



United States Department of the Interior



BUREAU OF RECLAMATION
Washington, D.C. 20240

IN REPLY REFER TO:

JUL 02 1993

W-6100

Memorandum

To: All Employees
From: Commissioner
Subject: Indian Trust Policy

Indian trust assets are legal interests in property held in trust by the United States for Indian tribes or individuals. The Secretary of the Interior is the trustee for the United States on behalf of Indian tribes. All Department of the Interior agencies, including the Bureau of Reclamation (Reclamation) share the Secretary's duty to act responsibly to protect Indian trust assets. The attached document sets forth Reclamation's policy to protect Indian assets from adverse impacts of its actions.

By copy of this memorandum I am directing the Assistant Commissioners of Program, Budget, and Liaison and Resources Management to incorporate into existing environmental directives this policy by October 1, 1993.

Attachment

Bureau of Reclamation
Indian Trust Asset Policy

This document describes the Bureau of Reclamation's (Reclamation's) policy to protect Indian trust assets from adverse impacts of Reclamation programs and activities, thereby better enabling the Secretary of the Interior (Secretary) to fulfill his responsibility to Indian tribes. In furtherance of this policy, Reclamation will modify its National Environmental Policy Act (NEPA) Handbook procedures.

Background

Indian trust assets (trust assets) are legal interests in property held in trust by the United States for Indian tribes or individuals. Examples of things that may be trust assets are lands, minerals, hunting and fishing rights, and water rights. The United States, with the Secretary as the trustee, holds many assets in trust for Indian tribes or Indian individuals.

The United States has an Indian trust responsibility (trust responsibility) to protect and maintain rights reserved by or granted to Indian tribes or Indian individuals by treaties, statutes, and executive orders, which rights are sometimes further interpreted through court decisions and regulations. This trust responsibility requires that all Federal agencies, including Reclamation, take all actions reasonably necessary to protect trust assets.

Policy

Reclamation will carry out its activities in a manner which protects trust assets and avoids adverse impacts when possible. When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation.

To carry out this policy, Reclamation will modify its NEPA compliance procedures to require evaluation of the potential effects of its proposed actions on trust assets. Reclamation will perform interdisciplinary analyses to assess potential impacts to trust assets and the consequences of such impacts for the Indian people who beneficially own the assets. The procedure shall include format changes in all NEPA compliance documents to highlight all trust asset impacts. These changes shall include:

- a statement that no impacts to trust assets are anticipated, when such is the case;
- a clearly labeled section discussing anticipated impacts to trust assets;
- an Indian trust asset item in the Categorical Exclusion Checklist.



IN REPLY REFER TO

D-5120

United States Department of the Interior



Mark

BUREAU OF RECLAMATION
DENVER OFFICE
P.O. Box 25007
Building 57, Denver Federal Center
Denver, Colorado 80225-0007

DEC 15 1993
MEMORANDUM

To: Assistant Commissioner - Engineering and Research
Attention: D-3000
Assistant Commissioner - Human Resources
Attention: D-4000
Assistant Commissioner - Program, Budget, and Liaison
Attention: W-6000
Assistant Commissioner - Administration
Attention: D-7000
Regional Director, PN, MP, LC, UC, GP
Attention: 100

From: J. William McDonald
Assistant Commissioner - Resources Management

Subject: National Environmental Policy Act Handbook Procedures
to Implement Indian Trust Asset Policy (NEPA)

The Commissioner has approved the subject procedures (enclosed) and directed that they be implemented immediately. As part of the implementation of the enclosed procedures, the Commissioner has directed that an Indian trust asset coordinator be appointed at the regional level to oversee compliance activities (Commissioner's memorandum dated November 29, 1993, enclosed).

In addition, the enclosed procedures are amended to include a November 8, 1993, Secretarial Order 3175 directive that environmental assessments, environmental impact statements, management plans, etc., should ". . . clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Department's trust responsibilities." A copy of Secretarial Order 3175 is also enclosed for your information.

If you have questions concerning the procedures, please contact Rebecca Westra at (303) 236-9336, extension 301. Questions concerning the Indian trust asset policy being implemented by these procedures should be directed to Adrienne Marks at (202) 208-5105.

Enclosures

Copies to persons on attached sheet.

cc: Commissioner, Attention: W-1000
Principal Deputy Commissioner, Attention: W-1010
Deputy Commissioner, Attention: D-1000
Assistant Commissioner - Program, Budget, and Liaison
Attention: W-6100 (Marks)
Regional Director, Boulder City NV
Attention: LC-108 (Saint)
Regional Director, Salt Lake City UT
Attention: UC-710 (Jacobson)
Regional Director, Billings MT
Attention: GP-130 (Rawlings)
(w/encl to each)

INDIAN TRUST CHAPTER: ASSESSMENT of IMPACTS on INDIAN TRUST ASSETS

ITA-1 Indian Trust Asset (ITA) Policy

The United States has a trust responsibility to protect and maintain rights reserved by or granted to American Indian (Indian) tribes or Indian individuals by treaties, statutes, and executive orders. These rights are sometimes further interpreted through court decisions and regulations. This trust responsibility requires that all Federal agencies, including Reclamation, take all actions reasonably necessary to protect ITAs.

Reclamation's Indian Trust Asset Policy was signed by the Commissioner on July 2, 1993. The Policy states that Reclamation will carry out its activities in a manner which protects ITAs and avoids adverse impacts when possible. When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation. Under no circumstances should Reclamation engage in a Fifth Amendment taking of ITAs without statutory authority and adequate compensation.

ITAs are legal interests in property held in trust by the United States for Indian tribes or individuals, or property that the United States is otherwise charged by law to protect. Examples of resources that could be ITAs are lands, minerals, hunting and fishing rights, water rights, and instream flows.

ITA-2 Applying NEPA Early - Identifying ITAs

The NEPA process should consider potential impacts on ITAs at the earliest reasonable time in the decisionmaking process. The initial step will be to identify ITAs in or near the affected area. ITA identification should involve consultation with: (i) potentially affected tribes, Indian organizations or individuals, and (ii) the Bureau of Indian Affairs, the Office of American Indian Trust, the Solicitor's Office, Reclamation's Native American Affairs Office (W-6100), or the Regional Native American Affairs coordinator, all of which are in the Department of the Interior. Refer to Section 2-1, "Apply NEPA Early," for additional guidance.

ITA-3 Categorical Exclusion Checklist (CEC)

A question addressing impacts to ITAs is included in the revised CEC (Figure 2.4). Contact with the entities listed in Section ITA-2, "Applying NEPA Early - Identifying ITAs," should be established to ascertain general locations and types of ITAs in or near the affected area. A signature line has been added to the CEC for concurrence in the ITA response by the appropriate Regional Director, Assistant Commissioner, or the designated ITA representative. Refer to Sections 2-2, "Categorical Exclusions," and 2-3, "Categorical Exclusion Checklist," for additional guidance.

ITA-4 Environmental Assessments (EAs) and Environmental Impact Statements (EISs)

The format and contents of EAs, EISs, and EIS Supplements required by Chapter 2, "Initiating the NEPA Process," and Chapter 4, "The Environmental Impact Statement," will be supplemented by the sections discussed below.

The methodology for determining whether ITAs exist will include discussions with the entities listed in Section ITA-2, "Applying NEPA Early - Identifying ITAs," and should include a review of relevant treaties, statutes, and executive orders. Relevant agreements and contracts should also be considered in the impact analysis.

A. Format and Content -

1. **Summary** - When there is a summary, a labeled section will briefly describe any expected impacts of the proposed action on ITAs. If there are no ITAs, or if no impacts to ITAs are anticipated, a statement to that effect will be included. The summary table will include impacts to ITAs.

2. **Proposed Action and Alternatives** - When it is determined there will be potential impacts to ITAs, a labeled section will present those mitigation measures to protect ITAs which are part of the alternatives. Any additional mitigation measures will be included in the Environmental Commitments Section. Effort should be made to seek agreement with affected tribes or owners of allotted lands as to reasonable ITA protection, mitigation or compensation. Agreement may also be necessary with the Corps of Engineers, Fish and Wildlife Service, Bureau of Indian Affairs, and other responsible Federal agencies.

3. Affected Environment and Environmental Consequences

a. Separate Chapter on Affected Environment - When there is a separate chapter on the Affected Environment and ITAs are located in or near the potentially impacted area, the chapter will contain a labeled section identifying potentially impacted ITAs, or a statement that there are no ITAs. This section will include full descriptions of the ITAs or a summary of ITAs described elsewhere in the chapter.

b. Separate Chapter on Environmental Consequences - When potential impacts to ITAs are identified, the chapter describing environmental impacts will contain a labeled section on ITAs. The section will include a full analysis of ITA impacts or a summary of impacts fully described elsewhere in the chapter. If the alternative would have no impact on ITAs, this should be stated.

c. Combined Chapter on Affected Environment and Environmental Consequences - The chapter will include a statement that there will be no impacts to ITAs, or a labeled section including the information discussed above in 3.a. and 3.b.

4. Consultation and Coordination - The chapter will include a separate, labeled section summarizing or describing public involvement activities undertaken to identify and assess impacts to ITAs.

5. Attachments - Environmental Commitments - The attachment will identify all measures included in the proposed action to avoid, mitigate, or compensate for impacts to ITAs.

B. Public Involvement -

A diligent effort will be made to elicit an appropriate level of input from potentially affected Indian communities in preparing and reviewing the NEPA compliance document. Public involvement should be used to: (i) assist to identify potentially affected ITAs and assess potential impacts; (ii) provide potentially affected Indian people with information about the actions being studied; and (iii) involve potentially affected Indian communities in the decisionmaking process.

The public involvement program for actions potentially affecting ITAs will include consultation with interested and affected individuals, organizations, agencies, tribal governments, and other governmental entities having jurisdictional responsibilities for the assets. Refer to Sections 2-4.C and 3-7, "Public Involvement," for further information.

ITA-5 Other Actions Associated with the Environmental Impact Statement (EIS)

A. Notice of Intent (NOI) -

When appropriate, the Federal Register NOI to prepare the EIS will briefly: (i) address the intent to assess potential impacts to ITAs, and (ii) request input about concerns or issues related to ITAs from potentially affected Indian groups and individuals, the general public, and state and Federal agencies. Refer to Section 3-5, "Notice of Intent," for additional information.

B. Notice of Availability (NOA) -

The Federal Register NOA for both the draft and final EIS will, if appropriate, refer to the analysis of impacts to ITAs.

ITA-6 Review, Filing, and Distribution

Procedures specified in Sections 2-5.C, "Processing," and 3-10, "Review, Filing, and Distribution," are amended so that potentially affected and interested Indian tribes, communities, and individuals will be placed on the distribution list to receive EAs and EISs.

ITA-7 Findings of No Significant Impact (FONSIs) and Records of Decision (RODs)

The FONSI or ROD will include: (i) a statement that there would be no impacts to ITAs, or (ii) a statement describing the expected impacts of the proposed action on ITAs, (iii) a listing of unresolved ITA issues, (iv) a list of any commitments to prevent, mitigate, or compensate adverse impacts to ITAs, and (v) a summary of any mitigation monitoring and enforcement programs related to ITAs. Refer to Section 2-5, "Finding of No Significant Impact," and Section 7-1, "Record of Decision," for additional information.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240



ORDER NO. 3175

Subject: Departmental Responsibilities for Indian Trust Resources

Sec. 1 Purpose. This Order clarifies the responsibility of the component bureaus and offices of the Department of the Interior to ensure that the trust resources of federally recognized Indian tribes and their members that may be affected by the activities of those bureaus and offices are identified, conserved and protected. It is the intent of this Order that each bureau and office will operate within a government to government relationship with federally recognized Indian tribes and that the Bureau of Indian Affairs provide timely and accurate information upon the request of their Interior Department counterparts.

This Order is for internal management guidance only, and shall not be construed to grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations.

Sec. 2 Authority. This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262).

Sec. 3 Responsibility. The heads of bureaus and offices are responsible for being aware of the impact of their plans, projects, programs or activities on Indian trust resources. Bureaus and offices when engaged in the planning of any proposed project or action will ensure that any anticipated effects on Indian trust resources are explicitly addressed in the planning, decision and operational documents; i.e., Environmental Assessments, Environmental Impact Statements, Management Plans, etc., that are prepared for the project. These documents should clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Department's trust responsibilities. Bureaus and offices are required to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect, the appropriate office of the Bureau of Indian Affairs, and the Office of the Solicitor (for legal assistance) if their evaluation reveals any impacts on Indian trust resources. All consultations with tribal governments are to be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposal on trust resources.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240



ORDER NO. 3175, Amendment 1

Subject: Departmental Responsibilities for Indian Trust Resources

Section 4 of Secretary's Order No. 3175, dated November 8, 1993, is amended to read as follows:

Sec. 4 Effective Date. This Order is effective immediately. Its provisions shall remain in effect until they are converted to the Departmental Manual, or until it is amended, superseded, or revoked, whichever occurs first. In the absence of the foregoing actions, however, this Order will terminate and be considered obsolete on June 1, 1995.

Secretary of the Interior

Date: August 17, 1994



United States Department of the Interior

BUREAU OF RECLAMATION
Washington, D.C. 20240

IN REPLY REFER TO:

OCT 21 1994

MEMORANDUM

To: Director, Reclamation Service Center
Regional Director, PN, MP, LC, UC, GP

From: Daniel P. Beard
Commissioner /s/ Daniel P. Beard

Subject: Indian Trust Asset Policy: Guidance for Implementing

Attached is a document dated August 31, 1994, containing a series of questions and answers about Reclamation's Indian trust policy and National Environmental Policy Act (NEPA) implementing procedures. This document incorporates comments provided by Reclamation's Denver and Regional Offices, as well as by the Solicitor's Office and the Office of American Indian Trust.

Reclamation has recently become the first Interior bureau to be found in "substantial compliance" with Secretarial Order 3175, which requires all bureaus to develop procedures for protecting Indian trust assets. As part of the compliance process, Reclamation has agreed that this questions and answers document shall be provided to all persons responsible for carrying out its trust asset policy and procedures, included with any training materials on Indian trust responsibilities, and included as a supplement to general NEPA materials. Please insure that the appropriate distribution is made.

Although no changes are planned for this document in the immediate future, comments are still welcome. They should be directed to:

Adrienne Marks, code W-6100
fax: 202-208-6688
lan: AMARKS

Attachment

cc: Director, Operations

bc: W-6100 (2), W-5000 (Troast), D-5300 (BGlenn)
LC-108 (Saint), LC-150 (Peterson), GP-400 (Byers)
UC-710 (Jacobson), PN-150 (JLawrence), MP-130 (PWelch)
(with attachment)

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August 31, 1994

**BUREAU OF RECLAMATION
INDIAN TRUST ASSET
POLICY AND
NEPA IMPLEMENTING PROCEDURES**

**QUESTIONS AND ANSWERS ABOUT
THE POLICY AND PROCEDURES**

BUREAU OF RECLAMATION
INDIAN TRUST ASSET
POLICY AND
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QUESTIONS AND ANSWERS ABOUT
THE POLICY AND PROCEDURES

Forward: This document provides answers to questions about Reclamation's Indian trust asset policy and the NEPA procedures implementing it. The primary audience is people who have no previous experience in dealing with Indian trust assets, but who now share the responsibility for carrying out the policy. An attempt was made to explain concepts as clearly as possible. However, as the subject of trust assets is inherently legalistic, some of the answers unavoidably share this characteristic. Despite this, these answers are not definitive legal opinions; whenever there is doubt about a legal point, the Solicitor's Office should be consulted.

Abbreviations used:

CEC - NEPA Categorical Exclusion Checklist
Interior - Department of the Interior
ITA - Indian Trust Asset
NEPA - National Environmental Policy Act
NAAO - Native American Affairs Office
Reclamation - Bureau of Reclamation
Tribe - Federally recognized Indian tribe

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Part I: ITA basics: What they are and where they are

I-1 - What are ITAs?

ITAs are "legal interests" in "assets" held in "trust" by the Federal Government for federally recognized Indian tribes or individual Indians.¹

"Assets" are anything owned that has monetary value. The asset need not be owned outright, but could be some other type of property interest, such as a lease or a right to use something. Assets can be real property, physical assets or intangible property rights.

A "trust" has three components: the trustee, the beneficiary, and the trust asset(s). The beneficiary is also sometimes referred to as the "beneficial owner" of the trust asset. In this trust relationship, title to ITAs is held by the United States (trustee) for the benefit of an Indian tribe or Indian individuals (beneficiary).

A characteristic of an ITA is that it cannot be sold, leased, or otherwise alienated without the United States' approval. While most ITAs are located on the reservation, they can also be located off-reservation. Examples of things that can be ITAs are lands, minerals, water rights, hunting and fishing rights, other natural resources, money, or claims.

"Legal interest" means there is a property interest for which a legal remedy, such as compensation or injunction, may be obtained if there is improper interference. ITAs do not include things in which a tribe or individuals have no legal interest. For example, off-reservation sacred lands in which a tribe has no legal property interest are not ITAs. In such a case, if other tribal interests (e.g., religious and cultural) could be impacted by a Reclamation action, these interests should be addressed in the cultural resources and social impacts assessments.

I-2 - Are listings of ITAs available?

There is not a comprehensive listing of ITAs for tribes and individual Indians, although such listings may exist for

¹These terms defined in Part II of this document.

some tribes. The Office of American Indian Trust is charged with assisting the Bureau of Indian Affairs to develop inventory listings of ITAs for all tribes. However, a lack of funding has prevented this inventory from progressing beyond an early stage. In the absence of an inventory, individual determinations must be made whenever it is essential to determine the trust status of a particular asset. As will be discussed below, it is not always necessary to determine this status.

I-3 - What is the distinction between "Indian trust resources" and "ITAs"?

Reclamation's trust policy does not distinguish between these terms, although there are other situations which do distinguish. For example, the implementing regulations for the Indian Self-Determination and Education Assistance Act refers to "trust assets" as one type of "trust resources."² Interior's Order 3175 refers only to Departmental responsibilities for Indian "trust resources." Reclamation's ITA policy extends to the same property covered by this order.

I-4 - Where are ITAs found?

ITAs can be found anywhere. While most ITAs are found on reservation lands, they can also be found off-reservation. When dealing with hunting, fishing, and water rights, it is especially important to consider off-reservation ITAs.

As noted below in the cultural resource discussion, the land status can sometimes affect whether something is considered an ITA. That is, whether the resource is located on public, trust, or non-trust private lands could affect the determination as to whether a thing is an ITA.

I-5 - Are ITAs found on ceded lands?

Ceded lands are a special type of lands that can be located on or off-reservation. These are lands that were Indian lands before ownership was formally transferred to the United States. ITAs can sometimes be found on ceded lands; this needs to be determined on a case-by-case basis.

² 25 CFR § 272.2(r)

I-6 - When is a cultural resource an ITA?

As defined in federal statutes and regulations, cultural resources are tangible property recognized as important to the nation's history and culture. Cultural resources include archeological sites, buildings and structures, locations, and landscapes. They are the subject of historic preservation laws.

In the absence of a treaty or act of Congress specifying otherwise, the trust status of a cultural resource generally depends on the status of the land on which the resource is found.

- Indian trust lands³ - Cultural resources located on Indian trust lands are often the property of the tribe or Indian beneficially owning those lands.⁴ These cultural resources are frequently ITAs.

- Private lands (or "fee" lands) - Private lands can be trust or non-trust lands. There are generally no trust responsibilities⁵ for archeological resources found on non-trust private lands, whether owned by Indians or non-Indians. Clarification should be sought when the term "private lands" is used, as the term is often used to refer only to non-trust lands.

- Public lands - Generally, cultural resources located on public lands belong to the Federal Government.⁶ As such, they are usually not ITAs.

I-7 - Are the human remains and "cultural items" that NAGPRA deals with trust assets?

Generally not. The Native American Graves Protection and Repatriation Act (NAGPRA), among other things, recognizes Indian ownership of human remains and certain cultural items located on lands within the exterior reservation boundary

³This term defined below in Part II.

⁴43 CFR § 7.13(b)

⁵This term discussed below in Part II.

⁶e.g., 16 U.S.C. § 470cc(b)(3)

and on public lands.⁷ (At this time it is not clear how the Department of the Interior implementing regulations will deal with non-Indian owned lands within exterior reservation boundaries.) Human remains and NAGPRA cultural items are not given trust status by virtue of NAGPRA. If in some situations they do have trust asset status, they derive it from some other source, such as land status, treaty or another statute.

Part II: Other background concepts and definitions

II-1 - What is meant by "Indian trust responsibility"?

Many Indian assets are held in trust by the United States for the benefit of an Indian tribe or Indian individual. Such trust status is derived from rights reserved by or granted to Indian tribes or individuals by treaties, statutes, and executive orders. The United States has a trust responsibility to protect and maintain these trust assets and rights. This responsibility requires that the United States, as trustee, deals with the trust assets in the same manner a prudent person would deal with his own assets. All federal agencies, including Reclamation, must take reasonable actions necessary to protect ITAs. The rationale is that where the government has power, it has the duty to exercise that power in a responsible manner.

II-2 - What are Indian trust lands?

Not all lands owned by Indians are trust lands. Trust lands must have been given that status by virtue of a Congressional or Presidential action. A hallmark of trust lands is that they cannot be alienated (that is, sold, leased, used for easements, or have the Indian owner's right to use them lessened) without approval from the United States. The United States holds legal title to trust lands.

Trust lands may be beneficially owned by a tribe or by individual Indians. Individually owned trust lands can be "allotted" or "non-allotted." Allotted lands are former reservation or publicly withdrawn lands held in trust by the United States for individuals, sometimes referred to as "allottees."

⁷25 U.S.C. § 3001(15) and § 3002

"Restricted lands" are similar to trust lands in that certain uses are subject to approval by the government. However, they are similar to Indian-owned private lands in that the Indian owners hold title to the land. Although resources found on restricted lands are not ITAs, the United States has a trust-like responsibility when exercising its approval authority. This means that the United States could be found liable for inadequately protecting Indian resources on restricted lands. For purposes of Reclamation's trust policy, impacts to resources on restricted lands and proposed mitigation measures should be documented as for trust lands.

"Fee lands" are private lands which may or may not be trust lands.

II-3 - Are "on-reservation lands" the same as "trust lands"?

"On-reservation land" is not synonymous with "trust land." When something is referred to as being "on-reservation," it usually means that it is located within the exterior reservation borders. Because of historical events, many reservations contain lands of different status, including tribal trust lands, allotted trust lands, privately owned lands, and public lands. When a reservation is said to have a "checkerboard" pattern, this refers to a mixture of trust and non-trust lands distributed in a pattern resembling a checkerboard. Because of this, it is important to ascertain the status of lands within the affected environment, and not to assume that because certain parcels of land are or are not trust lands, that the neighboring lands must have the same status.

II-4 - What is meant by the terms: "Indian," "Indian tribes," "Indian governments," "Indian communities," and "Indian individuals"?

These definitions are provided to facilitate understanding of terms used in this document and in Reclamation NEPA procedures; they are not intended to be comprehensive or to replace other definitions used by Reclamation.

"Indian individuals" are persons who are members of an Indian tribe.

"Indian tribes" are Indian tribes, bands, nations, and other organized groups or communities of Indians which are

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recognized by the Secretary of the Interior as: (i) eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and (ii) possessing powers of self-government.

"Indian governments" are tribal governments, councils, organizations, and other governing bodies organized to exercise powers of government usually within a defined geographical boundary.

"Indian communities" are communities, villages, pueblos, towns, and groups of Indian people who have common interests and are living within a common jurisdiction of an Indian government.

II-5 - What is Departmental Order No. 3175?

The requirements of this order are similar to those of Reclamation's ITA policy: Interior bureaus and offices must explicitly address anticipated effects on ITA's in planning, decision and operational documents, and explain how their decisions are consistent with the Department's trust responsibilities. When impacts are identified, there must be consultations with the recognized tribal government having jurisdiction over the affected ITAs, the BIA, and the Solicitor's office. The order is dated November 8, 1993, and will expire October 1, 1994, unless extended.

Reclamation has conferred with the Office of American Indian Trust to determine that compliance with Reclamation's trust asset policy and procedures (as interpreted by these questions and answers) is adequate to insure compliance with the Departmental Order. Reclamation's ITA policy and procedures will remain in effect until modified, and will be unaffected by the expiration of the Departmental Order.

II-6 - What is the nature of Indian tribal sovereignty and what does "government-to-government" mean?

The political relationship between the United States and federally recognized Indian tribes is unique from all other relationships maintained by the United States. This relationship is based on the nature of Indian tribes, which have been described as "domestic dependent nations." Tribal governments are unlike fully sovereign nations, such as Great Britain, and are unlike entities with derivative sovereign powers, such as states. Tribes have the power to

August 31, 1994

govern their own affairs and are not subordinate to State governments. Tribes should not routinely be treated through federal-state processes, but through processes upholding federal Indian law and policy and not impinging upon tribal sovereignty.

"Government-to-government" is the United States' policy for working with federally recognized Indian Tribes. This policy recognizes the unique aspects of tribal governments and tries to insure that tribes are not treated as "just another" interest group. It requires that federal agencies design solutions and tailor federal programs, in appropriate circumstances, to address specific or unique needs of Indian tribes.

Part III: Applying the procedures

III-1 - Do the ITA policy and NEPA implementing procedures apply to completed projects?

The responsibility enunciated in the policy statement concerning protecting ITAs from adverse impacts of Reclamation actions applies in all situations: to completed, operational projects as well as to new actions. However, Reclamation deemed it best to use the NEPA process to implement the ITA policy. The NEPA compliance process is triggered by "federal actions." This means there are no procedures at this time to deal with ITAs affected by operational, completed projects, absent an action triggering NEPA compliance. Nevertheless, if it is known that an operational project is adversely impacting trust assets, appropriate measures should be taken to eliminate or mitigate such impacts. Failing to do this could expose the government to increased liability.

Part IV: Assessing impacts to ITAs

IV-1 - Who can assist in identifying ITAs within the affected environment?

When there is doubt as to whether something is an ITA, the following entities should be consulted: potentially affected tribes or Indian individuals, the Solicitor's Office, the Bureau of Indian Affairs, the NAAO, or the

August 31, 1994

regional Native American Affairs Coordinator in those regions where such a position exists. ITA identification should become easier with experience. As the determination of ITA status is essentially a legal issue, the involvement of the Solicitor is important when it is essential to state with certainty if something is an ITA.

IV-2 - Is it always necessary to identify all ITAs located within the affected environment?

Potentially impacted resources that could be ITAs should be identified. However, for purposes of carrying out the ITA policy, it may not always be essential to determine with certainty if a particular resource is an ITA. For example, if it is known that a resource will not be impacted, or if it is known that a resource will be impacted but the owners of the affected trust asset and the United States as trustee are satisfied with the adequacy of mitigation proposed for a different reason, it would probably not be essential to determine if the resource is an ITA. In such cases, if the trust status of the resource is unknown, a discussion of the resource should be included in the sections of the NEPA compliance document dealing with ITAs, and the doubt concerning the trust status noted.

IV-3 - Is it necessary to describe the precise location of all potentially affected ITAs in the NEPA document?

The description of the location should be adequate to enable the decisionmaker to understand that potential impacts to ITAs were considered. It is anticipated that there could be times when a tribe does not want information about the precise locations of sensitive areas to be published. When possible, this preference should be honored.

Public disclosure for NEPA is governed by the Freedom of Information Act. An exception is provided for cultural resources covered by the National Historic Preservation Act. This latter statute authorizes Reclamation to withhold from public disclosure information about the location, character, or ownership of a cultural resource if the disclosure may cause an invasion of privacy, risk harm to the resource, or impede the use of a traditional religious site.^a No disclosure exemption is currently available for purely

^a16 U.S.C. § 470-2(a)

religious sites, although one might be created by the pending Native American Cultural Protection and Free Exercise of Religion bill.

IV-4 - What type of ITA impacts should be considered?

Actions that could impact the value, use or enjoyment of the ITA should be analyzed as part of the ITA assessment. Such actions could include interference with the exercise of a reserved water right, degradation of water quality where there is a water right, impacts to fish or wildlife where there is a hunting or fishing right, noise near a reservation when it adversely impacts uses of reservation lands.

Under the procedures, all impacts, both positive or negative, should be analyzed and discussed.

IV-5 - When ITAs are present, when is it appropriate to check "No" to the ITA item on the CEC?

"No" can be checked in the following situations:

- When there are no impacts.
- When all impacts are positive and non-significant. Any impacts should be documented and attached to the CEC.
- When impacts are negative, non-significant, can be adequately mitigated or compensated, and the adequacy of the mitigation or compensation is not in dispute. Any impacts and mitigative commitments should be documented and attached to the CEC.

IV-6 - How should Reclamation consider effects to cultural resources that may be ITAs?

None of Reclamation's other cultural resource responsibilities under NEPA, the National Historic Preservation Act (NHPA), and the Archaeological Resources Protection Act (ARPA) and their implementing regulations are affected by the changes in its NEPA procedures. These responsibilities are briefly summarized in Part VI of this document.

IV-7 - Why is it important to perform interdisciplinary studies to assess ITA impacts?

Reclamation believes it can make better decisions concerning potential impacts to ITAs by following an interdisciplinary approach. For example, when does an impact on an ITA cause a net loss to an Indian beneficial owner? Or, when do adverse social impacts on an Indian community outweigh a potential economic gain? Or, what are "reasonable" actions that a prudent person should take to protect ITAs and what are "unreasonable" actions? To resolve these questions, an interdisciplinary analysis should be performed to identify potential impacts and reasonable measures that could prevent or mitigate the adverse impacts.

IV-8 - Should social and cultural values be considered when addressing impacts on ITAs?

Yes. Social and cultural values should be considered to determine the full extent of the impacts and to define what measures to prevent the impacts are reasonable in view of the circumstances. If only economic impacts on physical assets were considered, bad decisionmaking could result. ITAs have economic value, but this may not be their only value; they may also have social or cultural values and impacts to the physical assets may affect social or cultural values in addition to economic value. Two examples follow.

Example 1: Assume a certain parcel of trust land would be adversely impacted as a result of a proposed action, but the economic impacts would be more than offset through project benefits, giving the Indian beneficial owner of the ITA a net economic gain. Assume also that this parcel was particularly important to the tribe as a sacred site. The negative social impacts of this project may outweigh the economic benefit.

Example 2: Assume an ITA would be impacted so as to cause a net economic loss; e.g., assume some tribal farm lands would be converted to wetlands as the result of an agency action. Assume that during the public involvement process, the tribe whose land is affected indicates that the positive cultural impacts associated with the wetlands creation would more than compensate them for the economic loss. The positive cultural benefits would probably be deemed to offset the economic loss, although the basis for this conclusion would need to be carefully documented.

IV-9 - Should the Indian tribal government always be the primary point of contact?

The tribal government should be the primary point of contact in most cases. There may, however, be some cases when another entity or individuals should be the primary point of contact, although even in these cases the tribal government should be notified as soon as practical of the situation. For example, when the only potentially impacted resources are allotted lands, the owners of the allotted lands would probably be the primary contact and the tribal government the secondary contact. Every situation needs to be assessed on a case-by-case basis. In all cases the public involvement program should include all affected and interested individuals and groups, including the BIA.

IV-10 - What is the role of the Bureau of Indian Affairs (BIA) in dealing with ITAs?

When tribes or individual Indians sell, lease, impact by allowing a right-of-way, or otherwise alienate or encumber ITAs, approval must be given by the Secretary of the Interior. This approval responsibility is delegated to the BIA in all cases except in parts of Oklahoma. For example, if Reclamation wanted to acquire a right-of-way across reservation lands, the contract would generally require BIA approval. For those cases when BIA lacks approval authority, such as when dealing with some restricted lands, the BIA will usually perform a field review to determine if the transaction should be approved. Therefore, when a proposed action includes a possible sale, lease, or other alienation or encumbrance of ITAs or restricted lands, Reclamation should keep the BIA informed.

IV-11 - What kind of input is required from the tribes or other affected Indians?

Reclamation NEPA procedures require Reclamation to have a public involvement program designed to elicit an appropriate level of input from Indian persons and entities at all stages of the NEPA compliance process. They require consultation with interested and affected individuals, organizations, agencies, tribal governments, and other governmental entities. Additionally, the government-to-government policy requires that tribal governments be consulted to the greatest extent practicable concerning actions with potential affects on the tribe, tribal ITAs, or

August 31, 1994

ITAs held in trust for individual tribal members.

MA significant concern expressed by Indians has been that governmental agencies frequently do not take the time to determine where the decisionmaking authority lies within the tribal system. Because of this, the agency does not deal with the "right" people during consultation and public involvement processes. To avoid this, adequate time and care should be taken to learn about the tribe and its decisionmaking system.

IV-12 - How should the NEPA document deal with situations in which the tribe and the United States disagree about whether a resource is an ITA?

If the resource would be impacted as a result of the proposed action and mitigation is not otherwise planned, it is necessary to state clearly the United States' position that the resource is not an ITA. However, the tribe's view should also be stated, so that the decisionmaker is aware of the dispute.

As discussed earlier in Part II, there are situations in which it is not necessary to determine the trust status of a particular resource. If one of these situations applies, it may be possible to avoid stating the United States' view on whether the asset is an ITA.

One example as to how a dispute could be discussed in an Environmental Assessment or Environmental Impact Statement (EIS) follows:

No adverse impacts to Indian trust assets are anticipated from the preferred alternative. However, flood frequency reduction measures for other alternatives may include dedicating up to one million acre-feet of lake space to flood control. The _____ Tribe is concerned that this flood frequency reduction method would prevent the full development of its irrigation project.

Reclamation concluded that no Indian trust assets were located within the river corridor. However, the _____ Tribe has asserted that it does have trust assets within its reservation boundary and that these are affected by dam operations. The claimed resources include fish, vegetation, wildlife, and cultural resources. Even though Reclamation does not agree with

this claim, impacts to the claimed resources were assessed as part of this EIS. The conclusion was that the restricted fluctuating and steady flow alternatives (including the preferred alternative) would have beneficial impacts on fish, vegetation, wildlife, and cultural resources relative to the No Action Alternative. A detailed analysis of the impacts on these resources for each alternative are described earlier in this chapter.

IV-13 - What happens if Indian communities disagree with Reclamation's conclusions concerning impacts to their ITAs?

The disagreement should be discussed in the NEPA document for consideration by the decisionmaker. Following the decision, the community would have the same channels of appeal open to other groups who disagree with conclusions reached by an administrative agency: they can appeal informally to the agency to reconsider its conclusions; or they can appeal formally if they feel the agency has acted in an arbitrary and capricious manner or that the agency failed to follow its own procedures.

Part V: Mitigation

V-1 - How do we mitigate or compensate for significant adverse effects?

The first strategy should be to avoid causing significant adverse impacts. When this is not possible, an attempt should be made to minimize such impacts. If adverse impacts do occur, the next step is to identify mitigation or compensation measures to offset adverse impacts so that there is no net loss to the Indian beneficial owners of the asset.

Mitigation determinations should be done as they are now, by consulting with affected Indian entities, appropriate state and federal agencies and using mitigation procedures as specified in Reclamation Instructions (R.I. 376.13).

Compensation, using current Reclamation procedures, is also an option when dealing with ITA impacts. Compensation may involve money or exchanging the damaged real property with other real property. Compensation should be based upon reviewed and approved appraisals and assessments, unless an

authorized official approved a negotiated settlement as provided for in 49 CFR 24.102(i).

Agreements between Reclamation and the Indian beneficial owners concerning the adequacy of the mitigation or compensation may require BIA approval of the tribal-Reclamation agreement. In some cases, Congressional approval may be required.

V-2 - Must an environmental commitment plan be approved by the affected tribe prior to its implementation?

It need not be "approved" by the affected tribe, but it is strongly preferred that the tribe support the proposed environmental commitment plan, especially insofar as it pertains to mitigating anticipated impacts to ITAs. If it is known that an affected tribe does not support the plan, this should be discussed in the NEPA document for consideration by the decisionmaker.

If an affected tribe does not support the plan, it could protest the plan as discussed above. Additionally, a tribe could decline to enter into agreements necessary to carry out the proposed action, making it impossible to implement.

Part VI: Interrelationship of ITA policy and procedures and other statutes and regulations

VI-1 - What other NEPA CEQ procedures pertain to Indian people or ITAs, and how do they relate to ITA procedures?

The NEPA statute does not specifically mention Native Americans, Indian tribes, Indian lands, or ITAs. However, its CEQ implementing regulations provide guidance about how they should be considered during the NEPA process. These include the following provisions:

(a) Federal agencies are to consult with Indian tribes early in the NEPA process. 40 CFR § 1501.2(d)(2)

(b) Affected Indian tribes are to be invited to participate in the scoping process. 40 CFR § 1501.7(a)(1)

(c) During the analysis of environmental consequences to an Indian reservation, discussions must consider possible conflicts between the proposed action and the objectives of

Indian land use plans, policies, and controls. 40 CFR § 1502.16(c)

(d) Indian tribes must be invited to comment on a draft EIS when the effects may be on a reservation. 40 CFR § 1503.1(a)(2)(ii)

(e) As part of the public involvement process, notice must be provided to Indian tribes when effects may occur on reservations. 40 CFR § 1506.6(b)(3)(ii)

(f) When effects are on an Indian reservation, an Indian tribe may become a cooperating agency by entering into an agreement with the lead agency. 40 CFR § 1508.5

Reclamation's procedures pertaining to ITAs are compatible with these, in that they expand on basic NEPA requirements to include a consideration of all ITAs and not just effects to Indian reservations.

VI-2 - What are Reclamation's other cultural resource responsibilities affecting Indian people and Indian cultural resources?

None of Reclamation's other cultural resource responsibilities under NEPA,⁹ NHPA,¹⁰ and ARPA¹¹ are affected by the changes in its NEPA procedures. These responsibilities are briefly summarized below:

- NEPA - Reclamation's NEPA procedures require consideration of ITAs, as well as consideration of cultural and historic resources. The Council on Environmental Quality's NEPA regulations require agencies to provide public notice to Indian tribes when effects may occur on reservations.¹²

- NHPA - NHPA's Section 106 process requires consultation with Indian tribes and traditional leaders for federal projects that may affect cultural resources significant to Native Americans, whether or not they are ITAs. Under NHPA,

⁹42 U.S.C. § 4331 (b)(4)

¹⁰16 U.S.C. § 470 et seq.

¹¹16 U.S.C. § 470aa-470mm

¹²40 CFR § 1506.6(b)(3)(ii)

consultations are initiated with Indian tribes, the public, and regulatory agencies to consider ways to avoid or mitigate the effects of federal undertakings on public, private, and Indian lands.¹³

NHPA also imposes additional obligations when federal undertakings may affect cultural resources located on Indian lands. When a proposed action is located on Indian lands, the affected tribe must be invited to participate in the consultation process and concur in any resulting agreement document.¹⁴ The State Historic Preservation Officer and the Advisory Council on Historic Preservation provide oversight for the consideration of Indian concerns.

- ARPA - ARPA provides Native Americans with opportunities to influence agency decisions about the treatment of cultural resources. An ARPA permit is required to conduct archeological excavations on public and Indian lands. Notice must be provided to tribes when the permit might result in harm to cultural or religious sites. For archeological excavation on Indian lands, ARPA requires tribal consent for the excavation and that tribally mandated terms and conditions be included in the ARPA permit.¹⁵

VI-3 - What is the American Indian Religious Freedom Act (AIRFA) and how does it affect Reclamation's ITA responsibilities?

AIRFA is a Congressional policy statement that recognizes Native Americans' rights to practice traditional religions and to have access to sacred sites located on public lands.¹⁶ AIRFA does not grant Native Americans more religious rights than those provided to all American citizens under the 1st Amendment to the Constitution, nor does it create ITAs. Because it does not create ITAs, AIRFA does not impact Reclamation's ITA responsibilities. However, it does impose procedural requirements on federal agencies to consider the impact of administrative actions on Native American religious beliefs and practices.

¹³36 CFR § 800.13(c)

¹⁴36 CFR § 800.1(c)(2)(iii)

¹⁵16 U.S.C. § 470cc

¹⁶42 U.S.C. § 1996

PEP - Environmental Compliance Memorandum No. ECM97-2

To: Heads of Bureaus and Offices

From: Willie R. Taylor, Director
Office of Environmental Policy and Compliance

Subject: Departmental Responsibilities for Indian Trust
Resources and Indian Sacred Sites on Federal Lands

This memorandum provides guidance to Departmental bureaus and offices with regard to the implementation of and compliance with 512 DM Chapter 2, Departmental Responsibility for Indian Trust Resources, and Executive Order No. 13007 - Indian Sacred Sites. These subjects are dealt with in Part I and Part II of the memorandum, respectively.

Part 1 - 512 DM Chapter 2

This Chapter provides guidance to bureaus and offices regarding Departmental responsibilities for the protection of Indian trust resources. This Chapter requires that any anticipated impacts to Indian trust resources from a proposed project or action by bureaus and offices be explicitly addressed in environmental documents.

This Chapter also provides that Departmental bureaus and offices, when engaged in the planning of any proposed project or action, will ensure that any anticipated effects on Indian trust resources are explicitly addressed in the planning, decision and operational documents; i.e., Environmental Assessments (EAs), Environmental Impact Statements (EISs), Management Plans, etc., that are prepared for the project. These documents must clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Department's trust responsibilities.

Accordingly, bureaus and offices must identify and evaluate during the scoping and/or planning processes any anticipated effects, direct or indirect, from the proposed project or action on Indian trust resources. If any impact to the Indian trust resources is identified, the bureau or office must consult with the affected tribe(s) on a government-to-government basis with respect to the impact from the proposed project or action.

If any significant impact to Indian trust resources is identified during the scoping and/or planning processes, the environmental document must clearly evaluate and state in the environmental consequences section, under a separate impact heading, how the proposed mitigation measures or actions in the document would be consistent with the Department's Indian trust responsibilities.

If a project or an action, however, is expected to have either an insignificant impact or no impact on any Indian trust resources, the document, under the scoping section in an EIS, must specifically state that the proposed project or action is expected to have either insignificant impact or no impact, direct or indirect, on any Indian trust resources, with reasons given. A similar statement must be included in an EA under an appropriate section.

Part 2 - Executive Order 13007

Executive Order No. 13007, dated May 24, 1996, provides that in managing Federal lands, each executive branch agency with statutory or administrative responsibility for management of Federal lands shall, to the extent practicable, permitted by law and not inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. In addition, where appropriate, agencies shall maintain the confidentiality of sacred sites.

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

Federal agencies are required to promptly implement procedures for the purposes of carrying out the provisions of the Executive Order, including, where practicable and appropriate, procedures to ensure that 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.

The Executive Order also carries with it the intent that Departmental bureaus and offices must ensure that any anticipated effects on Indian sacred sites which may arise from planning or proposed action are explicitly addressed in the planning, decision and operational documents; i.e., Environmental

-3-

Assessments (EAs), Environmental Impact Statements (EISs), Management Plans, etc. These documents must clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Executive Order.

Accordingly, bureaus and offices must identify and evaluate during the scoping and/or planning processes any anticipated effects, direct or indirect, from the proposed project on Indian sacred sites on Federal lands. If any impact to Indian sacred sites is identified, the bureau or office must consult with the affected tribe(s) on a government-to-government basis with respect to the impact from the proposed project or action. In addition, bureaus and offices, to the extent practicable, must ensure that: (1) Indian religious practitioners are provided access to and ceremonial use of Indian sacred sites, and (2) any action that adversely affects the physical integrity of Indian sacred sites is avoided.

If any significant impact to an Indian sacred site on Federal lands is unavoidable and is identified during the scoping and/or planning processes, the environmental document must clearly evaluate and state in the environmental consequences section, under a separate impact heading, how the proposed mitigation measures or actions in the document would be consistent with the provisions of the Executive Order.

If a project or an action, however, is expected to have either an insignificant impact or no impact on any Indian sacred site on Federal lands, the document, under the scoping section in an EIS, must specifically state that the proposed project or action is expected to have either insignificant impact or no impact, direct or indirect, on any Indian sacred site, with reasons given. A similar statement must be included in an EA under an appropriate section.

This Environmental Compliance Memorandum Replaces ECM95-2 dated May 15, 1995.

Signed: May 8, 1997
By: Willie R. Taylor
Director, Office of
Environmental Policy and
Compliance

Authenticated: July 17, 1997
By: Terence N. Martin
Team Leader, Office of
Environmental Policy and
Compliance

Department of the Interior**Departmental Manual****Effective Date: 12/01/95****Series: Intergovernmental Relations****Part 512: American Indian and Alaska Native Programs****Chapter 2: Departmental Responsibilities for Indian Trust Resources****Originating Office: Office of American Indian Trust****512 DM 2**

1. **Purpose.** This Chapter establishes the policies, responsibilities, and procedures for operating on a government-to-government basis with federally recognized Indian tribes for the identification, conservation, and protection of American Indian and Alaska Native trust resources to ensure the fulfillment of the Federal Indian Trust Responsibility.

2. **Policy.** It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.

3. Responsibilities.

A. **Heads of bureaus and offices** are responsible for identifying any impact of Departmental plans, projects, programs or activities on Indian trust resources. Department officials shall:

(1) Establish procedures to ensure that the activities of Departmental organizations impacting upon Indian trust resources are explicitly addressed in planning, decision, and operational documents;

(2) Ensure that bureaus and offices consult with the recognized tribal government whose trust resource, asset, or health and safety is potentially affected by the proposed action, plan, or activity;

(3) Remove procedural impediments to working directly and effectively with tribal governments;

(4) Provide drafts of all procedures or amendments to procedures developed pursuant to this Chapter to the Office of American Indian Trust for review and comment; and,

(5) Designate a senior staff member to serve as liaison between the bureau or office and the Office of American Indian Trust.

B. **Office of American Indian Trust** is responsible for ensuring compliance with the procedures and requirements under this Chapter. The Office of American Indian Trust will serve as the Department's liaison and initial point of contact on all matters arising under this Chapter. All procedures and amendments to procedures shall be submitted by Departmental bureaus and offices to the Office of American Indian Trust for review and comment. After such review and comment, the procedures and

amendments to procedures will be transmitted to the Assistant Secretary - Indian Affairs for final approval.

C. Assistant Secretary - Indian Affairs is responsible for approving bureau and office procedures, or amendments thereto, developed pursuant to this Chapter.

4. Procedures.

A. Reports. As part of the planning process, each bureau and office must identify any potential effects on Indian trust resources. Any effect must be explicitly addressed in the planning/decision documents, including, but not limited to, Environmental Assessments, Environmental Impact Statements, and/or Management Plans prepared for the project or activity. The documentation shall:

- (1) Clearly state the rationale for the recommended decision; and
- (2) Explain how the decision will be consistent with the Department's trust responsibility.

B. Consultation. In the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government (s), the appropriate office(s) of the Bureau of Indian Affairs, the Office of the Solicitor, and the Office of American Indian Trust. Each bureau and office within the Department shall be open and candid with tribal government(s) during consultations so that the affected tribe(s) may fully evaluate the potential impact of the proposal on trust resources and the affected bureau(s) or office(s), as trustee, may fully incorporate tribal views in its decision-making processes. These consultations, whether initiated by the tribe or the Department, shall be respectful of tribal sovereignty. Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).

12/01/95 #3049

Replaces 5/23/95 [#3040](#)

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Department of the Interior Departmental Manual

Effective Date: 6/5/98

Series: Intergovernmental Relations

Part 512: American Indian and Alaska Native Programs

Chapter 3: Departmental Responsibilities for Protecting/Accommodating Access to Indian

Originating Office: Office of American Indian Trust

512 DM 3

3.1 **Purpose.** This Chapter establishes the policy, responsibilities, and procedures to accommodate access to and ceremonial use of Indian sacred sites and to protect the physical integrity of such sites consistent with Executive Order No. 13007, "Indian Sacred Sites."

3.2 **Policy.** It is the policy of the Department of the Interior in managing federal lands under its jurisdiction, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, to accommodate American Indian and Alaska Native 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. It is also the policy of the Department of the Interior to consult with American Indian and Alaska Native tribes on a government-to-government basis whenever the Department has reason to believe that its plans, activities, decisions, or proposed actions may compromise the physical integrity of, or access to sacred sites.

3.3 **Definitions.** For purposes of this Chapter:

A. "Federal lands" means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

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

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

D. "Agency action" has the same meaning as in the Administrative Procedure Act,

5 U.S.C. § 551(13).

3.4 Responsibilities.

A. Heads of Bureaus and Offices shall be consistent with this policy:

(1) Establish written guidance and procedures that ensure that the bureau or office, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions:

(a) manages federal lands under its jurisdiction in a manner that avoids adversely affecting the physical integrity of sacred sites and requires that any unavoidable impacts are explicitly addressed in planning, decision, and operational documents;

(b) accommodates access to and ceremonial use by Indian religious practitioners of Indian sacred sites located on federal lands it administers;

(c) provides reasonable advance notice in writing and through direct contact with the appropriate representative of affected tribes of proposed actions, plans, projects, activities or decisions which may adversely affect the physical integrity of sacred sites or which may restrict future access to or ceremonial use of such sites;

(d) consults with the federally recognized tribal government whose sacred site(s) may be potentially affected by its proposed actions, decisions, projects, or activities; and

(e) maintains the confidentiality of the nature and location of sacred sites, where appropriate.

(2) Such procedures and guidelines must include provisions which direct the bureau or office:

(a) where appropriate, to enter into a memorandum of understanding, a memorandum of agreement or other written instrument setting forth the mutual understanding of the tribe and the bureau or office with regard to access and use of sacred sites on federal lands, confidentiality, and mutually acceptable processes for notice and dispute resolution including, for example, alternative dispute resolution procedures, which will 1) provide a mechanism for the early resolution of conflicts or disputes; 2) provide for the systematic resolution of complaints by tribes relating to agency action on federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites; and 3) enable tribal governments to file an administrative appeal from any action or failure to act by an official of the bureau or office that is contrary to the requirements of Executive Order No. 13007, "Indian Sacred Sites," the requirements of this Chapter, or bureau or office policy or procedures established to implement this Chapter or the Executive Order; and

(b) to identify, in consultation with concerned tribes, appropriate procedures to accommodate tribal concerns when a tribe has a religious prohibition against revealing precise

information about the location or practice at a particular sacred site.

B. Office of American Indian Trust will coordinate the Department's policy implementation and serve as the Department's liaison and initial point of contact on all matters arising under this Chapter. All procedures and amendments to procedures by bureaus and offices shall be forwarded to the Assistant Secretary - Indian Affairs through the Office of American Indian Trust for review and comment. Each bureau or office shall designate a senior level staff member as a point of contact for the Office of American Indian Trust on matters arising under this Chapter.

C. Assistant Secretary - Indian Affairs is responsible for advising bureaus and offices regarding procedures, or amendments thereto, developed pursuant to paragraph 3.4A of this Chapter.

3.5 Procedures.

A. Each bureau or office with statutory or administrative responsibility for the management of federal lands shall implement procedures for the purposes of carrying out the provisions of paragraph 3.4, above.

B. In all actions pursuant to this section, each bureau or office shall comply with the Executive Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," and Departmental Manual Part 512, Chapter 2 "Departmental Responsibilities for Indian Trust Resources."

3.6 Reports.

A. As part of the planning process, each bureau or office must identify and analyze the potential effects its proposed actions, decisions, or activities may have with regard to the physical integrity of sacred sites or which may affect use of and/or access to known sites. Any effect must be explicitly addressed in the planning/decision documents including, but not limited to, environmental assessments, environmental impact statements, and/or management plans prepared for the project or activity. Such documents shall:

- (1) clearly state the rationale for the recommended decision; and
- (2) explain how the decision is consistent with this Chapter.

B. Where a bureau or office determines that compliance with the general requirements of the Order would be clearly inconsistent with an essential agency function, the bureau or office shall fully explain its rationale for that conclusion in the report.

C. Beginning with an initial review conducted by September 30, 1998, each bureau or office shall undertake a periodic review of its policies, procedures, rules, and regulations to ensure consistency with the requirements of this Chapter and shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions:

(1) make any changes necessary in order to accommodate access to and ceremonial use of Indian sacred sites; and

(2) make any changes necessary to avoid adversely affecting the physical integrity of sacred sites;

3.7 Consultation. In all actions pursuant to this section, each bureau or office shall consult with the potentially affected federally recognized tribal government(s). Consultations with affected tribal governments shall be open and candid and each tribal government shall be accorded reasonable opportunity to evaluate fully the potential impact of the proposal prior to final agency action. Each bureau or office shall give full consideration to tribal views in its decision-making processes. Further, whether the consultation is initiated by a tribe or the Department, each bureau or office shall be respectful of tribal sovereignty. To the extent permissible under federal law and regulation, information received during consultation shall be managed in a manner which is least likely to be disclosed to third parties. Information so received shall be deemed confidential if disclosure would inappropriately reveal the nature, location or compromise the physical integrity of a sacred site.

3.8 Rulemaking. Each bureau or office shall take into account the policies and requirements mandated by Executive Order No. 13007, "Indian Sacred Sites" and this Chapter in the rulemaking process to ensure that Departmental rules and regulations are developed in accordance with the policies and procedural requirements outlined in this Chapter.

3.9 Memoranda of Agreement and Memoranda of Understanding. Each bureau or office shall, whenever appropriate:

A. contact any Indian tribe likely to be affected by its activities to develop and enter into Memoranda of Agreement or Memoranda of Understanding to:

- (1) avoid adverse impacts to the physical integrity of sacred sites;
- (2) accommodate access to and use of sacred sites by Indian religious practitioners;
- (3) safeguard the confidentiality of Indian sacred sites;
- (4) develop mutually acceptable notification processes; and
- (5) develop specific dispute resolution procedures.

B. develop a process for incorporating alternative dispute resolution procedures into a Memoranda of Agreement or Memoranda of Understanding.

3.10 Limitations. Nothing in this Chapter shall be construed to require a taking of vested property interests. Nor shall this Chapter be construed to impair enforceable rights to the use of federal lands that have been granted to third parties through final agency action or by statute.

Nothing in this Chapter creates any rights, benefits or trust responsibility enforceable at law or equity by any party against the United States, its agencies, offices, or any person.

6/5/98 #3214

New