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CHAPTER I. INTRODUCTION

A. Purpose and Organization of this Handbook

Manual Section 1780 (MS-1780) and Handbook 1780-1 (H-1780-1) are being released simultaneously. H-1780-1, Improving and Sustaining BLM-Tribal Relations, replaces H-8120-1 (Rel. 8-75, 12/03/04). MS-1780, Tribal Relations, replaces MS-8120 (Rel. 8-74, 12/03/04). MS-8120 and H-8120-1 were specific to implementation of cultural resources authorities only. Therefore, this new guidance is appropriately placed within the Bureau of Land Management (BLM) 1700 series, which addresses relations with other governments, including State, local, and international relations. Developed in response to issuance of Secretarial Order (S.O.) 3317, Department of the Interior Policy on Consultation with Indian Tribes, December 1, 2011, H-1780-1 with MS-1780 provides direction for all BLM programs for improving and sustaining tribal relations, including government-to-government consultation.

With issuance of Secretarial Order 3317, the Department of the Interior (DOI) reaffirmed a commitment to fulfill its tribal consultation obligations based on recognition of Indian tribes' right to self-governance and tribal sovereignty. The commitment was further affirmed with issuance of Secretarial Order 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries, August 20, 2014. This obligation for Federal agencies to engage with federally recognized Indian tribes on a government-to-government basis derives from long-established international legal customs predating the United States. Today, the Federal-tribal relationship is based on the U.S. Constitution and Federal treaties, statutes, Executive orders, and policies (see MS-1780, Tribal Relations, Section 1.3, Authority). This legal foundation is reviewed by Secretarial Order 3335 and embodied in a set of seven principles to guide Interior agencies. These principles address general intergovernmental relationships such as respecting tribal sovereignty and self-determination, being responsive in all communications, and working in partnership on mutually beneficial projects. They also address more specific issues associated with protection of trust lands and their associated resources as well as treaty rights applicable to public lands. These principles include protection of these lands and rights, avoiding or resolving conflicts to the maximum extent possible, and working collaboratively to achieve these goals. The seven guiding principles provided in Secretarial Order 3335 form a foundation for the following sections in this handbook.

H-1780-1 addresses a broad range of legal authorities and agency programs of interest to tribes and also highlights BLM responsibilities. It incorporates current guidance derived from recent case law, new Secretarial orders and policies, Executive orders, and decades of experience working with tribes on a government-to-government basis:

- Chapter I introduces the handbook material and its relationship to the manual.
- Chapter II establishes the historic context and legal foundation of BLM government-to-government relationships with Indian tribes. The interactions between BLM and tribal governments are rooted in and guided by the three key concepts of tribal sovereignty,

Federal trust responsibility to federally recognized tribes, and the government-to-government relationship, each of which are explained.

- Chapter III provides steps the BLM should take to build a positive broad-based relationship with Indian tribes. Suggestions stress developing partnerships based on common interests, financial support, confidentiality, and accountability.
- Chapter IV provides practical guidance on the mechanics of government-to-government consultations applicable to all BLM programs, including: (1) how to conduct and document consultation efforts; (2) identification of tribal leaders or their representatives; (3) developing strategies to achieve success in BLM-tribal relations, communications, meetings and formal government-to-government consultations; and (4) recognizing tribal motivation driving consultation.
- Chapter V addresses consultation needed in land use planning and decision support. It summarizes BLM obligations under the Federal Land Policy and Management Act (FLPMA); National Environmental Policy Act (NEPA); Executive Order (E.O.) 13175, Consultation and Coordination with Indian Tribal Governments; the American Indian Religious Freedom Act (AIRFA); and Executive Order 13007, Indian Sacred Sites. The use of ethnographic studies for planning purposes, how to coordinate tribal consultation obligations under these legal authorities, as well as key differences among the legal mandates are highlighted.
- Chapter VI outlines requirements for tribal consultation and opportunities for tribal partnerships within National Conservation Lands.
- Beginning with Chapter VII, a series of program-specific chapters can be found. Each chapter highlights legal authorities driving consultation and tribal relations for that program, explains special considerations applicable to that program, and identifies potential partnerships or agreements with Indian tribes.
- Program-specific chapters include: Fire Management Program (Chapter VII); Forest and Woodlands Program (Chapter VIII); Rangeland (Chapter IX); Fish and Wildlife Program (Chapter X); Cultural Resources Program (Chapter XI); Renewable Energy Program (Chapter XII); Fluid Mineral Program (reserved at Chapter XIII); Minerals Program (Chapter XIV); Cadastral Survey Program (Chapter XV); and Realty Program (reserved at Chapter XVI). Handbook guidance is not limited to those programs featured within individual chapters. Examples and clarifications are provided throughout the text regarding how the issue under discussion affects a variety of BLM program areas.

B. This Handbook's Place in the BLM Manual System

MS-1780 and this handbook, H-1780-1, are housed within the BLM's broad administrative manual series, since they focus on cooperative relations with other governments, including State and international relations. This guidance is intended for line managers exercising their executive duties and other agency decisionmakers; however, certain chapters and appendices provide technical direction as well. Agency staff and public land users will also find this

handbook beneficial to establish familiarity with agency policies and expectations of the decisionmakers.

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CHAPTER II. LEGAL FOUNDATIONS OF BLM-TRIBAL RELATIONS

A. Historical Context of the Engagement with Tribes

From initial non-Indian settlement of North America dating back to 1532, the status of Indian tribes as sovereign and independent political entities was a subject of debate by European nations. Spain established principles of Indian title and consent requirement as early as the 16th century, and these continued to influence international law discussions through the 18th century. Thus, tribal sovereignty was recognized by some prior to creation of the United States. Wishing to embrace a democratic principle of fairness fresh from their rebellion against political inequities, United States leaders recognized Indian tribes as legal entities capable of making treaties from the beginnings of the Federal-Indian relationship. However, also imbued with the dominant economic tendency of land expansion by its population, the United States inherited from England the conflicting policies of recognition of Indian sovereignty within the context of the “right of discovery” doctrine in order to legally rationalize expansion into lands previously settled by American Indians. The latter policy gave title to the “discoverer” subject only to the Indians’ right of occupancy.

Given the needs for security from conflict with the larger native populations, stability of the new political system, and land to grow economically, Indian relations were seen as the most important “foreign” affairs issue facing the new nation. In 1775, the Continental Congress in one of its first acts “declared its jurisdiction over Indian tribes [and] . . . [its authority] to treat with the Indians.” Twelve years later, the Northwest Ordinance of 1787, adopted to manage newly acquired territories, reaffirmed this recognition of sovereignty for tribal groups.

The U.S. Constitution, drafted also in 1787 and ratified in 1789, while acknowledging the sovereign status of Indian tribes established broad Federal legal authority, often described as “plenary” in reference to the absolute nature of Federal authority over Indian affairs. Three clauses of the Constitution are most relevant: (1) the Commerce Clause (article I, section 8), gives the Federal government primary authority to legislate over federally recognized Indian tribes; (2) the Treaty Clause (article II, section 2, clause 2) gave the President authority to make treaties subject to Senate ratification; and (3) the Supremacy Clause (article VI, section 2) states that the Constitution, Federal laws, and treaties compose the “Supreme Law of the Land.”

The very first session of Congress exercised its new Constitutional power in Indian affairs. The Indian Trade and Intercourse Act of 1790 (1 Stat. 137) defined in statute the Federal rights and duties toward Indian nations.

In addition, a series of Supreme Court decisions popularly known as the Marshall Trilogy after then Supreme Court Chief Justice John Marshall, issued between 1823 and 1832 (*Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832)), established several key legal tenets of Indian law:

- Only the Federal government has a preemptive right to procure Indian land, not States or individuals.

- The Federal government has a trust responsibility towards Indian tribes, which have the status of sovereign domestic dependent nations, though without power to make treaties with foreign countries.
- Indian treaties take precedence over State law.

Congress revamped the 1790 statute with the Indian Intercourse Act of 1834 (4 Stat. 729) which formed the modern outlines of Federal Indian law by establishing treaty making policy, creating the reservation system, and asserting that land and other property could not be taken from Indians without their consent. The 1834 act recognized American Indian “title” throughout most of the United States west of the Mississippi River.

In brief, for over two centuries, Federal policy towards Indian peoples has vacillated between two conflicting themes: self-sufficiency/self-governance and assimilation. The legal history may be conceptualized in distinctive time periods. The first, prior to 1871, was a time of escalating interaction between cultures across the continent. A great loss of population and economic capability occurred due to introduced exotic diseases and recurrent open hostilities. The period of intense interaction included treaties being established as the land base was rapidly lost. The century of 1871 to 1971 is marked by the oscillation of Federal policy, from assimilation to self-sufficiency and back to assimilation. The period since 1971 has been one of increasing self-sufficiency, self-governance, and economic growth.

During this time a complex body of case law has established the meaning and application of several legal concepts that underlie BLM-tribal relations today. Tribal relations including tribal consultation must be carried out in accordance with: (1) the special legal status of federally recognized tribal governments, (2) BLM’s Federal trust responsibility, and (3) tribal reserved rights.

B. Indian Treaties—General Background

Treaties served multiple functions, including recognizing a sovereign government, establishing economic relations, acquiring territory by the United States, establishing reserves where tribal law and customs prevail, and in only a handful of cases reserving rights of tribes to continue pursuing economic use of lands outside reservations as long as those lands remained in public domain. Early treaties such as the 1849 treaty with the Navajo Indians following acquisition of the Southwest territories from Mexico in 1848 were peace treaties. Many subsequent treaties forced economic reform by coercing American Indians to become agriculturalists and herdsman. The United States negotiated 367 treaties in the 18th and 19th centuries, beginning with a 1778 treaty with the Delawares. In total, some 720 land cessions occurred from 1784 to 1894 through treaties and other instruments.

Many treaties were negotiated during the 1850s but were not ratified by the Senate and never officially took effect. In 1851 there were 18 treaties negotiated in California and 19 in Oregon that were never ratified due to lack of support in Congress from the California and Oregon legislators.

Although the treaty period was terminated by Congress in 1871 through a rider added to the Indian Appropriation Act for that year, legislation affecting Indian tribal lands and rights continue to be enacted. These include Executive orders establishing reservations for non-treaty groups; acts restoring Federal recognition to tribes that had been previously terminated by Congress in the 1950s, such as the Grand Ronde Restoration Act of November 22, 1983 (Pub. L. 98-165; 97 Stat. 1064) and the Klamath Indian Tribe Restoration Act of August 27, 1986 (Pub. L. 99-398; 100 Stat. 849); and acts establishing reservations and Federal recognition, such as the Burns Paiute Reservation Act of October 13, 1972 (Pub. L. 92-488; 86 Stat. 806) and the Siletz Reservation Act of September 4, 1980 (Pub. L. 96-340; 94 Stat. 1073).

Texts for 366 treaties signed between 1778 and 1868 are provided on an Oklahoma State University website, Indian Affairs: Laws and Treaties (<http://digital.library.okstate.edu/kappler/>). Maps related to the treaty land cessions in addition to other cessations are provided by the Library of Congress website, Indian Land Cessions in the United States, 1784–1894 (<http://memory.loc.gov/ammem/amlaw/lwss-iloc.html>).

C. Special Legal Status of Federally Recognized Tribes

The terms *Indian tribe* and *tribes* will be used interchangeably throughout this document to mean a federally recognized tribal government. For Alaskans Natives, the Alaska Native Claims Settlement Act (ANCSA) of 1971 (43 U.S.C. 1601) resolved longstanding aboriginal land claims and stimulated economic development by establishing 12 Alaska Native regional corporations, later expanded to 13. Though important legal differences exist from tribal governments in other States, for purposes of this discussion, these federally established tribal organizations are included in the reference to Indian tribes. Federally recognized tribes are self-governing entities formally recognized by the Secretary of the Interior and that enjoy a government-to-government relationship with the United States. For the definitive list of federally recognized tribes, see Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, published annually by the Bureau of Indian Affairs (BIA) in the *Federal Register*. It updates newly recognized Indian tribes and any changes in official tribal names.

Tribes are different from other public land constituencies. They are neither *stakeholders* nor *just another public group* whose interests should be considered. Their special relationship with the United States Government is rooted in history and defined by law.

For further reading on the legal history of Federal-tribal relations, consult the following:

- Felix S. Cohen. *Cohen's Handbook on Federal Indian Law*. LexisNexis: New Providence, NJ. 2012.
- David H. Getches et al. *Cases and Materials on Federal Indian Law*. Thomson/West: St. Paul, MN. 2011.
- Stephen L. Pevar. *The Rights of Indians and Tribes*. New York University Press: New York, NY. 2004.

Tribal interests are not on an equal footing with the interests of most other groups and individuals. For example, an important principle of Indian law as applied by the judicial process is that treaties and statutes are to be interpreted as the tribes would have understood them at the time of signing or passage, particularly where ambiguities exist. This principle is referred to as *canons of construction*.

Sovereignty means federally recognized tribes have liberal control over civil and regulatory matters among their members and within reservation borders. Notwithstanding the plenary powers asserted by the U.S. Government over tribes, tribes are distinct, independent political communities within the U.S. borders, or “domestic, dependent nations” as described in an 1831 Supreme Court decision *Cherokee Nation v. Georgia*. This sovereign status was inherently recognized in the U.S. Constitution and addressed consistently by Congress over time. Tribes retain the various aspects of sovereignty unless expressly lost through treaty or statute. However, in addition to tribal membership, the Indian Citizen Act of 1924 (also known as the Snyder Act, 8 U.S.C. 1401(b)) extended U.S. citizenship to all Indian peoples, granting them voting privileges in Federal elections. Consequently, tribal members also have all the rights and responsibilities associated with U.S. citizenship.

In regulating their internal affairs and making their own laws, tribes can determine the qualifications for membership, regulate the exercise of off-reservation treaty rights by tribal members to hunt and fish outside State regulation, tax and regulate non-Indians who have commercial activities within reservation boundaries, and enjoy certain immunity from legal actions in State or Federal courts much like foreign citizens. An important reflection of tribal sovereignty has been the growth of tribal court systems with their own procedural rules. The courts are the primary forum for adjudicating civil issues affecting personal and property interests within a reservation and include criminal jurisdiction to a large extent involving tribal members. States have no jurisdiction to prosecute Indians for a crime within a reservation, and State laws do not apply to tribal lands except where Congress explicitly provides that a particular State law should prevail.

Given the sovereignty of federally-recognized tribes, the government-to-government relationship requires that the BLM accord tribal officials the appropriate respect and dignity of position. This showing of respect includes ensuring the BLM representative is authorized to speak for the agency and is adequately knowledgeable about the matter at hand. Owing to their status as self-governing entities, tribes should be notified to participate in decisionmaking processes at least as soon as (if not earlier than) the Governor, State agencies, local governments, and other Federal agencies.

D. Non-federally Recognized Groups and Individuals

BLM responsibilities to Native American groups not federally recognized is distinctly different. For example, the National Historic Preservation Act (NHPA) is silent on coordination with non-recognized Indian groups and non-recognized Alaska Native entities regarding properties of religious and cultural importance and NHPA Section 106 compliance in general. Non-recognized Native American groups, minority political factions, and individual tribal members

within Indian communities would be appropriately identified under NEPA and other authorities as interested parties on the same basis as interested members of the public. According these groups a government-to-government consultation status would commonly be considered an affront to recognized tribal governments who may hold conflicting concerns with the non-recognized parties and could jeopardize intergovernmental relationships. Some legal authorities addressing culturally sensitive topics such as management of sacred sites compel the BLM to seek input from a broader Native American participation than federally recognized tribes. These situations are noted in the appropriate sections of this handbook.

E. Trust Responsibility vs. Trust Assets

BLM's trust responsibilities encompass a broad understanding of the trust relationship. BLM has an affirmative duty to take into account tribal interests during decisionmaking when its actions may affect lands and resources of interest to tribes.

Federal trust responsibilities emanate from Indian treaties, statutes, Executive orders, and the historical relationship between the Federal government and Indian tribes. The Federal government's trust responsibilities deriving from this legal history are both broadly construed as the foundation of the government-to-government relationship and more narrowly defined as a formal, property-based responsibility.

The formal, property-based, fiduciary responsibility depends upon the existence of three elements: (1) a trust asset; (2) a trust beneficiary (the Indian tribe or individual Indian allottee); and (3) a trustee (the Secretary of the Interior). Secretarial Order 3215 defines trust assets as "lands, natural resources, money, or other assets held by the Federal Government in trust or restricted against alienation for Indian tribes and individual Indians." Restricted against alienation means that the assets cannot be sold or given away by tribes or individual Indians without the Secretary's consent. The BLM has this form of property-based trust responsibilities to a limited extent, commonly involving Indian minerals management, cadastral survey of Indian properties, and the potential effects of public land actions that extend onto tribal lands, such as effects on water and air quality.

The BLM's fiduciary responsibilities for Indian minerals management are explained in chapter XIV. Fiduciary refers when the Federal Government holds control to tribal property or makes management decisions related to tribal property for the benefit of the tribe. The BLM holds similar obligations to survey Indian lands as described in chapter XV.

However, the BLM does not hold land, resources, or property in trust for Indians on the public lands. BLM-administered lands and their cultural and natural resources are, therefore, not Indian trust assets. These resources include archaeological sites; places of traditional religious or cultural importance such as sacred sites; and plants and animals of traditional economic and cultural importance to tribes (see chapter XI). Similarly, human remains and cultural items subject to the Native American Graves Protection and Repatriation Act (NAGPRA) are also not Indian trust assets (see chapter XI, section B).

To summarize, the Federal Government has a trust responsibility arising from Indian treaties, statutes, and Executive orders that comprises the unique relationship between the United States and federally recognized American Indian tribes. When considering the Federal trust responsibility as it relates to the BLM public lands and resources, it is important to remember that these are not tribal trust assets meant to be managed for the sole benefit of the tribes. While the BLM clearly has the broader defined duty to consider tribal rights and interests and to consult with affected tribes when agency actions may pose an effect on the exercise of those rights, the BLM has no duty to automatically avoid an action solely because that action may adversely affect these off-reservation rights or interests. Such a decision affecting tribal interests must be based on the level of benefits to public land resources that a proposed action may offer. The BLM does, however, recognize the importance of public lands and resources to the tribes, particularly to the exercise of the tribes' reserved treaty rights, and the BLM acknowledges an affirmative responsibility to manage these resources in a manner that promotes Indian interests.

(See MS-1780, section 1.6 for BLM policy governing tribal relations, including the recognition of tribal interest in public lands and resources).

F. Reserved Rights—Off-Reservation Treaty Rights

After the Washington Territory was carved out of the Oregon Territory in 1853, several treaties finalized between December 1854 and June 1855 by Washington Territorial Governor Isaac Stevens reserved off-reservation tribal rights to continue the practice of traditional subsistence activities. Several of the treaties contain virtually identical language, reserving “the right of taking fish at all usual and accustomed places in common with citizens of the Territory ... together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle on open and unclaimed land.” The same format was copied by Stevens for treaties with the Confederated Salish and Kootenai Tribes of the Flathead Reservation in western Montana and the Blackfeet of eastern Montana. The Shoshone-Bannock Tribes of the Fort Hall Reservation signed the Fort Bridger treaties later in time with off-reservation rights as well that focused primarily on hunting. However, case law has interpreted “hunting” to include as broad a range of natural resources as the original Stevens treaties. The Klamath Treaty, signed October 14, 1864 and ratified July 2, 1866 (16 Stat. 707), only made reference to on-reservation rights (which are actually implied in all of them). However, since the loss of the extensive Klamath reservation in the 1950s termination era, case law has applied those rights to former reservation lands. This essentially makes them off-reservation in nature but with prescribed boundaries. BLM has few former Klamath reservation lands; such public lands are primarily administered by the Forest Service (Winema National Forest).

Treaties containing off-reservation rights include—

- Treaty of Medicine Creek, signed December 26, 1854, ratified March 3, 1855 (10 Stat. 1132) (in Washington);
- Treaty of Point Elliot, signed January 26, 1855, ratified March 8, 1859 (12 Stat. 927);
- Treaty of Point No Point, signed January 26, 1855, ratified March 8, 1859 (12 Stat. 933);

- Treaty with the Makah, signed January 31, 1855, ratified March 8, 1859 (12 Stat. 939);
- Middle Oregon (Warm Springs) Treaty signed June 25, 1855, ratified March 8, 1859 (12 Stat. 963);
- Walla Walla (Umatilla) Treaty signed June 9, 1855, ratified March 8, 1859 (12 Stat. 945);
- Nez Perce Treaty signed June 11, 1855, ratified March 8, 1859 (12 Stat. 957);
- Yakama Treaty signed June 9, 1855, ratified March 8, 1859 (12 Stat. 951);
- Fort Bridger Treaty with the Eastern Shoshone, signed July 2, 1863, ratified March 7, 1864 (18 Stat. 685);
- Blackfeet Treaty, signed October 17, 1855, ratified April 15, 1856 (11 Stat. 657); and
- Hellgate (Flathead) Treaty, signed July 16, 1855, ratified March 8, 1859 (12 Stat. 975).

Off-reservation rights also exist for tribes outside of the Northwest. Some Midwestern treaties to the east also provide for off-reservation treaty rights, such as the Treaty with the Menominee, signed in February 8, 1831, in Wisconsin. Following extinguishment of Alaska Native claims to aboriginal hunting and fishing rights by ANCSA, title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 (16 U.S.C. 3101 et seq.) granted hunting and fishing rights for subsistence use to Alaska Natives and rural Alaskans.

Most treaties did not include provisions for off-reservation rights, neither explicit nor implicit, even though many were created contemporaneously with the treaties containing off-reservation rights provisions. For example, in Oregon these included Treaty with the Cow Creek Band of Umpqua signed September 19, 1853, ratified April 12, 1854 (10 Stat. 1027), Treaty with the Rogue River signed November 15, 1854, ratified March 3, 1855 (10 Stat. 1119), Treaty with the Molala signed December 21, 1855, ratified March 8, 1859 (12 Stat. 981), and Northern Paiute Walpapi Treaty signed August 12, 1865, ratified July 5, 1866 (14 Stat. 683).

Although public land resources associated with off-reservation treaty rights (such as culturally important game and plants) are not trust assets, taking into account the potential effects of agency actions on those resources is a trust responsibility for the BLM. Due to the variation in treaty rights contained in the treaties, each tribe must be consulted separately. Importantly for public land management considerations, traditional tribal areas related to off-reservation treaty rights extend well beyond the United States–imposed ceded and reservation boundaries. Open communication and effective tribal consultation can minimize differing interpretations of treaty rights and Federal trust obligations by Federal agency personnel, tribal officials, and tribal members. United States trust responsibility compels agencies to protect the exercise of these treaty rights to the maximum extent practicable when accommodating competing non-Indian interests. Treaty rights to certain species of plants and animals, in addition to fish, have cultural, spiritual, medicinal, and economic values which vary by tribe. That ecosystem strategies should ensure substantial and sustainable yields of resources important to tribes is a universal goal for them. Tribes firmly believe agencies should view treaty rights positively, as opportunities, rather than as hindrances.

The tribal exercise of these treaty rights involves a wide range of native plants and wildlife and their corresponding habitat on public lands, including both terrestrial and aquatic. Reserved rights associated with “usual and accustomed fishing locations” in the Pacific Northwest are unique and constitute a property right in the land where the traditional fishing locations exist. With the exception of fishing rights, the other reserved rights are extinguished with passage of the related lands out of Federal ownership.

In *U.S. v. Winans* (1905), the reserved rights doctrine was elaborated by the Supreme Court. Tribes granted rights to the United States in their former territories not included within a reservation and rights not specifically relinquished were reserved. The Winters Doctrine, which followed in 1908, not only set the foundation for all Indian water law but also established the canons of construction in which any ambiguity in interpretation of treaties must be resolved in the tribes’ favor. In regard to water law, Indian water rights are defined by Federal rather than State law (contrary to the common *prior appropriation* doctrine), and the reservation of water rights is established by reservation of land. Allocated water must be sufficient to meet the purposes of the reservation.

As noted, a key principle is that reserved treaty rights can be exercised not only on the lands ceded by treaty but well beyond ceded boundaries in areas traditionally used for those activities at the time of the treaty. Therefore, only the tribe can define the extent of territory for which they wish to exercise their off-reservation rights. They are not limited by ceded territory boundaries. Another important point is treaty reserved rights on BLM public lands do not include land uses for religious ceremonies and do not include cultural resources such as archaeological sites.

Many ratified treaties do not recognize the application of off-reservation reserved rights to resources, indicating that in those cases tribal rights to the ceded lands were extinguished and reserved rights are limited to the reservation boundaries in cases where a reservation is established. In these situations, which are very common, desired access to and use of culturally important species by federally recognized tribes that do not have off-reservation reserved rights would be addressed in the context of government-to-government consultation and perhaps land use planning.

CHAPTER III. BUILDING AND MAINTAINING TRIBAL RELATIONSHIPS

A. Introduction

Successful relations with tribes are built upon the establishment of personal and professional relationships characterized by trust, respect, and mutual interest. Field offices are encouraged to utilize the tools and strategies presented in this chapter to establish deeper and more meaningful agency-tribal relationships. These relationships must be founded upon policies that encourage stable interactions and that seek out opportunities to interact positively with tribes across many program areas.

Examples of innovative, cooperative programs between BLM offices and individual tribes are presented in the following sections. Many tribal requests for gaining access to sites, gathering materials for traditional uses, and protecting sacred places can be addressed within the normal scope of multiple use management. But the BLM's success in addressing tribal issues depends a great deal on how strong its working relationships are with tribes, how trustful those relationships are, and how skillfully the agency has developed a respectful relationship over time.

B. Confidentiality

Native Americans may be reluctant to share sensitive information regarding resource locations and community-held values with agency officials for several reasons. First, historical relations among native people and others have led to a distrust of the Federal Government and the non-Indian public, especially related to the respect for Native American religion. Second, secrecy is often a central tenet of Native American religious beliefs. Third, many Native Americans fear that sharing information with outsiders could result in the abuse of sacred sites and the disruption of religious ceremonies.

Field offices often wish to express to Native Americans that sacred site details provided as part of consultation will be incorporated into the agency's management decisions but not disclosed to the public. What does it mean to promise confidentiality to the "maximum extent permitted by law"?

Native American reticence to share information stems from the fact that agencies have been partially hindered from effectively protecting sensitive information. Once in an agency's possession, the information may be subject to disclosure if it is requested under the 1966 Freedom of Information Act (FOIA; 5 U.S.C. 552) or distributed as part of publically available NEPA analysis.

The Supreme Court (see *Department of the Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 11 (2001)) rejected the possibility of an additional Indian trust FOIA exemption based on the United States-tribal trust relationship. So, if a member of the public requests an agency's sacred-site information, FOIA directly controls whether disclosure is

mandatory or whether the agency can withhold the information under an exemption. FOIA also governs whether information is subject to disclosure under NEPA.

The extent to which sensitive tribal information can be maintained as confidential depends on the degree to which it fits within one of FOIA’s nine exemptions. The two strongest candidates for protecting such sacred information are exemption 3 and exemption 6. Exemption 3 protects from disclosure matters “specifically exempted from disclosure by statute” and exemption 6 exempts “personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” These exemptions should protect most information about sacred sites. Whether or not all such information can be protected under them should be discussed with Regional Solicitors. (For more information, consult “Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management” by Ethan Plaut in *Ecology Law Quarterly* Vol. 36:137–166 at WEBSITE.)

The regulations (43 CFR 7) implementing the Archaeological Resources Protection Act (ARPA; 16 U.S.C. 470aa–470mm) also affords protection from public release. However, it is important to note that ARPA’s withholding authority has important limitations. First, the statute only authorizes withholding of information about “archaeological resources,” which include “material remains of past human life or activities which are of archaeological interest” and are at least 100 years of age. Second, even if the information involves an archaeological resource, if the State’s governor requests the information, the agency must provide it. Third, ARPA only applies to public surface. Thus, information gathered from BLM consultation regarding private or State surface is not protected under this statute.

Sections 101(d)(6) and 304(a) of the 1966 National Historic Preservation Act (54 U.S.C. 300101) also provide direction on disclosure of information. Although courts have not yet ruled that NHPA is a withholding statute under FOIA, it appears to be so. NHPA provides that the head of a Federal agency conducting NHPA consultation shall, after consulting with the Secretary of the Interior, “withhold from disclosure to the public information about the location, character, or ownership of a historic resource” if the Secretary and the agency conclude that disclosure would do any of three things: (1) cause a significant invasion of privacy; (2) risk harm to the historic resource, or (3) impede the use of a traditional religious site by practitioners. The main limitation with using this protection is that in order to withhold sacred site information under the NHPA, the BLM must first determine that the information pertains to historic properties—that is, properties included in or eligible for inclusion on the National Register of Historic Places (NRHP). The BLM then can only make a conditional promise to withhold information under the NHPA if there is a sufficient basis to conclude that the site or sites in question are historic properties.

State-adopted versions of the 1979 Uniform Trade Secret Act and the 1974 Privacy Act (5 U.S.C. 552a) also may provide limited degrees of protection. Other options to consider for protecting sacred site and other sensitive tribal information from public disclosure is to refrain from housing such information within any formal government system of records. Such data might be housed at tribal offices with joint use agreements allowing BLM officials with a need to know access to the files at tribal offices. Another possibility is to maintain such information

only in informal note form. Field offices should consult their Regional Solicitors regarding the application of these statutes and strategies for protecting from public disclosure sensitive information regarding sacred sites or places of traditional religious or cultural importance.

C. Building a Broad-Based Relationship

1. **Learn About Indian Tribes, Communities, and Leaders.** Managers and their staffs should take the time to learn about the tribes with which they will be working:

- What is their history?
- What is their aboriginal land base?
- When were they federally recognized?
- Were their reservation rights (if any) established by treaty or by Executive order?
- How are they organized?
- Do they have off-reservation treaty or other reserved rights?
- Are they related historically or culturally to other tribes in the area?
- Are there specific cultural customs that may have bearing on interactions and meeting protocols?

It is a good idea to read the most widely accepted ethnographic histories of the tribe and information produced by the tribe about itself and membership, often available on their website. Consider subscribing to tribal media and accessing websites or other media to keep informed about what is important to the tribes with an interest in your area, who the tribal leaders are, and what issues are of concern to them. Be open to receiving information from officials about their tribe, its customs, and history. Also, be aware that some information may be considered sensitive and should not be widely disseminated. Meet or contact tribal representatives, such as tribal history or cultural program leaders, to learn what sources of information about the tribe they recommend. This context will have a bearing on meetings and consultations with tribes and may affect how successful a BLM office is in its consultation efforts.

2. **Establish and Maintain Personal Relationships.** The most successful BLM-tribal working relationships are those built and maintained over a long period of time with the same individuals representing each party. A good example is the BLM Indian Land Surveyors (BILS) Program, whereby senior cadastral surveyors are stationed at BIA Regional Offices, consulting on a regular basis with tribal leaders and managers, individual Indians, and Alaska Natives regarding issues affecting BLM-tribal management of land boundaries (MLB) relations.

The BLM managers are encouraged to visit tribal councils and appropriate tribal leaders on a recurring basis. Face-to-face meetings help develop relationships, irrespective of

specific issues or proposed actions. Managers are encouraged to take advantage of these meetings to discuss how, when, and with whom follow-up consultation should occur. Attending economic enterprises, celebrations, dances, cultural festivals, sporting events, or feasts provides positive intercultural experiences that can build more personal, trustful relationships.

The BLM managers should assign tribal coordination duties to a limited number of employees with the goal of encouraging those employees to develop long-term professional relationships with tribes. These tribal liaisons or other staff play key roles in coordinating with tribal staff and representatives and often attend government-to-government meetings. These staff support field managers who have been delegated the authority to make binding decisions (see chapter IV. B). Suggested employee performance appraisal plan elements are provided in chapter III, section E.1.

When BLM managers and/or staff assigned consultation and coordination responsibilities retire, transfer, or have changes in job duties, tribal relationships can be adversely affected. Therefore, BLM managers should take appropriate actions to help minimize the turnover of personnel responsible for tribal coordination. Such actions might include assignment of accretion of duties, creation of appropriate career ladders, etc.

Potential disruptions due to staff turnover can be reduced or managed in a number of ways. New BLM managers and staff should take training on tribal consultation and relations, such as courses provided by the National Training Center (NTC). Several are available online. Tribal liaisons should brief managers shortly after they come on board regarding the history of local tribal relations, existing agreements, prominent issues, and resources of concern to the tribe that the BLM knows about. Tribal liaisons should accompany managers in meetings. New managers need to visit tribes soon after arrival to become oriented regarding tribal governmental structures and tribal perspectives and to ensure that regularly scheduled government-to-government consultations will not be disrupted.

Tribal governments hold elections for president or chairperson frequently, sometimes yearly. All BLM managers should quickly take the opportunity to meet with new tribal officials at the start of their tenure to discuss ongoing land use planning, land use actions, and proactive programs of interest to the two parties. Relationships between BLM personnel and permanent tribal staff, such as natural resources division directors, NAGPRA contacts, planning personnel, tribal historic preservation offices, and other program offices can help maintain continuity. Relationships with other tribal groups, such as the National Congress of American Indians, Alaska Federation of Natives, the Institute for Tribal Environmental Professionals, and other partnership groups can also help the BLM maintain up-to-date information regarding tribal leadership and contacts.

3. **Build Partnerships.** Managers and program leaders at all levels of the BLM should seek out opportunities to build partnerships with Indian communities. Each BLM program is to seek means of insuring that the management of public lands benefits from full

engagement with the original stewards of those lands through such means as cooperative agreements, interagency agreements, contracts, hires, and volunteers.

4. Collaborative Land Management.

- a. **Self-Governance Agreements and Compacts.** The 1975 Indian Self-Determination and Education Assistance Act (ISDEAA; 25 U.S.C. 450) provides for tribes to contract to take over certain Federal programs benefiting tribes. These self-determination act contracts are known as “638” contracts. Initially, this program only applied to the BIA and Indian Health Service. However, later amendments to the act (Pub. L. 100-472, 1988; Pub. L. 103-413, 1994) expanded self-determination contracting to all DOI agencies. Federal and tribal representatives negotiated regulations for the ISDEAA, which can be found at 25 CFR 900. In addition, there is an internal agency procedures handbook, which also resulted from Federal and tribal collaboration. As amended, Public Law 638 consists of five titles. Those applicable to the BLM include Title I, Indian Self-Determination Act, and Title IV, Tribal Self-Governance.

Under provisions of title I governing self-determination, contracting is mandatory. Contracts must be approved or declined within 90 days from receipt or they are automatically approved. Five declination criteria are established. Funding must be no less than currently spent on the program. Tribes receive a base amount plus indirect costs, support costs, and start-up costs for the first year.

In accordance with title IV on self-governance, tribes can take over multiple programs at once. Under Title IV, tribes negotiate and sign agreements, or *compacts*, with the Secretary of the Interior and then negotiate annual funding agreements with the agency. All federally recognized tribes are eligible for self-determination contracting, but tribes must apply and be approved by the Secretary to become self-governance tribes. Section 403(c) of title IV requires a *nexus* for compacting. Nexus programs are public land programs for which the tribe can establish a cultural, historical, or geographical connection. Compacting of nexus programs by the Secretary is discretionary.

Contractible BLM programs include Indian minerals and the field survey portion of cadastral surveys. The BLM maintains several self-determination contracts, including—

- Oil and gas inspection and enforcement with the Blackfeet, Rocky Boy’s Chippewa-Cree, and Crow tribes in Montana,
- Solid mineral function with the Crow tribe in Montana, and
- Field survey function of the cadastral survey program with many Native corporations in Alaska.

Self-governance agreements can build powerful collaborative relationships that are mutually beneficial. Under these agreements, tribes can provide a wide range of programs and services to their members such as law enforcement, education, road maintenance, road construction, forestry, fisheries, agriculture, other natural resources programs, and real estate services, such as appraisals. The Department's Office of Self-Governance administers the Self-Governance Program with respect to programs, services, functions, or activities administered by the BIA or other bureaus.

ISDEAA requires that Federal contracts and grants to Indian tribal organizations or for the benefit of Indians give preference, opportunities, training, and employment in connection to Indians to the greatest extent feasible. Field offices are encouraged to seek out additional opportunities to enter into compacting agreements. Managers and staff should consult the Internal Agency Procedures handbook and discuss the delegation of 638 responsibilities with their procurement staff and solicitors. (The Internal Agency Procedures Handbook for Non-Construction Contracting Under Title I of the Indian Self-Determination and Education Act (1999) can be found at WEBSITE.)

- b. **Fire and Aviation Programs.** The Fire and Aviation Directorate regularly partners with tribes and other agencies to maximize initial fire attack. The Fuels Management Program focuses on protecting communities and natural and cultural resources while providing for local economic opportunities. Hundreds of millions of dollars in recent years have significantly supplemented rural economies. Such contracts focus on the development of community wildfire protection plans, fuels treatments, biomass utilization, and consultations. Fire prevention and education teams consult with local residents to help reduce human-caused fires and to implement fire prevention and education programs (see chapter VII).
- c. **Cadastral Survey.** The BLM Cadastral Survey Program has established strong relationships with the BIA's Real Estate Services and Office of the Special Trustee for American Indians (OST) for the purpose of providing cadastral services on Indian trust lands. Principal components to this fiduciary trust program include: (1) developing the BLM Indian land surveyors program to install a highly experienced cadastral surveyor into each of the 12 BIA regional offices to expedite cadastral services to Indians; (2) creating a Certified Federal Surveyor (CFedS) Program to assist licensed land surveyors to continue their professional development and to implement a training program to certify hundreds of surveyors to work on Indian or trust lands, including training tribal surveyors; (3) improving the condition of the Public Land Survey System; (4) creating a cadastral Geographic Information System (CGIS) to graphically represent the records that compose land ownership and occupancy of the individual or tribe; (5) establishing cadastral survey project offices on reservations; and (6) providing title and mapping leadership in the Department's buy-back program.

An inventory of survey needs on Indian trust lands developed in collaboration with the BIA and OST prioritizes work based on trespass abatement, timber harvest, mineral leasing, and other priorities related to Indian trust assets and helps guide disbursement of funds into individual Indian monetary accounts (see chapter XV).

- d. **Cultural Resources Management.** In furtherance of the Inter-Agency Memorandum of Understanding (MOU) on the Protection of Indian Sacred Sites executed in 2012, the BLM should engage with tribal partners to build tribal capacity for the identification, evaluation, and protection of sacred sites. Tribes may be interested in entering into agreements to share capability, expertise, and insight into how to foster collaborative stewardship of sacred sites and other properties of traditional religious and cultural importance. Field offices should also consult with tribes when developing site-specific protection and management plans that pertain to sacred sites or properties of traditional religious and cultural importance. Following consultation and commitment in agreement documents, tribal expertise and capability regarding stabilization, patrolling, interpretation, or ethnographic insights into site use and significance can strengthen the management of cultural resources on public lands.

5. Procurement.

- a. **Small Disadvantaged Businesses.** The BLM is committed to increasing contracting opportunities for small business communities. Section 8(a) of the 1958 Small Business Investment Act (15 U.S.C. 14A) authorized the Small Business Administration to enter into prime contracts with Federal agencies and to subcontract the performance of the contract to small business concerns. Executive Order 11458, Prescribing Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise (34 CFR 4937), authorized the use of this provision to assist minority businesses and established the 8(a) program, as it is commonly called.

Many tribal businesses may be eligible to take advantage of their status as a Small Disadvantaged Business, an 8(a) participant, or a Historically Underutilized Business (HUB) Zone. Local procurement offices should contact tribal business offices and the Small Business Administration to encourage Indian tribal firms to bid on upcoming BLM contracts for which they may qualify. Small disadvantaged businesses must be owned by individuals who are “socially and economically” disadvantaged and meet other conditions as defined by regulations. (See 13 CFR 124.104.)

The 8(a) program assists in the expansion and development of existing, newly organized, or prospective profit-oriented small disadvantaged firms. Small businesses may apply for the section 8(a) program if they are owned and controlled by one or more persons who can provide evidence of having been deprived of the opportunity to develop and maintain a competitive position in the economy because of social and economic disadvantages. In Alaska, the corporations formed by ANCSA were legislatively approved for inclusion in the 8(a) program.

The HUB Zone program stimulates economic development and creates jobs in urban and rural communities by providing Federal contracting preferences to small businesses. These preferences go to small businesses that obtain this certification by employing staff who live in a HUB Zone and establishing a “principal office” in one of the specifically designated areas.

- b. **1910 Buy Indian Act (25 U.S.C. 47).** Under this act, the Secretary of the Interior has broad discretionary authority to promote the purchase of the products of Indian Country. Though mandatory for the BIA, the act is discretionary for the BLM. Its regulations were issued in July 2013 (see 48 CFR 1401; 1452; and 1480). This act provides further authorization for BLM to offer procurement contracts to Indian-owned businesses in their regions.
- c. **Indian Tribes Qualify as Not-for-Profit Organizations.** The Internal Revenue Service has determined that federally recognized tribes qualify as not-for-profit organizations; thus, contributions to them may be tax deductible. Their status as not-for-profit organizations allows tribes to participate in, or apply for, special grants and awards restricted to such organizations. Field offices must check with their procurement offices to pursue opportunities to utilize such grants to advance common goals and program interests.
- d. **Contracting for Services, Expertise, or Products Needed for Decisionmaking.** The BLM may require land use applicants to obtain information from tribes needed to fulfill its NEPA or NHPA requirements as a condition of the permit or authorization. Information may include knowledge about the management of natural resources or cultural properties, such as current or past land use practices, resource utilization, or distribution of natural resources. In addition, the BLM itself may contract or pay for tribes and Indian individuals to produce reports. (See chapter V on land use planning and chapter XI on cultural resources for more information on NEPA and NHPA requirements for decisionmaking and compliance.) The BLM’s ability to obtain this information may be impossible without assistance of an Indian tribe or tribal representative. Indian tribes often have occupied lands near or utilized portions of public lands for long periods of time. Their insights into past land conditions and the impacts of human use and occupation on ecosystems extend back in time for hundreds of years. Thus, their knowledge of natural and human interactions on the landscapes managed by the BLM might be shared with the BLM through—
 - Studies of plant or animal communities and how past land practices affected species diversity and distribution;
 - Fire regime studies that consider how frequently landscapes were deliberately burned by Native populations;

- Forestry studies that seek an understanding of pinyon-juniper canopy composition back through time based on ethnographic accounts of pinyon nut harvesting; and
- Ethnographic reports, National Register nominations, or other specific information regarding historic properties, trails, sacred sites, and landscapes.

6. Human Resources.

- a. **Introduction.** Field offices should consult their local servicing personnel office regarding which hiring authorities, tools, and programs may be used to attract underrepresented Native Americans, either directly to the BLM employment rolls or indirectly through a partner entity. Federal laws, Executive orders, and implementing regulations from the Office of Personal Management and the Equal Employment Opportunity Commission mandate certain programs to ensure equal opportunity in employment and equal treatment of employees. (See, for example, Executive Order 13592, Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities (3 CFR 13592; December 2, 2011)). The Native American Program requires special emphasis in providing employment opportunities for Indian people regarding Federal employment opportunities. The ISDEAA establishes Indian preference hiring for Federal programs that are designed to benefit Native people. This mandate is most often applied within the BIA and Indian Health Services but is not limited to these agencies. It requires that Federal contracts to Indian organizations or for the benefit of Indians give preference and opportunities for training and employment to Indians to the greatest extent feasible.
- b. **Employment Opportunities for Native Americans and Alaska Natives.** The BLM should develop Native American recruitment programs, including the Pathways Program, and participate in career days with tribes and Indian schools. This assists in attracting qualified personnel to the agency so that its workforce can be more representative of the nation's cultural diversity. These recruitment efforts should be focused in tribal communities near lands managed by the BLM for which tribes have cultural, economic, or religious interests.

Although the BLM does not utilize Indian preference hiring per se, the agency does allow self-identification for employment statistics. ANILCA Section 1308 (applicable to land managing agencies in Alaska) authorizes the hiring of individuals with specialized, localized knowledge or expertise.

Internship opportunities for tribal youth as well as challenge cost-share projects in partnership with tribes and the BIA offer additional opportunities to bolster Indian employment while facilitating mutually supported projects. Several authorities and programs are currently in place that can assist in these efforts, including the Special Emphasis Programs. All BLM offices should consider the applicability of the

following internship programs to boost Native American and Alaska Native hires within the agency:

- The BLM Intern Not-to-Exceed hiring authority allows a current student to be temporarily appointed to Federal service for 1 year or less via competition.
- Schedule D BLM Career Intern hiring authority provides current students with paid opportunities to work in Federal agencies and explore Federal careers while still in school.
- The Schedule D BLM Recent Graduates authority allows the agency to appoint individuals who recently graduated from qualifying institutions or programs to an intense 1-year on-the-job training and developmental program in the qualifying occupational series or career path.
- DOI Secretarial Direct Hire Authority for Resource Assistant Internship (DHA-RAI) Program can be used to attract and recruit underrepresented groups and to fill mission-critical and hard-to-fill occupations. These individuals are often not on the employment rolls of the BLM. These internships are for a minimum of 11 weeks of full-time work.
- Public Land Corps Special Hiring Authority programs provide work and educational opportunities in the areas of natural and cultural resource conservation and/or development. They are geared toward individuals in the 16–25 age range. The Public Land Corps program allows the BLM to partner with organizations to employ economically, physically, or educationally disadvantaged youth, using a contract, financial assistance, or cooperative agreement.

Programs such as these increase the technical knowledge of tribal members and lead to the employment of Indian youth within the BLM. In addition to meeting the agency's affirmative action goals, providing educational opportunities and employment to tribal members is a powerful demonstration of the BLM's sincerity in establishing positive long-term working relations with tribes.

A good example of this is Arizona's American Indian Youth Cultural Resource Internship Program. Authorized through a series of cooperative agreements and individual task orders since 2010, this program recruits tribal youth to conduct a variety of historic preservation activities within the Grand Canyon-Parashant National Monument. Southern Paiute, Dakota, and Navajo youth serve as interns and crew chiefs. They camp in the monument conducting inventory, recording sites, processing artifacts, and completing ceramic and clay analyses. Sessions last for 10 weeks. The national monument managers (National Park Service (NPS) and BLM) provide funding, project supervision, and logistical support while the Kaibab Band of Paiute Indians supplies the student interns, crew chiefs, and vehicles. This partnership exposes Indian youth to a

variety of professional agency personnel who encourage them to consider land and resource management careers. It enhances Federal agency knowledge of traditional Southern Paiute culture and traditions while preparing Indian youth for higher education opportunities and careers in public land management.

A more traditional internship program operates between the Montana State Office and the Salish-Kootenai College for the purpose of providing internships for students in a tribal college. This Cooperative Agreement funds a nontraditional program for educating natural resources students. It strengthens student and community knowledge about the BLM. It has increased student interest in career opportunities within the BLM and aided agency efforts to diversify its workforce.

See WEBSITE for more complete description of these programs, copies of master cooperative agreements, and the most recent task orders.

7. **Education.** The BLM can propose and negotiate cooperative agreements between the agency and tribes in the fields of education and employment. The BLM should seek out partnerships with Indian educational institutions to assist in the development of curricula or implementing cooperative education programs. For instance, online and distance learning programs can be developed in partnership with tribes to offer certificates in natural and cultural resources management. Field offices should ensure that Indian schools and children are included in their education outreach programs.

Fully accredited tribal colleges and universities located in the United States are eager to provide practical experiences and opportunities for their students. The BLM and tribal colleges can partner to establish opportunities for students to conduct research and become involved with public land management issues. Whether the project is documenting threatened or endangered plants or animals or conducting ethnographic studies, BLM-tribal college partnerships offer positive and enriching opportunities for the agency and tribes to appreciate the balance between multiple land use management and tribal cultural and economic interests.

Several current BLM-tribal partnerships support educational opportunities for tribal youth. They create more meaningful educational curricula for young Native Americans and strengthen their opportunities for meaningful employment.

Examples include Bridging the Divide: A Natural and Cultural Resource Field Camp for Tribal High School Youth. Partners include the Montana State Office, the Department-BLM Youth Corps Project, the Shoshone-Bannock Tribes, and Chief Dull Knife College. The program seeks to develop outdoor curricula through outdoor experiences and scientific exploration that connect tribal students to their natural and cultural heritage. Curricula and lesson plans provide teachers with educational background and tools to explore various aspects of natural/cultural resources management. The educational materials will be made available on agency and tribal websites for use or adoption by

outdoor education programs, educators, and agencies. In Fiscal Year 2014, for example, the focus was on wet meadow ecosystems and traditional uses of blue camas.

(See WEBSITE for actual agreement documents and detailed program descriptions.)

8. **Training Opportunities.** Secretarial Order 3317 requires that bureaus within the DOI develop and deliver training to enhance mutual understanding of cultural perspectives and the administrative requirements between tribal and Federal officials. More specifically, the Secretary’s Policy on Tribal Consultation commits the Department to develop training that will—

- Promote consultation, communication, and collaboration,
- Reinforce the Department’s duties,
- Explain the Department’s legal trust obligations, and
- Provide knowledge, skills, and tools necessary for collaborative engagement.

The Secretary’s policy specifically charges the Department of the Interior University with the responsibility to develop these courses and to encourage tribal representatives to participate in them together with Federal employees. Managers and staff should also complete the most recent tribal consultation training available through the Internet from either DOI Learn or other sources. The BLM NTC also developed a learning module on tribal consultation for managers and another on tribal consultation in Alaska. The OST also prepared a course on United States-tribal trust for the NTC. An additional training course, Working Effectively with Tribal Governments, was developed by the Department and the Advisory Council on Historic Preservation (ACHP). Training is also available outside the Federal Government. The BLM should provide tribal governments with the same access to its training programs as it provides to other Government agencies.

Managers and program leaders involved with tribal issues and tribal consultation should complete the most recent training courses on tribal relations offered for Federal Government/DOI/BLM employees and document this within their annual individual development plans. Websites listing current training opportunities include: <https://doiu.doi.gov/catalog>; <https://doiu.doi.gov/niptc>; and <http://www.blm.gov/ntc/st/en.html>.

BLM offices should invite tribes to attend and participate in BLM training courses related to NEPA, lands, right-of-way (ROW), cadastral survey, and cultural resources. Holding periodic joint training courses may familiarize BLM staff with tribal cultural and governmental structure and familiarize tribal leaders, staff, and members with BLM’s legal authorities, mission, history, and programs. Training courses should be tailored to address issues of local interest to tribes; both BLM and tribes can benefit from a greater understanding of how Federal programs can best coordinate and consult with tribal

governments. As funding allows, the BLM may send tribal staff to training at the NTC. Access to online training course should also be made available to tribes. The dialogue and multicultural perspectives that result from such exchanges enhance both the effectiveness of training as well as government-to-government consultation.

A number of tribes offer their own cultural awareness training, and BLM offices should take advantage where they are available. Examples include training offered by the Confederated Tribes of the Warm Springs, Confederated Tribes of the Umatilla Indian Reservation, and Shoshone-Bannock Tribes. Such classes strengthen BLM's staff understanding and appreciation of tribal traditional, cultural, and religious values, as well as treaties and other tribally reserved rights on Federal lands. Managers should encourage BLM staff to attend gatherings sponsored by tribal entities, tribal consortiums, or nonprofits offering specialized knowledge and addressing issues important to local people (such as the Alaska Federation of Natives annual conference).

States are encouraged to cohost workshops with tribes concerning tribal relationships, traditional cultures, and consultation. By including presentations by tribal and BLM leaders and displaying traditional technologies and crafts, a mutual understanding of traditional use areas, aboriginal homelands, and the full scope of tribal interests can be enhanced. One example follows.

Oregon. Eugene District. Interagency-Intertribal Sponsored Awareness Forum. In coordination with the Willamette National Forest and four tribes, the Eugene District co-hosted an all-day event for 100 Forest and BLM employees to hear about Indian law, local tribal history, and agency/employee responsibilities to tribes. Tribal chairpersons and members from the Confederated Tribes of Grand Ronde, Confederated Tribes of Siletz Indians, Confederated Tribes of Warm Springs, and Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians participated in a facilitated panel discussion and shared their tribes' histories. Tribal artists and traditional craft specialists participated by providing presentations and displays. Attendees were encouraged to engage and ask questions and to consider how their jobs contributed to the stewardship of lands and resources in which tribal members retain an interest.

The BLM offices may extend invitations to tribal political and cultural leaders to address BLM offices. This interaction could be part of Native American History Month activities, though it should not be limited to those occasions. These are excellent means to enhance the agency's appreciation of an individual tribe's culture, history, and living traditions. Opportunities may also exist to partner with other Federal agencies to sponsor tribal awareness forums to learn about Indian law, local tribal history, and agency responsibilities toward tribes.

D. Financial Support for Tribal Participation in BLM Decisionmaking

In a departure from previous manual and handbook direction, the BLM can now provide funding to tribes to facilitate their participation in the NEPA and NHPA processes under several circumstances. See also MS-1780, section 1.6.B, and H-1780-1, appendix 1. *It must be emphasized that this new compensation policy allows for compensation but does not mandate it.* Such compensation for consultation is not legally required; however the BLM has authority to provide it directly under certain circumstances, or require that compensation needed to acquire information necessary for the BLM to make decisions regarding land use applications or authorizations be provided by third parties.

The BLM may utilize its own appropriated funds or cost reimbursable accounts to reimburse tribal members for travel expenses to attend meetings in connection with NEPA, FLPMA, or the NHPA Section 106 processes or time taken to discuss proposed projects, cultural resource site management, or traditional use areas. (See the ACHP Memorandum, Fees in the Section 106 Review Process, July 6, 2001, www.achp.gov/feesin106.pdf in WEBSITE.)

E. Accountability

1. **Employee Performance Appraisal Plan Considerations.** Line managers and those staff members routinely engaged in actions with tribal implications must be evaluated regarding their efforts to build tribal relations and carry out effective consultation as part of their employee performance appraisal plan (EPAP) evaluations. Such annual performance reviews should include elements covering affirmative action, joint training, cooperative education and outreach, cooperative management programs, meeting the BLM's trust responsibilities, and consultation, as appropriate.

Check the most current version of the DOI Strategic Plan to tie in activities and accomplishments to the current identified mission areas of emphasis (e.g., 2014–2018 Strategic Plan, Mission Area 2, Strengthening Tribal Nations and Insular Communities, which includes several goals: Goal 1, Meet our Trust, Treaty, and Other Responsibilities to American Indians and Alaska Natives; Goal 2, Improve the Quality of Life in Tribal and Native Communities; and Goal 3, Empower Insular Communities). Many activities carried out by managers and staff support these mission area goals through Indian treaty rights, subsistence rights, supporting self-governance and self-determination, creating economic activities, strengthening Indian education, and creating economic opportunities.

While EPAP strategic goals and individual performance measures must be tailored to fit individual needs and local program emphases, suggested language for managers' EPAPs follows:

- Seeks opportunities to develop ongoing partnerships with tribes and to ensure that: land use decisions reflect thorough and well-documented government-to-government consultation; consultation with tribes begins early in the decision

process and is ongoing; and resulting decisions are documented to tribes and demonstrate how tribal issues and concerns were taken into account.

- Facilitates tribal access for tribal religious and traditional uses; maintains a professional staff capable of carrying out timely and effective government-to-government consultation and who seek out and establish educational, training, interpretive, contracting, fire, cadastral, or minerals programs of joint interest and benefit to tribes and the BLM.
 - Takes steps to fully utilize information gathered from tribes regarding traditional uses, access concerns, and resource issues and protects such sensitive information to the extent allowed by law from public disclosure.
 - Personally participates in tribal consultation and establishes professional relations with tribes, tribal governments, and tribal staff which facilitate long-term, positive partnerships involving land management, resource protection, and economic development.
 - Ensures that quality cadastral products and/or services are maintained for Indian Country. Promotes the benefits of cadastral services to improve the stewardship on Indian trust and restricted lands. Oversees effective technical assistance, training, and support on land survey issues for Indian lands and minerals. Assists the BIA in collecting survey needs and requests from trust and restricted landowners and tribal realty service providers and ensures that the delivered surveys meets the needs of the requesting party.
2. **DOI Reporting Requirements on Tribal Consultation.** Secretarial Order 3317 contains provisions concerning consultation reporting to the Secretary at the end of the fiscal year:

“On an annual basis, Bureaus and Offices shall report to the Secretary the results of their efforts to promote consultation with Indian tribes. Reporting is intended to be comprehensive and may include, but is not limited to, the scope of consultation efforts, the cost of those efforts, and the effectiveness of consultation activities. As part of its annual report, Bureaus and Offices shall provide a comprehensive listing of topics on which consultations were held, training, innovations, and the engagement of senior leadership in these efforts. Where possible, such reports shall include feedback from Indian tribes with whom the Bureau or offices has consulted.”

Managers are responsible for ensuring that such reporting encompasses all programs and must coordinate with the BLM’s Tribal Liaison Officer regarding exact content and formatting for data submissions. Effectiveness of consultation can be measured in an assessment of the amount and extent of dialogue that took place; the degree to which tribal feedback affected planning or land use decisions; sentiment of tribes regarding final decisions; and ongoing tribal involvement in mitigation, monitoring, or reclamation activities.

CHAPTER IV. TRIBAL CONSULTATION GENERAL CONSIDERATIONS

A. Distinguishing Between Notification, Coordination, and Consultation

The BLM involvement with tribes includes three important and distinct forms of interaction.

1. **Notification.** Notification is a one-way form of communication that provides information, data, or reports to tribes by the BLM, often leading to tribal consultation if the tribe so requests. Notification is usually associated with a formal process such as initiation of land use planning or environmental impact statement (EIS) efforts, or is related to the notification requirements of other authorities such as NAGPRA.

Where legally required notification is delivered through certified mail or delivery service, a return receipt or delivery confirmation is adequate demonstration that BLM has satisfied the notification requirement. With some tribes and individuals, however, a notice may not be deliverable for a variety of reasons. A receipt or report showing that delivery was not made does not meet the BLM's requirement. To avoid false starts and delays, BLM managers and staff should select a notification strategy that has a high expectation of success.

2. **Coordination.** Coordination is generally conducted with tribal representatives such as a Tribal Historic Preservation Officer (THPO), environmental professionals (e.g., air program directors and immediate staff), and any other personnel or officials who are defined as representatives by the tribes. These representatives are frequently contacted in advance of an action or policy, guidance, or rulemaking in which the BLM thinks tribes will have an interest. The purpose of coordination, among other things, is to: (1) assist BLM in assessing whether a particular action or decision may affect tribal interests; (2) involve tribes early in the action and/or decision development process to ensure meaningful tribal input; and (3) assist BLM in determining where consultation with elected or duly appointed tribal leaders may be appropriate. Tribal representatives may indicate that an action or decision does not affect tribal concerns or interests and that consultation is not necessary. This may help to streamline the consultation process.
3. **Consultation.** Consultation is designed to ensure meaningful and timely meetings or discussions with elected or duly appointed tribal leaders (or their authorized representatives) and BLM decisionmakers as they pertain to proposed BLM actions. Consultation is an opportunity for tribes to discuss the potential effects of planned agency actions on tribal interests and to make recommendations to the agency.

Fundamental principles reflected in Secretarial Order 3317 specify that—

- DOI agencies will demonstrate a meaningful commitment to consultation by identifying and involving tribal representatives in a meaningful way early in the planning process;

- Consultation is a process that aims to create collaboration with Indian tribes and to inform Federal decisionmakers—an exchange of information which promotes enhanced communication that emphasizes trust, respect, and shared responsibility; such communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process; and
- DOI agencies will seek to promote cooperation, participation, and efficiencies in the consultation process to ensure that future Federal actions are achievable, comprehensive, long lasting, and reflective of tribal input.

The BLM considers consultation to mean direct two-way communication between the agency and an American Indian or Alaska Native tribal government regarding proposed BLM actions. The purpose of consulting is to obtain substantive tribal input and involvement during the decisionmaking process. Sometimes the consultation process itself, through sharing and discussing cultural and natural resource information, can enrich and reinvigorate tribal knowledge and appreciation for historic properties, resources, and sites located on public lands.

The precise nature of the interaction should be mutually agreed to between individual tribes and the BLM through consultation. It will vary depending on the organization of tribal governments and the scope and complexity of the land management issues being discussed. The BLM offices are encouraged to develop MOUs with individual tribes that establishes procedures to ensure that adequate good faith consultation has occurred.

Though statutes and case law do not define what legally required consultation is, they do identify what it is not. Sending a letter to a tribe, receiving no response, and then considering this effort sufficient would not constitute the kind of dialogue that the tribes or courts would consider a good faith effort. (See MS-1780, Tribal Relations, Appendix 1, Judging the Adequacy of Tribal Consultation, for a detailed discussion.)

All land use planning requires tribal consultation but some land use actions may not. Consultation is necessary on land use actions when the BLM manager determines that the nature or location of a proposed land use could affect tribal interests or concerns. This determination should be an informed one, based on previous consultations and agreed-upon arrangements with the tribes involved.

Where trust assets are not involved, the public land decisionmaking must consider—but not necessarily conform to—a tribe’s requests. The BLM manager must make an affirmative effort to consult and must consider tribal input fairly, but decisions are based on multiple-use principles and a complex framework of legal responsibilities, not on property principles and the obligations of the trustee to the trust beneficiary. An exception is when the effects of actions on public land reach tribal lands and resources, such as effects on water quality downstream on an Indian reservation, then a true fiduciary trust situation may exist.

Consultation regarding BLM decisionmaking always includes these obligations—

- Identifying appropriate tribal governing bodies and individuals from whom to seek input;
- Conferring with appropriate tribal officials and/or individuals and asking for their views regarding land use proposals, changes in rules or regulations, policies and initiatives, or other pending BLM actions that might affect tribal cultural practices, economic development, access to valued locations, or other aspects of tribal life;
- Treating tribal information as a necessary factor in defining the range of acceptable public land management options; and
- Creating and maintaining a permanent record to show how tribal information was obtained and used in the BLM’s decisionmaking process.

Appendix 5 provides guidance for the preparation of a tribal consultation strategy. Such a strategy can help ensure that the roles of key players are identified and that the goals, target audiences, key messages, strategies, and tactics are identified. Whether or not a proposed action or land use justifies preparation of a formal consultation strategy, Appendix 5, Example of Contents for Tribal Consultation Strategy, should be reviewed to make sure that consultation efforts take into account all the factors that will condition its success.

B. BLM Representatives in Consultation

1. **Importance of Line Manager.** Government-to-government consultation requires the participation of a line manager and the tribal chairperson or other representative official designated by the tribal chair or council. For the BLM, this consultation responsibility generally falls to that line manager with the closest relationship to the concerned tribe or to the decisionmaking authority for the particular action at hand.

The BLM line managers, staff, and tribal authorities must understand the role of delegated authority in the consultation process. (See MS-1203, Delegation of Authority, which is posted at WEBSITE). The Secretary of the Interior has broad powers to delegate authority that derive from 5 U.S.C. 302, Reorganization Plan No. 3 of 1950, etc., and that authority may be delegated through the Department’s management hierarchy to the lowest practical level. However, an officer who delegates or re-delegates authority does not divest himself or herself of the power to exercise that authority, nor does the delegation or re-delegation relieve that official of the responsibility for actions taken pursuant to the delegation.

In most instances, the person with the most detailed knowledge and understanding of local tribal issues will be the local field office manager, who is often the first to contact a tribe on any issue. It may be necessary to explain the legal basis and robust nature of

BLM delegations of authority to assure Indian tribes that their engagement with a local BLM line manager is time well spent with a decisionmaker fully authorized to represent higher levels of authority within the agency and department.

While day-to-day consultation generally takes place at the field office level, state directors and the Director have important consultation responsibilities as well (see MS-1780, Tribal Relations, Section 1.4, Responsibility). Participation by State and Washington Office officials may be necessary for complex or highly controversial projects and is at the discretion of the officials involved.

2. **Role of Staff.** The BLM program specialists and staff play an invaluable role in gathering information and briefing their managers on issues affecting BLM-tribal relations. They provide professionally sound information, recommendations, and advice regarding tribes' traditional and ongoing uses of public lands, practices and beliefs, locations and uses of importance on public lands, and other information necessary for consultation. They interact frequently with their tribal counterparts within tribal governments to facilitate compliance with laws and regulations requiring tribal consultation and input into Federal decisionmaking. Staff often arranges consultation meetings and meets with tribal staff to discuss issues once BLM managers and tribal officials decide it is time to consult on a matter. They obtain and share data needed for decisionmaking. They may identify opportunities for cooperative agreements or other proactive relationships in the fields of education, outreach, and research with tribes. They play key roles in contracting and the management of sensitive information. BLM staff, however, cannot represent the BLM in government-to-government interactions.
3. **Role of Third Parties.** 36 CFR 800.2(c)(4) allows Federal agencies to delegate to their applicants the responsibility to initiate consultation. However, the BLM cannot unilaterally delegate its tribal consultation responsibilities to an applicant. Indian tribes are not obligated by statute or regulations to consult with an applicant. If an Indian tribe agrees to allow the BLM to authorize an applicant to initiate or carry out NHPA Section 106 consultation activities for a particular program or undertaking, such delegations must be articulated in written agreements between the BLM, the tribe(s), and the applicant. Such agreements must contain a provision requiring the BLM to reenter the consultation process at any time at the request of the Indian tribe.

Contractors cannot negotiate, make commitments, or otherwise give the appearance of exercising the BLM's authority in consultations. Therefore, as a general rule, consulting firms working for land use applicants may be approved by BLM to carry out the following limited and restricted activities to facilitate consultation—

- Gathering and analyzing data,
- Preparing reports,
- Arrange meetings,

- Facilitating field trip logistics, and
- Managing compilation of data and records as part of the administrative record.

While these steps are helpful, the BLM ultimately retains the responsibility to consult with Indian tribes on a government-to-government basis. It cannot be transferred by the BLM to other entities.

C. Identifying Tribes and other Indian Parties for Consultation

1. **Individual Tribes.** Specific consultation should focus on tribes known to have concerns about the geographic area under consideration and the particular resources and/or land uses involved. In addition, nonresident tribes with historic ties should be given the same opportunity as resident tribes to identify their selected contact persons and their issues and concerns regarding the public lands.

The BIA publishes an annual list of federally recognized tribes in the *Federal Register*. In addition to the list of recognized tribes, some area offices of the BIA periodically update supplemental lists of non-recognized Indian groups petitioning Federal recognition. They may be contacted to obtain additional information on tribal governments and other Native American organizations in the general vicinity. Non-recognized Native American groups, minority political factions, and individual tribal members within Indian communities may also be identified as interested parties on the same basis as interested members of the public.

2. **Points of Contact within Tribes.** Consultation requirements and procedures, including the identification of the appropriate tribal contact, vary according to the legal basis for consultation and any agreements the BLM has executed with tribes. For each tribe, BLM offices should develop and maintain current lists of—
 - Tribal officials (e.g., chairperson, president, council members, etc.),
 - Appropriate staff contacts for specific programs and issues (e.g., energy development, natural resources, lands, cadastral survey, economic development, THPO, etc.),
 - Traditional cultural or religious leaders, and
 - Lineal descendants of deceased Native American individuals whose remains are discovered on public lands or are in Federal possession or control.
 - a. **Tribal Officials and Staff.** Initiate government-to-government consultation through the presiding government official of the Indian tribe (e.g., the tribal chair or governor). Initial discussions should attempt to determine which individual(s) will be officially authorized to serve as the point of contact and the representative/spokesperson for the tribe for each of the various matters relating to the BLM. The BLM's consultation partners must be individuals who are authorized to speak for the

tribe relative to the matter at hand. It is useful to obtain this in writing or in the form of a specific tribal resolution. This protects both sides from unauthorized discussion.

While tribal officials are the conduit for government-to-government relations, other tribal staff and members should be included in the process. Although consultation partners may vary depending on which statute prompts a particular consultation episode, courtesy and protocol require that tribal governments be notified and given an opportunity to respond whenever the BLM intends to bring a tribal subunit or an individual tribal member into a consultation relationship. For example, BLM offices may need to contact local Navajo chapter houses about specific local projects; if they do so, they should also notify the Navajo Nation headquarters in Window Rock, Arizona.

The BLM offices should provide written summaries of face-to-face meetings so that tribal officials can understand what the BLM heard from tribal staff and provide the tribe with an opportunity to clarify the issues if tribal officials feel that tribal positions are not being accurately communicated. Meeting notes may be prepared by BLM staff or court reporters, if tribes prefer, and BLM funding allows for the contracting of such services. Such documentation provided to tribal officials should also be copied to those tribal staff who are working with BLM staff, including the THPO, environmental managers, biologists, economic development staff, and others.

If tribal officials inform the BLM that it is acceptable for the agency to correspond directly with their attorneys, the BLM must respect this request and must prepare correspondence to the attorneys with a copy provided to the elected tribal officials.

- b. **Traditional Cultural and Religious Leaders.** Official representatives of the tribe should be the first source for identifying traditional cultural and religious leaders and other individuals with specialized knowledge. These may change after tribal elections or a change in tribal administration. Names of persons known to be traditional cultural or religious leaders can sometimes be obtained from BIA area or agency offices; other Federal, State, and local government agencies that provide programs and services to Native Americans; local Native American cultural organizations and Native American ombudsman organizations; ethnographers, ethnohistorians, and anthropologists in universities and professional organizations; and other sources.
- c. **Lineal Descendants.** For purposes of NAGPRA, lineal descendants of named Native American individuals have legal priority for repatriation or transfer of human remains, funerary objects, and sacred objects. A lineal descendant is an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or by the common law system of descent to a known Native American individual whose remains, funerary objects, or sacred objects are being requested. This standard requires that the earlier person be identified as an individual whose descendants can be traced (see 43 CFR

10.14(b)). In other words, lineal descendants may be identified only when a personal identity (i.e., name) is known of the Native American human remains, individual buried with the funerary objects, or individual that owned the sacred objects. The BLM may not readily know the identity of lineal descendants without some research and may make initial contact through the larger unit of which they are members (tribes, communities, etc.) or through genealogical information such as descent records held by the appropriate BIA agency office.

3. **Coordinating Consultation Across Administrative and Jurisdictional Boundaries.**

BLM offices should seek partnership opportunities with other Federal agencies to jointly meet with tribes to discuss land management issues relevant to both agencies and multiple tribes. As an example, the Oklahoma Field Office participates in the annual U.S. Forest Service “To Bridge a Gap Conference,” which provides the BLM with a chance to meet with a wide variety of tribal leaders. Joint interagency funded tribal liaison positions may carry out such consultation at a savings to the Federal agencies.

Interstate pipelines, major infrastructure projects, and regional EISs, such as the Final Programmatic Impact Statement for Solar Energy Development in Six Southwestern States (Solar PEIS), provide opportunities for BLM offices to consolidate and coordinate tribal consultation. Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects (3 CFR 13604; March 22, 2012) requires such coordination to facilitate the review of nationally or regionally significant infrastructure projects. Rather than multiple states contacting tribes, such as the Hopi or Navajo, that frequently have concerns and interests in several states, BLM offices are encouraged to establish a lead BLM office to coordinate all consultation with tribes having interests across an interstate region. Such arrangements should be negotiated and stipulated in formal agreements signed by the tribes and the multiple BLM offices and the State Historic Preservation Officers (SHPO) involved.

4. **Multi-tribal Organizations.** Official tribal consultation takes place as part of government-to-government relations between the BLM and individual federally recognized tribes. However, tribal relations can also be enhanced through the development of positive working relationships with tribal consortiums. Examples of such organizations include the All Indian Pueblo Council, Affiliated Tribes of the Northwest Indians, California Association of Tribal Governments, and Intertribal Council of Arizona. Multi-tribal organizations may be willing to house and safely store sensitive ethnographic information.

Official repatriation or transfer of Native American human remains and/or cultural items subject to NAGPRA can only take place with either lineal descendants or claimant Indian tribes. However, tribes often work together on NAGPRA consultation and claim activities. Therefore, coordination of NAGPRA activities may occur with a multi-tribal organization, although such cannot replace government-to-government consultation.

BLM field offices should maintain working relationships with such organizations and are encouraged to make presentations to them at their meetings. As discussed in the Secretary's 2011 policy governing consultation with Indian tribes, it is appropriate to hold open tribal meetings for groups of tribes to attend to discuss national or regional issues. This can be an efficient means of communicating BLM activities to groups of tribes. Individual government-to-government consultation with individual tribes will still be required; however, attendance by BLM tribal liaisons, staff, and line managers fosters communication with a wider tribal audience than might otherwise be possible.

National tribal partnership groups, which include representatives of tribal governments, can be contacted as well. Their input may be insightful for large planning initiatives or large-scale EISs. Examples of such organizations include—

- National Tribal Air Association,
- National Tribal Toxics Council,
- National Tribal Water Council,
- United Southeast Tribes,
- National Tribal Operations Council, and
- Regional Tribal Operations Councils.

D. When in the Decisionmaking Process to Start Consultation

When it becomes apparent that the nature and/or the location of an activity could affect Indian tribal issues or concerns, the BLM manager should initiate appropriate consultation with potentially affected Indian tribes, as soon as possible, once the general outlines of the land use plan (LUP) or the proposed project-specific land use decision have been determined.

Although land use planning is the best time to identify landscape-scale issues and other broad tribal concerns, the BLM must address tribal concerns when approving specific land use authorizations and making other decisions, such as revising significant policies, rules, and regulations.

E. Preparing and Initiating Tribal Consultation

The first step to prepare for consultation is to identify a clear purpose for consultation and identify with whom such consultation should take place. It is critically important to know the tribes and the people with whom you are consulting.

The second step is to review the record of what is known about the relevant concerns of tribes who may wish to consult. Recorded sources that should be reviewed include—

- Cultural history of the tribe up to present (lands, treaties, etc.),

- Governmental organization,
- Primary tribal officials and staff contacts,
- Previous correspondence with tribes,
- Records of previous consultation,
- Public participation records for LUPs,
- Plan protest records,
- Transcripts of public hearings, and
- Minutes of public meetings.

Pay particular attention to land claims; boundary disputes; water rights; hunting, fishing, and gathering concerns; past and current tribal economic development proposals; ethnographic studies; and published and unpublished documentary sources. Such research should be undertaken to identify traditional use areas or tribal development plans that are closely associated with lands or resources which may be affected by BLM actions.

The third step is to directly contact tribal governments. The first contact is by letter to the chief executive of the tribe with follow-up telephone call(s) if field offices suspect that mail service may not be reliable or if there is a potential for tribal concern based on the conclusions of step 2 above. If the tribe has previously designated a representative to serve as a BLM contact, the BLM should send a courtesy copy of the BLM letter to that individual.

Unless constrained by an emergency situation, such as emergency stabilization and rehabilitation necessitated by wildfires, the BLM field offices should allow for tribes to comment at least 30 days after their receipt of documentation about a proposed action. This should be considered a minimum timeframe which should be lengthened where possible, especially if tribal council schedules are unlikely to be able to accommodate BLM scheduling needs.

The fourth step is to follow up with tribal representatives. If tribal representatives have been designated to consult with the BLM, the agency should follow its initial government-to-government contact by communicating with those individuals. Consultation at this level is generally conducted by BLM staff with tribal staff or other tribal members who have been identified as spokespersons to provide information about cultural and religious values or other concerns.

F. Correspondence Content

Correspondence sets the stage for successful consultation. A good letter to initiate consultation should be directed to the appropriate designated tribal representative and include—

- Its purpose;

- Sufficient details of the proposed action so that the reader can understand its extent and likely impact on the environment;
- A detailed map of the proposal at an appropriate scale;
- A summary of applicable laws and policies governing the BLM’s consultation process and decisionmaking along with a clear explanation of the extent of BLM discretionary decisionmaking under the applicable statutes;
- An explanation of upcoming opportunities for tribal input into BLM decision points and what the BLM needs to know at those points;
- An invitation for tribes to specify how they would like to be engaged in this decisionmaking process;
- A description of the kind of input needed (such as identification of traditional use areas, access needs, or sacred sites);
- An opportunity to schedule a face-to-face meeting;
- A request for the names and addresses of other persons who should be notified or consulted;
- An explanation of the role of any delegated authority and BLM staff responsibility with regard to tribal consultation;
- Identification of a BLM contact person who can provide further information about the project and how to reach him/her; and
- A specific date by which the BLM would like the tribe to respond.

The BLM should ask tribes for information regarding—

- Concerns they have about the proposed action and how to resolve any issues that might affect tribes;
- How to resolve adverse effects on traditional resources, use areas, trails, and natural or cultural resources identified in reviews of existing data for the area;
- Places of traditional religious or cultural importance that might exist but have not been identified in background data reviews for the project:
- Treatment of human remains and *cultural items* as defined by NAGPRA if excavation of those remains and items is anticipated: and
- The necessity for the BLM to contact any traditional leaders or religious practitioners. If the BLM is already aware of such leaders or practitioners, or if the tribe has designated representatives to act as liaisons with Federal agencies, the letter should state that the BLM plans to contact those individuals as well.

Clauses that might be appropriate under certain circumstances include—

- Referrals: “If you are not the appropriate individual to receive this request, please advise whom we should contact.”
- Flexible meeting proposals: “If this time and location are not appropriate, please contact [_____] within [_____] days prior to the scheduled meeting to make alternative meeting arrangements.”
- Documentation requests: “Please indicate on the enclosed map, if possible, areas of specific concern,” or “Please provide or refer us to any available information that would help us to understand the significance and nature of your concerns in the [area of proposed action] for the [proposed action] for the [tribe name].”

If a letter is returned as undeliverable, include the canceled, unopened letter in the official file and, if appropriate, begin more direct (and documented) attempts to carry out the notification or consultation.

G. General Features of Consultation

1. **Face-to-Face Meetings.** Neither BLM managers nor tribal officials have the time to meet face-to-face regarding every issue affecting the two parties. However, face-to-face consultation meetings are often the most effective way to achieve the objectives of consultation (seeking, discussing, and considering the views of other participants). Such face-to-face meetings are especially helpful for—
 - Annual briefings provided to tribal councils regarding major ongoing and foreseeable actions and programs;
 - Consultations concerning resource management plans (RMP), EISs, land tenure adjustments, other major undertakings, or in responses to controversies; and
 - When tribal feedback is needed to define what they consider to be “Departmental actions with tribal implications” as stated in the Secretary’s Policy on Tribal Consultation (S.O. 3317).

If relevant to the meeting agenda, ask tribes to suggest mitigation options. The best mitigation methods to resolve a particular tribal issue may be something the BLM, as outsiders, never considered. Try not to restrict the discussion to standard mitigation approaches the BLM would apply to most land use conflicts. The best way to approach this is to ask tribal representatives to not only identify their concerns but also to suggest potentially effective mitigation strategies to deal with them, including the most effective measures to reduce project effects if complete avoidance is not feasible.

2. **Regularly Scheduled Meetings with Indian Tribes.** The BLM managers should determine tribal preferences for information sharing and consultation. The BLM managers and staff should consider meeting with tribes in their areas after the office’s

annual work plan has been prepared. Regularly scheduled meetings can accomplish several important things:

- The BLM can identify and briefly explain actions planned for the coming year, as well as any additional land use proposals that are foreseeable on public lands or lands that may be affected by BLM decisions.
- The tribe can identify proposed actions or geographical areas that it is concerned about and about which it would like to be consulted at a later date. The tribe might also identify actions or geographical areas for which it feels no need to be consulted.
- For some proposed actions, the BLM and the tribe can agree to follow expedited or tailored consultation procedures to resolve scheduling conflicts, meet project timeframes, or accommodate special needs of the people involved.
- The tribe can use the meeting as an opportunity to identify persons it recognizes as traditional leaders or religious practitioners. The tribe can also identify specific proposed actions, kinds of actions, or geographical areas about which these individuals should be consulted.

Information coming out of these meetings may form the basis of consultation agreements or MOUs that can define the manner in which tribes prefer that future consultation take place, areas or actions the tribes wish to discuss in the future, or specific natural or cultural resources tribes wish to be consulted about whenever proposed actions might affect them. Regular periodic meetings can be an effective means for maintaining a constructive ongoing intergovernmental relationship.

3. **Make Consultation Meeting Locations Convenient.** For the benefit of both parties, managers are encouraged to strive for the most efficient and effective method of consultation. Whenever possible, avoid scheduling meetings on matters potentially affecting tribes in places where it would be difficult for tribal members to attend. It is hard for tribal elders, in particular, to travel long distances to attend meetings, and these are the people who are usually chosen by the tribe to be spokespersons on issues of traditional land use or religious concern. If a meeting can be scheduled on or near a reservation, tribal members are more likely to attend.

On occasion, onsite visits or other face-to-face meetings may be requested by the tribes or their designated representatives. A reasonable effort should be made to accommodate such requests in as timely a manner as possible.

4. **Meeting Etiquette.** At face-to-face meetings between the BLM and Indian tribes, BLM managers and staff should follow these commonsense guidelines:
 - Timing is critical. Be cognizant of the tribal calendar and major events. Plan meetings accordingly.

- Prepare and distribute meeting information for tribes in advance of the meeting.
- The BLM should work with tribes to prepare agendas that address both tribal and agency concerns.
- Ask tribal leadership if they wish to have appropriate tribal staff open and close the meeting. Be respectful of the fact that meetings will often open and close with a prayer.
- Be patient, especially if the meeting with a tribal council includes additional agenda items or follows no fixed schedule.
- If the BLM is hosting, allow a time at the beginning of the meeting to introduce participants and their roles. Provide a brief overview of the venue to allow for participation comfort.
- Gifts and food may be important parts of cultural exchanges. Be aware of and sensitive to local customs. Respectfully accept any offerings and provide food to the extent allowable by BLM ethic guidance.
- Respect local cultural practices. Details and arrangements for the government-to-government meetings should be carefully managed in advance by the staff and managers to ensure that managers are informed of local protocols.
- Be clear about what the BLM is doing and why, including which laws and regulations govern our actions. Set realistic expectations for what the BLM can, and cannot, do.
- Be respectful, professional, and polite by (1) using titles, not first names, especially in formal meetings; (2) turning off cell phones and never using smart phones during meetings even if tribal members may be doing so; (3) never interrupting a tribal speaker; and (4) framing questions tactfully in a manner that does not question an elder's knowledge but that seeks clarification or more information.
- Listen actively. When information is presented through anecdotes or stories, make sure to understand the point being made. Ask questions.
- Request permission to take photographs.
- Silence is okay and quiet moments for contemplation are often acceptable if not expected.
- Identify that notes are being taken and by what method. Provide an opportunity for meeting participants to review the notes shortly afterward to make sure their views are accurately represented.

H. Use of Internet to Facilitate Consultation

Carrying out adequate tribal consultation can be challenging for both individual BLM field offices and tribal offices, especially given restricted travel ceilings and the fact that tribal headquarters may be located hundreds of miles away. Staff at the BLM field offices should discuss with tribes the feasibility and acceptability of utilizing conferencing programs available over the Internet to facilitate consultation. Where tribes and the BLM operate compatible teleconferencing capabilities, telephone conferences, videoconferencing, webinars, and other software applications can greatly enhance the limited number of face-to-face meetings that can be arranged between top tribal leaders and BLM managers. Such real-time virtual communication can be utilized in appropriate circumstances to enhance staff-to-staff communication; to enable consultation on short notice; or to efficiently transmit status reports, although it cannot take precedence over direct face-to-face meetings when such meetings are feasible.

I. Lack of Tribal Response

Applicable government-to-government consultation authorities do not require participation by Indian tribes or other specific consultation parties outside the relevant Federal agency. Nor do those authorities establish specific timetables for when a party must engage in consultation.

As the Secretary's policy on Indian tribal consultation makes clear, even if the BLM has made an attempt to initiate consultation and has not received a response, the BLM must still make additional reasonable efforts periodically throughout the planning process to repeat invitations to consult.

If a tribe does not respond within a reasonable period of time, such as 60 days following a BLM requests for input, the responsible BLM manager or his/her designee should follow up with emails and/or personal telephone calls to tribal officials. Tribes should be informed that if they wish to provide feedback or input that they should contact the responsible BLM manager. This must be done at least for those NEPA actions where there is a public scoping process as part of government-to-government consultation. Following up letters with emails and/or telephone calls can assure that tribal officials understand the issue and that the BLM wants to consult in good faith. Varied forms of communication are particularly important where the BLM is trying to engage with a party that the BLM believes may have an interest in, or information about, the effects of an undertaking.

When a tribe is unresponsive to both the letter(s) and phone call(s), the BLM needs to carefully document its efforts to engage with the tribe. The BLM should note when, how frequently, and by what means it reached out to particular consulting parties. While there is no perfect solution to non-responsiveness, BLM offices must use a variety of means in an attempt to consult. Utilize written correspondence, emails, telephone calls, faxes, and face-to-face discussions if possible to demonstrate a wide-ranging and sustained effort to communicate.

There may be a variety of reasons why a tribe was unable to respond beyond those described below. The lack of response might be due to—

- Sensitivity of the issues involved,
- Reluctance to divulge specific information until later in the process when it might become more certain that areas of concern really will be adversely affected,
- Mislaying or sidelining of BLM correspondence, or
- Delegating response to a tribal staff member who was out of the office.

It is important to know the schedules for tribal council meetings for the tribes with which BLM offices consult. Some councils meet every month. Others only convene every few months. The BLM's comment periods may not coincide with tribal council meetings where responses are often determined by consensus.

J. Approaches to Contentious Meetings

Some consultation meetings may be confrontational because of widespread opposition to a particular proposed project or because of political reasons. In these situations, the BLM line manager may wish to consider the following strategies:

- Provide detailed draft agendas in advance for input and finalize the topics and issues to discuss that meet both BLM and tribal concerns. The agenda should explain how topics relate to the analysis of the undertaking's impacts and fit into the process.
- In situations where meeting confrontations are likely to be particularly acute or where the undertaking is complex, consider using facilitation through the Department's Office of Collaborative Action and Dispute Resolution.
- Hire a court reporter to make a transcript. The presence of a recorder may dampen confrontation since the attendees know their statements are being recorded verbatim. Transcripts may provide helpful documentation to inform a decision. They may be called upon to establish key facts if there is subsequent litigation.

K. How Much Consultation to Do—Meeting the Good Faith Standard

There is no simple measure of sufficiency of Indian tribal consultation efforts. The amount of consultation generally can be considered sufficient when the BLM has enough information to make an informed decision and, if that information is not provided by tribes, prepare a documented record of good faith effort before a decision was made.

Unless specified otherwise in a consultation agreement with the tribe, field managers should evaluate the amount of consultation necessary based on—

- Completeness and appropriateness of the list of Indian tribes and individuals consulted;

- Legal requirements posed by treaties (if any),
- Nature of the issues raised,
- A clear understanding of what the BLM needs to know from the tribes to make a robust decision,
- Potential harm or disruption a proposed action could cause,
- Alternatives that would reduce or eliminate potential harm or disruption,
- Intensity of concern expressed,
- Potential to resolve issues through further discussions, and
- Need for further consultation.

All such judgments should be well documented to ensure a complete record of the authorized officer's good faith efforts to identify, contact, and respond to Indian tribal concerns before reaching a decision. Sufficient information should be developed to demonstrate how decisions were reached and when they could potentially affect Indian tribal values associated with BLM-administered lands and resources.

This basic standard for good faith effort is the same for both land use planning and land use actions. As was the case at the land use planning stage, a BLM field manager can be confident that he or she has made a good faith effort to meet the requirements for tribal consultation on land use actions if, after sending out the initial letter to the governing authority of each tribe, the BLM manager—

- Follows up the letter with telephone call(s). If the tribe chooses not to participate or provide comments, the BLM can consider its efforts sufficient and proceed with the decisionmaking;
- Meets with tribal leaders or other tribal officials in person if tribes request it; and
- Informs tribal officials that the BLM intends to directly contact individuals such as traditional cultural leaders or religious practitioners the BLM already knows who might have concerns about the proposed action before actually doing so.

A good way to gauge whether consultation efforts have been sufficient is to consider the degree to which an objective review of the decision record would find a good faith effort to identify, notify, involve, and respond to all Indian tribes potentially affected by a proposed decision.

Several White House documents guide agencies in meeting this *good faith* standard. Section 2(a) of Executive Order 13007, Indian Sacred Sites, charges land managing agencies to “promptly implement procedures . . . to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall

comply with the Executive Memorandum of April 29, 1994, ‘Government-to-Government Relations with Native American Tribal Governments.’”

The referenced 1994 memorandum states: “Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.”

An example of how the courts define “reasonable and good faith effort” when consulting with tribes under NHPA emerged from the Tenth Circuit Court of Appeals’ decision in the case of *Pueblo of Sandia v. United States* (50 F 3d 856; 10th Cir 1995). In that case, the U.S. Forest Service wrote letters to Sandia Pueblo requesting detailed information about traditional cultural properties (TCP) within an area proposed for development. The tribe responded with only general information, stating that spiritual sites were located in the area but did not provide detailed locations or information about them. The Forest Service took this as insufficient information to confirm the presence of National Register-eligible TCPs and it reached the determination that no historic properties would be affected by the proposed action.

The tribe sued and the court opined that the information the tribe provided to the Forest Service, even though of a general nature, should have been enough to alert the agency that TCPs might be affected. The court stated that the agency should have followed up on the tribe’s assertions. The take away from this case is that writing letters to tribes asking them to identify places of traditional use, access, or cultural or religious importance may be a good first step, but it is not enough if tribally provided information indicates the presence of such places. A reasonable and good faith effort requires that the BLM follow up on this type of information provided and take additional steps to determine the nature of these places of tribal concern, determine whether or not those places qualify for nomination to the NRHP, and determine whether they would be affected by the proposed action.

See also MS-1780, Tribal Relations, Appendix 1, Judging the Adequacy of Tribal Consultation.

L. Documentation of Notification, Coordination, and Consultation

The BLM must document consultation efforts carefully through adoption of a consultation data tracking system. Copies of all correspondence, emails, telephone logs, meeting notes, and other records must be maintained in a complete administrative record.

Evidence of notification, coordination, and consultation (or failure despite diligent efforts) is to be included in the official file and provided to the line manager in support of a proposed decision. The names of preparers should appear on all notification and consultation materials, which should be signed and dated. The consultation record must show that the decisionmaker made a good faith effort to obtain and weigh tribal concerns in decisionmaking. If a decision does not conform to the tribe’s requests, the consultation record must explain the manager’s basis for reaching a different outcome.

Line managers should accustom themselves to looking for evidence of notification or consultation (whether successful or not as a result of a good faith effort) in the case file before making a decision. If notification or consultation was not done, the staff person preparing the material for the line manager should include a note and justification for why it was not carried out.

All attempts to establish telephone communication, and a record of all conversations conducted by telephone, should be documented by a signed and dated note to the files to be included in the permanent record. Copies of relevant emails are to be included as well. Field offices should check with records administrators to determine if certain texts or social media might also need to be preserved as part of the administrative record.

All direct face-to-face meetings must be documented by meeting notes describing dates, attendees, location, subjects covered, and decisions reached. The BLM-prepared meeting notes should be vetted with those who participated before final approval. Such meeting notes should be sent to tribal leaders as well as any tribal staff who attended the meeting. Correspondence transmitting the meeting notes should ask tribal officials to check to make sure that positions expressed by tribal staff at the meeting do in fact reflect the tribe's actual position on the issues discussed. Final copies of meeting notes may be provided to tribes who were invited but did not attend the meeting if the BLM field office anticipates additional opportunities for consultation with those tribes later in the process.

M. Conclusion of Consultation

In all cases, the tribes that have participated in consultation should be notified of the BLM's decision. This correspondence should be sent via certified mail or delivery service and a copy included in the permanent decision record. This notification should specifically include a discussion of the BLM's basis for its decision, how the final decision was or was not able to accommodate tribal concerns raised during the consultation process, and the avenues available for protest or appeal of the decision.

Following the BLM decision or authorization, opportunities are likely available for ongoing engagement with tribes regarding the implementation of the authorization, monitoring of its effects, and reclamation following the life of the project. Tribes should be made aware of opportunities to stay engaged with the BLM regarding the enforcement of any design guidelines or mitigation requirements to protect resources of concern to tribes.

CHAPTER V. GUIDANCE FOR TRIBAL CONSULTATION IN PLANNING AND DECISION SUPPORT

A. General Authorities

The FLPMA, the NEPA, Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Population and Low Income Populations, and Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, apply broadly to the management of public lands and provide opportunities for tribes to participate in decisionmaking across all BLM program areas and all classifications of public lands. In addition to the general authorities discussed in this chapter, some individual State or region-specific acts may provide additional mandates and requirements for the management of lands administered by the BLM, such as timberlands in western Oregon subject to the 1937 Oregon and California Revested and Sustained Yield Management Act (O&C Act; 43 U.S.C. 1181f). Unless otherwise specified, the requirements for consulting with tribes and fulfilling trust responsibilities remain consistent with these general authorities.

The FLPMA guides all BLM programs, NEPA pertains to the entire breadth of the human environment, and Executive Orders 12898 and 13175 involve all forms of guidance and policy making. The planning and environmental review systems supporting FLPMA and NEPA establish the procedural and scheduling framework for tribal consultation. Traditional religious activities including uses of sacred locations on public lands also should be considered in the management and planning processes of FLPMA and NEPA guided by the AIRFA and Executive Order 13007, Indian Sacred Sites. Executive Order 12898 requires that each Federal agency consider the impacts of its programs on minority and low-income populations, including tribal communities and reservations.

The BLM's land use planning process under FLPMA and the NEPA analysis that accompanies it, provides an early opportunity for tribes to help inform BLM decisions with the potential to affect their interests through both formal consultation and serving as cooperating agencies. For example, tribal concerns with regard to places of traditional use or environmental justice issues are most effectively identified and considered over the extended period of time afforded by the land use planning process and associated environmental review. Tribal preservation concerns should be identified in spatial and programmatic terms, to address in general the locales and the types of land use activities that would and would not be of further tribal concern as well as specific locations of cultural sensitivity the tribes wish to identify. Land use planning provides the BLM with the opportunity to learn about potential conflicts so they can be avoided or their severity reduced. Criteria and procedures for consulting with tribes about potential future individual land use actions and their role as a possible cooperating agency may be discussed and negotiated at this time. Similarly, NEPA's project planning process involves many of the same opportunities for identifying tribal issues through government-to-government consultation regarding proposed land development projects.

Given the breadth of tribal interests in many regions, it is advantageous for the BLM and tribes to consult and identify priorities to help mitigate the potentially high workloads for all those

concerned. Through this general consultation, the manager can determine what actions are likely to affect tribal interests. Such determinations can be the subject of communication protocols in MOUs to help guide all of those involved in future discussions.

1. **Federal Land Policy and Management Act.** The BLM is obligated in section 202(c)(9) of the FLPMA to coordinate all aspects of planning on public lands with Indian tribes and to ensure consistency between BLM's and the tribes' LUPs to the extent consistent with the laws governing the administration of the public lands. LUPs include RMPs and management framework plans. New RMPs, RMP plan revisions, and RMP amendments are planning efforts. Implementation-level plans are subsequent to the land use planning process.

Federal Land Policy and Management Act, Title II
<ul style="list-style-type: none"> • Directs the preparation and continuing maintenance of an inventory of the public lands, their resources, and other values, open to participation of the public and other governments, including tribes. • Directs that LUPs be developed, maintained, and revised (as needed), open to participation of the public and other governments and in coordination with the policies of approved tribal land resource management programs. • Provides through planning a means to anticipate conflicts between proposed land uses and tribal issues and concerns, and strive to reduce the number and severity of use conflicts at the implementation stage. • Provides for continuing coordination with Indian tribes regarding the consistency of LUPs, guidelines, and rules and regulations on public land and tribal land.

Figure V-1 Provisions of Title II of the Federal Land Policy and Management Act.

Going into consultation with knowledge about a tribe's historic relationship with the land and resources should enable managers to direct their questions in a sensitive and effective way.

After initiating contact, the BLM frequently consults with representatives designated by the tribe for that purpose. These representatives are usually tribal staff, often the tribe's own environmental and planning personnel.

While government-to-government consultation is on-going in the RMP process, it includes consultation with tribes at five specific points in the development of RMPs and plan revisions and amendments under the FLPMA. As noted in Chapter II, owing to their status as self-governing entities, tribes should be notified to participate at each step of the decisionmaking process at least as soon as (if not earlier than) the Governor, State agencies, local governments, and other Federal agencies. Consultation on the specific points may be performed on more than one at a time. These consultation points include when—

- The agency identifies planning issues,
- Proposed planning criteria are reviewed,
- Draft RMP and associated analysis are reviewed,
- The Proposed RMP/Final EIS is reviewed, and
- The agency notifies tribes of any changes that are made as a result of protests on the plan.

Consultation for FLPMA Purposes	
BLM consults with—	Purpose of consultation is—
<p>Elected tribal officials, or tribal representative(s) whom the tribal government has designated for this purpose</p>	<ul style="list-style-type: none"> • To solicit input identifying public land places, resources, uses, and values that are important to the tribe and/or tribal members and should be considered in LUPs • To coordinate BLM and tribal land use policies and programs, and to seek consistency between LUPs, guidelines, and rules and regulations affecting public land and tribal land

Figure V-2 Tribal consultation for purposes of Title II of the Federal Land Policy and Management Act.

Over the course of consultation at the land use planning stage, BLM should emphasize to tribes that with adequate information (strengthened by tribal input), the BLM is better able to consider decisions that may be beneficial to tribes. Administrative and land use allocation actions the BLM can take to protect and accommodate tribal use of culturally important places following consultation during land use planning include the following:

- Protecting sacred places from incompatible uses. Some places are so important to tribes that many land uses at or even near those places may be perceived by religious practitioners as defiling their religious character. If the BLM learns about these places during land use planning before allocation decisions are made, the agency may be better able to protect those locations.
- Avoiding authorization of conflicting activities at sacred places. Many rituals and ceremonies conducted by religious practitioners occur at certain times of the year and for relatively brief periods of time. If the BLM knows where sacred and ceremonial places are located, and when they are likely to be used, the agency can make decisions in LUPs to avoid conflicting activities at those locations at those critical times while always guarding against disclosures of any culturally sensitive tribal information without tribal consent.

- Making Off-Highway Vehicle (OHV) designation decisions that can accommodate tribal use and concerns with resource protection. The BLM often conceives OHV restrictions as protecting areas from potential damage. However, closing certain areas to OHV use through land use planning allocation decisions and route designations can inadvertently restrict or prohibit access to sacred places by tribal elders and religious practitioners who are unable to walk long distances. Therefore, tribes must be encouraged to participate in land use planning at the RMP level to identify their preferences for open/limited/closed OHV area allocations for motorized travel. Tribes also must be encouraged to participate and be consulted during the travel and transportation management implementation planning when route designations are determined. This will ensure that they will be able to continue visiting places important to them on the public lands.
- Facilitating traditional gathering of culturally important plants. Administrative actions can be identified in LUPs that will enable the gathering of medicinal plants, basketry materials, and other resources used in tribal cultures. For example, the BLM may specify in plans that collection by Native Americans of noncommercial quantities of herbs, medicines, and other items necessary for traditional cultural or religious purposes would be permitted through a simple letter of authorization issued annually, without charge.
- Making special designations to protect natural or mineral resources, historic properties, sacred sites, and traditional use areas. Areas of Critical Environmental Concern (ACEC) can be designated in whole or in part within RMPs to protect land and resources of traditional cultural or religious importance to tribes. Protective stipulations attached to the management of these areas can help accommodate use and access by Indian people and limit potentially conflicting land uses. (See, for example, the Biscuitroot Cultural ACEC in eastern Oregon, designated to provide priority use for Northern Great Basin and Plateau tribes to continue harvesting biscuitroots and bitterroots in accordance with their cultural traditions.)
- Developing consultation agreements with tribes. These communication protocols help structure and facilitate consultation on planning generally and on subsequent specific land use actions. They establish contacts for both government-to-government consultation and less formal staff communication. The agreement can identify tribal staff contacts and traditional or religious practitioners. Tribes can let the agency know in advance which types of actions they wish to be consulted about and/or areas requiring consultation whenever actions are planned there. Such agreements can be helpful to establish culturally sensitive ways for tribes to inform the BLM of their needs and concerns about places important to them.
- Developing comprehensive NAGPRA agreements. Land use planning offers a good opportunity to develop NAGPRA agreements with Indian tribes that have

claimed, or are likely to claim, Native American human remains or other cultural items subject to NAGPRA within the planning area. Though not mandatory, such agreements are strongly encouraged. Per 43 CFR 10.5(f), these agreements should address all land management activities that could result in the intentional excavation or inadvertent discovery of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony, and describe the procedures that will be followed to notify and consult with lineal descendants and Indian tribes and for determining custody, treatment, and disposition of intentionally excavated or inadvertently discovered human remains and/or cultural items. These agreements need to comply with the requirements of 43 CFR 10.5 and 10.6, and may take some effort to establish in the short term. However, comprehensive agreements are important planning tools. They reduce the likelihood that land use activities will be delayed if BLM and Indian tribes come to agreement on procedures in advance.

To meet the BLM's responsibilities under FLPMA, as well as responsibilities under many other authorities discussed in this chapter, the BLM line officer needs to inform tribal officials of opportunities to participate in the development of BLM plans, including their potential cooperating agency role. The BLM must request tribal reviews and ask which other tribal members should be contacted. The BLM offices need to make a good faith effort to pursue those contacts and carefully consider all input received. The BLM can consolidate the consultation effort using the following processes:

- Review what is already known about the interests of the tribe pertaining to the planning area, including ethnographic data or other information provided by the tribe;
- Initiate communication with potentially interested tribes on a government-to-government basis. The BLM accomplishes this by sending a letter, addressed personally to the chief executive of each tribe, providing a description and map of the planning effort, and inviting the tribe to participate in scoping. The letter should request comments on—
 - Any issues or concerns the tribe may have regarding the BLM's management of the planning area,
 - Any places of traditional religious or cultural importance to the tribe within the planning area, or needs for access to such places, that the BLM should consider in its planning effort including nomination of potential ACECs through a submittal process provided in the BLM ACEC Handbook, and
 - Any traditional religious or cultural practitioners the BLM should contact. If the BLM is already aware of such individuals, the agency letter should state that it will be contacting those persons as well.

- Invite an eligible federally recognized tribe to serve as a cooperating agency as provided in BLM’s A Desk Guide to Cooperating Agency Relationships and Coordination with Intergovernmental Partners (2012). (See WEBSITE for a copy of this publication.) Tribal officials may use that role as a convenient means to communicate their views or contribute their expertise, supplementing the government-to-government consultation process. A tribe’s eligibility is based on their local knowledge of culturally distinctive uses and an understanding of the land and resources involved, which often may be wide-ranging.

Tribes are often reluctant to reveal information about places of religious or cultural importance until they perceive a definite threat to those places. For that reason, tribes may not want to tell the BLM about specific sacred sites and other traditional places at the land use planning level when the agency does not yet know about specific impacts to particular geographical locations. In such cases, BLM managers should coordinate with BLM tribal liaisons or cultural heritage specialists who may be able to share ethnographic information and tribal histories with the planning team.

When engaged in consultation with tribes during land use planning, BLM offices may discuss safeguards the BLM is willing to adopt to protect sensitive information from disclosure. For example, BLM offices may allow tribes to keep primary written documentation at their offices while the BLM maintains references to them only as working files. Arrangements in which data utilized by the BLM during the decisionmaking process are housed at tribal offices must be documented in an MOU.

The BLM should send copies of the draft and proposed RMPs and associated environmental analysis to tribal officials for review and comment. If the tribe has chosen to participate as a cooperating agency, the letter should be part of the review and comment during the administrative (pre-public) review period provided for cooperating agencies. If not, the letter would be part of the draft RMP 90-day public review period following publication of the NEPA notification in the *Federal Register*. In addition, tribes will be allowed to comment during the 60-day governor’s consistency review and concurrent 30-day protest period at the final RMP stage. While there is usually not a formal comment period, comments from tribes may be accepted during this time frame. When making decisions on the plan, managers should consider any comments tribal officials provided and should notify the tribe of final plan decisions, including an explanation for why the plan was or was not able to accommodate particular tribal concerns.

The BLM is obligated in FLPMA Section 202(c)(9) and 43 CFR 1610.3-2 to ensure consistency between BLM LUP revisions and amendments and tribal LUPs (including Alaska Native village or regional corporation plans, as applicable). The BLM strives to ensure such compatibility to the extent that tribal LUPs are not inconsistent with the purposes, policies, and programs of Federal laws and regulations applicable to public land per 43 CFR 1610.3-2.

The BLM should carefully document all consultation efforts by including copies of correspondence, a record of telephone conversations, and copies of relevant emails in the administrative record for the planning effort. (See appendix 3 for example of a tribal consultation spreadsheet).

2. **National Environmental Policy Act.** The purposes of tribal consultation under the NEPA, in general, are to identify potential conflicts between proposed actions needing BLM approval and tribal interests and to seek alternatives that would avoid, reduce, or resolve them through the project planning process. The NEPA charges Federal agencies to consider the effects of any action that could significantly affect the quality of the human environment. NEPA Section 101 (b)(4) further notes that it is the “responsibility of the Federal Government to use all practicable means . . . to the end that the Nation may . . . preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice.” Clearly, the BLM cannot fulfill this obligation without learning about and considering American Indian and Alaska Native uses of the public lands. These are important parts of the human environment as well as the historic, cultural, and natural aspects of our national heritage. Information from federally recognized tribes can be gained through both consultation and the tribe’s cooperating agency involvement during the project planning analysis.

National Environmental Policy Act Section 102(2)(c)
<p>Directs the responsible Federal official considering a proposed action that could significantly affect the quality of the human environment to prepare a detailed statement on—</p> <ul style="list-style-type: none"> • The environmental impact of the proposed action, • Any adverse environmental effects which cannot be avoided should the proposal be implemented, • Alternatives to the proposed action, • The relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity, and • Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Figure V-3 Provisions of Section 102 of the National Environmental Policy Act.

The Council on Environmental Quality (CEQ) regulations require that agencies consult early with appropriate Indian tribes and invite any affected tribes to participate in scoping. The CEQ regulations also recognize tribal eligibility to serve as cooperating agencies in the project planning effort when the effects of a proposed action are on reservation lands. Tribes must be consulted whenever other governmental entities or the public are formally involved in BLM’s environmental review. In practice, this means that the BLM consults with tribes regarding EISs, environmental assessments (EA) for

which there will be a public review and comment period, and other NEPA documentation that entails public involvement or initial discussion with local or State governments. While tribal input for implementation level plans will not require as extensive a review period as compared to RMPs, a minimum of 30 days should be provided for tribal feedback for EAs, especially those that involve sites, historic properties, resources, or landscapes important to Native Americans. Additionally, the departmental manual (DM) requires consultation with Indian tribes when proposed actions might affect an Indian reservation (516 DM 4.16B).

Consultation for NEPA Purposes	
BLM consults with—	Purpose of consultation is—
Elected tribal officials, or tribal representative(s) whom the tribal government has designated for this purpose	<ul style="list-style-type: none"> • To identify a proposed action’s potential to conflict with tribal members’ uses of the environment for cultural, religious, and economic purposes • To seek alternatives that would resolve the potential conflicts

Figure V-4 Tribal consultation for purposes of Section 102 of the National Environmental Policy Act.

How does the BLM comply with NEPA’s tribal consultation obligations for project planning? Tribal consultation must take place at key points in the NEPA process. These key points include—

- Before initial public notice, including when pre-application meetings occur,
- At the formation of BLM’s proposed action,
- When alternative actions are formulated,
- When assessment of impacts is projected,
- At the publication of the analysis documents,
- At the Final EIS, when relevant, and
- Before the final decision is rendered.

Tribal consultation, including NHPA Section 106, may be appropriate even if BLM’s proposed action is covered by an applicable categorical exclusion (CX) that relieves that agency of having to prepare an EIS or EA. In these circumstances, the BLM should take care to consider whether or not the proposed action covered by the CX involves “extraordinary circumstances” relating to impacts to Indian tribal land uses, access, and 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 Indian tribal 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.

The NEPA document must fully disclose tribal issues and provide a summary of tribal consultation in order to demonstrate that tribal concerns have been heard and their positions considered. As is fitting for the special Federal-tribal relationship, tribal issues and recommendations should be fully discussed and addressed in relevant sections of the text within the NEPA document, rather than as an appendix to the discussion of cultural, and generally archaeological, resources. Relevant sections where these discussions could occur include the following:

- Scoping and Issues. Include a specific discussion of scoping issues raised by tribes.
- Affected Environment. Include a section that introduces those tribes with interests in the project and identifies resources or issues of significance to them.
- Alternatives. Discuss how tribal issues shaped the alternatives considered.
- Environmental Impacts. Address impacts, including cumulative effects, to tribal concerns and refer to more detailed discussions in other sections, such as impacts to water, biological, or botanical resources of tribal significance.

A number of strategies should be discussed with tribes during consultation associated with the NEPA process to protect resources and access issues of importance to them. Mitigation measures analyzed in the NEPA document may include, but are not limited to, the following:

- Attaching measures to use authorizations to protect resources of importance to tribes and accommodate their use. For example, in certain situations ceremonial places can be screened from view by planting vegetation or installing temporary visual barriers. Intrusive developments can be hidden or painted to blend with the environment.
- Moving competing uses. Conflicting activities and uses can be shifted to other areas or scheduled for other times.
- Removing incompatible facilities. Disturbed ground surfaces and vegetation can be restored. Vehicle use can be restricted. Livestock can be managed. Vandalism can be reduced by law enforcement patrols and site steward monitoring. Tribes can probably also suggest additional measures.
- Including tribes in project planning and utilizing their input to design specifications for access, parking, trails, interpretive signs, and other visitor

developments. Tribal consultation in several States has resulted in tribal input into the text and artwork on interpretive signs at rock art sites. Such consultation improves relations with tribes by partnering on the interpretation of a site reflecting their cultural traditions and enhances the interpretive experience of all visitors.

- Consulting with tribal governments to collaboratively identify means of reducing or avoiding impacts. This approach can be effective if a proposed action poses a disproportionate impact, economically or environmentally, on a tribal community or reservation.
- Issuing special use permits to address conflicts. Permits are generally not necessary when Indians wish to visit sacred sites because most Indian religious and ceremonial practices are solitary or involve only a few people for a short period of time. However in specially designated areas, such as where sensitive species exist, or where there is competition for special uses, a tribe may be issued a special use permit to authorize an activity if it is necessary to limit the duration of the event and the number of participants, and restrict simultaneous use by others.
- Negotiating MOU to facilitate access and use. If consultation with a tribe about a proposed activity reveals the potential for recurring conflicts with traditional cultural or religious uses, an MOU with the tribe can address concerns about access and use during certain times.
- Developing management of land boundary (MLB) plans to compile into one project planning document all the various geographical areas of interest and a risk assessment of potential conflict from inadequate or misrepresented knowledge, location, or markings. If a proposed action may involve areas of high risk, from either on-the-ground location uncertainty or in the authoritative geographical record, an MLB plan should be prepared by cadastral staff. Such plans identify areas of high risk due to uncertainty in the land tenure records. They provide an opportunity for the BLM and the affiliated tribe(s) to work from shared knowledge and to agree on mitigation measures. The BLM should attempt to develop a plan that reflects the tribe's information and knowledge of such locations. An MLB plan is particularly useful at the pre-undertaking stage of project planning, providing a common understanding of the whole landscape.
- Specifying the appropriate treatment of accidental finds resulting from project activities or natural erosion processes such as archaeological sites or human remains. This anticipation can include developing a NAGPRA plan of action to specify the procedures for notifying and consulting with lineal descendants and Indian tribes regarding intentional excavation or inadvertent discovery of Native American human remains and/or cultural items, and fieldwork and laboratory analysis that will be performed, consistent with ARPA. These plans are addressed in 43 CFR 10.5(3), and at a minimum address the types of objects to be considered as cultural items; information used to determine custody, treatment,

care, and handling; recording; analysis; traditional treatments; nature of reports; and planned disposition. Such plans provide an opportunity for the BLM and the affiliated tribe(s) to develop procedures for the excavation, treatment, and disposition of the remains. The Federal agency official must prepare, approve, and sign the written plan of action. A copy must be provided to the lineal descendants and Indian tribes involved, who may sign, but their signatures are not required. See Chapter XI, NAGPRA Consultation for Land Use Authorization, section B.3.f for more guidance and the law, regulations, and relevant BLM policy in the 8100 manual series for the requisite authority and procedural requirements for addressing agency responsibilities for compliance with NAGPRA.

Where tribal concerns are appropriately addressed through the NHPA Section 106 process, as in the consideration of historic properties with traditional and religious significance, the NEPA document should reference the outcome of the Section 106 process.

3. **Executive Order 13175.** Federal agencies are directed to develop an “accountable process” for ensuring meaningful and timely input by officials from federally recognized tribes in the development of legislation and regulatory policies that have tribal implications. The Executive order applies to regulations, legislative comments or proposed legislation, and other policies, statements, or actions that have substantial direct effects on one or more tribes, on the relationship between the Federal Government and tribes, or on the distribution of power and responsibilities between the Federal Government and tribes.

The Executive order was issued to strengthen government-to-government relationships and to reduce the imposition of unfunded mandates upon Indian tribes. Agencies may not promulgate any regulations that have tribal implications unless funds necessary to pay the direct costs incurred by Indian tribal governments to comply are provided. The agency must consult with tribal officials early in the process of developing the regulations prior to their promulgation. In a preamble to any final regulations, agencies must provide the Director of the Office of Management and Budget with a tribal summary impact statement consisting of a description of the agency’s consultations with tribal officials, a summary of tribal concerns, the agency’s position supporting the need for the regulation, and a statement of the extent to which the concerns of tribal officials have been met.

4. **Executive Order 12898.** Executive Order 12898, Federal Actions to Address Environmental Justice and Minority Populations and Low-Income Populations (February 11, 1994), directs Federal agencies to identify and address, “as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations” including federally recognized tribes as expressed in section 6-606. H-1601-1, Land Use

Planning Handbook, Appendix D, Social Science Considerations in Land Use Planning Decisions, establishes environmental justice as “a mandatory critical element for consideration in all land use planning and NEPA documents” and describes agency principles and the approach for incorporating environmental justice issues in its RMP/EIS process. The principles include determining when proposed actions may pose adverse and disproportionate impacts on tribal communities and reservations; providing full involvement of tribes in BLM decisions that affect their “lives, livelihoods, and health”; incorporating considerations in land use planning alternatives; and, in consultation with tribes, determining if land disposition proposals may affect real estate values and real income of the tribe. Tribal consultation should consider measures to eliminate or minimize impacts, document the findings, and recommend solutions. In addition to government-to-government consultation, scoping/issue identification meetings should be scheduled on tribal reservations to further encourage tribal participation. Information needs and related analyses should be incorporated in agency work plans for social and economic impact analyses, and the resulting considerations included in the analysis of the management situation, the affected environment chapter of the planning document, and the impact analysis (environmental consequences) chapter. An explanation of how environmental justice issues were considered and possibly mitigated also should be included in the description and rationale of the preferred alternative.

Meeting the requirements for environmental justice review in planning or project decisions does not constitute government-to-government consultation with tribes. Conversely, even if the tribal governments involved in a planning or project decision raise no objections to a proposed action, tribal members as individuals may raise environmental justice concerns, which must be considered.

5. **American Indian Religious Freedom Act.** The AIRFA is primarily a policy statement. It informs Federal officials that under the Establishment Clause of the First Amendment of the U.S. Constitution, the Federal Government should do nothing to prohibit the free exercise of religion. Section 1 reminds Federal agencies that Native Americans enjoy the same constitutional guarantees under the First Amendment as do all other people. Section 2 provides that the President will determine whether agency-specific laws and procedures conflict with the policy and need congressional action. The President’s determination was made in a report to the Congress 1 year after the 1978 enactment of AIRFA.

American Indian Religious Freedom Act
<p>Resolves that it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise their traditional religions, including—</p> <ul style="list-style-type: none"> • Access to sacred sites, including cemeteries, required in their religion; • Use and possession of sacred objects necessary to the exercise of religious rites and ceremonies; and • Freedom to worship through ceremonials and traditional rites without government intrusion or interference.

Figure V-5 Provisions of the American Indian Religious Freedom Act.

Case law has established that AIRFA has an ongoing implementation requirement, obligating agencies to consult with tribal officials and tribal religious leaders when agency actions would abridge the tribe’s religious freedom by (1) denying access to sacred sites required in their religion; (2) prohibiting the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies; or (3) intruding upon or interfering with ceremonies.

The AIRFA focuses not just on religious places, but also on religious practices—religious activities—and it directs agencies to consider both places and practices before taking actions that could affect them. The BLM’s corresponding policy is to avoid infringing on Native Americans’ religious rights. The BLM must examine proposed actions and authorizations, as well as routine management practices that could substantially restrict access or interfere with free exercise of religion.

Consultation for AIRFA Purposes	
BLM consults with—	Purpose of consultation is—
<p>Elected officials or tribal representative(s) and/or native traditional religious leaders whom the tribal government has designated or identified for this purpose</p>	<ul style="list-style-type: none"> • To identify the potential for land management procedures to conflict with Native Americans’ religious observances • To seek alternatives that would resolve the potential conflicts

Figure V-6 Tribal consultation for purposes of Section 2 of the American Indian Religious Freedom Act.

The provisions of AIRFA are not limited to federally-recognized Indian tribes. The constitutionally guaranteed freedom to follow the religion of one’s choice extends to all Native Americans—as to others—without qualification.

As a first step in complying with AIRFA’s consultation requirements, BLM offices should review existing information to identify previously recorded places and practices of traditional religious importance. Then, the agency contacts all potentially interested federally recognized tribes and other Native American groups by letter and telephone as part of the NEPA scoping process. Although AIRFA is not directed at tribal governments, BLM’s normal government-to-government channels are the best starting points for consultation since it is commonly a topic of tribal concern. After that, the BLM should elicit information and views directly from the traditional religious practitioners whose interest would be affected. After initiating contact by letter and telephone, the BLM field manager or designated representative should follow-up with face-to-face contact if places of religious significance or practices would likely be affected by BLM actions. If the agency learns that proposed plans or actions might disturb traditional religious places or disrupt traditional religious practices, the agency must seek ways to avoid or minimize those impacts.

6. **Executive Order 13007.** This Executive order directs Federal land managing agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and to avoid adversely affecting the physical integrity of such sacred sites to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions. A *sacred site* is defined as any “specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.”

This definition is at odds with the traditional Indian view that the sacred is embedded in all natural phenomena and that sacred sites are often not confined or precisely delineated. The Executive order does not deny this more all-encompassing view of sacredness. However, its definition of sacred sites clearly focuses on the places that are more important than others for worshipping the sacred or conducting religious ceremonies, and it is those special places that Federal agencies are directed to consider. Sacred landscapes would be the subject of consultation under NEPA.

The order is very explicit about not creating new rights and not limiting duly authorized land uses. It is “not intended to, nor does it, create any right, benefit, trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person” (section 4). Nothing in it is to be “construed to require a taking of vested property interests [nor] shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action” (section 3).

Executive Order 13007 directs Federal agencies to avoid harming sacred sites “to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions.” This is a reasonably strong standard. It is stronger than the standard for

protecting places of traditional religious and cultural importance under NHPA Section 106, which only requires agencies to “take into account” the effects of their actions on such places.

Executive Order 13007, Indian Sacred Sites
<ul style="list-style-type: none"> • Directs Federal land managers to accommodate Indian religious practitioners' access to and ceremonial use of Indian sacred sites, and to avoid adversely affecting the physical integrity of such sites; • Directs land managing agencies to implement procedures to carry out these accommodation and protection provisions, including reasonable notice of proposed actions or land use policies that may restrict future access to or ceremonial use of, or adversely affect physical integrity of, Indian sacred sites; • Cites Executive Memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments, as the model for communication procedures; and • Requires a report within 1 year on any statutory or administrative changes needed to meet the order's directions, and on the procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders.

Figure V-7 Provisions of Executive Order No. 13007

The order required agencies to report to the President within 1 year addressing changes needed to accommodate access and use of Indian sacred sites on Federal lands, or changes needed to avoid adversely affecting the physical integrity of sacred sites. The Order also required agencies to address in their report the procedures implemented or proposed, “to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.”

The BLM reported that no statutory or administrative changes were needed and provided copies of MS-8160 (1990) and Handbook H-8160-1 (1994) as its procedures for facilitating consultation.

Consultation for Executive Order 13007 Purposes	
BLM consults with—	Purpose of consultation is—
Elected officials or tribal representative and/or appropriately authoritative representative of an Indian religion whom the tribal government has identified for this purpose	<ul style="list-style-type: none"> • To determine whether proposed land management actions would— <ul style="list-style-type: none"> ○ Accommodate Indian religious practitioners’ access to and ceremonial use of Indian sacred sites on Federal lands; and/or ○ Avoid adversely affecting the physical integrity of Indian sacred sites on Federal lands. • To seek alternatives that would resolve potential conflicts.

Figure V-8 Tribal consultation for purposes of Executive Order No. 13007, “Indian Sacred Sites.”

Executive Order 13007 reinforces the original intent of AIRFA expressed 18 years earlier with regard to sacred sites. A major purpose of the Executive order is to improve communication between land managing agencies and tribes. The tribal government is the appropriate starting point for initiating an official dialogue. The BLM also generally consults with tribal representatives and Indian religious practitioners designated by the tribe for this purpose. The BLM’s initial correspondence should be addressed to the chief executive of the tribe, but communication among BLM staff, tribal staff, and religious practitioners can proceed after the official government-to-government contact.

- a. **Identifying sacred sites.** Aside from a few exceptional cases where well-known physical markers are present, only tribal representatives have the knowledge needed to identify a tribe’s sacred sites. A tribe may name an appropriately authoritative representative of an Indian religion to provide this information. Federal officials cannot know to accommodate access to and ceremonial use of Indian sacred sites, and to avoid adversely affecting them, unless the tribe identifies them. Identification can only occur by consultation.
- b. **Any place can be sacred.** Sacred sites include a variety of places and landscapes, including but not limited to springs, mountains, caves, rock shelters, rock art sites, archaeological sites, burial locations, and stone and earth structures. Some sacred sites would not routinely be recorded as archaeological sites by archaeological surveys. They can only be identified by Indian tribes. Other sacred sites might well be recorded as a result of archaeological surveys and their sacredness determined later through consultation with tribes.

Age is often irrelevant to sacredness. A location with little or no antiquity may be vitally important to a tribe as a religious or ceremonial site. Because some Indian

religious practitioners are considered to be in a continual process of revelation, the actual practice of ceremonies and rituals by these individuals establishes and affirms a site's sacredness. In many cases, there may be no inherent element of a landscape that makes one place sacred and another not. It may be the practices themselves that took place there that have conferred the element of sacredness to that spot on the landscape.

A place may have traditional religious importance even if not regularly visited by religious practitioners. Some sacred sites may be used only infrequently for special ceremonial purposes. Some highly sacred places may never be visited at all because they are considered too powerful or dangerous for a person to survive physically or spiritually.

Different places can be sacred at different times. The number, nature, and locations of sacred sites are not fixed. Information the BLM obtains at one point in time about such places may not be sufficient to assess the potential effects of undertakings upon that site at a later time. Religious observances are subject to change in form or location and can take on different meaning over time.

The setting is often highly important. The integrity of a site that has traditional religious importance can be adversely affected if damaged directly or indirectly through the introduction of visual intrusions or changes in sounds or air quality.

- c. **Distinguishing between sacred sites and other places of cultural importance.** In some cases, it may not be possible to differentiate among sacred sites and properties of traditional religious and cultural importance (sometimes called traditional cultural properties or TCPs) that may be eligible for listing in the NRHP. A sacred site may or may not be eligible for listing. Sacred sites are not addressed in the NHPA and the conclusion that a property fits the definition of a sacred site does not automatically confer significance to it relative to the NRHP.

The definition of sacred sites under Executive Order 13007 deals only with religion and not secular importance, unlike the NHPA's "properties of traditional religious and cultural importance," which can include a wide range of places that matter to people for both religious and secular reasons. TCPs differ from sacred sites in several important respects. TCPs are considered under NHPA Section 106, while sacred sites are considered under FLPMA, Executive Order 13007, and AIRFA. TCPs can be secular, while sacred sites cannot. TCPs normally must be at least 50 years old for entry in the NRHP, while sacred sites even if more than 50 years old may not be appropriate for NRHP listing. The similarity among these is that tribal identification is necessary as the beginning point for compliance with the intent of the law or executive order.

B. Ethnographic Studies

1. **Introduction.** Ethnographic studies, or *ethnogeographies*, are particularly useful at the pre-decisional stages of planning when they focus on land- and place-based concerns. Ethnographic studies conducted early in the planning cycle can be an effective tool to address tribal concerns on a broad landscape scale. Ethnographic studies may require interviews with subject matter experts (usually tribal members) and can contribute to a robust decisionmaking process. When the subject of such studies, tribal governments should be involved at an early stage to identify the key questions or issues to be explored. Ethnographic studies may be phased as a project progresses, and the level of effort should be proportionate to the decisions being made at any given phase. Such strategies should be explored during consultation at an early stage.

Overview ethnographies early in project planning, based on existing information, should identify tribes likely to be affected by the project; landscape-scale issues that could affect project designs and siting decisions; known areas and resources likely to be of interest to the affected tribes; the types of resources and areas likely to occur that are of historic and current tribal interest; and the need for and focus of further field surveys, informant interviews, and government-to-government consultation.

As project plans and tribal consultation progress, more in-depth and focused ethnographic information and consultation may be needed to identify and evaluate specific places of traditional and religious importance; to identify tribal values associated with cultural or natural resources; to define more generalized cultural concerns that characterize a tribe's relationship with the land; and to resolve potential impacts to land and resources of concern.

It may be necessary to include a cadastral survey and MLB plan within the ethnographic report. MLB plans may be needed when (1) boundaries and legal status of sacred sites, TCPs, and areas of traditional land uses lie close or adjacent to changes in land ownership or (2) the land status of such resources is uncertain or could be disputed.

2. **Scale.** Ethnographic studies or inventories, unlike archaeological inventory, seek not to identify things but to accurately profile values and the cultural context of their occurrence on the landscape. The BLM will not normally require separate ethnographic surveys for individual actions evaluated within EAs. Such actions are more limited in scope and BLM requests to tribes to identify sacred sites or traditional use areas should not be burdensome. Another means for addressing such concerns is the earlier identification of resources and important places through landscape-scale studies outside specific planning schedules. This broader approach can often avert potential disagreements and delays during planning actions and strengthen trust.

In contrast, for most EISs, the scope, impact, and controversy of the proposed action are far more widespread. Because the identification of sacred sites and traditional use areas could be burdensome for tribes for the lands affected by these large-scale projects, the

BLM may require an applicant to contract for ethnographic studies as part of this environmental review process. Contract methodologies, objectives, and ethnographer qualifications must all be approved in advance by the BLM in consultation with the tribe(s) of interest in the study. The BLM will use the results of these studies, along with other information as appropriate, to complete consultation under a variety of authorities.

3. **Who Pays.** When the BLM is engaged in RMP formulation, the agency itself may fund such studies when information pertaining to traditional lifeways, traditional use of plants and animals, trails, and sacred sites is needed to make decisions about land allocations. Internal BLM-generated undertakings, such as recreation projects or land restoration projects, may also require that the agency commission ethnographic studies (including MLB plan where needed).

Applicants, permittees, or operators (regardless of whether the undertaking is being evaluated through an EA or EIS) are responsible for funding ethnographic studies (including MLB plan where needed) when the anticipated information is required by the BLM to fulfill its project assessment obligations. These include identifying sacred sites, historic properties, and places of traditional cultural or religious importance within an area of potential effects; determining their significance; and designing treatment programs for significant properties affected.

4. **When Needed.** Traditional use areas and sacred sites are places that are integral to a community's history, traditional economy, religious expression, or ceremonial activity. These places are seen by tribes as necessary to maintain the continuing cultural identity or religious practices of the community. For many tribes, the links to specific places have been maintained, at least in part, but for many others, those links have been broken through centuries of conflict, displacement, assimilation policies, and other cultural disruptions. Ethnographic studies may be needed to identify specific places known to tribes as well as to capture the memory of them as it may exist in stories and elders' memories. Ethnographic studies may also be necessary to identify cultural beliefs and practices that could affect or be affected by proposed land uses or proposed land tenure adjustments.

5. **Decision Considerations.** There are several factors to consider when determining if an ethnographic study is warranted. As a general rule, before initiating this type of study, the BLM should:

- Establish the area to be covered by the planning effort or affected by a proposed action.
- Review the MLB plan, if available.
- Consult with tribes to determine the nature and extent of tribal concerns that occur in the area.

- Consider tribal communication protocols for sharing information about properties of traditional religious and cultural importance and sacred sites. In some cases, tribes will be able to provide information that traditional use areas or sacred sites are present and provide sufficient information to evaluate their importance and determine effects of planning or proposed action through the consultation process itself. If this is the case, the BLM can utilize this information without conducting an ethnographic study.
- Document consultation efforts if, after a reasonable and good faith effort to consult, tribes do not provide information regarding or concerns pertaining to culturally sensitive areas and locations, or areas that may be affected by the action. BLM may continue planning and implementation, including compliance with NEPA and other authorities, such as NHPA.
- Determine what must be done in order to meet the requirements of Executive Order 13007 if a tribe indicates that sacred sites are present, but cannot or will not provide specific location or other information about them. An ethnographic study can help BLM to determine how to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.
- Propose the use of an ethnographic study, in consultation with the tribes, to acquire information about traditional use areas. If, after a reasonable and good faith effort to consult, tribes provide information that such areas may be affected by the proposed action, but refuse to, or cannot, provide information necessary for the BLM to determine their importance and whether they could be affected by the planning or proposed authorization, then the BLM should document this situation. In addition to consulting with the tribes, the BLM office should also conduct an archaeological and literature records search for the project area early in the process.
- Consider that a focused ethnographic investigations may be warranted if consultation indicates that tribes may have knowledge of past land use practices (e.g., historic Indian fire practices) and their effects upon land health issues.
- Consider ethnographic fieldwork or targeted informant interviews if issues of environmental justice arise. These may inform the agency on tribal political and economic experiences that shape tribal perspectives on land management practices.

In an innovative partnership with the Northern Cheyenne Tribe and Chief Dull Knife College, the Montana State Office initiated ecoregional ethnographic assessments for the Northwestern Plains and Middle Rockies ecoregions. Designed to feed into ongoing rapid ecoregional assessments, these studies will yield a systematic overview of the ethnographic, historic, and archaeological information for the regions. The information will be incorporated into RMPs and will influence oil and gas leasing decisions, lease

stipulations, and determinations of renewable energy zones. Tribal benefits include being able to affect the management of important cultural resources on aboriginal lands and creating a GIS database of important cultural resources within their tribal historic preservation office. The tribal college is strengthened through creating a permanent archive of important tribal cultural resources as well as ethnographic and historic information; by providing select students with internship opportunities; and by offering students practical analytical experiences that are incorporated into curriculum materials. Information being collected as a result of archival and literature searches, oral history interviews, site visits by tribal elders, and site recording will be organized to protect proprietary information. The data will be housed to provide access to: (1) tribal information only; (2) tribal/BLM information only; and (3) tribal/BLM/public information.

(See WEBSITE for tribal resolution supporting the project; complete grant and cooperative agreement; and detailed scope of work.)

C. Coordinating Tribal Consultation Obligations under Different Laws

Efficiencies can be gained in the environmental review process by coordinating procedures for compliance with NEPA, NHPA Section 106, section 3 of NAGPRA, AIRFA, Executive Order 13007, and the BLM's tribal consultation responsibilities. Coordination will allow the BLM to (1) conserve resources by gathering information that helps to support all of these requirements at the same time; (2) reduce redundancy and avoid unexpected and unnecessary delays by synchronizing the schedules for meeting these requirements; (3) make it easier for the public and tribes to understand when and how to contribute to the BLM decisionmaking process for various issues; and 4) reduce litigation liability by ensuring that the requirements of these processes are met in a timely manner.

While NHPA Section 106 agreements are not intended to comply with statutes other than NHPA, efficiencies can be gained by coordinating consultation activities. In developing NHPA Section 106 programmatic agreements (PA), agencies should take into account efforts required by other Federal laws that relate to cultural resources, such as NAGPRA and ARPA. The coordination of the agency's compliance efforts should be recognized in Section 106 PAs and duplication of efforts should be avoided by tailoring the Section 106 process to accommodate their requirements.

Project efficiencies may be gained by agreeing ahead of time how NAGPRA consultation will take place should Native American human remains or other cultural items be discovered. When crafting PAs, offices should reference NAGPRA and the general steps that will take place when discoveries of Native American human remains or other cultural items occur as a standard stipulation, and then reference the plan of action (43 CFR 10.5(e)) or comprehensive agreement (43 CFR 10.5(f)). Either document may be attached to the PA as an appendix for reference, but they must be standalone documents (see Chapter XI, section B.3.g).

One of the principal opportunities for coordinating NEPA and NHPA 106 compliance is the

public notification and comment process in situations where an EIS is found to be appropriate. For example, rather than carry out a separate procedure for public notification to meet NHPA Section 106 requirements, the BLM may reference both authorities when publishing a notice of intent or notice of availability in the *Federal Register* and/or a notice of a public meeting in the newspaper. Referencing both statutory processes informs the public of their opportunity to bring forward broad environmental concerns as well as Section 106-related information, concerns, and opinions.

Regulations for both NEPA and NHPA require that agencies coordinate their compliance processes to the extent possible. Therefore, BLM offices must incorporate into their NEPA analysis available information on potential impacts to cultural and tribal resources and possible mitigation measures gathered through the NHPA Section 106 and tribal consultation processes. Offices must complete both the NHPA Section 106 process and tribal consultation prior to making a final decision on a proposed action.

NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 was published in March 2013. This guidance was prepared jointly by the ACHP and the CEQ. It provides advice on implementing provisions added to the Section 106 regulations in 1999 that address both *coordination* of the Section 106 and NEPA reviews and the *substitution* of NEPA reviews for the Section 106 process.

Appendix 4 presents a side-by-side matrix that illustrates the procedural, informational, participation, and documentation requirements of NEPA, NHPA Section 106, and tribal consultation. The right-hand column also shows key recommendations for coordinating the processes and successfully meeting compliance requirements prior to making a decision. (Note that completing a CX for an action may satisfy BLM's NEPA obligations but will not satisfy the BLM's NHPA Section 106 requirements.)

D. Key Differences between Various Authorities

The BLM's obligation to consult with Indian tribes on a government-to-government basis cannot be fulfilled only by consulting about historic properties significant to the Indian tribes under Section 106 of the NHPA. (For a detailed discussion of NHPA, see chapter XI.B.1.) Each Federal statute with a requirement to either coordinate or consult with Indian tribes carries with it the unique, separate obligation to consult on a government-to-government basis. In practice, government-to-government consultation may cover multiple issues of which Section 106 consultation is likely to play only a part.

NEPA's project planning process and FLPMA's land use planning process can each recognize and consider impacts to cultural resources that do not fit within the scope of the Section 106 process. There are a number of important legal differences when comparing the general authorities of FLPMA and NEPA to NHPA. Important distinctions can be noted in terms of (1) the types of resources to be considered, (2) general consultation procedures, and (3) timing for inventorying and collecting data about cultural resources.

The reach of NHPA is restricted to *historic properties*, and these are understood to be eligible for or listed on the NRHP under specific criteria at 36 CFR 60.4. Neither FLPMA nor NEPA requires this level of qualification in order to be inventoried, identified for management, or considered in the decisionmaking process. FLPMA land use planning only recognizes that historic, cultural, and archaeological resources must be managed regardless of significance unless adopted LUPs specify non-management options, while NEPA's project planning covers important historic and cultural aspects of our national heritage. *Important* is undefined in the law and its regulations.

Thus, it may be possible to consider, manage, and protect certain cultural resources under NEPA that might not qualify for consideration as historic properties under NHPA. Plant gathering areas, traditional landscapes, and some traditional cultural properties may still be evaluated and protected as part of the NEPA project planning process even though it might be difficult to determine them as eligible for listing in the NRHP.

NEPA regulations for project planning only require agencies to “make diligent efforts to involve the public in preparing and implementing their NEPA procedures” and to “provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents.” The public participation requirement is significant, but it does not obligate the agency to engage in a dialogue with the public or tribes or seek agreement on issues related to the NEPA process. Indeed, the NEPA project planning process does not mandate the type of engagement contemplated by the explicitly defined use of consultation to fulfill an agency's Section 106 obligations.

State and field offices should utilize the internet to facilitate public notification under NHPA through the use and distribution of NEPA Project Logs. Decision documents posted on the web stimulate public involvement and feedback on environmental documents and proposals on public lands. Public comment periods will continue to be initiated through official notifications (direct mailing, local and/or state newspapers, Federal Register notices). However, interested publics should also be encouraged to check these internet-based NEPA logs frequently to ensure adequate time for input on specific projects, especially in the case of projects without a planned formal comment period. BLM contact persons should be identified on the individual logs. (A good example of a field office that utilizes this strategy of public outreach is the Rio Puerco Field Office, Albuquerque District, New Mexico. See www.blm.gov/nm/st/en/fo/Rio_Puerco_Field_Office/rpfo_nepa.html).

Likewise, FLPMA's land use planning does not make any reference to a process of consultation with the public similar to requirements of NHPA. The BLM cannot simply rely on the proscribed public participation and notification requirements of these other two laws to comply with the Section 106 process of NHPA or with BLM's general trust obligations to consult. As discussed above, coordinating NEPA and NHPA compliance is encouraged; however, NEPA project planning procedures cannot substitute for the Section 106 process.

Slight but important differences are found in the requirements governing the timing and collection of data at different stages of each law's process. The Section 106 process of NHPA

allows for a phased identification approach. Agencies are also not required to have conducted a complete inventory of historic properties for all alternatives analyzed in a NEPA document. NEPA requires agencies to identify and assess impacts to cultural resources as part of its documentation; however, it is possible that more complete data regarding historic properties may be identified after release of NEPA documents.

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CHAPTER VI. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE NATIONAL CONSERVATION LANDS PROGRAM

A. Overview

This chapter explains how National Conservation Lands managers and staff carry out tribal consultation and coordination responsibilities in accordance with legal requirements for BLM's National Conservation Lands, which include national monuments, national conservation areas, components of the National Wilderness Preservation System; wilderness study areas (WSA); components of the National Wild and Scenic Rivers System; national scenic or historic trails designated as components of the National Trails System; any area designated by Congress to be administered for conservation purposes; and the National Conservation Lands Science Program. These lands feature exceptional scientific, cultural, ecological, historical, and recreational values, and differ tremendously in landscape and size. BLM management of these National Conservation Lands components must comply with specific designating acts of Congress and Presidential proclamations by conserving, protecting, and restoring the objects and values for which they were designated.

While National Conservation Lands units are designated based on a general recognition of their outstanding natural, scientific, scenic, or cultural values, BLM managers are rarely aware of all the values they contain. Relatively little public land has been carefully inventoried, marked, studied, or been the subject of ethnographic study to identify trails, traditional use areas, and sacred places of value to tribes. Therefore, tribal consultation and building sustained positive partnerships with Indian tribes is one of the best ways the BLM can understand and document the unique values the BLM is charged with managing and protecting within National Conservation Lands.

National Conservation Lands units have a mission to conserve, protect, and restore nationally significant landscapes and places that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations. These landscapes, and the natural and cultural resources they contain, create common ground with tribes who also want to conserve or preserve cultural resources, traditional use areas, trails, and sacred sites.

This guidance provides tools for agency land managers to fulfill the National Conservation Lands mission to conserve, protect, and restore the nationally significant landscapes and places that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations. Because individual National Conservation Lands units contain the full gamut of resources and lands of importance to Indian tribes, managers and staff should consult MS-1780, Tribal Relations, and individual chapters within this handbook regarding consultation issues relevant to particular resources and programs.

While all of these components pertain to National Conservation Lands and tribal relations, some goals offer more specific National Conservation Lands and tribal relations opportunities, and are also identified. National program policies generally applicable to BLM public lands apply to

National Conservation Lands components to the extent that they are consistent with the designation proclamation or legislation, other applicable law, and BLM policy.

Please note that the full content of all of the completed National Conservation Lands manuals, handbooks, and strategic plans referenced in this chapter can be found on WEBSITE and WO 400 National Conservation Lands Share Point Site. These include MS-6100, MS-6220, MS-6250, MS-6280, MS-6330, MS-6340, and MS-6400 (see also http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html).

The National Conservation Lands basic authorities derive from the FLPMA and 2009 Omnibus Public Land Management Act (Pub. L. 111-11). The FLPMA directs BLM’s interdisciplinary course of multiple-use and sustained-yield management “in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource and archeological values.”

The Omnibus Act formally codified the National Conservation Lands after years of existence derived from administrative origins. The act provided that, “In order to conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations, there is established in the Bureau of Land Management the National Landscape Conservation System” (Pub. L. 111-11, section 2002 (a)). “The Secretary shall manage the system in accordance with any applicable law (including regulations) relating to any component of the system ... and in a manner that protects the values for which the components of the system were designated” (section 2002(c)).

MS-6100 provides general policy to BLM personnel on managing public lands in National Conservation Lands. The manual reaffirms that BLM’s mission for the National Conservation Lands is to conserve, protect, and restore nationally significant landscapes and places that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations. The BLM’s vision for the National Conservation Lands is to be a leader in conservation by protecting landscapes, applying evolving knowledge, and bringing people together to share stewardship of the land.

While all National Conservation Lands strategic components pertain to tribal relations, some goals identify more specific National Conservation Lands and tribal relations opportunities and are identified here.

An overarching and explicit commitment by BLM is to conserve and protect natural and cultural resources as the primary objective within these areas. (See MS-6100, National Conservation Lands, Section 1.6 A, General Principles for the Management of National Conservation Lands Units.) Recognizing that the National Conservation Lands represent a relatively small portion of the land managed by the BLM and other Federal, State, tribal, and local government entities, these special conservation areas must be managed within the context of the larger landscape. A collaborative landscape approach to the management of National Conservation Lands provides opportunities to promote healthy landscapes and contribute to the local tribal economies and social fabric of the community. To instill this ethic, the BLM seeks to engage tribes and other

interested parties at the earliest opportunity in National Conservation Lands’ planning, management, and resource and geospatial data sharing, consistent with the Federal Advisory Committee Act and the Sunshine in Government provisions in section 313 of the FLPMA using existing collaborative forums, including government-to-government consultation with tribes. This includes working with tribes and others to identify and strive to protect lands that are critical to the long-term ecological sustainability of the landscape. The BLM also seeks to serve as an information resource for grassroots efforts to explore possible designations through legislation pertaining to the National Conservation Lands and ensure a diversity of viewpoints is brought to the table, including tribes. Such a collaborative approach is intended to: (1) cultivate a sense of shared stewardship for the BLM-managed public lands and advance the relevance of conservation lands; (2) connect diverse groups of people, interests, and government organizations by building strong partnerships; (3) attract volunteers; and (4) engage youth through education, interpretation, and outreach. This includes working in collaboration with tribes and other partners on outreach and media materials addressing natural and cultural resources. Indian perspectives will be sought and incorporated into outreach, educational, and interpretive materials since tribal views on the effects of use of such National Conservation Lands units as historic trails or wild and scenic rivers will differ significantly from immigrant settlers to the American West.

B. Components of the National Conservation Lands System

1. **National Monuments, National Conservation Areas, and Similar Designations.** The Antiquities Act of 1906 grants the President authority to designate national monuments in order to protect “objects of historic or scientific interest.” While most national monuments are established by the President, Congress has also occasionally established them to protect natural or historic features. All national conservation areas are established by Congress.

The BLM MS-6220, National Monuments, National Conservation Areas, and Similar Designations, provides the line manager and program staff professionals with general policies for the administration and management of these designations. These designations provide opportunities for collaborative tribal relationships.

Tribal Partnerships and Other Opportunities

The BLM enjoys a partnership with Pueblo de Cochiti and Sandoval County to provide access, facility development and maintenance, resource protection, research opportunities, public education, and enjoyment in the Kasha-Katuwe Tent Rocks National Monument. Established in 2001, the monument is located on lands with ancestral significance to the Pueblo de Cochiti. The pueblo serves as a gateway community to the monument since it administers 3 miles of access road through tribal lands. The establishing proclamation directs the BLM to manage the lands in close cooperation with the Pueblo de Cochiti. The proclamation further requires that the monument’s management plan protect the objects identified in the proclamation and

further the purposes of the AIRFA. The Pueblo de Cochiti and the BLM jointly desire to maintain and preserve the natural and cultural resources, regulate visitor access and use, provide visitor information and interpretation, and stimulate the pueblo's economy related to tourism. Cooperative management provides for on-the-ground efforts to maintain and protect natural and cultural values enhanced through stewardship by tribal members.

- 2. National Wild and Scenic Rivers System.** The 1968 Wild and Scenic Rivers Act (WSRA; 16 U.S.C. 1271) institutes a national wild and scenic rivers system that protects the special character of certain rivers, while recognizing the potential for use and development. Many of these river corridors support habitats critical for culturally sensitive species and long served as focal points for ancient settlements and special use areas. The WSRA provides three levels of classification: wild, scenic, and recreational. *Wild* rivers are free of dams, generally inaccessible except by trail, and represent vestiges of primitive America. *Scenic* rivers are free of dams, with shorelines or watersheds still largely primitive and undeveloped, but accessible in places by roads. *Recreational* rivers are readily accessible by road or railroad, may have some development along their shorelines, and may have been dammed in the past. (Note: Some eligible recreational rivers may be dammed, but the dams and elevated pools are segregated from the eligible segments of the river.)

Wild and scenic rivers make up approximately 20 percent of National Conservation Lands. The rivers are managed in accordance with overall guidance provided by the National Conservation Lands Program. The Interagency Wild and Scenic Rivers Coordinating Council ensures consistent management and operation.

The WSRA designated the initial components of that system and prescribed the methods and standards according to which additional components may be added to the system. Section 2(b) of the act states: "It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." The act specifically provides for protection and enhancement of "cultural outstandingly remarkable values."

The WSRA also requires Federal agencies to consider potential wild, scenic, and recreational river areas during their planning processes, and provides the Secretary of the Interior and the Secretary of Agriculture authority to acquire lands within the boundaries of any component of the National Wild and Scenic Rivers System. Lands owned by an Indian tribe may not be acquired without the consent of the tribe as long as the Indian tribe is following a plan for management and protection of the lands ensures its use for purposes consistent with the WSRA.

The BLM works in partnership with tribes to coordinate the management of wild and scenic rivers in several States. In Oregon, for example, the Oregon Omnibus Wild and Scenic Rivers Act of 1988 (16 U.S.C. 1274) designated over 173 miles of the Deschutes River and directed the Secretary of the Interior (BLM) to administer 100 miles of it through a cooperative agreement between the Confederated Tribes of the Warm Springs Reservation (the Confederation) and the State of Oregon (as provided in section 10(e) of the act). The other 73+ miles is managed by the Secretary of Agriculture (U.S. Forest Service). The same legislation also designated 147 miles of the John Day River and directed the Secretary of the Interior (BLM) to administer the river through a cooperative agreement with the State of Oregon. The river is managed cooperatively by a number of entities, including the Confederation. BLM entered into an MOU with the Confederation, BIA, the State of Oregon, and the John Day Coalition of Counties. The Confederation was involved in developing the management plans for both rivers and participates in their respective day-to-day management.

By executing the 2002 cooperative management agreement covering the Lower Deschutes River and the 2007 MOU for the John Day River, the BLM agrees to joint management plans for the rivers supported by all signatory parties. The agency and the Confederation agree to cooperate and coordinate with each other in implementing the decisions and regulations of the plan. They meet periodically to discuss implementation issues, tasks, priorities, and duties and to agree upon a schedule for management actions and projects. They develop annual written work plans. They consult and seek consensus on key decisions pertaining to plan implementation. Coordination by technical core team members and consultation by managers and executive board representatives occurs at regular intervals.

(Copies of both the 2002 Inter-Governmental Cooperative Agreement for Management of the Lower Deschutes River and the 2007 Inter-Governmental Memorandum of Understanding for Implementation of the John Day River Management Plan can be found at the WEBSITE).

Alaska wild and scenic rivers have specific provisions through the ANILCA for protecting and providing opportunities for subsistence uses by rural residences, Native and non-Native alike. *Subsistence uses* are defined in ANILCA, Title VIII, Section 803, as the “customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing; and for customary trades.” The BLM ensures that rural residents engaged in subsistence uses have reasonable access to subsistence resources on public lands (including within wild and scenic river corridors).

MS-6400, Wild and Scenic Rivers—Policy and Program Direction for Identification, Evaluation, Planning, and Management, provides policy, direction, and guidance for the identification, evaluation, planning, and management of eligible and suitable wild and scenic rivers and the planning and management of designated components of the national Wild and Scenic Rivers System. The Director, state directors and district managers/field managers are responsible for “developing and maintaining relationships with tribal governments, interested in the management of designated rivers or the inventory, evaluation, and management of potential additions to the National System.”

BLM must coordinate and consult with tribes concerned with the inventory, evaluation, and management of potential additions to the Wild and Scenic Rivers System. This tribal interaction and public involvement are critical, as rivers, due to their linear nature, often cross jurisdictional boundaries. Managers should involve any affected or concerned party at all stages of the wild and scenic river process. The manual also outlines eligibility criteria for cultural outstandingly remarkable values that can be modified as appropriate.

“The river, or area within the river corridor, contains rare or outstanding examples of historic or prehistoric locations of human activity, occupation, or use, including locations of traditional cultural or religious importance to specified social and/or cultural groups. Likely candidates might include a unique plant procurement site of contemporary significance.”

The wild and scenic river suitability evaluation guidance provides 13 factors to be analyzed including factor 11 that considers how designation may help or impede the goals of tribal governments or other governmental entities.

- 3. National Scenic and Historic Trails Program.** The BLM is one of several agencies that share responsibility for management of national scenic and historic trails. The BLM also serves as National Trail Administrator for three national historic trails, two of which are administered jointly with the NPS. Many recognized trails follow ancient routes of importance to tribes and intersect habitats of culturally sensitive plants and cultural resource sites.

National scenic trails are extended trails that provide outdoor recreation and conserve and enhance the various qualities—scenic, historical, natural, and cultural—of the areas they pass through.

National historic trails are extended trails that closely follow a historic trail or route of travel of national significance. Designation identifies and protects historic routes, historic remnants, and artifacts for public use and enjoyment.

The BLM also supports five national trail-related visitor centers to foster visitor enjoyment, appreciation, and learning.

The 1968 National Trails System Act, as amended (16 U.S.C. 1241–1251) established the National Trails System. The act states that:

“In order to provide for the ever-increasing outdoor recreation needs of an expanding population and in order to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation, trails should be established. . . .

“National Trail administration and management responsibilities are fulfilled . . . in coordination with Tribes.”

MS-6250, National Scenic and Historic Trail Administration, also addresses specific functions delegated to the BLM from the Secretary of Interior pursuant to the National Trails System Act regarding how to conduct national scenic or historic trail feasibility studies, how to administer a national scenic or historic trail upon designation by Congress, and the responsibilities of national scenic or historic trail administrators.

MS-6280, Management of National Scenic and Historic Trails and Trails Under Study or Recommended as Suitable for Congressional Designation, states that an objective of the BLM is to develop and maintain relationships, and collaborate and coordinate with tribes and other interested parties regarding management of national trails. The BLM Director and district/field managers are to develop and maintain relationships, including collaborating and coordinating with tribes and other interested parties and ensure efforts are made to manage national trail resources on shared trail boundaries in accordance with applicable laws and in a manner compatible with the respective landowners and management entities and in coordination with tribes and other interested parties.

In the management and stewardship of national trails and national trail management corridors, the BLM must encourage, assist, and establish cooperative tribal relationships, partnerships, and stakeholder involvement to increase efficiencies, improve awareness and communication, promote consistency, and expand participation in the management of the national trails.

The BLM must also coordinate a trail inventory on an ongoing basis to ensure consistency and information sharing. The national trail inventory must be conducted in cooperation with tribes and interested parties in accordance with policy, agreements, and protocol. The BLM manager is to coordinate inventory efforts with tribes, other interests, SHPOs, and the ACHP to maximize efficiencies. The BLM may offer technical training and/or limited financial support to tribes who are interested in participating in national trail inventory (National Trails System Act sections 7(a)(1)(B), 11(b)(1), and 11(c)).

The BLM’s National Scenic and Historic Trails Strategy and Work Plan provides a framework for the development of program guidance and direction for management of the National Trails System. The strategy contains a mission statement, followed by a set of goals, objectives, and actions. The work plan outlines the priorities, timeframes, and responsible office.

Tribal Partnerships and Other Opportunities

Native American traditional cultural knowledge of plants, animals, and the landscapes that contain them inform and enrich the management and interpretation of national scenic and historic trails. A good example is the close involvement of the Nez Perce Tribe in the administration of the Nez Perce Nee-Mee-Poo National Historic Trail, as outlined in an MOU with the U.S. Forest Service, the lead agency for this trail’s management. (A copy of this MOU is posted at WEBSITE).

BLM Montana Field Offices actively consult with the Nez Perce Tribe, the Confederated Tribes of the Coleville Reservation, and the Confederated Tribes of the Umatilla Reservation regarding any Federal undertakings that could potentially affect areas along the designated trail route, as well as prior to initiating any interpretive efforts involving the trail. Revisions of the Comprehensive Trail Management Plan incorporate consultation efforts and proactive working relationships with other Indian tribes whose aboriginal territories are crossed by the designated trail route.

Tribes are invited to participate in all National Trails System workshops and conferences. Strong partnerships can be developed with tribes to enhance the interpretation and visitor experiences at national historic trails, as occurs between the Montana BLM and the Nez Perce Tribe regarding the Nez Perce Nee-Mee-Poo National Historic Trail.

4. Wilderness Program.

- a. **Congressionally Designated Wilderness.** Wilderness is a legal designation designed to provide long-term protection and conservation of Federal public lands. Wilderness is defined by the 1964 Wilderness Act (16 U.S.C. 1131-1136) as “an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain . . . Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.”

The Wilderness Act and the Religious Freedom Restoration Act (42 U.S.C. 2000bb–2000bb-4) established the general legal authority for Congress to designate and for agencies to manage wilderness. The Act did a variety of things including—

- Established a national policy to preserve wilderness,

- Established a definition of wilderness,
- Established a National Wilderness Preservation System,
- Designated the first 9.1 million acres of legally protected wilderness,
- Established a single, consistent wilderness management direction,
- Mandated a wilderness review process, and
- Asserted the exclusive power of the Congress to designate wilderness areas.

MS-6340, Management of BLM Wilderness, includes Section 6340.19, Traditional Use by Native Americans, which states:

“Many wilderness areas are, in whole or in part, also important locations for traditional uses by Native Americans, from areas important for the collection of natural materials, to places for traditional religious practice, and entire landscapes of cultural identity. Traditional uses in wilderness are managed in accordance with the Wilderness Act, the National Historic Preservation Act, the Archaeological Resources Protection Act, the American Indian Religious Freedom Act (AIRFA), the Religious Freedom Restoration Act (RFRA), the Native American Graves Protection and Repatriation Act, Executive Order 13007—Indian Sacred Sites, the Department of the Interior Tribal Consultation Policy of December 2011, and BLM Manual 8120.”

The following are some examples of how Native Americans exercise their rights in wilderness—

- Access to sacred sites important to their religion,
- Use and possession of sacred objects important to the exercise of religious rites and ceremonies, and
- Freedom to worship through ceremonies and traditional rites without government intrusion or interference.

The BLM allows Native American traditional practices that are consistent with preserving wilderness character, as well as uses guaranteed by treaty reserved rights which may impair wilderness character. In addition, the BLM must use the following guidelines in managing traditional uses in wilderness areas:

- Traditional uses and sacred locations can only be identified by Indian tribes or tribal representatives. The BLM must consult with designated representatives of appropriate federally recognized tribes to identify these uses and locations. If affected Indian tribes are reluctant to divulge this information, the BLM assumes that these sites and resources will be adequately protected if the area’s wilderness character is preserved.

- Native Americans may have rights guaranteed by treaty to collect natural materials from a wilderness area for religious or subsistence purposes without additional authorization from the BLM. In addition, under AIRFA and Religious Freedom Restoration Act, Native Americans may be permitted by the BLM to collect for religious purposes natural materials that are not allowed to be collected by other members of the public even though not explicitly guaranteed by treaty.
 - In accessing a sacred site or collecting natural materials in wilderness, Native Americans generally may not use motor vehicles, motorized equipment, motorboats, mechanical transport, or land aircraft, unless the use of such prohibited tools is guaranteed by treaty or any special provisions in enabling legislation. However, they could be authorized if an analysis of the “minimum tool” necessary indicates that the project or activity is necessary to meet the minimum requirements for the administration of the area and the tool or method used results in the least impact to the physical resource or wilderness values.
 - In general, the BLM will not close a wilderness or portion of the wilderness for Native American traditional practices. In rare instances, upon the request of an Indian tribe or Indian religious community, the BLM may temporarily close to the general public use of one or more specific portions of a wilderness area in order to protect the privacy of traditional cultural and religious activities in such areas by Native Americans. Any such closure must affect the smallest practicable area for the minimum period necessary for such purposes.
- b. **Wilderness Study Areas.** In addition to formally designated wilderness areas, FLPMA directed the Bureau to inventory and study its roadless areas for wilderness characteristics that often also contain culturally sensitive traditional use areas and sacred sites. To be designated as a WSA, an area had to have the following characteristics—
- Size—roadless areas of at least 5,000 acres of public lands or of a manageable size;
 - Naturalness—generally appears to have been affected primarily by the forces of nature; and
 - Opportunities—provides outstanding opportunities for solitude or primitive and unconfined types of recreation.

In addition, WSAs often have special qualities such as ecological, geological, educational, historical, scientific and scenic values.

The congressionally directed inventory and study of BLM’s roadless areas received extensive public input and participation. By November 1980, the BLM had completed field inventories and designated about 25 million acres of WSAs. Since 1980, Congress has reviewed some of these areas and has designated some as wilderness and released others for non-wilderness uses. Until Congress makes a final determination on a WSA, the BLM manages these areas to preserve their suitability for designation as wilderness. The BLM manages over 500 WSAs containing nearly 13 million acres located in the Western States and Alaska.

MS-6330, Management of Wilderness Study Areas, states that it is BLM’s policy to “develop and maintain relationships with ... tribal governments ... regarding the stewardship of WSA’s.”

5. **National Conservation Lands Science Program.** The BLM’s National Conservation Lands comprise a natural and cultural scientific laboratory that attracts scientists from around the world. Indeed, several National Conservation Lands components have been designated by Congress or the President because of their varied scientific objects and values of interest. These scientific values have opened the door for valuable research on topics ranging from geology, paleontology, archaeology, and history to biology, botany, and anthropology. For instance, researchers are discovering new species of dinosaurs, studying best practices for rangeland management, determining butterfly diversity, reintroducing endangered species, examining the dynamics of riparian areas, and more.

The benefits of this research are shared by both the scientists and BLM managers. Researchers have the opportunity to conduct studies in unique and protected landscapes, while BLM managers can use the results to help more effectively and efficiently manage the National Conservation Lands. Good working relationships between scientists and BLM have provided for many fruitful, mutually advantageous projects.

Many of the scientific research projects in National Conservation Lands are conducted through partnerships with tribes as well as scientists and scientific organizations, including universities, government agencies, special-focus groups, and nongovernmental organizations. (See WEBSITE for a copy of the National Conservation Lands Science Strategy.)

FLPMA directs BLM’s interdisciplinary course of multiple-use and sustained-yield management “in a manner that will protect the quality of *scientific*, scenic, historical, ecological, environmental, air and atmospheric, water resource and archeological values.” Public Law 111-11 established National Conservation Lands to “conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and *scientific* values for the benefit of current and future generations” (emphasis added).

MS-6100 describes how “the BLM will use the best available science in managing (National Conservation Lands) units” and how the BLM will promote National Conservation Lands units “as sites for scientific research.” Scientific research on BLM

lands, including the National Conservation Lands, follows the Department of the Interior’s policy on scientific integrity (305 DM 3, Integrity of Scientific and Scholarly Activities (2011)).

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CHAPTER VII. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE FIRE MANAGEMENT PROGRAM

A. Introduction

BLM involves tribes at the strategic and program planning levels through tribal consultation on LUPs/RMPs and preseason program coordination meetings as well as at the tactical program-implementation level during fuels program implementation planning, community assistance, prevention, and incident management. BLM uses compatible planning processes, funding mechanisms, training, qualification requirements, operational procedures, and public education programs for all fire management activities with other Federal agencies and tribes to the maximum extent possible. BLM is committed to standardization of policies and procedures among Federal agencies and tribes. Consistency of plans and operations provides a platform upon which Federal wildland fire management programs can cooperate across agency and government boundaries.

B. Legal Authorities for Tribal Consultation within the Fire Management Program

1. **Reciprocal Fire Protection Act (1955; 42 U.S.C. 1856, 1856a).** Under this act, Federal agencies charged with the duty of providing fire protection for any property of the United States are authorized to enter into a reciprocal agreement with any fire organization maintaining fire protection facilities in the vicinity of such property for mutual aid in furnishing fire protection for such property and for other property for which such organization normally provides fire protection.
2. **Federal Grant and Cooperative Agreement Act (1977; 31 U.S.C. 6301–6308), Economy Act (1932; 31 U.S.C. 1535), and Federal Land Policy and Management Act.** These acts authorize the BLM to enter into contracts, agreements, and award grants.
3. **Timber Protection Act (1922; 16 U.S.C. 594).** This act authorizes the Secretary of Interior to “protect and preserve, from fire ... timber owned by the United States upon the public lands ... Indian reservations, or other lands under the jurisdiction of the Department of Interior.”
4. **Alaska Native Claims Settlement Act (1971; 43 U.S.C. 1601–1624).** Section 1620(e) states:

“Real property interests conveyed pursuant to this chapter to a Native individual, Native group, corporation organized under section 1613(h)(3) of this title, or Village or Regional Corporation shall continue to be regarded as public lands. . . . So long as there are no substantial revenues from such lands they shall continue to receive wildland fire protection services from the United States at no cost.”
5. **Departmental Manual 620, Wildland Fire Management, Chapter 2, General Policy and Procedures—Alaska (620 DM 2).** Section 2.4 states:

“BLM will maintain and operate the Department of the Interior wildland fire suppression organization in Alaska with the primary intention of providing cost-effective suppression services and minimizing unnecessary duplication of suppression systems for Department of the Interior agencies. BLM will also provide consistency in State and Native wildland fire relationships and provide statewide mobility of wildland fire resources. BLM is authorized to provide safe, cost-effective emergency wildland fire suppression services in support of land, natural and cultural RMPs on Department of the Interior administered land and on those lands that require protection under the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1620(e)), herein after referred to as Native Land. BLM will execute these services within the framework of approved fire management plans or within the mutually agreed upon standards established by the respective land managers/owners.

“Nothing herein relieves agency administrators in the Interior bureaus of the management responsibility and accountability for activities occurring on their respective lands.

“Wildland fire suppression and other fire management activities provided on Native Lands under the authority of the ANCSA, as amended (43 U.S.C. 1620(e)), will consider Native land managers on an equal basis with Federal land managers.

“Each bureau will continue to use its delegated authority for application of wildland fire management activities such as planning, education and prevention, use of prescribed fire, establishing emergency suppression strategies and setting emergency suppression priorities for the wildland fire suppression organization on respective bureau lands.”

6. **Tribal Forest Protection Act** (2004; 25 U.S.C. 3115a). This law authorizes the Secretary of Interior to give special consideration to tribally proposed stewardship contracting or other projects on BLM land bordering or adjacent to Indian trust land to protect the Indian trust resources from fire, disease, or other threat coming off of BLM land.

C. Importance of LUP/RMP for Fire Planning and Coordination with Indian Tribes

The LUP (see Chapter V, Guidance for Consultation in Planning and Decision Support) sets the objectives for the use and desired condition of the various public lands, including fire management objectives and the fire management program in the designated area. Response to fires is guided by the strategies and objectives outlined in the RMP.

The BLM must consult with tribes during the LUP/RMP process and during development of programmatic emergency stabilization and burned area rehabilitation plans, hazardous fuels treatment projects, and fire management plans that implement decisions beyond those of the LUP/RMP. BLM should seize the opportunity to consult with tribes early during the NEPA development process to adjust planning decisions to meet tribal needs of access, resource utilization, restoration of vegetation communities containing culturally important plants, and protection of sacred sites.

D. Areas of Responsibility

The BLM has the legal authority to protect the lands under its management and administration from the adverse effects of wildfire. This can be done by the agency itself or through contracts and agreements with other protection organizations.

E. Program Operation Standards

During initial action, all agencies (Federal, State, local, and tribal) accept each other's standards. Once jurisdiction is clearly established, then the standards of the agency(s) with jurisdiction prevail. Prior to the fire season, Federal agencies must meet with their State, local, and tribal agency partners to facilitate an understanding of the qualification/certification standards that will apply to the use of local non-Federal firefighters during initial action on fires on lands under the jurisdiction of a Federal agency. The National Wildfire Coordinating Group position standards (as identified in Product Management System (PMS) 310-1, Wildland Fire Qualification System Guide) are considered the industry standard and are essential for safe operations in the wildland fire environment. Failure to meet the standards would prohibit tribal firefighters from participation in off-reservation fire activities beyond initial attack.

F. Cohesive Strategy

The 2009 Federal Land Assistance, Management and Enhancement (FLAME) Act (43 U.S.C. 1748a) directed the Departments of Agriculture and Interior to develop a cohesive wildland fire management strategy. The cohesive strategy takes a holistic view of fire on the landscape—across jurisdictions in an “all hands all lands” approach to create fire adapted communities, restore and maintain landscapes, and respond to wildfires. This approach supports an inclusive intergovernmental approach to “safely and effectively extinguish fire where allowable; manage our natural resources; and as a Nation, live with wildland fire.”

G. Partnerships with Tribes

Developing and updating agreements with tribes can clarify jurisdictional interrelationships and define roles and responsibilities among BLM and tribal fire protection entities. These agreements may be used to coordinate preparedness needs across the landscape and gain operational efficiencies to meet peak operational demands and achieve economic efficiencies in fuels management, preparedness, and prevention.

H. Use of 638 Compacts or Self-Governance Contracts in the Fire Program

In the lower 48 States, the BIA, through treaties and Executive orders, has the responsibility to protect tribal lands that are held in trust by the Federal Government but not on intermingled fee lands (private land owned and intermingled with tribal trust lands) unless the bureau establishes MOU with local protection districts. Protection responsibility does include allotted lands held by individual tribal members. Protection responsibility includes wildland fire management, wildfire suppression and external structure protection.

Because the BIA has responsibility to protect tribal lands in the lower 48 States, the use of 638 compacts or self-governance contracts for fire management by the BLM does not occur. However, for Native lands in Alaska, Secretarial Order 3077 (March 17, 1982) recognized the economic and operational benefits of continuing suppression responsibilities by the BLM for all Native Lands conveyed under ANCSA and DOI-managed lands including Native allotments. Therefore, Indian tribes in Alaska can compact or contract to implement fire program functions for Native lands for which the BLM otherwise would have responsibility.

For Native lands in Alaska there are three basic situations:

- **BLM Management:** The BLM manages and implements the entire wildfire program using primarily BLM employees.
- **Contract Program:** An individual tribe may contract for all or part of the program. They can either run the program themselves or contract with the private sector. (This is currently the case in Alaska where the Alaska Fire Service has entered into an annual funding agreement with local tribal entities to provide wildland fire training of emergency fire crews).
- **Compact Program:** A compact tribe accepts funding from the BLM to take full control of the program. The BLM withdraws its personnel leaving only a single BLM employee (either a superintendent or trust officer). In this case, the tribe only has to follow Federal law, but not necessarily BLM policies. The BIA retains the responsibility to sign delegations of authority to incident management teams.

CHAPTER VIII. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE FOREST AND WOODLANDS PROGRAM

A. Overview

1. Oregon and California Grant Lands and the Public Domain Forestry Programs.

The BLM manages almost 67 million acres of forest and woodlands, comprised of Oregon and California grant lands in western Oregon and public domain (PD) forest across the West. The PD forest land covers over 32 million acres across the 13 Western States and over 33 million acres in Alaska. The O&C Act directs the BLM to manage the 2.3 million acres of productive commercial timberlands for permanent forest production in conformance with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, contributing to the economic stability of local communities and industries, and providing recreational opportunities. The FLPMA directs BLM to apply principles of multiple-use and a sustained yield of resources in the management of PD lands. Management of the PD lands focuses on restoring forest health and improving wildlife habitat, reducing the risk of catastrophic wildfire, and providing a variety of special forest products including firewood to local communities.

BLM-administered lands yielded \$285 million worth of timber and other forestry products in Fiscal Year 2013. Overall, these lands generated \$658 million worth of timber-related economic activity. Timber-related activity also helped to support more than 2,900 jobs, most of them in Oregon. The BLM's forestry and woodlands management program manages public access to a variety of other forestry products including personal use firewood and non-wood special forest products (such as Christmas trees, native seeds, mushrooms, and floral/greenery). Non-wood special forest products from BLM-managed lands generated over \$300,000 in sales in Fiscal Year 2013.

Personal use fuelwood gathered from BLM-administered lands in Fiscal Year 2014 amounted to about 11,000,000 cubic feet. Assuming a market price of \$200 per cord, the market value of this fuelwood was almost \$17 million. Additionally, BLM collected around \$550,000 in permit fees for personal fuelwood collection.

2. Use of Public Lands Forest Products by Tribes and Pueblos.

Most traditional tribal lands or aboriginal territories inhabited by the many tribes were ceded to the United States through treaty and are now within public land boundaries. Within these aboriginal or traditional territories, the tribal members were able to obtain resources needed to support their livelihoods and sustenance.

A variety of forest products are important to tribes, including firewood for cooking, heating, and ceremonial use as well as nuts, berries, poles, and traditional vegetative materials for subsistence and ceremonial needs. A number of tribal communities also have forest products businesses and may have an interest in saw timber or commercial firewood from public lands. Tribal communities in many areas of the west rely on BLM forest products to sustain their traditions and meet their cultural needs. For many,

firewood is the primary source of heat and is used for cooking in many areas where propane, liquefied natural gas or other petroleum fuels are unavailable or cost prohibitive. In the Eastern Navajo Chapters of New Mexico, for example, firewood is the primary source of heat for 90 percent of tribal members with 60 percent of this firewood being harvested primarily by permit from BLM lands.

The BLM policy is to accommodate, to the greatest extent practicable, traditional use of public lands by Native Americans and to support traditional gathering of culturally important plants, timber, and forest products. Additionally, economic development opportunities may exist involving forest products, including merchantable timber and biomass utilization. For many tribal communities, access to forest products and involvement in forest planning efforts are important to maintaining traditional gathering and ceremonial use of cultural utilized plants, timber, and other forest products.

B. Legal Authorities

1. **Sale of Timber and Vegetative Materials.** Providing forest products to members of tribal communities is subject to existing statutes and regulations concerning disposal of forest products. Authority to sell or otherwise dispose of forest and vegetative products, including timber, is found in the 1947 Materials Act (30 U.S.C. 601 et seq.); the current policy for the sale of vegetative resources is found at 43 CFR 5420.0-6. This policy states that all timber or other vegetative resources to be sold or removed shall be appraised and in no case shall be sold at less than the appraised value. In addition, 43 CFR 5462.2 prohibits cutting, removing, or otherwise damaging any timber, tree, or other vegetative resource except authorized by a forest product sale, contract, permit, or Federal law or regulation.
2. **Non-sale Disposal and Free Use With Permit.** Current policies for the issuance of free-use permits for vegetative resources are found at 43 CFR 5500 and 5510, MS-5500, and in 43 CFR 8365.1-5. The 1955 Multiple Surface Use Act (30 U.S.C. 611) gives the Secretary the ability to dispose of certain minerals and certain vegetative products, timber, and forest products without charge. The law states that any Federal, State, or Territorial agency, unit, or subdivision, including municipalities, or any association or corporation not organized for profit, may take and remove, without charge, materials and resources subject to this act, for use other than for commercial or industrial purposes or resale. However, limitations for Non-sale or Free-Use permits are specified by current Federal regulations:
 - Free-use permits must not be issued when the applicant owns or controls an adequate supply of timber or vegetative materials to meet their needs (43 CFR 5511.2-1).
 - Free-use permits must not be issued to individuals, outside of Alaska, except qualified mining claimants, and non-sale disposals must be for the applicants own

use and may not be bartered or sold or used for commercial or industrial purposes or resale (43 CFR 5510.0-3(b)).

- Free-use permits issued to a nonprofit association or corporation may not provide for the disposition of more than \$100 worth of timber or other vegetative materials during any one calendar year (43 CFR 5511.307).

3. **Non-sale Disposal and Free Use—No Permit (free or otherwise).** No permit is required for the collection of limited amounts of vegetative products by members of the public in accordance with 43 CFR 8365.1-5. Commonly available renewable resources such as flowers, berries, nuts, seeds, cones, and leaves may be collected for noncommercial uses. This language could encompass a wide range of vegetative resources of concern to tribes.
4. **Tribal Forest Protection Act.** Passed in response to wildfires crossing onto tribal lands from Federal lands, the act applies to national forest and BLM lands. The statute allows tribes to submit a request to enter into contracts and agreements with the BLM to conduct projects aimed at reducing threats from Federal lands and protecting tribal forests. The BLM must respond to a request within 120 days, either supporting and initiating the project, or denying the project with an explanation but offering a schedule of consultation with the Indian tribe for the purpose of developing a strategy for protecting the Indian forest land or rangeland of the Indian tribe and interests of the Indian tribe in Federal land.

Proposed projects under the Tribal Forest Protection Act entail work on Federal land that borders or is adjacent to tribal lands. Activities include treatments to reduce fire danger and other threats to tribal forests and communities as well as other land restoration activities. In entering into an agreement or contract under Public Law 108-278, including stewardship contracts, the BLM may give specific consideration in the procurement process to tribally related factors such as historical and cultural affiliation with the land, treaty rights, agency/tribal working relationships, landscape features, and others found in the act (see 25 USC 3115a, section 2(e)(2)A-H). The Tribal Forest Protection Act is important particularly for BLM lands that abut reservation boundaries. Developing an agreement or stewardship contract for managing forestlands in these areas is highly encouraged.

C. Treaties and Forest Products

A variety of treaties exist with tribes located primarily in the northern Rockies and Pacific Northwest that not only established reservations for the exclusive use of the tribes, but also reserved their right to continue traditional activities in aboriginal territories beyond these reserved areas. As stated in Chapter II, Section F, some tribes or their members have retained rights to hunt, fish, and/or gather other resources on ceded lands, even if these lands are no longer within Indian Country. A number of treaties and the ANILCA contain language reserving

the right to hunt, fish, and conduct other traditional activities such as harvesting forest and vegetative products on lands off of the reservations.

Questions arise concerning the issue of whether valid treaty rights in a Senate-ratified statute supersede the Code of Federal Regulations concerning off-reservation lands. For example, the treaty between the United States and the Bannock and Shoshone of the Fort Hall Reservation from 1900 states that “so long as any of the lands ceded . . . under this treaty remain part of the public domain, Indians belonging to the above mentioned tribes . . . shall have the right, without any charge therefore, to cut timber for their own use, but not for resale.” So, under the treaty, tribal members can cut timber, not just collect forest products, without having to pay. On the one hand, the Federal regulations do not allow for free-use permits to be issued to individuals outside of Alaska. On the other hand, the treaty is a law and thus carries greater legal weight than the regulations, given Federal Government’s trust responsibility to recognize treaties and honor their exercise. Secretarial Order 3335, *Reaffirmation of the Federal Trust Responsibility*, states that the trust responsibility can often be best achieved “through legislative authorization.” Future legislative authorizations could address issues related to forest products sale and disposal. However, until then, offices and States will have to balance trust responsibility with compliance with applicable Federal regulations.

The Federal regulations guiding BLM decisions regarding the sale or non-sale disposal of forest products establish restrictions on the issuance of free-use permits. States have the discretion to establish price guidelines for the sale of vegetative materials and forest products of interest to tribes that are not cost prohibitive. For example, willows used by a number of different tribes for basket weaving cannot be provided free of charge if they will be used for commercial purposes such as selling baskets and do require an appraisal based on market conditions. However, the commercial market may be limited for some products and the appraised value may be low. Another option for non-sale disposal of forest products is to develop stewardship projects with tribal communities. A number of legal instruments exist to allow partnerships with tribal entities such as financial assistance agreements, stewardship contracts, agreements and forest products sales, and service contracts. Executing stewardship contracting with interested tribes provides an alternative solution to the tribal treaty/forest products sale regulation conundrum.

D. Stewardship Contracting

Stewardship contracting authority, originally granted under the Appropriations Bill of 1999 (Pub. L. 105-277, section 347), and amended by the Omnibus Appropriations Bill of 2003 (Pub. L. 08-7, section 323), was permanently authorized by Section 8205 of the 2014 Agricultural Act (7 U.S.C. 8702) (i.e., Farm Bill). Using stewardship contracts and agreements can be effective in meeting the forest products needs of tribes and pueblos while developing economic development projects through collaborative forest management. The BLM’s primary objective for its stewardship contracting program is to implement projects that increase the health and resiliency of both public lands and local communities. Stewardship often involves exchanging goods for services, where a partner conducts service work for the BLM and in return can acquire forest products for their use. Stewardship contracting provides the authority to utilize the value of forest products to offset the cost of service work within a single contract. If a

tribe or pueblo has a forestry program and can provide or develop a forestry crew, stewardship contracting can be an important tool for both engaging tribal communities in public lands forest management as well as for economic development within the community.

Meeting local and rural community needs is a requirement of stewardship contracting and may be identified through collaboration. The level of collaboration should match the size, complexity, duration and level of public interest in the stewardship project. Existing collaborative relationships can be used, thus streamlining the collaborative process. Collaborative processes allow and provide opportunities for diverse interests and stakeholders to play an active and meaningful role in stewardship projects.

The primary objective of a stewardship contracting project is to achieve one or more of the land management goals that meet local and rural community needs. These goals as identified in the authorizing legislation, may include, but are not limited to—

- Road and trail maintenance or obliteration for improved water quality;
- Soil productivity, habitat for wildlife and fisheries, or other resource values;
- Setting prescribed fires to improve composition, structure, condition, and health of stands or to improve wildlife habitat;
- Removing vegetation or other activities to promote healthy forest stands, reduce fire hazards or achieve other land management objectives;
- Watershed restoration and maintenance;
- Restoration and maintenance of wildlife and fish habitat; and
- Control of noxious and exotic weeds and reestablishing native plant species.

Additional guidance can be found in End Results, Stewardship Project Guidance, Version 3, available at: http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2013.Par.93379.File.dat/IM2013-057_att1.pdf.

E. Establishment of Consultation Protocols through Agreements, Contracts, and Other Instruments of Collaboration

1. **Build a Relationship with Tribal Foresters and Natural Resource Staff.** Regular or annual meetings or workshops between BLM and tribal forestry staff could potentially be done at a regional level as well as a State or local level. Many tribal communities have tribal forestry programs either as a stand-alone agency or as part of a natural resources department under the tribal government or tribal corporation. Some tribal forestry programs have developed under 638 self-rule authority and may be located under a different department in the tribal organization (i.e., the Ramah Navajo Chapter Forestry Program is located under the chapter school board). With government-to-government consultation between tribal leaders and BLM line officers, ample opportunity exists for

staff-to-staff consultation and collaboration between BLM foresters and their tribal counterparts.

2. **Meetings to Discuss Proposed Forest Management Projects.** Opportunities for collaboration can be initiated between BLM foresters and tribal entities staff. If there is sufficient interest or a number of outstanding issues to discuss, quarterly forest management coordination meetings may be scheduled. Make sure to check the cultural calendar with the tribal communities to avoid conflict with feasts, festivals or other cultural events. An MOU may be useful to create a more structured process for consulting on forest management issues.
3. **Agreements.** Although not used to transfer funds or pay for service work, an MOU can describe the process for meeting with tribal forestry officials on a regular basis. For example, the MOU can state the BLM will schedule meetings, transmit a proposed agenda, and circulate resulting meeting notes within certain timeframes. An MOU can also have a list of projects, issues, or ongoing opportunities for consultation, and the list should be regularly updated. For example, an MOU between the BLM and tribal community could describe a process for setting regular meetings to discuss ongoing issues such as access to forest products, protection for ceremonial use vegetation collection areas, and opportunities for economic development such as developing a stewardship agreement.

Developing an MOU also gives a chance for the BLM staff to work with their tribal counterparts and offers a glimpse into their internal process. For collaborative forest restoration and management activities, BLM staff may need other instruments that allow for the transfer of funds such as financial assistance agreements, service contracts, or intergovernmental agreements.

A copy of a draft MOU between the Albuquerque District of the New Mexico BLM and Jemez Pueblo is posted at WEBSITE. It establishes regular coordination meetings to discuss a variety of forestry related issues, law enforcement, environmental review, and economic opportunities.

CHAPTER IX. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE RANGELAND MANAGEMENT PROGRAM

A. Introduction

This chapter explains how managers and staff carry out tribal consultation and coordination when conducting land health evaluations, developing allotment or grazing management plans, modifying permitted livestock grazing use, and planning range improvements and vegetation treatments. Consultation is part of program implementation and management and thus supported by appropriate rangeland subactivities. The BLM must notify relevant tribal contacts when identifying the watersheds, allotment, or permits that are subject to grazing management review. Appropriate notification is described in Chapter IV of this handbook.

B. Consulting During Monitoring and Evaluation Processes

Range health monitoring processes can include establishing monitoring sites and identifying data collection methods, both quantitative and qualitative. Tribes may be interested in collecting or contributing data that informs the evaluation process. Therefore, BLM should provide opportunities for tribes to be involved in developing a monitoring plan for grazing allotments or watersheds. Such monitoring plans should include a list of resource objectives, the methods for data collection, the sites where data will be collected, and the responsible parties for collecting the data. The BLM also should notify relevant tribes of the areas where evaluation reports, including land health evaluations, are planned each year and provide the tribe an opportunity to review, comment, and give input during preparation of particular reports in areas of interest to the tribe.

C. Consulting During Grazing Permit Renewal and Other Vegetation Management Activities

The BLM should notify tribal contacts when initiating NEPA processes for range improvements, vegetation treatments, and grazing management. The BLM should provide tribes an opportunity to participate in the development of allotment management plans (or their equivalent) and other alternatives for analysis in NEPA documents. Individual tribal members that have a grazing permit or lease should be consulted as a permittee, separately from tribal consultation unless the tribe designates that member to represent them. The BLM should identify to the appropriate tribes at the beginning of each year which areas are expected to be addressed, either through permit renewal or management changes necessary to address grazing management or land health issues.

The BLM should notify tribes when it is planning range improvement structures or vegetation treatments. Changes in the physical environment as well as timing of the activity involved have potential to affect the properties of religious or cultural sites and activities. Tribes may also identify seed sources or species that can be planted/seeded to restore cultural uses.

D. How Types of Projects Requiring Tribal Consultation Are Defined

Individual BLM protocols, authorized under the BLM's National PA (see chapter XI), may specify which types of range projects do and do not require tribal consultation under the NHPA. For example, in Wyoming, no consultation with the SHPO or tribes is required for grazing lease renewals and transfers in which the type and numbers of animals and seasons of use do not change. In addition, states may not need to consult with tribes or their SHPOs for small range improvements that have minimal potential to affect cultural resources, such as short fence lines, small stock ponds, or the placement of a stock tank.

It may be cumbersome to the tribes and the BLM to consult in all cases, especially where scattered BLM lands and areas with extensive split estate contain numerous, small, and discontinuous grazing leases. BLM offices, as part of their consultation with tribes to define which types of projects tribes wish to consult on under NEPA and NHPA, should define the types and scales of range projects of interest/concern to tribes.

CHAPTER X. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE FISH AND WILDLIFE PROGRAM

A. Introduction

The BLM and Indian tribes have a common goal of conserving fish and wildlife species, their habitats, and the ecosystems upon which they depend. A number of tribes retained off-reservation treaty or other reserved rights which have a large focus on hunting and usual and accustomed fishing locations. Therefore, the health of habitats on public lands that support culturally sensitive species are critically important. As a result, tribes often manage and influence some of the most important fish and wildlife habitats both on and off reservations. Subsequently, the Federal Government and the BLM have distinct and unique obligations as well as common interests with tribes to effectively manage and make best decisions toward our shared resources and trust responsibilities.

B. Collaborative Conservation Approach

While the major components of this handbook are aimed at cultivating and maintaining effective partnerships between the BLM and Indian tribal governments, a prominent common goal is to effect long-term conservation of fish and wildlife resources. Tribes and the BLM share a common goal of ensuring responsible and sustainable management of natural resources and ecosystems, maintaining healthy populations of plant and animal species, and protecting sensitive species.

Tribes have authority for self-government, including the management of fish and wildlife resources within the boundaries of reservations. Tribes usually have the most intimate knowledge of species locations, population health, and management requirements for species occurring on tribal lands. Tribal fish and game departments may also regulate off-reservation treaty rights to hunt by issuing tribal members off-reservation hunting permits (the Shoshone Bannock Tribes for example). The BLM also recognizes that Tribal management of fish, wildlife, plants, and other natural resources, while in accordance with many of the same principles as Federal management of these resources, is at times guided by different goals and concerns than those of the BLM. Efforts should be made to obtain and incorporate tribal natural resources development plans into BLM integrated resource management strategies that protect fish and wildlife and other natural resources.

BLM should acknowledge that the tribes will usually be the primary managers of fish and wildlife resources on tribal lands and will maintain and hold records concerning fish and wildlife species and management. BLM should also recognize that tribes may have specific, relevant understanding of natural resources within their purview based on traditional knowledge accumulated over a long period of time. Information collected by a tribe is not subject to Federal Freedom of Information Act requests, provided that the information was collected using tribal funds and is maintained with the tribe. In cases where tribal proprietary or confidential cultural or religious information is not compromised, BLM should request that tribes share this information with the BLM. The BLM has a trust responsibility to assist the tribe in caring for

fish, wildlife, plants, and their habitats, and the BLM has much expertise in the area of fish and wildlife habitat management. While tribes may be able to contribute important traditional ecological knowledge to the BLM, the BLM can provide valuable and important technical assistance to tribes who seek means to manage fish and wildlife for conservation and sustainable use. These can include candidate, proposed, listed, and non-status species.

C. Subsistence Management

When BLM field offices prepare habitat management plans or improvement projects, they must consult with Indian tribes and ensure, to the extent possible, that proposed BLM activities and conservation measures will not hinder the gathering of plants or the tribal taking of fish at usual and accustomed locations where specifically reserved by treaty or impede other reserved rights and traditional uses involving wildlife on public lands. Tribal concerns should also be considered when developing management and recovery plans for species valued for nonsubsistence reasons.

Title VIII of the ANILCA created a Federal responsibility to manage fish and wildlife resources needed for subsistence on Federal public lands for certain rural Alaska residents, including Native Americans. As part of the Federal Subsistence Board, the BLM is uniquely responsible for the cooperative management of subsistence resources and uses on BLM lands in Alaska, including fresh waters that run in or are adjacent to BLM lands.

D. Endangered Species and Management of Critical Habitat

On June 5, 1997, the Secretaries of the Interior and Commerce jointly issued Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act. This order not only addressed consultation requirements specific to the Endangered Species Act, but also provided guidance and direction about the department-wide Federal-tribal relationship and its relationship to tribal reserved rights, and clarified agency trust responsibilities. The order provided a policy framework for establishing and maintaining effective working relationships and mutual partnerships to promote the conservation of fish and wildlife species and the health of ecosystems on which they depend. The Secretarial order directs that responsibilities under the Endangered Species Act be carried out in a manner that harmonizes trust responsibilities, tribal limited sovereignty, and statutory missions such that tribes do not bear a disproportionate burden for the conservation of listed species.

Secretarial Order 3206 directed all bureau and agencies within the DOI to:

- Work directly with and seek to establish effective government-to-government working relationships with tribes to promote and protect the health of ecosystems. Tribes are to be afforded adequate opportunities to participate in data collection, consensus seeking, and associated processes.
- Recognize that tribal lands are not subject to the same controls as Federal public lands.

- Take affirmative steps to assist tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species depend, including cooperative identification of appropriate management measures to address concerns for such species and their habitats.
- Offer and provide scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote maintenance, restoration, enhancement, and health of ecosystems.
- Recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources and give deference to tribal conservation and management plans for tribal trust resources that adequately address BLM’s conservation needs for fish and wildlife species. Government-to-government consultations should be conducted to discuss the extent to which BLM and tribal RMPs commonly incorporate actions that address the conservation needs of listed species.
- Be sensitive to Indian culture, religion, and spirituality and adequately take into consideration the impacts of BLM actions and policies regarding tribal use of fish and wildlife species for cultural and religious purposes.
- Recognize the need for and make available information related to tribal fish and wildlife resources, facilitate the mutual exchange of information and strive to protect sensitive tribal information from disclosure. Effort should be made to promptly notify and consult with affected tribes regarding all requests for tribal information.

E. Disruption and Removal of Animal Parts

The U.S. Fish and Wildlife Service is delegated custodial process responsibility for processing and distributing certain animal parts, such as eagle feathers, for recognized religious, ceremonial, and cultural purposes in accordance with Federal laws. BLM offices must coordinate with the appropriate U.S. Fish and Wildlife Service office regarding animal part availability and the need to conduct required scientific and law enforcement investigations. In addition, fish and wildlife animals or body parts should not be relocated or removed from any Tribal land except by explicit prior written authorization from the tribe. This also includes handling or distributing animal parts from areas where there are found.

F. Confidential Biological Information

The tribe has authority to manage access to and to safeguard information about tribal lands, resources, and ecosystems, and their associated flora and fauna. Information obtained from tribal governments and information generated by the BLM through technical assistance to tribal governments must not be shared or released without the tribe’s consent or as required by law. It is ideal and desirable for both tribes and the BLM to establish a protocol to facilitate sharing of information while ensuring that tribal proprietary, commercial, and other confidential information is protected. There are several types of confidential biological information, as detailed below.

1. **Traditional Ecological Knowledge.** This term is used to describe the knowledge held by indigenous cultures about their immediate environment and the cultural practices that build on that knowledge. Traditional ecological knowledge can include an intimate and detailed knowledge of plants, animals, and natural phenomena; the development and use of appropriate technologies for hunting, fishing, trapping, agriculture, and forestry; and a holistic knowledge.
2. **Confidential Tribal Information.** Confidential Tribal Information means all information that is religious, cultural, ceremonial, proprietary, financial, technical, commercial, privileged, sensitive, or confidential in nature or content or that relates to natural resources, cultural resources, or resource management practices of the tribe. Information can mean any verbal, visual, pictorial, specimen, graphic, electronically stored, printed, recorded, or written material acquired from the tribe or other person or entity or obtained in any other way. Confidential Tribal information should not be used in any way that is detrimental to or that could result in a competitive disadvantage to the tribe. The BLM should provide an opportunity for the tribe to review and consult on drafts of any documents (e.g., biological opinions) containing confidential tribal fish and wildlife information prior to its disclosure or completion as a final document.

Examples of potentially confidential biological information include—

- Biological reports, summaries, data, maps, photographs;
- Lists of species occurring on tribal lands;
- Habitat or ecosystem conditions on tribal lands;
- Water quality, quantity, and inventories of the tribe's water resources, including surface water and groundwater;
- Commercial activities of the tribe;
- Natural resource management practices or plans of the tribe;
- Location and nature of fish and wildlife sites of cultural significance to the tribe; and
- Biological information gathered on tribal lands.

G. Land Access and Cross-Boundary Field Activities

The BLM should access tribal lands to collect biological and habitat information only upon written authorization by the tribe and should be accompanied by an authorized representative designated by the tribe. The tribes and the BLM should each designate a primary contact person to coordinate any authorized field activities and information requests.

H. Law Enforcement

A federally recognized Indian tribe has the inherent authority to develop codes and regulations to protect natural resources on its tribal lands. Tribes also have authority to develop and enter into agreements with other agencies and entities in order to promote, protect, enhance, and pursue effective management of its natural resources. It may be appropriate for a tribe and the BLM to enter into a memorandum of agreement (MOA) for law enforcement to discuss and enforce enumerated Federal laws that address the protection and conservation of fish, wildlife and natural resources within the respective jurisdiction.

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CHAPTER XI. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE CULTURAL RESOURCES PROGRAM

A. Introduction

This chapter explains how BLM managers and staff can carry out tribal consultation in accordance with legal requirements contained within historic preservation, archaeological resource protection, and related cultural resource authorities.

B. Consulting Under Cultural Resources Authorities

Since passage of several bills by Congress protecting selected Native American sites in the American Southwest in the late 19th century, the legislative and executive branches of government have passed or issued a number of laws and Executive and Secretarial orders addressing Native American cultural heritage issues. They have steadily increased Federal agency responsibilities, including the BLM’s, for taking into account Native American concerns in their decisionmaking processes and management goals. Several general authorities were addressed in Chapter V, Guidance for Tribal Consultation in Planning and Decision Support. This chapter describes three statutes and their regulations that more specifically address cultural heritage issues and the interaction of these authorities with those described elsewhere in this handbook. Line officers with the assistance of cultural resource specialists must give tribal concerns full consideration according to the legal requirements.

1. **National Historic Preservation Act.** Requirements for tribal consultation come from Sections 106 and 110 of this law.

Consultation for NHPA Section 106 Purposes	
BLM consults with—	Purpose of consultation is—
Elected officials or Tribal representative(s) whom the tribal government has designated for this purpose	<ul style="list-style-type: none"> • To identify tribally significant religious or cultural properties that may be eligible for the National Register of Historic Places
	<ul style="list-style-type: none"> • To understand tribal concerns sufficiently to take into account the effects that a proposed Federal undertaking might have on National Register eligible properties

Figure XI-1 Tribal consultation for purposes of Section 106 of the National Historic Preservation Act.

Generally speaking, the purpose of consulting with tribes under the NHPA during land use and project planning is to call for meaningful tribal participation in BLM’s efforts to—

- Identify places of traditional cultural or religious importance and other tribally valued historic resource sites and locations,

- Evaluate the significance of those places in relation to the NRHP criteria,
- Assess potential effects on places of traditional cultural or religious importance from any pending land use planning decision or undertaking, and
- Determine appropriate mitigation measures to avoid or reduce adverse effects of planned special designations, land use allocations, and management prescriptions.

Section 106 of the NHPA requires Federal agencies to identify and consider potential effects that their undertakings might have on significant historic properties. Specific provisions to consult with Indian tribes during Section 106 compliance were added to the act through amendments in 1992 (see MS-8100, appendix 5, section 101(d)(6)). The NHPA is blind to land ownership, just like NEPA. Effects must be considered regardless of who owns the land. Therefore, the BLM must consult with tribes about potential effects on places of traditional or religious importance regardless of where those places are located.

Section 101(d)(6) of the National Historic Preservation Act
<ul style="list-style-type: none"> • Specifies that the traditional or historical importance an Indian tribe attaches to a particular place may make the place eligible* for the National Register of Historic Places (i.e., a “historic property” that is significant for purposes of the act); and • Directs agencies carrying out Section 106 compliance to consult with any Indian tribe whose tradition or history may contribute to the National Register eligibility* of a potentially affected property.
<p>* National Register eligibility is determined by evaluating a candidate property’s characteristics against the National Register criteria at 36 CFR 60.4. See BLM MS-8110. No property type enjoys categorical eligibility.</p>

Figure XI-2 Provisions of Section 101(d)(6) of the National Historic Preservation Act.

Consultation under the NHPA is government-to-government, so it should start with the chief executive of the tribe. In practice, tribes may designate tribal staff members to communicate with BLM for this purpose. However, the BLM’s first contact, usually in the form of a letter, should be addressed to the chief executive of the tribal government. Additional tribal staff to be contacted is often determined by formal or informal agreements between the tribe and the BLM.

In some cases, the BLM’s proposed actions on public lands may affect places of traditional religious or cultural importance located on lands within Indian reservation boundaries. When that occurs, consultation must also include the THPO if the tribe has such an official approved by the NPS in accordance with Section 101 of the NHPA to carry out Section 106 responsibilities on tribal lands. In these cases, consultation with

tribes regarding determinations of eligibility, effect, and treatment must be carried out as specified at 36 CFR 800, rather than state protocols executed under the BLM’s National PA.

a. **Traditional Cultural Properties and Eligibility.** The NHPA and its implementing regulations (36 CFR 800) refer to “properties of traditional religious and cultural importance.” These are places that are prominent in a particular group’s cultural practices, beliefs, or values, when those practices, beliefs, or values—

- Are widely shared within the group,
- Have been passed down through the generations, and
- Have served a recognized role in maintaining the group’s cultural identity for at least 50 years.

The term “traditional cultural property” (TCP) is also used in reference to such valued places, but it is not found in law or regulation. It is a term coined in an NPS guidance document, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties. In reference to tribes it has come to be widely used as synonymous with the phrase “properties of traditional religious and cultural importance” referred to in the NHPA and the regulations implementing it. For that reason, the two terms may be considered synonymous within this handbook.

Places of traditional religious or cultural importance to tribes may be archaeological sites (such as burials, rock art, eagle catching pits, stone effigies, kivas, shrines, and so on) but often are not. The traditional importance an Indian tribe ascribes to a place may make that place eligible for the National Register even if the place has no archaeological artifacts or features. The BLM cannot know if a tribe ascribes traditional or cultural importance to a place unless it asks the tribe. These kinds of values are normally not articulated by archaeologists preparing inventory reports. Most BLM archaeologists are trained to identify and evaluate the scientific values of cultural properties, but identifying and evaluating the traditional religious or cultural values of a place requires consultation with the people or community who holds those values.

In consulting with tribes, four kinds of places may emerge as TCPs—

- Places that are still used and important to tribes,
- Places that are no longer used but are still remembered and are important to the tribe,
- Places that are lost from memory but are later discovered in the field and identified as important places that are described in the tribes’ oral histories, and

- Places that are lost from memory but are later discovered in the field and identified as important to the tribe even though they are not described in the tribes' oral histories.

The third and fourth types of TCPs may be considered problematic since they were not previously known to the tribal community. However, in consultations with tribes, do not allow the label of TCP to become a contentious issue. The focus of consultation must be on gathering enough information to demonstrate how the place does, or does, not meet NRHP eligibility criteria and if it does, how it can best be managed to avoid or mitigate adverse effects that may result from the proposed undertaking.

Eligibility for the NRHP is a professional determination based on application of the NRHP criteria (36 CFR 60.4). Only those places that fulfill one or more of the NRHP criteria may be found eligible. No type of property is automatically, categorically eligible, including TCPs. All candidate NRHP-eligible properties must be evaluated against the criteria. Those that do not meet the eligibility standard are not subject to compliance with Section 106 of the NHPA. This does not mean that they are without protection, only that the NHPA is not the correct legal tool for protecting them.

BLM-Specific Section 106 Compliance Procedures. In February 2012, the BLM Director, Chairman of the ACHP, and President of the National Conference of State Historic Preservation Officers approved the updated National PA, 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 (see WEBSITE for a copy). This PA authorizes BLM to comply with Section 106 by following its own cultural resource program policies and procedures as found in the BLM 8100-series manuals and handbooks.

As part of implementing the PA, individual BLM state directors and SHPOs may execute state-specific protocols that guide how they interact, exchange information, and complement one another's capabilities. These two party protocols are executed in consultation with tribes and other interested parties. Procedures agreed to within individual state BLM-SHPO protocols may streamline and expedite the Section 106 consultation process. (Tribal consultation obligations required by 36 CFR 800 remain in effect unless a BLM state negotiates and executes an agreement with a tribe that tailors tribal consultation procedures in a manner acceptable to both parties). In addition, the PA requires that state directors improve BLM-tribal relations by meeting with tribes to find ways to improve communication, including the opportunity to develop consultation procedures tailored to the needs of the individual BLM field office and specific tribe or tribes.

The principles of the national PA and BLM-SHPO protocols, and the procedural details in the BLM 8100 series manuals and handbooks effectively replace the ACHP’s regulations (36 CFR 800) and associated guidance for routine compliance activities, except when they occur on tribal lands. For any decision affecting tribal land and for more complex cases, the BLM follows the provisions of the 36 CFR 800 process or other alternative procedures under 36 CFR 800.14.

- b. **“Indian Tribe” is Specified in the Act.** Section 101(d)(1) states the purpose “to assist Indian tribes in preserving their particular historic properties.” Section 101(d)(6) directs agencies to weigh NRHP eligibility for properties important to an Indian tribe, and to consult with the Indian tribe in regard to properties found eligible. BLM is also obligated to consult with tribes regarding cultural resources even when sites or use areas are not found eligible to the NRHP.

“(A) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

“(B) In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).”

The NHPA is silent on coordination with non-recognized Indian groups and non-recognized Alaska Native entities regarding properties of religious and cultural importance and Section 106. These groups would be addressed under NEPA and other authorities.

- c. **Consolidating Consultation Efforts.** Under NHPA Section 101(d)(6)(B) and Section 110(E)(ii), tribal consultation may be appropriate when archaeological data recovery is being considered to mitigate adverse effects on a property’s scientific importance, to determine if the property also has ascribed religious and cultural significance. Where appropriate, such consultation opportunities may be used to meet the separate consultation requirements of 43 CFR 7.7 of the 1979 Archaeological Resources Protection Act (16 U.S.C. 470aa–470mm) and NAGPRA Section 3(c) as well as those of NHPA Sections 101 and 110.

However, care must be taken to keep the several acts’ distinct legal purposes separate, so that they do not become blended and confused in the various participants’ minds. Losing focus on the requirements of individual laws, participants specified, and reasons for obtaining the Indian tribal input can result in omissions, mistakes, inappropriate expectations on the part of Indian tribes, and inadvertent noncompliance on the BLM’s part.

2. **Archaeological Resources Protection Act.** The ARPA provides for the protection and management of archaeological resources through the approval of permits for their

excavation or collection. Tribal consultation requirements under ARPA derive from sections 4(c) and 10. Section 4(c) requires the responsible Federal land manager to notify the appropriate Indian tribe before approving a cultural resource use permit (see MS-8150) for the excavation or collection of archaeological resources (see 43 CFR 7.3), if the Federal land manager determines that a location with cultural or religious importance to the tribe may be harmed or destroyed by the permitted activity.

Section 4 of the Archaeological Resources Protection Act
<ul style="list-style-type: none"> • Requires the Federal land manager, before issuing a permit to excavate or remove archaeological resources from public land, to notify* the affected Indian tribe when a location having cultural or religious importance to the tribe may be harmed or destroyed by the permitted activity. • Requires Federal land managers to include in the permit any terms and conditions deemed necessary to carry out the purposes of the act. Section 10 links ARPA's implementation and the purposes of the American Indian Religious Freedom Act.
<p>* Uniform regulations at 43 CFR 7.7 recognize that notification logically leads to consultation if the tribe so requests, and require that any terms and conditions agreed to through consultation will be included in the permit.</p>

Figure XI-3 Provisions of Section 4 of the Archaeological Resources Protection Act.

a. **Section 4(c).** The exact wording of Section 4(c) of ARPA is:

“If a permit issued under this section may result in harm to, or destruction of, *any religious or cultural site*, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the *site* as *having religious or cultural importance*. Such notice shall not be deemed a disclosure to the public for purposes of Section 9” (16 U.S.C. 470cc(c); emphasis added).

The statutory term *site* in the phrase “religious or cultural site” does not mean the same as the word *site* in the discipline of archaeology, and should instead be understood to refer to a *place* or a *location*, whether archaeological in nature or not. The ARPA regulations provide, for example, that a “Federal land manager may enter into agreement with any Indian tribe . . . for determining *locations* for which such tribe . . . wishes to receive notice under this section” (43 CFR 7.7(b)(3), emphasis added).

(1) A site having religious or cultural importance is probably at least as likely to occur in the absence of archaeological resources as in their presence. If the Federal land manager were to notify tribes only with respect to archaeological resources, a location’s religious or cultural importance could go unheeded, and inadvertent harm or destruction could occur and the BLM’s notification requirement would be unfulfilled.

- (2) “Having religious or cultural importance” is an AIRFA concept, not an archaeological resource one. The phrase came into the 1979 ARPA bill after a hearing where testimony was given by advocates for Indian religious freedom and traditional religious practitioners, shortly after the American Indian Religious Freedom Act of 1978 became law. The language in ARPA Section 10(a), requiring the rule makers to consider AIRFA when drafting uniform implementing regulations, was included in the ARPA bill at the same time. It reads, “Such rules and regulations may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996).” The purpose of AIRFA is to ensure access to religious sites and freedom to worship through ceremonials and traditional rites, unhindered by Federal infringement, restriction, or intrusion.
- (3) When implementing Section 4(c), the focus of notification and consultation should not be just the archaeological resources that are the subject of a permit application. Rather, BLM should consider the location, nature, scale, and timing of permitted activities that would occur under the permit (e.g., presence of work crews, surface disturbance) relative to places on the landscape that members of an Indian tribe are known, through consultation, to regard as important for their traditional cultural and religious observances. Although excavations may normally be considered a CX under NEPA, the BLM must still consult with Indian tribes under ARPA when the field manager concludes that proposed activities might result in harm or destruction to religious or cultural sites or traditional cultural or religious practices that occur there.
- (a) **Would permitted activities in the area, at the time proposed, hinder or intrude on legally (AIRFA) protected religious use?** If the Federal land manager is confident, based on previous consultation, that permitted activities would not hinder such use, there would be no reason to notify an Indian tribe before processing an ARPA permit application.
- (b) **Would permitted activities in a specific place, including an archaeological site, raise cultural concerns?** For example, a ruin that an applicant has selected for excavation might be recognized in cultural tradition as a venerable ancestral home, or an archaeological site might contain features that are always considered important for cultural or religious reasons. Those kinds of concerns should influence the BLM decision about issuing a permit for excavating and/or removing archaeological resources. When the BLM notifies and consults tribes under ARPA, the focus should not be restricted to the archaeological resources identified in the permit application. The BLM also should consider the: (1) location, (2) nature, (3) scale, and (4) timing of the activities that would occur under the permit.
- (c) **Also, a tribe might have concerns about the potential for disturbing human remains and funerary objects.** This would be subject to

consultation under NAGPRA. (See 43 CFR 10.3 regarding consultation regarding intentional excavations.)

Consultation for ARPA 4(c) Purposes	
BLM consults with—	Purpose of consultation is—
Tribal representative(s) whom the tribal government has designated for this purpose	<ul style="list-style-type: none"> To consider tribal religious or cultural locations on public lands, which archaeological activities, if permitted, could harm or destroy
	<ul style="list-style-type: none"> To consider protective terms and conditions that could be put into a permit to protect tribal religious or cultural locations from harm or destruction

Figure XI-4 Tribal consultation for purposes of Section 4(c) of the Archaeological Resources Protection Act.

- b. **Consultation Procedures.** In general, only permits for major testing programs, excavation, or collection require tribal notification and consultation before being issued. (See ARPA Section 4 and 43 CFR 7.7.) The Federal land manager determines, based on information obtained from Indian tribes, whether proposed archaeological activities on public lands (such as specific instances of testing or excavation) could harm or destroy places of tribal religious or cultural importance, such as places where members of a tribe conduct cultural activities and religious observances. Because of their nature, scale, or timing, most inventory and minor testing proposals have little potential to permanently harm or destroy such places and will not warrant notification.

When the responsible BLM manager determines that tribal notification is necessary before processing an ARPA permit application, the BLM should notify the appropriate tribe(s) by mail, with return receipt requested. The notification letter should—

- Describe the location and nature of the proposed archaeological work,
- Identify the harmful or destructive effects the proposed work might have on known places of religious or cultural importance,
- Offer to consult with the tribe regarding the proposed work,
- State that any request for consultation must be received by the BLM within 30 days from the date the tribe received the notification letter,
- Cite ARPA Section 4(c) and 43 CFR 7.7(a) as the basis for notification, and

- Cite NAGPRA Section 3(c) if the proposed work would involve intentional excavation of human remains, funerary objects, sacred objects, or objects of cultural patrimony

If the tribe asks to consult after receiving the notification letter, then the consultation should be undertaken expeditiously consistent with the procedural requirements and timeframes contained in 43 CFR 7.7(a)(3), MS-8150, and chapter IV of this handbook. When permit-related consultation is taking place, it is appropriate to use the opportunity to consult prospectively with regard to NAGPRA to develop procedures to be followed in case human remains or cultural items are discovered.

- c. **Decision and Documentation.** Based on the results of consultation and in conformance with 305 DM 3 (see below), the BLM must consider whether to modify the proposed work to accommodate the tribe’s concerns or even deny the permit altogether. The Federal land manager must determine the nature, location, and timing of field excavation as well as analysis methods that will be authorized in the permit. A standards for boundary evidence (SBE) certificate of land boundary locations and land status must be obtained by cadastral staff when authorized work is contemplated within one-quarter mile of a boundary. When decisions about field work and laboratory analyses do not conform to the requests of Indian tribes, the manager must document the reasons in the permit file and notify the tribes of the outcome and its basis.

- (1) **Conformance with DOI policy on integrity of scientific and scholarly activities.** On December 16, 2014, the Department issued 305 DM 3 on Integrity of Scientific and Scholarly Activities. The policy and requirements apply to all DOI employees when they engage in, supervise, manage, or influence scientific activities. DOI stated policy is that: “Science and scholarship play a vital role in the Department’s mission, providing one of several critical inputs to decisionmaking on conservation and responsible development of natural resources, preservation of cultural resources, and responsibilities to tribal communities.” The manual establishes a number of policy statements, including that the DOI will:

- Support a culture of scientific integrity;
- Recognize the importance of scientific information, science, and scholarship as methods for maintaining and enhancing the effectiveness and establishing credibility and value with all sectors of the public;
- Preserve the integrity of scientific activities it conducts and activities that are conducted on its behalf;
- Facilitate the free flow of scientific information; and
- Document the scientific findings considered in decisionmaking.

Responsibilities delegated down to managers and supervisors include the obligation to comply with and implement this chapter as it pertains to their area of management or supervision and to ensure that all contracts and permits covered under the scope of this chapter and under their purview include the requirements of this policy in the performance work statement.

- (2) **Non-federally recognized tribes and nontribal groups may be notified.** The uniform regulations implementing ARPA provide that the Federal land manager may also give notice to any other Native American group known to consider potentially affected locations as being of religious or cultural importance (43 CFR 7.7(a)(2)). Input from non-federally recognized and nontribal groups is in the nature of public participation, not government-to-government consultation. (Nontribal groups might include environmental organizations interested in protecting archaeological sites or Indian sacred sites.)
- (3) **Document unsuccessful efforts.** If all efforts to notify and consult with the appropriate Indian tribe(s) prove unsuccessful, the permit application may be processed without further delay. In all cases, documentation of efforts to notify and consult must be included in the permit file. This documentation will serve as evidence of notification and consultation efforts in accord with 43 CFR 7.7.
3. **Native American Graves Protection and Repatriation Act.**

- a. **Introduction.** The NAGPRA was enacted in 1990 to address the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. The NAGPRA, and its implementing regulations, 43 CFR 10, provide terms, definitions, and procedural requirements for addressing treatment and disposition of Native American human remains and funerary objects, sacred objects, and objects of cultural patrimony (cultural items). This section addresses tribal notification and consultation requirements under NAGPRA. Refer to the law, regulations, and BLM-specific policy for the full scope of procedural requirements for NAGPRA compliance.

NAGPRA has two distinct parts. Its provisions for collections of Native American human remains and cultural items in the control of the BLM, generally, before NAGPRA was enacted on November 16, 1990, differ from the provisions that apply to Native American human remains and cultural items discovered on public lands after that date. The former are “existing collections” and the latter are “new discoveries.” Items that came into the control of the BLM after 1990, but that did not come from the public lands also represent collections, such as items that are acquired through law enforcement efforts or donations to the BLM.

In regard to existing collections, the BLM consults with lineal descendants and Indian tribes on the documentation of Native American human remains and cultural items in BLM museum collections in order to complete summaries and inventories and to determine cultural affiliation and disposition. The consultation and documentation requirements are prescribed in NAGPRA Sections 6 and 7 and 43 CFR 10.8-11.

For new discoveries, the BLM also consults under NAGPRA to obtain the views of lineal descendants and Indian tribes that are potentially culturally affiliated with Native American human remains and cultural items that are likely to be excavated or removed from public lands and/or Indian tribes that aboriginally occupied those public lands. BLM also consults with Indian tribes when Native American human remains and/or cultural items are discovered on the public lands. Consultation for both planned and unanticipated activities includes obtaining their views on how those remains and objects should be excavated, removed, handled, studied, and cared for, including transfer of custody to claimant tribes. The consultation and documentation requirements for planned excavations and inadvertent discoveries are prescribed in NAGPRA Section 3 and 43 CFR 10.3-6.

- b. **Consulting Parties under NAGPRA.** Consultation under NAGPRA is government-to-government consultation and takes place between the line manager and the executive officer of the tribe, unless consultation is delegated to other tribal officials. As with other consultation and coordination, BLM staff may provide coordination and communication in support of consultation efforts.

Requirements for tribal consultation derive from NAGPRA Sections 3(c) and 3(d) for new discoveries on public lands and from Sections 5(b) and Section 6(b) for museum collections.

Many Indian tribes have designated NAGPRA representatives to consult with Federal agencies. In the absence of a designated tribal NAGPRA representative, the BLM line manager should consult with the executive officer of the tribe.

Finding lineal descendants for NAGPRA materials will be exceptionally rare. However, if they can be located, lineal descendants tracing their ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or by the common law system of descent to a known Native American individual whose remains, funerary objects, or sacred objects are being requested have first priority to claim them. BLM must consult with lineal descendants if any are known, although this would be unusual and would only apply when the remains and cultural items are relatively recent. Unlike other claimants under NAGPRA, lineal descendants do not have to be members of federally recognized tribes.

BLM managers are required to consult with tribes under NAGPRA to determine affiliation and disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. Each of these items is defined in

the regulations implementing the act at 43 CFR 10.2. No age limitation exists for items protected under NAGPRA, unlike ARPA which has a 100-year threshold. Age is irrelevant under NAGPRA.

- c. **Existing Collections.** NAGPRA requires agencies and museums to complete reviews of their collections to identify Native American human remains and cultural items that are defined in NAGPRA. Often, these collections may be housed in nonfederal museums and universities, and BLM will coordinate the process with the repository officials.

NAGPRA Sections 5, 6, and 7
<ul style="list-style-type: none"> • Section 5(b) requires completion of an inventory of human remains and associated funerary objects in consultation with tribal governments and traditional religious leaders. • Section 5(d) requires Federal agencies to attempt to determine the cultural affiliation of the human remains and affiliated funerary objects and then within 6 months, notify affected Indian tribes. • Section 6(b) requires Federal agencies to provide a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony to tribal governments and traditional religious leaders and consult with them. • Section 7 states that, if pursuant to Sections 5 or 6, cultural affiliation is established/shown and if requested by the tribe or known lineal descendant, the cultural items shall be returned at a place and in a manner of delivery determined through consultation.

Figure XI-5 Provisions of Sections 5, 6, and 7 of the Native American Graves Protection and Repatriation Act.

(1) NAGPRA requires two types of documents: inventories and summaries.

- (a) Inventories for NAGPRA purposes are a detailed item-by-item inventory of Native American human remains and associated funerary objects that are in its possession or control, whether housed in BLM facilities or other repositories. BLM completes such inventories in consultation with potentially affiliated tribes and in partnership with museums under the terms of contracts, assistance agreements, and or other forms of cooperative agreements. A recommended inventory format was provided by the NPS, Departmental Consulting Archaeologist in 1995, which is provided at WEBSITE.

For preparing an inventory of Native American human remains and associated funerary objects, BLM must consult with:

- (i) Lineal descendants of individuals whose remains and associated funerary objects are likely to be subject to the inventory provisions of these regulations; and

(ii) Indian tribe officials and traditional religious leaders—

- From whose tribal lands the human remains and associated funerary objects originated;
- That are, or are likely to be, culturally affiliated with human remains and associated funerary objects; and
- From whose aboriginal lands the human remains and associated funerary objects originated (43 CFR 10.9(b)).

(b) Additionally, the BLM prepares separate summaries of collections covering unassociated funerary objects, or those for which the BLM does not have control of the human remains with which the items were interred, sacred objects, and objects of cultural patrimony. For preparing a summary, BLM must consult with Indian tribe officials and traditional religious leaders—

- From whose tribal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated;
- That are, or are likely to be, culturally affiliated with unassociated funerary objects, sacred objects, or objects of cultural patrimony; and
- From whose aboriginal lands unassociated funerary objects, sacred objects, or objects of cultural patrimony originated (43 CFR 10.8(d)).

For determining cultural affiliation, the BLM uses all available evidence to determine which present-day tribe or tribes have the closest cultural affiliation to the human remains or other NAGPRA items. This evidence can be based on information related to geography, kinship, biology, archaeology, anthropology, linguistics, folklore, oral tradition, history, or other relevant information or expert opinion, including information provided by tribes.

Several tribes may possess some degree of particular cultural affiliation to cultural items in question. The BLM's decision to contact and offer to repatriate these items to the tribe with the closest cultural affiliation does not mean that another tribe has no connection to the items. It simply acknowledges that on the basis of all lines of evidence, the BLM has decided that the first tribe is the closest cultural affiliate. However, the BLM does not need to choose one tribe over another and can affiliate to more than one Indian tribe. This can be quite common, as present-day political entities represented by Indian tribes include groups that are related across multiple tribes. Determinations of cultural affiliation to more than one tribe is often the result of consultation and agreement among the tribes.

- (c) Consultation requirements are prescribed in the regulations and direct that agencies provide certain materials to help tribal officials identify NAGPRA cultural items. BLM may need to make arrangements for tribal officials to travel to the repositories where the collections are housed or to meetings to discuss NAGPRA items. (See Appendix 2, Implementation of BLM Policy Regarding Compensation to Native Americans for Products and Their Participation in the BLM’s Decisionmaking Processes.)
- (2) When the inventory has been completed, the BLM state office prepares a notice of inventory completion and submits the draft notice and a copy of the inventory to the Washington Office NAGPRA Coordinator who coordinates its publication in the *Federal Register*. BLM’s consultation with tribes is documented in this notice. The NPS provides sample templates on their website at www.nps.gov/NOTICES/INDEX.HTM#Native_templates.

If a culturally affiliated tribe makes a claim for any of the items described in inventories or summaries, the BLM must repatriate the items to the tribe within 90 days after receiving the tribe’s written request. However, if another tribe makes a competing claim, the BLM must evaluate the strength of each claim and decide which tribe is the closest cultural affiliate before proceeding with the return of the items. Before repatriation takes place, the BLM must publish its intention to do so within the *Federal Register*. For items covered in the summaries, such a notice is called a “notice of intent to repatriate,” while for items covered in the inventories, the notice is a “notice of inventory completion.”

The purpose of the notices is to describe the items in enough detail so that other tribes can express their interest and affiliation to them if they choose. The BLM office submits the notice to the Washington Office NAGPRA Coordinator who reviews and provides it to the NPS National Program Manager who then publishes it in the *Federal Register*. The agency then must wait at least 30 days after it is published before repatriating the items so that other tribes have a chance to submit competing claims.

By 2015, BLM had completed inventories and summaries of known collections and numerous repatriations had taken place or were underway. Nevertheless, collections are continuously coming to light as museums find them in their facilities. In other situations, old academic field schools or unauthorized collections are belatedly turned over to BLM offices years after they were collected and are now subject to the provisions of NAGPRA. In these situations, inventories and summaries must be updated and additional tribal consultation pursued.

Realistically, the BLM’s obligations to consult with tribes regarding existing collections will be ongoing for many years to come. They did not end in 1995, despite the timeframe specified when NAGPRA was enacted. Acknowledging

this fact, a new section was added in 2007 to the NAGPRA regulations that addresses requirements to inventory and consult with tribes about museum collections well into the future. The Future Applicability Rule promulgated in 43 CFR 10.13 provides new timeframes to complete summaries and inventories for the new material. New summaries are due within 6 months and new inventories within 2 years of receipt of new holdings or collections.

- d. **Use of Pictures and Digital Scans.** Scanning of human remains or other cultural items should generally be avoided since the process exposes delicate objects to bright light and potentially damaging physical manipulation to achieve acceptable images.

The use of photographs in NAGPRA matters should be carefully considered. Many tribes are uncomfortable with the creation and distribution of images of human remains or funerary objects. However, this can be one of the most effective consultation tools for sharing information. A key concern is that once an image is created, it can be difficult to control access to the image and use of those images by recipients.

However, images can represent a convenient way to exchange information with tribal members who are not able, for whatever reason, to view human remains and objects in person at repositories. The BLM's distribution of images must be limited to those individuals who need to see them for determinations of affiliation and consultation purposes. BLM staff must be sensitive to the use and distribution of images of NAGPRA items.

Tribal representatives may request to view human remains and other cultural items in person. If they are not able to or choose not to, and instead wish to view photographs of the items, the BLM must make every effort to provide such images in the format most convenient for the tribes to use. The images remain the property of the BLM. Images are not given to a tribe unless the human remains or cultural items are officially repatriated.

- e. **New Discoveries.** New discoveries cover both those items intentionally excavated or inadvertently discovered on public land after NAGPRA was enacted on November 16, 1990. The law requires that anyone who discovers human remains or other NAGPRA items on public land report them to the BLM manager in writing. However, complete, official notification by a member of the public does not always occur. Regardless, within 3 days of learning of the discovery, the field manager must telephone, notify in writing, and initiate consultation with—

- Any tribe that is “likely to be” culturally affiliated with the discovered items,
- Any tribe that aboriginally occupied the area of discovery, and

- Any other tribe “with a demonstrated cultural relationship” or that is “reasonably known to have a cultural relationship” to the discovered items (43 CFR 10.5(a)).

NAGPRA Sections 3(c) and (d)
<ul style="list-style-type: none"> • Require the responsible Federal agency to consult with the affected Indian tribe before issuing a permit to excavate or remove Indian human remains and associated funerary objects from public land. • Require the responsible Federal agency to safeguard Native American human remains and/or cultural items discovered during an authorized land use, and to halt the land use for as much as 30 days.* • Require the Federal agency to notify potential lineal descendants and potentially claimant tribes when Native American human remains and/or cultural items are discovered on the public lands.
<p>* Regulations at 43 CFR 10.4(d)(iv) and 10.5(b) direct the responsible Federal agency official to consult according to procedures set out in the regulations.</p>

Figure XI-6 Provisions of Section 3(c) and (d) of the Native American Graves Protection and Repatriation Act.

If the discovery occurs, but no plan of action is in place, work must cease at the location of the discovery and the remains must be safeguarded for up to 30 days while the BLM consults with potential lineal descendants and the above-listed Indian tribes to determine how the remains must be removed (if they must be removed), how the remains should be treated, and how the remains will be transferred to the closest culturally affiliated tribe. To minimize chances that the project will be shut down for the full 30 days, when there is a reasonable likelihood that a project will result in the discovery of Native American human remains and/or cultural items subject to NAGPRA, BLM offices should consult with Indian tribes and develop plan(s) of action that will be implemented should discoveries occur. (See Plans of Action below).

If no plan of action is in place, neither the law itself nor its regulations establish a set time period for completing or terminating consultation in these circumstances. Consultation can continue even if work at the discovery location resumes at the end of the 30 days. Developing the plan of action can be very time consuming, so it is advisable to have a completed one in advance of a project.

The BLM must publish a newspaper notice before transferring custody of NAGPRA items excavated or removed from public lands after November 16, 1990. These newspaper notices inform tribes about discoveries, give tribes an opportunity to claim custody of the items, and ensure that all potential claimants receive due process before their rights are precluded by transfer of custody. Newspaper notices must be

published two times, two weeks apart. Custody of the items can be transferred 30 days after the second notice is published. A copy of the notice must be sent to the Washington Office NAGPRA Coordinator, who will share with the National NAGPRA Program Manager in the NPS.

- f. **NAGPRA Consultation for Land Use Authorizations.** All Federal authorizations to carry out land use activities on the public lands, including all leases and permits, must include a requirement for the holder of the authorization to notify the appropriate Federal official immediately upon the discovery of Native American human remains and/or cultural items (43 CFR 10.4(g)). This requirement ensures that authorized land users are aware of their responsibility to notify the BLM manager should Native American human remains and/or cultural items be discovered as part of their activities.

In addition, BLM must notify and consult with Indian tribes before issuing authorizations when it anticipates that an activity may result in the discovery of Native American human remains and/or cultural items. For instance, in the previous discussion of ARPA, it was pointed out that provisions of NAGPRA must be met before a cultural resource use permit is issued. This is because NAGPRA links to ARPA.

As required by 43 CFR 10.3(c), the Federal agency official must take reasonable steps to determine whether a planned activity may result in the excavation of Native American human remains and/or cultural items subject to NAGPRA from Federal lands. Prior to issuing any approvals or permits for activities, the Federal agency official must notify in writing the Indian tribes that (1) are likely to be culturally affiliated, (2) aboriginally occupied the area, and (3) the Federal agency official reasonably believes are likely to have a cultural relationship with the remains and items that are expected to be found. The notice must be in writing and describe the planned activity, its general location, the basis upon which it was determined that Native American human remains and/or cultural items may be excavated, and, the basis for determining likely custody pursuant to 43 CFR 10.6. The notice must also propose a time and place for meetings or consultations to further consider the activity; the Federal agency's proposed treatment of any human remains, funerary objects, sacred objects, or objects of cultural patrimony that may be excavated; and the proposed disposition of any excavated human remains, funerary objects, sacred objects, or objects of cultural patrimony. Written notification should be followed up by telephone contact if there is no response in 15 days. Consultation must be conducted pursuant to 43 CFR 10.5. If no such items are likely to be excavated or removed, consultation under NAGPRA would not be required before issuing the permit.

The BLM might need to notify and consult with tribes before issuing the permit for other reasons, as described in the ARPA regulations (43 CFR 7.7) but not for purposes of complying with NAGPRA.

NAGPRA Consultation for Discoveries on the Public Lands	
BLM consults with—	Purpose of consultation is—
<p>Lineal descendants, if known, or tribal representative(s) whom the tribal government has designated for this purpose</p>	<ul style="list-style-type: none"> ● To agree in advance how to treat potential NAGPRA issues such as identifying “cultural items” and determining their appropriate treatment and disposition. ● To agree after the fact how to identify inadvertently exposed “cultural items” and to assure that they receive appropriate treatment and disposition.

Figure XI-7 Tribal consultation for purposes of Section 3(c) and 3(d) of the Native American Graves Protection and Repatriation Act.

g. **Plans of Action.** The results of tribal consultation for items to be excavated or removed are documented in plans of action. Plans of action are not optional. They must be prepared in consultation with the most closely affiliated tribe whenever it is anticipated that human remains or other NAGPRA items may potentially be excavated or removed. Plans of action must be prepared regardless of whether the remains to be removed were inadvertently discovered or were already known and selected for intentional excavation. They specify procedures for excavation and subsequent laboratory analyses. Plans of action have a specific format, which is detailed in the regulations at 43 CFR 10.5(e). The BLM must give the most closely affiliated tribe the opportunity to sign the plan of action; however, obtaining the tribe’s signature is not mandatory. After the 30-day stop work period has expired, BLM can move forward and implement the plan of action even if the tribe has not signed it.

Field offices should consult with Indian tribes whenever there is a reasonable likelihood that authorized land uses or intentional excavations may encounter human remains or other NAGPRA items and seek agreement on their treatment, analysis, and disposition. If such agreements can be documented within an MOU ahead of time, disruptions to ongoing land use activities can be minimized in discovery situations.

A cultural resource use permit (see MS-8150) or equivalent documentation is required before Native American human remains and cultural items covered by NAGPRA may be intentionally excavated or removed from Federal lands. This ensures that the recovery is conducted in accordance with ARPA, as required by 43 CFR 10. Documentation showing that required consultation has occurred must be included in the decision record, including the responsible manager’s choice of field excavation and analysis methods. The Native Americans consulted are notified of the outcome and basis for the recovery plan or plan of action as the case may be.

- h. **Reburial on Public Lands.** Lineal descendants and Indian tribes may ask to rebury Native American human remains and funerary objects on the public lands. While not a component of NAGPRA, reburial is often a requested outcome, and the BLM may consider reburial of Native American human remains and funerary objects once the NAGPRA process has concluded (i.e., human remains and/or cultural items have been repatriated or transferred to claimant descendants or tribes).

The reburial of NAGPRA items on public lands is a discretionary action and authorized on a case-by-case basis. The BLM is not required under NAGPRA, or any other authority, to rebury repatriated or transferred NAGPRA materials on public lands. BLM retains the discretion to decide whether to authorize reburials and under what conditions reburials will occur. Reburials may be authorized by the state directors with copies of relevant documentation provided to the Washington Division of Cultural and Paleontological Resources and Tribal Consultation (WO-240) as part of annual report submissions.

In evaluating a reburial request, BLM managers should consider the legal and logistical issues associated with reburial, such as:

- (1) **Land Status and Selection.** Lands best suited for reburial activities are locations well away from areas or routes frequented by the public and areas withdrawn from multiple uses and mineral entry, such as wilderness areas and WSAs. These are areas where future earth disturbing lands uses are unlikely.
- (2) **Coordination with Relevant Authorities.** Reburial actions must also comply with FLPMA, NEPA, NHPA, NAGPRA, ARPA, AIRFA, and Executive Order 13007.
- (3) **Legal Protection.** All activities and documentation related to reburial must be kept confidential to the maximum extent authorized by law. As appropriate, sites may be part of historic properties as defined in the NHPA. Civil and criminal penalties may result from vandalism, disturbance, removal, and/or trafficking of items from the burial under ARPA, NAGPRA, and/or other authorities.
- (4) **Practical Considerations.** Any applicable State health and safety or cemetery laws must be complied with prior to a reburial. Whenever possible and appropriate, reburials should be as close to the original interment location as possible. Lineal descendants and/or claimant tribes must be offered an opportunity to be present and conduct a ceremony at the reburial. Reburied materials must not include coffins, boxes, or underground structures that could create a future safety hazard. No monuments or memorials may be constructed or left at the site. Protective measures such as screening may be considered.
- (5) **Future Bureau Responsibilities.** Identify any future responsibilities, such as providing access to tribes (if requested) and monitoring. The use of fencing or

other protective devices that would require ongoing monitoring are discouraged. Consider entering into a reburial agreement (MOU) with the tribes articulating roles and responsibilities.

- (6) **Budget Considerations.** Consider the costs to the agency for allowing a reburial. The BLM may facilitate the reburial by providing staff and equipment. For post-1990 excavations or inadvertent discoveries related to a BLM-funded, permitted, or licensed project, costs associated with reburial must be considered part of the project costs of the land use program or land use authorization borne by the applicant.

Once reburial locations have been identified and a reburial plan developed addressing the considerations mentioned above, the BLM manager must send the proposal to their state directors for approval. The BLM's cultural staff will maintain records of such reburials as part of cultural resources site record databases.

i. **Reburial vs. Stabilization.**

- (1) For museum collections (Sections 5–7 of NAGPRA; 43 CFR 10.8-11), reburial may be authorized on a case-by-case basis for Native American human remains and cultural items repatriated from BLM museum collections to the claimant Indian tribe(s). BLM may also rebury culturally unidentifiable remains from BLM museum collections following disposition authorized in 43 CFR 10.11(c).
- (2) For new discoveries (Section 3 of NAGPRA; 43 CFR 10.3-7), reburial may be authorized on a case-by-case basis upon completion of a transfer of custody of newly discovered human remains and cultural items (intentional excavations and inadvertent discoveries) excavated or removed from the public lands to claimant Indian tribe(s). Costs associated with reburial for new discoveries related to projects funded, permitted, or licensed by the BLM, if authorized, may be considered part of project costs.
- (3) For inadvertent discovery situations where burials are eroding out of the ground and individual bones are being lost and destroyed by washing downslope or weathering, field offices are authorized to place the bones together as close to the original location as possible and rebury them with the least ground disturbance possible so as not to draw attention to the location. These actions represent stabilization, not reburial, since the items have not been formally excavated and removed.

In inadvertent discovery situations where pipeline construction or other land-disturbing activity exposes human remains or other NAGPRA cultural items, stabilization of the remains may be achieved by relocating them outside the proposed disturbance area on a case-by-case basis following consultation with culturally affiliated tribes. In these inadvertent discovery cases, the NAGPRA

transfer of custody process is not triggered; removal for formal identification could prompt considerable NAGPRA compliance work for all parties involved. No transfer of legal custody takes place and the materials remain in the BLM’s ownership and control. No formal reburial is considered to have taken place. Development of a Plan of Action that addresses these circumstances is encouraged, both on a project-specific basis and on a more programmatic level.

C. Special Considerations/Issues That Apply to the Cultural Resources Program

1. **Data Security and Confidentiality.** The BLM is the sole Federal agency responsible for collecting resource information for the lands it manages. It is also responsible for maintaining that information in a secure environment. This information is used to evaluate the significance of these resources. It is also used to develop appropriate protection measures in long-term land-use planning documents and in the environmental documentation supporting multiple use decisions. Access to cultural resource information is restricted by a variety of legal authorities, including 43 CFR 7 implementing ARPA Section 9; NHPA Sections 101(d)(6) and 304(a); and section 1 of Executive Order 13007.

Disclosure of sensitive Native American information may be denied if it—

- Exists only in “working files” (i.e., documents that are not formal products of the agency or official correspondence, such as raw ethnographic data or notes—except for information used in making a decision, which must become part of the official decision record and therefore be subject to disclosure);
- Pertains to a property listed in or eligible for the NRHP and disclosure would risk harm to the property, cause a significant invasion of privacy, or impede the use of a traditional religious site by practitioners; or
- Pertains to an archaeological resource as defined in 43 CFR 7, and disclosure would risk harm to the resource.

Less tangible values, when they coincide in space with historic properties or archaeological resources, could also be protected from disclosure under these authorities. The confidentiality of information less firmly associated with a historic property or archaeological resource, however, is not resolved. No blanket FOIA exemption exists for NAGPRA related information. Thus, potentially sensitive information, such as the specific nature of materials subject to NAGPRA consideration, and the identity of descendants or culturally affiliated Indian tribes, may be subject to FOIA disclosure. However, if the NAGPRA cultural items are associated with an archaeological resource, the locational information would be subject to the FOIA exemption in ARPA. Consequently, the BLM state FOIA officer must evaluate any NAGPRA-related FOIA request, case-by-case, in close consultation with the NAGPRA coordinator and the responsible manager. While BLM managers should make every effort to safeguard

sensitive information to the fullest degree possible, information may not be improperly withheld in the face of a lawful FOIA request.

To the extent permitted by law, if a tribe submits information under a claim of protection, the BLM can assert an applicable privilege for, and seek to protect, that information from public disclosure. While these privileges are initially asserted by the BLM, a challenge to an assertion of privilege is ultimately resolved by the Federal judiciary when a decision is challenged in court. In this circumstance, a privileged document may be subject to review or possible release by a court, notwithstanding the BLM's good faith assertion of an applicable privilege. Thus, a tribe must assess and be comfortable with any and all submissions it makes to assist the BLM in its land-use planning process, understanding that there is some risk certain documents may, in the end, be publically disclosed.

Managers and staff carrying out Native American consultation should clearly represent the sort of information they seek, the purposes to which the information will—and will not—be applied, and the limits of the BLM's ability to protect the information from public disclosure. The extent of that ability must not be misrepresented. All sensitive data should be carefully maintained and securely stored. Offices responsible for gathering sensitive information and conducting consultation should have adequate physical and procedural means to ensure secure file maintenance and management. Each office may wish to develop maps or geospatial layers in accordance with BLM/Federal/Federal Geographic Data Committee standards showing areas where tribes have identified issues or concerns. Maps can depict lands historically occupied or utilized and can also locate areas identified as having ongoing traditional religious significance and use. However, when information of this extremely sensitive nature is included, maps must be treated as confidential working files with limited internal access and kept from public view. The metadata should indicate its confidentiality.

On a case-by-case basis, BLM state offices may negotiate unique solutions with tribes to safeguard sensitive information. Contracts for ethnographic studies may require submission of summary reports to the BLM. These should contain no confidential information, maps, or figures and are intended to provide managers and the public an overview of the study, its results, and implications for management decisions. Final comprehensive reports can contain sensitive information and could be housed at tribal headquarters or tribal historic preservation offices. BLM and tribes may agree that such comprehensive final reports will be held at tribal offices, and specified BLM staff will be granted access and use of them at those locations. When data utilized by the BLM during the decisionmaking process will be housed at tribal offices, access and use of the data must be documented in an MOU.

2. **Data Share Agreements.**

- a. **Background.** When the BLM shares sensitive cultural resources information with tribes, it documents the specific purpose and retains appropriate safeguards through a data sharing agreement signed by the line manager with jurisdiction over the

information provided. Site records and survey data are the property of the BLM as entrusted to our management under FLPMA and other authorities. These data do not constitute the “intellectual property” of tribes despite cultural ties to some archaeological, protohistoric, and historic sites by Indian tribes. Such data may be needed by tribes for purposes of input into the NHPA Section 106 process, ARPA permitting, or the identification of places of traditional cultural and/or religious importance.

On a broad level, the BLM may withhold from public disclosure information about historic or archaeological resources under both the NHPA (Section 304) and the Archaeological Resources Protection Act (Section 9(a)). Further, Executive Order 13007 directs Federal agencies to “maintain the confidentiality of sacred sites.”

However, these confidentiality provisions refer to “disclosure to the public.” Tribes, in contrast, have a standing that must be recognized as separate and distinct from the public. The sharing of sensitive cultural resources data may be undertaken as described below with the understanding that it is BLM policy to consult with tribes regarding decisions that may affect tribal values or interests. This sharing is in accordance with the DOI’s Policy of Consultation with Indian tribes, which emphasizes the goals of improving informed BLM decisionmaking and the fostering of a government-to-government exchange of information in the spirit of trust, respect, and shared responsibility.

Overlapping of ancestral, aboriginal, or ceded lands will not affect BLM data sharing decisions. Competing land claims between tribes is also not a factor in BLM data share agreements with individual tribes.

- b. **Range of Data Share Agreements.** Data share agreements may be executed in a variety of formats with tribes.

Tribes may execute user agreements through SHPO offices in states where the SHPO controls access to and use of inventory and site data housed in a common repository. In these circumstances, potential users must agree to use the data responsibly and to protect it from unauthorized release. SHPO staff evaluates data requests and enforces the agreements. Such data share agreements may work effectively, although how up-to-date such SHPO databases are varies considerably across different states.

In addition, tribes may negotiate and execute a data share agreement directly with the BLM. All data sharing agreements should provide the following as minimum standards—

- Specific types (formats, media) of confidential-sensitive data to be provided by BLM;

- Purposes for which BLM data is being shared, including expectations for how data sharing will assist consultation on BLM plans/projects;
- How and when data will be shared;
- Procedures for identifying data files as “confidential nonpublic data”;
- Reference to relevant legal authorities;
- Identification of tribal staff who will have access to the confidential/sensitive data;
- BLM contact persons;
- Security, protection, and access to confidential-sensitive data;
- A commitment by the tribe to protect the data from release to other parties to the maximum extent provided by tribal authorities; and
- Notification to BLM when the tribe receives a request by others to access the shared data.

Provisions for data sharing between the BLM and a tribe may also be specified within NHPA Section 106 PAs provided that the agreement contains the minimum standards discussed above.

In the absence of a formal data share agreement, the BLM may share cultural information relevant to a BLM-proposed decision with tribes participating in the NHPA Section 106 process. The data provided will be at a level of detail needed to inform consultation, provided that such sharing of information does not put the subject cultural resources at risk from vandalism or theft, or violate a commitment to other tribes regarding the safeguarding of confidential information.

- c. **Cancellation of Data Sharing.** A BLM manager may decide to stop further distributions of confidential information to tribes if the BLM manager has reason to believe that confidential information has been or may be inappropriately distributed by the tribe and that BLM’s distribution of information to the tribe poses a risk of harm, including actual or potential threats to the integrity or condition of cultural resources. If the BLM manager determines to end distribution, the manager will inform the tribe in writing of the BLM’s decision and the basis for its concerns. The BLM should allow the tribe 30 days to initiate consultation to discuss the matter if it wishes to continue to receive confidential information.
- d. **Data That Should Not Be Shared.** BLM cultural resources databases are extensive and they may contain information on particular sites that should not be shared with tribes under any circumstances. The following situations provide examples:

- Records should be pulled from data exchanges if they pertain to sites located on surface estates not managed by the BLM.
 - Data related to sacred sites or places of traditional cultural and/or religious importance to a particular tribe provided by traditional religious leaders/practitioners and/or ethnographic informants should not be shared with other tribes, unless expressly approved by tribal representatives. The BLM is obligated under AIRFA and Executive Order 13007 to protect access to and physical integrity of sacred sites.
 - BLM managers must take great care to ensure that access to and protection of sites considered sacred by individual tribes/tribal members is not compromised by the release of confidential-sensitive cultural resources data to other tribes.
 - Data pertaining to human burials or human reburial locations where BLM has determined that a connection exists with lineal descendants and/or culturally affiliated tribe should not be shared unless expressly approved by the lineal descendants or leader of the culturally affiliated tribe.
 - Data relating to historic period archaeological/built environment sites associated with European-American settlement and use and lacking evidence of pre-contact or American Indian occupation/use may be excluded when providing data to tribes. (Note that in some cases, tribes may already have access to these data through the SHPO. Their review can reveal Native American affiliations or associations that may not have been previously identified or known).
- e. **Format and Costs for Data Sharing.** The BLM may share digital site and survey data if a tribe has the technical capacity to receive, manipulate, and protect the data. Many tribes have established GIS for maintaining their own cultural resources data, which are managed by professionally qualified staff and GIS specialists. In these cases, there is no compelling reason not to share digital data as long as an appropriate data sharing agreement is in place. Labor costs for preparing and transmitting the data dumps will be absorbed by the BLM's information technology and cultural programs. The production, duplication, and distribution of hard copies of inventory and evaluation reports and data recovery plans will generally only occur on a project or undertaking basis. In these cases, costs must be passed on to the applicant or benefitting subactivity.
3. **Development of MOUs with Tribes to Facilitate NHPA Section 106 Consultation.** In the process of reviewing, updating, and rewriting state protocols as required by the National PA, states must include language that encourages development of MOAs or MOUs with tribes to better define the NHPA Section 106 consultation procedures best adapted to individual tribes. These will be two-party agreements outside of the BLM-SHPO protocols, but the protocols should mention the BLM commitment to pursue them.

Tribal consultation MOUs can define in advance such matters as: (1) the types of undertakings tribes wish to consult on; (2) geographical areas where tribes desire NHPA Section 106 consultation; (3) types of properties tribes wish to consult on regarding determinations of eligibility, effect, or treatment; (4) data sharing procedures; (5) how contacts should be made; (6) when contacts are appropriate; (7) who serves as contact points; and (8) in what manner should communication be made. Many tribes are overwhelmed with Federal Government consultation requests under the various Federal statutes. Consultation MOUs can focus consultation just on those sites, areas, or undertakings about which the tribes are most concerned.

There are a number of excellent examples of agreements that clarify and streamline consultation and coordination and encourage cooperative activities on public lands. BLM offices are encouraged to access the WEBSITE for current examples of such accords. Examples of successful MOU negotiated in the past include—

- Arizona. Memorandum of Understanding between Hualapai Tribe and the United States Department of the Interior’s Bureau of Land Management, Colorado River District (2012).
 - Idaho. Memorandum of Understanding between the Shoshone-Paiute Tribes of the Duck Valley reservation and the Idaho Bureau of Land Management, United States Department of the Interior (2007).
 - California. Consultation Protocol between Big Pine Paiute Tribe and Bureau of Land Management, Bishop Field Office, Ridgecrest Field Office (2003).
4. **Tribal Monitoring or Participation in Archaeological Survey and Excavation.** The BLM will continue to adhere to the Secretary of the Interior’s Standards and Guidelines governing professional qualifications for archaeology and history when issuing archaeological permits for inventory, testing, or excavation on the public lands. See MS-8150, Permitting Uses of Cultural Resources. Separate archaeological surveys performed by tribes in addition to those archaeological inventories permitted by the BLM and carried out by contract with BLM applicants must not be required.
- a. **Archaeological Survey.** Indian tribes may request that tribal members be included on archaeological survey crews. Inclusion of tribal members on archaeological crews authorized by BLM permit to inventory on public lands is not normally implemented. However, inclusion of such crew members may be helpful to identify sacred sites or TCPs.

If the BLM Deputy Preservation Officer feels that inclusion of tribal crew members is needed in order to recognize and identify all types of archaeological properties likely to be encountered on survey, such an arrangement may be authorized by the Deputy State Director, provided that tribal crew members meet the professional standards the cultural resources permittee requires for its crew members and are acceptable to the

THPO(s) involved. If it is not possible to include tribal members from every tribe with an interest in the area of effect, then tribal survey crew members selected should be individuals demonstrating knowledge and insights most widely applicable to the properties likely to be encountered.

Costs for inclusion of tribal participants as crew members must be borne by the cultural permittee and charged to the land use applicant. Any recommendations regarding identification and evaluation of cultural resources encountered will be incorporated into survey reports submitted by the cultural permittee.

Cultural resource permittees will review the qualifications of proposed Indian tribal crew members in consultation with the BLM Deputy Preservation Officer. .

If no Indian tribal crew members meet the BLM qualifications, the permittee shall discuss this situation with the DPO to see if alternative procedures are possible. If not, then the BLM shall document a reasonable and good faith effort to engage qualified tribal members on the crew, and move on with the project.

- b. **Archaeological Excavation.** Indian tribes may request that tribal members be included on archaeological testing or excavations. Inclusion of tribal members on archaeological crews authorized by BLM permit to conduct testing or excavations on public lands is not normally implemented. However, the BLM Deputy Preservation Officer may allow inclusion of tribal members on testing or excavation crews for permits issued by the Deputy State Director under certain circumstances.

First, the cultural resource permittee may include tribal members as part of excavation crews if their inclusion is needed in order to recognize and identify any cultural items subject to NAGPRA. Such an arrangement may be authorized if all tribal crew members meet the professional standards the cultural resources permittee requires for its testing or excavation crew members.

Second, tribal monitors may be included on archaeological crews to observe trenching, blading, or other land disturbing operations the BLM is authorizing that may disturb human burials or funerary objects subject to NAGPRA to help ensure that disturbances to the cultural remains are minimized. In these circumstances, the tribal monitors do not need to meet normal hiring standards by the cultural resource permittee for crew members.

Cultural resource permittees will review the qualifications of proposed Indian tribal crew members in consultation with the BLM Deputy Preservation Officer. If no proposed tribal members meet the minimum qualifications maintained by individual cultural resource permittees, then it is unlikely that the BLM will approve the permit.

Costs for inclusion of tribal participants as crew members involved with survey, testing, excavation, or monitoring are normally borne by the cultural permittee and charged to the land use applicant. However, the BLM may also make independent arrangements for tribal monitors and coordinate the supervision and payment for such services with the land use applicant.

5. **With Whom to Consult under Cultural Resource and General Authorities (Summary).** The following chart indicates the types of Indian tribal officials and/or individuals with whom the BLM is obligated to consult under both the more general authorities discussed within chapter V and in this chapter as well.

Whom To Consult	NHPA	ARPA	NAGPRA	FLPMA	NEPA	AIRFA	E.O. 13007
Tribal representative whom the tribal government has designated for this purpose	X	X	X ²	X	X	X	X
Lineal descendant of an identified Native American individual			X ¹				
Traditional religious leader			X ³			X ³	
Appropriately authoritative representative of an Indian religion							X ³
¹ Lineal descendants (who need not be tribal members) have legal precedence for repatriation and custody. ² Indian tribes also consulted. ³ A tribal government may designate a “traditional religious leader” or an “authoritative representative” as the tribe’s representative for consultation under AIRFA or Executive Order 13007. Under NAGPRA, a traditional religious leader is a person recognized by tribal members as responsible for performing certain cultural or religious duties or a leader of the tribe or organization’s cultural, ceremonial, or religious practices, as defined in 43 CFR 10.2(d)(3).							

Figure XI-8 With whom to consult depends on the particular legal authority.

CHAPTER XII. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE RENEWABLE ENERGY PROGRAM

A. Introduction

This chapter provides background on renewable energy development of the public lands and explains when BLM managers and staff may carry out tribal consultation in accordance with the BLM’s policy and regulatory requirements for solar and wind energy development on the public lands. Due to the scale and scope of solar and wind energy developments, a proposed project’s area of potential effects may impact natural resources, landscape features, access, or cultural resources important to tribes.

B. Background

The BLM authorizes solar and wind energy developments under Title V of the FLPMA and its enabling regulations at 43 CFR 2800. The FLPMA also provides comprehensive authority for the administration and protection of the public lands and their resources and directs that the public lands be managed “on the basis of multiple use and sustained yield” (43 U.S.C. 1701(a)(7)).

Executive Order 13212, Actions to Expedite Energy-Related Projects, dated May 18, 2001, established a policy that Federal agencies should take appropriate actions, to the extent consistent with applicable law, to expedite projects that increase the production, transmission, or conservation of energy. Subsequently, an MOU was developed among the Department of Energy (DOE), DOI, Department of Agriculture, Environmental Protection Agency, Council on Environmental Quality, and members of the Western Governors’ Association to establish a framework for cooperation between the western states and the Federal Government, to address energy problems facing the west, and to facilitate renewable energy production.

Section 211 of the Energy Policy Act of 2005 states: “It is the sense of the Congress that the Secretary of the Interior should, before the end of the 10-year period beginning on the date of enactment of this Act, seek to have approved non-hydropower renewable energy projects located on the public lands with a generation capacity of at least 10,000 megawatts of electricity.”

In 2012, the BLM met the goal established by Congress by approving over 12,000 megawatts of renewable energy. However, the development of renewable energy is a continuing Federal priority. On June 25, 2013, to emphasize the importance of the renewable energy goals of the nation, the Executive Office of the President released President Obama’s Climate Action Plan to reduce carbon pollution. The climate action plan set a new goal for the DOI to approve a renewable energy capacity of at least 20,000 megawatts of electricity on the public lands by 2020.

Further, the President issued Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects. The President established executive policy to improve the permitting and review processes across multiple agencies to reduce the aggregate

time required to make permitting and review decisions on projects. In the policies, improved outcomes for communities and the environment were also addressed. The policies compelled the agencies to improve practices such as “pre-application procedures, early collaboration with other agencies, project sponsors, and affected stakeholders and coordination with State, local and tribal governments.”

On September 30, 2014, the BLM published in the *Federal Register* (79 FR 59022) its proposed rule to amend its existing regulations found under 43 CFR 2800 in order to facilitate responsible solar and wind energy development on the public lands. This proposed rule promotes the use of preferred areas for solar and wind energy development, and establish competitive processes, terms, and conditions for such development. The proposed rule describes such preferred areas as “designated leasing areas (DLAs).” DLAs include locations (such as solar energy zones (SEZ)) that have been designated through BLM’s landscape-scale land use planning process as appropriate for solar or wind energy development by way of a competitive offer. The proposed rule describes its authorizations within DLAs as leases, and its authorizations outside of DLAs as grants. The BLM’s proposed rule also codifies its existing policies for early coordination, application prioritization, and bonding requirements, as well as diligent application and development requirements. The proposed rule incentivizes development within DLAs over the lands outside of such areas.

C. NEPA Compliance for Utility-Scale Renewable Energy Right-of-Way Authorizations

In its analysis of utility-scale renewable energy ROW applications, the BLM must always comply with requirements of NEPA, including tribal consultation. NEPA and tribal consultation may be required when BLM analyzes a renewable energy development after a competitive process has taken place.

Renewable energy applications are externally generated requests for the use of lands administered by the BLM. As explained below, early coordination between BLM and other Federal Government agencies, identification of the purpose and need, and the development of alternatives are required components for the decision process the BLM engages in when weighing such uses. Each required component may include tribal consultation and would be discussed in the NEPA document.

Competitive processes are internally generated administrative processes used to determine which among several potential developers may continue BLM analysis and review for a renewable energy development on the public lands. For example, the BLM may hold a competitive process when there are two or more competing applications for the same system on the public lands. In some instances, BLM may invite competition in some areas, such as SEZs, as described in the Solar PEIS. When designating such areas, BLM must consult and coordinate with tribes throughout the land use planning processes (see chapter V of this handbook). Further, BLM’s proposed rule would establish an administrative process for handling SEZs and other such designated areas as DLAs.

1. **Disclosing Early Coordination in the NEPA Process.** Field offices must incorporate the early coordination in NEPA documents, such as tribal consultation, and discuss this information in scoping meetings and other public meetings. These may also be reflected in the alternatives section of the NEPA document.

For renewable energy applications, early coordination is conducted without land use planning decisions in place that would establish the application area lands for competitive purposes. The BLM should incorporate by reference and tier, as appropriate to the current LUP and disclose the tribal consultation and coordination that occurred within the NEPA documents. The NEPA documents must incorporate any PAs or MOU into the scoping and other public meetings sections of the NEPA documents. In some instances, tribal consultation and coordination may have been completed during the most recent LUP amendment (e.g., landscape-scale NEPA such as the Solar PEIS) and further consultation may not be necessary before BLM issues a NEPA decision for a project. However, BLM should address such NEPA processes and decisions in their ongoing consultation and coordination with tribal governments.

In the event that competition occurs on the public lands for a renewable energy projects, such as in an SEZ or a DLA, BLM may not need to consult further before issuing a NEPA decision for the project. However, BLM should include such NEPA processes and decisions in their ongoing consultation and coordination with tribal governments. The NEPA documents must incorporate any PAs or MOUs into the scoping and other public meetings sections of the NEPA documents.

2. **Purpose and Need.** The purpose and need statement in the NEPA document must also describe the BLM's authorities and management objectives. Additionally, offices must include a description of the BLM's decision(s) to be made as part of the purpose and need statement to help establish the scope of the NEPA document.
3. **Alternatives.** For renewable energy ROWs, the BLM and the applicant consider many different types of alternatives during pre-application activities including those suggested to the BLM by external parties, such as tribes, through scoping and comments on the draft NEPA document. The BLM must develop a well-supported rationale when deciding if such alternatives are reasonable and whether to analyze them or eliminate them from detailed analysis.

D. Tribal Government-to-Government Consultation

Key to improving the permitting and review processes for renewable energy projects is to ensure timely tribal consultation as required by various authorities, such as NEPA and NHPA. To improve government-to-government consultation processes associated with NHPA Section 106, the BLM in coordination with the ACHP and other agencies developed a “toolkit” of procedures to help guide agencies and project proponents in meaningfully taking into account tribal concerns related to the NHPA. The procedures were released to BLM field offices and posted on the ACHP website (see www.achp.gov/apptoolkit.html).

On September 24, 2012, the BLM executed a PA establishing general principles governing BLM-tribal consultations and describing opportunities for tribal input into the specific steps in the NHPA Section 106 compliance process for the solar energy program. Parties to the PA include the BLM, ACHP, and SHPOs from Arizona, California, Colorado, Nevada, New Mexico, and Utah. The PA establishes procedures the BLM will follow to meet its NHPA Section 106 obligations for all future site-specific solar energy applications where the BLM is the lead Federal agency and the application is for projects on BLM-managed public lands. (See WEBSITE or http://solareis.anl.gov/documents/docs/Solar_PA.pdf for a copy of the final Solar PA.)

E. Solar and Wind Energy Applications—Due Diligence

1. **Applicant Qualifications.** All potential solar and wind energy developers must meet 43 CFR 2803.10 requirements for “who may hold a grant.” Such requirements must be met to BLM’s satisfaction and require that developers provide information on their financial and technical capabilities to construct, operate, maintain, and decommission a project on the public lands. Factors demonstrating such capacity may include international or domestic experience; availability of sufficient capitalization; conditional commitments of DOE loan guarantees; confirmed power purchase agreements; engineering, procurement, and construction contracts; and supply contracts with credible third-party vendors. Such technical and financial capability will become a condition of any ROW authorization, and failure to sustain them for the development of an approved project can be grounds for termination of the authorization.
2. **Plan of Development—Due Diligence.** The BLM requires a plan of development (POD) for all solar and wind applications consistent with the provisions of 43 CFR 2804.25(b). The POD must be of sufficient detail to provide the basic information necessary to begin the environmental analysis and make tribal consultation meaningful for all parties. Such a plan must be submitted in a timely manner, and in the case of wind energy it must be submitted prior to the end of the initial 3-year term of a wind energy site testing authorization, if such an authorization is held.

F. Early Coordination Meetings and Development Prioritization

Early coordination and careful review of proposed renewable energy projects with tribes, as well as Federal, State, and local government agencies, help the BLM identify and prioritize those applications for the public lands that have the fewest resource conflicts and the greatest likelihood of success. Early coordination meetings with tribes and others will be required before an authorization is given for lands that are designated for competitive solar and wind energy purposes. Subsequent consultation and coordination meetings may be held when reviewing the POD for projects of competitively gained authorizations.

1. **Early Coordination Meeting Discussions.** The BLM requires that all applicants schedule and participate in at least two early coordination meetings for proposed developments outside of designated competitive areas. The purpose of the meetings

includes identifying and discussing potential environmental and siting constraints, lands availability, timeframes, financial obligations, consultation procedures with Indian tribes, and potential tribal concerns regarding access, resource utilization, and impacts to sacred sites.

Early coordination meetings can identify necessary studies pertaining to environmental, visual, and cultural resources, including the need for ethnographic studies, and allow consideration of potential alternative site locations and project configurations.

Other Federal and State agencies and tribes must be invited to participate to ensure issues and concerns are given full consideration early in the process. State and field offices should establish consultation or coordination agreements with other agencies and Indian tribes to facilitate the process.

Lands designated for solar and wind energy competition have already been coordinated and consulted on with Federal, State, and tribal governments or offices prior to the BLM's decision to designate such an area. Competitively gained authorizations in such areas may not be coordinated or consulted on further, prior to their authorization of the development. However, additional coordination and consultation may occur when evaluating the POD of such projects.

Early coordination activities with tribal governments can be incorporated into an environmental review document as part of the background information for the NEPA document in preparation for government-to-government consultation.

Required early coordination meetings focus on different matters for a potential development. The focus of the first early coordination meeting is to discuss the general project proposal, the status of the BLM land use planning in the area, potential siting constraints, potential environmental issues including anticipated tribal concerns in the area, and BLM ROW processes. The second meeting must initiate and ensure coordination with Federal, State, and local governments, and Indian tribes. This dialogue provides an opportunity to discuss potential environmental and siting constraints and modify the proposed project as appropriate before an application is accepted by the BLM. Follow-up coordination and government-to-government consultation meetings between the BLM and concerned tribe(s) will likely be needed.

2. **Review and Screening of Applications.** The BLM will not accept a solar or wind energy development ROW application for lands outside areas designated for competitive purposes without first holding the early coordination meetings. No application will be processed until an applicant has submitted a complete ROW application with sufficient detail to initiate the environmental analysis and review process, including tribal consultation, and the applicant has provided cost recovery fees as required by the regulations at 43 CFR 2804.14.

The BLM will prioritize an application by placing it into one of three categories based upon the potential level of conflicts the development may have on the public lands, including resources, access, and landscapes of tribal concern. It may re-categorize the application based on new information received through surveys, public meetings, or other data collection, or after any changes to the application. Should a proposed project meet only the criteria of the lowest conflict resources, it would receive priority over other applications that meet the medium and high resource conflict criteria. Applications that meet one or more medium resource conflict criteria will be prioritized over applications that meet high resource conflict criteria. Applications that meet one or more high resource conflict criteria may not be feasible to authorize. Developments within a designated competitive area will be prioritized over all other potential solar and wind energy developments.

Application screening criteria are specified within the final version of a BLM's proposed rule to amend portions of 43 CFR 2800 and portions of 43 CFR 2880, and develop a revised subpart 2809. The proposed rule may be found at blm.gov (see www.blm.gov/style/medialib/blm/wo/MINERALS_REALTY_AND_RESOURCE_PROTECTION/_energy/solar_and_wind.PAR.4208.File.dat/Solar%20and%20Wind%20Competitive%20Leasing%20Proposed%20Rule.pdf).

G. Project-Specific Consultation

When the BLM is made aware of a potential solar or wind energy project on the public land, the BLM will initiate project-specific consultation with tribes. When consulting for a project-specific action, the following steps are identified as requirements for processing an application or opportunities for tribal consultation that will satisfy the BLM's policy and regulatory requirements for solar or wind energy development that are summarized in Appendix 4.

1. **Early Coordination.** The BLM requires that all prospective applicants schedule and participate in two early meetings with the BLM before the BLM will accept a new ROW application for a solar or wind energy development outside of DLAs. The purpose of the second pre-application meeting is to initiate and ensure early coordination with tribes, as well as Federal, State, and local government agencies.
2. **Pre-NEPA Public Meetings.** If a public meeting is held by BLM for a proposed project before the acceptance of an application, tribal governments will be notified and invited to participate in the meeting.
3. **Application Status.** Upon receipt of an application and the POD, the BLM may update the tribal governments with the POD and anticipated processing timeline and milestones of the project.
4. **Begin Protocols in Appendix 4.** From this point, follow Appendix 4 of this handbook which illustrates the procedural, informational, participation, and documentation requirements of NEPA, NHPA Section 106, and tribal consultation. The right-hand

column in this appendix contains recommendations for coordinating the processes and successfully meeting compliance requirements prior to making a decision.

Maintain communication with project manager and stay apprised of changes to the preferred action and its alternatives within the NEPA document, which are articulated within the POD. This will assist consultation with the tribal governments using the most current project information.

H. Comprehensive Solar and Wind Energy Programs

1. **Solar Energy.** In 2007, the BLM issued Instruction Memorandum (IM) 2011-003, Solar Energy Development Policy, to address increased interest in solar energy development on BLM-administered public lands and to implement goals to construct renewable energy facilities on public lands. This policy established procedures for processing ROW applications for solar energy development projects in accordance with the FLPMA and the BLM regulations.

The BLM's practice at that time was to evaluate solar energy ROW applications on a project-by-project basis. In addition, many of the BLM's LUPs did not specifically address solar energy development; therefore, projects not in conformance with existing LUPs required individual LUP amendments. Moreover, the BLM did not have a standard set of mitigation measures that could be applied consistently to all solar energy development projects. The need to develop case-by-case mitigation measures and amend LUPs added to the time needed to process ROW applications for solar energy projects.

On March 11, 2009, the Secretary of the Interior issued Secretarial Order 3285, which announced a policy goal of identifying and prioritizing specific locations best suited for the large-scale production of solar energy on public lands. The Secretarial Order required DOI agencies and bureaus to work collaboratively with each other, tribes, Federal agencies, individual states, local governments, and interested stakeholders, including renewable energy generators and transmission and distribution utilities, to : (1) encourage the timely and responsible development of renewable energy and associated transmission, while protecting and enhancing the nation's water, wildlife, and other natural resources; (2) identify appropriate areas for generation and transmission; (3) develop best management practices for renewable energy and transmission projects on public lands to ensure the most environmentally responsible development and delivery of renewable energy; and (4) establish clear policy direction for authorizing the development of solar energy on public lands. On February 22, 2010, Secretarial Order 3285 was amended to clarify Departmental roles and responsibilities in prioritizing development of renewable energy. The amended order is referred to as Secretarial Order 3285A1.

As an agency with a multiple-use mission, to comply with Secretarial Order 3285A1, the BLM must make land use decisions that are environmentally responsible and sustain the health and productivity of the public lands for the use and enjoyment of present and future generations. The BLM recognized that for solar energy development to be

successful, it must be consistent with protection of other important resources and values, including cultural, historic, and paleontological values, units of the National Park System, national wildlife refuges, and other specially designated areas.

To comply with Executive Order 13212 and the Energy Policy Act of 2005, and later with Secretarial Order 3285A1, and to replace elements of the 2007 Solar Energy Development Policy, the BLM began developing a comprehensive solar energy program in much the same way as the BLM had developed the 2006 Wind Energy Policy. In May 2008, in conjunction with the DOE, the BLM initiated a programmatic environmental impact statement (PEIS) for solar energy development under NEPA. In December 2010, the BLM and DOE published the Draft Solar PEIS. During the comment period, the public, as well as many cooperating agencies and key stakeholders, offered suggestions on how the BLM and DOE could increase the utility of the analysis, strengthen elements of the BLM's proposed Solar Energy Program, and increase certainty regarding solar energy development on BLM-administered lands. On October 28, 2011, the lead agencies published a supplement to the Draft Solar PEIS, in which adjustments were made to elements of the proposed Solar Energy Program and to guidance for facilitating utility-scale solar energy development to better meet BLM and DOE solar energy objectives. The Final Solar PEIS was published in July 2012; after further deliberation and consultation, the record of decision (ROD) was signed by the Secretary in October 2012 that—

- Created a comprehensive Solar Energy Program to administer the development of utility-scale solar energy resources on BLM-administered public lands in six southwestern states: Arizona, California, Colorado, Nevada, New Mexico, and Utah, including a component that requires continued consultation with tribes at the project-specific level;
- Provided that future project-specific environmental analyses for solar energy development would tier from the analysis in the Solar PEIS/ROD, thereby allowing the project-specific analyses to focus just on critical, site-specific issues of concern; and
- Established land use allocations and incorporated required programmatic and specific design features into 89 BLM LUPs in the 6-state study area.

In addition, the decision: (1) identified areas excluded from utility-scale solar energy ROWs; (2) established 17 SEZs, which are priority areas for utility-scale solar energy development ROWs, and identified a process to establish new SEZs; and (3) identified *variance areas*, areas potentially available for utility-scale solar energy development outside of exclusion areas and SEZs.

2. **Wind Energy.** In response to Executive Order 13213, issued in 2002, the BLM developed the interim Wind Energy Development Policy (IM 2003-020) to address immediate needs for responding to requests for wind development on public lands.

Because of the need for a permanent policy, the BLM in 2003 began a comprehensive process of reviewing the potential of the public lands to support wind energy development. Utilizing the Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States (Wind PEIS), which analyzed alternatives and potential impacts of wind energy development, the BLM in January of 2006 issued a ROD that—

- Established a comprehensive Wind Energy Development Program to administer the development of wind energy resources on BLM-administered public lands in 11 western states (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), which includes a component that required continued consultation with Indian tribes at the project-specific level;
- Provided that future project-specific environmental analyses for wind energy development would tier from the analysis in the Wind PEIS/ROD, thereby allowing the project-specific analyses to focus on critical site-specific issues of concern;
- Established policies and best management practices (BMP) for the administration of wind energy development activities;
- Replaced the BLM Interim Wind Energy Policy with a new policy (IM 2009-43) that incorporated the programmatic policies and BMPs evaluated in the PEIS; and
- Amended 52 BLM LUPs in 9 states: Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. The LUP amendments included the adoption of the Wind Energy Development Program policies and BMPs described in the Wind PEIS, as well as identification of specific areas where wind energy development will be excluded.

I. Solar and Wind Energy Development Policy

Processing applications for solar and wind energy projects on public lands must be carried out in the following manner:

1. **Inventory and Planning.** The BLM released the Wind PEIS in collaboration with the DOE's National Renewable Energy Laboratory. Appendix B of the Wind PEIS provided an inventory of wind resource maps of the public lands administered by the BLM. Updates to these wind resource maps are available online at <http://wwmp.anl.gov/> in a web-based geospatial data viewer and may be downloaded for further review and use.

All land use planning efforts must address the renewable energy resource potential, tribal and public concerns, and opportunities for renewable energy development within the land use planning area. Land use plan revisions will address the environmental and tribal/public concerns associated with commercial wind energy development, such as the

availability of lands for development applications or the designation of exclusion or competition areas.

- 2. Open, Exclusion, and Competitive Lands.** *Open areas* are lands that the BLM may accept applications for renewable energy development that have not been identified as exclusion or competitive areas. Open areas may have been previously referred to as avoidance or variance zones that are potentially sensitive to renewable energy development.

Exclusion areas are lands for which the BLM will not accept applications for renewable energy development. BLM has determined that such development of these lands is incompatible with specific resource management goals and objectives, and a decision was made excluding those lands from renewable energy development. Lands excluded from renewable energy site monitoring and testing and development include designated areas that are part of National Conservation Lands (wilderness areas, WSAs, national monuments, national conservation areas, wild and scenic rivers, and national historic and scenic trails).

Competitive areas are lands that BLM has identified as preferred areas for solar and wind energy development. A competitive process to offer these lands is described in the BLM's proposed rule. Competitively designated areas are closed to applications for renewable energy development and may only hold competition to determine a successful bidder. The selected bidder will receive the authorization once all bidding requirements are fulfilled. These areas would include areas designated through BLM's landscape-scale land use planning process as appropriate for solar or wind development through a competitive offer.

Land use plans may identify ROW avoidance, exclusion or competition areas under BLM land use planning guidelines (see appendix C of H-1601-1, Land Use Planning Handbook). The identification of open, exclusion, and competitive areas on the public land may be found in BLM's land use planning decisions and program implementation tools. These may be found on the BLM's renewable energy webpage at www.blm.gov/wo/st/en/prog/energy/renewable_energy.html.

- 3. Processing Timeframes, Authorizations, and Due Diligence.** ROW developments for solar and wind energy must be identified as a priority field office workload and will be processed in as timely a manner as possible. Application and development due diligence requirements are found within the BLM's development policies and regulations under 43 CFR 2800. These requirements include those for site and project area testing and monitoring, development, cost recovery, rents and fees and bonding. Such policies and regulations may be found on the BLM's renewable energy webpage.
- 4. Performance and Reclamation Bond.** The BLM must require a performance and reclamation bond for all solar and wind energy projects to ensure compliance with the terms and conditions of the ROW authorization. The authorized officer may increase or

decrease the bond amount at any time during the term of the ROW authorization, consistent with the BLM regulations and policy.

5. **Design Features and Best Management Practices.** The BLM’s Solar PEIS identified the impacts of solar energy development and BMPs in terms of design features that can mitigate or reduce adverse impacts from solar development on the public lands. The design features include mitigation measures which in turn specify project-specific plans such as cultural resources protection measures and mitigation plans addressing tribal concerns to the maximum extent feasible. The terms and conditions of each ROW lease or grant must require that these plans be included in a POD and that the holder will fully comply with the terms of the plans.

The BLM’s Final Wind PEIS identified the impacts of wind energy development and BMPs that can mitigate or reduce adverse impacts from wind development on the public lands. The BMPs include mitigation measures which in turn specify project-specific plans that may include cultural resources protection measures and mitigation plans addressing tribal concerns to the maximum extent feasible. The terms and conditions of each ROW lease or grant must require that these plans be included in a POD and that the holder will fully comply with the terms of the plans.

**CHAPTER XIII. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO
THE FLUID MINERAL PROGRAM (RESERVED)**

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CHAPTER XIV. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE MINERALS PROGRAM

A. Introduction

This chapter explains how BLM managers and staff carry out tribal consultation and coordination when managing onshore Federal mineral resources and when assisting the BIA, tribes, and Indian allottees with minerals management under the trust responsibilities of the DOI. (The term Indian allottee means 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.)

The DOI's Bureau of Ocean Energy Management is responsible for managing the development of the nation's offshore resources. Functions include leasing, plan administration, environmental studies, and resource and economic evaluation. The Bureau of Safety and Environmental Enforcement enforces offshore safety and environmental regulations.

B. Onshore Energy and Mineral Lease Management Interagency Standard Operating Procedures

Significant interagency coordination is required when managing both Federal onshore minerals as well as Indian trust mineral resources. Recently, an interagency working protocol was executed formally specifying these roles and responsibilities, known as Onshore Energy and Mineral Lease Management Interagency Standard Operating Procedures, or Standard Operating Procedures (SOP). (The SOPs can be found at WEBSITE.). The purpose of the SOPs, effective October 1, 2013, is to establish common standards and methods for creating efficient and effective working relationships to achieve the Departmental goal of accurate energy and minerals accountability for onshore Federal and Indian leases.

The SOPs describe the responsibilities and information sharing required among bureaus and offices under the jurisdiction of the Assistant Secretary, Policy, Management and Budget; Assistant Secretary, Land and Minerals Management; Assistant Secretary, Indian Affairs; and the OST in carrying out the DOI's responsibilities for Federal and Indian onshore lease management and accounting.

The SOPs were developed by a working group of staff from the BLM, BIA, Office of Natural Resources Revenue (ONRR), Office of Surface Mining Reclamation and Enforcement (OSM), OST, and Office of Indian Energy and Economic Development (IEED). They explain the sole, joint, and final responsibilities assigned to agencies for all activities required for the leasing and development of minerals on Indian trust and Federal onshore lands. The SOPs replace earlier versions of the Tripartite MOU between the BIA, the BLM, the ONRR (the former Minerals Management Service), and OSM.

While formal lines of communication are established in the SOP between the Federal agencies, especially between the BLM and the BIA, the BLM does retain the responsibility to communicate with allottees regarding mineral development, surface resource protection, and

other issues. Guidance provided elsewhere in this handbook (especially chapters III and IV) may be utilized to carry out such communications and outreach more effectively.

In cases where Indian tribes have established their own departments for the development of mineral resources, they will be responsible for the diligent development of their own mineral resources within their reservations. In these cases, the BLM and BIA consultation and coordination actions may vary from what is described within the SOP.

1. **Division of Responsibilities.** The management activities for onshore Federal and Indian leases which involve BIA, BLM, IEED, ONRR, OSM, and OST responsibilities and information sharing are described in eight attachments to the SOP. The attachments contain detailed tables showing the responsibilities of each agency for all onshore Federal and Indian mineral development activities. Key attachments include—

- Attachment A: Agency responsibilities and information sharing for Indian owned fluid minerals that offers a comprehensive listing of actions discussed within the SOP regarding the information sharing and division of responsibilities, by agency, for managing Indian trust fluid minerals.;
- Attachment B: Agency responsibilities and information sharing for fluid minerals on Federal onshore lands;
- Attachment C: Agency responsibilities and information sharing for Indian-owned solid minerals which, like the section on fluid minerals on Indian lands, sets out detailed agency responsibilities assigned to every step in the process of managing and developing solid minerals on Indian lands;
- Attachment D: Agency responsibilities and information sharing for solid minerals on Federal onshore lands;
- Attachment E: General operating procedures for information sharing by BIA, BLM, IEED, ONRR, OSM, and OST to the public, including sharing personally identifiable information, and for protecting information that may be proprietary or confidential;
- Attachment F: BLM/BIA/ONRR responsibilities and procedures for the Indian Mineral Development Act, including administrative responsibilities for BLM, BIA, IEED, ONRR, OST, and tribes;
- Attachment G: Responsibilities and procedures of BIA, BLM, and OSM for coal leasing and mining operations on Indian lands, including the procedures for cooperation and coordination among BIA, BLM, and OSM for the surface and resource management of coal mining and exploration on Indian lands; and
- Attachment H: Responsibilities and procedures for renewable energy resource development on Indian lands.

2. **Outreach.** Agencies have responsibilities under the SOPs for outreach, including government-to-government consultation and communication with Indian communities to demonstrate the work they perform and to provide customer support. Agencies agree to share their outreach schedules with each other for each fiscal year (and updates as appropriate) to prevent conflicting information dissemination, to promote efficiencies, and to minimize imposition on the resources and time of tribes and individual Indian mineral owners. Agencies must provide copies of inquiries from tribes and allottees to other affected agencies in a timely manner.

C. Tribal Consultation for Federal Minerals Management Generally

Federal mineral resource management, as with other resource programs, begins with the RMP process involving consultation with all applicable tribes. Refer to Chapter V, Guidance for Tribal Consultation in Planning and Decision Support, of this handbook. Consultation must seek to ascertain tribal concerns about areas proposed for mineral leasing or development. These include areas of traditional use, access to sacred sites, and other locations of cultural sensitivity. Off-reservation treaty rights on public lands involving mineral development should also be addressed. BLM should protect treaty-based fishing, hunting, gathering, and similar rights of access and resource use on public lands while considering the leasing and/or sale of Federal mineral resources. BLM is directly involved in the right of access for tribal members as they exercise treaty based rights on lands managed by BLM.

A variety of references may be consulted for guidance regarding the planning and development of fluid and solid minerals on Federal onshore lands managed by the BLM and tribal consultation responsibilities associated with such actions. See MS-1780, Tribal Relations, Chapter 1, Section 1.3, Authority, and Section 1.5, References.

In regard to fluid minerals, Onshore Oil and Gas Order No. 1 governs onshore oil and gas operations, Federal and Indian oil and gas leases, and approval of operations. Updated versions of this order cover procedures for processing applications for permits to drill and the use of BMPs in lease development. H-1624-1, Planning for Fluid Mineral Resources, provides detailed instructions for complying with the fluid minerals supplemental program guidance for resource management planning. It covers procedural directions for analyzing and documenting reasonably foreseeable fluid mineral development and the impact of such development on the human environment.

Concerning the solid mineral program, regulations at 43 CFR 3461, Federal Lands Review: Unsuitability for Mining, reference the central role of land use planning assessments. These regulations primarily implement the general unsuitability criteria listed in Section 522(a) of the 1977 Surface Mining Control and Reclamation Act (30 U.S.C. 1272(a)). During the land use planning process and in response to input received from tribes through its consultation process, the BLM must assess the unsuitability of Federal lands for all or certain stipulated methods of coal mining. Each of the unsuitability criteria is applied to all coal lands with development potential identified in the comprehensive LUP or analysis. Comments must be solicited from the

public and Indian tribes by notices published in the *Federal Register* and other means of contact and consultation detailed in chapters IV and V of this handbook.

Twenty criteria are listed for determining lands unsuitable for all or certain stipulated methods of coal mining. These include—

- Number 7: All publically or privately owned places which are included in the NRHP, and
- Number 20: Federal lands in a State to which is applicable a criterion (i) proposed by the State or Indian tribe located in the planning area, and (ii) adopted by rulemaking by the Secretary.

It is clear that thorough and well-documented consultation must accompany this process and the regulations at 43 CFR 3461.2-2 refer to the necessity of completing such consultation prior to the adoption of a comprehensive LUP.

There are a number of references that may be consulted which provide guidance and policy for the management and protection of cultural resources and associated tribal consultation in the face of minerals development on Federal lands. The ACHP website (www.achp.gov) lists case studies and agreement documents covering minerals projects and compliance timing, consideration of alternatives for project location and implementation, consultation with Indian tribes and other interested parties, and assessment of impacts on natural and cultural landscapes. The website links to the CEQ and ACHP handbook on integrating NEPA and NHPA; Federal Oversight and Assistance for Shale Gas Development and Section 106; and other resources for complying with Section 106. The ACHP also maintain links to a toolkit which provides tips and advice for applicants navigating the NHPA Section 106 process

Under terms of the BLM's National PA with the ACHP and the National Conference of SHPOs (2012) (see copy at WEBSITE), each BLM state executes a protocol agreement with its SHPO. These stipulate how Section 106 consultation will take place locally.

While protocols cannot alter the tribal consultation process specified within 36 CFR 800, local consultation procedures can be customized if agreed to by tribes in signed agreements. For example, appendix A of Wyoming's Protocol, commits to consultation and compliance procedures specified in numerous coal, oil and gas, and geophysical project-specific supplemental MOA and PAs.

D. Tribal Consultation for Federal Minerals Management in Split Estate Situations

The BLM is also involved in the leasing of Federal minerals in split estate situations where they lie under Indian trust lands. Appendix A of the SOP addresses procedures for such situations involving mineral development. Onshore Oil and Gas Order Number 1 describes the requirements for approval of these leases. The order was amended in 2007 by the Oil and Gas Gold Book.

For both fluid and solid mineral development, the BLM is to pursue tribal consultation on potential effects of the proposed Federal action as normally pursued in BLM decisionmaking processes. In addition, appendix A of the SOPs requires that the BLM consult with the BIA to obtain conditions of mineral leasing approval through a surface use agreement prior to authorizing the action. The BIA records the surface use agreement with the Land Title and Records Office within 30 days after its execution. When mutually agreed to, the BIA may assume BLM responsibilities for the surface use agreement and disbursement of any annual payments required for the use of the Indian trust surface.

Any authorization for disposal of water produced by a minerals action will be in accordance with the terms and conditions of the issued application for permit to drill and with Onshore Order Number 7. Depending upon the method of disposal, other Federal agencies such as the Environmental Protection Agency may also be involved. For solid minerals, the BLM will use BIA reclamation standards for evaluating an operator's restoration plan. Upon acceptance of reclamation actions by the operator, the BLM is to notify the BIA in addition to the operator. Attachment G to the SOP addresses coal leasing procedures for split estate situations involving Federal minerals and Indian trust surface.

For split estate situations involving Federal minerals and nonfederal surface, such as State trust lands and private ownership, the BLM is compelled to satisfy the same procedures as if the surface were Federal in regard to NEPA and the NHPA. The BLM brochure, Cultural Resource Requirements on Private Surface—Federal Minerals for Oil and Gas Development (a copy may be found at WEBSITE) describes the common Section 106 process (see chapter XI) as applied to fluid minerals situations, including the identification of locations of traditional cultural or religious importance to Indian tribes.

In all these split estate situations, the Federal mineral rights are considered the dominant estate, meaning they take precedence over other rights associated with the surface property. However, the BLM is compelled to show due regard for the nonfederal interests, including tribal, and occupy only those portions of the surface that are reasonably necessary to develop the mineral estate.

E. BLM Responsibilities for Indian Trust Minerals Management

Development of mineral leases on tribal lands requires consultation with both the BIA and individual tribes. In certain circumstances, the BLM may be required to consult directly with Indian mineral owners themselves. BLM employees working in the minerals program need to have detailed knowledge of the BLM role in managing Indian trust minerals and their part in carrying out these responsibilities. They should be aware that their action or inaction can directly or indirectly impact Indian trust assets, and that Indian lands are very different from private, public, or acquired Federal lands. For example, allotted lands and mineral ownership can be highly fractionated due to Indian heirship laws, which can make decisions concerning mineral resource development very complicated.

It is important to emphasize that the BLM does not manage or account for trust funds; it manages lands and mineral resources which generate trust funds. The BLM Indian trust minerals responsibility concerns the management of Indian trust assets, which are defined in 303 DM 2.5, Principles for Managing Indian Trust Assets, as “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.” Potential impacts to trust assets from public land mineral activities should be considered during the RMP process.

1. **Principles for Managing Indian Trust Minerals.** According to 303 DM 2, the proper discharge of the Secretary’s trust responsibilities requires that persons who manage Indian trust assets do the following.
 - a. Protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion.
 - BLM has direct responsibilities for mineral operations on Indian trust lands, and monitors Indian leases for production verification, inspection and enforcement, diligent development, etc. so that the resource is not wasted or unduly depleted. BLM also watches for mineral trespass.
 - The general goal is to maximize economic gain for tribes and/or allottees.
 - b. Assure that any management of Indian trust assets that the Secretary has an obligation to undertake promotes the interest of the mineral owner and, to the extent it is consistent with the Secretary’s trust responsibility, supports the owner’s intended use of the assets.
 - This requires consultation. Field offices should not assume that economic factors are the only ones to consider in determining “best interest.” Consult with the mineral owner and use that information to make decisions, which must be technically and legally correct and reasonable. If it is Indian allotted land, BLM may be consulting with BIA, the fiduciary trust officer, or an allottee association.
 - As trustee, the agency makes the final determination, which may at times go against the wishes of the tribe or individual mineral owner.
 - Document all consultations and explain how BLM arrived at its final decision.
 - c. Enforce the terms of all leases or other agreements that provide for the use of trust assets and take appropriate steps to remedy trespass on trust or restricted lands.
 - BLM inspects Indian mineral leases to ensure proper measurement and reporting for royalty purposes, inspection and enforcement, etc.
 - BLM employees should be aware that revenues from minerals might be the only income for an individual Indian beneficiary.

- d. Promote tribal control and self-determination over tribal trust lands, resources, or interests.
- Make sure employees have a working knowledge of the ISDEAA Titles I and IV.
 - Support employment of tribal members under 638 contracts.
- e. Select and oversee persons who manage Indian trust assets.
- BLM is responsible for selecting personnel to manage Indian trust resources and must select personnel with the skills and knowledge to successfully carry out the programs and support activities involving Indian trust resources.
 - Employees must have an understanding of the trust responsibility and the role of a fiduciary and be willing to accept that responsibility and work with tribes and individual Indian beneficiaries.
- f. Confirm that tribes that manage Indian trust assets pursuant to contracts and compacts authorized by the ISDEAA protect and prudently manage Indian trust assets.
- In carrying out program reviews, BLM conducts oversight of tribes with 638 contracts to ensure resources are protected.
- g. Provide oversight and review of the performance of the Secretary's trust responsibility, including Indian trust asset and investment management programs, operational systems, and information systems.
- BLM conducts oversight through periodic reviews [inspections, internal control reviews, department reviews, OST reviews] of trust programs, including records and automated systems containing trust data.
- h. Account for and timely identify, collect, deposit, invest, and distribute income due or held on behalf of beneficial owners.
- Although BLM has no direct responsibility for trust monies, BLM might be called upon for supporting documentation at the request of BIA, OST, or ONRR.
- i. Establish and maintain a system of records that permits beneficial owners to obtain information regarding their Indian trust assets in a timely manner and protects the privacy of such information in accordance with applicable statutes.
- Such records are verifiable and provide information on how the trust resource was managed.

- Documentation assures information can be provided to beneficial owners upon request, while protecting the privacy of those records per applicable statutes (BLM guidance should provide enough information that employees know whether Indian records/data meet payment card industry (PCI) security standards or are publically available).
- j. Communicate with beneficial owners regarding the management and administration of Indian trust assets.
- BLM should be in communication with the beneficial owners of the trust resources regularly. In most offices with Indian minerals responsibility, BLM meets on a periodic basis with tribal minerals personnel.

For example, representatives from the BLM Arizona State Office organize quarterly coal coordination meetings with the Hopi Tribe and the Navajo Nation. Representatives from the BIA and OSM attend as well. Participants discuss on a government-to-government basis coal-related mining and environmental issues involving the DOI's management of the Arizona and New Mexico coal mines located within the Hopi and Navajo reservations.

- BLM minerals personnel must understand that the Indian trust programs are part of BLM's mission, and that BLM is not merely doing BIA's job. The trust functions were delegated to BLM by the Secretary or were established by law. This puts BLM in the role of a fiduciary, and BLM has the responsibilities of a fiduciary in managing trust assets and making decisions that may impact trust assets. Not being aware of this might result in inadvertent damage to trust assets, resulting in liability to the Government. Employees may be held personally liable where it is determined that their actions were deliberate.
- k. Protect treaty-based fishing, hunting, gathering, and similar rights of access and resource use on traditional tribal lands.
- BLM is directly involved in the right of access for tribal members as they exercise treaty-based rights on traditional tribal lands managed by BLM.
2. **The BLM Role—Indian Trust Minerals.** BLM employees must be aware that the Federal Government has been held liable where it was found to be in breach of trust. This may involve payments to tribes and/or allottees, or may result in new agency procedures. Examples include—
- *Cobell v. Salazar*: \$3.4 billion dollar settlement

- Assiniboine-Sioux in Montana: BLM Indian Oil and Gas Diligent Development Program resulted from court ruling

If there is a question concerning trust management issues, look to statutes, regulations, the Departmental Manual, and if not addressed, then go to the Solicitor for advice or formal opinion.

Being a trustee requires good communication within the agency, with other agencies, and with beneficiaries. Communication with tribes and/or allottees is unlike communication with the public. Be cognizant of your obligations as trustee and the requirement to do what is in the best interest of the beneficiary.

Keep in mind that each tribe is unique and that the interests of tribes or individual Indians may be different and may change over time. Get to know the relationship between allottees and their tribe. These may be adversarial or there may be a conflict of interest between the tribe and allottees. Know what authority tribes have over allotted lands, if any, in a particular instance. Check with BIA regarding these issues.

Become familiar with your local tribe(s) organization—chair, council, executives, traditional religious leaders, and so on. Some dates or seasons of the year are not appropriate for conducting certain minerals management or development activities. Become acquainted with local tribal protocols. It is helpful to subscribe to the local tribal paper (if there is one) to keep up politically and socially. Follow local political developments; however, your take on the implications may be different because you are not part of the tribe. Staff must become familiar with local Indian land ownership patterns, especially in split estate situations where the minerals may be Federal and the surface owner is a tribe or individual Indian, or vice-versa.

Many allottees may be unaware that BLM can help them. BLM field offices may need to meet in a smaller group when consulting with allottees or have a separate meeting for allottees so they are not worried about the consequences of speaking out.

BLM has to balance its roles of steward of the public lands and Indian mineral trustee. Employees in lands and planning need to be aware of the responsibilities relating to the potential impact on trust assets from public land activities. Notify tribes/allottees and BIA of the potential or known impacts of Federal land activities and options for mitigation. Do not inform tribes of potential impacts to their trust mineral assets late in the planning process. If competing land uses might impact tribal mineral interests, field offices must consult with tribes early on in the process so that they can become involved in the planning stages.

Staff must keep up to date on what is occurring with trust programs, especially if there are problems, new guidance, budget issues, information technology factors, etc. that can affect Indian trust management.

If BLM lands are in a treaty-rights area, employees need to be aware of treaty-based rights of access on public lands.

Employees must remember that funds used to administer BLM's trust programs (e.g., subactivities where the special project codes "TRST", or tribe codes are used) are not trust funds; they are Federal funds used for trust programs.

3. **BLM Personnel Management—Indian Trust Minerals.** BLM managers must—

- Ensure that employees have the skills and knowledge necessary to carry out their Indian trust minerals duties.
- Devote the resources (budget, people, and equipment) necessary to carry out the trust responsibility.
- Know which employees are working in trust management and how much of their time is spent on this.
- Emphasize to employees the importance of bringing potential/actual problems or issues that may affect their trust work or the way they do their work to the attention of their immediate supervisors.
- Make sure human resources support is available. If trust positions become vacant, fill them with qualified people.
- Ensure that employees, especially new ones, know they are working with a trust asset.
- Make sure employees are aware of the government-to-government relationship, and know the office and local tribal protocols for Indian consultation and communication.

F. Indian Self-Determination Act

BLM minerals personnel need to be aware of the requirements of Titles I and IV of the Indian Self-Determination Act, Public Law 93-638, which was passed in 1975. (Public Law 100-472, Indian Self-Determination Amendments Act of 1988, extended contracting to eligible programs in non-BIA agencies within the Department.) This authority applies to all land management programs, though it will be discussed below because it has often been applied to minerals programs.

- Title I requires the Secretary to contract with tribes for programs and services carried out by the Federal Government for the benefit of Indians because of their status as Indians. Contracts are usually portions of programs in the form of projects. Strict timeframes apply, including 90-day automatic approval unless one or more of five declination criteria apply. There are only five acceptable reasons to decline a contract request. In Alaska, ANCSA corporations are eligible to apply for agreements under this authority. The Federal Acquisition Regulations clauses, which are mandatory on all Federal contracts,

cannot be included except by mutual agreement. The BLM requires specific tribal resolutions to assure validity on both sides. Most contracts over a certain threshold amount are administered by the National Operations Center and not the local office due to the restrictive amount ceilings.

Contracted programs for the BLM include the inspection and enforcement function for minerals operations on Indian lands. In New Mexico, the BLM has entered into a cooperative agreement with the Jicarilla Apache tribe for improving and coordinating the oil and gas inspection program on tribal lands. The agreement improves the coordination in planning and programming of these inspections, increases their frequency, and provides for a more uniform application of regulations and improved communications between the BLM and the tribe in the performance of their regulatory functions. In Alaska, there is a long history of contracting for cadastral survey of individual allotments.

(See WEBSITE for a copy of Cooperative Agreement L10AC15876 establishing this program and information on other opportunities).

- Tribes can ask to contract for non-Indian programs under title IV, section 403(c) based on taking over other activities which are of a special geographic, historical, or cultural significance (called nexus programs). Agreements under this authority are sometimes called “compacts,” and whole programs could be affected. Strict timeframes apply, including 90-day automatic approval unless one or more of 5 declination criteria apply. There are only 5 acceptable reasons to decline a compact request. The Department provides 100 percent of program funding plus start-up and indirect costs. Regulations for all DOI agencies are found at 25 CFR 900 and 1000.

All employees should know that 638 contracts issued under title I are mandatory while compacts agreed under title IV are discretionary; however, both are extremely time sensitive. Delays may occur because: (1) the request is misdirected or unknowingly delayed by mailroom or other non-program personnel or (2) the request sits on the desk of person who is on leave or travel.

CHAPTER XV. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO THE CADASTRAL SURVEY PROGRAM

A. Background

The Cadastral Survey Program is a core mission of the BLM responsible for supporting field offices by supplying clearly defined boundaries and other land information for the protection and proper management of public and Indian lands. Both planning and resource programs involve boundary components that may require early involvement of land tenure subject matter experts early on in the decision process. Nearly every program requires accurate land boundary knowledge in order to protect the land and resources from trespass and unauthorized use. This can be achieved after completion of management of land boundary (MLB) plans utilizing SBE. By policy, if projects are planned within one-quarter mile of a boundary, an SBE process is required prior to final decisions and work on the ground.

BLM either performs the needed surveys itself or oversees the surveying by others. BLM administers the Public Land Survey System, which is the official system for storing public land boundary record information. This system includes about 1.3 million linear miles of boundary lines of Federal and Indian lands on 385 million acres in the western United States, excluding Alaska.

Public lands in the United States have been surveyed into townships and sections since 1785. These surveys contribute to a master title plat showing the survey or boundary lines. Since 1864 all surveys of Indian lands held in trust by the Federal Government have been under the direction and control of the BLM and one of its predecessors, the General Land Office. This delegation was codified at 25 U.S.C. 176. The Department's fiduciary trust responsibility includes the improvement and protection of approximately 56 million acres of land and natural resources to improve the quality of life for tribal communities. Establishing Indian land boundaries follows the guidance in the BLM's Manual of Surveying Instructions for the Survey of the Public Lands of the United States 2009 and the Department's Standards for Indian Trust Lands Boundary Evidence: A Cadastral Business Practice Standard. The standards were developed jointly by the BIA, the BLM, the OST, and the ANCSA corporation representatives.

B. Cadastral Program Role in Managing Trust Assets

The 1994 American Indian Trust Fund Management Reform Act (25 U.S.C. 4001) established a State-licensed land surveyor service (CFedS) in partnership with the BLM cadastral program. Other technical roles include the pre-approved agency or tribal official or agent, an individual who has successfully completed the certification process to qualify to perform land description reviews, and tribal members and BIA employees who have become proficient in the creation and review of legal descriptions. These programs have strengthened BLM/BIA capacities for addressing trust asset boundary needs.

The Office of Special Trust for American Indians (OST) oversees all the trust reform efforts within the BLM, BIA, and ONRR. The BLM's Washington Office Chief Cadastral Surveyor

provides direction and control over BLM’s Cadastral Survey Program and its functions regarding tribal issues. The program’s objective is to better “manage risks and assure proper and efficient discharge of the Secretary’s responsibility to trust beneficiaries” by reducing the potential for boundary defects.

Proper management of Indian trust assets is complicated by multiple ownership based on complex and confusing land descriptions resulting from inaccurate or inadequate boundary descriptions based on approximate locations. The Cadastral Survey Program strives to resolve such ambiguities prior to transactions since resolution after transactions can be very costly and may involve litigation. The standards of boundary evidence for Indian trust lands guide when and how to engage boundary location subject matter experts so as to minimize unnecessary and costly land surveys.

C. Boundary Evidence

A major focus of the BLM Cadastral Program is the concern for Indian trust lands boundary evidence under authority of the American Indian Trust Fund Management Reform Act. Boundary evidence is the authenticated documentation used to describe natural or political separation that delineates and identifies a tract of land sufficiently to ascertain its actual location on the ground. The act enhanced the Department’s management of the Secretary’s trust responsibility which specifically relates to Indian trust assets, including land or a natural resource held by the Federal Government in trust or that is restricted against alienation. The objectives of this guidance are to provide “consistent, timely, efficient and economical assessment of the need for boundary evidence relative to Indian trust assets”; expeditiously process Indian trust asset transactions; facilitate solutions to Indian trust asset boundary issues; and protect assets from boundary conflicts, trespass, unauthorized use, and ambiguous land descriptions. The Cadastral Survey Program webpage on the national BLM website provides additional information on boundary evidence services.

The American Indian Trust Fund Management Reform Act of 1994 created the OST. The Act addressed the federal government and the Interior Department’s management of Indian trust funds. It established a collaborative approach between BLM and BIA to engage tribal beneficiaries in the management and use of tribal trust assets. This approach recognized five major business processes, including cadastral survey. The act also implemented a standard land status record system that includes Indian lands, an improved Federal surveyor program to certify private land surveyors and tribal surveyors, and a program creating a BLM Indian Land Surveyor at each of the BIA regional offices to focus on Indian trust survey issues and provide on-site assistance at the BIA.

The four sources of establishing boundary evidence for tribal trust assets are: (1) actual land survey by trained professional surveyors; (2) a land description review; (3) a chain of surveys review; and (4) physical land inspection concerning unrecorded activities. Often the effort produces a boundary assurance report when an actual survey is not performed. The non-survey techniques involve survey and land records, photography, mapping, and computer software.

D. Survey Process

The cadastral survey process begins when either an Indian beneficiary, a tribe, or the BIA identifies a need for survey services and submits an informal request to the BLM. The BLM must determine that the request pertains to trust lands and that the interested party would benefit from the services. Normally a tribal manager or the BIA initiates a boundary-related task to resolve a trespass, manage or protect natural resources, determine precise reservation boundaries for law enforcement purposes, or for some other purpose. The BLM develops a cost for the solution, and the BIA, in consultation with the tribe, determines funding availability. The BIA will incorporate the specific task into an established priority listing for that region. Funds are provided by the BIA headquarters to BLM under an interagency agreement (IA) negotiated by both agencies. Occasionally individuals or tribes may provide funds directly to the BLM for the survey services and the BIA is not involved.

During such surveys, archaeological and historical sites must not be recorded or depicted on maps by cadastral crews. Such documentation eventually becomes available to the public online or in public rooms. Restricting public knowledge of the location of cultural properties is needed to maintain their preservation. Cadastral crews may report any finds back to the appropriate cultural resources specialist for follow-up recordation.

Once the service is performed, the BLM must enter the information into official records and submit a written report and digital products or other prepared results to the requesting parties. The tribal manager or BIA are ultimately responsible for the outcome. The standards for boundary evidence are applied to acquisitions, conversions, transfers, partitions, asset management, donations, ROWs, easements, leases, and other land and resource transactions. The tribe or BIA consults with a BLM cadastral surveyor, a certified federal surveyor, or a pre-approved agency or tribal official or agent to determine if boundary evidence is needed and the type of method appropriate for the specific occasion. The Trust Model has identified training for BIA employees and tribal members in regard to cadastral survey, including training at the BLM NTC.

Generally, the BLM should perform surveys for all acquisitions and for all conveyances, conversions, transfers, partitions, and management activities where improvements are anticipated, management involves a larger property, new boundaries are being established, boundaries and titles are complex and confusing, litigation is probable, or instances where a survey is specifically required.

The needs for survey include establishing accurate boundaries for transfer of ownership, resolving ownership and land use disputes, and establishing accurate locations of proposed roads, pipelines, or utility lines. The associated extensive fieldwork in conducting a formal survey also can result in discoveries of unauthorized or previously unknown land uses or damages. Thousands of unauthorized use cases have been discovered by BLM/BIA surveys leading to the recovery of millions of dollars in revenue for tribes from unauthorized ROWs and unauthorized extraction of oil, gas, and other valuable minerals. Therefore, priority setting by BIA and BLM and the tribes is important. High risk situations where significant potential revenues could be

collected are of particular interest in addition to land transactions. The creation of an adequate system to identify high risk lands is still a focus of the agencies and tribes.

Despite the sovereign status of tribes exempting them from recording requirements of State laws and regulations, they must have their surveys recorded in the county record system so that they are accessible to others for protection of their boundaries.

All title documents affecting Indian land are recorded in the Indian Land Record of Title. The BIA's Division of Land Titles and Records and its Land Titles and Records Office are the official Federal offices of record for all documents affecting title to Indian lands and for the determination, maintenance, and certified reporting of land title ownership and encumbrances on Indian trust and restricted lands.

DRAFT

**CHAPTER XVI. GUIDANCE FOR TRIBAL CONSULTATION APPLICABLE TO
THE REALTY PROGRAM (RESERVED)**

DRAFT

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 except by acts of Congress. 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.

Intermingled fee lands: Privately owned parcels of lands interspersed with tribal trust lands.

-M-

Management of land boundary: Management of Land Boundary (MLB) Cadastral Program strives to incorporate land tenure specialists into consultation processes and products by early involvement in planning projects.

-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.

Nontrust 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 such as reservations and allotments, 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.

Restricted from alienation: Assets cannot be sold or given away by tribes or individual Indians without the Secretary's consent.

-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.”

-T-

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

ACEC	area of critical environmental concern
ACHP	Advisory Council on Historic Preservation
AIRFA	American Indian Religious Freedom Act
ANCSA	Alaska Native Claims Settlement Act
ANILCA	Alaska National Interest Lands Conservation Act
ARPA	Archaeological Resources Protection Act
BIA	Bureau of Indian Affairs
BILS	BLM-Indian lands surveyors
BLM	Bureau of Land Management
BMP	best management practices
CEQ	Council on Environmental Quality
CFedS	certified federal surveyor
CFR	Code of Federal Regulations
CX	Categorical Exclusion
DLA	designated leasing area
DOE	Department of Energy
DOI	Department of the Interior
DM	Departmental manual
EA	environmental assessment
EIS	environmental impact statement
E.O.	Executive order
EPAP	employee performance appraisal plan
FLAME	federal lands assistance management and enhancement
FLPMA	Federal Land Policy Management Act
FOIA	Freedom of Information Act
GIS	Geographic Information System
HUB	historically underutilized business
IEED	Office of Indian Energy and Economic Development
IM	instruction memorandum
ISDEAA	Indian Self-Determination and Education Assistance Act
LUP	Land Use Plan
MLB	management of land boundaries
MOA	memorandum of agreement
MOU	memorandum of understanding
NAGPRA	Native American Graves Protection and Repatriation Act

NCL	National Conservation Lands
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPS	National Park Service
NRHP	National Register of Historic Places
NTC	National Training Center
O&C Act	Oregon and California Revested and Sustained Yield Management Act
OHV	Off-Highway Vehicle
ONRR	Office of Natural Resources Revenue
OSM	Office of Surface Mining, Reclamation, and Enforcement
OST	Office of the Special Trustee for American Indians
PA	Programmatic Agreement
PCI	Payment Card Industry
PD	public domain
PEIS	programmatic environmental impact statement
POD	plan of development
Pub. L.	Public Law
RMP	resource management plan
ROD	record of decision
ROW	right-of-way
SBE	standards for boundary evidence
SEZ	solar energy zone
SHPO	State Historic Preservation Officer
S.O.	Secretarial Order
SOP	(Onshore Energy and Mineral Lease Management Interagency) standard operating procedure
Stat.	statute
TCP	traditional cultural property
THPO	Tribal Historic Preservation Officer
U.S.C.	U.S. Code
WSA	wilderness study area
WSRA	Wild and Scenic Rivers Act

Appendix 2 — Implementation of BLM Policy Regarding Compensation to Native Americans for Products and Their Participation in the BLM’s Decisionmaking Processes

MS-1780, Tribal Relations, Chapter 1, Section 1.6, Policy, Subsection.B, Compensation to Tribes, states:

“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.

Upon issuance of this Manual and H-1780-1, the BLM will allow an expansion of compensation to include Native American contributions of information, comments, or input into the BLM’s decisionmaking 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.”

A. Policy Regarding Compensation for Products

1. **Consider If Contracting Is Appropriate.** The BLM should first consider whether contracting with tribes and tribal representative is appropriate. The BLM should consider contracting when obtaining reports or other specific products. No restrictions exist that prevent the BLM from contracting for the services of qualified Native American individuals, firms, or organizations, through the BLM acquisition and procurement procedures to produce in-depth reports or other specific products. Such services do not constitute *consultation* in accordance with the MS-1780, Tribal Relations.

The BLM manager must fully comply with all Federal procurement rules. Care must be exercised to prevent any expectations on the part of tribal officials, tribal elders, or individual tribal members that BLM will automatically pay for input from such parties. Where BLM’s contract costs would be reimbursable, any form of payment to Indian tribes should be coordinated with affected project applicants beforehand. All payment should be directed through the BLM using appropriate Federal procurement procedures.

- a. **BLM requests information about traditional cultural practices affecting present-day plant and animal distributions.** An interdisciplinary management plan is being developed for an area. In assessing current conditions, questions are raised about how long the current plant species composition has existed and how past land uses including Native American use of fires may have reduced or increased various species. The BLM decides to gather information to better understand how humans have changed the environment. Elders of the Indian tribe that historically occupied the area agree to share their knowledge of traditional practices that manipulated and changed the plant and animal communities if compensated. Payment for such information may be appropriate.

- b. **BLM requests assistance in documenting and evaluating a place used for traditional purposes.** An Indian tribe has informed BLM of a specific place where its members have conducted traditional ceremonies for generations (i.e., a traditional cultural property (TCP)). From the information provided by the tribe, BLM determines that the property is likely to meet the National Register eligibility criteria but requests assistance in more thoroughly documenting and evaluating the property in the field to meet eligibility documentation requirements as well as meet broader management responsibilities under the Federal Land Policy and Management Act. The tribe offers the expertise of a traditional practitioner who agrees to accompany BLM personnel to the property and assist in its documentation, but only if he is paid for his time and travel. In such a case, BLM payment for the services rendered by the traditional expert may be appropriate.
- c. **BLM requests tribal participation in preparing written reports or other products.** An archaeological site is excavated. During consultations with a local Indian tribe prior to the excavation, BLM learns that the site figures prominently in the tribe's oral histories and determines that the tribe's perspective would be a valuable addition to the excavation report. The tribe is willing to assist in writing or providing information for the report if it is paid for doing so. If BLM asks the tribe to participate, payment to the tribe may be appropriate.
- d. **BLM requests tribal documentation of traditional land uses and resource exploitation.** A large-scale right-of-way application for a solar development will result in the removal of large tracts of native vegetation, including Indian rice grass and mesquite. Indian tribes have indicated a concern regarding the impacts development will cause to these traditional food sources. The BLM decides to contract for an ethnographic study of traditional uses of Indian rice grass, mesquite beans, and other native plants on the lands potentially affected. Researchers want to know how important these resources are to traditional lifeways and current lifestyles; whether or not other nearby plant resources could be substituted; and whether compensatory mitigation programs involving seeding new areas for these culturally important plants is possible. In this case, payment to informants and tribal officials through an ethnographic contract would be appropriate.
- e. **BLM requests assistance in analyzing or interpreting cultural materials.** An archaeological site identified during a field inventory contains artifacts unfamiliar to the archaeologist. The archaeologist shows the artifacts to local Native Americans who recognize them as similar in appearance to objects they use in traditional activities. The Native Americans offer to explain the manner in which they use such objects if they are paid for this information. If BLM requests such information, payment may be appropriate. Interpretations of artifact use and meaning must be cross-checked with other ethnographic, historic, and archaeological sources.

2. **Consult WEBSITE.** The site has examples of contracts with tribes for such products as ethnographic studies, identification of sacred places, documentation of the meaning of rock art sites, and traditional land use practices.

B. Policy Covering BLM Decisionmaking Processes

1. **Strategies to Follow Which Can Minimize the Need to Provide Compensation for Consultation.** Although the BLM may authorize compensation to Indian tribes for some of their costs associated with consultation, BLM field offices should make every effort to minimize the need for such compensation by adhering to the following strategies.
 - a. **Avoid creating attendance difficulties.** Whenever possible, the BLM should schedule meetings on or near reservations and tribal communities so that tribal members can attend without incurring travel and per diem expenses.
 - b. **Utilize technology to minimize travel.** If acceptable to the tribe(s) involved and technologically feasible for both parties, use Internet conferencing programs to create virtual meetings to minimize the need for travel by either party. While not every tribe will have such technological capabilities, many tribes are updating their information technology capabilities, making such communications possible.
 - c. **Take advantage of government-sponsored overlapping meetings.** BLM field managers should take advantage and meet with tribal officials and other representatives when tribes will be attending meetings that BLM managers and staff would also be attending. Examples include Congressional Field Hearings, State legislative sessions, or Secretarial or Congressional field visits. By coordinating schedules, the BLM and tribes may be able to meet for a portion of a day while their representatives are readily available. However, do not attempt to attend tribally sponsored meetings unless invited to participate.
2. **Goals in Providing Compensation.** The goals of the BLM providing, or requiring that proponents provide, compensation for tribal participation in BLM decisionmaking processes are: (1) to obtain information necessary to complete compliance reviews and (2) to facilitate tribal reviews of materials in order to meet project deadlines.
3. **Actions/Undertakings for Which Compensation May Be Provided.**
 - a. **Large-scale undertakings initiated by outside parties, requiring an environmental impact statement (EIS).** Such projects are frequently established on a cost recovery basis. In these circumstances, the proponent may be required by the BLM to pay for tribal compensation and to make arrangements for such payments through their own contracts or other agreements directly with the tribe(s). Compensation would be provided for travel costs and per diem to attend consultation meetings.

For these cases, the BLM must inform the proponent regarding the requirements for work and services that must be performed and the products expected. If contracts are required for ethnographic studies to provide information and insight on traditional lifeways, resources, TCPs, subsistence resources, traditional hunting or fishing concerns, or sacred sites that could be impacted by the proposed project, the proponent must award contracts to obtain BLM's specific information needs.

Cost reimbursable accounts must cover BLM staff time, travel expenses, and per diem required to carry out tribal consultation in situations where BLM budget limitations for this purpose are insufficient to carryout effective tribal engagement.

- b. **Small-scale undertakings initiated by outside parties, usually analyzed and approved with environmental assessments.** Such actions/undertakings might include oil and gas, range, and, timber projects, etc. It is expected that tribal consultation will already have taken place at earlier lease approval stages or the land use planning stage.

Nevertheless, the BLM must add a clause or term to existing permits or lease authorizations that informs operators/licensees/permittees that if tribal consultation issues arise, the operator/licensee/permittee may be required to pay for additional tribal consultation. The BLM's *retained rights* under the oil and gas leasing process allow it to condition development so as to protect the environment, including cultural resources and those resources subject to tribal consultation. Rights granted on leases are subject to Secretarial orders, Executive orders, and manuals and handbooks when not inconsistent with lease rights granted. Both section 6 of leases forms and regulations (43 CFR 3101.1-2) allow reasonable measures to be required to be taken to minimize adverse impacts to the environment and other resources. MS-3101 also established that under the BLM's reserved authority, it may impose additional mitigation measures beyond lease stipulations to ensure that proposed operations minimize adverse impacts to other resources so long as consistent with lease rights granted. Interior Board of Land Appeals (IBLA) decisions (see 176 IBLA 144, 155(2008)) also recognize the BLM's rights to condition post-lease development pursuant to the 43 CFR 3101 regulations and the unnecessary or undue degradation clause, holding that the BLM can require post-lease conditions of approval that were not addressed in original lease stipulations.

Thus, operators/licensees/permittees may be required to pay for tribal consultation and arrange for such payments through their own contracts or other agreements directly with the tribe(s). Compensation would be provided for travel costs and per diem to attend consultation meetings.

For these cases, the BLM must inform the proponent regarding the requirements for work and services that must be performed and products expected. If contracts are required for ethnographic studies to provide information and insight on traditional lifeways, resources, TCPs, subsistence resources, traditional hunting or fishing

concerns, or sacred sites that could be impacted by the proposed project, the proponent must award contracts to obtain BLM's specific information needs.

- c. **BLM-initiated projects (new resource management plans (RMP), RMP updates, BLM-instigated developments).** In these cases, the BLM itself, through the benefitting subactivity, may pay for tribal compensation. Subject to approval in advance by the field manager and subject to the availability of funds, the BLM may provide compensation to defray the costs of travel, per diem, time, or the preparation of reports, documentation, and correspondence. Compensation should be provided from the BLM to tribes in accordance with the terms and conditions of assistance agreements, MOAs, or contracts executed in advance.
4. **Third Party Participation.** The BLM will not provide compensation to third parties who participate in meetings and discussions between the BLM and Indian tribes. Compensation may only be considered for Indian tribal participants in the government-to-government consultation process.
5. **Reasonable Limits for Compensation Provided by Outside Parties.** The BLM will not intervene to arbitrate or settle disputes between land use applicants and tribes regarding negotiated rates for contracted products or compensation for participation in the consultation process itself. The BLM can only require that project proponents make a reasonable and good faith effort to acquire data in a timely manner required by the agency to make its decision. If the BLM determines that tribal demands for compensation exceeded prevailing standards and negotiations break down on this issue; if specified products were never delivered; or if products did not meet agreed upon deliverables standards, the BLM must document these efforts and continue with the decisionmaking process. The proponent will not be held accountable or penalized.
6. **Format and Provisions for Agreement Documents Establishing Compensation for BLM-Initiated Projects (New RMPs, RMP Updates, and BLM-Instigated Developments).** Agreement documents with tribes in which the BLM helps to defray consultation costs for BLM-initiated projects will consider tribal consultation input as fees for professional services. Amounts provided may not fully cover tribal expenses but, like honoraria, represent a sign of respect.

If the BLM concludes that consultation costs to a tribe constitute a barrier to effective consultation and that an agreement document is appropriate, a lump sum payment on a per project basis directly to the tribe itself is allowed. Tribal governments will be responsible to distribute the funds to the individual tribal members who have participated in the consultation effort. Individual tribal members will make their own travel arrangements. Federal Government per diem rates do not apply. No receipts are required on the part of the BLM. Tribal representative will make their own travel arrangements. Tribal representatives will be responsible for their own taxes.

The agreement document should contain the following sections and these suggested provisions.

- a. **Objective.** The scope of the project should clearly be defined here in terms of final outcomes anticipated, the role of the parties, and the specific anticipated uses of funding.
 - b. **Project management plan.** Project proposals should be incorporated here.
 - c. **Term of agreement.** Agreements should be multiyear, usually valid for up to 5 years.
 - d. **Financial support.** Funding sources, carry-over provisions, and any cost sharing provisions must be specified. The BLM may provide compensation for consultation at the discretion of the manager and in consideration of relevant factors, such as the complexity of the project, travel costs, etc. Guidelines for consideration include the following suggested maximum amounts per project—
 - New RMPs—up to \$1,000 per tribe,
 - RMP updates—up to \$500 per tribe, and
 - BLM-instigated developments—up to \$500 per tribe.
 - e. **Deliverables and reports.** Care must be taken to describe in detail the expected deliverables or products to be provided to the BLM. Such descriptions are necessary for the BLM to judge whether or not useful information that met the specified format and content for products was delivered satisfactorily. Such deliverables might include detailed written NHPA Section 106 or NEPA comments; participation in meetings; formal Section 106 or NEPA verbal comments; and documentation of traditional uses, resources, access, or presence of sacred sites or TCPs within areas likely to be affected by proposed actions or proposed changes in land use.
7. **Examples of BLM-Tribal Agreements.** Posted on the WEBSITE are several recent agreements between the BLM and Indian tribes in which the BLM provided financial compensation to facilitate tribal input into BLM decisionmaking processes. Among the approaches provided, staff and field managers may wish to consider the following example.

The Montana State Office transferred funds to the Crow tribe who agreed to host intertribal workshops. These workshops focused on producing individual, formal tribal consultation protocols/agreements for BLM field offices in Montana, the Dakotas, and Wyoming. Twenty-two Indian tribes were invited to attend. The goal is to negotiate consultation protocols that can define more efficient and effective consultation procedures between the BLM and tribal governments and/or their designated representatives. The Crow tribe used the payments to cover the costs of motel

accommodations and meeting room expenses. As “host”, the Crow tribe received funding from the BLM via an Assistance Agreement and then distributed funds to participating tribal representatives to reimburse them for costs of mileage and per diem expenses. Funds were made available by the Crow tribe to be handed out at the beginning of each meeting for all participants attending the workshops.

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Appendix 3 — Spreadsheet/Database to Document BLM-Indian Tribal Consultation

The BLM’s administrative record must contain the complete documentation of BLM-tribal consultation for each land use plan and action approved by the line officer. Such documentation must include copies of correspondence, telephone logs, meeting notes, emails, and reports exchanged between the parties. The administrative record of tribal consultation must be assembled separately from the record of other obligations to engage the public more generally.

A summary of the consultation history for each tribe should be captured in a spreadsheet/database format in chronological order. Figure A3-1 provides an example of such documentation. In the example, the “Contacting BLM Office” column should list the individual BLM field office engaged in the consultation along with point of contact information for the BLM individual(s) carrying out the consultation. The “Tribe” column must list the tribe involved along with the mailing address, email, and telephone information for the tribal officials and staff who are being contacted. The “Current Status” column provides space to summarize the most up-to-date issues, upcoming meetings, deliverable dates for reports or interviews, or a brief summary of issues of most interest to tribes. The “Contact History” column must provide dates for email, letters, documents, telephone calls, field trips, etc. The “Tribal Response” column briefly summarizes tribal responses or input to documents, meetings, phone calls, or other forms of communication. BLM staff must keep this spreadsheet up to date.

The spreadsheet is a helpful summary, but the complete consultation record, including all documents must be maintained in folders for each individual tribe. The courts have ruled that grouping tribes together in the administrative record is unhelpful. Indian tribes are not interchangeable. Consultation with one tribe does not relieve the BLM of its obligation to consult with any other tribe.

Contacting BLM Office	Tribe	Current Status	Contact History	Tribal Response

Figure A3-1 Example of a spreadsheet/database to document tribal consultation.

Appendix 4 — Coordination of NEPA, NHPA 106, and Tribal Consultation

National Environmental Policy Act (NEPA)	National Historic Preservation Act (NHPA) Section 106	Tribal Consultation	Making It Work
Project Formulation			
<ul style="list-style-type: none"> ➤ Identify the purpose and need for action ➤ Conduct internal scoping^(iv) ➤ Describe the proposed action and preliminary alternatives ➤ Identify preliminary issues for analysis <ul style="list-style-type: none"> • Determine appropriate form of NEPA⁽ⁱ⁾ compliance: Categorical Exclusion (CX)⁽ⁱⁱ⁾, Determination of NEPA Adequacy (DNA), Environmental Assessment (EA)⁽ⁱⁱⁱ⁾, or Environmental Impact Statement (EIS)⁽ⁱ⁾ ➤ Develop a plan to involve the public 	<p>Initiate 106 Process</p> <ul style="list-style-type: none"> ➤ Establish undertaking and potential to cause effects ➤ Identify potentially affected State Historic Preservation Officers (SHPO) and/or Tribal Historic Preservation Officers (THPO), tribes and consulting parties ➤ Develop a plan to involve the public ➤ Begin Section 106 consultation per established protocols when applicable 	<ul style="list-style-type: none"> ➤ Establish list of Indian tribes potentially affected ➤ Develop a plan to consult with affected Indian tribes ➤ Notify Indian tribes of opportunity to consult 	<ul style="list-style-type: none"> ➤ Incorporate NHPA Section 106 and tribal consultation into the overall project schedule and tracking system
External Scoping			
<ul style="list-style-type: none"> ➤ Publish/post notification of scoping (notice of intent, press release, website, etc.) ➤ Conduct scoping ➤ Refine issues for analysis ➤ Define scope of analysis ➤ Refine alternatives ➤ Identify data needs 	<p>Identify Historic Properties</p> <ul style="list-style-type: none"> ➤ Refine Area of Potential Effects (APE) in consultation with SHPO/THPO ➤ Seek information from consulting parties on historic properties in the APE ➤ Notify the public and invite their comments ➤ Review new and existing information and identify data gaps 	<ul style="list-style-type: none"> ➤ Initiate staff level and government-to-government consultation with Indian tribes. ➤ Gather information from Indian tribes to assist in identifying properties of religious and cultural significance 	<ul style="list-style-type: none"> ➤ Include the project in all staff level and government-to-government consultation meetings ➤ Include language in any notification of scoping (including notice of intent) stating it partially fulfills NHPA 106 public notification requirements ➤ Ensure all public contacts and scoping meetings include NHPA information

National Environmental Policy Act (NEPA)	National Historic Preservation Act (NHPA) Section 106	Tribal Consultation	Making It Work
	<ul style="list-style-type: none"> ➤ Develop strategy to complete resource identification 		<ul style="list-style-type: none"> ➤ Use scoping and tribal consultation to identify historic resources and key issues, especially landscape level concerns that could pose challenges ➤ Document everything
Prepare Preliminary/Draft NEPA Document			
<ul style="list-style-type: none"> ➤ Include: <ul style="list-style-type: none"> • Proposed Action • Alternatives • Affected Environment • Environmental Consequences (direct, indirect, and cumulative effects) • Mitigation 	<ul style="list-style-type: none"> ➤ Complete resource identification and eligibility determination, make determination of effect or no effect, notify all consulting parties and invite their views ➤ Consider views of consulting parties and public on effects Assess Adverse Effects ➤ Assess and determine whether effects are adverse or not. Invite the Advisory Council on Historic Properties (ACHP) to participate as appropriate and according to the state protocol under the programmatic agreement (PA) Resolve Adverse Effects ➤ Consult to resolve potential adverse effects; prepare draft memoranda of agreement (MOA) or PA 	<ul style="list-style-type: none"> ➤ Continue consultation with Indian tribes to complete identification of resources and effects of proposed action ➤ Resolve potential adverse effects to resources of concern; invite tribes to be a party to the MOA or PA that will conclude the NHPA 106 process 	<ul style="list-style-type: none"> ➤ Include any information obtained from the NHPA Section 106 and tribal consultation in the draft NEPA document sections on affected environment, impacts, and mitigation for public review and comment and to help meet Section 106 documentation requirements ➤ Include the draft MOA or PA in the appendix of draft NEPA document, protecting sensitive information from tribes ➤ Update the public on the status of NEPA, NHPA Section 106 and tribal consultation on state and field office websites ➤ Keep tribes informed by including on the agenda at all regular meetings with tribes

National Environmental Policy Act (NEPA)	National Historic Preservation Act (NHPA) Section 106	Tribal Consultation	Making It Work
Release Preliminary/Draft NEPA Document			
<ul style="list-style-type: none"> ➤ Publish/post notification of draft (notice of availability (NOA), press release, website, etc.) ➤ Receive comments on the draft 	<ul style="list-style-type: none"> ➤ Send draft MOA/PA and documentation required by NHPA Section 106 to SHPOs, tribes, and consulting parties 	<ul style="list-style-type: none"> ➤ Consult on the proposed MOA/PA that will conclude the Section 106 process and determine whether tribes will be primary signatories or concurring signatories 	<ul style="list-style-type: none"> ➤ State that notices of draft NEPA documents (including NOA) partially fulfill requirements of NHPA Section 106; combine mailing of draft NEPA document with coordination of draft MOA/PA ➤ Review NEPA comments to highlight unresolved cultural, historic, and/or tribal issues
Prepare Final NEPA Document			
<ul style="list-style-type: none"> ➤ Respond to comments ➤ Modify draft NEPA document as necessary 	<ul style="list-style-type: none"> ➤ Respond to comments ➤ Modify draft MOA/PA as necessary 	<ul style="list-style-type: none"> ➤ Respond to tribal comments and concerns 	<ul style="list-style-type: none"> ➤ Include the draft final MOA or PA in the appendix of the final NEPA document
Release Final NEPA Document			
<ul style="list-style-type: none"> ➤ Publish/post notification of final NEPA document (NOA, press release, website, etc.) 	<ul style="list-style-type: none"> ➤ Sign MOA/PA (prior to the decision record or record of decision). 		
Sign Decision Record			
<ul style="list-style-type: none"> ➤ Document the decision 			<ul style="list-style-type: none"> ➤ Include NHPA Section 106 mitigation in the decision record

(i) For the purposes of this side-by-side, the NEPA process has been generalized into stages without consideration for specific type of NEPA documentation.

(ii) Section 106 of the NHPA and tribal consultation provide statutory obligations independent of the requirements of NEPA. Because CXs and DNAs provide limited opportunities for public and tribal involvement, effective coordination between the NEPA process and Section 106 of the NHPA and tribal consultation may not always be possible.

(iii) Some form of public involvement is required in the preparation of all EAs; the type and extent is up to the discretion of the authorized officer. Examples include: external scoping, public notification before or during preparation of EA, public meetings, or public review and comment on EA prior to it being finalized. As a consequence, Section 106 of the NHPA and tribal consultation may require more public involvement and consultation than is afforded by an EA.

(iv) Note that the newly revised Management of Land Boundary Cadastral Program strives to incorporate land tenure specialists into consultation processes and products by early involvement in planning projects. These specialists should be incorporated into planning teams whenever there is a need for gathering, interpreting, and presenting spatial and land status data.

Appendix 5 — Example of Contents for Tribal Consultation Strategy

A tribal consultation strategy can facilitate communication among all those engaged in the consultation process. Such strategies may be simple or elaborate depending upon the project, those engaged in the project and the complexity of the process (for example, multiple agencies and many tribes). Strategies should clearly identify the roles and responsibilities of those involved in consultation. The following template and examples may be adopted or adapted as needed.

Introduction to the Strategy: Provide background and the reasons for developing a consultation strategy.

For example:

- Introduce the project
- Briefly reference the major authorities for tribal consultation on this project (e.g., National Historic Preservation Act (NHPA), National Environmental Policy Act (NEPA), Federal Land Policy and Management Act (FLPMA), relevant Executive orders, and other applicable authorities).

Purpose: What is the purpose of this strategy?

For example:

- The tribal consultation strategy will facilitate internal and external communication and help ensure informed and effective consultation among all parties.

Goals: What are the goals of this strategy?

For example:

- Coordinate internal communication so that all agency parties, including relevant staff and managers at every level engaged with the project, are informed as necessary and so that any manager engaged in consultation is fully informed of the issues.
- Establish expectations and roles and responsibilities of those key individuals involved in the project.
- Coordinate external communications among agency and federally recognized tribes so that—
 - All parties are fully informed about the project and its developments from initial planning through construction;
 - The agency establishes an understanding of how individual tribes prefer to receive information and updates and how to engage in consultation;

- Information to tribes is conveyed in a timely and respectful manner;
 - Tribes are provided ample opportunity to make consultation as meaningful as possible, participate in informal dialog and information sharing as well as formal government-to-government consultation, convey their views and issues, and influence the decisions; and
 - Agencies meet their obligations to comply with laws, regulations, and policies governing tribal consultation and can demonstrate a reasonable and good faith effort to do so.
- Consider other goals that may be appropriate to the project.

Target Audiences (Internal and External): Who are the key players in tribal consultation process? What are their roles and responsibilities?

For example:

- Identify the potentially interested federally recognized tribes:
 - Who are the current tribal leaders for official correspondence and government-to-government consultation and what is their contact information?
 - Which tribes have a Tribal Historic Preservation Officer? What is his/her name and contact information?
 - Which tribal staff or tribal members are likely to be concerned with the project?
 - Does the tribe have a designated point of contact for the project or for specific issues (e.g., lands issues, economic development, etc.)?
 - Make sure all correspondence is appropriately addressed to the tribal leader and the designated point of contact, and copied to any other relevant staff.
- Find out if there are potentially interested Native American groups that are not federally recognized:
 - Who are they and how should they be approached since government-to-government consultation is neither mandated nor appropriate?
 - Contact and coordinate with these groups through the NEPA process and comply with presently established state and local practices.
- Identify the BLM personnel likely to be engaged in the consultation process:
 - Who is the authorizing officer, decisionmaker, or other official with primary government-to-government consultation responsibilities?
 - Who are other officials likely to be engaged (e.g., Director, state director, other local offices)? What are their roles?

- Who are the key staff (project manager, tribal liaison or staff lead for tribal consultation; other specialists; other staff at other levels of the organization)? What are their responsibilities?
- Identify the proponent and the third-party contractor for the project:
 - Who are their key contacts for lands, fisheries, natural resources, cultural or other tribal concerns?
 - What is their contact information?
 - What are their roles and responsibilities?
- Determine who or what individuals, agencies, or others should be part of the consultation plan:
 - When and how should these individuals/entities be involved?

Key Messages: What do you want to say to each of your audiences? What do they need to know and understand? Develop key messages for consistency among BLM managers and staff.

For example:

- What are the goals of consultation (to make consultation meaningful; to develop relationships; to improve outcomes for all)?
- What contribution can tribes make to the NEPA, FLPMA, Cadastral Survey, Standards for Boundary Evidence Certificate(s), or Section 106 processes?
- What are the key opportunities for tribes to participate in the project? What are the points in the process where tribal engagement is most valuable? How do these relate to project timelines and decisions?
- What can the BLM do to facilitate tribal participation?
- What is the role of delegated authority in the consultation process? Do the various parties to the process understand that role?
- What decisions are anticipated along the way? When will they be made? And by whom?
- What are the main points about the project that tribes need to know, and what are some of the constraints on the project (consider time, location)?

How do you intend to accomplish communication goals?

For example:

- Identify the individual tribes' preferred means of communication and consultation.

- Develop internal communication protocols and tracking mechanisms to ensure all managers and staff remain current and informed regarding tribal concerns and issues, and are consistent in their communications with tribes.
- Develop benchmarks and timeframes for consultation, coordinate with the NEPA, NHPA Section 106, cadastral survey, standards for boundary evidence certificate(s), or right-of-way application processes.
- Maintain confidentiality of tribally sensitive information to the maximum extent possible.
- Make sure to continue and document your outreach efforts even in the face of non-responsiveness from individual tribes.

Tactics: What do you need to do to implement strategies and achieve goals?

For example:

- Determine what official correspondence must be prepared, and when should it go out:
 - Start with a letter inviting consultation and conveying key messages.
 - What are the other points in the process when you need to send letters and invite consultation, including face-to-face meetings?
 - Close with a letter to each tribe thanking the tribe for their participation, identifying their issues, and how these concerns were addressed.
- Develop a system for tracking all communication:
 - Each communication with tribes—letters, meetings, phone calls, field trips, formal meeting and staff—should be documented in a correspondence record form or other appropriate log.
- Ensure timely and appropriate follow-up to tribal letters, calls, requests, and issues raised:
 - Consider using a centralized tracking system that will record all contacts, requests, and follow-up actions needed.
 - Designate a point-of-contact (may be a contractor) to maintain the tracking system and to identify all follow-up actions needed (response letters, materials requested, meetings requested, issues raised); to report regularly to staff and management; and to make sure responses are made in a timely manner.
- Integrate Section 106 invitations to consult with the NEPA outreach process.
- Use all appropriate communication tools to ensure frequent and current information flow among various participants: agency, tribes, proponent, consultants:
 - Include letters, meetings, field trips, telephone, email, web, personal communications.
 - Document all communications.

- Provide tribes the opportunity to review agency consultation notes and records to ensure correct understanding of tribal concerns and requests.
- Establish the best possible administrative record documenting all efforts at consultation and interaction.

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