

PROTOCOL GUIDELINES:
**CONSULTING WITH INDIAN TRIBAL
GOVERNMENTS**

**BUREAU OF RECLAMATION
NATIVE AMERICAN AND INTERNATIONAL AFFAIRS OFFICE**

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INTRODUCTION

Indian tribes have a unique political relationship with the government of the United States, including the Bureau of Reclamation. In recognition of that special relationship, Reclamation is charged with engaging in regular and meaningful consultation with Indian tribes and is responsible for adhering to a government-to-government relationship.

Recently, there has been a growing awareness that federal-tribal interactions, particularly consultation, can be improved and enhanced. One means for Reclamation to achieve that end is by providing guidance about developing and implementing appropriate protocol for conducting tribal consultation. Protocol is a tool for establishing mutually agreed-upon principles and procedures for interacting and communicating, and for better understanding Reclamation and tribal expectations. Once established, agreements about Reclamation-tribal protocol can be used as a basis for conducting meaningful and proactive consultations, maintaining government-to-government relationships, and entering into partnerships and collaborative efforts.

Each tribe in the 17 Reclamation states¹ is a distinct legal-political entity, and the message presented here is that the tribes are not to be treated as though they are alike or only another member of the general public. Indian tribes are sovereign governments. Each tribe has its own unique set of needs, concerns, and interests that are often shaped or influenced by historical events and cultural values. Developing protocol, conducting consultation, maintaining a government-to-government relationship requires openness and understanding, patience and flexibility, and an appreciation and acceptance of the fact that there are no linear solutions or cookbook answers.

This reference tool has been prepared to provide Reclamation management and staff with guidance about protocol, consultation, and the government-to-government relationship. These topics are interrelated and closely connected to a suite of underlying doctrines and concepts. As such, background and advisory information is presented about Indian law, cultural awareness, and planning for and conducting meetings with tribes. It is intended to encourage and facilitate meaningful interactions and communications with tribal governments and their members.

Guidance on protocol was originally issued in early 1998 and subsequently revised and updated in 2001. This document builds on that framework and draws upon many of the lessons that have been learned. Also, it incorporates recent legal and policy developments and is intended to facilitate compliance with the Department of the Interior Policy on Consultation with Indian Tribes and the companion Secretarial Order 3317.

¹ The term "Reclamation states" means the states and areas referred to in the first section of the Act of June 17, 1902, as amended (43 U.S.C. 391).

BACKGROUND

Federal Indian policy and federal-tribal relations are topics deeply rooted in the history of the political relationship between the United States and Indian tribes. As such, they touch upon and are influenced by the Constitution, treaties, statutes, executive orders, court decisions, and administrative actions. Against this backdrop a few of the central tenants of federal Indian law and policy stand out. This section examines some of those core themes and concepts. For a more in-depth analysis of the history of federal Indian policy and federal-tribal relations, refer to Indian law treatises such as *American Indian Law in a Nutshell* by William C. Canby, Jr. and *Handbook of Federal Indian Law* by Felix S. Cohen.

Basics of Indian Law

The history of federal-tribal relations shows that the national policy toward Indians has been marked by periods of inconsistent or contradictory policy shifts. At times the federal policy toward Indians has been idealistic (i.e., self-determination and self-governance), at others it has been less than altruistic and has caused much hardship for Indians (i.e., removal, allotment, and termination). Although marked by periods of fluctuating policy extremes, there are common themes that have persisted throughout the history of the federal-tribal relationship.

Drawing upon a historical perspective, Judge William C. Canby, Jr. has identified four core principles:

- Indian tribes are independent entities with inherent powers of self-government.
- The independence of Indian tribes is subject to the exceptionally great powers of Congress to regulate and modify the status of Indians.
- The power to deal with and regulate Indian tribes is wholly federal.
- The federal government is responsible for the protection of Indian tribes and their property, including protection from encroachment by the states and their citizens.²

What is an Indian Tribe

The term Indian tribe has two commonly used meanings, based on social-cultural and legal-political concepts. From a sociological or anthropological perspective, an Indian tribe is a group of related people who share a common social, political, economic, and religious way of life in a defined geographic space and speak a common language or dialect. A tribe in this sense derives its origin from a shared social or cultural experience.

Tribes are also legal-political entities that have been recognized by the United States for special governmental purposes. Generally, the federal government has determined tribal status for legal and political purposes using the power granted through the Indian Commerce Clause (Article I,

² William C. Canby, Jr., *American Indian Law in a Nutshell* (St. Paul, MN: West Publishing Company, 1988). pp. 1-2.

Section 8, Clause 3) and the Treaty Clause (Article II, Section 2, Clause 2) of the Constitution. Once recognized by the United States, a tribe will remain in existence as a legal-political entity unless or until Congress diminishes its status.

Federally Recognized Tribes. Federal recognition can be derived from several sources, including a treaty, executive or administrative order, legislation, or by custom of dealing with the federal government. There are currently 566 tribes that are recognized by the federal government as having a special political relationship with the United States. These tribes and their members are eligible to receive the support, benefit, and protection of federal programs and services because of their status as Indians. The Bureau of Indian Affairs maintains and annually publishes a list of federally recognized tribes in the Federal Register.³ Additional tribes are periodically recognized and added to the list and occasionally a tribe may change its official name, so it is important to be aware of additions and modifications to the list of recognized tribes.

Federally Recognized Tribes within the 17 Reclamation States. Approximately 280 federally recognized Indian tribes reside within the 17 Reclamation states. These tribes, like other water using entities, are eligible to receive the benefits of the Reclamation program, including opportunities for partnerships and collaborative efforts to develop, manage, and protect their water and related resources.

Tribal Sovereignty

Sovereignty is the power to govern, and Indian tribes historically have been recognized as being distinct, independent, political communities with the power to exercise self-government. The right of tribes to govern themselves is based on a preexisting sovereignty that has been acknowledged in treaties, executive orders, and Supreme Court decisions. As Felix S. Cohen explained:

“Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty that has never been extinguished.”⁴

Although tribes possess the rights and powers of sovereignty, their sovereign powers have been diminished as a result of their relationship with to the United States. This relationship is based on three underlying concepts.

- Prior to European contact, Indian tribes inherently possessed all powers of sovereignty.

³ The list of federally recognized Indian tribes is authorized by 25 U.S.C. 479a-1. The list was updated on August 10, 2012 (77 Federal Register 47868).

⁴ Felix S. Cohen, *Handbook of Federal Indian Law: 1982 Edition*, edited by Rennard Strickland (Charlottesville, VA: The Michie Company, 1982), p. 231, internal quotation marks omitted.

- Each tribe began its relationship with the United States as a sovereign power; however, the powers of sovereignty have been limited by treaties and laws.
- What has not been expressly limited by Congress remains within the domain of tribal sovereignty.

Because of their relationship with the federal government, tribes are not foreign nations in the international sense of sovereignty. Rather, tribes are characterized as having the status of “domestic dependent nations.” This means that tribes are subject to the legislative authority of the United States. It also means that the United States has fiduciary duties and obligations and is sometimes required to take certain actions on behalf of tribes. This latter principle provides the basis for the special federal-tribal relationship, and gives rise to the trust responsibility. Additional information and guidance about the trust responsibility is provided in Reclamation’s Indian trust asset policy, National Environmental Policy Act implementing procedures, and their associated guidance documents.

Government-to-Government Relationship

A government-to-government relationship is a bilateral recognition of the sovereignty of the respective parties. As such, it is a concept that draws upon many of the principles found in international law and diplomacy, particularly those used for establishing and maintaining a formal relationship between nations. In order to successfully engage in this type of relationship it is necessary for the parties to interact in a manner that is respectful of each other’s position as a sovereign.

When dealing with tribes, maintaining a government-to-government relationship frequently requires the federal government to:

- Ensure that appropriate senior level officials and managers are present at initial and necessary follow-up meetings with tribal governmental officials.
- Understand the tribe’s political structure, including the appropriate titles for addressing tribal leaders.
- Conduct communications in a manner that is mindful of tribal preferences.
- Be sensitive to cultural diversity and apply an understanding of cultural awareness.
- Negotiate and develop agreed-upon principles and procedures for conducting interactions, including consultation.

CONSULTATION

Consultation is a term with many meanings, connotations, and expectations. It is also a concept that goes to the heart of federal-tribal interactions and communications. This section will explore what is meant by consultation.

Consultation – What is it

Consultation historically has been a core component of the federal tribal-relationship. Its early origins can be found in the treaty making process, whereby federal and tribal sovereigns conducted their discourse on a government-to-government basis. As an outcome of that interaction, the term consultation frequently appears in treaties and is used to denote the process for maintaining and conducting formal federal-tribal communications. More recently, it is found in a variety of federal statutes, regulations, and policies as something that is required to be completed. See Appendix A for a summary of the pertinent statutes, regulations, and policies that require tribal consultation.

Tribal Perspectives and Expectations. In the broadest sense, the term consultation probably has at least as many definitions as there are federally recognized tribes. Each tribe has its own view of what it means to be a sovereign, and they know how they prefer to engage in communications with the federal government. For example, some tribes only recognize consultation when it takes place between high ranking government officials and tribal government leaders. Other tribes may be more willing to acknowledge and sanction communications between lower ranking federal-tribal representatives.

Points on a Continuum. One way to appreciate the mix of meanings that are ascribed to the term consultation is to view it as a continuum. There is a range of meanings, and all points on the continuum are essentially correct; however, some points may be closer to a particular tribe's expectation about what constitutes consultation. Two points on the continuum stand out as general reference points. For simplicity, these reference points can be thought of as consultation with a capital "C" and consultation with a lowercase "c."⁵

- **Consultation with a Big "C."** This is formal communication on a government-to-government basis. It is conducted between the leaders of tribal governments and senior representatives from the federal government. After a relationship has been developed, agreements may be reached that recognize and sanction communications between federal-tribal designated representatives. A key component of this type of consultation is the federal government's recognition of tribal sovereignty.

⁵ Note that the terms "Consultation with a Big C" and "Consultation with a Little c" are intended for illustration purposes only. It is recommended that these terms should not be used when discussing, initiating, or conducting consultation with Indian tribes because they may lead to misunderstandings about what is intended to be accomplished.

- Consultation with a Little “c.” This is the type of communication that frequently occurs between designated federal-tribal middle level management and technical staff at meetings, through telephone contacts, and during on-site visits. Although it is sometimes not recognized by tribes as communication on a government-to-government basis, it serves as a useful conduit for sharing information, satisfying certain legal requirements, and developing relationships.

The distance between these two points on the consultation continuum is at times subtle. It is often shaped by a variety of factors:

- Tribe’s political structure
- Tribe’s preferred methods of communication
- Subject matter
- Underlying statutory, regulatory, or policy requirements
- Nature and complexity of the issues
- Degree to which the federal-tribal relationship has developed
- Whether a protocol has been established

Given this situation, discretion is advised when talking to tribes about consultation – the speaker and the listener may have different expectations about what is meant by consultation and how it should be conducted.

Consultation - What does it Mean

The term consultation is rarely defined in the federal statutes,⁶ regulations,⁷ and policies that require federal agencies to consult with Indian tribes. Although it is seldom defined, the Department of the Interior Policy on Consultation with Indian tribes and the companion Secretarial Order 3317, issued on December 1, 2011, provide guiding principles and a general description of the attributes of consultation:

⁶ The Policy for Indian Control of Indian Education provides the following definition of consultation: “[T]he term ‘consultation’ means a process involving the open discussion and joint deliberation of all options with respect to potential issues or changes between the Bureau [of Indian Education] and all interested parties.” 25 U.S.C. 2011. This statute requires consultation to ensure quality education for all tribal members. The statute is only applicable to Department of the Interior’s Bureau of Indian Education.

⁷ A general definition of the term consultation is provided in the regulations implementing section 106 of the National Historic Preservation Act. That definition provides: “Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary’s ‘Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act’ provide further guidance on consultation.” 36 CFR 800.16(f).

- “Government-to-government consultation between appropriate Tribal officials and the Department requires Departmental officials to 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 effective collaboration with Indian tribes and to inform Federal decision-makers. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process.”
- “Bureaus and offices will seek to promote cooperation, participation, and efficiencies between agencies with overlapping jurisdictions, special expertise, or related responsibilities when a Departmental action with Tribal implications arises. Efficiencies derived from the inclusion of Indian tribes in all stages of tribal consultation will help ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of tribal input.”⁸

Plain Meaning. In the absence of a controlling definition, and in light of tribal perceptions, it may be useful to turn to the dictionary for a better understanding of the plain meaning of the word consultation. It means to seek an opinion, ask for advice, or to confer – it does not mean obtaining consent.

Working Definition. For purposes of this document, consultation means the process of seeking and considering the views of others. It involves establishing, conducting, and maintaining formal communication with Indian tribal governments and their members.

With Whom Do You Consult

Reclamation has an obligation to consult with Indian tribes. This responsibility is based on the unique political relationship that the United States has with federally recognized tribes and is set forth in statutes and regulations, executive orders and memoranda from the President, and Department of the Interior and Reclamation policies. This body of law and policy requires consultation with one or more of the following entities, depending on the situation or context:

- Tribal government leaders
- Designated tribal representatives
- Traditional religious leaders, identified by tribal officials
- Lineal descendants, identified by tribal officials

⁸ See section 4 of Secretarial Order 3317. Similar language appears in the Department of the Interior Policy on Consultation with Indian Tribes.

Depending on the applicable statutes, regulations, and policies, consultation with tribes may be required for proposed federal actions located on and off Indian lands and sometimes involves tribes residing outside of the 17 Reclamation states.

Consultation Contexts

Consultation with Indian tribes generally occurs in three contexts:

To Develop or Improve Relationships. Consultation is affirmatively initiated by Reclamation and conducted in order to build new or better working relationships with tribes. It is particularly useful as a means to set the tone for future interactions and consultations and to set the stage for partnerships and collaborative projects.

To Comply with Federal Statutes, Regulations, and Policies. Consultation is required by statute, regulation, and policy when Reclamation is proposing legislation, regulations, policies or actions that have tribal implications⁹ or planning projects or activities that could affect the environment, trust resources, endangered species, cultural resources, sacred sites, or human remains and other cultural items. This has been the traditional approach to consultation.

At Tribal Request. Tribes may request Reclamation to initiate consultation to learn about the Reclamation program, inquire about opportunities for partnerships and collaborative projects, or to express their views or raise questions about potential Reclamation actions. When a tribe requests consultation, receipt of the request should be confirmed in writing and responded to in an expeditious manner.

Initiating Consultation

Consultation should be initiated early in the planning process. A written notice, usually in the form of a letter inviting the tribe to consult, should be sent to the tribe's governing official or designated representative at least 30 days prior to the scheduled consultation meeting. The notice should identify the date and location of the consultation and sufficiently describe the topic to be discussed, time lines, and possible outcomes. The notice should explain how the tribe can request additional information, obtain technical assistance, or provide feedback prior to the consultation. If exceptional circumstances do not permit a 30 day notice period, the invitation should explain the reasons for the abbreviated notification. As with all communication with tribes, if a tribe does not respond within a reasonable period of time, appropriate efforts should be made to repeat the invitation, including making telephone contacts.

Documenting Consultation

Because consultation is required by a variety of statutes, regulations, and policies it is important to maintain a reviewable record that documents Reclamation's good faith effort to consult with Indian tribes. This is a sound business practice. Further, the Department of the Interior Policy on Consultation and the companion Secretarial Order 3317 require Reclamation to report annually to the Secretary on the results of its consultation efforts. The Policy provides:

⁹ See the definitions of "policies that have tribal implications" as the term is used in section 1(a) of EO 13175 - Consultation and Coordination with Indian Tribal Governments and "Departmental actions with tribal implications" as the term is used in Section III of the Department of the Interior Policy on Consultation with Indian Tribes. Both definitions are provided in Appendix A.

“Reporting is intended to be comprehensive and may include, but is not limited to, the scope of consultation efforts, the cost of these efforts, and the effectiveness of consultation activities. As part of its annual report, Bureaus and Offices shall provide a comprehensive listing of the 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 Office has consulted.”¹⁰

Additional guidance will be provided by Reclamation’s Native American and International Affairs Office based on the Department’s annual reporting requirements. Maintaining a reviewable record of the consultations that have been conducted with tribes should make it easier to be responsive to the annual reporting requirement, regardless of the categories of information the Department requests.

Payment for Consultation

Questions are sometimes raised about whether payment should be made to tribes for consulting with the Reclamation or to reimburse them for travel or related expenses incurred while participating in consultation. Reclamation has not traditionally made such payments to tribes. This is consistent with the federal government’s practice of not providing payment or reimbursement to other countries for conducting government-to-government consultation with the United States. However, when Reclamation has requested Indian tribes, organizations, or individual members to perform services that Reclamation would normally pay a contractor or consultant to provide, it is appropriate to provide financial compensation.¹¹

Another Consideration

Often it is necessary for Reclamation to first consult with an Indian tribe to determine a protocol for consultation, prior to engaging in formal tribal consultation.

¹⁰ Section IV of the Department of the Interior Policy on Consultation with Indian Tribes.

¹¹ See also Reclamation’s Guidelines for Payment of Consultation Fees Relating to Native American Graves Protection and Repatriation Act (dated August 7, 1995), issued on August 10, 1995.

PROTOCOL

Protocol is a term that is increasingly being used in the context of federal-tribal governmental relations. Although the concept of protocol is being used more frequently, its precise meaning and the reasons why it has come into vogue remain somewhat poorly understood. This section focuses on what is meant by protocol and examines some of its policy underpinnings.

Protocol – What does it Mean

Protocol is a concept that is based on principles found in diplomacy and international law. In this context it is both the manners and means for conducting discourse between sovereign nations. As such, it is applicable as a conceptual frame of reference for guiding the conduct of federal-tribal interactions, including consultation.

Diplomatic Context. In diplomatic circles, protocol has two meanings:

- The etiquette or manners of diplomats when conducting ceremonial and formal business between nations.
- A preliminary memorandum often signed by diplomatic negotiators that records the basic agreements reached prior to the final form in which the agreement appears; or an agreement among diplomatic negotiators indicating the results reached by them at a particular stage in a negotiation.

Working Definition. For purposes of this document, protocol has the following meanings when used in the context of federal-tribal interactions:

- The etiquette or manners used when conducting federal-tribal interactions and communications, with particular consideration given to applying an understanding of cultural diversity and awareness, and being respectful of sovereignty.
- A document that records mutually agreed-upon principles and procedures for conducting consultation, fulfilling the trust responsibility, and maintaining a government-to-government relationship.

Both these meanings are of equal importance and should receive the same level of consideration. However, it should be recognized that it is frequently necessary to apply the first part of this definition in order to achieve the second.

Policy Framework for Developing Protocols with Tribes

Recent federal policy has embraced the use of protocol during federal-tribal interactions. Federal agencies have been encouraged to develop protocol for conducting consultations with tribes. The following is a brief overview of the policies that underlie the need to develop protocol with tribes.

Government-to-Government Relations with Native American Tribal Governments.
The President's April 29, 1994, memorandum on government-to-government relations set

the stage for developing protocol with tribes. The memorandum states that each department and agency is to:

- Respect tribal sovereignty and operate within a government-to-government relationship with federally recognized tribes.
- Consult to the greatest extent practicable and to the extent permitted by law.

The memorandum from the Assistant Secretary – Indian Affairs, dated February 24, 1995 provides guidance on how to implement the President’s government-to-government policy. It specifically recommends that each bureau should:

- Design a special protocol for consultation.
- Take a proactive approach to working with tribal governments.

Reclamation’s June 14, 1996, plan for implementing a government-to-government relationship with tribes establishes the framework for designing a special protocol:

- Designate positions responsible for facilitating Reclamation-tribal communication.
- Coordinate with tribal officials to identify appropriate channels of communication.
- Evaluate and modify the processes used to solicit the views of tribal governments.
- Design solutions and tailor programs to address specific or unique needs of tribal communication.

Government-to-Government Relationship with Tribal Governments. The President’s 23, 2004, memorandum reaffirmed the government-to-government relationship and support for and respect of tribal sovereignty and self-determination.

Tribal Consultation. The President’s November 5, 2009, memorandum affirmed Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) and the government-to-government relationship. It provides, in part:

- Executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials.
- Executive departments and agencies are responsible for strengthening the government-to-government relationship between the United States and tribes.
- Consultation is a critical ingredient of a sound and productive federal-tribal relationship.

Department of the Interior Policy on Consultation with Indian Tribes. The guidelines implementing the Department’s consultation policy establish a uniform framework for conducting tribal consultation and provide for the use of protocol:

- The consultation guidelines are to be used during tribal consultation, except when otherwise agreed to by a bureau or office and an Indian tribe through an individual written protocol that conforms to the guidelines.
- Consultation and individual protocols are intended to provide greater efficiency and transparency in Department practices in order to maximize tribal participation.

In subsequent sections the concept of protocol will be examined from the perspective of understanding cultural diversity and awareness, and guidance will be provided about conducting meetings with tribes. That information will then be used to set the stage for additional guidance about how to develop and enter into protocol agreements.

CULTURAL DIVERSITY AND AWARENESS

Reclamation values the relationships it is developing and maintaining with Indian tribes. Because these relationships require understanding, sensitivity, and respect for Indian culture and life ways, this section focuses on providing a framework for obtaining an awareness and appreciation of cultural diversity. When reading this section, the following should be kept in mind:

- Each tribe is a unique and distinct cultural entity, and they should not be treated as though they are alike.
- Understand that the guidance presented here is intended only as a brief look into a cross-cultural frame of reference.
- Although much about working with Indians involves understanding and respect, there is always more to learn about interacting with people from different cultural heritages.
- Even though subsequent consultation experiences may become easier or more comfortable, discretion should still be exercised.

World View, Culture, and History

Understanding the concept of “world view” is a key to appreciating cultural diversity. World view refers to a cultural frame of reference. As children grow up in family units within particular cultural systems, they develop a world view – a general way of experiencing and interpreting the social, natural, and supernatural events of life. These ways of experiencing life create knowledge and belief systems that are so basic that people may take them for granted, never considering that people from other cultures may perceive things differently.

Even though we may accept variation in the attitudes and beliefs among the individuals in our own cultural group, we may not realize that individuals from other cultural groups might see life through a totally different but equally valid lens. Awareness that there are alternative world views helps in establishing positive relationships with Indian tribes and their members.

Reclamation employees expecting to work with Indian tribes should strive to cultivate sensitivity to and a working grasp of the unique cultural, historical, and political aspects of the specific tribes with whom they will regularly interact in their region, area office, or specific project location.

The following is a list of people who may be able to provide information about tribes:

- Tribal government officials and staff
- Tribal elders and traditional religious leaders
- Bureau of Indian Affairs employees

- Indian Health Service employees
- Reclamation's Native American and International Affairs Office staff
- Reclamation's Regional Native American Affairs Program Managers
- Reclamation's Area Office Native American Affairs Program Specialists
- Reclamation's cultural resources management staff

Information about tribes can also be found in anthropology and history reference materials. Although technical information about water and related resources is frequently relied on when Reclamation deals with a project that involves a particular Indian tribe, other sources of information are useful for placing the tribe within a broader and richer cultural context. For example, information about traditions (legends, myths, or religious beliefs), customs (marriage, inheritance, and subsistence patterns), and history (prehistoric and contemporary) may provide a more in-depth appreciation and sense of their culture and present-day life ways.

Awareness of and Respect for Diversity

When people from different cultures interact, communication problems can often occur. Some problems stem from cultural differences. Often the problems relate to misunderstandings about differences in body language, the role of the participants, different cultural views about an issue, or underlying but unexpressed expectations. These challenges can be mitigated in several ways:

- Attend cross-cultural awareness training about Indian cultures. This type of training is particularly useful for Reclamation employees who are likely to participate in federal-tribal interactions, including government-to-government consultations. It fosters an appreciation of and respect for cultural differences and helps to provide a framework for developing cross-cultural relationships.
- Be aware of personal biases and expectations, and then avoid acting on them. Introspection and self-awareness can be useful skills when working with Indians, as it is when dealing with other people.
- Cultivate a tribal contact. It is a useful way to learn the customary and acceptable behaviors of the tribe. This kind of relationship can provide insight into the tribal dynamics and conventions, besides being personally enriching.

The following are examples of some of the cultural differences that may be encountered while interacting with Indians, along with some suggested interpretations and responses.

Prayers or Blessings Before the Beginning of Meetings. When hosting a meeting, many tribes will offer prayers or blessings at the initiation or conclusion of a meeting. These invocations may be handled in a variety of ways, depending upon the cultural traditions of the tribe. Frequently, a tribe will have an elder or spiritual leader bless the meeting with a prayer or traditional song, usually in the tribe's language. Showing

respect for the tribe's beliefs and practices, through appropriate behavior, is important for establishing trust and maintaining goodwill.

English as a Second Language. For some Indians, especially the elders or more traditional tribal members, English was learned in forced academic settings or fairly late in life. Thus the English language may have unpleasant connotations or it may be spoken awkwardly or uncomfortably. Others, however, may exert a command of the English language that attests to their facility in moving through the dominant Euro-American culture of the United States. Given this range, Reclamation employees need to be mindful of the fact that differences in English speaking abilities can create communication problems, misunderstandings, or inaccurate expectations.

Although most tribes have their own language, they generally will conduct meetings with Reclamation in English or arrange to have translators available. Sometimes this means that the translator will interpret alternately in English for Reclamation's participants and in the tribe's language for the Indian participants.

Humor. Reclamation employees should be cautious about attempts to be humorous, particularly early in the relationship-building process. Humor sometimes does not translate well between people from different cultures and can occasionally lead to misunderstandings. Indian humor is frequently subtle or understated. Occasionally, tribal participants may exchange jokes in their own language (or they at least appear to be laughing about something). In those situations, Reclamation employees are encouraged to display patience and the tribal participants may decide to let the non-Indian participants in on the humor.

Being Greeted With Silence. Indians sometimes speak very little at meetings. This is often because many Indian cultures frequently value and encourage quiet and reserved personalities. Always assume that they are listening, even if they may not be actively engaging in conversation. Sometimes in meetings Indian participants may be waiting to discuss matters more fully with other tribal members, elders, or an attorney before making any verbal statements or commitments.

Attorney's Role. Often, a tribal delegation will ask its attorney to attend meetings with federal officials. Some attorneys will speak for the tribal delegation; others may explain some legal and technical points to the tribal delegation. The attorney is representing the interests of the client tribe, and tribal delegation decides the attorney's role.

Tribal Caucus. Sometimes during meetings a tribal delegation may request a break to have a tribal caucus, a private internal meeting and discussion among the members of the tribal delegation. If a separate breakout room is not available, the non-Indian attendees may be requested to leave the meeting room so the tribal delegation can conduct a caucus. Reclamation employees should be respectful of the tribe's request and willing to accommodate the tribal delegation's need to confer with its leaders, members, attorney, or technical experts. The amount of time that a tribe will need for its caucus is frequently open ended and will vary in duration depending on subject matter and complexity of the topic that the tribes needs to discuss or evaluate. Be prepared to be patient and flexible.

Duration of Meetings. Generally, Indian people start meetings when everyone arrives and they finish when everyone has had a “say.” Meeting can start fifteen minutes to one hour after the scheduled start time and last several hours. This is sometimes referred to as “Indian time.” Understanding and accepting that other cultures place different priorities on the concept of time will go a long way toward establishing a strong, positive relationship with a tribe. While waiting for meetings to start, Reclamation employees may want to interact with tribal members, make additional meeting preparations, or relax.

Proper Titles for Tribal Delegates. Because meetings with tribal leaders are official meetings with another government, it is important that all tribal delegates are treated with respect and addressed by their proper titles. This can be achieved by finding out in advance the proper terms for addressing their leaders: Chief, President, Governor, Chairperson, and so forth.

Conflict or Anger. The history of federal-tribal relations has left an indelible mark on Indian tribes. Indians, like other people, sometimes view federal employees with distrust or apprehension. If the federal government is perceived as having a record of breaking its promises, or using manipulation and deceptive tactics in its relationships, the people who feel that they have been let down may view federal representatives with anger or suspicion.

When dealing with Indian tribes and their representatives consider the possibility that conflict or anger occasionally may be encountered, especially early in the relationship-building process. An emotional response in reaction to anger or frustration expressed about historical events or past government actions (that may have nothing to do with Reclamation or its employees) might compound or escalate a negative situation. Displaying sensitivity, listening without becoming defensive, and perhaps showing common interests are some possible appropriate non-confrontational responses to manifested anger or frustration. As in any situation with conflict, always avoid condescension.

Cultural Baggage

Cultural expectations are best left outside of the meeting room. Doing so will help to make one more receptive to tribal conventions, even those that may not be completely understood. It also helps to facilitate a greater appreciation of the fact that tribes are distinct cultural, legal, and sovereign entities and each would prefer to be treated as such – strive for awareness, sensitivity, and respect.

LAYING THE GROUNDWORK: MEETING WITH TRIBES

This section is directed at the practical aspects of organizing and planning for meetings with Indian tribal governments, consortiums, and organizations. It should be recognized that much of the guidance offered is also applicable to meetings with other entities and in different contexts. This guidance is provided to support Reclamation's commitment to meaningful meetings and communications, including tribal consultation. It is intended to increase the likelihood that Reclamation will develop positive long-term relationships with Indian tribes.

Pre-Meeting Activities

Schedule internal Reclamation meetings and coordinate with appropriate tribal counterparts before scheduling meetings with Indian tribes. Use pre-meetings and contacts to identify tribal leaders, clarify issues, plan the meeting, and learn about the tribe's history, culture, and political structure. The following are some useful planning steps and topics to consider.

Identify Whom You Will be Meeting. Identify whom you will be meeting and give consideration to their role and position in the tribal government, or status within the traditional tribal community.

Identify and Assess the Issues. Evaluate the information collected so far, decide the kind and level of meeting to hold, determine gaps in information, and prepare a meeting agenda. When possible, share the draft agenda with appropriate tribal representatives and be open to making changes in response to their input. Keep in mind that two different agendas may be converging on the table – Reclamation's and the tribe's. Both agendas must be understood, respected, and ultimately integrated. Be prepared to be flexible.

Identify What You Want to Accomplish. Consider why Reclamation is meeting with the tribe and what is expected to be accomplished:

- To exchange information, discuss ideas, or seek advice.
- To obtain reactions to proposed bureau plans or actions.
- To reach agreement on processes or procedures for maintaining communications and solving problems.
- To build opportunities for developing partnerships and working collaboratively.

Assess Who Should Attend the Meeting. Identify who from Reclamation should attend the meeting. Reclamation's participation may include, but not be limited to:

- Regional Director
- Area Manager
- Regional Native American Affairs Program Manager

- Area Office Native American Affairs Program Specialist
- Technical staff
- Native American and International Affairs Office representative
- Facilitator, if one is needed and agreed to by mutual consent

Ensure that Reclamation will have the appropriate employees at the meeting. They will need to be knowledgeable about the subject matter and authorized to speak on behalf of Reclamation.

Depending on the protocol or subject matter, it may be appropriate for the Regional Director or the Area Manager to go to the first meeting, or first few meetings, to get the relationship building process started on the right footing. Their participation is likely to influence the level and type of meeting that will occur with the tribe.

Identify the Type of Meeting. Coordinate with tribal counterparts to determine what type of meeting should be held and understand whether the meeting is expected to be a formal meeting between senior Reclamation employees and tribal government leaders or whether it will be an informal meeting between designated Reclamation and tribal technical representatives. Identification of the type of meeting will help ensure that the appropriate level and type of Reclamation employees will attend the meeting.

Meeting Format. Consider the type of relationship that has been established, or needs to be established, with the tribe and identify the appropriate meeting format. The format for an initial meeting (or first few meetings) with the tribe might conform to tribal preferences and procedures. Subsequent meetings ideally should conform to the procedures agreed-upon in a protocol agreement. Possible meeting formats include: presentation followed by discussion, listening session, small group “breakout,” question and answer session, of a combination of these.

Assess the Role of Third Party Participants. Third party participants at meetings may include, but are not limited to:

- Federal employees from other bureaus and agencies
- State or local government representatives
- Other external entities such as water user groups or associations

Consider the following general questions regarding third party participants:

- What do they know about the topic?
- What is their stake in the meeting?
- Who are they politically or socially?

- What is their attitude about the meeting and toward Reclamation and the tribe?
- Will their actions have impacts on the proceedings?
- Who are the decision makers and will they be present?

Consider the relationship of the third party participants to the tribe:

- Has the tribe agreed that it is appropriate to have third parties attend and participate in the meeting?
- How are they perceived by the tribe?

Meeting Logistics

Selecting the Meeting Site. Reclamation employees should select meeting locations that are reasonably accessible to the tribe, from both a logistic and economic perspective. Selecting meeting locations on or near a reservation may be one approach. Alternating meeting locations at Reclamation and tribal offices might be an alternative and equitable solution. Also, consider having some meetings in the field where Reclamation management and staff can walk the land with tribal members and possibly generate some mutual understanding. Tribal input should be solicited prior to selecting the meeting location.

Selecting the Meeting Date. Meeting dates should be selected to accommodate the availability of the tribe's leadership. Reclamation employees should be mindful that the tribe's internal political and cultural calendar may place limitations on the availability of tribal officials. Prior to selecting a meeting date, contact the tribe and identify potential meeting dates that will work for both Reclamation and the tribe.

Promise Only What Can be Delivered. The Reclamation participants must make a "good faith effort" to exchange their ideas, views, and information at meetings, not just freely and openly, but also honestly and tactfully. Statements made to tribal leaders will be taken seriously and viewed as representing the positions of Reclamation and the United States government. Offer, posit, and promise only what can be delivered.

Visual Aids. Consider the usefulness of visual aids – a map of the area, facility plans, diagrams, organizational and flow charts, and so forth. Visual information is sometimes easier to absorb than the verbal kind.

Technical Information. Some tribal participants, including the decision makers, may be unfamiliar with technical information and formats. Arrange for the attendance of Reclamation technical experts, with good communication skills, who can "interpret" the technical information for those who have had limited exposure to them. Making allowances for the interpretation of technical terms and concepts is not any different when working with Indians than it is in Reclamation's dealings with non-Indians. It helps to ensure that everyone understands what is being presented. Also, ensure that the

tribal participants have sufficient notice that technical information will be presented so they can decide whether they want to invite their own technical experts to the meeting.

Media Involvement. If the media will be present at the meeting, or if Reclamation and the tribe expect to be dealing with the media, consider organizing a working group with the tribe to prepare a joint media handout or press release before the meeting. If a cooperative work group is not desirable or feasible, either Reclamation or the tribe may decide to issue its own press release. In the absence of an agreed-upon media protocol, this is a discretionary matter for both Reclamation and the tribe.

The Host's Offer. Commonly, when Indian tribes host meetings, they provide food, coffee, tea, or soft drinks for the guest participants. If Reclamation is considered the host for the meeting, try to emulate this behavior by offering similar appropriate food or refreshments as benefit the occasion. Discretion, resourcefulness, and personal initiative may be required to be a good host.

Meeting Closure and Consensus

Before leaving the meeting, assess the following:

- Was the agenda covered?
- Did everyone have an opportunity to contribute?
- Did everyone understand the issues?
- Did everyone understand the process for action?
- Did everyone understand what will happen next?
- Did the participants make any commitments about what will happen next?
- Will a subsequent, follow-up meeting be needed?

Avoid developing a snapshot assessment of the meeting's outcome. An initial evaluation of the meeting's outcome may not be entirely consistent with the tribe's understanding of the meeting's outcome. Sometimes it is helpful to solicit input from the tribe to clarify whether there is a common understanding of the meeting's outcome. Further, while some meetings may move quickly to closure or consensus, others may require subsequent discussions and additional meetings. Even if everyone at the meeting seems to agree with the meeting's outcome, the process that the tribe will go through to decide its course of action may take additional time.

Post-Meeting Follow-Up

Questions to be considered after the meeting, and some answers, might include:

- How do you know if you have had a successful meeting?

Frequently, success can be measured from several levels, contexts, or perspectives. For example, simply obtaining a meeting with a particular tribe might be considered a success in one situation. In another, a written agreement might cap a series of negotiations. If there is an opportunity to talk informally with someone from the tribal delegation, ask for his or her assessment of the meeting. Find out what he or she expects will happen next. Also, consider inviting the tribal leaders to provide feedback.

- What if there is a difference of opinion about what happened at the meeting?

Attempt to reconcile any differences of opinion by making an oral inquiry into the matter. Since oral communications are often the preferred means for information exchange among many Indian cultures, expect most contacts to be face-to-face and, to a lesser degree, by telephone. After these oral exchanges, send a letter recapping Reclamation's understanding of the meeting.

During the planning stage for the meeting Reclamation and the tribe will normally reach agreement about which party will be responsible for preparing and distributing meeting notes and summaries. Agreement should also be reached about the appropriate Reclamation and tribal points of contact in the follow-up phase. If the topics of discussion were complex or controversial, it may be advantageous to circulate meeting notes or summaries in draft for review and comment before distributing them as a final document. This review will help to ensure that the views and interests of both parties are accurately characterized and represented.

When Reclamation has the responsibility for providing draft meeting notes or summaries, consideration needs to be given to the time frame for expecting a reply from the tribe. In a polite letter to the appropriate tribal official, send the draft meeting notes or summary and a reiteration of the agreed to process or next steps for action. In the letter, also state Reclamation's time frames, processes, or legal constraints. Allow a reasonable time for the tribe to consider and respond. Establishing "a reasonable time" should take into account tribal expectations. Ideally, this interval should have been agreed to as part of the meeting's closure. Even in the absence of this type of agreement, Reclamation's "good faith effort" should include a clear delineation of any required deadlines and procedures. As with all written correspondence with tribes, if a reply is not received within a reasonable amount of time, Reclamation employees are advised to follow-up with a telephone call to the designated tribal contact.

Frequently, a tribe will not make decisions regarding an issue until everyone has had a chance to have a voice. Have patience and try not to force issues or expect responses prematurely. Affording a tribe a reasonable opportunity to respond to each action item of a meeting helps in gaining the tribe's trust and good will.

GUIDANCE FOR DEVELOPING PROTOCOL AGREEMENTS

After initial meetings and consultations, it may be useful to negotiate and enter into an agreement that memorializes mutually agreed-upon federal-tribal protocol for conducting consultation and maintaining a government-to-government relationship. This section offers general guidance for developing protocol agreements. It is intended to provide a conceptual frame of reference about the intent, content, and format for such agreements. An example of a Reclamation-tribal protocol agreement is included in Appendix B.

What is a Protocol Agreement

A protocol agreement is usually a written document that records mutually agreed-upon principles and procedures for conducting a federal-tribal relationship on a government-to-government basis. As such, it is intended to:

- Provide an agreed upon framework for maintaining a government-to-government relationship.
- Ensure that appropriate levels of Reclamation leadership interact with tribal leadership.
- Establish procedures and designate representatives with authority for conducting consultation.
- Enhance timely, meaningful, and open lines of communication.
- Clarify expectations and promote the recognition of Reclamation and tribal interests.
- Build opportunities for developing partnerships and working collaboratively on Indian water and related resource management projects.

Who Should Negotiate the Protocol Agreement

The Reclamation negotiation team normally will consist of the Regional Director or Area Manager, Regional Native American Affairs Program Manager or Area Office Native American Affairs Specialist, and appropriate technical staff. The Regional Native American Affairs Program Manager usually will have the lead responsibility for coordinating Reclamation's involvement during negotiation and preparation of the protocol agreement. The Native American and International Affairs Office may be invited to participate.

Preparing the Protocol Agreement

Each protocol agreement will be unique and designed to recognize that the tribe entering into the agreement is a separate sovereign with a special relationship with the United States. As such, each agreement needs to be developed in collaboration with the tribe and tailored to the specific needs and circumstances of the Reclamation-tribal relationship. The protocol agreement also needs to be responsive to the particular type of relationship that the tribe has developed or is in the process of developing with Reclamation. For example, a protocol agreement may be

developed that acknowledges or reaffirms the processes and procedures that are currently being used to maintain an established ongoing federal-tribal relationship.

Background and Preparation. Because each protocol agreement must be developed in collaboration with the tribe, it is important that the Reclamation negotiation team become knowledgeable about the tribe. As a good starting point, the following should be considered:

- Cultural and historical information
- Tribe's political system and governing processes
- Appropriate channels of communication identified by the tribe

Protocol Agreement Format. There are no set or preestablished requirements regarding a protocol agreement. The format and content of the protocol agreement are to be developed jointly by Reclamation and the tribe, through negotiation, in a manner that is respectful of their mutual sovereignty. It is recommended, however, that protocol agreements should be structured to resemble either a memorandum of agreement or a memorandum of understanding. Other less formal protocol agreement formats may be appropriate, depending on tribal preferences and the nature of the federal-tribal relationship.

Protocol Agreement Content. Each protocol agreement is to be tailored to the specific type of relationship that Reclamation and the tribe have developed or are in the process of developing. The following are examples of the stipulations that should be considered, negotiated, and included in the protocol agreement, as appropriate:

- That Reclamation and tribe will maintain a government-to-government relationship by implementing the protocol.
- The types of issues that will require meetings, interactions, and consultations between Reclamation's Regional Director or Area Manager and the tribe's governmental leadership.
- That Reclamation and the tribe will designate representatives (by position or title) to serve as the points of contact for conducting consultation about specified types of issue (e.g., cultural resources, natural resources, and environmental compliance).
- The types of proposed Reclamation activities or actions that the tribe would like to receive notice and the appropriate method, and time frame, for providing notice.
- The appropriate methods for maintaining communication (e.g., telephone contact, fax, letter, informal meetings, and formal meetings).
- The time frame for responding to oral and written communications.

- That Reclamation and the tribe will exchange information, research, and technical assistance.
- That the Regional Director or Area Manager will meet with the tribe on a periodic basis (e.g., annually, every six months, or other specified interval) to exchange information, discuss upcoming projects or activities, and monitor the effectiveness of the protocol.
- That the protocol does not create any legal rights or obligations.
- How to resolve disputes, including the use of alternative dispute processes (e.g., third party mediation).
- The time period in which the protocol will remain in effect and the specific calendar date on which the protocol will expire, unless Reclamation and the tribe agree to a written extension.
- How to amend or modify the protocol.
- The process for ending or canceling the protocol.

Other stipulations may be included in the protocol agreement, as necessary.

Who Should Sign the Protocol Agreement

The protocol agreement will be signed by individuals possessing sufficient delegated authority to represent their respective sovereign governments. What this means is that the Regional Director or Area Manager will normally sign a protocol agreement for Reclamation. Tribes will sign the protocol agreement according to their established governmental customs and practices.

Retention and Distribution of Signed Protocol Agreements

Duplicate original protocol agreements should be prepared so that Reclamation and the tribe each receive an original signed protocol agreement. Because protocol agreements memorialize agreed-upon principles and procedures for maintaining a government-to-government relationship, it is important that Reclamation retains and maintains a record of these documents.

The Regional Native American Affairs Program Manager usually will be responsible for ensuring that original protocol agreements are retained by the regional office in a system that provides for their safekeeping and accessibility for future reference. This individual should also have the lead role in coordinating their distribution. In order to maintain a Reclamation-wide record about protocol agreements with tribes, a copy of each executed protocol agreement should be submitted to the Native American and International Affairs Office. A copy of the protocol agreement should be provided to all other Reclamation offices that may have interactions with the tribe that entered into the protocol agreement.

Caveat about Protocol Agreements

A caveat needs to be considered when negotiating and entering into protocol agreements:

- The protocol agreement is intended to improve Reclamation-tribal interactions by memorializing agreed-upon procedures for conducting consultation and maintaining a government-to-government relationship. It is not intended to create any additional rights or responsibilities that may be enforceable against either Reclamation or the tribe. Nor is it intended to take away any rights.

It is recommended that this caveat should be included in each protocol agreement to lessen the risk of future misunderstandings. If enforceable provisions are desired to satisfy specific legal responsibilities, transfer funds, or incur obligations, separate and distinct instruments, as appropriate, will be needed to accomplish those intended purposes. Legally enforceable provisions are not to be included in protocol agreements.

Tribal Discretion

Although Reclamation prefers to use written protocol agreements, Indian tribes have the discretion to decide whether they want to negotiate, prepare, and sign a written protocol agreement. If a tribe does not want to sign a protocol agreement, that decision is to be respected. Sometimes, depending on tribal preferences, agreements about protocol may not result in a formal written document. Should that occur, Reclamation employees are encouraged to consider and apply this guidance, as appropriate, to establish with the tribe a general or informal frame of reference for conducting Reclamation-tribal interactions.

OTHER ISSUES

This section examines a variety of miscellaneous issues associated with Reclamation-tribal interactions.

Time Frame for Dealing with Tribes

The time frame for developing relationships, conducting consultations, and negotiating protocol agreements with tribes is largely open-ended and will vary on a case-by-case basis. These activities are frequently time consuming, particularly when Reclamation-tribal relations have not been established or maintained. In view of this situation, adequate advance planning is advised. Plan for and anticipate that substantial amounts of time and personal involvement may be required to develop relationships that will lead to open and productive consultations and meaningful protocol agreements. Patience also is necessary, so plan to consult early and often.

Sometimes, before a tribe can take an action, approval must be obtained from the tribal council or similar governing body. Often approvals and decisions are adopted by a tribe in the form of a tribal resolution. Since a resolution is a formal statement by a tribal government, time will be required for the tribe to deliberate and advance a resolution through the tribe's political process.

When planning meetings with a tribal council, or placing matters before them for their consideration, attention needs to be given to the schedule that the tribe has established for tribal council meetings. The interval between meetings may range from several weeks to several months, depending on the tribe.

Costs Associated with Consultation and Protocol

The costs associated with Reclamation's involvement in conducting consultation and negotiating protocol agreements are programmatic costs and should be budgeted for accordingly. They are considered to be a normal cost of doing business. The Regional or Area Office will normally budget for and bear the costs for conducting these activities. However, if Reclamation is performing activities or providing services on a cost reimbursable basis, the costs associated with consultation and protocol will normally be considered to be reimbursable unless otherwise exempt by law.

Budget Matters

Reclamation has the authority to consult with tribes during the preliminary formulation of Reclamation's budget, particularly with regard to those programs and activities that are for the benefit of Indians. Such consultations may be mutually beneficial. They afford Reclamation an opportunity to share information, and they give the tribes a chance to learn about the Reclamation program, including the projects and activities that tribes might be eligible to participate in through the Indian Self-Determination Act, Tribal Self-Governance Act, or other collaborative programs. Ideally, the consultation should be conducted early enough in the budget formulation process so tribes can provide meaningful input.

It should be recognized that, although Reclamation may consult with tribes about certain items in the budget, there is no express mandatory requirement to afford tribes an opportunity to actively

participate in all of Reclamation's budgetary matters. Although the Bureau of Indian Affairs generally formulates its budget with greater tribal participation, that type of involvement occasionally creates an expectation that the other Interior bureaus conduct their budgetary matters in the same manner as the Bureau of Indian Affairs. Reclamation operates under a different set of statutory authorities and obligations. Also, Reclamation does not have the authority to release the President's budget to tribes prior to its release to Congress by the Office of Management and Budget. Guidance from Reclamation's budget staff should be sought whenever there are questions about whether it is appropriate to release budget information.

Confidentiality

Tribes are particularly sensitive about the disclosure of certain kinds of information, including religious practices, sacred sites, traditional knowledge, intellectual property, and cultural resources. In order to minimize the likelihood that confidential information will be released, Reclamation employees are encouraged to refrain from acquiring sensitive information. Tribes should be informed that they should only submit to Reclamation information that the tribe is willing to release as part of the public record. If tribally sensitive information is disclosed or collected during consultation, Reclamation employees should be mindful of the following:

- Tribal information that has been disclosed or collected should be protected to the maximum extent practicable and permitted by law.
- Information obtained from tribes may become part of the public record and be released under the Freedom of Information Act (FOIA).¹²
- When FOIA requests are made for the release of tribal information, Reclamation offices are encouraged to notify and consult with the affected tribe.
- Guidance from Reclamation's FOIA Officer should be sought whenever there are questions about FOIA, including whether there are applicable exceptions for withholding tribal information.

In the event of a FOIA request, three exceptions may be applicable for withholding tribal information:

National Historic Preservation Act. The National Historic Preservation provides that a federal agency can withhold from disclosure to the public, after consultation with the Secretary of the Interior, information about a historic resource¹³ if the disclosure:

- May cause a significant invasion of privacy.
- Risk harm to the historic resource.

¹² Note also that information collected from a tribe may be released as part of a discovery request in the event of litigation.

¹³ Historic resource has the same meaning as historic property and is defined at 16 U.S.C. 470w(5).

- Impede the use of a traditional religious site by practitioners. 16 U.S.C. 470w-3(a).

Archaeological Resources Protection Act. Under the Archaeological Resources Protection Act (ARPA) a federal land manager can withhold information about the nature and location of any archaeological resource¹⁴ that requires an ARPA permit or other permissions under this act or under any other provision of federal law. 16 U.S.C. 470hh(a).

Self-Determination Act. Under the regulations implementing the Self-Determination Act the following types of information are exempt from FOIA:

- Copies of tribal records that are clearly required to be maintained as part of a bureau's record keeping system.
- Records of contractors, including archived records.
- Records maintained solely by an Indian tribe or tribal organization. 25 CFR 900.2(d).

Closing Thoughts

Although this guidance document provides background and advisory information about protocol, consultation, and the government-to-government relationship, it is important to note that there is always more that can be learned about working with Indian tribes. Reference materials are useful tools for sharing information about federal-tribal relations and providing practices pointers for improving communications and interactions. However, working directly with Indian tribes and interacting with their members often creates opportunities to acquire additional knowledge and firsthand experience, while at the same time being personally enriching and rewarding.

¹⁴ See 16 U.S.C. 470bb(1) for definition of "archaeological resource."

APPENDIX A: LEGAL AND POLICY REQUIREMENTS FOR CONSULTATION

Consultation with Indian tribes and their members is required by a variety of statutes, executive orders, and policies. The following is an overview of the major legal requirements for consultation that are applicable to Reclamation. The requirements for notification and consent are also addressed in order to distinguish these closely related topics from the subject of consultation. This section is intended to highlight the authorities and contexts that give rise to formal and informal federal-tribal communications, and the requirements for satisfying those responsibilities. A synopsis of each authority is presented and pertinent parts are cited for reference. Links to the full text of the authorities can be found on Reclamation's Native American Affairs home page at: <http://www.usbr.gov/native/policy/index.html>.

Statutes

The statutory framework for consultation involves three bodies of law pertaining to: Indians, cultural resources, and the environment.

Indian Self-Determination and Education Assistance Act

The Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended) establishes a self-determination policy and permits federally recognized Indian tribes to plan, conduct, and administer programs and services that traditionally have been managed by the federal government. Only Title I and Title IV are applicable to the Reclamation program.

Title I – Indian Self-Determination Act (25 U.S.C. 450 et seq.). The Indian Self-Determination Act, directs the Secretaries of the Interior and Health and Human Services, upon the request of an Indian tribe by tribal resolution, to enter into a self-determination contract¹⁵ with an Indian tribe or tribal organization for planning, conducting, or administering programs and services (including construction) that are funded by the federal government for the benefit of Indians because of their status as Indians. It is commonly referred to as the “638 process.” The regulations implementing the Indian Self-Determination Act, at 25 CFR Part 900, establish certain consultation requirements:

- Consultation is to be maintained with tribal governments and tribal organizations about the Secretary's budget process related to the programs, functions, services, and activities available to be performed under self-determination contracts. 25 CFR 900.3(b)(6).
- The parties to a self-determination contract are encouraged to consult during the development of the Program of Requirements (POR) and following submission of the POR to the federal agency having jurisdiction over the program to be contracted. 25 CFR 900.117(b). A POR is a planning document that provides background information and design criteria for use in preparing construction documents. 25 CFR 900.113(g).

¹⁵ See 25 U.S.C. 450b(j) for the definition of contract, which includes grants and cooperative agreements.

- Before spending any funds for a planning, design, construction, or renovation project, consultation is required with Indian tribe or tribal organization that would be significantly affected by the expenditure to determine and to follow tribal preferences to the greatest extent feasible concerning: size, location, type, and other characteristics of the project. 25 CFR 900.119.
- If an Indian tribe or organization is contracting solely to perform construction management services, consultation is required with the Indian tribe or tribal organization during the performance of a self-determination construction contract on a regular basis, as agreed to by the parties, to facilitate the exchange of information. 25 CFR 900.131(a)(1).

It should be recognized that the Indian Self-Determination Act and its regulations have numerous provisions that require either Reclamation or the tribe to provide or respond to formal written notice within prescribed time frames and procedures. For example, notice is required about the following:

- Allocation and availability of funds
- Intent to contract
- Conflict of interest
- Tort claims
- Awarded funds are insufficient to complete a project
- Intent to suspend, withhold, or delay payment
- Intent to terminate a construction contract for convenience
- Reassumption of a project
- Emergency reassumption
- Appeals

Title IV – Tribal Self-Governance Act (25 U.S.C. 458aa to 458hh). The Tribal Self-Governance Act of 1994, expands upon the principles found in the Indian Self-Determination Act and provides greater opportunities for Indian tribes to participate in programs and services conducted by the Department of the Interior. Under this act, tribes participating in self-governance can negotiate and enter into annual funding agreements to plan, consolidate and administer certain programs, services, functions, and activities currently administered by the Department. The regulations implementing the Tribal Self-Governance Act, at 25 CFR Part 1000, establish certain consultation requirements:

- Executive Order (EO) 13084 on Consultation and Coordination with Indian Tribal Governments and any subsequent EO regarding consultation apply to implementation of the self-governance regulations. 25 CFR 1000.4(c)(9). Note that EO 13084 has been revoked and superseded by EO 13175, which is discussed below.
- Consultation is required with tribes participating in self-governance to determine which programs are eligible for inclusion in the annual list of available programs. 25 CFR 1000.131, to 133.
- Consultation is required when negotiating an annual funding agreement for a program that is of special geographical, historical, or cultural significance to more than one tribe. 25 CFR 1000.135.
- When required by law or when appropriate under bureau discretion, a bureau may use a public consultation process in negotiating an annual funding agreement. 25 CFR 1000 Subpart I.

American Indian Religious Freedom Act (42 U.S.C. 1996)

In 1978 Congress passed a joint resolution regarding American Indian religious freedom. The American Indian Religious Freedom Act (AIRFA) is a Congressional policy statement that recognizes that Indians have the right to practice traditional religions, access sacred sites located on public lands, and use and possess sacred objects. It also directs all federal departments and agencies to evaluate, within one year after passage of AIRFA, their policies and procedures in consultation with traditional Indian religious leaders. AIRFA was amended in 1994 to provide for the traditional use of peyote by Indians for religious purposes.

Although AIRFA does not confer special religious rights to Indians, courts have held that it does impose certain procedural requirements:

- Federal agencies are required to learn about and avoid unnecessary interference with traditional Indian religious practices. See Crow v. Gullett, 541 F.Supp. 785, 793 (D.S.D. 1982).
- Federal agencies must evaluate their policies and procedures in light of AIRFA's purpose, and ordinarily should consult with tribal leaders before approving projects likely to affect religious practices. *Id.*
- Federal agencies can satisfy the procedures required by AIRFA by including the consideration of Indian religious concerns in evaluations and documents completed under the National Environmental Policy Act. See Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983), cert. denied 464 U.S. 1056 (1984).

Native American Graves Protection and Repatriation Act (25 U.S.C. 3001)

The Native American Graves Protection and Repatriation Act (NAGPRA) requires consultation with Indian tribes, traditional religious leaders, and lineal descendants of Native Americans

regarding the treatment and disposition of specific kinds of cultural items¹⁶ – human remains, funerary objects (associated and unassociated), sacred objects, and cultural patrimony. Under this act, consultation is required:

- Prior to the intentional excavation or removal of Native American human remains and objects. 25 U.S.C. 3002(c).
- During the completion of the inventory of human remains and associated funerary objects and summary of unassociated funerary objects, sacred objects, and cultural patrimony. 25 U.S.C. 3003(b) and 3004(b).
- To determine the place and manner of delivery when returning cultural items. 25 U.S.C. 3005(a)(3).

The regulation implementing NAGPRA establish a procedural framework for conducting consultation, providing notice, and obtaining consent. This framework is at times complex and may present procedural difficulties, particularly if NAGPRA is not considered early in project planning.

The following is a synopsis of the NAGPRA regulations that specifically deal with consultation, notice, and consent. It is intended to introduce managers and planners to the complexities of NAGPRA, while at the same time providing the level of detail needed to guide NAGPRA practitioners.

Intentional Archeological Excavation. The intentional excavation of NAGPRA cultural items is allowed only if:

- The objects are excavated or removed in accordance with the requirements of the Archaeological Resources Protection Act. 43 CFR 10.3(b)(1).
- Consultation has been completed, or in the case of tribal lands, consent has been obtained from the tribe. 43 CFR 10.3(b)(2).
- There is proof of the consultation or consent. 43 CFR 10.3(b)(4).

Reasonable steps must be taken to determine whether a planned activity may result in the excavation of NAGPRA cultural items. If it appears likely that NAGPRA cultural items will be excavated, the following procedures must be followed:

- Written notice must be provided to tribes that are likely to be culturally affiliated with the NAGPRA cultural items. 43 CFR 10.3(c)(1).
- Written notice must be provided to any present-day Indian tribe that aboriginally occupied the area of the planned activity and any other tribes that are likely to have a cultural relationship to the NAGPRA cultural items. 43 CFR 10.3(c)(1).

¹⁶ See 25 U.S.C. 3001(3) for a definition of NAGPRA cultural items.

- The notice must be in writing and describe the planned activity, its general location, the basis on which it was determined that NAGPRA cultural items may be excavated, and the basis for determining likely custody of those items. 43 CFR 10.3(c)(1).
- The notice must also propose a time and place for meetings or consultation to further consider the activity and the proposed treatment or disposition of NAGPRA cultural items. 43 CFR 10.3(c)(1).
- Telephone contacts should be made if there is no response in 15 days to the written notice. 43 CFR 10.3(c)(1).
- Following consultation a written plan of action must be prepared and implemented. 43 CFR 10.3(c)(2).

Inadvertent Discoveries. In the event of a discovery of NAGPRA cultural items the following procedural steps must be completed:

- The person making the discovery is required to provide immediate telephone notification, with written confirmation to the federal land managing agency or, if on tribal lands, to the responsible tribal official. 43 CFR 10.4(b).
- If the inadvertent discovery occurred in connection with an ongoing activity on federal or tribal lands, the person providing notice must stop the activity in the area of the inadvertent discovery and make reasonable efforts to protect the NAGPRA cultural items. 43 CFR 10.4(c).
- If the discovery is made on federal lands, the land managing agency must complete the following within three days after receipt of the written confirmation of notification:
 - Certify receipt of the notification. 43 CFR 10.4(d)(1)(i).
 - Take immediate steps to protect the discovery. 43 CFR 10.4(d)(1)(ii).
 - Notify the tribes likely to be culturally affiliated with the discovery by telephone and with follow-up written confirmation. 43 CFR 10.4(d)(1)(iii).
 - Initiate consultation. 43 CFR 10.4(d)(1)(iv).
 - The activity may resume 30 days after the notified federal agency certifies the receipt of the written confirmation of notice, and all of the requirements of NAGPRA and other laws have been completed (an otherwise lawful test). 43 CFR 10.4(d)(2).
 - Similar notification procedures apply to discoveries made on tribal lands; however, consent is required before the cultural items may be excavated or removed. 43 CFR 10.4(e).

- All authorizations (leases and permits) to carry out activities on federal lands must include a requirement for the holder of the authorization to provide notice in the event of a discovery. 43 CFR 10.4(g).

Consultation. In the event of intentional excavation or inadvertent discoveries, federal agency officials must consult with Indian tribal officials to identify lineal descendants and traditional religious leaders.

- The consulting parties may include:
 - Indian tribes that have aboriginal lands where the planned activity will occur or where the inadvertent discovery has been made. 43 CFR 10.5(a)(1).
 - Indian tribes that are, or are likely to be, culturally affiliated with the NAGPRA cultural items. 43 CFR 10.5(a)(2).
 - Indian tribes that have a demonstrated cultural relationship with the NAGPRA cultural items. 43 CFR 10.5(a)(3).
- Consultation is to be initiated after appropriate steps have been taken to identify lineal descendants and provide them with written notice. 43 CFR 10.5(b)(1).
 - The notice must propose a time and place for meetings or consultation, proposed treatment measures, and the proposed disposition of NAGPRA cultural items. 43 CFR 10.5(b)(2).
 - The consultation must seek to identify traditional religious leaders who should be consulted and seek to identify, where applicable, lineal descendants. 43 CFR 10.5(b)(3).
- During the consultation process the following information, as appropriate, must be provided in writing to lineal descendants and tribal officials that are likely to be affiliated with the NAGPRA cultural items:
 - A list of all lineal descendants and tribes that are being or have been consulted. 43 CFR 10.5(c)(1).
 - An indication that additional documentation used to identify affiliation will be supplied upon request. 43 CFR 10.5(c)(2).
- During the consultation process the following information, as appropriate, must be requested:
 - Name and address of the Indian tribal official that will act as the tribal representative during the consultation process. 43 CFR 10.5(d)(1).

- Names and appropriate methods to contact lineal descendants who should be contacted to participate in the consultation process. 43 CFR 10.5(d)(2).
- Recommendations on how the consultation process should be conducted. 43 CFR 10.5(d)(3).
- Following consultation, the federal agency must prepare, approve, and sign a written plan of action. 43 CFR 10.5(e).
 - A copy of the plan must be provided to the lineal descendants and involved tribes.
 - The lineal descendants and tribal officials may sign the plan of action.
- Whenever possible, comprehensive agreements should be entered into with Indian tribes. 43 CFR 10.5(f).
 - The agreements should address all federal land managing activities that could result in the intentional excavation or inadvertent discovery of cultural items.
 - Consultation regarding the agreement should lead to the establishment of standard procedures for carrying out the regulatory requirements regarding consultation.
 - Signed agreements, or correspondence related to efforts to reach agreements, constitute proof that consultation has been completed.

Custody. When transferring custody of NAGPRA cultural items intentionally excavated or inadvertently discovered back to lineal descendants or tribes, the following procedures must be followed:

- Notice of the proposed disposition must be published in a newspaper of general circulation in the area where they were excavated or discovered and, if applicable, in a newspaper of general circulation in the area(s) in which the tribes now reside. 43 CFR 10.6(c).
- The notice must be published at least two times, at least a week apart. 43 CFR 10.6(c).
- The transfer must not occur until at least 30 days after the publication of the second notice in order to allow time for additional claimants to come forward. 43 CFR 10.6(c).

Summaries and Inventories. Consultation is required during the preparation of summaries of unassociated NAGPRA cultural items and inventories of associated NAGPRA cultural items held in museums and federal collections.

- Consultation about summaries and inventories is required with lineal descendants, tribal officials, and traditional religious leaders. 43 CFR 10.8(d)(1) and 10.9(b)(1).
- Consultation about summaries and inventories may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue. 43 CFR 10.8(d)(2) and 10.9(b)(2).
- During summary consultation copies of the summary are to be provided to lineal descendants (when known), tribal officials, and traditional religious leaders. 43 CFR 10.8(d)(3).
- During inventory consultation federal agencies must provide information about the tribes that have been or are being consulted, a description of how the inventory is being conducted, time frames for completing the inventory, and an indication that additional information will be supplied upon request. 43 CFR 10.9(b)(3).
- During summary and inventory consultation federal agencies must request information about the name and address of the tribal official that will act as the representative during consultations, recommendations about how to conduct the consultation process, names and appropriate methods to contact lineal descendants and traditional religious leaders. 43 CFR 10.8(d)(4) and 10.9(b)(4).
- A notice of intent to repatriate unassociated NAGPRA cultural items is required to be published in the Federal Register. 43 CFR 10.8(f).
- Notification of the completion of the inventory must be published in the Federal Register and sent to likely and identified culturally affiliated tribes. 43 CFR 10.9(e).

Repatriation. Consultation is required for the repatriation of associated and unassociated NAGPRA cultural items.

- Consultation is required with requesting lineal descendants or culturally affiliated Indian tribe, as appropriate, to determine the place and manner of repatriation. 43 CFR 10.10(d).

Archaeological Resources Protection Act (16 U.S.C. 470aa to 470mm)

The Archaeological Resources Protection Act (ARPA) provides a means for protecting archeological resources located on public and Indian lands. This act delimits prohibited activities, establishes civil and criminal penalties, and creates a permitting process. Permits are required prior to excavating or removing archeological resources located on either public or Indian lands. In the case of Indian lands, consent of the tribe or Indian owner also is required prior to the issuance of a permit. Although ARPA does not specifically require consultation, it does impose a notification requirement:

- Indian tribes are required to be notified before an ARPA permit is issued that could result in possible harm to, or destruction of, any tribal religious or cultural site on public lands. 16 U.S.C. 470cc(c) and 43 CFR 7.7(a).
- Notice is to be provided at least 30 days before a permit is issued. 43 CFR 7.7(a).
- The notice is to be sent to the chief executive officer or other designated tribal official. 43 CFR 7.7(a)(1).
- If a tribe requests a meeting during the 30-day period, a meeting may be held with the official tribal representatives to discuss their interests, including ways to avoid or mitigate potential harm or destruction. Any adopted mitigation measures are to be included in the permit. 43 CFR 7.7(a)(3).
- In the event that a permit must be issued immediately because of imminent threat of loss or destruction of an archeological resource, the 30-day period is waived. However, appropriate tribes are required to be notified after the permit is issued. 43 CFR 7.7(a)(4).

National Historic Preservation Act (16 U.S.C. 470 et seq.)

The National Historic Preservation Act (NHPA), as amended, creates a framework for the preservation of important cultural resources and establishes a procedural process for the consideration of the effects of federal undertakings on historic properties. The term historic property means any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places (National Register).¹⁷ NHPA requires federal agencies to conduct consultation with Indian tribes when carrying out preservation and compliance responsibilities.

- Properties of traditional religious and cultural importance to an Indian tribe may be determined to be eligible for the National Register. 16 U.S.C. 470a(d)(6)(A).
- Consultation is required with any Indian tribe that attaches religious and cultural significance to historic properties. 16 U.S.C. 470a(d)(6)(B).
- Preservation related activities are to be carried out in consultation with Indian tribes. 16 U.S.C. 470h-2(a)(2)(D).
- The procedures for compliance with section 106 of NHPA are required to provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with Indian tribes, regarding the means by which adverse effects on such properties will be considered. 16 U.S.C. 470h-2(a)(2)(E)(ii).

¹⁷ See 16 U.S.C. 470w(5) for the definition of “historic property” or “historic resource”.

The regulations implementing NHPA's section 106 compliance process also establish procedural requirements for conducting consultation with Indian tribes. See 36 CFR Part 800.

National Environmental Policy Act (42 U.S.C. 4321)

The National Environmental Policy Act (NEPA) establishes a procedural process that requires the preparation of an environmental assessment or environmental impact statement for any proposed major federal action that may significantly affect the quality of the human environment. The regulations implementing NEPA require tribal consultation and involvement during the NEPA process.

- Federal agencies are to consult with Indian tribes early in the NEPA process. 40 CFR 1501.2(d)(2).
- Affected Indian tribes are to be invited to participate in the scoping process. 40 CFR 1501.7(a)(1).
- During the analysis of environmental consequences to an Indian reservation, discussions must consider possible conflicts between the proposed action and the objectives of tribal land use plans, policies, and controls. 40 CFR 1502.16(c).
- Indian tribes must be invited to comment on a draft Environmental Impact Statement when the effects may occur on a reservation. 40 CFR 1503.1(a)(2)(ii).
- As part of the public involvement process, notice must be provided to Indian tribes when effects may occur on reservations. 40 CFR 1506.6(b)(3)(ii).
- When effects take place on an Indian reservation, an Indian tribe may become a cooperating agency by entering into an agreement with the lead agency. 40 CFR 1508.5.

Reclamation's *NEPA Handbook* provides additional guidance about how the NEPA process is used to consider Indian trust assets, sacred sites, and off-reservation effects.

Executive Orders and Memoranda

Government-to-Government Relations with Native American Tribal Governments

The Presidential Memorandum of April 29, 1994, establishes policy for maintaining a government-to-government relationship with Native American tribal governments. It directs that executive agency activities that affect tribal rights or trust resources must be implemented in a knowledgeable and sensitive manner that is respectful of tribal sovereignty. Consultation with tribal governments is required to the greatest extent practicable and permitted by law prior to taking actions that could affect federally recognized tribal governments. All such consultations are to be open and candid.

Indian Sacred Sites

Executive Order 13007, dated May 24, 1996 establishes additional requirements for the protection and preservation of Indian religious practices. Each federal agency is required to accommodate access to, and ceremonial use of, Indian sacred sites located on federal lands by Indian practitioners, and avoid adversely affecting the physical integrity of such sacred sites.

Consultation and Coordination with Indian Tribal Governments

On November 6, 2000, the President signed Executive Order (EO) 13175 on consultation with tribal governments. This EO builds on previous administrative actions and is intended to:

- Establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications;
- Strengthen government-to-government relationships with Indian tribes; and
- Reduce the imposition of unfunded mandates upon Indian tribes.

For purposes of this EO, “policies that have tribal implications” refers to “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and the responsibilities between the Federal Government and Indian tribes.”¹⁸

This EO revokes EO 13084 (Consultation and Coordination with Indian Tribal Governments, issued on May 14, 1998).

Government-to-Government Relationship with Tribal Governments

The Presidential Memorandum of September 23, 2004, reaffirms the national policy of self-determination for Indian tribes, Executive Order 13175 on Consultation and Coordination with Tribal Governments, and the government-to-government relationship with tribal governments.

Tribal Consultation

The Presidential Memorandum of November 5, 2009, reaffirms Executive Order 13175 on Consultation and Coordination with Tribal governments and directs each agency to prepare and submit a detailed plan of actions to implement the policies and directives of EO 13175 and fulfill other reporting requirements. On July 10, 2010, the Office of Management and Budget issued updated guidance for implementing EO 13175.

¹⁸ See section 1(a) of EO 13175.

Department Manual and Secretarial Orders

Indian Trust Responsibilities

The Department Manual Part 512, Chapter 2, articulates the policy, responsibilities, and procedures for consulting with Indian tribes to identify and assess impacts to Indian trust resources (originally issued as Secretarial Order 3175, dated November 8, 1993).

- It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health or safety.
- Heads of bureaus and office are responsible for assessing impacts to trust resources and for consulting with the recognized tribal government whose trust assets are potentially affected by the proposed action, plan, or activity.
- All consultations are to be conducted in an open and candid manner respectful of tribal sovereignty, so that all interested parties may evaluate for themselves the potential impact of the proposal on trust resources.

Tribal Rights, Trust Responsibilities, and the Endangered Species Act

On June 5, 1997, the Secretaries of the Interior and Commerce jointly issued Secretarial Order 3206. It provides guidance about the federal-tribal relationship and implementation of the Endangered Species Act. Tribal consultation is required to maintain effective working relations and mutual partnerships to promote the conservation of sensitive species and the health of ecosystems. The order articulates a set of guiding principles:

- Work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.
- Recognize that Indian lands are not subject to the same controls as federal public lands.
- Assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.
- Be sensitive to Indian culture, religion, and spirituality.
- Make available to Indian tribes information related to tribal trust resources and tribal lands, facilitate the mutual exchange of information, and strive to protect sensitive tribal information from disclosure.

Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites

The Department Manual Part 512, Chapter 3 establishes the policy, responsibilities, and procedures to accommodate access to and ceremonial uses of Indian sacred sites and to protect the physical integrity of such sites consistent with Executive Order 13007, "Indian Sacred Sites." See also the Department of the Interior's *Implementation Report: Executive Order No. 13007, Indian Sacred Sites*, dated May 23, 1997.

Department of the Interior Policy and Secretarial Order on Consultation with Indian Tribes

The Department's policy on consultation with Indian tribes was issued on December 1, 2011. It acknowledges and affirms the Department's commitment to fulfilling its tribal consultation obligations whether directed by statute, administrative action such as Executive Order 13175, or other applicable Secretarial Orders or policies. The policy broadly establishes the framework for enhancing the Department's consultation processes:

- Requires consultation between appropriate tribal officials and Departmental officials.
- Establishes accountability and reporting requirements.
- Provides commitments to develop and deliver training to improve the Department's capacity for promoting collaboration and consultation with Indian tribes.
- Promotes innovative and effective consultation practices.
- Establishes roles and responsibilities.
- Requires all bureaus and offices to review existing policies affected by the consultation policy.
- Provides consultation guidelines for use by bureaus when considering a Departmental action with tribal implications.

For purposes of this policy, "Departmental action with tribal implications" means: "Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe on matters including, but not limited to:

1. Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands;
2. The ability of an Indian Tribe to govern or provide services to its members;
3. An Indian Tribe's formal relationship with the Department; or
4. The consideration of the Department's trust responsibilities to Indian Tribes.

This, however, does not include matters that are in litigation or in settlement negotiations, or matters for which a court order limits the Department's discretion to engage in consultation."

The companion Secretarial Order 3317 further clarifies the roles and responsibilities for complying with the consultation policy.

Reclamation Policy and Guidance

Reclamation's Indian Policy

On February 25, 1998, the Commissioner issued Reclamation's Indian Policy. This over arching policy acknowledges and affirms Reclamation's commitment to fulfilling the federal laws and policies of the President and Secretary relating to Indians.

Indian Trust Responsibilities

Reclamation's Indian Trust Asset Policy was announced by the Commissioner on June 2, 1993, and procedures for its implementation through the NEPA process were signed by the Commissioner on November 29, 1993. A guidance document dated August 31, 1994, provides questions and answers about Reclamation's Indian trust asset policy and NEPA implementing procedures.

Government-to-Government Relations

On June 14, 1996, the Commissioner issued Reclamation's action plan (dated June 4, 1996) for implementing government-to-government relationships with Indian tribes consistent with the Presidential Memorandum of April 29, 1994.

Sacred Sites

On September 16, 1998, the Commissioner issued final guidance for implementing Executive Order 13007, dated May 24, 1996, on sacred sites.

**APPENDIX B:
EXAMPLE PROTOCOL AGREEMENT**

The following is an example of a protocol agreement that has been negotiated and entered into by Reclamation and an Indian tribe. The format and content of other negotiated protocol agreements may vary from this example, depending upon tribal preferences and the type of relationship that Reclamation and the tribe have developed or are in the process of developing.

DNR: Compliance lax on testing for toxic vapors

By: Associated Press May 21, 2012 11:09 am

WAUSAU, Wis. (AP) – Wisconsin regulators are following up on thousands of old chemical spills where cleanup consultants may have skipped a key step – investigating whether toxic vapors could seep into nearby homes or businesses.

The state Department of Natural Resources says a “noticeable” string of site owners applied to have their cleanup cases officially closed, even though they hadn’t checked for vapor leaks as required. No one at the agency knew precisely how many sites failed to investigate the potential for fumes build-up, so the DNR sent notices to all 2,500 sites in September clarifying that the vapor tests were mandatory.

“In 2010, we published our final guidance for the state, so we’re into 2011 and people are telling us, ‘Oh, nobody ever told us,’” said Terry Evanson, the director of the DNR’s vapor-intrusion program. “We were getting tired of listening to that excuse, so we sent a letter to every site in the whole state.”

A review by Gannett Wisconsin Media found that many site owners have only recently begun the tests. Hundreds of other sites may never be checked unless the owners do new construction or sell their properties.

None of the Wisconsin incidents of fume buildup has risen to the level of being added to a federal database. Still, even the possibility that harmful fumes could contaminate a home can be devastating for owners.

Deanna Schneider bought her home on Madison’s east side in 1997. The Madison-Kipp Corp. factory, which makes aluminum-based components, is located just behind her house, but Schneider figured she could tolerate the proximity because she liked the neighborhood.

Last year, the company and the DNR notified her and two neighbors that chemicals might be seeping into their basements as vapor. Schneider, a single mom of a 9-year-old son, felt blindsided.

“I was really angry,” she said. “I was shocked. I was very disheartened with the fact that they had been telling me everything was OK.”

Madison-Kipp tested the soil beneath her basement and found 1,080 parts per billion of tetrachloroethylene in the clay, far higher than the 6 parts per billion that requires a mitigation system be installed.

The DNR forced the company to pay for a mitigation system, but Schneider said she’s still worried about all the children on the block who have been exposed to the chemical since the day they were born.

Investigating vapor intrusion is intended to guard against a future problem as buildings’ foundations develop cracks for chemical vapors to get inside and collect at harmful levels. Evanson said regulators were less concerned with small one-time spills than with long-standing industrial sites and other businesses that used chemicals daily.

Those cleanups can take years, and many site owners are dependent on consultants to follow DNR rules.

Ken Lassa, an environmental department manager for Wausau-based REI Engineering, said the site-cleanup industry has been aware of vapor intrusion for at least 20 years, but the competition for jobs will lead some firms to take shortcuts.

However, even when consultants or site owners properly investigate vapor intrusion, the DNR only closes the cases with the caveat that new construction could require more testing.

For example, at the former home of Kerwin Paper Co. in Appleton, tests found levels of toxic chemicals in groundwater at the site. Now the site of an apartment complex, developers and the DNR designed a ventilation system to prevent vapors from causing health issues.

Information from: Wausau Daily Herald, <http://www.wausaudailyherald.com>

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