H-8160-1 - GENERAL PROCEDURAL GUIDANCE FOR NATIVE AMERICAN CONSULTATION

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Chapter I. Introduction

A. Purpose and Goal. Handbook H-8160-1 combines with Manual Section 8160, "Native American Coordination and Consultation" to form the 8160 Manual. The Handbook is intended to advance the policy and broad direction contained in the Manual Section by giving practical guidance to Bureau of Land Management (BLM) managers and staffs whose duties include coordination and consultation with Native Americans. The Handbook does not stand alone; it is incomplete without the Manual Section. The goal of the whole Manual is to assure that tribal governments, Native American communities, and individuals whose interests might be affected have a sufficient opportunity for productive participation in BLM planning and resource management decision making. This Handbook is mainly devoted to providing general guidance for determining when, where, what kind, and how much consultation is needed. Supplementary material appended to the Handbook explains policy and provides illustrative case examples. Future H-8160 Handbook releases will expand on the general guidance given here.

B. Consultation and Documentation Standard.

Before making decisions or approving actions that could result in changes in land use, physical changes to lands or resources, changes in access, or alienation of lands, BLM managers must determine whether Native American interests would be affected, observe pertinent consultation requirements, and document how this was done. In the face of a legal challenge, the consultation record will be the BLM's basis for demonstrating that the responsible manager has made a reasonable and good faith effort to obtain and consider appropriate Native American input in decision making.

C. Definition. For purposes of this Handbook, **consultation** is the active, affirmative process of: (1) identifying and seeking input from appropriate Native American

governing bodies, community groups, and individuals; and (2) considering their interests as a necessary and integral part of the BLM's decision making process. The aim of consultation is to involve affected Native Americans in the identification of issues and the definition of the range of acceptable management options.

D. Unique Legal Relationship. While Federal Government agencies are legally responsible to consider the interests of members of the public in general, Federal agencies' official interactions with Native Americans, including consultation, are distinguished by unique legal relationships. Sovereign status of Indian tribes and special provisions of law set Native Americans apart from all other U.S. populations and define a special level of Federal agency responsibilities.

This Handbook discusses some of these responsibilities, advises generally on how to meet them, and describes the special products needed as an outcome of official interactions with Native Americans.

E. Relationship to Manual Section 8160. This Handbook complements Manual Section 8160 by adding general, practical guidance on when and how managers should conduct and document consultation with Native Americans. Chapter IV pays special attention to the aims and requirements, among others, of the American Indian Religious Freedom Act (AIRFA); the Native American Graves Protection and Repatriation Act (NAGPRA); the Archaeological Resources Protection Act (ARPA); and the National Historic Preservation Act (NHPA), as amended in 1992. Not all potentially pertinent legal authorities are being addressed in this inaugural version of the Handbook.

F. Interim Focus. In its present version, this guidance is weighted toward legal authorities and issues that are usually associated with the cultural heritage programs. The weighting owes to the fact that these authorities and issues are creating a special need for guidance at this time.

Readers should recognize that many issues of concern to Native Americans arise within program domains other than those covered by the cultural heritage programs, such as wildlife and fisheries, forestry, lands, minerals, and others. For more details, see Manual Section 8160.08.

Future H-8160 releases will give additional guidance on coordinating and consulting with Native Americans for the other land and resource management programs identified in Manual Section 8160.08A2.

The presently weighted focus, however, should not in any way limit the application of this guidance to cultural heritage program issues.

The general consultation procedures and information-gathering tools described in this Handbook should work very much the same whether issues are religious freedom or range improvement, whether resources are historic properties or wildlife species (to name a few).

The important thing here is how well information is obtained and factored into decision making, not so much the particular subject matter of the information. The BLM considers the ways its decision making might cause consequences for Native Americans within the context of its **land use planning and environmental review** systems, fundamental management systems in which all programs participate. (See Manual Section 8160.08A1a-g.)

The key to making those systems work as they should for Native Americans is to bring particular groups' cultural interests and concerns into the planning and environmental review process from the very outset, and to consider them appropriately at each stage of the analysis and decision making (e.g., RMP's and project plans; general EIS's and specific EA's).

The intent behind linking Native American consultation closely with land use planning and environmental review is to take full advantage of these standard, familiar, and timely procedural systems, rather than to try to establish a separate system that would operate independently from planning and environmental review. See Sections IV.E. and F. below for more discussion.

Chapter II. Consultation Issues

The geography of Federal land administration and the overlay of land use classifications are contributing factors in many Native American religious freedom and "cultural resource" issues involving the BLM and other Federal land managing agencies.

Issues are both general and particular. On the one hand, traditional Native Americans may attach religious and cultural values to lands and resources on a very broad scale, such as recognizing a mountain or a viewshed as a sacred landscape, and they may be concerned about any potential use that would be incompatible with these values. On the other hand, issues may be specific to discrete locations on public lands, such as reasonable access to ceremonial places, or to the freedom to collect, possess, and use certain regulated natural resources, such as special-status species.

Many Native American issues and concerns, although associated with BLM lands and resources, are based on intangible values. Intangible values are not amenable to

"mitigation" in the same way that a mitigation strategy can be used to address damage to, or loss of, physical resources.

Some of the issues that frequently surface in consultation are briefly discussed here to illustrate the relationship of Native American interests and concerns to BLM land and resource management decisions.

A. Access. Free access to traditionally significant locations can be a difficult issue for BLM managers when there would be conflicts with other management obligations. For example, individuals' age or infirmity often combine with distance or terrain to make motorized vehicle access the only practical means for some Native Americans to reach locations of religious importance. This presents a dilemma to managers where public lands are being managed as sensitive riparian habitat or for their wilderness character, for example, and motorized vehicle access is accordingly restricted or prohibited. The BLM can end up in the contradictory situation of trying to protect resources and landscapes----the continuing existence of which is essential to traditional Native American practices----from the Native American practitioners themselves.

B. Use. One of the more tangible issues with potential for resource conflict is Native Americans' collection and use of plants and animals for traditional religious and/or cultural purposes. Some species regulated under the Endangered Species Act may have religious or cultural significance. Collection of other resources, such as plant products, minerals, and gemstones, may be regulated under other statutory authority and/or BLM policy.

C. Sacredness. Native Americans' attribution of sacredness to large land areas is one of the most difficult issues for BLM managers to reconcile with other management responsibilities. From the viewpoint of traditional religious practitioners, a particular land area could be regarded as a hallowed place, devoted to special religious rites and ceremonies. Practitioners might perceive any secular use or development in such a place to be injurious to its exceptional sacred qualities or a sacrilege and, therefore, unacceptable from their view. Nevertheless, the BLM manager might be put in the position of having to weigh a proposal for a legally and politically supported use, such as mineral development, in an area regarded as sacred and inviolate.

D. Mitigation. Strategies to reduce proposed Federal actions' impacts, or proposed undertakings' effects, generally follow models related to the National Environmental Policy Act, the National Historic Preservation Act, and their implementing regulations (40 CFR Parts 1500-1508 and 36 CFR Part 800). Where Native American cultural and religious concerns are involved, however, conventional methods of mitigation generally do not appropriately address the consequences felt by Native American practitioners.

The fact that the BLM's cultural resource specialists are frequently the ones assigned to do the staff work for certain Native American issues could lead to some misunderstanding that Native American issues are cultural resource issues. From there it could be mistakenly deduced that Native American issues might often be resolved through mitigation methods such as archaeological data recovery. Such ideas would misinterpret the majority of Native American issues that managers must consider in decision making.

It is feasible, where some issues of Native American use are involved, that mitigation procedures could work. For example, mitigation could work in cases where common natural products are the object, and either the BLM proposal or the Native American use is flexible.

That is, it may be possible for a BLM proposal to be modified to allow continuing traditional resource use, or it may be acceptable for the Native American use to be moved outside the proposed affected area. In contrast, however, more abstract, nonresource issues surrounding belief and practice may be a much different matter.

The American Indian Religious Freedom Act and sacred-object elements of the Native American Graves Protection and Repatriation Act represent statutory reaffirmation of constitutional guarantees that protect free exercise of religion for all Americans. The Religious Freedom Restoration Act (see IV.G. below) prohibits the Government from substantially burdening a person's exercise of religion, except to further a compelling governmental interest.

Infringement of a constitutional guarantee is absolute----it either occurs or it does not; less infringement is still infringement.

Infringement of religious freedom cannot be mitigated in the way that impacts and effects on natural resources and cultural properties can be reduced. Compromise----i.e., we give a little, they give a little----is not a suitable option. To demonstrate compelling governmental interest is a stringent test for routine land and resource management activities.

E. Consultation as Conflict Identification. Consultation is sometimes approached apprehensively, with a view that talking with Native Americans will result in more intractable problems than existed before. This view can be relieved by awareness that many Native American issues and concerns are not much different from public issues and concerns that BLM deals with on a regular basis, and that the means for dealing with them are basically the same.

It is possible for BLM managers to address many of the concerns for gaining access to sites, attaining needed materials, and protecting Native American values, within the normal scope of multiple use management. Solutions may include: (1) providing administrative access to sensitive areas; (2) making special land use designations (e.g., ACECs); (3) developing Cooperative Management Agreements with Native American communities; (4) stipulating for continuing Native American uses in leases, permits, and other land use authorizations; (5) diverting or denying clearly incompatible land uses; and similar affirmative management solutions.

Consultation should identify not only Native Americans' interests and concerns, but also their suggestions for potentially effective approaches to address them.

Consultation is incomplete, and largely pointless, unless it is directed toward the identification of mutually acceptable solutions.

When a proposed BLM decision poses potential consequences for lands and resources valued by Native Americans, consultation with the community that holds the values and identified the consequences can generate strategies for an appropriate management response.

F. Summary.

It is the goal of the consultation process to identify both the resource management concerns and the strategies for addressing them, through an interactive dialogue with appropriate Native American communities.

Native American concerns may require something different from the usual kind of analysis and consideration when mitigation is not a realistic option. Where a proposed action would infringe on constitutional rights or treaty rights, mitigation or compromise is not a proper response.

The general outline of consultation procedures in this Handbook focuses on Native American interests and concerns, but the approach is not significantly different from the approaches employed to identify and address the points of view and convictions of other groups. It is the nature of the BLM planning and environmental review process to give adequate consideration to issues from outside the BLM, including those that do not lend themselves to physical inspection or objective and quantifiable analysis.

Chapter III. Consultation Guidance

The essential reason for Native American consultation is to identify the cultural values, the religious beliefs, the traditional practices, and the legal rights of Native American people which could be affected by BLM actions on Federal lands.

While carrying out their many other mandated responsibilities, the BLM's managers are also obligated to assure that the cultural and religious concerns of Native Americans are identified and addressed as part of decision making.

The same is true of other Federal agencies. But because of the great quantity of lands under the BLM's administrative charge, plus their wide distribution, their western and Alaskan location, and their many potential uses, the BLM has special obligations toward Native Americans' land and resource-related cultural and religious issues, unmatched in all of the Federal Government.

This means that the BLM, arguably more than any other bureau or agency, must establish ongoing, credible consultation relationships with the Native American peoples whose interests are potentially affected by the BLM's multiple use management of the public lands.

The identification of Native American cultural values, issues, and concerns can occur only through consultation with tribal governments and practitioners of traditional culture and religion.

Specific knowledge of contemporary Native American cultural values can be obtained only from the Native American community that possesses the values, much as some forms of proprietary information about public land resource values (such as oil and gas well log data) must be obtained from outside the BLM.

Specific knowledge about contemporary values can be obtained only by direct means. Although contemporary religious and cultural values may be a continuation of historical relationships with the same lands and resources, historical accounts and publications cannot be substituted for direct contact with Native Americans, or assumed to contain the information required to identify and address the concerns of contemporary Native American communities.

A. General Requirements of Consultation.

In contrast to general BLM public notification procedures, where the goal is to provide the public an opportunity to comment on proposed actions, the BLM must demonstrate a good faith effort to elicit specific kinds of information from Native Americans.

Published notices and letters, indicating that the BLM is contemplating an action and that interested persons may comment, generally will not prove sufficient to ensure that legal obligations to consult with Native Americans have been met.

A tribal council's or Native American organization's failure to respond to an inquiry letter cannot be assumed to indicate that the group is not concerned or does not have information relevant to the action being proposed.

As a general rule, formal tribal positions may be adopted only through a tribal government meeting. For some tribes, such meetings occur only on a monthly or even less frequent basis. Where this is the case, the BLM will have to undertake additional and specific notification and consultation efforts to assure a timely response (see sections III.D. and E. below).

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

The 1992 Amendments to the National Historic Preservation Act provide, in Sec. 101(d)(6) and 304(a), that----

Properties of traditional religious and cultural importance to an Indian tribe . . . may be determined to be eligible for inclusion on the National Register;

In carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe . . . that attaches religious and cultural significance to properties described [above];

[Agency officials] after consultation with the Secretary, shall withhold from disclosure to the public, information about the location, character, or ownership of a historic property if [they] determine that disclosure may (1) cause a significant invasion of privacy; (2) risk harm to the historic resource; or (3) impede the use of a traditional religious site by practitioners.

These new provisions in the Act help free the BLM to hold sensitive information confidential, and thus to build more effective consultation relationships with Native American communities.

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

Native American groups frequently withhold specific information, unless or until there is a direct threat to traditional values and culturally significant places.

Before making project-specific decisions, managers may need to provide additional opportunities for Native Americans to identify their specific concerns.

Improved relationships improve consultation. Some of the hesitancy to provide specific information earlier in the planning and project review process may be overcome once an effective working relationship has been built.

When a good working relationship has been established, something less than direct, face-to-face contact may be sufficient. In general, where telephone and mail contacts with a particular group are demonstrably successful and mutually agreed to be sufficient, documented telephone and mail communication should satisfy requirements. (Managers should have some form of documentation on file attesting to agreed-upon working arrangements.)

Conversely, where telephone or mail contact has been found to be a poor avenue for opening dialogue (e.g., faulty mail delivery, lack of a telephone, individuals or groups are not available during normal work hours), a good faith effort to consult will likely require that one or more direct, personal contacts be undertaken.

B. With Whom to Consult

Consultation requirements and procedures, including the identification of the appropriate consultation partner, vary according to the legal basis for consultation.

As discussed in more detail in Chapter IV, the various statutes and regulations require consultation with one or more of the following:

officials of federally recognized tribal governments (including Alaska Native corporations);

representatives of nonrecognized Indian communities;

traditional cultural or religious leaders and practitioners; and

lineal descendants of deceased Native American individuals whose remains are in Federal possession or control.

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

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

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

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

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

In addition to the list of recognized tribes, Area Offices of the BIA produce a **supplemental list of nonrecognized Indian groups** petitioning Federal recognition. The BIA's Area or Agency Offices should be contacted to obtain updated and additional information on tribal governments and other Native American organizations in the general vicinity. (See Manual Section 8160.04D and E.)

Each BLM office should develop and maintain lists of:

The tribal officials and traditional religious leaders who have been designated by tribal governments to serve as contacts for notification and consultation.

Other Native American individuals and representatives of nontribal groups identified as being interested in proposed BLM actions.

Identifying tribal contacts. Initial inquiries should be addressed to the presiding government official of the Indian tribe, e.g., the Tribal Chairman. Initial discussions

should attempt to determine which individual(s) will be officially authorized to serve as the point of contact and the representative/spokesperson for the tribe for each of the various matters relating to the BLM.

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

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

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

Facilitating communication. Nonprofit organizations and public assistance agencies that provide services to Native Americans can sometimes facilitate communication with tribes, communities, traditional leaders, etc. (e.g., legal aid, family service, elders' health programs, regional associations). Native American community organizations and ombudsman organizations can also help to identify appropriate parties for consultation.

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

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

Similarly, cultural resource consulting firms working for land use applicants, etc., might appropriately be approved to make contacts and collect information in some

circumstances, such as to identify traditional cultural properties for purposes of Section 106 compliance (see Section IV.C. below and MS 8160.08A1b); but they cannot negotiate, make commitments, or otherwise give the appearance of exercising the BLM's authority in consultations.

Summarizing information. Each office should develop maps of Native American interests for its area of jurisdiction. Such maps should show tribal and sub-tribal interests and locate lands historically occupied or utilized. Maps can also locate areas identified as having ongoing traditional religious significance and use. However, when information of this extremely sensitive nature is included, maps must be treated as confidential working documents and kept from public view. (See Section III.F. below.)

C. When in the Decisionmaking Process to Start Consultation

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

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

More information to help guide the timing of consultation and the identification of consultation partners can be found in Chapter IV, the legislative requirements section of this Handbook.

D. Consultation Process

Preparing for Consultation. The first steps of preparation are to identify a clear purpose for consultation, and then to review the record of what is already known about the relevant interests of Native Americans who might want to have input into the BLM's activities.

Recorded sources that should be reviewed include public participation records for land use plans; minutes of public meetings; transcripts of public hearings; pertinent

correspondence; protest records; documentation of previous consultation; and similar records of Native American public involvement.

The BLM's and others' cultural resource records, including class I inventories and published and unpublished documentary sources, should be reviewed to identify any previously recorded areas and/or properties of traditional religious or cultural importance, and any traditional lifeway values that are closely associated with lands or resources which may be affected by BLM actions.

Properties of traditional religious or cultural importance include, among other things, those "traditional cultural properties" that may be eligible for the National Register of Historic Places, as described in the National Register staff's guidance document, National Register Bulletin No. 38.

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

Initiating Native American Contacts. After establishing a need and a purpose for consulting and determining with whom to consult (see Section III.B. above), managers must make reasonable efforts to elicit information and views directly from affected Native Americans.

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

Whenever their interests would be involved, both those tribes and groups that live near and/or use the lands in question, and also those with historical ties to the lands who now live elsewhere, should be contacted and given an opportunity to participate.

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

Tribal government officials are the appropriate spokespersons where proposed actions might affect tribal lands and interests. However, tribal officials may not have all of the pertinent information.

It may be that information about cultural and religious values and concerns associated with BLM lands can only be obtained from cultural or religious leaders and practitioners who are not tribal government officials.

A return receipt from certified mail will verify **notification**, but by itself will generally not be adequate to establish a good faith effort to enter **consultation** (except in established relationships where mail communication is mutually agreed to be sufficient; see III.A. above).

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

Courtesy Notice.

Notices of public meetings and announcements of opportunities to review environmental documents should be provided to all Native Americans who have been identified as having, or may reasonably be expected to have, an interest in BLM activities and authorizations.

This level of general announcement, promoting general public participation, should not be construed to meet a specific legal requirement to notify potentially affected Native Americans.

Legally Required Notification.

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

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

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

Legally required consultation. In several court tests, attempts at written correspondence have been considered insufficient demonstration of an agency's effort to consult, unless accompanied by telephone and/or direct contact.

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

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

In general, correspondence should----

identify the purpose of the letter (i.e., the action being proposed and the specific legal/regulatory basis for writing);

identify a BLM contact person and how to reach him/her (if for consultation, note that a call or visit will follow);

specifically request the kind of Native American input needed (such as identification of potential cultural concerns);

provide an opportunity for a meeting; and

solicit the names and addresses of other persons who should be notified or consulted.

Some additional clauses which might be appropriate under certain circumstances include the following:

Referrals: "If you are not the appropriate individual to receive this request, please advise whom we should contact."

Flexible meeting proposals: "If this time and location are not appropriate, please contact [_____] within [___] days prior to the scheduled meeting to make alternative meeting arrangements."

Documentation requests: "Please indicate on the enclosed map, if possible, areas of specific concern," or "Please provide or refer us to any available information that would help us to understand the significance and nature of traditional cultural concerns in the [area of proposed action] for the [proposed action] for the [group or tribe name]."

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

Documentation of notification and consultation.

Include notification and consultation documents in the permanent decision record.

Evidence of notification and consultation (or of the failure of diligent efforts) is to be included in environmental documentation and provided to the authorized officer in support of a proposed decision. The names of preparers should appear on all notification and consultation materials.

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

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

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

After initial mail and telephone contacts have been made, a meeting should be scheduled with appropriate tribal officials and traditional cultural or religious leaders and practitioners (unless they determine that their participation has been sufficient and a meeting is not necessary).

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

E. How Much to Do

There is no simple measure of sufficiency of Native American consultation efforts. Managers and staffs must evaluate the----

potential harm or disruption a proposed action could cause;

alternatives which would reduce or eliminate potential harm or disruption;

completeness and appropriateness of the list of Native American groups and individuals consulted;

nature of the issues raised;

intensity of concern expressed;

legal requirements posed by treaties;

relative productivity of consultation; and

need for further consultation----

on a case-by-case basis.

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

In general, enough information should be developed to document how decisions were reached when they may potentially affect Native American values associated with BLM-administered lands and resources.

It is important to keep in mind that many, perhaps most, specific issues of Native American concern will <u>not</u> be issues associated with cultural resources such as archaeological sites.

Native American cultural concerns are likely to center on issues of access, collection and use of plants and animals, protection of religious places, and incompatible land and resource uses.

A good way to gauge whether the BLM's consultation efforts have been sufficient is to mentally step outside one's actual role, then to consider the degree to which an outsider's objective review of the decision record would find a good faith BLM effort to identify, notify, involve, and respond to all Native Americans potentially affected by a proposed decision. How would it look to an Indian? To a judge? To the press?

F. Confidentiality

One of the greatest barriers to completely open consultation discussions is Native Americans' hesitation to divulge information about places that are considered to have a sacred character, or practices that are of a sacred or private nature. In some instances, reluctance to speak of such matters is strong enough to prevent information sharing altogether.

Two points are very important:

We must exhibit a high degree of respect and sensitivity when elders or traditionalists convey privileged information about religious locations and practices.

The extent to which we can limit the public's access to sensitive information must be addressed honestly and openly. We must not overstate our ability to protect sensitive information.

Limitations. When they are willing to share it at all, tribal officials and traditional practitioners frequently request that the BLM hold confidential specific information on the nature of traditional locations, traditional uses, and other matters integral to traditional practice. Examples are traditional plant gathering areas, vision quest stations, graves and cemeteries, reinterment locales, ceremonial sites, shrines, and sacred places.

The Freedom of Information Act (FOIA) allows the public to seek disclosure of Federal agency information. It also allows agencies to hold back some classes of material, but the Act generally limits agency discretion in favor of open public access.

"Working files," i.e., documents that are not formal products of the agency or official correspondence, are not generally subject to release under FOIA requests (5 U.S.C. 552(b)(3)). Thus, raw ethnographic data and notes are excluded from release under FOIA requests.

This useful classification should not be overused or abused.

Besides the general exclusions of FOIA, specific laws sometimes provide authority to protect information. It is longstanding BLM policy to restrict sensitive Native American information from public disclosure, to the greatest degree possible under specific pertinent laws and regulations (Manual Section 8160.06F). Unfortunately, assurances of protection based on this policy have been limited by the fact that few of the pertinent categories of sensitive information are covered by law and regulations.

New amendments to the National Historic Preservation Act (Sec. 304(a)) have improved the BLM's ability to protect more kinds of sensitive Native American information. However, some kinds of potentially sensitive information are still not explicitly exempt from public disclosure.

The 1992 Amendments to the National Historic Preservation Act allow Federal agency officials, with the concurrence of the Secretary of the Interior, to withhold information about the location, character, or ownership of a**historic property** (i.e., one included in or eligible for the National Register of Historic Places).

Under the NHPA, information can be withheld if disclosure might----

cause a significant invasion of privacy;

risk harm to the historic resource; or

impede the use of a traditional religious site by practitioners.

These provisions broaden the BLM's discretion to protect sensitive information, so long as it relates to distinct, fixed properties.

The Archaeological Resources Protection Act (Sec. 9 and 43 CFR Part 7) allows Federal agencies to protect archaeological resources from harm by restricting information on their nature and location.

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

To summarize, the BLM can protect from FOIA disclosure sensitive Native American information that----

exists only in "working files"; or

pertains to a property listed in or eligible for the National Register of Historic Places, if disclosure would risk harm to the property, cause a significant invasion of privacy, or impede the use of a traditional religious site by practitioners; or

pertains to an archaeological resource as defined in 43 CFR Part 7, if disclosure would risk harm to the resource.

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

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

G. Conclusion of Consultation

In all cases the Native American groups which have been involved in the consultation process should be notified of the BLM's final decision.

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

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

H. Other Issues

Compensation.

In general, payment to Native Americans for "consultation" described in this Handbook is not authorized, in keeping with Department of the Interior Acquisition Regulations (DIAR 1437.103, Personal Services Contracts and Federal Acquisition Regulation, Part 37.104).

Additional information on this topic is included in Appendix 1, "Policy on Compensation to Native Americans for Their Participation in the BLM's Administrative Process".

Refusal to consult or conditional consultation. The BLM is required to take steps to provide a good faith opportunity for Native Americans to make their religious and cultural concerns known, so that these concerns can be fully considered during decision making. Indian tribes, Native American communities, and traditional religious or cultural leaders and practitioners are not required to participate.

When BLM has provided sufficient opportunity and has documented that this is the case, and the intended consultation partner refuses or declines to consult, the BLM's requirement is met.

If the potential consultation partner will consult only on condition of payment, for example, the BLM should document its efforts to consult and proceed.

Conflicting Information. The BLM regularly deals with conflicting information from individuals and groups interested in how the public lands are managed. It is no different when dealing with Native Americans. As a Federal agency, the BLM has the responsibility to make informed decisions about the needs and concerns of Native Americans. It is not the responsibility of the BLM to resolve disagreements external to the BLM nor to require consensus before making informed decisions.

For example, in an area of interest to two groups from the same tribe, one might insist that the region contains sacred sites that should not be disturbed, while the other might maintain that the sites can be disturbed. The BLM must consider all information and perspectives in the decision record and document the basis for selecting a particular alternative.

Chapter IV. Procedures Unique to Specific Laws

A. American Indian Religious Freedom Act

The Senate record, describing factors that led to the American Indian Religious Freedom Act of 1978 (AIRFA), highlights the finding that the majority of Federal agencies' "infringements [of American Indian Religious freedom] have resulted not from an express Federal policy but rather from a lack of policy" (Senate Report 95-709).

AIRFA's main purpose, then, was to establish a policy of Federal protection for traditional American Indian religious freedoms. Further, with an eye to correcting Federal policies and practices that could infringe on American Indian religions, the Act directed an Executive Branch review of agencies' programs and regulations "in consultation with Native religious leaders."

It is the Congress' stated intent that the source of information on potential infringement ". . . be the practitioner of the religion, the Medicine people, religious leaders, and traditionalists who are Natives - and not Indian experts, political leaders or any other non-practitioner." (Senate Report 95-709.)

Consultation for purposes of AIRFA is specifically directed at identifying the concerns of traditional Native American religious practitioners relative to proposed BLM actions.

Traditional religious practitioners are frequently not tribal officials or governmental leaders. The steps described in Chapter III of this Handbook should be employed to identify these religious practitioners.

Consultation pursuant to AIRFA should be initiated as soon as land uses are proposed which have the potential to affect Native American religious practices.

As the first step, managers should review existing records and documentary sources to identify any previously recorded properties of traditional religious importance and any traditional ritual or ceremonial practices associated with the lands in question.

Next, managers must make reasonable efforts to elicit information and views directly from the Native Americans whose interests would be affected.

All potentially interested tribes and groups should be contacted by letter and telephone to request their direct participation and input. This would include tribes and groups that live near and/or use the lands in question, and also those known to have historical ties to the lands but now live elsewhere.

In any such communication, it must be clear that the purpose of the request is to learn about places of traditional religious importance that cannot be identified without the tribe's or group's direct assistance, so that the BLM may know to protect the places from unintended harm and to provide for appropriate Native American access.

Following initial mail or telephone contact, if there is reason to expect that places of religious significance to the tribe or group are likely to be affected by BLM actions, the District Manager or an authorized representative should initiate face-to-face personal contact with appropriate officials of the tribe or group and/or with traditional religious leaders. (See Section III.D. above.)

The purpose of such personal contact is to seek mutually acceptable ways to avoid or minimize disturbance of traditional religious places or disruption of traditional religious practices.

Specific requests to obtain and consider information during planning or decision making must be thoroughly documented, both as part of the administrative record and as a basis for determining if further inventory or consultation will be needed in subsequent BLM actions.

B. Archaeological Resources Protection Act

Notification related to permits.

The Archaeological Resources Protection Act (ARPA), Sec. 4(c), requires notification of the appropriate Indian tribe before approving a cultural resource use permit for the excavation (testing and data recovery) of archaeological resources (more than 100 years old), if the responsible Federal land manager determines that a location having cultural or religious importance to the tribe may be harmed or destroyed.

The uniform regulations implementing ARPA include a provision that the Federal land manager may also give notice to any other Native American group known to consider potentially affected locations as being of religious or cultural importance (43 CFR 7.7(a)(2)).

Sample text for a notification letter is contained in Appendix 1 of the BLM's Cultural Resource Use Permits manual (Manual Section 8151).

If all documented efforts to notify and consult with the appropriate Indian tribe(s) or Native American group(s) prove unsuccessful, processing of the permit application may proceed without further delay. Whether successful or not, documentation of efforts to notify and consult must be included in the permit file.

This documentation will serve as evidence of notification and consultation efforts in accord with 43 CFR 7.7.

If the response to the notification is a request for consultation, then consultation should be expeditiously undertaken consistent with the procedural requirements and timeframes contained in 43 CFR 7.7(a)(3) and Manual Section 8151.

C. National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires the identification and consideration of potential adverse effects on properties which may be significant due to their traditional or historic importance to an Indian tribe. The specific requirement for consultation relative to Sec. 106 of the Act is in Sec. 101(d)(6), added by amendments passed in 1992.

Consultation for Sec. 106 purposes is limited to Indian tribes (and Native Hawaiian organizations). It focuses (1) on identifying properties with tribal religious or cultural significance that are potentially eligible for inclusion in the National Register of Historic

Places; and (2) on taking into account the effects a proposed Federal undertaking might have on them.

In nearly all cases, the BLM's land use planning and environmental compliance procedures, and the procedures outlined in Section IV.A. above for consulting under AIRFA, should provide sufficient documentation to identify "traditional cultural properties" (as discussed in National Register Bulletin No. 38) and "religious and cultural values" (pursuant to NHPA Sec. 101(d)(6)).

Separate consultations with Indian tribes regarding the National Register eligibility of particular properties should not be necessary on a project-by-project or a site-by-site basis. Rather, input from Indian tribes should be sought more programmatically during land use planning and environmental review. Procedures and criteria may be the subject of agreements with tribes.

The 1992 NHPA amendments add significant new provisions concerning Indian tribes' participation in historic preservation. Regarding consultation, besides Sec. 101(d)(6) discussed above, Sec. 110(a)(2) directs Federal agencies' programs to ensure----

"(D) that the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, [and others] carrying out historic preservation planning activities. . . and . . .

"(E) that the agency's procedures for compliance with section 106----

"(ii) provide a process for the identification and evaluation of historic properties . . . and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, [and] Indian tribes . . . regarding the means by which adverse effects . . . will be considered . . . ."

The language in Sec. 101(d)(6), requiring agencies to consult with Indian tribes that attach religious and cultural significance to traditional properties that may be eligible for the National Register, reinforces procedures BLM Field Offices are already directed to follow.

For example, Native Americans are to be asked to participate where active management of historic properties is planned, i.e., where activity plans and project plans are being written and specific, on-the-ground steps will be taken to protect and/or interpret the property. (See Manual Section 8132.12B.) The purpose is to obtain Native Americans' views on how (or whether) the property should be patrolled, monitored, protected, stabilized, and interpreted. The consultation should increase BLM's sensitivity to Native

American viewpoints and aid in developing programs of site interpretation that reflect traditional community points of view.

Native Americans' participation in the historic preservation process should not end with the identification of properties potentially affected by agency undertakings.

Under Sec. 101(d)(6)(B) and Sec. 110(E)(ii), consultation may be called for when data recovery is being considered to mitigate adverse effects on a property's scientific importance, if the property also has ascribed religious and cultural significance.

Where appropriate, such consultation opportunities may be used to meet the separate consultation requirements of 43 CFR 7.7 and Sec. 3(c) of NAGPRA, as well as those of Sec. 101 and Sec. 110 of NHPA.

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

D. Native American Graves Protection and Repatriation Act

The purpose of consultation under the Native American Graves Protection and Repatriation Act (NAGPRA) is to reach agreement as to the treatment and disposition of the specific kinds of "cultural items" defined in the Act: Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.

Federal agencies are required to consult with the appropriate Indian tribe or lineal descendant under four circumstances:

A summary of a Federal agency's or a museum's holdings, dating from before the Act, indicates that unassociated funerary objects, sacred objects, and/or objects of cultural patrimony are present;

An inventory of a Federal agency's or a museum's holdings, dating from before the Act, finds human remains and/or associated funerary objects;

An agency official is processing an application for a permit that would allow the excavation and removal of human remains and associated funerary objects from Federal lands; and

Items covered by the Act have been disturbed unintentionally.

Summaries of holdings were completed by November 1993, and inventories will be completed by November 1995, in accordance with Sections 5 and 6 of the Act. Only the last two of these circumstances are discussed here.

Intentional removal.

Under NAGPRA, Federal agencies must consult with appropriate Indian tribes or individuals prior to authorizing the intentional removal of Native American human remains and funerary objects found with them.

Documentation to show that consultation pursuant to Sec. 3(c) of NAGPRA has occurred must be included and maintained in the decision record.

A cultural resource use permit (see BLM Manual Section 8151) or equivalent documentation is generally required before human remains and artifacts covered by the Act may be excavated or removed from Federal lands. Permit-related notification, and consultation if it is requested, are required by ARPA Sec. 4 and 43 CFR 7.7.

When permit-related consultation will be taking place, it should be appropriate in most cases to use that opportunity to consult prospectively with regard to NAGPRA, to develop procedures to be followed in case human remains and cultural items are discovered. In any event, consultation for NAGPRA's purposes must occur before the excavation or removal of human remains and cultural items may be authorized.

Unintended disturbance.

Human remains and/or cultural items subject to NAGPRA discovered as a result of a BLM or BLM-authorized activity, such as construction or other land-disturbing actions, are to be handled in the manner described in the "inadvertent discovery" procedures found at Sec. 3(d) of the Act.

Where there is a reasonable likelihood of encountering undetected cultural items during a proposed land use, agreements should be negotiated with tribes or groups before the project is authorized to provide general guidance on treatment of any cultural items that might be exposed. Knowing how to react in advance can save time and confusion.

E. National Environmental Policy Act

The purposes of Native American consultation under the National Environmental Policy Act (NEPA) are to identify potential conflicts that would not otherwise be known to the

BLM, and to seek alternatives that would resolve the conflicts. It should be clear to all that NEPA's charge to "preserve important historic, cultural, and natural aspects of our national heritage" cannot be fully met without informed consideration of Native Americans' heritage.

An administratively key purpose is to develop documentary records sufficient to demonstrate that the BLM has taken adequate steps to identify, consult with, and weigh the interests of Native Americans in its decision making.

Using environmental review as a foundation for consulting with Native Americans has several special advantages:

Compliance with NEPA is one of BLM's most fundamental and most universal steps preliminary to decision making.

It is standard BLM procedure during compliance with NEPA to consider the impacts proposed actions and their alternatives would have on cultural resources.

Regulations implementing NEPA specifically require Federal agencies to consult with Indian tribes and interested persons and organizations (40 CFR 1501.2, 1501.7; see also 516 DM 4.B. on consultation when Indian reservations would be affected).

Addressing NAGPRA, AIRFA, and NHPA issues during consultation for NEPA improves consultation efficiency and ensures thorough coverage of Native American issues in the NEPA review.

The overarching nature of NEPA compliance provides a good opportunity to consolidate the consultation record.

Caution must be exercised when mitigation is proposed in the analysis of impacts and alternatives.

An infringement of religious freedom, or a burden on religious practice, or a loss of religiously significant resources cannot be "mitigated" in the usual sense of the word (i.e., to lessen, soften, lighten). It is possible, however, to deal with potential infringement, burden, or loss by developing alternatives or management options that would avoid the specific impact. Avoiding an impact by not taking a certain action or parts of an action fits within the meaning of mitigation as defined in the CEQ regulations (see 40 CFR 1508.20).

F. Federal Land Policy and Management Act

Land use planning.

The primary procedural means for complying with the consultation obligations described in this Handbook is the land use planning process, including the associated environmental review.

The BLM's land use planning process is also the primary mechanism for identifying places associated with traditional lifeway values, such as areas where plants and animals can be collected for cultural or religious purposes. These include properties of traditional cultural importance that may be eligible for the National Register of Historic Places, described as "traditional cultural properties" in National Register Bulletin No. 38.

The most appropriate time to learn about traditional cultural properties and other Native American issues and concerns, not already identified in cultural resource inventories (see Manual Section 8111.12A, 8111.13C5, 8111.13C6c), is during the public participation phases of land use planning and environmental review.

Identification of special concerns and consultation toward their accommodation are most effectively carried out over the extended period of time afforded by the planning and environmental review process. All Field Offices should already be following direction in Manual Section 8160.08A1 incorporating consideration of Native American issues and concerns into this process.

The BLM's land use planning process offers several opportunities for interested persons, including Native Americans, to raise issues, to express their views, and to identify places of concern.

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

In addition, the BLM is obligated in Sec. 202(c)(9) to coordinate all aspects of planning with Indian tribes, to ensure consistency between BLM's and the tribes' land use plans.

Indian tribes are not "just another public" whose interests ought to be considered. In their relations with Federal agencies, Indian tribes have special rights as sovereign governments. To use timely opportunities in the planning process as occasions to coordinate and consult is not meant to dismiss the special relationship the U.S.

Government maintains with Indian tribes, or to put all interests on equal footing with tribal interests.

Regulations and policies relating to public participation in land use planning are found at 43 CFR 1610 and in Manual Section 1614. Program-specific responsibilities to coordinate and consult during land use planning are discussed in Manual Section 8160.08A.

G. Religious Freedom Restoration Act

The Religious Freedom Restoration Act of 1993 does not have procedural requirements in the way that the laws discussed in preceding sections do.

The Act reinstates the judicial standard that requires a Federal Government agency to demonstrate a "compelling governmental interest" before substantially burdening a person's religious liberty:

"Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person----

"(1) is in furtherance of a compelling governmental interest; and

"(2) is the least restrictive means of furthering that compelling governmental interest."

(Public Law 103-141, Sec. 3(b).)

Although the Act does not impose specific procedural requirements, it restores a powerful standard for justifying governmental burdens on religious liberty, affecting all persons and religions equally.

The Act's compelling-interest test should be the basic standard guiding all BLM decisions that might burden Native Americans' free exercise of religion, whenever free exercise would involve access, use, ritual practice, and other activities related to traditional religious uses of lands and resources.

SUBJECT: **POLICY ON COMPENSATION TO NATIVE AMERICANS FOR PARTICIPATION IN THE BLM'S ADMINISTRATIVE PROCESS**

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

BACKGROUND: **POLICY**

It is the BLM's policy not to give compensation to members of the public, including Native Americans, for contributing information or comments as input into the BLM's administrative process.

Purpose of input

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

Ambiguous terminology

Some misunderstanding seems to result from use of the term "consultation." As used in this context, the term means conducting a dialogue, exchanging information. A participant in this kind of consultation is not a "consultant" in the way that a contractor who provides technical services might be called a consultant. Accordingly, "consultants' fees" are not appropriate to this kind of consultation.

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NOTE: Nothing prevents the BLM from contracting for the services of qualified Native American individuals, firms, or organizations, through the BLM acquisition and procurement procedures, to produce in-depth ethnographic reports or other specific products. Such services would not constitute "consultation" as used in the BLM 8160 Manual and this issue analysis.

BASIS FOR CONSULTATION

Legal Requirements

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

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

Component of Normal Administrative Process

Inviting Native Americans to identify and address issues of particular concern to them is a regular component of the BLM's administrative process. BLM Manual Section 8160 and Handbook H-8160-1 contain guidance for conducting Native American coordination and consultation. As expressed and expanded on in the Manual Section, the BLM's basic policy is to "[c]oordinate and consult regularly with appropriate Native American groups to identify and consider their concerns in land use planning and decision making" (BLM Manual Section 8160.06B).

The Character of Consultation

Consultation is taken to be "the active, affirmative process of: (1) identifying and seeking input from appropriate Native American governing bodies, community groups, and individuals; and (2) considering their interests as a necessary and integral part of the BLM's decisionmaking process. The aim of consultation is to identify issues and to define the range of acceptable management options" (BLM Handbook H-8160-1, I.C.).

ASSISTANCE IS CONDITIONALLY ALLOWABLE

The Comptroller General has determined that under limited circumstances it may be appropriate for a Federal agency to assist a party who otherwise would not be able to participate in the agency's administrative process. An agency may assist in paying expenses only if the party "is indigent or otherwise unable to finance its participation" (59 CG 424).

The Federal agency is expected to review the income, expenses and net assets of the participant in making a determination of financial capability. The mere fact that an individual has to live within a budget and balance choices among alternative activities does not qualify him or her for assistance: "[W]e would expect the participant to choose

which public activities are the most significant and to use its own resources to participate in those activities" (59 CG 424).

THE BLM SHOULD ACCOMMODATE PARTICIPATION

It is neither feasible nor appropriate for the BLM to undertake the level of personal financial review set forth by the Comptroller General, to determine if compensation would be appropriate, every time consultation with Native Americans is required. Rather, the BLM should attempt to avoid creating circumstances where compensation for expenses might be necessary. That is, the BLM should make efforts to accommodate Native American participation whenever possible.

For example, the BLM should not hold public meetings on matters potentially affecting Native Americans in places where it would be difficult for Native Americans to attend.

Broad Public Interest

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

SUBJECT: **TRIBAL MANAGEMENT OF NON-TRIBAL LANDS AND RESOURCES**

ISSUE SUMMARY: The authority and opportunity exist to expand tribal government involvement, control and partnerships in land and resource management programs through application of self- determination contracts (88 Stat. 2203) and Cooperative Management agreements.

BACKGROUND: **DIRECT SERVICES**

The BLM administers only a few direct services to Indian tribes, but these present immediate opportunities to increase tribal involvement and enhance tribal control of resource management activities.

Inspection and Enforcement of Indian Oil and Gas Operations could be contracted. Currently limited tribal certification has been undertaken for inspection and enforcement of Indian Oil and Gas operations. The Department of the Interior's Indian Minerals Steering Committee is evaluating additional opportunities for enhancing tribal involvement through: (1) restructuring of the program to provide a higher level of tribal

control and administrative authority; (2) redesign of certification curriculum to assure higher completion and retention rates of Indian attendees; and (3) creation of an active agency support structure for on-going tribal program administration and trust assurance.

Sand and Gravel Operations (Salables). The solid minerals expertise available within the Bureau of Land Management could provide an on-going resource to tribes in support of tribally controlled programs and assure fulfillment of the government's trust obligation.

COLLABORATIVE MANAGEMENT

Current Initiatives

Some of the Bureau program relationships which lend themselves to cooperative management include: joint management and staffing; resource protection; habitat management; watershed restoration; and regional ecosystem management.

To the degree that joint management efforts with tribal governments have been developed, they have proven quite successful. One of the most comprehensive intergovernmental regional management partnerships with a tribe has been initiated with the Agua Caliente for the cooperative management of the "Santa Rosa Mountains National Scenic Area". The area includes both public and tribal lands and is being jointly managed in a partnership among BLM, the tribe and local governments, for resource protection, reintroduction of peninsular bighorn sheep, and scenic quality.

Potential Initiatives

Besides the examples outlined above, a number of programs represent significant opportunities for contracting or cooperative resource management relationships:

Forestry and Watershed Management: An opportunity exists to build upon existing relationships through program aspects including coordinated forest planning, reclamation, erosion management, mitigation, and environmental review. Additional partners in this relationship are represented by the professional forestry organizations in which the tribes actively participate, universities supporting technical training of tribal members in forestry career fields, and other federal and state agencies managing contiguous forest lands.

Cultural Heritage: Many tribes not only possess cultural knowledge of public lands within their traditional homelands, but also have developed professional staffs for

managing archaeological and historic resources. In addition, recent amendments to the National Historic Preservation Act (1992) provide authority for tribes to assume the role of State Historic Preservation Officers (SHPO) under certain circumstances. In many areas of the western United States public lands and tribal lands are interspersed, providing an opportunity to coordinate and consolidate regional historic resource management and cultural heritage programs through compacting relationships. Some tribes have built extensive programs including professional expertise in archaeology, ethnohistory, ethnography, and cultural traditions, as well as a law enforcement and administrative capacity that could be applied to collaborative programs of cultural resource management.

Range Management: Several tribes in the Northern Plains States and Great Basin have an economic base heavily reliant on grazing and rangeland management. Many of the current Departmental initiatives addressing rangeland reform speak to issues of primary concerns to tribes in the West. Over a dozen tribal governments are dependent upon grazing for their current livelihood and are pursuing new strategies for a sustainable economic base. Rangeland management opportunities for cooperative management include monitoring of rangeland condition, rehabilitation and revegetation, facility design, installation and maintenance.

Cadastral Survey: Currently BLM provides cadastral survey services to both the Bureau of Indian Affairs (BIA) and tribes, in some areas of the country, under negotiated cooperative services agreements. These services tend to be regular in nature and reflect a consistent and expanding workload. Cooperative development of a joint cadastral survey program, through compacting with tribes, could provide training, employment and skill development opportunities and enhance availability of survey services to tribal governments.

SUBJECT: **RIGHTS SECURED TO TRIBES BY TREATY**

ISSUE SUMMARY: Where treaties were executed with the United States, important rights were guaranteed to tribes, and many of these rights continue to be enforceable today. Rights secured to the tribes by treaty include beneficial ownership of Indian lands, hunting and fishing rights, and entitlement to certain Federal services such as education or health care.

BACKGROUND: **THE NATURE OF TREATIES**

Indian treaties stand on essentially the same footing as treaties with foreign nations. Since they are made pursuant to the Constitution, they take precedence over any conflicting State laws by reason of the Supremacy Clause. U.S. Const., Art. VI,

2; ***Worcester*** v. ***Georgia***, 31 U.S. (6 Pet.) 515 (1832). They are also the exclusive prerogative of the Federal Government. The First Trade and Intercourse Act, 1 Stat. 137 (1790), forbade the transfer of Indian lands to individuals or States except by treaty "under the authority of the United States." This provision, repeated in later Trade and Intercourse Acts, has become of tremendous current importance, for several Eastern States negotiated large land cessions from Indian tribes near the end of the eighteenth century.

Not only is the treaty-making power exclusively Federal, it rests almost entirely with the President. It is true that two-thirds of the Senate must concur in any treaty, but the initiation of the process and the terms of negotiation are inevitably controlled by the Executive Branch. (Indeed, there were many instances, especially in California, where Executive officials negotiated treaties and acted upon them despite the failure of the Senate to ratify them.) In the middle of the eighteenth century, Congress and particularly the House of Representatives grew increasingly resentful of being excluded from the direction of Indian affairs.

The ultimate result was the passage in 1871 of a rider to an Indian appropriations act providing that: "No Indian nation or tribe . . . shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ." 25 U.S.C.A. 71. The rider also specified that existing treaty obligations were not impaired. As an attempt to limit by statute the President's constitutional treaty-making power, the rider may well be invalid, but it accomplished its purpose nonetheless by making it clear that no further treaties would be ratified. Indian treaty-making consequently ended in 1871, and formal agreements made with the tribes thereafter were either approved by both houses of Congress or were simply embodied in statutes.

INTERPRETATION OF TREATIES

Rules of Sympathetic Construction. To compensate for the disadvantage at which the treaty-making process placed the tribes and to help carry out the Federal trust responsibility, the Supreme Court has fashioned rules of construction sympathetic to Indian interests: Treaties are to be construed as they were understood by the tribal representatives who participated in their negotiation. They are to be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians.

One of the most important applications of these rules of construction is found in ***Winters*** v. ***United States***, 207 U.S. 564 (1908), which dealt not with a treaty but with an Indian agreement made in 1888 and ratified by an act of Congress.

The tribes involved in that agreement had ceded to the United States a large tract of land to be opened up for settlement, while reserving to themselves other land, bordered by a flowing stream, which became the Fort Belknap Reservation in Montana. Non-Indian settlers diverted the stream, and the United States brought suit on behalf of the Indians. The settlers argued that lands would not have been ceded for settlement without also ceding the water which would permit them to become fruitful. The United States argued that lands would not have been reserved for the tribes unless water had also been reserved to make the reservation productive.

Faced with these plausible contradictory interpretations, the Court chose to interpret the agreement from the standpoint of the Indians and to resolve the conflict in their favor. The resulting decision has become the foundation of all Indian water law.

If the language of a treaty is clear, it will be applied whether or not the outcome is favorable to the Indians. Even where the treaty provisions are unclear, the tribes do not inevitably win every dispute over their interpretation. Nevertheless, the rules of construction have had a very substantial effect favorable to Indian interests.

Effect on Interpretation of Statutes. The rule of sympathetic construction has been carried over from treaties to statutes dealing with Indian matters. The Supreme Court has on numerous occasions adhered to "the general rule that statutes passed for the benefit of the dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." ***Alaska Pacific Fisheries*** v. ***United States***, 248 U.S. 78, 89 (1918). This rule has been applied in construing Public Law 280, a statute that deals with Indians but was not necessarily passed for their benefit. ***Bryan*** v. ***Itasca County***, 426 U.S. 373, 392-93 (1976).

SUBJECT: **COMPETITION OVER NATURAL RESOURCES--TRADITIONS VERSUS COMMERCE**

ISSUE SUMMARY: The decision whether and how to develop natural resources is a subject of great debate in Indian communities. Indian people hold various and conflicting opinions concerning the effect of resource development on a tribe's social structure and deeply held traditional, religious and environmental values. Economically attractive commercial development of traditional subsistence resources can create strain within Indian communities and between reservations and neighboring jurisdictions.

BACKGROUND: **HUNTING AND FISHING RIGHTS**

Hunting for subsistence purposes is common among reservation Indians and is often viewed as continuation of a traditional lifeway. Deer and elk are migratory animals, and cross- jurisdictional conflicts arise as herds move from tribal lands to Federal, State, and private lands. Tribes in growing numbers are stocking and managing big game herds in order to attract non-Indians to the reservation for recreation. In the Pacific Northwest and the Great Lakes area, Indian fishing has become embroiled in controversies over salmon, steelhead and lake trout. Indian fishers sell commercially most of the fish they take, but the subsistence value is also significant.

OFF-RESERVATION RIGHTS

In the Pacific Northwest, many treaties provide for off-reservation fishing rights: they often guarantee the "right of taking fish, at usual and accustomed grounds and stations . . . in common with all citizens of the territory." The States have argued that the treaty provisions allow tribes access to their usual and accustomed places, but permit no special additional rights. The tribes have argued that "in common with" guarantees them half of the resource.

Boldt Decision. In the "Boldt decision," a Federal District Court judge in the State of Washington ruled that the tribes possess the right to harvest up to 50 percent of the salmon and steelhead at their off-reservation sites. Sit-ins and demonstrations by vocal non-Indians, including sports and commercial fishermen, followed.

The State of Washington, acting contrary to the Boldt decision on several occasions, has been openly criticized by the Federal courts. The Supreme Court, in ***Washington*** v. ***Washington State Commercial Passenger Fishing Vessel Association*** (1979), upheld almost all aspects of the Boldt decision. The controversy continues in numerous enforcement actions on individual rivers in the State of Washington. In the Great Lakes, similar off-reservation fishing rights were adjudicated even though the treaties made no reference to off-reservation fishing.

SUBJECT: **WATER RIGHTS**

ISSUE SUMMARY: The positioning of Indian lands on most major river systems has created inevitable and major conflicts with public and private water interests in the water-scarce West.

BACKGROUND: **INDIAN RESERVED WATER RIGHTS**

State Law and Prior Appropriation Doctrine. Western States (and now most States in the Midwest) have always used the prior appropriation doctrine to allocate water rights.

It is based on the notion of "first in time, first in right." Basically, under State law a water user obtains a right senior and superior to all later users if he or she appropriates the water by diverting water out of a watercourse and putting it to a beneficial use for such purposes as irrigation (easily the major water use in the West), mining, industrial, municipal or domestic use. Once these conditions are met, the water user has established an appropriation date.

Federal Law and Reserved Rights Doctrine. In contrast, Indian water rights are defined by Federal rather than State law. The first landmark Supreme Court case on this issue is ***Winters*** v. ***United States*** (1908). That case arose from a factual situation where residents of the Fort Belknap Reservation began diverting water from the Milk River in 1898. Upstream non-Indian water users had beneficially diverted a substantial portion of the Milk River in the early 1890's, before the tribe's appropriation.

The Supreme Court, applying Federal law, held in ***Winters*** that **sufficient water was reserved to fulfill the purposes of the reservation** at the time the reservation was established--1888.

This doctrine of Federal reserved rights established a vested right, whether or not the resource was actually put to use, and enabled the tribe to expand its water use over time in response to changing reservation needs. In making its decision, the Court construed the agreement establishing the reservation in favor of the tribe. The Court failed to clarify, however, whether it was the tribe or the Federal Government that reserved the water.

In ***Arizona*** v. ***California*** (1963), Federal reserved rights on the Colorado River were upheld for Indian reservations established by Executive Order and for public lands such as National Recreation Areas and National Forests. The amount of water reserved was an amount sufficient to satisfy the future as well as the present needs of the tribe. The test used was the amount of water necessary to irrigate all the "practicably irrigable acreage" on the reservation.

The Supreme Court rejected the tribes' claim that the amount of water allocated to the reservations under a 1964 decree should be increased. The tribes based their claim for an increase on two facts that affected the "practicably irrigable acreage" on the reservations: First, acreage recognized in 1964 as part of the reservations was excluded erroneously from the original decree. Second, additional acreage had been recognized recently as part of the reservations.

The Court applied the reserved rights doctrine to Federal public lands as well as to Indian reservations in ***Arizona*** v. ***California***. Later cases have limited the extent of

reserved water rights for Federal, non-Indian reservations of land (such as National Forests). Reserved water rights for these non-Indian reservations are limited to the primary purposes for which the reservation was created, i.e., those purposes actually stated. Water rights necessary for secondary uses must be obtained pursuant to State law. The courts still must determine the extent to which these limitations apply to reserved water rights for Indian reservations. Significant differences between the application of State law on Federal lands and on Indian reservations suggest that the distinction between primary and secondary purposes does not apply to reserved water rights for Indian reservations.

PROCEDURAL ISSUES

McCarran Amendment. The McCarran Amendment, passed by Congress in 1952, consents to the joinder of the United States as a defendant in Federal and State court adjudications of water rights. In ***Colorado River Water Conservation District*** v. ***United States*** (1976), the Supreme Court ruled that although Federal courts continue to have concurrent jurisdiction, the McCarran Amendment provides State courts with jurisdiction to adjudicate Indian water rights held in trust by the United States.

In its 1983 decision in ***Arizona*** v. ***San Carlos Apache Tribe***, the Supreme Court held that the McCarran Amendment allows State adjudication of Indian water rights even in those States that expressly have disclaimed jurisdiction in their constitutions or enabling acts.

It should be noted that the McCarran Amendment allows joinder of tribes only in general stream adjudications--comprehensive actions in which all potential water users in a watershed are joined. In addition, the statute confers judicial jurisdiction only; Indian water rights continue to be determined according to Federal substantive law.

UNRESOLVED QUESTIONS

Determining the scope of Indian reserved water rights involves numerous substantive questions that remain unsettled. Among these are the following:

1. Who reserved the water--the Federal Government or the tribes?

2. What priority dates do the tribes possess? In one case, involving a tribe that did not use water for irrigation in pre-treaty times, the court held that for traditional purposes, e.g., hunting and fishing, tribes possess a priority date of time immemorial, while for other purposes, e.g., agriculture, the date each particular reservation was established is the priority date.

3. What quantity of water is reserved? Is "practicably irrigable acreage" the maximum extent of Indian reserved water rights? What does "practicably irrigable" mean? Does it, as has been suggested to the Supreme Court, mean "economically feasible" using present technology?

4. Do Indian water rights include future needs, those not foreseeable at the time of the establishment of the reservation (e.g., the development of coal resources)?

5. Do Indian reserved rights include instream flows for fishery purposes? The Ninth Circuit Court of Appeals has upheld such a reservation.

6. Can Indian reserved rights be sold (or leased) to non-Indians? It has been argued that Indian water rights do not exist apart from tribal land and, therefore, cannot be sold separately.

7. Does a non-Indian purchaser of an allotment also purchase the ***Winters*** rights? The few decided cases in this area agree that a non-Indian purchaser of an allotment succeeds to some water rights, although they disagree on the nature and extent of those rights.

8. To what extent may tribes regulate water uses within their reservations? The Ninth Circuit Court of Appeals has denied State regulatory authority over non-Indian water use on fee land in a situation where the stream was entirely within the boundaries of the reservation. Many tribes are processing water codes now to regulate water uses within their reservations.

9. Is it in the best interests of tribes to quantify their rights? Legally, ***Winters*** rights include future needs, which are not lost if they are not exercised. Practically, States are awarding new non-Indian rights regularly, and tribal rights in part may go by the wayside under the "use it or lose it" philosophy that always has governed water policy in the West.