



AMERICAN INDIAN AND ALASKA NATIVE POLICY

AND

**DEPARTMENT OF DEFENSE INSTRUCTION
NUMBER 4710.02: DoD INTERACTIONS WITH
FEDERALLY-RECOGNIZED TRIBES**

**U.S. DEPARTMENT OF DEFENSE
AMERICAN INDIAN AND ALASKA NATIVE POLICY**

PREAMBLE

These principles establish the Department of Defense's (DoD) American Indian and Alaska Native Policy for interacting and working with federally-recognized American Indian and Alaska Native governments (hereinafter referred to as "tribes"¹)(a). These principles are based on tribal input, federal policy, treaties, and federal statutes. The DoD policy supports tribal self-governance and government-to-government relations between the federal government and tribes. Although these principles are intended to provide general guidance to DoD Components on issues affecting tribes² (b), DoD personnel must consider the unique qualities of individual tribes when applying these principles, particularly at the installation level. These principles recognize the importance of increasing understanding and addressing tribal concerns, past, present, and future. These concerns should be addressed prior to reaching decisions on matters that may have the potential to significantly affect (c&d) protected tribal resources, tribal rights, or Indian lands³ (e).

¹ As defined by most current Department of Interior/Bureau of Indian Affairs list of tribal entities published in Federal Register pursuant to Section 104 of the Federally Recognized Indian Tribe List Act.

² This policy is not intended to, and does not, grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

³ Definition of Key Terms:

- Protected Tribal Resources: Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.
- Tribal Rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.
- Indian Lands (f): Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

(a) This policy governs Department interactions with federally recognized tribes only; it does not govern interaction with unrecognized tribes, state-recognized tribes, Alaska Native corporations, or Native Hawaiian Organizations. [In Alaska, as a practical matter, the Department may be required to consult with Alaska Native corporations simply because these corporate entities own and manage much of the land in Alaska. In addition, all Federal agencies must consult with Alaska Native corporations "on the same basis as Indian tribes under Executive Order No. 13175." See section 161 of Public Law 108-199 (188 Stat. 452), as amended by section 518 of Public Law 108-447 (118 Stat. 3267)]. DoD interactions with Native Hawaiian Organizations are governed by Department of Defense Instruction 4710.03, "Consultation With Native Hawaiian Organizations," issued on October 25, 2011. A copy of the Instruction is available at www.denix.osd.mil/na/hawaii.

(b) This policy neither enlarges nor diminishes the Department's legal obligations with respect to federally recognized tribes, nor does the policy provide an independent cause of action upon which the Department may be sued.

(c) The phrase "may have the potential to significantly affect," which appears throughout the policy, establishes the general threshold or "trigger" for consultation to be used unless a statute or other legal obligation specifically establishes a lower threshold for consultation. It is expected that DoD personnel will informally contact interested tribes whenever there is any real possibility that tribal interests may be affected by proposed DoD actions, but that continued, more formal consultation will be necessary only when it appears, from initial discussions with a tribe, that tribal interests will be significantly affected by the proposed action. In other words, the policy anticipates a two-step process designed first, to overcome the fact that, as non-Indians, we may not always recognize the effect our actions may have on tribal interests unless we ask; and second, to permit DoD to proceed without the need for further consultation unless potentially significant consequences are identified during this initial discussion. [Note: The word "significantly" is used in this policy in its ordinary dictionary sense; i.e., as a synonym for

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"material" or "important." It should not be interpreted in the NEPA or Council on Environmental Quality NEPA Regulations sense, as that would set a higher threshold for consultation than is intended.]

(d) There is no obligation to consult with tribes absent a proposal that "may have the potential to significantly affect" tribal interests. In other words, the obligation to consult with tribes under this policy is event- or proposal-driven. Nonetheless, as a matter of discretion, general consultation may be desirable where an installation expects to have frequent interaction with a tribe and wishes to establish a stand-by protocol for consultation absent the pressures associated with a particular proposal.

(e) The phrase "protected tribal resources, tribal rights, or Indian lands," which appears throughout the policy, works in conjunction with the "may have the potential to significantly affect" trigger to determine when DoD must consult with tribes. Generally speaking, DoD must consult with tribes only when its proposed actions may have the potential to significantly affect Indian lands, treaty rights, or other tribal interests protected by statute, regulation, or executive order. [Note: Some statutes may establish a lower threshold for consultation than the default threshold established in this policy (see, e.g., 16 U.S.C. 470a(d)(6)(B)); in such cases, the Department must consult with tribes in accordance with the statutory requirements.] [Note also, that individual rural residents of Alaska, including both Natives and non-Natives, generally have a right to engage in nonwasteful subsistence uses of fish, wildlife, and other wild, renewable resources on public lands in Alaska. While this right is not a tribal right per se, installations nonetheless may find it both convenient and beneficial to consult with the appropriate Alaska Native entity whenever a proposed DoD action may have the potential to adversely affect the subsistence activities of several members of the same village or tribe.]

(f) With respect to Alaska, the term "Indian Lands" does not include lands held by Alaska Native Corporations or lands conveyed in fee to an Indian Reorganization Act entity or traditional village council; the term may include village-owned townsite lands (depending on the particular status of the village itself and upon a fact-specific inquiry into whether the area at issue qualifies as a dependent Indian community), and individual Native townsite lots and Native allotments (so long as these properties remain in either restricted fee or trust allotment form).

I. TRUST RESPONSIBILITIES

DoD will meet its responsibilities to tribes. These responsibilities are derived from:

- Federal trust doctrine (g) (i.e., the trust obligation of the United States government to the tribes);
- Treaties, Executive Orders, Agreements, Statutes, and other obligations between the United States government and tribes, to include:

1. Federal statutes (e.g., Native American Graves Protection and Repatriation Act, American Indian Religious Freedom Act, National Environmental Policy Act, National Historic Preservation Act, Alaska National Interest Lands Conservation Act, Alaskan Native Claims Settlement Act, and Archeological Resources Protection Act); and

2. Other federal policies (e.g., Executive Order 12898, “Environmental Justice”; Executive Order 13007, “Indian Sacred Sites”; Executive Order 13021 “Tribal Colleges and Universities”; “Executive Memorandum: Government to Government Relations with Native American Tribal Governments,” dated 29 April 1994; and Executive Order 13084, “Consultation and Coordination with Indian Tribal Governments”).

DoD will annually review the status of relations with tribes to ensure that DoD is:

- Fulfilling its federal responsibilities; and
- Addressing tribal concerns related to protected tribal resources, tribal rights, or Indian lands.

(g) Under the federal trust doctrine, the United States--and individual agencies of the federal government--owe a fiduciary duty to Indian tribes. The nature of that duty depends on the underlying substantive laws (i.e., treaties, statutes, agreements) creating the duty. Where agency actions may affect Indian lands or off-reservation treaty rights, the trust duty includes a substantive duty to protect these lands and treaty rights "to the fullest extent possible." Otherwise, unless the law imposes a specific duty on the federal government with respect to Indians, the trust responsibility may be discharged by the agency's compliance with general statutes and regulations not specifically aimed at protecting Indian tribes.

II. GOVERNMENT TO GOVERNMENT RELATIONS

Build stable and enduring relationships with tribes by:

- Communicating with tribes on a government-to-government basis (h) in recognition of their sovereignty;
- Requiring meaningful communication addressing tribal concerns between tribes and military installations at both the tribal leadership-to-installation commander and the tribal staff-to-installation staff levels (i);
- Establishing a senior level tribal liaison in the Office of the Secretary of Defense (j) and other appropriate points of contact within DoD to ensure that tribal inquiries are channeled to appropriate officials within DoD and responded to in a timely manner;
- Providing, to the extent permitted by DoD authorities and procedures, information concerning opportunities available to tribes to: 1) compete for contracts, subcontracts, and grants, and participate in cooperative agreements; 2) benefit from education and training; 3) obtain employment; and 4) obtain surplus equipment and property;
- Assessing, through consultation, the effect of proposed DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands before decisions are made (k);
- Taking appropriate steps to remove any procedural or regulatory impediments to DoD working directly and effectively with tribes on activities that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands; and
- Working with other federal agencies, in consultation with tribes, to minimize duplicative requests (l) for information from tribes.

(h) Indian tribes have been called "domestic dependent nations"--i.e., nations within a nation. As such, consultation with tribes on a "government-to-government basis" requires a high degree of formality. Unless--or until--a tribal-specific protocol for consultation has been developed, formal contact with a tribe should be made by the installation commander, and should be directed to the tribe's senior elected official, usually referred to as the tribal chair, governor, or president.

(i) Although communication with tribes on a government-to-government basis demands attention--at least initially--at a relatively senior level of command, the goal should be to develop mutually acceptable protocols or procedures that will allow most day-to-day liaison and work with interested tribes to be accomplished on a staff-to-staff basis. Senior commanders and tribal leaders should be kept apprised of this day-to-day interaction, but--once these protocols are in place--need act personally and directly only when requested to do so by the other party.

(j) Although the Deputy Under Secretary of Defense for Environmental Security will provide tribes with a senior-level liaison to ensure tribal inquires are promptly addressed, DoD officials at all levels of command should strive to make it easier for tribes to receive timely answers to the questions they may have concerning DoD activities that may affect them. One way to accomplish this at the installation level could be to designate and announce a principal point-of-contact for the receipt of tribal inquiries.

(k) The single most important element of consultation is to initiate the dialogue with potentially affected tribes before decisions affecting tribal interests are made. Meaningful consultation demands that the information obtained from tribes be given particular, though not necessarily dispositive, consideration; this can happen only if tribal input is solicited early enough in the planning process that it may actually influence the decision to be made. Consultation is worth very little if decisions have already been made.

(l) Keep in mind that many tribes have relatively few enrolled members and only a limited staff to respond to your requests. This being the case, coordinate your requests for information with other federal agencies whenever doing so may reduce the administrative burden on the affected tribe.

III. CONSULTATION

Fully integrate (down to staff officers at the installation level) the principle and practice of meaningful consultation and communication with tribes by:

- Recognizing that there exists a unique and distinctive political relationship between the United States and the tribes that mandates that, whenever DoD actions may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands, DoD must provide affected tribes an opportunity to participate in the decision-making process that will ensure these tribal interests are given due consideration in a manner consistent with tribal sovereign authority (m);
- Consulting consistent with government-to-government relations and in accordance with protocols mutually agreed to (n) by the particular tribe and DoD, including necessary dispute resolution processes;
- Providing timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands;
- Consulting in good faith throughout the decision-making process (o); and
- Developing and maintaining effective communication, coordination, and cooperation with tribes, especially at the tribal leadership-to-installation commander level and the tribal staff-to-installation staff levels.

(m) What constitutes "due consideration...consistent with tribal sovereignty" depends, in part, on the underlying law that dictates that consultation take place. "Consultation" can vary from simple notice of a pending action to negotiation to obtain the tribe's formal consent to a proposed action (the absence of which may be enough to stop that action from proceeding). The attached table summarizes the specific legal obligations owed tribes under the trust doctrine and various statutes. In general, two principles should be kept in mind. One, tribes are not just another interested party; where tribal interests may be significantly affected, tribes must be regarded as separate from the general public for the purposes of consultation. Second, in most cases, consultation should include an invitation to potentially affected tribes to provide information to DoD concerning actions that may significantly affect tribal interests; that information should be given special consideration. In some instances, e.g., where Indian lands or treaty rights may be significantly and adversely affected, tribal rights may take precedence and dictate that DoD protect these rights to the fullest extent possible.

(n) There are over 570 federally recognized Indian tribes, each with its own distinctive cultural identity. Just as is true with foreign nations, a "one-size-fits-all" prescription for consultation with Indian tribes is neither appropriate nor possible. Instead, installations should expect to have to negotiate a mutually agreeable protocol with each separate tribe with which it must consult. While certain elements can be expected to be a part of any such protocol, installations should be mindful of the fact that tribes all have different ways of controlling property, harvesting natural resources, revering the environment, and even conducting consultations.

(o) Keep it in mind that the consultation trigger contemplates a two-step process. Consultation need continue throughout the decision-making process only for those proposals that have the potential to significantly affect tribal interests.

IV. NATURAL AND CULTURAL RESOURCES PROTECTION

Recognize and respect the significance tribes ascribe to certain natural resources and properties of traditional or customary religious or cultural importance by:

- Undertaking DoD actions and managing DoD lands consistent with the conservation of protected tribal resources and in recognition of Indian treaty rights to fish, hunt, and gather resources at both on- and off-reservation locations (p);
- Enhancing, to the extent permitted by law, tribal capabilities to effectively protect and manage natural and cultural tribal trust resources (q) whenever DoD acts to carry out a program that may have the potential to significantly affect those tribal trust resources;
- Accommodating, to the extent practicable and consistent with military training, security, and readiness requirements, tribal member access to sacred and off-reservation treaty fishing, hunting, and gathering sites located on military installations; and
- Developing tribal specific protocols to protect (r), to the maximum extent practicable and consistent with the Freedom of Information Act, Privacy Act, National Historic Preservation Act, and Archeological Resources Protection Act, tribal information regarding protected tribal resources that has been disclosed to, or collected by, the DoD.



WILLIAM S. COHEN
SECRETARY OF DEFENSE
October 20, 1998

(p) Fulfillment of the trust responsibility demands that federal agencies protect the lands and habitats that support the resources upon which the meaningful exercise of tribal hunting, fishing, and gathering rights depend. This includes actions on non-Indian-owned lands (including DoD installations) that may affect Indian lands or off-reservation treaty rights (such as reserved rights to hunt, fish, or gather on treaty-ceded lands or "usual and accustomed" grounds and stations). In addition, in Alaska, DoD must endeavor to protect the continued viability of all wild, renewable resources in order to minimize, to the extent possible, the adverse effects of its actions on rural residents who depend upon subsistence uses of such renewable resources.

(q) Where a proposed DoD action may have the potential to significantly affect tribal trust resources (i.e., Indian lands or treaty rights to certain resources) or DoD has been given express statutory authority (e.g., §8050 of the Department of Defense Appropriations Act of FY 1999), DoD may have limited authority to help develop and enhance the affected tribe's capacity to better manage these resources. This, however, is an area fraught with fiscal law pitfalls; consequently, installations are advised to consult with legal counsel before committing to expend appropriated funds for this purpose.

(r) Presently, legal authority to protect tribal information concerning sacred sites is very limited. Section 9 of the Archeological Resources Protection Act (16 U.S.C. § 470hh) and Section 304 of the National Historic Preservation Act (16 U.S.C. § 470w-3) may provide some protection from a request for such information, but may not be enough to guarantee confidentiality in the face of a Freedom of Information Act request for disclosure--especially the NHPA provision. A written consultation agreement with a tribe may be appropriate in some circumstances and permit an installation to withhold disclosure under FOIA Exemption 5, but even this tactic may prove to be ineffective. As a consequence, installations should be careful not to overstate their ability to keep sensitive tribal information confidential.

**GOVERNMENT-TO-GOVERNMENT RELATIONS WITH
NATIVE AMERICAN TRIBAL GOVERNMENTS
EXECUTIVE MEMORANDUM**

April 29, 1994

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of a historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally-recognized Native American tribes.

I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

- (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally-recognized tribal governments.
- (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.
- (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs and activities.
- (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal government on activities that affect the trust property and/or governmental rights of the tribes.
- (e) Each executive department and agency shall work cooperatively with other federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.
- (f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 (“Enhancing the Intergovernmental Partnership”) and 12866 (“Regulatory Planning and Review”) to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

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The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

WILLIAM J. CLINTON
THE WHITE HOUSE
April 29, 1994

*INDIAN SACRED SITES
EXECUTIVE ORDER 13007
May 24, 1996*

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions,

(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) “Federal lands” means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and “Indian” refers to a member of such an Indian tribe; and

(iii) “Sacred site” means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Section 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments.”

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to

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agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Section 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, “agency action” has the same meaning as in the Administrative Procedures Act (5 U.S.C.551[13]).

Section 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person.

WILLIAM J. CLINTON
THE WHITE HOUSE
May 24, 1996

CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS
EXECUTIVE ORDER 13175

November 6, 2000

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

- (a) “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 responsibilities between the Federal Government and Indian tribes.
- (b) “Indian tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.
- (c) “Agency” means any authority of the United States that is an “agency” under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5). “Tribal officials” means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

- (a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.
- (b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
- (c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

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(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

1. encourage Indian tribes to develop their own policies to achieve program objectives;
2. where possible, defer to Indian tribes to establish standards; and
3. in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation.

(a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

1. funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or
2. the agency, prior to the formal promulgation of the regulation,
 - a. consulted with tribal officials early in the process of developing the proposed regulation;
 - b. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
 - c. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

1. consulted with tribal officials early in the process of developing the proposed regulation;
2. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
3. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

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(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies.

Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions.

(a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review.

This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

WILLIAM J. CLINTON
THE WHITE HOUSE
November 6, 2000

Presidential Documents

Title 3—

Memorandum of November 5, 2009

The President

Tribal Consultation

Memorandum for the Heads of Executive Departments And Agencies

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the *Federal Register*.

U.S. DEPARTMENT OF DEFENSE

57882 Federal Register / Vol. 74, No. 215 / Monday, November 9, 2009 / Presidential Documents

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.



THE WHITE HOUSE,
Washington, November 5, 2009.

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Department of Defense INSTRUCTION

NUMBER 4710.02
September 14, 2006
USD(AT&L)

SUBJECT: DoD Interactions with Federally-Recognized Tribes

- References:
- (a) DoD Directive 5134.01, "Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L))," December 9, 2005
 - (b) DoD Directive 4715.1E, "Environment, Safety, and Occupational Health (ESOH)," March 19, 2005
 - (c) DoD Instruction 4715.3, "Environmental Conservation Program," May 3, 1996
 - (d) Secretary of Defense Policy on "Department of Defense American Indian and Alaska Native Policy," October 20, 1998¹
 - (e) through (s), see Enclosure 1

1. PURPOSE

This Instruction implements DoD policy, assigns responsibilities, and provides procedures for DoD interactions with federally-recognized tribes (hereafter referred to as "tribes") in accordance with References (a) through (d), Executive Order (E.O.) 13175² (Reference (e)), and the Presidential Memorandum on "Government-to-Government Relationship with Tribal Governments"³ (Reference (f)).

2. APPLICABILITY AND SCOPE

This Instruction applies to:

2.1. The Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components").

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

3. DEFINITIONS

3.1. Indian. A member of a tribe, as defined in subparagraph 3.5.

3.2. Indian Lands. Any lands the title to which is either held in trust by the United States for the benefit of any Indian tribe or Indian, or held by an Indian tribe or Indian subject to restrictions by the United States against alienation (Reference (d) and 32 Code of Federal Regulations (CFR) part 229 (Reference (g))).

1 Copies may be obtained via the internet at <https://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html>

2 Copies may be obtained via the internet at <http://www.epa.gov/fedrgstr/eo/eo13175.htm>

3 Copies may be obtained via the internet at <http://www.whitehouse.gov/news/releases/2004/09/22040923-4.html>

3.3. Protected Tribal Resources. Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by or reserved by or for Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources (Reference (d)).

3.4. Tribal Rights. Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, un-extinguished aboriginal title, treaty, statute, judicial decision, Executive Order, or agreement, and that give rise to legally enforceable remedies (Reference (d)).

3.5. Tribe. A federally-recognized Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the most current Department of Interior list of tribes published in the Federal Register (Reference (c), Reference (d), and Section 1996a of 42 United States Code (U.S.C.) (Reference (h))).

4. POLICY

It is DoD policy to:

4.1. Meet its responsibilities to tribes as derived from Federal trust doctrine, treaties, and agreements between the United States Government and tribal governments, and to comply with Federal statutes, regulations, Presidential Memorandums, and Executive Orders governing DoD interactions with tribes.

4.2. Build stable and enduring government-to-government relations with federally-recognized tribal governments in a manner that sustains the DoD mission and minimizes effects on protected tribal resources in accordance with References (c) through (f) and 32 CFR part 22 (Reference (i)).

4.3. Fully integrate, down to staff officers and civilian officials at the installation level, the principles and practices of meaningful consultation and communication with tribes in accordance with References (a) through (f).

4.4. Take into consideration the significance that tribes ascribe to protected tribal resources on protected land in accordance with References (c), (g), and (h); 36 CFR part 800 (Reference (j)); 43 CFR part 10 (Reference (k)); Sections 470, 470.1, and 470.a through 470.w of title 16 U.S.C. (Reference (l)); and E.O. 13007⁴ (Reference (m)).

5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) shall oversee DoD interactions with tribes.

5.2. The Deputy Under Secretary of Defense for Installations and Environment (DUSD(I&E)), under the USD(AT&L), shall:

5.2.1. Develop additional policy and guidance, as needed, in accordance with Reference (a).

5.2.2. Designate responsibilities and provide procedures for DoD interactions with tribes.

5.2.3. Enhance the DoD Components' understanding of tribal issues and concerns through education and training programs and outreach activities.

5.2.4. Assist the DoD Components in identifying requirements of Presidential Memorandums, Executive Orders, statutes, and regulations governing DoD interactions with tribes.

⁴ Copies may be obtained via the internet at <http://web.em.doe.gov/public/tribal/eo13007.html>

5.2.5. As requested, assist the DoD Components with consultation and government-to-government relations with tribes to implement the following:

5.2.5.1. Support and services for eligible organizations and activities outside the Department of Defense in accordance with DoD Directive 1100.20 (Reference (n)).

5.2.5.2. The DoD Office of Small Business Programs in accordance with DoD Directive 4205.1 (Reference (o)).

5.2.6. Oversee DoD Component implementation of this Instruction, compliance with the guidance for consulting with tribes set forth in Enclosure 2, and compliance with the measures of merit set forth in Enclosure 3.

5.2.7. Coordinate with other Federal Agencies and tribal organizations, as appropriate, on tribal issues of regional and national scope.

5.3. The Heads of the DoD Components shall:

5.3.1. Integrate the requirements of Presidential Memorandums, Executive Orders, statutes, and regulations regarding DoD interactions with tribes into their mission requirements.

5.3.2. Plan, program, and budget for statutory and regulatory requirements applicable to interactions with tribes consistent with DoD guidance and fiscal policies, and within available resources.

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

5.3.4. Consult with federally-recognized tribal governments on a government-to-government basis on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands in accordance with Reference (d), Enclosure 2, and the measures of merit in Enclosure 3.

5.3.5. To the extent permitted by legal authority, provide information on opportunities for tribes to compete for requests for proposals or other potential contracting, sub-contracting, and grant or cooperative agreement instruments; for surplus equipment and property; and for education, training, or employment, as appropriate.

5.3.6. Promptly notify the DUSD(I&E) of tribal issues that have the potential to be elevated to OSD for resolution.

5.3.7. Assign tribal liaison responsibilities to staff at the Headquarters level to coordinate tribal issues with the Office of the DUSD(I&E).

6. PROCEDURES

6.1. The DoD Components shall consult with tribes whenever proposing an action that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.

6.2. The DoD Components shall consult with tribes in accordance with the requirements specified in References (c) through (h).

6.3. Consultation required by paragraphs 6.1. and 6.2. shall apply to proposed actions that may have the potential to significantly affect tribes, including, but not limited to: land-disturbing activities, construction, training, over-flights, management of properties of traditional religious and cultural importance, protection of sacred sites from vandalism and other damage, access to sacred sites, access to treaty-reserved resources, disposition of cultural items in accordance with Reference (k), and land use decisions.

6.4. The DoD Components shall afford tribes that have a cultural or historical affiliation with the lands encompassed by the installation an opportunity to consult on the development of the Integrated Cultural

Resources Management Plan (ICRMP), and, where tribal treaty rights or other rights to natural resources potentially may be affected, Integrated Natural Resources Management Plans (INRMPs).

6.5. In consultation with tribes identified in paragraph 6.4, the DoD Components shall incorporate in applicable documentation, including ICRMPs and INRMPs, a standard process for consultation whenever issues arise between the tribe and the Component.

6.6. The DoD Components shall involve tribal governments early in the planning process for proposed actions that may have the potential to affect protected tribal rights, land, or resources, and shall endeavor to complete consultations prior to implementation of the proposed action. Early involvement means that a tribal government is given an opportunity to comment on a proposed action in time for the tribal government to provide meaningful comments that may affect the decision. Installations should take advantage of the processes set forth in 40 CFR parts 1500-1508 (Reference (p)) and E.O. 12898⁵ (Reference (q)) to involve tribes in early planning.

6.7. The DoD Components are encouraged to use agreements such as Comprehensive Agreements, Memorandums of Agreement, or Memorandums of Understanding between the Department of Defense and tribal governments, as appropriate, on issues of common interest to each party. The primary goal of formalized agreements with tribal governments is to foster relationships that facilitate military training and readiness while addressing issues of importance to tribes.

6.8. When contacting tribes, the consultation shall be initiated by the installation commander. Follow-on consultation shall be at a level agreed to by the installation commander and tribal government leadership.

6.9. Base commanders at installations that have on-going consultation and coordination with tribes shall assign a staff member to serve as a tribal liaison.

6.10. Installation personnel who conduct activities that may have the potential to affect protected tribal rights, land, or resources shall participate in training courses and workshops to raise their awareness of tribal culture and to learn about local tribal issues, especially access, use, and privacy issues, that may be affected by military operations such as low-level flights and access to sacred sites.

7. EFFECTIVE DATE

This Instruction is effective immediately.



Kenneth J Krieg
Under Secretary of Defense
for Acquisition, Technology, and Logistics

Enclosures – 3

- E1. References, continued
- E2. Guidance for Consultation with Tribes
- E3. Compliance Measures of Merit

⁵ 5 Copies may be obtained via the internet at www.epa.gov/civilrights.eo12898.htm

E1. ENCLOSURE 1

REFERENCES, continued

- (e) Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," November 6, 2000
- (f) Presidential Memorandum on "Government-to-Government Relationship with Tribal Governments," September 23, 1994
- (g) Title 32, Code of Federal Regulations, Part 229, "Protection of Archeological Resources: Uniform Regulations," current edition
- (h) Section 1996a of title 42, United States Code, American Indian Religious Freedom Act
- (i) Title 32, Code of Federal Regulations, Part 22, "DoD Grants and Agreements: Award and Administration," current edition
- (j) Title 36, Code of Federal Regulations, Part 800, "Protection of Historic Properties," current edition
- (k) Title 43, Code of Federal Regulations, Part 10, "Native American Graves Protection and Repatriation Regulations," current edition
- (l) Sections 470, 470.1, and 470.a through 470.w of title 16, United States Code, Conservation
- (m) Executive Order 13007, "Indian Sacred Sites," May 24, 1996
- (n) DoD Directive 1100.20, "Support and Services for Eligible Organizations and Activities Outside the Department of Defense," April 12, 2004
- (o) DoD Directive 4205.1, "Department of Defense Small Business and Small Disadvantaged Business Utilization Programs," September 11, 1996
- (p) Title 40, Code of Federal Regulations, Parts 1500-1508, "Council on Environmental Quality," current edition
- (q) Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," February 11, 1994
- (r) DoD Directive 5400.07, "DoD Freedom of Information Act Program," October 28, 2005
- (s) Federal Register, Volume 48, Page 44716, "Secretary of the Interior's Professional Qualification Standards," September 29, 1983

E2. ENCLOSURE 2

GUIDANCE FOR CONSULTATION WITH TRIBES

Consultation is always a dialog, with information and opinion respectfully exchanged in both directions. The following guidance is designed to facilitate the consultation process and to make it more productive.

E2.1. The DoD Components should identify official points-of-contact prior to initiating consultation with all tribes (or lineal descendants in the case of Reference (k) actions) that may have an interest in the matter under consultation. As tribal boundaries have shifted and tribes have migrated, tribes that seem far removed geographically may have a traditional interest in assets and actions at specific, present-day installations.

E2.2. Commanders and commanding officers play a prominent role in government-to-government consultation. Commander/commanding officer presence and signature is appropriate at significant milestones such as formal initiation of consultation, notification of final DoD decisions about proposed actions under consultation, and completion of any agreement document that may result from consultation.

E2.3. Commanders and commanding officers may delegate follow-up consultation functions. Designated DoD staff at the local or regional level may negotiate details and engage in routine consultation with tribal government staff or other tribal representatives delegated by tribal authorities.

E2.4. Consultation should take place at a time and in a location convenient for tribal representatives. DoD staff may find it necessary to negotiate the time and place for consultation, recognizing that many tribes do not have an operating budget that will pay for tribal representatives' transportation and per diem, and that tribal representatives may have existing work, community, and family commitments.

E2.5. DoD staff should consider several factors in scheduling consultation. Consultation may require multiple meetings over a period of months, or may be dependent upon culturally specific circumstances such as religious ceremonies conducted only at certain times of the year, availability of information sources, or certain natural resources cycles. DoD Components should start early and allow plenty of time. If there is an urgent need for expeditious consultation, the component must make this fact known to tribal contacts and negotiate an expedited timetable.

E2.6. Participating members of a particular culture are in the best position to provide the most up-to-date and accurate information about that culture; therefore culturally specific information obtained from a member of a particular culture is to be respected as expert testimony.

E2.7. In participating in consultation, DoD staff should take into consideration and respect tribal protocols, such as the following:

E2.7.1. Tribal representatives may want to open a meeting with a traditional ceremony, although DoD representatives are under no obligation to participate.

E2.7.2. The installation may need to schedule meetings well in advance to enable the tribe to decide upon appropriate attendees such as tribal elders, traditional religious leaders, and translators.

E2.7.3. Tribal representatives may be reluctant to discuss culturally sensitive information outside of the tribe or at certain times of the year, or they may need to clear information with traditional religious leaders or tribal council members prior to making commitments.

E2.7.4. Tribal governments differ from each other in their organizational structures and corporate cultures. DoD representatives should be mindful that these differences may affect formal titles and forms of address (such as “Chief,” “Governor,” and/or “Chairman”) and other forms of protocol. Tribal representatives may be female or male, elected or not elected, political or spiritual leaders, and exhibit other variations from tribe to tribe.

E2.8. Each tribe should be consulted separately, unless affected tribes choose to act collectively.

E2.9. Without including culturally sensitive information, document the consultation in writing and place it in the administrative record. Although consent, approval, or formal agreement from tribal governments is not required to conclude the consultation process and to proceed with a project on Federal land, the record must show that the Department of Defense has given careful consideration to all the available evidence and points of view before making the final decision.

E2.10. The Department of Defense recognizes that a tribe may wish to keep confidential some of the information it may provide during consultation. Tribes should be assured that the Department of Defense will make every reasonable effort, consistent with the law, to withhold from public disclosure any specific information that a tribe identifies as confidential, especially information related to sacred sites and other traditional cultural properties. Nonetheless, tribes should also understand that the Department of Defense is required to provide public access to its records under the Freedom of Information Act (Reference (r)), except to the extent that any such records are protected from disclosure by a statutory exemption or exclusion. Consequently, tribes should be encouraged to seek the advice of their own legal counsel before providing sensitive information to the Department of Defense.

E2.11. The final decision should be placed into the administrative record and circulated to all consulting parties. It should explain the reasoning as well as the data compiled, but exclude any direct reference to culturally sensitive information provided by tribes and to information sensitive to the DoD mission.

E3. ENCLOSURE 3

COMPLIANCE MEASURES OF MERIT

E3.1. Policy Implementation

E3.1.1. The Office of the DUSD(I&E) shall assess the number of installations that have incorporated a process for consultation with tribes either as part of an ICRMP and/or an INRMP, or as an independent process in which tribal interests have been identified.

E3.1.2. A process for consultation is required only when tribes have a cultural or historical affiliation with the lands encompassed by the installation for an ICRMP, and where tribal treaty rights or other rights to natural resources potentially may be affected, for an INRMP.

E3.2. Native American Graves Protection and Repatriation Act (NAGPRA) (Reference (k))

The Office of the DUSD(I&E) shall assess the number of installations:

E3.2.1. With possession or control of any archaeological, historic, or ethnographic collections, including items held by a DoD contractor for the installation.

E3.2.2. With possession or control of items in paragraph E3.2.1., where these items have been professionally evaluated for the presence of “cultural items” as defined in Section 2 of Reference (m). “Professionally evaluated” means the items have been examined and a finding made by a person who has professional training to make an authoritative determination. At a minimum, the person making the determination shall meet the requirements of 48 FR 44716 (Reference (s)).

E3.2.3. With professionally evaluated items that meet the definition of cultural items.

E3.2.4. Retaining possession or control of NAGPRA cultural items that do not fall within the following categories:

E3.2.4.1. The cultural affiliation cannot be determined.

E3.2.4.2. Consultation is ongoing.

E3.2.1.3. No tribes have expressed an interest in the items for repatriation purposes.

E3.2.1.4. Repatriation is pending Federal Register Notice.

