

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

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In Reply Refer To:
8160 (NV-930) P

October 20, 2004

EMS TRANSMISSION 10/20/04
Instruction Memorandum No. NV-2005-008
Expires: 9/30/2006

To: Field Managers, Nevada
Deputy State Directors and Staff Chiefs, NSO

From: State Director, Nevada

Subject: Clarification of Native American Consultation Responsibilities

Native American consultation is undertaken to give tribes a reasonable opportunity to identify significant places and resources that may be impacted by proposed undertakings and to propose mitigative actions to minimize those impacts. Because consultation can be time consuming, adequate consultation may require more time than allowed by the optimal timeline for making a decision. Therefore, the decision to consult must be made with due consideration for our responsibilities to tribes as well as our responsibilities for multiple use-management under other authorities.

The basic guidance for initiating and conducting Native American consultation is found in Manual Section 8160, Handbook H-8160-1, and WO IM 2005-003 for fluid minerals. These authorities outline 1) The legal basis for consultation; 2) How to deal with trust responsibilities; 3) Roles and responsibilities for managers and staff; and 4) Guidance for the consultation process.

This Instruction Memorandum clarifies, but does not replace, the basic guidance.

1. Consultation is required:
 - A. For all environmental impact statements, major environmental assessments, resource management plans, activity plans, and plan amendments.
 1. Native American consultation should begin as early as possible in the planning or environmental analysis process.
 2. Tribes should be given the same role and opportunities for participation in these activities as is given to state and local governments.
 3. All third party contracts for these activities should include provisions for gathering appropriate information on Native American concerns.
 4. Contractors need to be qualified to gather and interpret ethnographic information.

- B. In all cases where a federally recognized tribe has requested consultation via a request to consult on a specific undertaking or class of undertakings or through a general consultation request covering the area or type of resources potentially impacted by the proposed undertaking.
 - C. In all cases where there is insufficient information to support the conclusion that the proposed undertaking will not impact tribal heritage resources or other matters of tribal concern.
2. Consultation is not required:
- A. For any actions that are categorical exclusions in Section 106 consultation or under the NEPA. However, Native American concerns need to be considered and the decision-making process must be documented when deciding if an activity can be categorically excluded.
 - B. Where there is sufficient information to support the conclusion that the proposed undertaking will not impact tribal heritage resources or other matters of tribal concern.
3. The decision that there is sufficient or insufficient information to support the conclusion that the proposed undertaking will not impact places or resources of interest to the tribal should be based on:
- A. Review of the available ethnographic record to identify known or recorded places or resources of interest to the tribe.
 - B. Review of previous consultations with the tribe to determine if consultation is likely to be productive.
 - C. A determination that there may be tribal concerns within the area impacted by the undertaking.
 - D. A determination that the undertaking could impact those concerns.
 - E. An assessment of the adequacy of consultation efforts in relevant land-use plans and associated environmental documentation.
4. Consultation under the National Historic Preservation Act (NHPA)

Since properties of traditional religious and cultural importance to a tribe may be eligible for inclusion on the National Register of Historic Places, Section 106 compliance includes the identification, evaluation, and treatment of such properties in consultation with the State Historic Preservation Office (SHPO) and the relevant tribe(s).

5. Good Faith Consultation

Good faith consultation occurs in the context of our overall legal responsibilities. The process needs a structure accommodating tribal needs while at the same time allowing us to process undertakings in a timely manner. This entails communicating with a tribe in a way that allows sufficient time for productive consultation to resolve tribal concerns.

If there is insufficient time for concluding consultation (generally less than 45 days), then personal contacts and face-to-face consultation rather than letters, should be used to ensure adequate consultation within the available time. All face-to-face consultation attempts need to be documented in the case file and the results confirmed in writing with the tribes.

If there is sufficient time, i.e., generally more than 45 days, consultation should be initiated through a letter to the tribal chair(s) as soon as possible in the planning/decision process. The letter should locate and explain the proposed project, identify known sites that may be of traditional interest, offer to meet with the tribal government to discuss the project, and offer field visits as needed. This letter should be followed by phone call(s), offering meetings, field visits, or further clarification as needed. The person conducting the consultation needs to be fully empowered to make decisions.

While there is no set number of letters, meetings, or phone calls that constitutes a good faith consultation, we are responsible for expending the effort to make it as productive as possible. In productive consultation, the tribe is providing necessary information as we jointly move to seeking a resolution of their concerns. Productive consultation should continue, with the decision postponed, until it is complete. Productive consultation should then be concluded with a letter detailing the results of the consultation, and agreements reached, and any actions taken to deal with tribal concerns.

Non-productive consultation must be ended with a letter to the tribe(s) detailing our attempts to consult with them, informing them that we are terminating consultation, and offering them a final reasonable period (30 calendar days where possible) to initiate consultation. After the final response period ends the decision can be made and the Decision Record can be issued.

6. Documentation

All consultation decisions, including the decision that consultation is not needed, and associated material supporting the decisions have to be included in the case file. The file must be sufficiently complete and detailed so as to include the data, thought process, and decision criteria used to deal with tribal concerns in relationship to the undertaking. Any documentation involving historic properties will be provided to the SHPO in accordance with the Statewide Protocol.

If you have any questions, please contact Pat Barker at 861-6482.

Signed By:
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