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Subject

8120 - TRIBAL CONSULTATION UNDER CULTURAL RESOURCES (PUBLIC)

1. Explanation of Material Transmitted. This release completely revises BLM Manual Section 8160.
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 Materials Superseded: Manual pages superseded by this release are listed under REMOVE below. No other directives are superseded.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:

REMOVE

All of 8160 (Rel. 8-58)

INSERT

8120

(Total: 7 sheets)

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.01 Purpose. This Manual Section provides basic policy direction on BLM's consultation responsibilities under cultural resource-related laws and executive orders, regarding cultural, historical, and religious concerns of American Indians and Alaska Natives ("tribes"). Its purpose is to clarify legal relationships between BLM and tribes relative to such concerns. Procedural direction will be found in Handbooks issued subject to this Manual Section. Direction on consulting with tribes under other authorities, such as land- and natural-resource-management authorities, may be found in other programs' directives under the appropriate subject-function codes.

.02 Objectives. The objectives of the tribal consultation component of the cultural resource management program are to:

A. Define policy and standards for government-to-government consultation within the framework of the legal authorities listed in .03.

B. Ensure that tribal issues and concerns are given legally adequate consideration during decision-making.

C. Provide guidance about collecting, evaluating, applying, and protecting sensitive information relating to tribal concerns.

D. Foster good working relationships with tribes.

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.03 Authorities.

A. American Indian Religious Freedom Act of 1978 (P.L. 95-341; 92 Stat. 469; 42 U.S.C. 1996) resolves that it shall be the policy of the United States to protect and preserve for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express, and exercise their traditional religions, including but not limited to access to religious sites, use and possession of sacred objects, and freedom to worship through ceremonials and traditional rites. Federal agencies are directed to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices. The Act, a specific expression of First Amendment guarantees of religious freedom, is not implemented by regulations. Duties pursuant to the Act fall under general administrative responsibilities such as planning and environmental review. It is included here because of legislative linkage with the Archaeological Resources Protection Act (see .03C). (Note: A U.S. Court of Appeals has determined that there is a compliance element in the American Indian Religious Freedom Act, requiring that the views of Indian leaders be obtained and considered when a proposed land use might conflict with traditional Indian religious beliefs or practices, and that unnecessary interference with Indian religious practices be avoided during project implementation, but specifying that conflict need not necessarily bar Federal agencies from adopting proposed land uses in the public interest. Wilson v. Block, 708 F.2d 735, 747 [D.C. Cir. 1983].)

B. National Historic Preservation Act of 1966 (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470) addresses preservation of historic properties, including historical and archaeological districts, sites, buildings, structures, and objects that are eligible for the National Register of Historic Places. Federal agencies must take into account the probable effects of their proposed undertakings on eligible properties. Some properties may be eligible for the National Register because of historical importance to a tribe, including traditional religious and cultural importance. A 1992 amendment to the Act (P.L. 102-575) explicitly directs that properties of traditional religious and cultural importance to an Indian tribe may be determined to be eligible for inclusion on the National Register, and that in carrying out its responsibilities under Section 106 of the Act, a Federal agency shall consult with any Indian tribe that attaches religious and cultural significance to such properties. Determining any property's National Register eligibility follows a criteria-driven evaluation procedure specified at 36 CFR Part 60.

C. Archaeological Resources Protection Act of 1979 (P.L. 96-95; 93 Stat. 721; 16 U.S.C. 470aa) provides for the protection and management of archaeological resources, and specifically requires notification of the affected Indian tribe if archaeological investigations proposed in a permit application would result in harm to or destruction of any location considered by the tribe to have religious or cultural importance. The Act directs consideration of the American Indian Religious Freedom Act (see .03A) in the promulgation of uniform regulations for the Act.

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D. Native American Graves Protection and Repatriation Act of 1990 (P.L. 101-601; 104 Stat. 3048; 25 U.S.C. 3001) establishes that lineal descendants, tribes, and Native Hawaiian organizations have rights of ownership to "cultural items" (i.e., human remains, funerary objects, sacred objects, and objects of cultural patrimony, as defined in the Act), taken from Federal lands and Indian lands after the date of enactment. It requires identification of "cultural items" that were in Federal agencies' and federally funded museums' possession or control before enactment; establishes a requirement and process for agencies and museums to repatriate "cultural items" on request; directs the Secretary to form a review committee to oversee implementation; provides for imposing civil penalties on museums that fail to comply; authorizes grants of funds for tribes, Native Hawaiian organizations, and museums to carry out the Act; requires the Secretary to promulgate regulations; and assigns to U.S. District Courts jurisdiction to adjudicate violations of the Act and to enforce the Act's provisions.

E. Executive Order 13007, "Indian Sacred Sites" (May 24, 1996) directs Federal agencies to manage Federal lands in a manner that accommodates Indian religious practitioners' access to and ceremonial use of Indian sacred sites, and that avoids 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 intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person" (Sec. 4).

F. Presidential Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," directs the heads of departments and agencies to operate within a government-to-government relationship with recognized tribes; to consult openly and candidly with tribal governments prior to taking actions that affect recognized tribal governments; to assess the impact of Federal plans, projects, programs, and activities on tribal trust resources and to consider tribal government rights and concerns during their development; to take appropriate steps to remove procedural impediments to working with tribal governments on activities that affect the trust property and/or governmental rights of the tribes; among other things. The Memorandum was elevated to Order strength by reference in E.O. 13007 (see .03E).

G. Secretarial Order No. 3215, "Principles for the Discharge of the Secretary's Trust Responsibility" (April 28, 2000) provides guiding principles to employees of the Department who carry out the Secretary's responsibility toward Indian trust assets. It defines "Beneficial owner," meaning tribes and individual Indians for whom Indian trust assets are held in trust or restricted against alienation; "Trustee," meaning the Secretary or any person authorized to act as Trustee for Indian trust assets; "Indian trust assets," meaning lands, natural resources, money, or other tangible assets held in trust for Indian tribes and individual Indians or restricted against alienation; and "Trust responsibility," meaning responsibility only toward Indian trust assets as defined. It establishes a series of Trust Principles concerning (for example) protection, management, accounting for, and maintenance of records about Indian trust assets during the discharge of the Secretary's trust responsibility.

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.04 Responsibility.

A. Director, through Assistant Director for Renewable Resources and Planning, has overall responsibility for establishing, implementing, and evaluating policy for meeting BLM's tribal consultation responsibilities.

B. Group Manager for Cultural Heritage, Fossil Resources, and Tribal Liaison is responsible for leading affected staffs in developing, reviewing, and revising BLM's national level tribal consultation policy and procedures, and for maintaining contacts with other Federal bureaus, agencies, and departmental offices in Washington, D.C., regarding the proper consideration of tribal issues and concerns.

C. State Directors within their respective jurisdictions are responsible for:

1. Ensuring that tribal consultation responsibilities are accomplished.
2. Developing technical information, policy guidance, and procedures as needed.
3. Maintaining contacts with other Federal offices at State and regional levels regarding tribal issues and concerns.

D. Field Office Managers, as appropriate, are responsible for:

1. Initiating contact and consulting with tribes pursuant to requirements of laws, executive orders, and regulations cited in .03 and .05.
2. Obtaining, documenting, and using input from tribes when developing plans, actions, and programs, including needs for access to sacred sites as defined in E.O. 13007.
3. Developing protocols, where appropriate, for communication within the framework of the Bureau's government-to-government relationship with tribes.

E. Tribal Liaisons, acting as staff to the Director, State Directors, and Field Office Managers, are responsible for providing professionally sound information, recommendations, and advice regarding tribes' traditional uses of public lands, traditional tribal practices and beliefs, and locations on public lands that may be associated with such practices and beliefs.

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.05 References.

A. BLM Manual Section 8110 - Identifying and Evaluating Cultural Resources. Section 8110.22D gives guidance on locating properties of traditional cultural importance. Section 8110.32F1 and 2 address exceptions to the general exclusion of religious properties from National Register eligibility. Section 8110.33C2 states that properties designated historically or culturally significant by State, local, and tribal governments do not automatically accrue National Register eligibility, but must be evaluated according to the National Register criteria (see .05C).

B. BLM Manual Section 8150 - Permitting Uses of Cultural Resources. Section 8150.12B7 and .13 require that cultural resource use permit applications be reviewed to determine if proposed work would have potentially harmful or destructive effects on locations of religious or cultural importance to Indian tribes, and that tribes be notified and consulted if harmful or destructive effects would occur.

C. 36 CFR Part 60 - National Register of Historic Places. Section 60.4 sets out the criteria and criteria considerations, and the procedures, for determining National Register eligibility

D. 36 CFR Part 800 - Protection of Historic Properties. Regulations of the Advisory Council on Historic Preservation implement Section 106 of the National Historic Preservation Act, including consultation with tribes pursuant to Section 101(d)(6) of the Act (see .03B). The BLM, operating independently of the regulations through agreements with the Advisory Council and the State Historic Preservation Officers (see Manual Section 8120, App. 1), must observe a tribal consultation process comparable to the process in the regulations.

E. 43 CFR Part 7 - Protection of Archaeological Resources. Section 7.7 defines the process for "Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance," pursuant to Section 4(c) of the Archaeological Resources Protection Act (see .03C).

F. 43 CFR Part 10 - Native American Graves Protection and Repatriation Regulations. These regulations cover procedures for complying with the Native American Graves Protection and Repatriation Act.

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.06 Policy.

A. State Directors and Field Office Managers, as appropriate, shall represent the United States in government-to-government meetings with tribes.

B. Field Office Managers shall establish day-to-day working relationships with tribal officials comparable to their working relationships with State and local government officials.

C. Field Office Managers and staffs shall recognize that traditional tribal practices and beliefs are an important, living part of our Nation's heritage, and shall develop the capability to address their potential disruption as a consequence of a proposed BLM land use decision.

D. Field Office Managers and staffs shall facilitate access to public lands for the purposes of religious use and other traditional uses, such as gathering natural resources, and shall avoid unnecessary interference with traditional religious practices.

E. Field Office Managers and staffs shall consult with affected tribes to identify and consider their concerns in BLM land use planning and decision-making, and shall document all consultation efforts.

F. Field Office Managers and staffs shall ensure that information on tribal religious and cultural issues receives good faith consideration during decision-making, and that BLM decisions do not unduly or unnecessarily burden the pursuit of traditional religious or cultural practices.

G. Field Office Managers and staffs shall protect from disclosure to the public sensitive and confidential information about traditional tribal practices and beliefs, and the locations with which they are associated, to the greatest degree possible under law and regulation. Where appropriate, Field Offices shall maintain the confidentiality of sacred sites.



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.07 File and Records Maintenance. See .06E, .06G. Filing requirements are found in the GRS/BLM Combined Records Schedule (Schedule 4).

.08 Relationship to Tribal Governments.

A. Federally Recognized Tribes. The governments of federally recognized tribes are the legal representatives for ensuring that tribal members may exercise rights and privileges held through treaties, executive orders, and agreements with the United States, both on and off reservations. The special legal status of tribal governments requires that official relations with BLM, including consultation pursuant to this Manual Section, shall be conducted on a government-to-government basis. Authorities and responsibilities of specific tribal governments are defined in the constitutions and bylaws of the individual tribes.

B. Alaska Natives. The Alaska Native Claims Settlement Act of 1971 (ANCSA; 43 U.S.C. 1601) created in Alaska both federally recognized tribes and other federally established Alaska Native entities.

1. Alaska Native Tribes. Federally recognized Alaska Native tribes are accorded the same benefits and privileges as federally recognized Indian tribes in the contiguous 48 states. Alaska tribes, as identified by the Bureau of Indian Affairs annually in the Federal Register, are acknowledged to have the immunities and privileges available to other federally recognized tribes by virtue of their government-to-government relationship with the United States, as well as the responsibilities, powers, and obligations of such tribes. An up-to-date tribal listing can be obtained from the designated Native Liaison in the Alaska State Office or a Field Office, or from the headquarters office of the Bureau of Indian Affairs.

2. Alaska Native Corporations. In addition to recognized tribes, the BLM in Alaska routinely works with the native corporations formed under ANCSA, and acknowledges their additional roles in representing their shareholders. The for-profit, business corporations manage the subsurface rights of approximately 44 million acres, identified in the Act to be conveyed to Alaska Natives through the corporations. These federally established, State-chartered corporations, while distinct from tribal governments, also may provide important information for BLM managers. Most native corporations have Web sites that can be located with a normal search.

C. Groups and Communities that are not Federally Recognized. The BLM may consult with non-recognized Native groups and communities at its discretion. However, there is no obligation in the cultural resource laws to do so. Non-recognized groups and communities and their individual members may participate in the BLM's decision making as members of the public.

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D. Indian Individuals. Lineal descendants who may or may not be tribal members have rights to claim human remains and associated funerary objects under the Native American Graves Protection and Repatriation Act (.03D). Individuals' religious observances are protected under the American Indian Religious Freedom Act (.03A) and Executive Order No. 13007 (.03E). Where such individuals are already known to the BLM, direct contact would be possible. However, as a matter of protocol and courtesy, initiation of contacts with tribal members should always be coordinated with tribal officials.

E. Tribal Historic Preservation Officers. (The following paragraphs 1. through 3. are repeated, and renumbered, from BLM Manual Section 8100.08C1.)

1. As authorized in Section 101(d) of the National Historic Preservation Act and subject to the Secretary's approval, Indian tribes may establish historic preservation programs to give them greater roles and responsibilities for preserving historic properties on tribal lands. Tribes with approved programs designate Tribal Historic Preservation Officers (THPO) who may assume any or all of the functions of a State Historic Preservation Officer (SHPO) with respect to tribal land. Assumed functions may include identifying and maintaining inventories of culturally significant properties, nominating properties to national and tribal registers of historic places, conducting Section 106 reviews of Federal agency projects on tribal lands, and conducting educational programs on the importance of preserving historic properties.

a. For tribes with approved programs, Field Office managers consult with the THPO in lieu of the SHPO for undertakings occurring on, or affecting historic properties on, tribal lands.

b. For other tribes, Field Office managers consult a tribally designated representative in addition to the SHPO during review of projects occurring on, or affecting historic properties on, their tribal lands.

2. In accordance with Section 101(d)(6) of the National Historic Preservation Act, Indian tribes often choose to designate the THPO as their tribal representative to assist Federal officials in identifying tribally significant, National Register-eligible properties, potentially affected by a proposed Federal undertaking on non-tribal lands. Although the same individual or office is involved, this is a role completely apart from the THPO's roles with respect to the tribe's preservation program and tribal lands.

a. Concerning non-tribal lands, THPOs do not assume any of the SHPO's functions.

b. Concerning non-tribal lands, Field Office managers consult with THPOs only when they have been designated as tribal representatives for purposes of Section 106, for their assistance in identifying and evaluating properties of traditional religious and cultural importance to the tribe.

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c. Concerning non-tribal lands, THPOs designated as tribal representatives for purposes of Section 106 are acting as tribal representatives, not as THPOs. This distinction and its implications may not always be clear. THPOs do not have management responsibility or authority for tribally significant properties on non-tribal lands.

3. The BLM national Programmatic Agreement (Manual Section 8100, Appendix 13) does not apply to undertakings on tribal lands. A Field Office manager considering an undertaking on tribal lands complies with 36 CFR Part 800, or where the tribe has entered into an agreement with the Advisory Council, with the tribe's preservation regulations.

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Glossary of Terms

(See also Manual Section 8100, Glossary of Terms.)

-A-

Alaska Native: (See "Indian tribe." See also .08B.)

-C-

consultation: the process of identifying and seeking input from appropriate tribal governing bodies, considering their issues and concerns, and documenting the manner in which the input affected the specific management decision(s) at issue.

-G-

government-to-government relationship: the formal relationship that exists between the Federal Government and tribal governments under United States laws. Tribal governments are considered dependent domestic sovereignties with primary and independent jurisdiction (in most cases) over tribal lands. Concerning proposed BLM plans and actions, at least the level of consideration and consistency review provided to State governments must be afforded to tribal governments.

-I-

Indian tribe: any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe. (See Public Law No. 103-454, 108 Stat. 4791, 25 U.S.C. 479a. See also .08.)

-R-

reburial: an action sometimes requested of Federal agencies by lineal descendants or Indian tribes concerning human remains and/or other NAGPRA "cultural items" (see Manual Section 8100 Appendix 9, Sec. 2) that have been repatriated (a) from museum collections; (b) after an authorized intentional excavation and removal; or (c) after removal from the immediate vicinity of their original location following an "inadvertent discovery" (see Manual Section 8100 Appendix 9, Sec. 3(d). See also Handbook H-8120-1, Ch. II.C.)

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-S-

sacred site: "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site." (Quoted from Executive Order 13007, Section 1(b)(iii).)

-T-

tradition: longstanding, socially conveyed, customary patterns of thought, cultural expression, and behavior, such as religious beliefs and practices, social customs, and land or resource uses. Traditions are shared generally within a social and/or cultural group and span generations.

traditional: conforming to tradition.

tribal government: the formal representative governing body of a recognized tribe (as defined in 25 CFR 61 and published annually in the Federal Register).

tribe: (See "Indian tribe." See also .08.)