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Subject

H-8120-1 - GENERAL PROCEDURAL GUIDANCE FOR NATIVE AMERICAN
CONSULTATION (PUBLIC)

1. Explanation of Material Transmitted. This release completely revises BLM Manual Handbook H-8160-1.
2. Reports Required: None
3. Materials Superseded: Manual pages superseded by this release are listed under REMOVE below. No other directives are superseded.
4. Filing Instructions: File as directed below:

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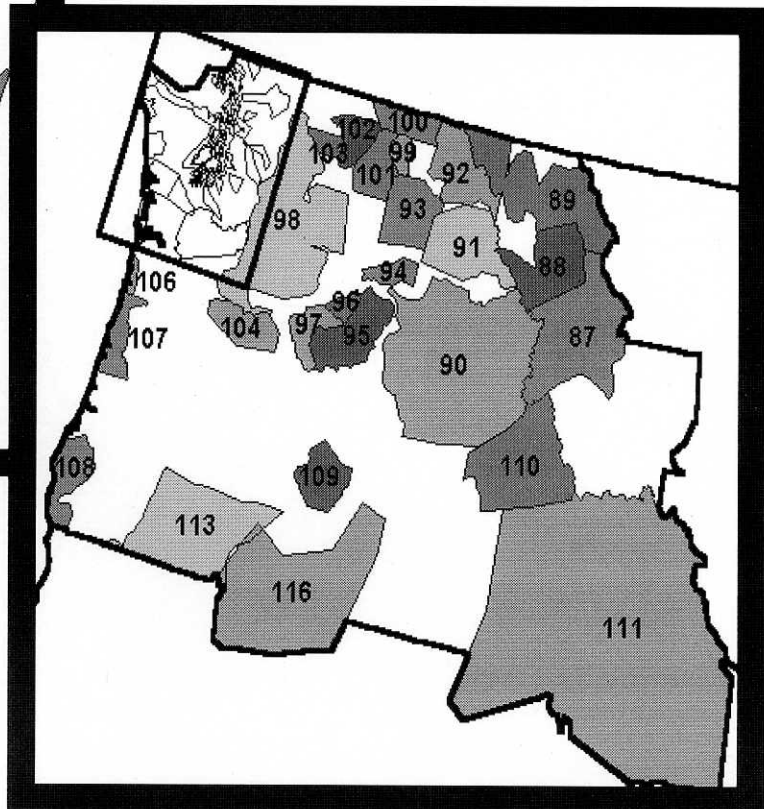
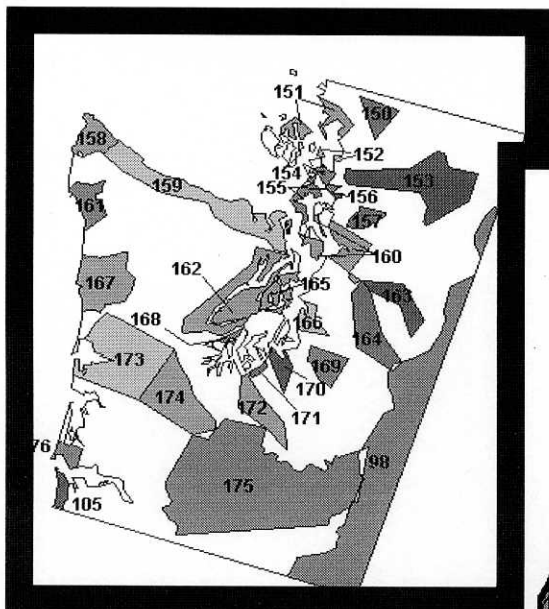
All of H-8160-1 (Rel. 8-65)

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H-8120-1

(Total: 23 sheets)

Guidelines for Conducting Tribal Consultation



BLM Manual Handbook

H-8120-1



U.S. Department of the Interior
Bureau of Land Management

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CHAPTER I. Introduction

A. Purpose and Goal of this Handbook. This Handbook replaces H-8160-1 (Rel.8-65; 11/3/94), "General Procedural Guidance for Native American Consultation." Compared to the replaced edition, this Handbook narrows the span of coverage to focus mainly on the "cultural resource" laws, executive orders, and regulations. It also covers new authorities and policies, as does the new Manual Section 8120, "Tribal Consultation under Cultural Resource Authorities." As before, the Handbook's overall purpose is to assist BLM managers and staff members in carrying out their assigned tribal consultation responsibilities and roles. Its goal is to help assure (1) that federally recognized tribal governments and Native American individuals, whose traditional uses of public land might be affected by a proposed BLM action, will have sufficient opportunity to contribute to the decision, and (2) that the decision maker will give tribal concerns proper consideration. The difference is that the new Manual Section and Handbook, unlike the earlier versions, do not endeavor to cover all aspects of BLM-tribal relations under the full range of legal authorities.

B. This Handbook's Place in the BLM Manual System.

1. 8120 Manual: The 8120 Manual consists of Manual Section 8120 ("Tribal Consultation Under Cultural Resource Authorities") and this Handbook, H-8120-1. As a component of the 8100 "cultural resource management" Manual series, the 8120 Manual is primarily aimed toward implementing the tribal coordination and consultation responsibilities that stem from historic-preservation, archaeological resource-protection, and related cultural resource authorities.

2. 1600- and 1700-Series Manuals: As representatives of the United States Government, BLM's line managers maintain ongoing relations with their tribal counterparts and assure adequate and timely tribal involvement in BLM decisions. These are executive rather than technical-program duties. Accordingly, the subject of tribal relations should appropriately be covered in the BLM's broad administrative Manual series, particularly in the Manual Sections and Handbooks dealing with the planning and environmental assessment phases of decision making. Until tribal consultation sections are incorporated in those Manual series, managers and their supporting staffs may use this Handbook for general guidance.

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C. What is Consultation?**Consultation has 4 essential elements:**

<ul style="list-style-type: none"> • Identifying appropriate tribal governing bodies and individuals from whom to seek input.
<ul style="list-style-type: none"> • Conferring with appropriate tribal officials and/or individuals and asking for their views regarding land use proposals or other pending BLM actions that might affect traditional tribal activities, practices, or beliefs relating to particular locations on public lands.
<ul style="list-style-type: none"> • Treating tribal information as a necessary factor in defining the range of acceptable public-land management options.
<ul style="list-style-type: none"> • Creating and maintaining a permanent record to show how tribal information was obtained and used in the BLM's decisionmaking process.

Who is a tribe? This Handbook frequently uses the terms "Indian tribe" and "tribe" without expanding on the meaning. Either term can be understood to mean a federally recognized tribal government, whether in the Lower 48 or Alaska, whether the people would call themselves American Indians or Alaska Natives. Recognized tribes are self-governing entities that enjoy a government-to-government relationship with the United States. For further definition, see Manual Section 8120.08 and glossary. For the definitive list, see BIA's more or less annual FEDERAL REGISTER listing and occasional FEDERAL REGISTER updates. (Note: At this writing the BIA Web site is closed. When it returns to the Web, it should again publish an up-to-date, Web-accessible list. Meanwhile, several non-BIA Web sites have similar lists that can be used for general information but should not be considered authoritative.)

The U.S. Government's representative. Just as it is important to determine who is empowered to speak for the tribe and to ensure that the BLM is consulting with the appropriate individuals, the BLM owes the tribes the same courtesy. Except when discussions are at the preliminary staff-to-staff stage, the BLM's representative must be authorized to speak for the BLM and must be adequately knowledgeable about the matter at hand. Generally speaking, this will be the appropriate line manager.

CHAPTER II. Consulting under Cultural Resource Authorities

"**Cultural resource authorities**" means the laws and executive orders listed and described in Manual Section 8120.03. Some of these are implemented by regulations listed in Manual Section 8120.05. This chapter characterizes the authorities that most often require cultural resource specialists to consult with tribes. The next chapter, Chapter III, characterizes *general* authorities – *not* cultural resource authorities – two of which (Federal Land Policy and Management Act and National Environmental Policy Act) often provide the procedural and scheduling framework for cultural resource-related consultation.

A. National Historic Preservation Act

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to identify and consider potential effects that their undertakings might have on significant historic properties. Specific provisions to consult with Indian tribes during Section 106 compliance were added to the Act through amendments in 1992 (See Manual Section 8100 Appendix 5, Section 101(d)(6)).

Section 101(d)(6) of the National Historic Preservation Act–
<ul style="list-style-type: none"> • Specifies that the traditional or historical importance an Indian tribe attaches to a particular place may make the place eligible* for the National Register of Historic Places (i.e., an "historic property" that is significant for purposes of the Act); and • Directs agencies carrying out Section 106 compliance to consult with any Indian tribe whose tradition or history may contribute to the National Register eligibility* of a potentially affected property.
<hr style="width: 20%; margin-left: 0;"/> <p>* National Register eligibility is determined by evaluating a candidate property's characteristics against the National Register criteria in 36 CFR 60.4. See BLM Manual Section 8110. No property type enjoys categorical eligibility.</p>

FIG. 1. Provisions of Section 101(d)(6) of the National Historic Preservation Act.

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BLM-specific Section 106 compliance procedures. The BLM Director, the Chairman of the Advisory Council on Historic Preservation (Council), and the President of the National Conference of State Historic Preservation Officers approved a national Programmatic Agreement (PA) in 1997 (see Manual Section 8100, Appendix 13, or Manual Section 8140, Appendix 1). The PA authorizes BLM to comply with Section 106 by following its own cultural resource program policies and procedures as found in the BLM 8100-Series Manual Sections and Manual Handbooks. As part of implementing the PA, individual BLM State Directors and SHPOs have executed State-specific protocols that guide how they interact, exchange information, and complement one another's capabilities. The principles of the national PA and BLM-SHPO protocols, and the procedural details in the BLM Manuals and Handbooks replace the Council's regulations (36 CFR Part 800) and associated Council guidance for routine compliance activities. For more complex cases, the Council and SHPO may be asked to assist. (In Eastern States, where BLM holdings are few, no protocols are in effect and compliance follows the provisions of 36 CFR Part 800.)

CONSULTATION FOR SECTION 106 PURPOSES	
BLM consults with–	Purpose of consultation is–
Tribal representative(s) whom the tribal government has designated for this purpose	<ul style="list-style-type: none"> ● To identify tribally significant religious or cultural properties that may be eligible for the National Register of Historic Places
	<ul style="list-style-type: none"> ● To understand tribal concerns sufficiently to take into account the effects that a proposed Federal undertaking might have on eligible properties

FIG. 2. Tribal consultation for purposes of Section 106 of the National Historic Preservation Act.

Traditional Cultural Properties and Eligibility. Eligibility for the National Register of Historic Places is a professional determination based on application of the National Register criteria (36 CFR 60.4). Only those places that fulfill one or more of the National Register criteria may be found eligible. No type of property is automatically, categorically eligible, including traditional cultural properties. All candidate National Register-eligible properties must be evaluated against the criteria. Those that do not meet the eligibility standard are not subject to compliance with Section 106 of the National Historic Preservation Act. This does not mean that they are without protection, only that the NHPA is not the correct legal tool for protecting them.

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Planning. The best time to foresee and forestall potential conflicts between BLM-authorized land uses and tribally significant historic properties is during land use planning and its associated environmental impact review. Planning and environmental review procedures are good ways to elicit information from tribes concerning "traditional cultural properties" (TCPs) and other places with "traditional or historic importance" pursuant to NHPA Sec. 101(d)(6). (See Ch. III.)

Tribal preservation concerns should be identified in spatial and programmatic terms, to address in general the locales and the types of land use activities that would and would not be of further tribal concern. Obtaining sufficient information at this early stage should serve to reduce later project-level consultation. Agreements on criteria and procedures for consulting with tribes about individual land use actions may be discussed at this time.

"Indian tribe" is specified in the Act. Section 101(d)(1) states the purpose "to assist Indian tribes in preserving their particular historic properties." Section 101(d)(6) directs agencies to weigh National Register eligibility for properties important to an Indian tribe, and to consult with the Indian tribe over properties found eligible.

"(A) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
 "(B) In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A)."
 National Historic Preservation Act Sec. 101(d)(6)

The Act is silent on consultation with non-recognized Indian groups and non-recognized Alaska Native entities regarding properties of religious and cultural importance and Section 106.

Consolidating consultation efforts. Under Sec. 101(d)(6)(B) and Sec. 110(E)(ii), tribal consultation may be called for when data recovery is being considered to mitigate adverse effects on a property's scientific importance, if the property also has ascribed religious and cultural significance. Where appropriate, such consultation opportunities may be used to meet the separate consultation requirements of 43 CFR 7.7 and Sec. 3(c) of NAGPRA (see II.B. and C.), as well as those of Sec. 101 and Sec. 110 of NHPA.

However, care must be taken to keep the several Acts' distinct legal purposes separate, so that they do not become blended and confused in the various participants' minds. Losing focus on individual laws' requirements, participants specified, and reasons for obtaining the Native American input can result in omissions, mistakes, inappropriate expectations on the Native Americans' part, and inadvertent noncompliance on the BLM's part.

B. Archaeological Resources Protection Act.

The Archaeological Resources Protection Act (ARPA), Sec. 4(c), requires the responsible Federal land manager to notify the appropriate Indian tribe before approving a Cultural Resource Use Permit (see Manual Section 8150) for the excavation or collection of archaeological resources (see 43 CFR 7.3), *if the Federal land manager* determines that a location with cultural or religious importance to the tribe may be harmed or destroyed by the permitted activity.

<p>Sec. 4 of the Archaeological Resources Protection Act (ARPA)–</p>
<ul style="list-style-type: none"> • Requires the Federal land manager, before issuing a permit to excavate or remove archaeological resources from public land, to notify* the affected Indian tribe when a location having cultural or religious importance to the tribe may be harmed or destroyed by the permitted activity. • Requires Federal land managers to include in the permit any terms and conditions deemed necessary to carry out the purposes of the Act. Sec. 10 links ARPA's implementation and the purposes of the American Indian Religious Freedom Act.
<p>* Uniform regulations at 43 CFR 7.7 recognize that notification logically leads to consultation if the tribe so requests, and require that any terms and conditions agreed to through consultation will be included in the permit.</p>

FIG. 3. Provisions of Section 4 of the Archaeological Resources Protection Act.

Section 4(c). The exact wording of Section 4(c) of ARPA is as follows (emphasis added):

<p>"If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of Section 9." (16 U.S.C. 470cc(c))</p>

The statutory term *site* in the phrase "religious or cultural site" should not be expected to mean the same as the word "site" in the discipline of archaeology, and should instead be understood to refer to a *place* or a *location*, whether archaeological in nature or not. The ARPA regulations provide, for example, that a "Federal land manager may enter into agreement with any Indian tribe . . . for determining *locations* for which such tribe . . . wishes to receive notice under this section" (43 CFR 7.7(b)(3), emphasis added).

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A site "having religious or cultural importance" is probably at least as likely to occur in the absence of archaeological resources as in their presence. If the Federal land manager were to notify tribes only with respect to archaeological resources, a location's religious or cultural importance could go unheeded, and inadvertent harm or destruction could occur.

"Having religious or cultural importance" is an American Indian Religious Freedom Act (AIRFA) concept, not an archaeological resource one. The phrase came into the 1979 ARPA bill after a hearing where testimony was given by advocates for Indian religious freedom and traditional religious practitioners, shortly after the American Indian Religious Freedom Act of 1978 became law. The language in Section 10(a) of ARPA, requiring the rule makers to consider AIRFA when drafting uniform implementing regulations, was included in the ARPA bill at the same time. It reads, "Such rules and regulations may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat.469; 42 U.S.C. 1996)." The purpose of AIRFA is to ensure access to religious sites and freedom to worship through ceremonials and traditional rites, unhindered by Federal infringement, restriction, or intrusion. (See III.C.)

Therefore, when implementing Section 4(c), the focus of notification and consultation should not be just the archaeological resources that are the subject of a permit application. Rather, we should be considering the **location, nature, scale, and timing of permitted activities** that would occur under the permit – e.g., presence of work crews; surface disturbance – relative to places on the landscape that members of an Indian tribe are known, through consultation, to regard as important for their traditional cultural and religious observances.

Would permitted activities in the area, at the time proposed, hinder or intrude on legally (AIRFA) protected religious use? If the Federal land manager is confident, based on previous consultation, that permitted activities would not hinder such use, there would be no reason to notify an Indian tribe before processing an ARPA permit application.

Would permitted activities in a specific place, including an archaeological site, raise cultural concerns? For example, a ruin that an applicant has selected for excavation might be recognized in cultural tradition as a venerable ancestral home; or an archaeological site might contain features that are always considered important for cultural or religious reasons. Those kinds of concerns should influence the BLM decision about issuing a permit for excavating and/or removing archaeological resources.

Also, a tribe might have concerns about the potential for disturbing human remains and funerary objects. This would be subject to consultation under NAGPRA (see II.C.).

Consultation for ARPA 4(c) purposes	
BLM consults with–	Purpose of consultation is–
<p>Tribal representative(s) whom the tribal government has designated for this purpose</p>	<ul style="list-style-type: none"> ● To consider tribal religious or cultural locations on public lands, which archaeological activities, if permitted, could harm or destroy ● To consider protective terms and conditions that could be put into a permit to protect tribal religious or cultural locations from harm or destruction

FIG. 4. Tribal consultation for purposes of Section 4(c) of the Archaeological Resources Protection Act.

Notifying tribes of potential harm or destruction. The Federal land manager determines, based on information obtained from Indian tribes, whether proposed archaeological activities on public lands (such as specific instances of testing or excavation) could **harm or destroy places** of tribal religious or cultural importance, such as places where members of a tribe conduct cultural activities and religious observances. Because of their nature, scale, or timing, most archaeological proposals have little potential to permanently harm or destroy such places and will not warrant notification.

Non-tribal groups may be notified. The uniform regulations implementing ARPA provide that the Federal land manager may also give notice to any other Native American group known to consider potentially affected locations as being of religious or cultural importance (43 CFR 7.7(a)(2)). Input from non-tribal groups is in the nature of public participation, not government-to-government consultation.

Document unsuccessful efforts. If all efforts to notify and consult with the appropriate Indian tribe(s) prove unsuccessful, the permit application may be processed without further delay. In all cases, documentation of efforts to notify and consult must be included in the permit file. This documentation will serve as evidence of notification and consultation efforts in accord with 43 CFR 7.7.

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Consultation procedures. If the tribe's response to the notification is a request for further information or consultation, then consultation should be expeditiously undertaken consistent with the procedural requirements and timeframes contained in 43 CFR 7.7(a)(3), Manual Section 8150, and Chapter IV of this Handbook.

When permit-related consultation will be taking place, it should be appropriate in most cases to use that opportunity to consult prospectively with regard to NAGPRA (see II.C.), to develop procedures to be followed in case human remains and cultural items are discovered.

Decision and documentation. Following consultation, the Federal land manager determines the nature, location, and timing of the field excavation and analysis methods that will be authorized in a permit. When decisions about field work and laboratory analyses do not conform with the requests of Indian tribes, the manager should always document the reasons in the permit file and notify the tribes of the outcome and its basis.

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C. Native American Graves Protection and Repatriation Act.

BLM managers are required to consult with tribes under the Native American Graves Protection and Repatriation Act (NAGPRA) to determine affiliation and disposition of the specific kinds of "cultural items" defined in the Act: Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.

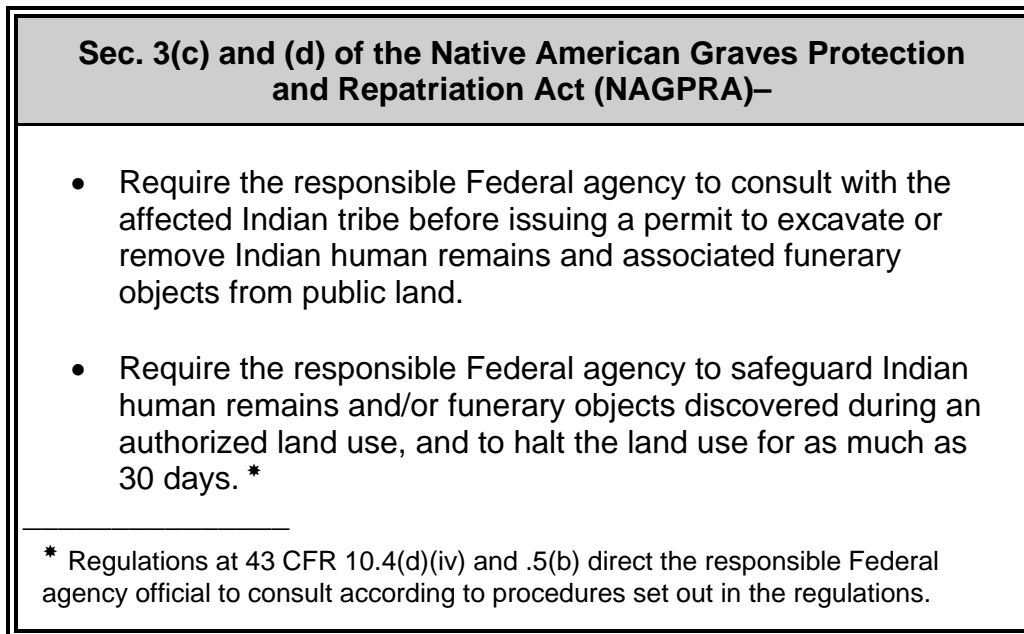


FIG. 5. Provisions of Section 3(c) and (d) of the Native American Graves Protection and Repatriation Act.

1. Intentional removal of human remains and/or funerary objects. A Cultural Resource Use Permit (see Manual Section 8150) or equivalent documentation is required before human remains and artifacts covered by NAGPRA may be intentionally excavated or removed from Federal lands (see section B). The responsible manager must consult with appropriate Indian tribes or individuals prior to authorizing the intentional removal of Native American human remains and funerary objects found with them. This consultation should follow procedures in 43 CFR 10.3, Appendix 1 of this Manual Handbook, and Manual Section 8150. Documentation to show that required consultation has occurred must be included in the decision record, including the responsible manager's choice of field excavation and analysis methods. The Native Americans consulted are notified of the outcome and basis for the recovery plan.

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2. Human remains and/or funerary objects discovered during land use. The BLM's policy is to leave burial sites and their contents undisturbed whenever possible.

When human remains and/or funerary objects subject to NAGPRA, are discovered as a result of a BLM or BLM-authorized activity, such as construction or other land-disturbing actions, they are to be handled in the manner described in the "inadvertent discovery" procedures found at 43 CFR 10.4 and the general procedures of this Manual Section, and the procedures for applicable State laws. Managers should coordinate these and other responsibilities for "inadvertent discovery" under NAGPRA with those under the NHPA, as described in Manual Section 8140.28.

"Inadvertent discovery" procedures in 43 CFR 10 include ceasing activity in the area of the discovery and protecting the NAGPRA materials. The Field Office is required to identify and consult with any lineal descendant or culturally related tribe (or, if no descendant or culturally related tribe is identified, with a tribe for whom the area of the discovery falls within boundaries of their aboriginal land, as determined by a final judgment of the Indian Claims Commission or the U.S. Court of Claims). Consultation should focus on the BLM's plan of action and final disposition of the discovered materials, and must be documented.

If the materials are to be excavated and removed from the public lands, pursuant to the provisions of Section 3(c) of the Act, the Field Office manager follows the provisions in Chapter II.C.1, including publication of a newspaper notice pursuant to 43 CFR 10.6, identifying the tribe that has been determined to be affiliated and to whom ownership of the materials would accrue following their removal. If, in consultation with the descendants or tribes, the Field Office manager determines that excavation and removal from the public lands is not required, the materials remain in the Federal Government's ownership and control.

Where there is a reasonable probability of encountering undetected human remains and associated funerary objects during a proposed land use, discussions with tribes before the project is authorized can provide the manager with general guidance on treatment of any cultural items that might be exposed. During discussions, the manager should explore the possibility of developing agreements on how to respond in advance, to save time and avoid confusion.

3. Reburial of NAGPRA items on public lands is not authorized. Due to the substantial and extensive legal, logistical, and practical problems that would ensue if human remains and other "cultural items" repatriated or transferred to lineal descendants or tribes were to be reburied on public land, the Bureau's policy is:

The BLM's managers shall not directly or indirectly authorize or permit the reburial of repatriated, removed, or transferred human remains and/or other NAGPRA materials, on public lands.

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This policy does not apply to NAGPRA materials that have not been removed from the immediate vicinity of their original location following an inadvertent discovery. It also does not apply to portions of burials that were mistakenly removed in the interests of State health and safety laws (e.g., a hiker takes a skull found eroded from a stream bank to the coroner), or that were taken illegally and have been recovered through law enforcement investigations. In these cases, if the original burial location is known and the location is stable and not currently subject to conflicting uses, and if the affiliated tribe has been consulted and has entered into written agreement, the missing portion of the burial may be reunited with the in situ remainder. The BLM must make it clear to all parties that such restoration of a missing portion of an in situ burial does not affect the Federal Government's ownership or control of the restored burial, nor does it diminish the Bureau's ability to protect the restored burial under Federal law.

Consultation for NAGPRA purposes	
BLM consults with–	Purpose of consultation is–
<p>Lineal descendants, if known, or tribal representative(s) whom the tribal government has designated for this purpose</p>	<ul style="list-style-type: none"> ● To agree in advance how to treat potential NAGPRA issues such as identifying "cultural items" and determining their appropriate treatment and disposition. ● To agree after the fact how to identify inadvertently exposed "cultural items" and to assure that they receive appropriate treatment and disposition.

FIG. 6. Tribal consultation for purposes of Section 3(c) and (d) of the Native American Graves Protection and Repatriation Act.

CHAPTER III. Consulting under General Authorities



"General authorities," for purposes of this Handbook, means laws, executive orders, and regulations that are not considered "cultural resource authorities" like those discussed in the preceding chapter. The Federal Land Policy and Management Act (FLPMA) guides all BLM programs, and the National Environmental Policy Act (NEPA) pertains to the entire human environment. The planning and environmental review systems supporting FLPMA and NEPA often provide the procedural and scheduling framework for cultural resource-related consultation. Finally, the American Indian Religious Freedom Act (AIRFA) and the Indian Sacred Sites order (Executive Order 13007) sound as if they might be cultural resource authorities, but they are much more fundamental than that, pertaining to the free exercise clause of the First Amendment.

A. Federal Land Policy and Management Act.

The BLM's land use planning process under FLPMA has opportunities for tribes to identify places associated with traditional values, traditional cultural properties, and sacred sites prior to a specific action or proposed land use. The land use planning process is the primary mechanism for complying with the American Indian Religious Freedom Act (AIRFA) and Executive Order 13007. Tribal concerns with regard to places of traditional cultural or religious importance are most effectively identified and accommodated over the extended period of time afforded by the land use planning process and associated environmental review.

Federal Land Policy and Management Act, Title II–
<ul style="list-style-type: none"> • Directs the preparation and continuing maintenance of an inventory of the public lands, their resources, and other values, open to participation of the public and other governments. • Directs that land use plans be developed, maintained, and revised (as needed), open to participation of the public and other governments and in coordination with the policies of approved tribal land resource management programs. • Provides through planning a means to anticipate conflicts between proposed land uses and tribal issues and concerns, to reduce the number and severity of use conflicts at the implementation stage. • Provides for continuing coordination with Indian tribes regarding the consistency of land use plans, guidelines, and rules and regulations on public land and tribal land.

FIG. 7. Provisions of Title II of the Federal Land Policy and Management Act.

In developing Resource Management Plans (RMP) and plan amendments, BLM managers are required to involve others, including Indian tribes, at five specific points: (1) identification of issues; (2) review of proposed planning criteria; (3) review of the draft Resource Management Plan and Environmental Impact Statement (RMP/EIS); (4) review of the final RMP/EIS; and (5) notice of any changes as a result of protests.

Broad information, regarding the general nature of traditional values and the general location of culturally significant traditional places, should be elicited in early planning stages. Going into consultation with knowledge about a group's historic relationship with the land and resources should enable managers to direct their questions in a sensitive and effective way.

Although consultation at the land use planning level should seek as much information as tribes are willing to share with BLM, tribes often withhold specific information unless or until there is a direct threat to traditional values and culturally significant places. Before making project-specific decisions, managers may need to provide additional opportunities for Native Americans to identify their specific concerns at the land use action level.

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Consultation for FLPMA purposes	
BLM consults with–	Purpose of consultation is–
<p>Tribal representative(s) whom the tribal government has designated for this purpose</p>	<ul style="list-style-type: none"> ● To request tribal assistance in identifying and inventorying public land places, resources, uses, and values that are important to the tribe and/or tribal members and should be considered in land use plans ● To coordinate BLM and tribal land use policies and programs, and to seek consistency between land use plans, guidelines, and rules and regulations affecting public land and tribal land

FIG. 8. Tribal consultation for purposes of Title II of the Federal Land Policy and Management Act.

The BLM is obligated in Sec. 202(c)(9) to coordinate all aspects of planning with Indian tribes, to ensure consistency between BLM's and the tribes' land use plans, to the extent consistent with the laws governing the administration of the public lands.

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B. National Environmental Policy Act

The purposes of tribal consultation under the National Environmental Policy Act (NEPA) are to identify potential conflicts that would otherwise not be known to the BLM, and to seek alternatives that would avoid, reduce, or resolve the conflicts.

Indian tribes are not specifically mentioned in the Act, but tribal involvement is specified in the CEQ regulations at 40 CFR §§ 1501.2, 1501.7, 1502.16, 1503.1, 1506.6, and 1508.5. Agencies are advised in § 1501.2 to consult early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations, and in § 1501.7, to invite any affected Indian tribe to participate in scoping.

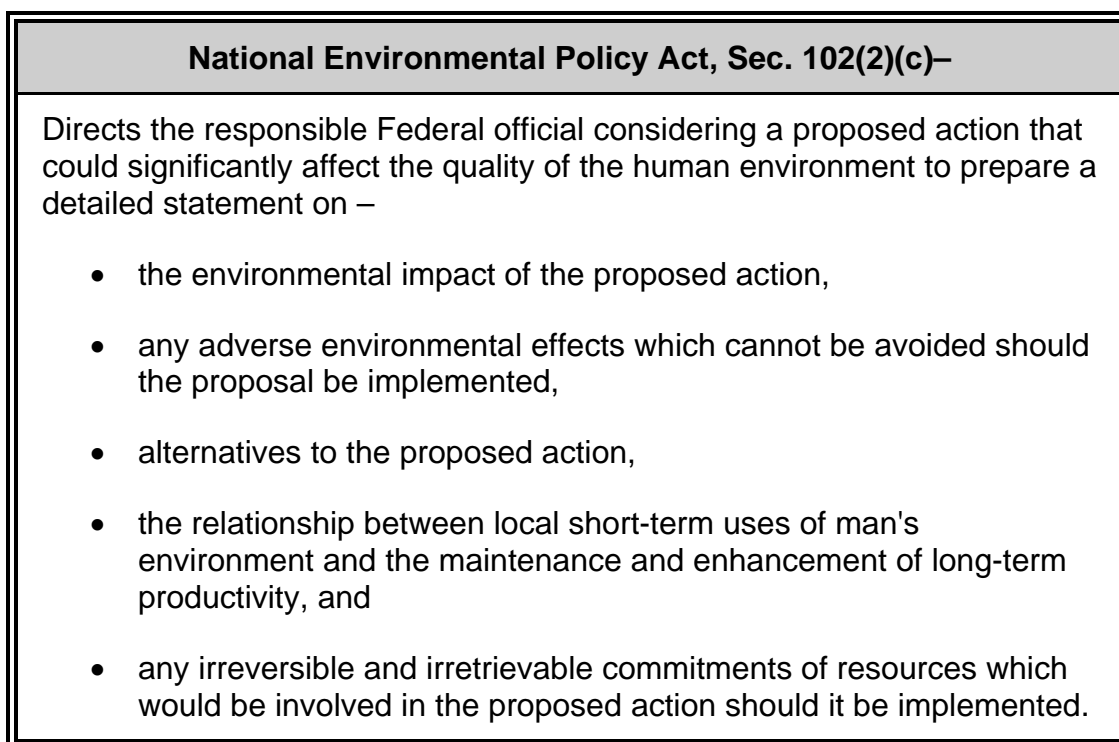


FIG. 9. Provisions of Section 102 of the National Environmental Policy Act.

Tribes must be consulted whenever other governmental entities or the public are formally involved in the BLM's environmental review process (see Manual Handbook H-1790-1). This means that tribes must be consulted for Environmental Impact Statements (EISs), major Environmental Assessments (EAs), or other NEPA documentation that entails public involvement or initial discussions with local or state governments.

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Consultation for NEPA purposes	
BLM consults with–	Purpose of consultation is–
<p>Tribal representative(s) whom the tribal government has designated for this purpose</p>	<ul style="list-style-type: none"> ● To identify a proposed action's potential to conflict with tribal members' uses of the environment for cultural, religious, and economic purposes ● To seek alternatives that would resolve the potential conflicts

FIG. 10. Tribal consultation for purposes of Section 102 of the National Environmental Policy Act.

C. American Indian Religious Freedom Act

The American Indian Religious Freedom Act (AIRFA) was a joint resolution of the two chambers of the Congress. The President adopted the resolution and signed it into law. Because it started out as a statement of the sense of the Congress, AIRFA is mainly a policy instrument. Section 1 reminds Federal agencies that Native Americans enjoy the same Constitutional guarantees under the First Amendment, as do all other people. Section 2 provides that the President will determine whether agency-specific laws and procedures conflict with the policy and need congressional action. The President's determination was made in a report to the Congress 1 year after AIRFA's 1978 enactment.

Case law has established that AIRFA has an ongoing implementation requirement, obligating agencies to consult with tribal officials and tribal religious leaders when agency actions would abridge the tribe's religious freedom by (a) denying access to sacred sites required in their religion; (b) prohibiting the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies; or (c) intruding upon or interfering with ceremonies.

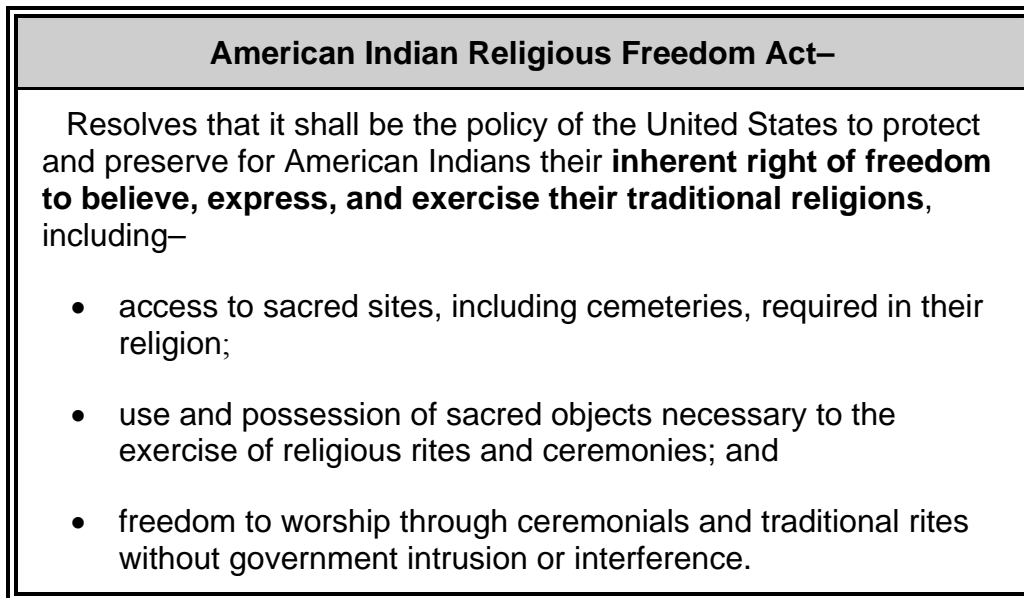


FIG. 11. Provisions of the American Indian Religious Freedom Act.

The BLM's corresponding policy is to avoid infringing on Native Americans' religious rights. Land use allocations, proposed BLM actions and authorizations, and routine management practices that could substantially restrict access or interfere with free exercise must be examined in consultation with tribes.

Consultation for AIRFA purposes	
BLM consults with–	Purpose of consultation is–
<p>Tribal representative(s) and/or native traditional religious leaders whom the tribal government has designated or identified for this purpose</p>	<ul style="list-style-type: none"> ● To identify the potential for land management procedures to conflict with Native Americans' religious observances ● To seek alternatives that would resolve the potential conflicts

FIG. 12. Tribal consultation for purposes of Section 2 of the American Indian Religious Freedom Act.

Not strictly government-to-government. The provisions of AIRFA are not limited to federally recognized Indian tribes. The constitutionally guaranteed freedom to follow the religion of one's choice extends to all Native Americans – as to others – without qualification. The BLM manager's best starting point for consultation purposes, however, is through the government-to-government channels that structure most of BLM's official relations with Indian tribes.

D. Executive Order No. 13007, "Indian Sacred Sites"

Executive Order No. 13007, May 24, 1996, directs Federal land managing agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and to avoid adversely affecting the physical integrity of such sacred sites, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions.

The Order is very explicit about not creating new rights and not limiting duly authorized land uses. It is "not intended to, nor does it, create any right, benefit, trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person" (Sec. 4). Nothing in it is to 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" (Sec. 3).

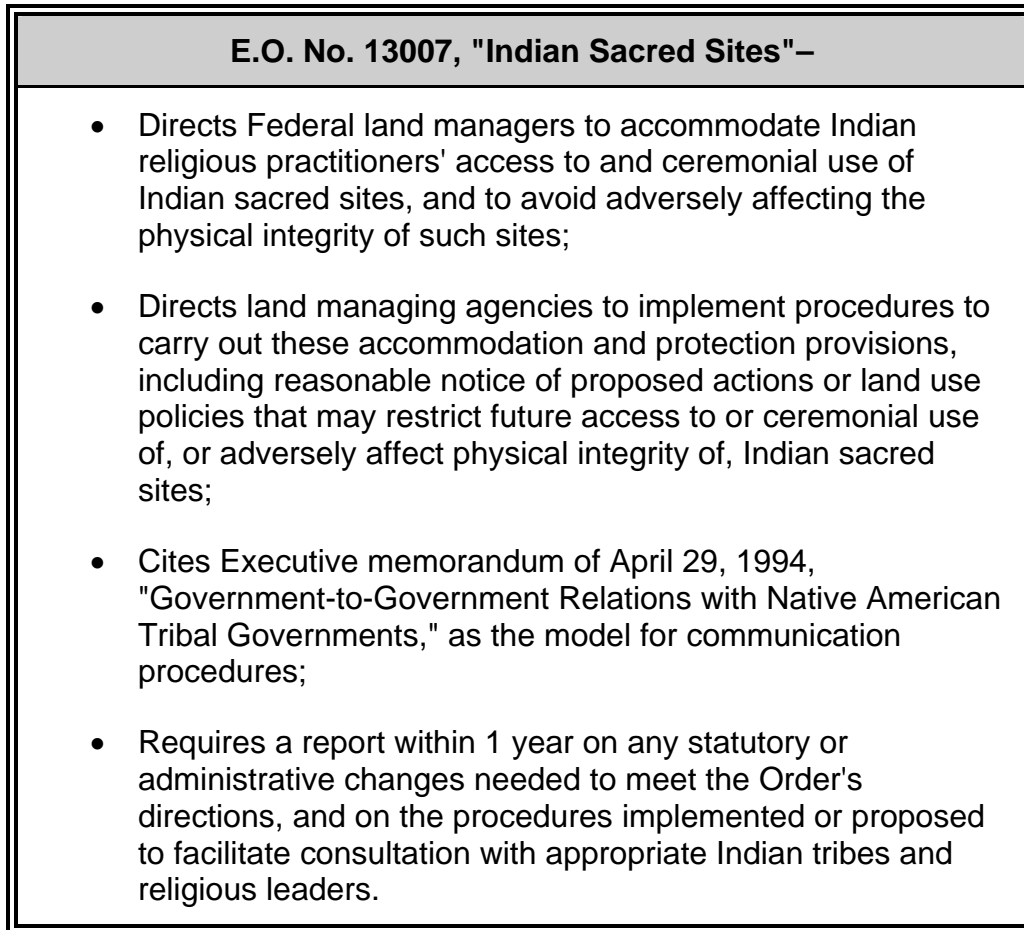


FIG. 13. Provisions of Executive Order No. 13007.

The Order required agencies to report to the President within 1 year addressing changes needed to accommodate access and use of Indian sacred sites on Federal lands, or changes needed to avoid adversely affecting the physical integrity of sacred sites. The Order also required agencies to address in their report the procedures implemented or proposed, "to facilitate consultation with appropriate Indian tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites."

The BLM reported that no statutory or administrative changes are needed, and provided copies of Manual Section 8160 (1990) and Manual Handbook H-8160-1 (1994) as its procedures for facilitating consultation.

Consultation for E.O. 13007 purposes	
BLM consults with–	Purpose of consultation is–
<p>Tribal representative and/or appropriately authoritative representative of an Indian religion whom the tribal government has identified for this purpose</p>	<ul style="list-style-type: none"> ● To determine whether proposed land management actions would-- <ul style="list-style-type: none"> ❖ accommodate Indian religious practitioners' access to and ceremonial use of Indian sacred sites on Federal lands; and/or ❖ avoid adversely affecting the physical integrity of Indian sacred sites on Federal lands. ● To seek alternatives that would resolve potential conflicts.

FIG. 14. Tribal consultation for purposes of E.O. No. 13007, "Indian Sacred Sites."

Identifying sacred sites. Only tribal representatives have the knowledge needed to identify a tribe's sacred sites. A tribe may name an appropriately authoritative representative of an Indian religion to provide this information. Federal officials cannot know to accommodate access to and ceremonial use of Indian sacred sites, and to avoid adversely affecting them, unless the tribe identifies them. Identification can only occur by consultation.

Overlap with "TCP's" and "religious or cultural sites." In some cases it may not be possible to differentiate among "sacred sites," "properties of traditional religious and cultural importance" (sometimes called "TCP's") that may be eligible for the National Register of Historic Places, and "sites of religious or cultural importance" subject to ARPA notification.

The similarity among these is that tribal identification is necessary as the beginning point for compliance with the intent of the law or executive order. A difference is that the BLM must apply the criteria in 36 CFR 60.4 to determine the eligibility of a traditional cultural property identified by a tribe. Identification itself does not make a property eligible for the National Register.

CHAPTER IV. Considerations That Apply to Various Authorities

A. Public Land Resources Are Not Indian Trust Assets

"Indian trust assets" means lands, natural resources, money, or other assets held by the Federal Government in trust or restricted against alienation for Indian tribes and individual Indians (Secretarial Order No. 3215, April 28, 2000). Trust is a formal, legally defined, property-based relationship that depends on the existence of three elements: (1) a trust asset (lands, resources, money, etc.); (2) a beneficial owner (the Indian tribe or individual Indian allottee); and (3) a trustee (the Secretary of the Interior). Many things and ideas that are commonly represented in terms of "trust" obligations are not actually part of the Government's trust responsibility toward Indians.

Cultural resources on BLM administered lands are not Indian trust assets. Sacred sites on BLM administered lands are not Indian trust assets. Human remains and cultural items subject to NAGPRA are not Indian trust assets.

B. The Nature of BLM's Tribal Consultation under Cultural Resource Authorities.

Tribes often experience "consultation" as it is conducted by the Bureau of Indian Affairs, whose officials act as agents for the Trustee (the Secretary of the Interior) to assure protection of Indian-owned trust assets. This form of "consultation," confined to issues of land and resource use on Indian land, normally concludes with the outcome that the tribe or individual Indian landowner intended.

In contrast, BLM's tribal consultation under cultural resource authorities generally does not involve either Indian lands or trust assets, and consequently there is no ownership-based presumption that a tribe's input will compel a decision that fulfills the tribe's requests or resolves issues in the tribe's favor. The BLM manager must make an affirmative effort to consult, and must consider tribal input fairly; but decisions are based on multiple-use principles and a complex framework of legal responsibilities, not on property principles and the obligations of the trustee to the trust beneficiary.

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If these distinct meanings of "consultation" are not understood and a BLM decision runs counter to a tribe's requests, the tribe might object that the BLM has not consulted properly. Therefore, a part of consultation must be to make clear to our consultation partners that the BLM is not acting as the Trustee's agent, that trust assets are not involved, and that public-land decision making must consider – but not necessarily conform with – the tribe's requests.

C. Cultural Resource Project Plans.

A tribe shall be consulted when cultural resource project plans are prepared involving resources related to that tribe's heritage. Such plans may be prepared when sites will be stabilized, repaired, or developed for public interpretation and visitation.

D. No Compensation Given for Consultation Per Se

As stated in the 8120 Manual, BLM does not compensate any entity, including Indian tribes, for consultation required by law, regulation, or other authorities, where the consultation is part of BLM administrative processes designed to protect the interests of the consulting entity.

Nothing prevents the BLM from contracting or paying for the services of qualified individuals, firms, or organizations, including tribes and Indian individuals, through BLM procurement procedures, to produce in-depth ethnographic reports, National Register nominations, or other specific products for proactive management uses that are not considered BLM administrative processes designed to protect tribal interests.

This topic is discussed in more detail in Appendix I.

E. Data Security and Confidentiality

The BLM is the sole Federal agency responsible for collecting cultural resource information for the lands it manages. It is also responsible for maintaining that information in a secure environment. This information is used to evaluate the significance of these resources and to develop appropriate protection measures in long-term land-use planning documents and in the environmental documentation supporting multiple use decisions. Access to this information is controlled by 43 CFR Part 7 implementing Section 9 of ARPA and Section 101(d)(6) and 304(a) of NHPA.

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On a project-specific basis, tribes may access this information by executing an agreement with the BLM to facilitate sharing and maintaining information and records related to cultural resources in a manner consistent with ARPA.

Native Americans may be reluctant to share sensitive information regarding resource locations and values with agency officials. This is partly because agencies have been hindered, until recently, from effectively protecting Native American cultural information from public disclosure under the Freedom of Information Act.

Disclosure of sensitive Native American information may be denied if it:

- | |
|---|
| <ul style="list-style-type: none"> • exists only in "working files" i.e., documents that are not formal products of the agency or official correspondence, such as raw ethnographic data or notes (except that if the information is used in making a decision, it must become part of the official decision record and therefore be subject to disclosure); or |
| <ul style="list-style-type: none"> • pertains to a property listed in or eligible for the National Register of Historic Places and disclosure would risk harm to the property, cause a significant invasion of privacy, or impede the use of a traditional religious site by practitioners; or |
| <ul style="list-style-type: none"> • pertains to an archaeological resource as defined in 43 CFR Part 7, and disclosure would risk harm to the resource. |

Less tangible values, when they coincide in space with historic properties or archaeological resources, could also be protected from disclosure under these authorities. The confidentiality of information less firmly associated with a historic property or archaeological resource, however, is not resolved.

No blanket FOIA exemption exists for NAGPRA related information. Thus, potentially sensitive information such as the specific nature and location of materials subject to NAGPRA consideration, and the identity of descendants or culturally affiliated Indian tribes, may not be automatically withheld from FOIA disclosure. Consequently, the BLM State FOIA officer must evaluate any NAGPRA-related FOIA request, case-by-case, in close consultation with the NAGPRA coordinator and the responsible manager. While BLM managers should make every effort to safeguard sensitive information to the fullest degree possible, information may not be improperly withheld in the face of a lawful FOIA request.

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Managers and staffs carrying out Native American consultation should clearly represent the sort of information they seek, the purposes to which the information will – and will not – be applied, and the limits of the BLM's ability to protect the information from public disclosure. The extent of that ability must not be misrepresented.

All sensitive data should be carefully maintained and securely stored. Offices responsible for gathering sensitive information and conducting consultation should have adequate physical and procedural means to ensure secure file maintenance and management.

F. Whom to Consult under Cultural Resource and General Authorities (Summary)

See Chapters II and III for discussion of the legal authorities, the requirements, and the purposes for consultation.

Whom To Consult	NHPA	ARPA	NAGPRA	FLPMA	NEPA	AIRFA	EO13007
Tribal representative whom the tribal government has designated for this purpose	X	X	X ²	X	X	X	X
Lineal descendant of Native American human remains with established identity			X ¹				
Traditional religious leader whom the tribal government has identified for this purpose						X ³	
Appropriately authoritative representative of an Indian religion							X ³

FIG. 15. Whom to consult depends on the particular legal authority.

¹ Lineal descendants (who need not be tribal members) have legal precedence.

² If no lineal decendants are known, then the tribe is consulted.

³ A tribal government may designate a "traditional religious leader" or an "authoritative representative" as the tribe's representative for consultation under AIRFA or E.O. 13007.

CHAPTER V. How to Consult

A. General Features of Consultation

Consultation usually demands more effort than routine public participation.

Tribal consultation means dialogue between a BLM manager and an American Indian or Alaska Native tribal government regarding proposed BLM actions, intended to secure meaningful tribal input and involvement in the decisionmaking process.

As both a precursor to and an ongoing part of consultation, BLM managers are encouraged to visit tribal councils and appropriate tribal leaders on a recurring basis. This face-to-face meeting irrespective of specific issues or proposed actions helps to develop relationships that can reduce the time and effort spent in later consultation on individual projects or actions. Managers are encouraged to take advantage of these meetings to discuss how and when and with whom follow-on consultation would occur with affected tribes and/or their designated representatives. Remember, this is government-to-government consultation and should be treated with appropriate respect and dignity of position. The manager's direct involvement can be key to building a solid working relationship and successful consultation.

When publishing notices and/or open letters to the public, indicating that the BLM is contemplating an action and that comments are welcome, managers should send individual letters, certified mail or delivery confirmed, to tribes requesting their input on actions being considered.

If a timely response is not received to such requests, the manager should follow up with personal telephone calls to tribal officials as part of government-to-government consultation. There may be a variety of reasons why a timely response to a letter is not provided. It is important in opening dialogue with tribal governments to at least initially follow up letters with telephone calls to assure that tribal officials understand the issue and that the BLM manager wants to consult in good faith.

Lack of response might be an issue of sensitive information. Particularly where places of religious importance are involved, tribes may be reluctant to provide specific information, perhaps because it is culturally impermissible to share such information outside the tribe, or because the appropriateness of BLM's use and protection of the information are not certain. Some of the hesitancy to provide specific information early in the planning and project review process may be overcome once an effective working relationship has been built.

On occasion, onsite visits or other face-to-face meetings may be requested by the tribes, or their designated representatives, or initiated by the BLM manager. A reasonable effort should be made to accommodate such requests in as timely a manner as possible.

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For the benefit of both parties, managers are encouraged to strive for the most efficient and effective method of consultation. Whatever method is chosen, all consultation activities should be carefully documented in the official record.

B. Identifying Consultation Partners

Consultation requirements and procedures, including the identification of the appropriate consultation partner, vary according to the legal basis for consultation and any agreements the BLM has executed with tribes, and may require consultation with one or more of the following:

- | |
|--|
| • Officials of federally recognized tribal governments; |
| • Representatives of non-recognized Indian communities; |
| • Traditional cultural or religious leaders; and |
| • Lineal descendants of deceased Native American individuals whose remains are in Federal possession or control. |

In some circumstances, others may be designated by tribes or individuals to act as spokespersons.

Specific consultation should focus on groups known to have concerns about the geographic area under consideration and the particular resources and/or land uses involved.

Although consultation partners may vary depending on which statute prompts a particular consultation episode, courtesy and protocol require that tribal governments be notified and given an opportunity to respond whenever the BLM intends to bring a tribal subunit or an individual tribal member into a consultation relationship.

The BLM's consultation partners must be individuals who are authorized to speak for the tribe or group relative to the matter at hand. The BLM may also need to consult with other interested individuals whose participation is not "official" so far as the tribe or group is concerned.

Identifying tribes. The Bureau of Indian Affairs (BIA) publishes an annual list of federally recognized tribes in the FEDERAL REGISTER. This list is the best starting point for identifying recognized tribes with which the United States has a government-to-government relationship. This list is not exhaustive and must be augmented by other sources.

Tribes and groups with historic ties to the lands in question, including those that are no longer locally resident, should be given the same opportunity as resident tribes and groups to identify their selected contact persons and their issues and concerns regarding the public lands.

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In addition to the list of recognized tribes, Area Offices of the BIA produce a supplemental list of non-recognized Indian groups petitioning Federal recognition. The BIA's Area or Agency Offices should be contacted to obtain updated and additional information on tribal governments and other Native American organizations in the general vicinity. (See Manual Section 8120.04D and E.)

Each BLM office should develop and maintain lists of–

- | |
|--|
| <ul style="list-style-type: none"> • The tribal officials and traditional religious leaders whom tribal governments have designated to serve as contacts for notification and consultation. |
| <ul style="list-style-type: none"> • Other Native American individuals and representatives of non-recognized groups identified as wanting to know about pending BLM actions. |

Identifying tribal contacts. Initial inquiries should be addressed to the presiding government official of the Indian tribe, e.g., the Tribal Chairman. Initial discussions should attempt to determine which individual(s) will be officially authorized to serve as the point of contact and the representative/spokesperson for the tribe for each of the various matters relating to the BLM.

Identifying traditional cultural and religious leaders. Official representatives of the tribe or group should be the first source for identifying traditional cultural and religious leaders and other individuals with specialized knowledge. Names of persons known to be traditional cultural or religious leaders can sometimes be obtained from BIA Area or Agency Offices; other Federal, State, and local government agencies that provide programs and services to Native Americans; local Native American cultural organizations and Native American ombudsman organizations; ethnographers, ethnohistorians, and anthropologists in universities and professional organizations; and other sources.

Identifying lineal descendants. A determination of lineal descent must be based on evidence provided by the person claiming descent. Since the BLM cannot contact such persons directly until they have identified themselves, initial contact should be made through the larger unit of which they are members (tribes, communities, etc.) or through descent records of the appropriate BIA Agency Office. It is not possible to identify lineal descendants when the personal identity of the human remains is not known.

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Consultation roles generally may not be transferred to others. Nonprofit organizations and public assistance agencies that provide services to Native Americans can sometimes facilitate communication with tribes, communities, traditional leaders, etc. (e.g., legal aid, family service, elders' health programs, regional associations). Native American community organizations and ombudsman organizations can also help to identify appropriate parties for consultation.

However, unless they are specifically authorized to do so, such organizations should not be considered to "represent" tribes or groups in an official sense. The BLM's contact with extra-tribal and public assistance groups is not a substitute for consultation with tribes or individuals, nor can these groups take the BLM's part in consultation.

The BLM's responsibility to notify and consult with Native Americans cannot be assigned or delegated to any other party.

Similarly, cultural resource consulting firms working for land use applicants, etc., might appropriately be approved to make contacts and collect information in some circumstances, such as to identify traditional cultural properties for purposes of Section 106 compliance; but they cannot negotiate, make commitments, or otherwise give the appearance of exercising the BLM's authority in consultations.

Summarizing information. Each office may wish to develop maps showing areas where tribes have identified issues or concerns. Maps can depict lands historically occupied or utilized, and can also locate areas identified as having ongoing traditional religious significance and use. However, when information of this extremely sensitive nature is included, maps must be treated as confidential working files and kept from public view. (See IV.E.)

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C. When in the Decision Making Process to Start Consultation

One of a manager's earliest steps in the decision cycle, regardless of the scale of the decision, should be to determine whether the decision could have consequences for Native American issues or concerns. Of course, this entails an information-based judgment, so the degree of effort involved in making the determination will depend on how far along the unit is in gathering information and establishing relationships with Indian tribes and other Native American groups. The less of this that has been done, the more lead-time will be needed to make a good determination.

In any case where it appears likely that the nature and/or the location of an activity could affect Native American issues or concerns, the BLM manager should initiate appropriate consultation with potentially affected Native Americans, as soon as possible after the general outlines of the land use plan or the proposed land use decision can be described.

Owing to their status as self-governing entities, tribes should be notified and invited to participate at least as soon as (if not earlier than) the Governor, State agencies, local governments, and other Federal agencies.

More information to help guide the timing of consultation and the identification of consultation partners can be found in Chapters II and III of this Handbook.

D. Preparing for Consultation

The first step to prepare for consultation is to **identify a clear purpose** for consultation **and identify with whom** such consultation should take place. The second step is to **review the record** of what is already known about the relevant concerns of tribes that might want to have input into the BLM's activities. Recorded sources that should be reviewed include—

✓ previous correspondence with tribes;
✓ records of previous consultation;
✓ public participation records for land use plans;
✓ plan protest records;
✓ transcripts of public hearings;
✓ minutes of public meetings.

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The BLM's and others' cultural resource records, including class I inventories and published and unpublished documentary sources, should be reviewed to identify any previously recorded areas and/or properties of traditional religious or cultural importance, and any traditional values that are closely associated with lands or resources which may be affected by BLM actions. Properties of traditional religious or cultural importance include, among other things, those "traditional cultural properties" that may be eligible for the National Register of Historic Places.

When existing records are being reviewed, special attention should be paid to places that Native Americans are likely to perceive as culturally sensitive in contemporary traditional cultural practice (human burial sites, shrines, prayer sites, rock art, natural features traditionally used for religious purposes, etc.).

E. Initiating Native American Contacts

After establishing a need and a purpose for consulting and determining with whom to consult, managers must make good faith efforts to elicit information and views directly from affected Native Americans.

An initial contact should be made with all potentially concerned tribal governments and other Native American groups, by letter and telephone, explaining the reason for the contact; requesting their direct participation and input in the decision making process; and asking them to identify any traditional cultural or religious leaders and practitioners who they think should also be contacted.

When a manager knows that tribal issues and concerns would be affected by a decision, tribes and groups that live near or use the lands in question should be contacted and given an opportunity to participate. Tribes that reside elsewhere, but have known historic ties to the land, may have issues or concerns that could be affected by a decision. In cases where the manager can reasonably anticipate that such tribes would have issues and concerns with the effects of a proposed decision, these tribes should be contacted also.

For any Indian tribe that may be expected to have issues and concerns about a proposed decision, the initial point of contact should be the tribal chief executive, except in cases where another tribal official has already been designated as the BLM's contact.

Tribal government officials are the appropriate spokespersons where proposed actions might affect tribal issues and concerns. It is their responsibility to identify any tribal members who may have pertinent information concerning cultural and religious values or concerns.

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If the BLM has established a consultation relationship with traditional leaders through previous contacts, these individuals should be contacted at the same time as tribal government officials are contacted. If there is no existing consultation relationship with traditional leaders, tribal government officials should be asked to identify individuals who might have special knowledge related to traditional uses of BLM lands.

F. Legally Required Notification

A specific legal requirement to notify Native Americans (e.g., pursuant to ARPA Sec. 4(c)) can generally be met through certified mail, return receipt requested, or delivery confirmation from a delivery service.

Where legally required notification is delivered through certified mail or delivery service, a return receipt or delivery confirmation is adequate demonstration that BLM has satisfied the notification requirement. With some tribes and individuals, however, a notice may not be deliverable for a variety of reasons. Obviously, a receipt or report showing that delivery was not made is clear indication that the BLM's requirement has not been met.

To avoid false starts and delays, BLM managers and staffs should select a notification strategy that has a high expectation of success.

G. Legally Required Consultation

Notification can be satisfied through simple one-way written means. *Consultation* is generally construed to mean direct, two-way communication.

While statute and case law do not provide the methods of communication needed to constitute legally required consultation, the legal standard is a "good faith effort." Two White House documents guide agencies in meeting this standard:

The Sacred Sites Executive Order, E.O. 13007 in Section 2(a), charges land managing agencies to "promptly implement 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.'"

The referenced April 29, 1994, memorandum states: "(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."

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H. Correspondence Content

Whether correspondence is meant to serve as notification or as a written precursor or supplement to direct, person-to-person consultation, there are certain correspondence guidelines that apply in either case.

In general, correspondence should—

- identify the purpose of the letter (i.e., the action being proposed and the specific legal/regulatory basis for writing);
- identify a BLM contact person and how to reach him/her (if for consultation, note that a call or visit will follow);
- specifically request the kind of Native American input needed (such as identification of potential cultural concerns);
- provide an opportunity for a meeting; and
- solicit the names and addresses of other persons who should be notified or consulted.

Some additional clauses that might be appropriate under certain circumstances include:

- Referrals: "If you are not the appropriate individual to receive this request, please advise whom we should contact."
- Flexible meeting proposals: "If this time and location are not appropriate, please contact [_____] within [___] days prior to the scheduled meeting to make alternative meeting arrangements."
- Documentation requests: "Please indicate on the enclosed map, if possible, areas of specific concern," or "Please provide or refer us to any available information that would help us to understand the significance and nature of traditional cultural concerns in the [area of proposed action] for the [proposed action] for the [group or tribe name]."

If a letter is returned as undeliverable, include the canceled, unopened letter in the official file and, if appropriate, begin more direct (and documented) attempts to carry out the notification or consultation.

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I. Documentation of Notification and Consultation

Include notification and consultation documents in the permanent decision record.

Evidence of notification and consultation (or of the failure of diligent efforts) is to be included in the official file and provided to the authorized officer in support of a proposed decision. The names of preparers should appear on all notification and consultation materials. The consultation record must show that the decision maker made a good faith effort to obtain and weigh tribal input in decision making. If a decision does not conform with the tribe's requests, the consultation record must explain the manager's basis for reaching a different outcome.

Managers are to take an active role in consultation efforts and should accustom themselves to looking for evidence of notification or consultation (or unsuccessful good faith efforts) before making a decision. If no notification or consultation is needed, the staff person preparing the material for the manager should include a note to this effect.

Telephone contact. All attempts to establish telephone communication, and a record of all conversations conducted by telephone, should be documented by a signed and dated note to the files, to be included in the permanent record. Copies of relevant emails are to be included as well.

Meetings and direct consultation. The purpose of meetings and direct consultation is to elicit specific information to be integrated into the body of data submitted to the authorized officer as a basis for decision making.

Consultation and coordination meetings should be narrowly focused on the proposed BLM action, or the planning area involved, with the goal of developing: (1) a specific description of the places and/or values at issue; and (2) potential management options to avoid or minimize any negative consequences to Native American cultural and religious values and practices.

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J. How Much Consultation to Do

There is no simple measure of sufficiency of Native American consultation efforts. On a case-by-case basis, unless there is a valid consultation agreement with the tribe, Field Managers should evaluate the amount of consultation necessary based on the:

- potential harm or disruption a proposed action could cause;
- alternatives that would reduce or eliminate potential harm or disruption;
- completeness and appropriateness of the list of Native American groups and individuals consulted;
- nature of the issues raised;
- intensity of concern expressed;
- legal requirements posed by treaties (if any);
- potential to resolve issues through further discussions; and
- need for further consultation.

All such judgments should be well documented to assure a complete record of the authorized officer's good faith efforts to identify, contact, consult, and respond to Native American cultural concerns before reaching a decision.

In general, enough information should be developed to document how decisions were reached when they may potentially affect Native American values associated with BLM-administered lands and resources. It is important to keep in mind that many, perhaps most, specific issues of Native American concern will *not* be issues associated with cultural resources such as archaeological sites. (Rather, Native American cultural concerns are likely to center on issues of access, collection and use of plants and animals, protection of religious places, and incompatible land and resource uses.)

A good way to gauge whether consultation efforts have been sufficient is to consider the degree to which an objective review of the decision record would find a good faith effort to identify, notify, involve, and respond to all Native Americans potentially affected by a proposed decision.

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K. Use of Information Gained Through Consultation

The BLM manager must give tribal concerns and preferences due consideration and make a good faith effort to address them as an integral part of the decision making process. Final decisions may not always conform with the preferences and suggestions of the tribes. How tribal issues were addressed must be documented as part of the decision record (see I. in this chapter).

L. Conclusion of Consultation

In all cases, the tribes that have participated in consultation should be notified of the BLM's decision.

This notification should specifically include a discussion of the BLM's basis for its decision, relationship to the tribal concerns raised in consultation, and the avenues available for protest or appeal of the decision.

This correspondence should be sent certified mail or delivery service and a copy included in the permanent decision record.

APPENDIX 1: Policy on Compensation to Native Americans for Their Participation in the BLM's Administrative Process

Issue Summary:

Native American individuals and organizations sometimes ask the BLM for payment or other compensation in return for bringing Native American issues to the BLM's attention and providing the BLM with information on Native American interests and concerns that relate to the BLM's land use planning, environmental review, and other legal-regulatory administrative requirements.

Policy:

The BLM does not compensate individuals or organizations – including Native American individuals, Indian tribes, Indian communities, and Indian organizations – for contributing information or comments as input into the BLM's administrative process.

Background:

Purpose of input. In the regular course of business, the BLM frequently invites input from Indian tribal officials, members of Native American communities, and practitioners of traditional culture and religion, as well as from other potentially affected parties and members of the general population. The BLM requests this input to satisfy legal requirements aimed at ensuring balance of perspectives in protecting the greater public interest. The input that Native Americans choose to provide may benefit their particular interests relative to future BLM actions or decisions. As with other participants, Native Americans' contributions to the BLM administrative process are a form of voluntary participation.

Ambiguous terminology. Some misunderstanding seems to result from use of the term "consultation." As used in this context, the term means conducting a dialogue, exchanging information. A participant in this kind of consultation is not a "consultant" in the way that a contractor who provides technical services might be called a consultant. Accordingly, "consultants' fees" are never appropriate to this kind of consultation.

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Basis for Consultation:

Legal Requirements. Requirements to notify and consult with Native Americans under specific circumstances are included in the Archaeological Resources Protection Act (P.L. 96-95), the Native American Graves Protection and Repatriation Act (P.L. 101-601), the National Historic Preservation Act (P.L. 89-665), and regulations implementing these laws. (See Chapter II.)

Native American coordination and consultation are also regularly conducted to address the more general requirements in the American Indian Religious Freedom Act (P.L. 95-341), the National Environmental Policy Act (P.L. 91-190), the Federal Land Policy and Management Act (P.L. 94-579), and pertinent regulations.

Component of Normal Administrative Process. Inviting Native Americans to identify and address issues of particular concern to them is a regular component of the BLM's administrative process. BLM Manual Section 8120 and Handbook H-8120-1 contain guidance for conducting Native American coordination and consultation. As expressed and expanded on in the Manual Section, the BLM's basic policy is to "consult with affected tribes to identify and consider their concerns in BLM land use planning and decision making, and [to] document all consultation efforts" (BLM Manual Section 8120.06E).

The Character of Consultation. Consultation consists of (a) identifying appropriate tribal governing bodies and individuals from whom to seek input; (b) conferring with appropriate tribal officials and/or individuals and asking for their views regarding land use proposals or other pending BLM actions that might affect traditional tribal activities, practices, or beliefs relating to particular locations on public lands; (c) treating tribal information as a necessary factor in defining the range of acceptable public-land management options; and (d) creating and maintaining a permanent record to show how tribal information was obtained and used in the BLM's decision making process." (BLM Handbook H-8120-1, I.C.).

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The BLM Should Accommodate Participation:

Avoid creating attendance difficulties. It is neither feasible nor appropriate for the BLM to undertake the level of personal financial review set forth by the Comptroller General to determine if compensation would be appropriate every time consultation with Native Americans is required. Rather, the BLM should seek to avoid creating circumstances where compensation for expenses might be requested.

Attempt to accommodate participation whenever possible. For example, the BLM should routinely make efforts never to schedule public meetings on matters potentially affecting Native Americans in places where it would be difficult for potentially affected Native Americans to attend.

Broad Public Interest. A wide range of input is sought on the full spectrum of BLM land use planning, environmental review, and proposed actions. It is essential to the broad public interest that the BLM obtain full and substantive input as a basis for its decisions. It is also important for the BLM to minimize controversy based on a perception of partiality, or on an impression that opinions and information the BLM receives might be colored by the BLM's compensation to a participant.

The BLM May Contract for Services:

Reports or other specific products. Nothing prevents the BLM from contracting for the services of qualified Native American individuals, firms, or organizations, through the BLM acquisition and procurement procedures, to produce in-depth ethnographic reports or other specific products. Such services would not constitute "consultation" as used in the BLM 8120 Manual and this issue analysis.

The BLM manager must fully comply with all Federal procurement rules. Care must be exercised to prevent any expectations on the part of tribal officials, tribal elders, or individual tribal members that BLM will routinely pay for input from such parties. Where BLM's contract costs would be reimbursable, any form of payment to Indian tribes should be coordinated with any affected project applicants beforehand. The BLM does not request project applicants to contract directly with Native American individuals, firms, or organizations. All payment should be directed through the BLM using appropriate Federal procurement procedures.

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The following four examples illustrate situations for which payment for services may be considered:

1. BLM requests assistance in documenting and evaluating a place used for traditional purposes. An Indian tribe has informed BLM of a specific place where its members have conducted traditional ceremonies for generations (i.e., a "traditional cultural property"). From the information provided by the tribe, BLM determines that the property meets the National Register criteria but requests assistance in more thoroughly documenting and evaluating the property in the field to meet broader responsibilities under the Federal Land Policy and Management Act. The tribe offers the expertise of a traditional practitioner who agrees to accompany BLM personnel to the property and assist in its documentation, but only if he is paid for his time and travel. In such a case, BLM payment for the services rendered by the traditional expert may be appropriate.

2. BLM requests assistance in analyzing or interpreting cultural materials. An archaeological site identified during a field inventory contains artifacts unfamiliar to the archaeologist. The archaeologist shows the artifacts to local Native Americans who recognize them as similar in appearance to objects they use in traditional activities. The Native Americans offer to explain the manner in which they use such objects if they are paid for this information. If BLM requests such information, payment may be appropriate.

3. BLM requests information about traditional practices. An interdisciplinary management plan is being developed for an area. In assessing current conditions, questions are raised about how long the current plant species composition has existed and how past land uses may have reduced or increased various species. The BLM decides to gather information to better understand how humans have changed the environment. Elders of the Indian tribe that historically occupied the area agree to share their knowledge of traditional agricultural and horticultural practices if they are paid for it. Payment for such information may be appropriate.

4. BLM requests tribal participation in preparing written reports or other products. An archaeological site is excavated. During consultations with a local Indian tribe prior to the excavation, BLM learns that the site figures prominently in the tribe's oral histories and determines that the tribe's perspective would be a valuable addition to the excavation report. The tribe is willing to assist in writing or providing information for the report if it is paid for doing so. If BLM asks the tribe to participate, payment to the tribe may be appropriate.

COVER IMAGES are adapted from “Indian Land Areas Judicially Established 1978,” by Frederick L. Briuer, Ph.D., and Gary A. Hebler, U.S. Army Engineer Waterways Experiment Station, U.S. Army Corps of Engineers, based on the similarly named U.S. Geological Survey map that “portrays results of cases before the U.S. Indian Claims Commission or the U.S. Court of Claims in which an American Indian tribe proved its original tribal occupancy of a tract within the continental United States.” See http://www.wes.army.mil/el/ccspt/natamap/usa_pg.html .