

Consultation With Federally Recognized Indian Tribes



Office of the Deputy Assistant Secretary of Defense
(Environment, Safety and Occupational Health)

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Purpose

Respond to House Report 114-537, p. 373, to accompany H.R. 4909, the National Defense Authorization Act of Fiscal Year 2017:

“...In consultation with the Secretaries of the Military Departments, provide a briefing...that addresses compliance with applicable laws, regulations, and instructions regarding interactions with Federally-recognized Tribes. In addition, the briefing shall identify what actions could be taken, consistent with DoDI 4710.02, to ensure that timely notice and appropriate consultation with tribes occurs prior to taking any actions that may have the potential to significantly affect protected tribal resources, treaty rights, or Indian lands protected by a statute, regulation or executive order.”



Objectives

- Clarify how DoD ensures compliance with laws, regulations, and executive orders regarding requirements for timely and meaningful tribal consultation
- Review DoD principles regarding tribal consultation
- Outline the DoD-wide approach to consultation with tribes and tools that support the effort
- Describe DoD-wide efforts to assess consultation efforts across the Department and make improvements



Origins of DoD Consultation Obligations

- **Trust Responsibility**
- **Fiduciary Duty**
- **Treaty Reserved Rights**
- **Federal Laws**
 - National Historic Preservation Act (NHPA)
 - Archeological Resources Protection Act (ARPA)
 - Native American Graves Protection and Repatriation Act (NAGPRA)
 - American Indian Religious Freedom Act (AIRFA)
 - Religious Freedom Restoration Action (RFRA)
 - National Environmental Policy Act (NEPA)
 - Endangered Species Act (ESA)



Origins of DoD Consultation Obligations

- **Executive Orders**
 - 13007 – Indian Sacred Sites (1996)
 - 13175 – Consultation and Coordination With Indian Tribal Governments (2000)



Origins of DoD Consultation Obligations

Trust Responsibility

- Tribes are separate and distinct communities with sovereignty over lands retained
- Treaties with tribes were intended to ensure availability of a sustainable, land-based, traditional existence
- Treaty law -- tribes retain everything they did not expressly give up
- Federal Government has a duty to protect tribes' fiduciary interests in consideration for land concessions made



Origins of DoD Consultation Obligations

Trust Responsibility (cont'd.)

- Tribes' interests include
 - tribal lands (46.2m acres of reservations; 8.9m acres of allotted lands)
 - resources (including off-reservation reserved rights to fish, hunt, and gather on ceded lands)
 - human remains and other NAGPRA cultural items
 - traditional cultural properties
 - archeological resources



Origins of DoD Consultation Obligations

Fiduciary Duty

- All Federal agencies have a role in protecting Indian resources
- DoD and other agencies must:
 - Consult with tribes prior to taking action that may affect tribal lands or resources
 - Analyze all relevant information prior to making a decision on a proposed action
 - Make decisions based on a tribe's best interests, among other factors
 - Maintain and provide to the tribe an accurate accounting of all transactions affecting tribal lands or resources



Origins of DoD Consultation Obligations

Treaty Reserved Rights

- DoD must consider treaty reserved rights to resources in reviewing a proposed project
- Treaties are the supreme law of the land
- Treaty rights held by a tribe are not generally diminished by the passage of time or non-use



Origins of DoD Consultation Obligations

Treaty Reserved Rights (cont'd.)

- Express rights outlined in treaties (principally in the Pacific Northwest and around the Great Lakes) include hunting, fishing, gathering, and grazing rights
 - Tribes have right of access to “usual and accustomed” fishing locations
 - Tribes have the right to take up to half of the harvestable fish
 - Treaties bar actions that despoil fish habitat (see 9th Circuit’s “culverts” decision)
- Implied rights in treaties include right to water as necessary to make expressly reserved rights meaningful



Federal Laws That Include Requirements for Consultation

National Historic Preservation Act

- Requirement – consider impacts to National Register of Historic Places-eligible properties when planning and undertaking federal actions, permits, and licenses
- DoD consults with tribes that attach religious or cultural significance to identified historic properties
- DoD takes into account the effect of its undertaking on identified historic and culturally-significant properties



Federal Laws That Include Requirements for Consultation

Archeological Resources Protection Act

- Requirement – permits and/or permission to excavate “archeological resource” (material remains of human activity at least 100 years old) from public or Indian lands
- DoD consults with any tribe to obtain permission if archaeological resource is on Indian lands, and notifies the tribe if archaeological resource is on installation land
- Disposition of cultural items subject to the Native American Graves Protection and Repatriation Act is conducted in accordance with the provisions of NAGPRA



Federal Laws That Include Requirements for Consultation

Native American Graves Protection and Repatriation Act

- Requirement – the federal agency must consult with a tribe when an intentional excavation or inadvertent discovery of human remains on federal or tribal lands occurs. Also includes items such as funerary objects, sacred objects, and objects of cultural patrimony
 - Items are removed in accordance with the requirements outlined in ARPA
- DoD must stop work, protect the site from intrusion, and consult with the related tribe to develop a plan of action regarding disposition of the remains and other items



Federal Laws That Include Requirements for Consultation

Religious Freedom Restoration Act

- Prohibits government from substantially burdening a person's exercise of religion unless it can show:
 - That the burden furthers a compelling governmental interest; and
 - Is the least restrictive means of furthering that interest
- Consultation provides an important means to implement a proposed action.



Federal Laws That Include Requirements for Consultation

National Environmental Policy Act

- Requirement – consider environmental impacts of a proposed act that may affect the quality of the human environment
- DoD is obligated to engage in a transparent decision-making process that considers the environmental effects of a proposed project; including review of written analyses and comments from interested parties such as tribes



Federal Laws That Include Requirements for Consultation

National Environmental Policy Act (cont'd.)

- Tribes are invited to:
 - review scoping of the proposed project;
 - discuss conflicts with tribal land use plans and policies;
 - provide comments on a draft Environmental Impact Statement when there are effects to Indian lands; and
 - participate in hearings, review documents related to the project.



Federal Laws That Include Requirements for Consultation

Endangered Species Act

- Requirement – when an action proposed by a federal agency may affect tribal trust resources (fishing, hunting, gathering, etc.), consultation is required
- DoD invites affected tribes to consult about the proposed project and then gives full consideration to information the tribe provides in developing reasonable and prudent alternatives



Executive Orders

E.O. 13007 – Indian Sacred Sites (1996)

- Purpose – protect sites considered sacred by tribes
- DoD provides notice to tribes of proposed actions that may limit access to or adversely affect such sites
- DoD also accommodates requests for access to and ceremonial use of Indian sacred sites by Indian religious practitioners
- DoD strives to avoid affecting the physical integrity of sacred sites



Executive Orders

E.O. 13175 – Consultation and Coordination With Indian Tribal Governments (2000)

- Purpose – federal agencies are directed to respect tribal government and sovereignty, honor tribal treaty rights, and strive to meet the Trust Responsibility. The E.O. also directs federal agencies to develop a process to ensure meaningful and timely input from tribes in consultations regarding proposed projects or regulations affecting tribal lands or other interests
- DoD developed its *American Indian and Alaska Native Policy* regarding tribal consultation in 1998.
 - DoD held over 20 consultations in locations throughout the country to gather input from tribes before finalizing the policy



DoD Consultation Policies and Instructions

Department of Defense Instruction 4710.02: DoD Interactions With Federally Recognized Tribes (2006)

- Purpose – reinforces and reestablishes DoD tribal consultation policy, provides guidance to the Military Departments regarding how to conduct consultations, assigns responsibilities of DoD and the Military Departments, and details the measures of success DoD will track annually regarding compliance with consultation standards
- Requires compliance with all relevant federal laws (NHPA, NAGPRA, ARPA, NEPA, etc.), executive orders (12898, 13007, 13175, etc.), and relevant DoD policies



DoD Consultation Policies and Instructions

Department of Defense Instruction 4710.02: DoD Interactions With Federally Recognized Tribes (2006) (cont'd.)

- Performance— the Military Departments must provide DoD data regarding policy implementation and compliance with NAGPRA annually. Data is collected on the number of installations that have incorporated a process for consultations with tribes as part of plans to manage cultural and/or natural resources or as an independent process in which tribal interests are identified. In addition, data is provided on the evaluation and management of collections of items subject to NAGPRA, including efforts to repatriate them. DoD assesses the data and advises the Military Departments on how to enhance compliance



Principles of DoDI 4710.02

- Meet the Trust Responsibilities DoD has to tribes
- Build stable and enduring relationships with tribes
- Fully integrate the principle and practice of meaningful consultation and communication with tribes down to staff officers at the installation level
- Protect natural and cultural resources to which tribes ascribe traditional or customary religious or cultural importance



DoD Tribal Consultation Process and Expectations in DoDI 4710.02

Government-to-Government relations with tribes throughout DoD emphasizes:

- Communicating with tribes in recognition of their sovereignty
- Requiring meaningful consultation addressing tribal concerns occurs between the tribal leader and installation commander and between their staff level contacts
- The role of the senior level tribal liaison in the Office of the Secretary of Defense in ensuring that tribal inquiries are channeled to the appropriate officials in a timely manner
- Assessing through pre-decisional consultation, the effect of proposed DoD actions on protected tribal resources, rights, and Indian lands



Consultation With Native Hawaiian Organizations

Department of Defense Instruction 4710.03: Consultation With Native Hawaiian Organizations (2011)

- Purpose – establishes DoD Native Hawaiian consultation policy, provides guidance to the Military Departments regarding how to conduct consultations, assigns responsibilities of DoD and the Military Departments, and details the measures of success DoD will track annually regarding compliance with consultation standards
- Requires compliance with all relevant federal laws (NHPA, NAGPRA, ARPA, NEPA, etc.), executive orders (12898, 13007, 13175, etc.), and relevant DoD policies



Consultation With Native Hawaiian Organizations

Department of Defense Instruction 4710.03: Consultation With Native Hawaiian Organizations (2011) (cont'd.)

- DoD remains the only federal land management agency with a policy guiding consultation with Native Hawaiian Organizations.
 - DoD held over a dozen consultations in locations throughout the Hawaiian islands to gather input before finalizing the policy
- Performance – The Military Departments must provide DoD data regarding policy implementation and compliance with NAGPRA annually, in accordance with measures tracked in DoDI 4710.02



DoD Commitment Extends to Interagency Coordination

These efforts include:

- **Treaty Rights**
 - 2016 – signing on to the *Interagency Memorandum of Understanding Regarding Coordination and Collaboration for the Protection of Tribal Treaty Rights*
- **Sacred Sites**
 - Forging a partnership to protect Indian sacred sites among the four leading land-managing agencies (Interior, Defense, Agriculture, and Energy) and the Advisory Council on Historic Preservation
 - 2012 – signing the *Interagency Memorandum of Understanding Regarding Coordination and Collaboration for the Protection of Indian Sacred Sites*



DoD Commitment Extends to Interagency Coordination

- **Sacred Sites (cont'd.)**
 - 2015 – developed a unified policy statement about the protection of sacred sites among the signatories
 - 2015 – crafted a statement on the confidentiality of information about Indian sacred sites agreed to by all signatory agencies
 - 2015 – led a team of agency and tribal volunteers that developed an online training module for federal employees regarding sacred sites now hosted by the Department of Justice at <https://www.justice.gov/tribal/video/sacred-sites-training-video>.
 - 2016 – signing on to extend the Sacred Sites MOU until 2024



DoD Commitment Extends to Interagency Coordination

- **White House Council on Native American Affairs (created in 2013 by E.O. 13647)**
 - DoD is a member of the Council and has supported various activities, including by:
 - Contributing information about DoD's Native American-related programs to the Native OneStop online clearinghouse now hosted on www.benefits.gov
 - Updating the other cabinet agencies on the efforts of the interagency efforts on sacred sites and treaty rights and encouraging them to participate
 - Taking a role in helping plan the annual Tribal Nations Summits hosted by the White House from 2009-2016



DoD's DENIX Website Provides Information and Tools for Tribes

DoD's Defense Network Information Exchange (DENIX) Website Provides Information and Tools for Tribes.

www.denix.osd.mil/na - DoD shares this public website with Military Service personnel, tribes, and other external stakeholders. DoD builds tribes' awareness of this resource through exhibits at the national conferences of organizations that represent tribes' interests (National Congress of American Indians, etc.)

The site includes information and resources on:

- Federal laws related to consultation
- DoD policies and other guidance to Military Departments regarding consultation, sacred sites, treaty rights, and more



DoD's DENIX Website Provides Information and Tools for Tribes

The site includes information and resources on (cont'd.):

- Consultation – what it is, how to be effective, how to ensure it is timely and meaningful and considers cultural issues important to the tribe
- Tools – examples of successful agreements and protocols between military installations and tribes
- Training – insight into training DoD sponsors for military and civilian personnel at installations to help them build effective working relationships with tribes
- Contact information for the DoD tribal liaison in the event a tribe needs support for a dispute with a military installation



DoD Consultation Training

- The American Indian/Alaska Native/Native Hawaiian Cultural Communications and Consultation Courses for military and civilian personnel offered annually by DoD. Courses are scheduled in response to the requests of installations in need:
 - Over 2,000 personnel have been trained since 2003
 - Course includes instruction by Native American experts in law and Native American-military history, intercultural communications, and practical strategies for effective communication. DoD instructors provide insight into the requirements and implementation of DoDI 4710.02 and Military Department-specific policies



DoD Consultation Training

- Training classes held from 2016-2017 included sessions in
 - Navy Region Northwest (WA) Nov. 2016
 - Joint Base Pearl Harbor-Hickam (open to all military personnel in Hawaii) Feb. 2017
 - Navy Region Southwest (CA) Nov. 2017
- The curriculum and cultural events at each session are tailored to address the unique nature of local tribal/Native Hawaiian consultation issues



DoD Guidance Regarding Effective Tribal Consultation

DoDI 4710.02 and each Military Department's consultation policy require:

- Conducted at the installation level, between the installation commander and the tribal leader, as well as among the staff level contacts they designate
- Part of an ongoing effort to maintain an effective working relationship with each tribe culturally or historically affiliated with installation-managed lands
- Initiated as early as possible in the process of planning a proposed action
- Set up to provide a tribe(s) a minimum of 30 days to respond to an invitation to consult or provide comment



DoD Guidance Regarding Effective Tribal Consultation

DoDI 4710.02 and each Military Department's consultation policy require (cont'd):

- Organized to allow for cooperative dialog regarding how to avoid, minimize, or, as needed, mitigate impacts to tribal lands, tribal treaty rights and related resources, and sites considered sacred to tribes
- Transparent regarding the decision making process on a proposed project or action being discussed
- Documented for future reference by future installation commanders and staff as well as tribal leaders



Military Service-specific Policies Designed to Implement DoDI 4710.02

- **Army – AR 200-1 and Secretary of the Army Policy Memorandum: American Indian and Alaska Native Policy.** (2012). The policy memo echoes the principles of DoDI 4710.02 and establishes Army consultation policy as implementing the DoD Instruction at all levels of the Army organization
- **Navy –SECNAVINST 11011.14A.** (2005), The Navy policy also echoes the principles of DoDI 4710.02. The Navy Instruction establishes Navy policy, responsibilities, procedures, and guidelines for consultation and related relationships with tribes. The policy also calls for Navy staff to assist commanders in carrying out their consultation responsibilities. The policy also commits the Navy to training or leveraging training for personnel responsible for consultation activities. Navy policy also outlines guidance on how to plan for effective consultation and document results for future use. SECNAVINST 4000.35A, Department of the Navy Cultural Resources Program, also includes provisions consistent with DoDI 4710.02



Military Service-specific Policies Designed to Implement DoDI 4710.02

- **Marine Corps – MCO P5090.2A (2009).** Consultation policy is outlined in the 2009 Appendix to the *Environmental Compliance and Protection Manual's* chapter on “Cultural Resources Management.” The Marine Corps’ policy references as guidance DoDI 4710.02 and SECNAVINST 11011.14A. The Marine Corps commits to establishing a “permanent relationship” with American Indian and Alaska Native tribes and Native Hawaiian Organizations (NHOs) to identify resources management concerns of those groups and address them. The Marine Corps further pledges to engage tribes and NHOs as early as possible in the project planning process and to respect the confidentiality concerns of tribes and NHOs regarding sensitive cultural information they share in consultations.



Military Service-specific Policies Designed to Implement DoDI 4710.02

- **Air Force – AFI 90-2002.** First published in 2014, the policy requires Air Force installation commanders to meet at least twice each year with the leader of each tribe culturally or historically affiliated with installation-managed lands. Each commander must appoint an Installation Tribal Liaison Officer. Every installation must develop a Tribal Relations Plan including key contacts and established protocols. In addition, each installation annually submits a report to Air Force headquarters on consultation activities for the previous year and compliance with law, DoD policy, and Air Force policy.



Continued Consultation Efforts and Improvements: 2016-2017

Examples of recent tribal consultation:

- **Department of the Army**
 - 108 Army installations regularly consult with tribes
 - 107 Army installations invited tribes to consult during development of the installation-specific Cultural Resources Management Plan
 - 100 Army installations invited tribes to collaborate to develop a consultation protocol to guide their working relationship
 - 12 Army installations have executed a Comprehensive Agreement with tribes under the Native American Graves Protection and Repatriation Act



Continued Consultation Efforts and Improvements: 2016-2017

- **Department of the Army (cont'd.)**
 - Seven Army installations notified 21 tribes of proposed actions that triggered review under the Archeological Resources Protection Act and invited the tribes to provide comment on the permit requested
 - 23 Army installations invited tribes to consult regarding tribal treaty rights associated with natural resources that may be affected by installation operations
 - Tribes have identified 164 sacred sites and sites of traditional religious and cultural importance on Army installations



Continued Consultation Efforts and Improvements: 2016-2017

- **Department of the Navy**
 - approximately 200 consultations are conducted annually
 - 53 Navy installations regularly consult with tribes
 - 38 Navy installations invited tribes to consult during development or revision of installation-specific Cultural Resources Management Plans
 - 19 Navy installations have or are developing a consultation protocol with a tribe
 - Three Navy installations have executed a Comprehensive Agreement with tribes under the Native American Graves Protection and Repatriation Act
 - Four Navy installations invited tribes to consult regarding tribal treaty rights



Continued Consultation Efforts and Improvements: 2016-2017

- **U.S. Marine Corps**
 - Six Marine Corps installations conducted a total of 78 consultations in FY 2016
 - Four Marine Corps installations invited tribes to consult during development of installation-specific Cultural Resources Management Plans
 - One Marine Corps installation has executed a Comprehensive Agreement with a tribe under the Native American Graves Protection and Repatriation Act



Continued Consultation Efforts and Improvements: 2016-2017

- **Department of the Air Force**
 - 15 Air Force installations consulted with tribes in FY 2016 regarding proposed consultation protocols
 - 11 Air Force installations consulted with tribes in FY 2016 under the Native American Graves Protection and Repatriation Act
 - Air Force installations conducted 34 tribal consultations in FY 2016 regarding National Environmental Policy Act actions
 - Air Force installations conducted 42 consultations in FY 2016 regarding proposed actions pursuant to the National Historic Preservation Act
 - 46 bases have appointed Installation Tribal Liaison Officers
 - 28 bases have developed an Installation Tribal Relations Plan



Continued Consultation Efforts and Improvements: 2016-2017

- **U.S. Army Corps of Engineers (USACE)**
 - On average, the Corps conducts over 6,000 consultation-related actions annually
 - Each of the 38 Districts is staffed by a Tribal Liaison to assist local staff
 - A senior Tribal Liaison at the headquarters level assists all Districts and provides consultation training and a cultural immersion course annually



Continued Consultation Efforts and Improvements: 2016-2017

- The *USACE Tribal Consultation Policy* was established in 2012
 - applies to Corps Civil Works projects and the Regulatory Program
 - requires regular training of the District-level personnel
 - asserts that “consultation will be an integral, invaluable part of USACE planning and implementation”
 - reiterates the important role of the District-based Tribal Liaison in helping other staff build effective working relationships with area tribes
 - implements the USACE’s commitment to Tribal Policy Principles about respecting sovereignty, meeting the trust responsibility, prioritizing government-to-government consultation, ensuring consultation is pre-decisional and transparent, helping tribes with economic development when possible, and protecting both natural and cultural resources



Updates to the DoD Instruction 4710.02

- Originally published in 2006, the Instruction is under revision (pending publication in the Fall of 2017)
- The updated Instruction will be reviewed at future sessions of the DoD-sponsored cultural communications and consultation courses offered annually to Military Departments
- DoD will also promote awareness of the updated Instruction among tribal leaders through dissemination to tribal organizations and contacts and through the DENIX website



Updates to the DoD Instruction 4710.02, Cont'd.

- Updates and improvements suggested by tribes and by Military Departments include additional detailed guidance on
 - When to consult
 - What to consult about
 - How to plan for timely and meaningful consultation
 - Who should be involved in consultation
 - How to consider tribal protocols for consultation, especially regarding culturally sensitive information provided by the tribe in a consultation
 - How to record for future reference the results of a consultation



DoD-wide Efforts to Improve Tribal Consultation Policies and Guidance

Military Department-specific consultation policies and guidance to personnel

- Army – an update to AR 200-1 will be published by the end of 2017. It reflects the Army's review of lessons learned since the policy was first published in 2012
- Navy – in coordination with the Marine Corps, the Navy reviews and updates its policies and guidance as necessary
- Air Force – an update to AFI 90-2002 will be published by the end of 2017. It reflects lessons learned and best practices since the policy was established in 2014



Summary

- DoD is committed to complying with laws, regulations, and executive orders regarding requirements for timely and meaningful tribal consultation through its policies, requirements, standards, and actions
- DoD has developed strong and dynamic principles to ensure meaningful tribal consultation
- DoD consults with tribes often and fulfills its trust responsibilities
- DoD is continually assessing its consultation performance across the Department to make improvements that sustain mission readiness



Summary, Cont'd.

- DoD provides its civilian and military personnel with the training and tools necessary to engage in meaningful and successful consultation
- The Military Departments join DoD in its steadfast commitment to building effective working relationships with tribes and Native Hawaiians