



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

10 AUG 2016

CECG

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS, AND  
DISTRICT COMMANDERS

SUBJECT: Tribal Consultation Responsibilities in the Regulatory Program

1. This memorandum reaffirms and clarifies the U.S. Army Corps of Engineers (USACE) Tribal Consultation Policy Memorandum, 01 November 2012 (enclosed) as it applies to the agency's Regulatory Program.<sup>1</sup>
2. The USACE recognizes the sovereign status of federally-recognized American Indian and Alaska Native Tribal Governments (as determined by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 USC 479a); hereinafter referred to as "Tribes") and our obligation for meaningful, pre-decisional government-to-government consultation.
3. This obligation applies to the USACE Regulatory Program, which implements Section 404 of the Clean Water Act, Sections 9 and 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act. Annually, district commanders issue approximately 80,000 permit-related decisions, and many of the decisions require consultation with Tribes.
4. Consultation with Tribes must occur if the activities requiring Department of the Army (DA) authorization, regardless of permit type, have the potential to significantly (i.e., materially) affect protected tribal resources, tribal rights (including treaty rights) and tribal lands. The United States has specific responsibilities to each Tribe based on treaties, statutes, or other sources. These responsibilities may include the duty to protect tribal rights to hunt, fish, and gather resources at both on-reservation and off-reservation locations. Tribes may be resident within the district area of responsibility (AOR) or may be removed Tribes with resources within the district AOR. District commanders must ensure that any permit decision does not violate any treaty, or impermissibly impact other protected interests. District commanders must also consult with Tribes pursuant to the National Historic Preservation Act when a proposed activity requiring DA authorization has the potential to affect potentially eligible historic properties that are of religious or cultural significance to Tribes.

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<sup>1</sup> The USACE Tribal Consultation Policy applies to all USACE programs.

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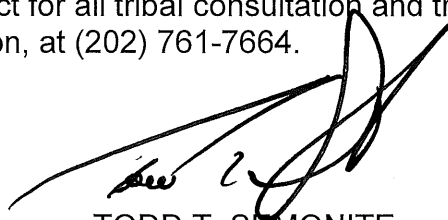
SUBJECT: Tribal Consultation Responsibilities in the Regulatory Program

5. Given the volume and complexity of actions in the Regulatory Program and the potential for regulated activities to impact Tribes, commanders should strive to establish relationships with Tribes at the beginning of their command and prior to activity-specific issues arising. Where communication protocols are not already established, commanders should work with interested Tribes to develop operating procedures that are acceptable to those Tribes (reference 33 CFR 320.4(j)(6) and USACE Tribal Consultation Policy). Commanders should also be proactively engaged when activity-specific issues arise and government-to-government consultation with elected tribal leaders is appropriate. Many Tribes work with multiple districts and divisions, therefore, commanders should work with each other, and those Tribes, to ensure any informal or formal protocol or agreements with a Tribe are consistent among the districts/divisions, to the extent appropriate and practicable. In some instances tribal consultation for actions affecting multiple Tribes in different districts have been conducted following the Lead District Initiative.<sup>2</sup> Commanders should assess when is appropriate and beneficial to conduct consultation using this model.

6. Similarly, all districts should have guidance and practices in place for identifying and evaluating potential impacts to tribal resources, tribal rights, tribal lands, and historic properties, and ensuring that meaningful consultation with Tribes occurs for Regulatory actions. Many district commanders have found it helpful to have archaeologists in the Regulatory Program office that can conduct Section 106 reviews while also having other project management responsibilities.

7. The USACE has highly skilled Tribal Liaisons at the district, division, and headquarters levels that are available to provide commanders support in fulfilling our government-to-government responsibilities to Tribes. For instance, District Tribal Liaisons have established relationships with Tribes that are crucial to the successful consultation and partnering with tribal governments. Tribal Liaisons are expected to render their expertise to fully support the Regulatory Program when needed. The Tribal Nations Technical Center of Expertise located in Albuquerque is also available to provide support. Commanders are encouraged to utilize these experts.

8. My point of contact for Regulatory is Ms. Jennifer Moyer, Chief, Regulatory Program, at (202) 761-4598. My point of contact for all tribal consultation and tribal issues is Ms. Lisa Morales, Senior Tribal Liaison, at (202) 761-7664.



TODD T. SEMONITE  
Lieutenant General, U.S. Army  
Commanding

Encl

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<sup>2</sup> MG Don T. Riley, Memorandum for Commanders, Major Subordinate Commands and District Commands, *Lead District Initiative*, 24 November, 2004.



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

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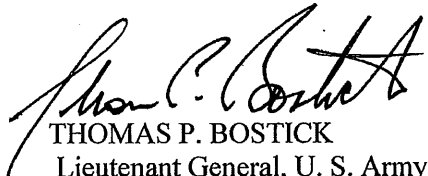
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MEMORANDUM FOR Commanders, Directors and Chiefs of Separate Offices, US Army Corps of Engineers

SUBJECT: Tribal Consultation Policy

1. This memorandum affirms and formalizes current tribal consultation procedures for the U. S. Army Corps of Engineers (USACE).
2. The interaction between the federal government and federally recognized Indian Tribes (including Alaska Natives) has its origins in the U. S. Constitution and has been upheld and defined through Treaties, U.S. Supreme Court cases, various statutes and regulations, presidential documents and policies, including the Department of Defense American Indian and Alaska Native Policy, and the USACE Tribal Policy Principles, recently reissued on 10 May 2010.
3. The Policy provides an outline of our responsibilities to federally recognized Tribes as well as a framework for consulting with them. It is purposefully general in nature because each of the 565 federally recognized American Indian and Alaska Native Tribes are distinct and separate governments, requiring a consultation process that may be completely unique to them.
4. USACE recognizes the sovereign status of Tribal governments and our obligation for pre-decisional government-to-government consultation. USACE also recognizes the unique role Tribes play as partners in water resources projects and seeks to develop relationships with all Tribes who may need our assistance in their capacity building and self-determination.
5. USACE has an excellent tribal program coordinated by a tribal liaison at Headquarters and a point of contact or liaison in each District and Division office. These experts are ready to support you and answer any questions you have regarding tribal policies.
6. An accountable process to interact with Tribes is mandated in Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000, and Presidential Memorandum, *Tribal Consultation*, 05 Nov 2009. Please ensure that your staff is aware of and abides by our Consultation Policy to ensure effective and mutually beneficial relationships with tribal partners.
7. My point of contact on this issue is Dr. Georgeie Reynolds, (202) 761-5855.

Encl

  
THOMAS P. BOSTICK  
Lieutenant General, U. S. Army  
Commanding

**U.S. Army Corps of Engineers  
Tribal Consultation Policy**

1. References.

- a. U.S. Constitution, Articles I, Section 8; Article VI.
- b. National Historic Preservation Act.
- c. American Indian Religious Freedom Act.
- d. Archaeological Resources Protection Act.
- e. Native American Graves Protection and Repatriation Act.
- f. Religious Freedom Restoration Act.
- g. Executive Order 13007, *Indian Sacred Sites*, 24 May 1996.
- h. Department of Defense American Indian and Alaska Native Policy, 20 Oct 1998.
- i. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000.
- j. Engineer Regulation 1105-2-100, *Planners Guidance Notebook*, 22 Apr 2000.
- k. Department of Defense Instruction Number 4710.02: DoD Interactions with Federally Recognized Tribes, 14 Sep 2006.
- l. Army Regulation 200-1, *Environmental Protection and Enhancement*, 13 Dec 2007.
- m. Engineer Regulation 1130-2-540, *Project Operations – Environmental Stewardship Operations and Maintenance Guidelines and Procedures*, 11 Aug 2008.
- n. Presidential Memorandum, *Tribal Consultation*, 5 Nov 2009.
- o. USACE *Tribal Policy Principles*, 18 Feb 1998 and 10 May 2010.
- p. Announcement of Presidential support for the *United Nations Declaration on the Rights of Indigenous Peoples*, Public Papers of the President, December 16, 2010.

2. Purpose. On November 5, 2009, President Barack Obama issued a Memorandum to the heads of all federally 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 U.S. Army Corps of Engineers’ (USACE) commitment to engage in consultation with federally recognized Tribes.

3. Background. There are responsibilities to Tribes resulting from the Federal Trust Doctrine, as well as from Treaties, statutes, regulations, Executive Orders and agreements between the United States government and tribal governments. 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) provide guidance.

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: Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.

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 federally recognized Tribes are sovereign governments and will be treated with respect.

(1) Sovereignty is the foundation of tribal governments.

(2) Tribes are responsible for their own governance and management.

b. The Trust responsibility will be honored and fulfilled.

(1) The federal government has a unique legal and political relationship with Tribal governments that recognizes self-government and self-determination.

(2) USACE is committed to supporting projects and programs beneficial to Tribes through partnership with them.

(3) USACE will ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands.

(4) USACE will protect and allow access to protected tribal resources under USACE jurisdiction to the extent practicable, and will work to develop and implement access policies as needed.

(5) USACE will share information that is not otherwise controlled or classified information.

c. USACE will maintain a government-to-government relationship with Tribes.

(1) Tribes have a unique and distinctive political and legal relationship with the United States.

(2) A Tribe may have access to the Chief of Engineers, the Assistant Secretary of the Army (Civil Works), and other high level individuals if the need arises.

(3) While most interaction will be staff to staff, decision making will be leader to leader (the head of the Tribe and the district commander), with the assistance of the local subject matter expert (typically, the Tribal Liaison).

d. Consultation will be an integral, invaluable process of USACE planning and implementation.

(1) When appropriate, potentially affected Tribes, as determined by the Corps, including Tribes whose aboriginal territories extend to the lands where an activity would occur, will be contacted by letter, telephone or e-mail sufficiently early to allow a timely review of the proposed action. If contacted Tribes notify USACE that other Tribes are potentially affected, USACE has the responsibility to notify those Tribes as well.

(2) Any activity that has the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands-individual projects, programs, permit applications, real estate actions, promulgation of regulations and policies-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 conducted at the district or division level under the guidance of an individual who effectively interacts with Tribes, usually the Tribal Liaison, unless there is a request for HQUSACE (and/or OASA(CW) in the case of Civil Works) input, or if HQUSACE determines input is necessary.

(4) Commands will ensure that all Tribes with an interest in a particular activity that has the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands are contacted and their comments taken into consideration.

(5) Consultation procedures for individual projects or programs may be developed at the local level to meet the needs of particular Tribe(s).

(6) 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.

(7) A dispute resolution process will be developed during the consultation process, including a provision to elevate the consultation to higher USACE and/or Tribal levels.

(8) Requests for consultation by a Tribe to USACE will be honored.

e. 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 to the extent permitted by law and policy.

(2) To the extent permitted by law and policy, provide information on opportunities to compete for requests for proposals or other potential contracts with USACE.

(3) Sharing appropriate information on USACE programs, policies and procedures, and public documents.

(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, within existing authority, other capacity-building opportunities as they occur.

f. Protection of natural and cultural resources.

(1) USACE recognizes the importance of strict compliance 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 may not comprise the full range of consultation, nor of cultural property and resource protection.

(3) To the extent allowed by law, USACE will protect the location of historic properties, properties of religious and cultural significance, and archaeological resources, in consultation with and when requested by the affected Tribe(s).<sup>1</sup>

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

a. Build relationships with Tribes soon after each change of command by face-to-face interaction at the local headquarters or at tribal offices when at all possible.

b. Identify and remove procedural impediments to working with Tribes whenever possible.

c. Share appropriate Corps procedures, regulations and organizational information with Tribes.

d. Maintain open lines of communication through consultation with Tribes during the decision making process for those matters that have the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands.

e. Provide Tribes with points of contact on project-related issues, and issues in general.

f. Encourage partnerships on projects with Tribes wherever possible.

g. 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, workshops, and an annual meeting of USACE tribal liaisons have been developed and should be attended by Corps employees who interact with Tribes-liaisons, project managers, program managers, real estate professionals, regulators, leaders, contracting specialists, etc.

8. Accountability. To assess 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 at HQUSACE and transmitted to DoD (OSD) on a yearly basis. A copy of this report will be distributed to federally recognized Tribes upon request.

9. Implementation. USACE will incorporate the six Tribal policy principles, including pre-decisional consultation, into its planning, management, budgetary, operational, and legislative

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<sup>1</sup> USACE will make every reasonable effort, consistent with law, to withhold this information. However, USACE is required to provide public access to its records under the Freedom of Information Act and can only withhold those records protected from disclosure under a statutory exemption or exclusion. Tribes are encouraged to seek legal advice before providing sensitive information to USACE.



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.<sup>2</sup>

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<sup>2</sup> This policy is not intended to, and does not grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian Tribe, or to preempt, modify or limit the exercise of any such right.