



## **FEDERAL PRESERVATION PROGRAM NOTES**

### **Base Realignment and Closure Activities Requiring Consultation with Native Americans**

On October 20, 1998, the Department of Defense (DoD) adopted the American Indian and Alaska Native Policy (Policy), which provides general principles for DoD interactions with Federally-recognized tribes. This Policy should guide DoD Components in their interactions with Federally-recognized tribes regarding BRAC activities. For the full text of the Policy see:  
<https://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html>.

Consultation with tribes provides an invaluable means of obtaining expert advice, ideas, and diverse opinions from Native American constituents regarding the control and appropriate treatment of Federal resources potentially affected by BRAC. In some instances, failure to consult early in the process can significantly delay a project, either through court injunction or public pressure where the interests of a Federally-recognized tribe are involved.

There are several specific requirements for consultation with Native Americans as follows:

#### **National Historic Preservation Act (NHPA) and its implementing regulations at 36 CFR Part 800**

- Installations must determine whether they have any properties of traditional religious or cultural significance to Native Americans.
- Installations with such properties are required to follow the requirements of Section 106 of NHPA regarding consultation with Native Americans if the BRAC activity constitutes an undertaking as defined in the ACHP regulation (36 CFR 800.16(y)). Further information on Section 106 is available at the ACHP Web site at [www.achp.gov/work106.html](http://www.achp.gov/work106.html).
- In addition to the Section 106 consultation requirements, tribes may be a party to existing or proposed agreements regarding a historic property at the BRAC installation that may provide Native Americans with additional participation or concurrence in agency decisions. These agreements are typically referred to as either a Programmatic Agreement (PA), or a Memorandum of Agreement (MOA).

### **Native American Graves Protection and Repatriation Act (NAGPRA) and its implementing regulations at 43 CFR 10**

- NAGPRA requires consultation with Indian tribes, Native Hawaiian organizations, lineal descendants, and traditional Native American religious leaders in order to provide for the determination of cultural affiliation and disposition or repatriation of Native American cultural items (Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony) that may be held by a closing installation and to new discoveries on tribal lands, Federal lands, or Federally controlled lands. A copy of NAGPRA, its implementing regulations, and helpful material for NAGPRA compliance are available at: <http://www.cr.nps.gov/nagpra/MANDATES/INDEX.HTM>.

### **American Indian Religious Freedom Act (AIRFA)**

- AIRFA is the Federal law regarding the protection and preservation of Native Americans' right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.
- AIRFA mandates that Federal agencies consult with Native American leaders to protect and preserve Native American religious cultural rights and practices; Executive Order 13007 elaborates on this responsibility. Installations must consult with Native Americans over the impacts that any realignment, transfer, lease, or sale of BRAC property may have regarding continued access to sites used for ceremonial and traditional rites.

### **Archaeological Resources Protection Act (ARPA)**

- ARPA prohibits excavation, collection, removal, and disturbance of archaeological resources on DoD lands without a permit and notification to tribes if archaeological work may result in harm to a Native American religious or cultural site.
- Installations must consult with the culturally affiliated Indian tribe(s) or Native Hawaiian organization(s) and obtain permission, if the activity will occur on Indian lands.
- Installations with archaeological collections may be subject to the provisions of NAGPRA if the collections meet the definition of cultural items under Section 2 of NAGPRA. A copy of NAGPRA, its implementing regulations, and helpful material for NAGPRA compliance are available at: <http://www.cr.nps.gov/nagpra/MANDATES/INDEX.HTM>.

### **Executive Order 13007 -- Native American Sacred Sites**

- Sacred sites are places identified by a tribe as sacred by virtue of its religious significance to, or ceremonial use by, an Indian religion.
- Executive Order 13007 requires Federal agencies to consult with tribes on a government-to-government basis whenever plans, activities, decisions, or proposed actions affect the integrity of, or access to, a sacred site.
- If a sacred site is also a historic property under the National Historic Preservation Act, the installation must consult with the tribe(s) under the requirements of Section 106 of the Act. See the information paper at (WEBSITE Address) for more information on historic properties.

- Closing installations, in particular, must thoroughly understand current policies, existing agreements, and tribal rights regarding the continued use of sacred sites after DoD transfers ownership. The full text of Executive Order 13007 is available at: [http://www.cr.nps.gov/nagpra/AGENCIES/EO\\_13007.HTM](http://www.cr.nps.gov/nagpra/AGENCIES/EO_13007.HTM)

### **Other requirements for consultation with Native Americans**

- National Environmental Policy Act: <http://www.epa.gov/compliance/nepa/index.html>
- Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments:” <http://www.epa.gov/fedrgstr/eo/eo13175.htm>
- Executive Order 12898, “Environmental Justice:” <http://www.epa.gov/civilrights/eo12898.htm>
- Memorandum for Heads of Executive Departments and Agencies, April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments:” [http://www.cr.nps.gov/nagpra/AGENCIES/Clinton\\_Memorandum.htm](http://www.cr.nps.gov/nagpra/AGENCIES/Clinton_Memorandum.htm)
- DoD Instruction 4715.3, “Environmental Conservation Program:” <https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Legacy/ETB/DoDI47153.htm>

### **Further Reading**

- To learn more about consultation, the full text of “The Meaning of Consultation” by C. Timothy McKeown of the National Park Service is available at: [http://www.cr.nps.gov/aad/Cg/vol2\\_num3-4/index.htm](http://www.cr.nps.gov/aad/Cg/vol2_num3-4/index.htm)
- In addition, the National Association of Tribal Historic Preservation Officers in cooperation with the National Park Service recently completed a report entitled: “Tribal Consultation: Best Practices in Historic Preservation,” which provides a great source of information. The report is available at: [http://www.nathpo.org/special\\_projects-Best\\_Practices.html](http://www.nathpo.org/special_projects-Best_Practices.html).

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