

DEPARTMENT OF THE ARMY  
US Army Corps of Engineers  
Washington, DC 20314-1000

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TRIBAL CONSULTATION POLICY  
**DRAFT/DELIBERATIVE**

1. Purpose. On November 9, 2009, President Barack Obama issued a Memorandum to the heads of all Federal agencies entitled *Tribal Consultation* (74 Fed Reg 57881) reaffirming Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (65 Fed Reg 67249) signed by President William J. Clinton on November 6, 2000. E.O. 13175 requires all Federal agencies to formulate “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This document affirms the Corps’ legal responsibility to engage in pre-decisional consultation with federally recognized Tribes, an important component of that process.

2. Background. As stated in Executive Order 13175, “The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.” There are also Presidential Memoranda and Proclamations, the Department of Defense *American Indian and Alaska Native Policy*, Department of Defense Instruction number 4710.02: *DoD Interactions with Federally Recognized Tribes*, and US Army Corps of Engineers *Tribal Policy Principles* (Attachment 1).

For the purposes of this policy, the following definitions are applied:

- a. Tribe: Indian Tribes as defined in E.O. 13175, “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 the Federally Recognized Indian Tribe List Act of 1994, 25 USC 479a.”
- b. Consultation: A process to ensure meaningful and timely input by Tribal officials into any project, program, permit or other undertaking that may have a potential to affect Tribal interests, Trust resources and treaty reserved rights.

### 3. References.

- a. U.S. Constitution, Articles I, Section 8; Article VI, 17 Sep 1787.
  - b. National Historic Preservation Act of 1966.
  - c. American Indian Religious Freedom Act of 1978
  - d. Archaeological Resources Protection Act of 1979.
  - e. National Graves Protection and Repatriation Act of 1990.
  - f. Religious Freedom Restoration Act of 1993.
  - g. Executive Order 13007, *Indian Sacred Sites*, 24 May 1996.
  - h. Army Regulation 200-4, *Cultural Resources Management*, 1 Oct 1998.
  - i. Department of Defense American Indian and Alaska Native Policy, 20 Oct 1998.
  - j. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000.
  - k. Engineer Regulation 1105-2-100, *Planners Guidance Notebook*, 22 Apr 2000.
  - l. Department of Defense Instruction Number 4710.02: *DoD Interactions with Federally Recognized Tribes*, 14 Sep 2006.
  - m. Army Regulation 200-1, *Environmental Protection and Enhancement*, 13 Dec 2007.
  - n. Engineer Regulation 1130-2-540, *Project Operations – Environmental Stewardship Operations and Maintenance Guidelines and Procedures*, 11 Aug 2008.
  - o. Presidential Memorandum, *Tribal Consultation*, 9 Nov 2009.
  - p. USACE *Tribal Policy Principles*, 18 Feb 1998 & 10 May 2010.
  - q. United Nations Declaration on the Rights of Indigenous Peoples, 16 Dec 2010.
4. Applicability. This regulation applies to all HQUSACE elements, Major Subordinate Commands, District Commands, the Institute for Water Resources, the Humphreys Engineering Center Support Activity, and the Engineer Research and Development Center.
5. General Policy-The Tribal Policy Principles.
- a. All Tribes are sovereign entities and will be treated with respect.
    1. Sovereignty is the foundation of tribal nations.
    2. Tribes are responsible for their own governance and management.
  - b. The Trust responsibility will be honored and fulfilled.
    1. USACE will pursue and support projects and programs beneficial to Tribes.
    2. Tribal trust resources and reserved treaty rights will be protected to the full extent of the law.
    3. USACE will allow access to tribal resources under Corps jurisdiction whenever possible, and will work develop and implement access policies.
  - c. USACE will maintain a government-to-government relationship with Tribes.
    1. The Commander and the leader of a Tribe are considered equals.
    2. Most interaction will be staff to staff, but decision making will be leader to leader.
    3. A Tribe may have access to the Chief of Engineers and the Assistant Secretary of the Army (Civil Works) if the need arises.

- d. Pre-decisional consultation will be an integral part of USACE planning and implementation.
  1. Potentially affected Tribes, as determined by the Corps, will be contacted by letter, telephone or e-mail sufficiently early in the review process to allow pre-decisional consultation.
  2. Activities that have the potential to affect federally recognized Tribes —individual projects, programs, permit applications, promulgation of regulations —regardless of land status, will be reviewed at the District level by an individual who effectively interacts with Tribes, usually the Tribal Liaison.
  3. Consultation will be primarily conducted at the District or Division level, unless there is a request for HQUSACE (and OASA(CW) in the case of Civil Works) input, or if HQUSACE determines input is necessary.
  4. Through consultation, Trust resources and reserved treaty resources (including sacred sites and traditional cultural properties) will be protected whenever possible.<sup>1</sup>
  5. Commands will ensure that all Tribes with an interest in a particular activity are contacted and their comments taken into consideration.
  6. Consultation procedures for individual projects or programs may be developed at the local level with Tribal input.
  7. In recognition of the varied organizations and customs of different Tribes, written protocols for consultation procedures may be considered and implemented at the local level with a specific Tribe.
- e. To the extent authorized, USACE will support Tribal self-determination, self reliance and capacity building by:
  1. Partnering with Tribes on studies, projects, programs and permitting procedures will be supported and promoted where permissible under the law.
  2. Providing Tribes with information to bid on USACE contracts.
  3. Sharing information on USACE programs, policies and procedures.
  4. Utilizing Tribal knowledge for planning purposes and to inform operational activities.
  5. Supporting Tribal efforts to lease and operate water resource projects and lands, where appropriate.
  6. Identifying and implementing other capacity building opportunities as they occur.
- f. Protection of natural and cultural resources:
  1. USACE will comply with the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA) and other statutes concerning cultural and natural resources.
  2. USACE acknowledges that compliance with the above statutes does not comprise the full range of consultation nor of resource protection.
  3. To the extent allowed by law, USACE will protect the location of historic properties and archaeological resources, in consultation with and when requested by the affected Tribe(s).

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<sup>1</sup> Certain statutes such as the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act have consultation processes imbedded in them.

6. Responsibilities of Commanders and other USACE officials interacting with federally recognized Tribes.

1. Build relationships with Tribes soon after assuming command by face-to-face interaction at the local headquarters or at tribal offices when at all possible.
2. Identify and remove procedural impediments to working with Tribes whenever possible.
3. Share Corps procedures, regulations and organizational information with Tribes.
4. Keep Tribes informed during the decision making process for an undertaking.
5. Provide Tribes with points of contact on project-related issues and general issues.
6. Encourage partnerships on projects with Tribes wherever possible.
7. Encourage collaborative partnerships by other Federal and state agencies with Tribes to further their goals and projects.

7. Education. To develop a proactive well-informed workforce, in-house training and workshops have been developed and should be attended by any Corps employee who may interact with Tribes—project managers, program managers, real estate professionals, regulators, leaders, contracting specialists, etc.

8. Accountability. To assess of the effectiveness of USACE Tribal consultation, professionals who interact with Tribes will keep records of consultation meetings and other tribal interactions. These records will be accessible and can be made available for purposes of reporting to OMB through DoD as per the reporting requirement in the Presidential Proclamation of 5 Nov 2009. The report will be synthesized information at HQUACE and transmitted to DoD (OSD).

9. Implementation. USACE will incorporate the six Tribal policy principles, including pre-decisional consultation, into its planning, management, budgetary, operational, and legislative initiatives, management accountability system and ongoing policy and regulation development processes.

10. General Provision. This policy does not establish new requirements, but reaffirms procedures and policies already in place, clarifies responsibilities and establishes clear measures of implementation success.

FOR THE COMMANDER:

DIONYSIOS ANNINOS  
COL., EN  
CHIEF OF STAFF

## Attachment 1: USACE Tribal Policy Principles

### **U.S. ARMY CORPS OF ENGINEERS TRIBAL POLICY PRINCIPLES**

**TRIBAL SOVEREIGNTY** - The U.S. Army Corps of Engineers recognizes that Tribal governments are sovereign entities, with rights to set their own priorities, develop and manage Tribal and trust resources, and be involved in Federal decisions or activities which have the potential to affect these rights. Tribes retain inherent powers of self-government.

**TRUST RESPONSIBILITY** - The U.S. Army Corps of Engineers will work to meet trust obligations, protect trust resources, and obtain Tribal views of trust and treaty responsibilities or actions related to the Corps, in accordance with provisions of treaties, laws and Executive Orders as well as principles lodged in the Constitution of the United States.

**GOVERNMENT-TO-GOVERNMENT RELATIONS** - The U.S. Army Corps of Engineers will ensure that Tribal Chairs/Leaders meet with Corps Commanders/Leaders and recognize that, as governments, Tribes have the right to be treated with appropriate respect and dignity, in accordance with principles of self-determination.

**PRE-DECISIONAL AND HONEST CONSULTATION** - The U.S. Army Corps of Engineers will reach out, through designated points of contact, to involve Tribes in collaborative processes designed to ensure information exchange, consideration of disparate viewpoints before and during decision making, and utilize fair and impartial dispute resolution mechanisms.

**SELF RELIANCE, CAPACITY BUILDING, AND GROWTH** - The U.S. Army Corps of Engineers will search for ways to involve Tribes in programs, projects and other activities that build economic capacity and foster abilities to manage Tribal resources while preserving cultural identities.

**NATURAL AND CULTURAL RESOURCES** - The U.S. Army Corps of Engineers will act to fulfill obligations to preserve and protect trust resources, comply with the Native American Graves Protection and Repatriation Act, and ensure reasonable access to sacred sites in accordance with published and easily accessible guidance.