal liaison activities.
- G. *Tracking Costs of Consultation and Tribal Relations.* All BLM employees engaged in tribal consultation must code their time to the appropriate program element in conformance with the BLM's cost management structure, which emphasizes coding to the specific project/activity compelling the consultation, such as a right-of-way application, permit issuance, lease, or specific fire activity. In instances where no direct cost, output-producing program element is applicable, labor and operations costs tied to consultation or tribal relations must be coded to "AJ" where available. All costs must be tracked by each BLM employee and accounted for in the appropriate annual reporting so the Director can provide accurate costs of tribal consultation to the Secretary pursuant to Secretarial Order 3317.

1.7 File and Records Maintenance

See sections 1.2.E, 1.4, 1.6.A–D, and 1.9.A–C. Filing requirements are found in the General Record Schedules (GRS)/BLM Combined Records Schedule (Schedule 4).

DRAFT

Chapter 2. BLM Relationship to Tribal Governments, Individuals, and Non-federally Recognized Groups

2.1 Federally Recognized Tribes

The governments of federally recognized tribes are the legal representatives for ensuring that tribal members may exercise rights and privileges held through treaties, Executive orders, and agreements with the United States, both on and off reservations. The special legal status of tribal governments requires that official relations with the BLM, including consultation pursuant to this manual section, must be conducted on a government-to-government basis. Authorities and responsibilities of specific tribal governments are defined in the constitutions and bylaws of the individual tribes.

Federally recognized Alaska Native tribes are afforded the same benefits and privileges as federally recognized tribes in the contiguous 48 states. Alaska tribes, as identified by the Bureau of Indian Affairs (BIA) annually in the *Federal Register*, are acknowledged to have the immunities and privileges available to other federally recognized tribes by virtue of their government-to-government relationship with the United States, as well as the responsibilities, powers, and obligations of such tribes. An up-to-date tribal listing can be obtained from the designated native liaison in the Alaska State Office or a field office, or from the headquarters office of the BIA.

2.2 Indian Individuals and Nongovernmental Tribal Groups

- A. The religious observances of American Indians, Eskimos, Aleuts, and Native Hawaiians are protected under the AIRFA (section 1.3B) and Executive Order 13007 (section 1.3D), whether or not they are members of a federally recognized Indian tribe.
- B. Lineal descendants who may or may not be tribal members have rights to claim human remains and associated funerary objects under the NAGPRA (section 1.3B).
- C. As a matter of protocol and courtesy, initiation of contacts with tribal members must always be coordinated by BLM line officers through tribal officials. However, reburials of lineal ancestors may be conducted directly with family members. Tribal NAGPRA coordinators or other tribal officials must be involved, to the maximum extent possible given the wishes of the family, provided all other decision process and notification requirements of NAGPRA are met. If the reburial takes place on tribal lands, an authorized representative of the tribe must take custody of the remains and no longer hold the BLM responsible for disposition.
- D. During consultation, tribal groups such as cultural committees or elders may offer information or opinions that differ from those provided by official tribal representatives. The consultation record maintained within NEPA or NHPA Section 106 documentation should acknowledge that differences of opinion were expressed to

the BLM but make clear that the agency is required to defer to the position of the official tribal representatives.

2.3 Groups and Communities Not Federally Recognized

The BLM consults with non-recognized Native groups and communities in limited circumstances. In accordance with the ARPA regulations (43 CFR 7.7(a)(2)), the BLM may notify and consult with Native American groups that do not meet the definition of an Indian tribe under ARPA. The agency will consult with such groups in accordance with the terms of the AIRFA and those portions of the NAGPRA affecting lineal descendants. Non-recognized groups and communities and their individual members can participate in the BLM's decisionmaking as members of the public. Since only federally recognized tribes qualify as governments under 25 U.S.C. 479a, a non-federally recognized group may not serve as a cooperating agency in preparation of an EIS or environmental assessment (EA).

Chapter 3. Program Relationships

3.1 Tribal Relations Inform Decisionmaking and Program Management

A. *Relationship to Administrative Procedures.* BLM managers utilize land use planning and environmental review to solicit and consider Indian tribal issues and concerns. Managers and staff must employ appropriate techniques through government-to-government consultation to ensure the early identification and consideration of Indian tribal values potentially affected by BLM land use decisions. Such processes should be routine during the collection and evaluation of land use and resource information at the very earliest stages of land use plans and environmental document preparation.

1. *Tribal Consultation and Public Participation.* Indian tribal issues and concerns must be identified through government-to-government consultation and public participation techniques used in the NEPA process (e.g., scoping, public notices, and informational mailings). In addition, managers shall establish any additional effective means necessary for consulting with Indian tribes regarding any proposed actions which may affect traditional religious or cultural practices or traditional land uses. For example, BLM offices may need to schedule presentations and discussions at tribal chapter houses in isolated communities where routine public scoping meetings might be unlikely to result in adequate tribal attendance and participation.
2. *Inventory.* At the initiation of planning and environmental review, government-to-government consultation should be used to define and consider Indian tribal issues and conflicts as they apply to various proposed program decisions and actions. Interdisciplinary team members will share their knowledge of known sensitive and significant resources based on inventory data, ethnographic or historic literature, or other documentation.
 - a. Special techniques may be needed to supplement existing BLM databases to identify resources potentially affected by BLM land use decisions. These techniques may include—
 - Review of natural or cultural resource literature, including credible ethnographic sources;
 - Interviews with knowledgeable members of the Native American community, who may or may not be official representatives of the tribal government or ANCSA Corporation; and
 - Problem-oriented research focusing on Native American land use.
 - b. Interviews and new ethnographic fieldwork must incorporate appropriate safeguards for collection and use of, and access to, potentially sensitive information acquired through interviews and direct ethnographic techniques.

This may include locational information, tribal requirements for ethnographic studies, details concerning sacred sites or properties of traditional religious and cultural importance, cultural uses of plants and animals on the public lands, and the names of interview subjects or other contacts who are not official governmental representatives of affected groups.

3. *Consideration During Decisionmaking.* Managers must ensure that information on Native American issues receives good faith consideration during decisionmaking and that BLM decisions do not unduly or unnecessarily burden the pursuit of traditional religions or lifeways.
4. *Cooperating Agency Status.* Federally recognized tribal governments are eligible to serve as cooperating agencies in the preparation of EISs and RMPs. In accordance with Department NEPA regulations and BLM planning regulations, managers are expected to make a reasonable effort to identify tribes who have special expertise concerning a proposed RMP or EIS and must extend an invitation to those identified. The Council on Environmental Quality regulations implementing NEPA also allow Federal agencies to invite tribal governments to serve as cooperating agencies in preparation of EISs where effects occur on reservation lands. A tribe may choose to serve as a cooperating agency or not. Establishment of cooperating agency status with a particular tribe does not relieve the BLM of its ongoing responsibilities to consult fully regarding proposed decisions or actions with that tribe.
5. *Consistency Review.* Whether or not tribes elect to serve as cooperating agencies in the preparation of environmental impacts statements, they will be given advanced notification of proposed projects/plans as is provided for cooperating agencies. In addition, as part of its responsibilities under section 202(c)(9) of the FLPMA, as implemented by 43 CFR 1610.3-2, the BLM must, to the extent practicable, ensure consistency with affected Indian tribal or corporate land use and resource allocation plans.
6. *Special Designations.* Designations of “areas of critical environmental concern” (43 CFR 1610) and other appropriate forms of special recognition and protection of lands and resources of interest to tribes provide opportunities to consult with Indian tribes to consider, protect, and provide access to places of importance to them.
7. *Documentation.* EISs and EAs ordinarily serve as the primary documentation of the identification steps taken and the consideration given to Indian tribal concerns. However, NHPA Section 106 consultation obligations and requirements for tribal consultation may be appropriate even if the BLM’s proposed action is covered by an applicable categorical exclusion that relieves the agency of the need to prepare an EIS or EA. BLM should also take care to consider that the proposed action covered by the categorical exclusion does not involve “extraordinary

circumstances” relating to potential impacts to Native American land uses, access, or cultural or religious values, as articulated in the Department of the Interior’s NEPA regulations at 43 CFR 46.215. If, for any reason, a NEPA document will not be prepared, an appropriate non-NEPA document should be used to substantiate identification and consideration of Native American concerns and places of importance to them. Such non-NEPA documentation may consist of BLM-tribal consultation logs, inventory reports, data recovery reports, etc. These documents should be maintained and housed with the administrative record for the project.

8. *Agreements.* Written agreements, such as memoranda of understanding, between the BLM and Indian tribes and other groups, are encouraged to define relationships, issues of concern, contacts, and coordination and consultation procedures.
- B. *Environmental Justice.* The Department of the Interior’s Environmental Justice Strategic Plan, 2012–2017 provides important policy direction. The identified goals include:
1. *Outreach.* “Ensure minority, low-income, and tribal populations are provided with the opportunity to engage in meaningful involvement in the Department’s decision making processes.”
 2. *Effects analysis and mitigation.* “The Department will, on its own or in collaboration with partners, identify and address environmental impacts that may result in disproportionately high and adverse human health or environmental effects on minority, low-income, or tribal populations.”
 3. *Partnering.* “Use existing grant programs, training, and educational opportunities, as available, to aid and empower minority, low-income, and tribal populations in their efforts to build and sustain environmentally and economically sound communities.”
- C. *Relationship to Specific BLM Resource Management Programs.* While specific instances of Indian tribal coordination and consultation might focus on particular lands and resources or a single BLM management program or project, Indian tribal concerns generally cross-cut program boundaries and involve several programs simultaneously.
1. *Cadastral Survey.* The BLM is responsible for performing cadastral surveys on all Federal and Indian trust lands. These surveys provide tribal land managers with information necessary for the management of their lands. The program has established strong relationships with the BIA’s Real Estate Services program and the Office of Special Trustee for the purpose of providing cadastral services on Indian trust lands. Under the fiduciary trust model approved by the Secretary, cadastral surveys are provided to tribes, individual American Indians, and Alaska

Natives. The BLM prioritizes inventory needs on Indian trust lands based on the application to trespass abatement, timber harvest, mineral leasing, and other priorities related to Indian trust assets and the disbursement of funds into individual Indian monetary accounts.

2. *Cultural Resources.* Cultural resource inventory and evaluation, use allocations, National Register nominations, public interpretation, management, and protection projects may require consultation with Indian tribes depending on the nature of the cultural resources or the areas affected. For example, identification of tribal traditional lifeway values and public land cultural properties associated with those values, and preparation of ethnological/sociological elements in class I inventories provide an opportunity for tribal consultation and should include participation by tribal consultants and tribal review for accuracy, sufficiency, and data security. Consultation is also necessary as part of compliance with NAGPRA and the agency's responsibilities for completing summaries and inventories of Native American human remains and cultural items in museum collections as well as those discovered on the public lands. Tribal consultation may also be appropriate when issuing ARPA permits.
3. *Fire and Aviation.* The wildland fire, community assistance, fire planning, fuels management, safety, and training components all frequently affect Indian communities. Plans to implement Secretarial Order 3336, Rangeland Fire Prevention, Management and Restoration, include processes for tribal consultation. National fire prevention and education teams work with local Indian residents to reduce human-caused fires and implement fire prevention programs. The BLM sponsors workshops to help people live safely in the wildland-urban interface. The fuels management program treats millions of acres and invests significantly in contracts to local Indian communities for fuels treatments, biomass utilization, and contracting. Employment as firefighters provides a significant economic boost to tribal communities.
4. *Forestry.* Proposed resource allocations and use authorizations should be sensitive to Native American requirements for the noncommercial use of renewable forest and woodland products (e.g., firewood, house and sweat lodge logs, food plants, traditional craft plants, medicinal plants, and ritual plants). Off-reservation treaty rights must be accommodated where applicable in accordance with principles 2 and 5 of Secretarial Order 3335. Discretionary forest and woodland management activities (e.g., herbicide spraying, commercial pinion nut harvesting) should involve tribal input, as appropriate. Special authorizations relating to subsistence uses in Alaska will follow policies developed under the authority of the 1980 Alaska National Interest Lands Conservation Act for the Secretary of the Interior through the Federal Subsistence Board. Restoration of forested lands, including thinning, prescribed fuels treatments, and treatment of

insect infestations may be contracted to tribes in accordance with the 2004 Tribal Forest Protection Act.

5. *Lands and Realty.* Land actions that would change the ownership or the use of public lands may be of concern to Indian tribes. Land tenure adjustments must consider how proposed changes in land ownership would affect off-reservation treaty rights since many tribes have the right to hunt, fish, and gather plant materials on unoccupied Federal lands. Early and meaningful tribal consultation will be required to address the impacts of large undertakings, including rights-of-way, upon resources, public land uses, and Indian religious practices. The use of trails, traditional gathering areas, and access to sacred sites and other traditional use areas all can be affected by these landscape-scale projects.
6. *Minerals.* The BIA serves as the leasing agent for trust minerals on Indian lands when a tribe chooses to develop their mineral resources. The BIA follows the regulations at 25 CFR 211 and 225, which mandate the development of the mineral resources in a manner that maximizes the economic interests of Indian mineral owners. The BIA is responsible for addressing any adverse environmental or cultural resource impacts resulting from such development. The BLM trust responsibilities mainly apply to post-lease activities, under administrative authorities pursuant to 43 CFR 3160, 3260, 3400, and 3590. Specific BIA and BLM responsibilities are described in Onshore Federal and Indian Energy and Mineral Lease Management Standard Operating Procedures (SOP) listed in Section 1.5.B.3. The SOP describes the responsibilities and information sharing required among bureaus and offices under the jurisdiction of the Assistant Secretaries for Policy, Management and Budget; Land and Minerals Management; Indian Affairs; and the Office of the Special Trustee for American Indians in carrying out the Department of the Interior's responsibilities for Indian mineral lease management and accounting. As delineated in the SOP, the BLM has the statutory and regulatory responsibility for oversight of coal and other mining operations on Indian land and provides technical assistance to Indian tribes, allottees, and the BIA, including preparing economic, resource, and mining assessments and analyses; approving exploration and mine and reclamation plans; supervising exploration, development, and abandonment of operations; recommending bonds; and conducting inspection, enforcement, and production verification. The BLM also administers mineral activities for certain allotted and unallotted Indian lands in accordance with authorities in section 1.3 above, as implemented by 25 CFR 211–214 and 216.
7. *Procurement.* As authorized by the Indian Self-Determination and Education Assistant Act (Pub. L. 93-638), the BLM awards contracts to federally recognized Indian tribal governments so they can manage programs and services otherwise conducted by the BLM for Indians. Contracts, grants, and cooperative agreements are authorized. BLM programs involved are primarily cadastral

survey and minerals management. Potentially, aspects of the cultural resources, forestry, range, recreation, and wildlife and fisheries programs could participate if they are of specific geographic, historical, or cultural significance to the Indian tribes.

8. *Rangeland and Plant Conservation.* Due consideration must be given to Indian tribal rights established by treaties, and to requests by tribes consistent with such rights, in the administration of the grazing management and range improvement programs. For example, grazing season of use may be adjusted to accommodate traditional use of native plant resources. Similarly, proposed vegetation treatments such as burning, chaining, spraying, and seeding may need to be weighed in terms of tribal needs for maintenance of traditional plant use areas. Range improvement projects (such as water developments) may have the potential to affect properties of traditional religious or cultural importance. Where tribes hold grazing preference on public lands, they generally are required to follow standard permitting application and NEPA processes for permitted actions similar to nontribal entities. BLM assists tribal nurseries with native plant materials development and partners with tribes that grow local native seed crops for use by BLM in range restoration and rehabilitation.
9. *Recreation.* Native American cultural and religious concerns should be considered when collecting recreation inventory information, preparing recreation management plans, developing or maintaining recreation facilities, designating travel routes, establishing use limitations, and processing special recreation use permits. For example, visual resource management classification should account for landscapes with attributed sacredness; seasonal off-road vehicle limitations might be necessary when traditional uses could be disrupted; and areas used for subsistence or ritual activities might need organized recreation use channeled away from them. Programs and materials for interpreting areas or subjects related to traditional Native American cultures and practices will incorporate the perspectives of the Native Americans as appropriate.
10. *Renewable Energy.* Geothermal, solar, and wind energy development proposals that would change the use of public lands may be of concern to Indian tribes. The use of trails, traditional gathering areas, access to sacred sites and traditional use areas, including traditional cultural properties, can all be affected by these landscape-scale projects. Early and meaningful tribal consultation is required to address the impacts of large right-of-way permitted undertakings upon resources, public land uses, and Indian religious practices.
11. *Soil, Water, and Air.* Any proposed action that could affect water use must provide for Indian tribal water requirements in accordance with established treaty rights, as confirmed by the responsible State water right authority or pertinent legal decisions. Indian tribal water rights based on reserved water rights are not

covered by State law but in many cases have been perfected under State water right adjudications.

12. *Wildlife and Fisheries.* Court decisions have affirmed that Native Americans may not be impeded in their taking of anadromous fish from usual and accustomed places on public lands (see the 1979 Supreme Court affirmation of the Boldt decision). Tribes with reserved rights to usual and accustomed fishing locations retain those rights, including access even when the lands on which the locations are located have passed from Federal ownership, unlike treaty reserved rights to hunting and gathering. In addition, Title VIII of the Alaska Native Interest Lands Conservation Act created a Federal responsibility to manage fish and wildlife resources needed for subsistence on Federal public lands for certain Alaska residents, including Native Americans. As part of the Federal Subsistence Board, the BLM is uniquely responsible for the management of subsistence resources and uses on BLM lands, including fresh waters that run in or are adjacent to BLM lands. When BLM field offices prepare habitat management plans or improvement projects, they must consult with Indian tribes and take care that proposed conservation measures will not hinder usual and accustomed tribal taking of fish or hunting of game on public lands. Indian tribal concerns should also be taken into account when developing management and recovery plans for species valued for non-subsistence reasons (e.g., eagles).
13. *Wilderness.* Wilderness study reports and wilderness management plans should recognize areas used historically for Native American traditional activities, such as gathering medicinal plants and conducting religious ceremonies. The BLM may consider granting access by elders or other traditionalists with limited mobility via motorized transportation if the use of minimum tool can be justified. Although wilderness designation may protect traditional use areas from incompatible use or development, designation and management as wilderness may also have the unintended effect of disrupting established traditional uses.

3.2 Tribal Consultation Obligations Extend to Inter-Agency Relationships

- A. *Planning.* In the review of other Federal agencies' land use plans under section 202(c)(9) of FLPMA and 43 CFR 1610.3-2, the BLM should give special recognition and consideration of Native American issues and concerns.
- B. *Environmental Review.* When the BLM acts as lead agency for the environmental review of a proposed action that would affect other agencies' lands, the BLM is responsible for identifying Indian tribal concerns and issues for all potentially affected lands, through consultation with tribes and cooperating agencies, through the NEPA scoping process, and through other appropriate information gathering methods. Examples include EISs for interstate pipeline projects, oil and natural gas development, coal and other mine developments, and interstate transmission line projects. When the BLM is not the lead agency, the BLM will limit its government-to-government

consultation to those tribes that have interests or concerns regarding the effects of the action upon lands managed by the BLM.

- C. *Exchange of Information.* The BLM and other Federal agencies should routinely share pertinent non-confidential information about Native American concerns and issues. Sensitive information obtained under promise of confidentiality may not be shared without explicit permission from its source. Explicit guidance concerning the sharing of minerals information is contained in attachment E of the SOP.
- D. *Cooperation.* The BLM should explore opportunities to cooperate with the BIA or other Federal agencies to improve opportunities for Indian tribes to enter into cooperative agreements/assistance agreements (e.g., education, training, interpretation, museum work/curation, basic data collection, and ethnographic inventory). Potentially sensitive programs that may involve several agency jurisdictions should be coordinated to the greatest degree possible (e.g., wild and scenic river designations in areas of Native fisheries). Regional and interagency meetings should be organized when such an approach lessens the burden of consultation for tribes and when such coordination can make the process more efficient or timely. Such coordinated interagency meetings may supplement but cannot replace the BLM's government-to-government consultation requirements with individual tribes.

3.3 Relationship to State and Local Governments

- A. *Consistency.* As part of its responsibilities under section 202(c)(9) of FLPMA, as implemented by 43 CFR 1610.3-2, the BLM shall, to the extent practicable, ensure consistency with affected Indian tribal or corporate land use and resource allocation plans. Native American cultural and religious issues shall be part of this consistency review. The BLM should implement its programs, as they relate to Native American concerns, as consistently as practical with State and local laws and ordinances. However, where Federal lands are concerned, Federal law has precedence over State and local law.
- B. *Exchange of Information.* The BLM should share pertinent non-confidential information relating to Native American issues and concerns with State and local governments in the same manner and with the same limitations as outlined in section 1.9.B.3 above.

Glossary of Terms

-A-

Alaska Native: The indigenous peoples of Alaska, including Inupiat, Alutiiq, Yupik, Aleut, Eyak, Tlingit, Haida, Tsimshian, and a number of northern Athabaskan tribes.

-C-

Consultation: See government-to-government consultation.

Coordination: Communication and dialogue between the BLM and Indian tribes involving leadership or staffs in an attempt to increase cooperation between the two parties and the effectiveness of their relationship.

-D-

Director: Director of the Bureau of Land Management.

-E-

Ethnography: Structured and systematic analysis of the culture of a community or other distinctive social unit, through fieldwork-based study with members of the community as well as other sources.

Ethnohistory: Study of a cultural group's past based on various sources, including ethnography, oral tradition, linguistics, ecology, and other relevant disciplines.

-F-

Federal tribal relations: The formal relationship that exists between the Federal Government and tribal governments under United States laws.

Fiduciary responsibility: A high standard the Federal government is held to in cases where it has control or supervision over tribal monies or properties; the government has the duty of care to manage such tribal assets in the tribe's best interest as determined in part through consultation and to maintain accurate accounting of all transactions regarding the resources. This high standard applies to BLM programs that are involved in the management of tribal lands and resources, such as the cadastral and minerals program.

-G-

Government-to-government consultation: The formal consultation between BLM line offices and elected tribal officials or those tribal representatives specifically delegated by elected tribal officials to engage in such consultation and decisionmaking. Consultation is the process of

identifying and seeking input from appropriate tribal governing bodies, considering their issues and documenting the manner in which the input affected the specific management decision(s) at issue. Consultation is an accountable process that ensures meaningful and timely input by tribal officials into the development of regulatory policies and agency decisions that have tribal implications.

Government-to-government relationship: The formal interaction between agencies of the Federal Government and tribal governments under the laws of the United States. Tribal governments are considered domestic sovereignties with primary and independent jurisdiction (in most cases) over tribal lands. Concerning BLM actions, minimally the same level of consideration and consistency review provided to other agencies or governmental jurisdictions must be afforded to Indian tribes.

-I-

Indian allottee: Any Indian for whom land or interest in land is held in trust by the United States or who holds title subject to Federal restriction against alienation.

Indian group: Any Indian aggregation within the United States which the Secretary of the Interior has not recognized as possessing tribal status.

Indian lands: Any lands title to which is either (1) held in trust by the United States for benefit of any Indian tribe or individual or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Indian organization: This includes (1) those federally recognized, tribally constituted entities designated by their governing body to facilitate BLM communications and consultation activities or (2) any regional or national organizations whose board is composed of federally recognized tribes and elected/appointed tribal leaders. These organizations represent the interests of tribes when authorized by those tribes, such as the National Association of Tribal Historic Preservation Officers.

Indian tribe: Any 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 Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103-454; 108 Stat. 4791; 25 U.S.C. 479a.)

Indian trust assets: Lands, natural resources, money, or other assets *held by the Federal Government in trust or that are restricted against alienation* for Indian tribes and individual Indians. In the case of the BLM, this term usually applies to any trust mineral lease (fluids or solids) for which the BLM has responsibilities on or within the boundaries of defined Indian reservations and allotments.

Inherently governmental function: As defined by the Federal Activities Inventory Reform (FAIR) Act of 1998 and 2003 Office of Management and Budget Circular A-76, these are functions that, as a matter of Federal law and policy, must be performed by governmental

employees and cannot be contracted out. They are functions so intimately related to the public interest as to require or mandate performance by government personnel. These activities require the exercise of substantial discretion in applying governmental authority and/or in making decisions for the government. Inherently governmental functions normally fall within two categories: the exercise of sovereign governmental authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.

-N-

Native American: Any individual descended from a native group of the Americas, including Aleuts, Eskimos, and American Indians who may also be members of federally recognized tribes or American Indian and Alaska Native organizations.

Non-trust asset: An asset that is not held in trust by the United States for the benefit of an Indian tribe. Examples include natural and cultural resources not on tribal trust lands including sacred sites, human remains, and cultural items subject to NAGPRA.

-P-

Policies that have tribal implications: Regulations, legislative comments, or proposed legislation as well as other policy statements or actions that potentially have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Property of traditional religious and cultural importance: A form of historic property as defined in 36 CFR 800; a tangible property (district, site, building, structure, or object) that is associated with cultural practices or beliefs of a living community that (1) are rooted in that community's history and (2) are important in maintaining the cultural identity of the community. The significance of these properties lies in the role that they play in a community's historically rooted beliefs, customs, and practices. This term may be considered synonymous with traditional cultural property (TCP; see below).

Proposed land use: Any use of lands or resources, BLM-administered or not, that requires a BLM manager's formal approval, whether proposed by BLM or by an outside applicant.

-R-

Reburial: An action requested of Federal agencies by lineal descendants or Indian tribes concerning human remains and/or other NAGPRA "cultural items" that (1) have been repatriated from museum collections or (2) have had their custody transferred following an intentional excavation or inadvertent discovery (see MS-8100, The Foundations for Managing Cultural Resources, Appendix 9, Native American Graves Protection and Repatriation Act, Sections 2 and 3(d)).

Repatriation: Transfer of control of human remains, funerary objects, sacred objects, and objects of cultural patrimony by museums or Federal agencies to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization in accordance with NAGPRA and its regulations at 43 CFR 10.

Reservation: Lands withdrawn from U.S. settlement and reserved for exclusive Indian use through treaty, act of Congress, Executive action (including action by the Secretary of the Interior pursuant to certain statutes), and/or by action of a colony, State, or foreign nation.

Reserved rights: Those rights not specifically extinguished through a treaty or agreement. Rights may include hunting, fishing, and gathering privileges, or water and other resource use guarantees.

-S-

Sacred site: “Any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or 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 practitioners of 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” (Executive Order 13007, section 1(b)(iii)).

Secretary: The Secretary of the Interior.

Subsistence use: The customary and traditional use by Native Americans of renewable resources on the public lands. For Alaska, specific statutory definition of “subsistence uses” comes from section 803 of the Alaska National Interest Lands Conservation Act of 1980 and is paraphrased as “the customary and traditional uses by rural Alaska residents of wild renewable resources for direct personal or family consumption as food, shelter, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.”

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Tradition: Longstanding, socially conveyed, customary patterns of thought, cultural expression, and behavior, such as religious beliefs and practices, social customs, and land or resource uses. Traditions are shared generally within a social and/or cultural group and span generations. They represent a continuity of understanding relative to some activity, way of life, or mode of expression, which guides particular actions and beliefs. Traditions are not static but evolve to reflect changing economic, political, and technological circumstances.

Traditional: Conforming to tradition.

Traditional cultural property (TCP): A property that derives significance from traditional values associated with it by a social and/or cultural group such as an Indian tribe or local community; commonly refers to culturally sensitive areas determined eligible to the National Register by meeting the criteria and criteria of exceptions at 36 CFR 60.4 (see National Register Bulletin 38).

Tribal government: The formal representative governing body of an Indian tribe (as defined in 25 CFR 83 and published annually in the *Federal Register*).

Tribal land: All lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Tribal notification: A one-way form of communication that provides information, data, or reports to Indian tribes by the BLM, leading to tribal consultation if the tribe so requests.

Tribal officials: Elected or duly appointed tribal leader or official designated in writing by an Indian tribe to represent the tribe in government-to-government consultations.

Tribal trust resource: Those natural resources located on Indian lands. They are protected by a fiduciary obligation on the part of the United States.

Tribe: See Indian tribe.

Trust asset: Land, natural resource, money, or other asset held by the Federal Government in trust or restricted against alienation for Indian tribes and individual Indians.

Trust relationship: The unique legal and moral duty of the United States to assist Indian tribes and Alaska Natives in the protection of their property and rights, furthering self-governance, and community well-being.

Trust responsibility: The duties and obligations of the Federal Government and its employees to protect the interests of federally recognized tribes. Trust responsibilities are founded on the Constitution and are a function of the unique legal doctrine that evolved as tribal lands were consumed by the territorial expansion of the United States and as promises were made by the Federal Government to protect tribal interests. Federal law and court decisions have interpreted this responsibility to extend to all Federal agencies. For the BLM, this obligation requires a reasonable and good faith effort to identify, consider, protect, and conserve locations and resources important to Indian tribes including those associated with treaty-reserved rights; and to carry out programs in a manner sensitive to and consistent with Indian tribal concerns and tribal government planning and resource management programs.

Appendix 1 – Acronyms and Abbreviations

AIRFA	American Indian Religious Freedom Act
ARPA	Archaeological Resources Protection Act
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
CFR	Code of Federal Regulations
DM	Departmental manual
EA	environmental assessment
EIS	environmental impact statement
FLPMA	Federal Land Policy Management Act
NAGPRA	Native American Graves Protection and Repatriation Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
Pub. L.	Public Law
RMP	resource management plan
SOP	(Onshore Energy and Mineral Lease Management Interagency) standard operating procedure
Stat.	statute
TCP	traditional cultural property
U.S.C.	U.S. Code

Appendix 2 – Judging the Adequacy of Tribal Consultation

A. Introduction

There are few legal standards that define what constitutes adequate tribal consultation. The clearest standard pertains to compliance with the National Historic Preservation Act (NHPA). Section 101(d)(6)(B) of the NHPA requires federal agencies, as part of the NHPA Section 106 process, to consult with Indian tribes that attach religious and cultural significance to historic properties potentially affected by an undertaking. The regulations implementing NHPA Section 106 require federal agencies to make a “reasonable and good faith effort” to identify historic properties within the area of potential effect in part through consultation with Indian tribes (see 36 CFR 800.4(b)). However, this standard only applies to the agency’s effort to consult with Indian tribes regarding historic properties of religious and cultural significance in the context of NHPA Section 106 and not the other specific and general authorities that require tribal consultation on a government-to-government basis.

The BLM’s tribal consultation efforts are much broader than the identification of historic properties, and thus, it is important to weigh the adequacy of the agency’s overall effort to consult with tribes under all applicable authorities listed in section 1.3 of this manual.

Given that the federal courts and the Interior Board of Land Appeals have interpreted the “reasonable and good faith effort” standard for tribal consultation in the NHPA Section 106 context, the BLM will apply that standard as a benchmark for determining the adequacy of consultation with tribes as it relates to all of the applicable authorities.

B. Factors Affecting the Amount of Consultation Needed

BLM line managers engaged in tribal consultation must judge the amount of time and resources to devote to this obligation based upon a number of factors. These include—

- Scope and complexity of proposed land use action;
- Availability of alternatives that would reduce or eliminate potential harm or disruption;
- Completeness and appropriateness of the list of Indian tribes and individuals with whom consultation has already been documented;
- Nature of issues raised;
- Intensity of concern expressed;
- Legal requirements posed by treaties, if applicable;
- Potential to resolve issues through further discussions; and
- Need for further consultation.

C. Sufficient Consultation

Recent Federal district and appellate court cases and Interior Board of Land Appeals' decisions shed light on how courts judge the adequacy of agency-tribal consultation efforts. In cases where agency efforts were judged to be sufficient, consultation and decisionmaking benefitted from—

- A pattern of numerous and repeated efforts to engage in consultation through various means of communication even when the tribe did not respond;
- A pattern of regularly scheduled consultation meetings with tribes ;
- Early engagement to allow maximum contribution from tribes, when the agency has the maximum flexibility and before any alternatives have been finalized;
- Communications through a variety of mediums, including face-to-face meetings, telephone conference calls, notices, shared documents, field trips, and site visits;
- Direct involvement of BLM line officers and elected tribal officials in consultation;
- An engagement with tribes that allows for a reasonable opportunity to identify their concerns, provide input on the projects effects, and participate in resolving any adverse effects;
- The opportunity for tribes to conduct on-site inspection of resources;
- Documentation that the agency obtained and considered tribal input and that final decisions took that input into account; and
- Continuation of dialogue after initial authorizations and the involvement of tribes in monitoring, mitigation, and reclamation activities

D. Failure to Adequately Consult

In judicial rulings critical of agency consultation efforts, these fatal flaws were identified—

- Initiation of consultation with tribes late in the planning/decision process;
- Failure to fully share all relevant information with tribes;
- Meetings and communications that were of an informational nature rather than two-way communication designed to obtain and consider tribal views and recommendations; and
- Consultations restricted to individual tribal members or meetings limited only to BLM and tribal staff, rather than government-to-government consultation between elected tribal representatives and the designated representatives of the United States.

E. Conclusion

Developing an ongoing long-term relationship with tribes who have expressed ties to public lands and information relating to them can make the difference between success and failure in government-to-government consultation. The sufficiency of consultation will be viewed holistically by the courts; it is the sum of the consultation effort that determines its adequacy, not individual steps in the consultation process. The sheer number and volume of letters, meetings, or reports provided to tribes are not enough to demonstrate appropriate consultation. Rather, a good way to gauge whether the BLM's consultation efforts have been defensible is to consider the degree to which an objective review of the decision record would find a good faith effort to identify, notify, respond, and meaningfully involve Indian tribes potentially affected by a proposed decision.

Appendix 3 – BLM Tribal Liaison Position Description

A. Introduction

This position is the direct outgrowth of Secretarial Orders 3175 and 3317. The orders emphasize the responsibility of each federal agency in fulfilling United States trust responsibilities to sovereign Indian nations. A primary means in fulfilling these responsibilities is through establishment and maintenance of government-to-government relations.

The position is to be located in the BLM XXXXXX Office and report to the XXXX Manager. Primary responsibility will be to facilitate formal relations between the BLM and the tribal governments of those federally recognized tribes expressing interests in the actions of the BLM unit.

B. Major Duties and Responsibilities

The tribal liaison officer—

- Is the principal liaison between BLM and particular Indian tribes having interests in the management unit. The incumbent will coordinate the programs of the Bureau with programs of the tribes;
- Advises line management in BLM on the possible impact of alternative courses of action and of the negotiated reasons for a preferred course of action;
- Is responsible for communication with each agency office on policy issues where differing interpretation or policy positions exist among the agencies as to how those decisions impact any Indian tribe;
- Evaluates sensitive problem issues and recommends to the appropriate agency action officer the necessary steps to solve those issues;
- Has primary responsibility for monitoring all BLM programs which affect the Indian communities and communicating potential issues with managers and staff concerning Native American perception of the status of projects and programs;
- Attends tribal meetings where invited and agency presence is appropriate. Due to the need for government-to-government communication, the liaison often must adapt agency guidelines, regulations, and policy to tribal situations while maintaining integrity of congressional and agency purposes;
- Attends events and participates in ceremonies on behalf of the agency when requested;
- Develops and maintains knowledge of Native American cultures, philosophies, and needs as they pertain to analyzing Indian tribal needs and effecting workable solutions to those needs in relation to agency programs;

- Maintains working knowledge of the history of treaties with the Indian tribes and of the current operative laws which affect the government-to-government communication and the Secretary's trust responsibilities; and
- Is aware of the training available from the agency on various programs which might be of benefit to the Native American workforce, maintains communication with agency training, and informs the tribal leaders of appropriate ways to seek training from the agency.

C. Factors

1. The following knowledge is required by the position:

- Incumbent must have detailed practical knowledge of the principles, concepts, and regulations that govern the relation between managers of the public land and Indian tribes.
- Incumbent must have highly sensitive awareness for the interplay between the various Indian tribes and respect that interplay while not attempting to interfere with it.
- Incumbent must have a working knowledge of the minerals trust responsibilities of the Secretary of the Interior as they relate to Indian lands.
- Incumbent must have a working knowledge of laws such as the Native American Graves Protection and Repatriation Act and amendments to the American Indian Self Determination and Education Assistance Act, which is a foundation for understanding the relationships between the United States and various Indian tribes.
- Incumbent must have working experience and knowledge of how to do business with other cultures and people for whom English is not the primary language.
- Incumbent must be able to consult and advise effectively with representatives of private and public organizations and all levels of the agencies.
- Incumbent must have the ability to develop new solutions to problems not readily resolved by accepted methods.
- Incumbents must have well-honed listening skills and be able to understand the appropriate time to listen and the appropriate time to express agency concerns.
- Incumbent will be working in and around the jurisdictions of several BLM managers and other Federal agencies. The liaison must have the communication skills and knowledge to provide assistance without causing a sense of disruption among the various agency managers. This requires a keen understanding of the agencies' organizational structure, chain-of-command relationships, and channels for communication.

2. Supervision

Incumbent will be representing BLM State Director or BLM District Managers (list field offices). Because the job will be located in the BLM XXX Office and because administrative support for the position will come from the BLM XXXXX Office, the position will report directly to the appropriate Deputy State Director or District Manager of the XXXX Office. Differences of opinion among the BLM management will be coordinated through the BLM XXXX State Office.

Work will be assigned by XXXXXX Manager. Request for incumbent's assistance by the various BLM field offices will be coordinated through the XXXXX Manager or his designee.

The position will be on the BLM XXXXX State Management Team.

3. Guidelines

Guidelines are broadly stated, such as basic legislation and interpretation of that legislation. Incumbent must be resourceful in administering and developing new methods of proposed new policies.

4. Complexity

The work consistently varies in the range of problems and processes which can involve several complex problems of a sensitive nature and which can have national and intergovernmental implications. The incumbent can be directly involved in matters that can be controversial or sensitive and that can involve other agencies and organizations. Because of the legal ambiguities and overlapping geographic range of interests of various Indian nations, incumbent must exercise extreme tact and ingenuity in obtaining cooperation from all concerned parties.

There must be a demonstrated ability to counsel and evaluate all levels of government through collaborative techniques and through the patience required to demonstrate respect and caring.

5. Scope and Effect

Decisions require constant effort and awareness of their potential impact on the public, Federal resources, Indian resources, and agency policy. Decisions must be made in keeping with agency policy and regulations and with legal and legislative mandates of these rights.

6. Personal Contacts

Personal contacts are with leaders of the various Indian nations, with the respected spokesmen and women, and with the religious leaders. These include all levels of contact

from casual visits to formal meetings. Personal contacts, as coordinated with various agency officials, will include meetings with affected other tribes in the region. Contacts also include the working relationships which build trust with each of the land managers within whose jurisdiction the incumbent is working. Regular and routine contacts by the incumbent will be made with the district and field office managers to keep them informed on the content and progress of issues, concerns, activities, etc. regarding Indian tribes in their areas of responsibility.

7. Purpose of Contacts

The purpose of the contacts is often to negotiate, justify, defend or settle significant matters. Contacts involve meetings, presentations, hearings, etc. Such contacts typically involve different and apparently irreconcilable differences, and require the incumbent to achieve a solution or find acceptable options. Another purpose of contacts will be to serve as a functional model for other applications of these skills and to communicate both successes and failures to interested parties.

8. Physical Demands

The work requires travel, often to remote sites. The work will often require long hours of meetings and distance driving. The work will also require careful documentation of communication.

9. Work Environment

Work is typically performed in offices, meeting rooms, etc. Travel will involve exposure to moderate discomforts.