Attachment 1

Bureau of Reclamation Indian Trust Asset Policy

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

NOV 29 1993

W-6100

MEMORANDUM

To: Assistant Commissioner - Resources Management

From: Daniel P. Beard
Commissioner

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

Attached are the procedures to implement Reclamation's Indian trust asset policy. These procedures should be implemented upon receipt of this memorandum.

I am also directing you to commence a review of Reclamation Instructions to determine changes necessary to complete the implementation of this policy. This review should be completed by June 30, 1994.

By copy of this memorandum, I am directing all Regional Directors to designate one or more individuals who will have authority to certify on Categorical Exclusion Checklists that no impacts to Indian trust assets are anticipated. Names of these individuals should be provided to the Director of the Native American Affairs Office, W-6100.

Attachment

cc: Regional Director, PN, MP, LC, UC, GP

United States Department of the Interior

BUREAU OF RECLAMATION
Washington, D.C. 20240

IN REPLY REFER TO:
W-6100

MAR 15 1994

MEMORANDUM

To: Regional Director, PN, MP, LC, UC, GP
(attention: 150, 400, 700)

From: Joseph L. Miller
Director, Native American Affairs Office

Subject: Indian trust asset policy: guidance for implementing

Attached is a draft copy of a document containing a series of questions and answers about Reclamation's Indian trust asset policy and National Environmental Policy Act (NEPA) implementing procedures. This document was prepared with input from the Denver Office, this office, and LC-150.

Please circulate to all appropriate offices for review and field testing. Comments should be provided to the persons named below. The initial comment period will end June 30, 1994. If there are significant comments, a revised copy will be prepared and distributed.

Written comments on this document should be directed to:

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

Information copies of anything sent to Ms. Marks should be directed to:

Rebecca Westra, D-5100
fax: 303-236-3573
lan: RWESTRA

Attachment

August 31, 1994

BUREAU OF RECLAMATION INDIAN TRUST ASSET POLICY AND NEPA IMPLEMENTING PROCEDURES

QUESTIONS AND ANSWERS ABOUT THE POLICY AND PROCEDURES

August 31, 1994

BUREAU OF RECLAMATION
INDIAN TRUST ASSET
POLICY AND
NEPA IMPLEMENTING PROCEDURES

QUESTIONS AND ANSWERS ABOUT THE POLICY AND PROCEDURES

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

Abbreviations used:

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

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August 31, 1994

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

I-1 - What are ITAs?

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

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

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

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

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

I-2 - Are listings of ITAs available?

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

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[1]These terms defined in Part II of this document.

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

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

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

I-4 - Where are ITAs found?

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

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

I-5 - Are ITAs found on ceded lands?

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

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[2] 25 CFR § 272.2(r)

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

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

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

- Indian trust lands[3] - Cultural resources located on Indian trust lands are often the property of the tribe or Indian beneficially owning those lands.[4] These cultural resources are frequently ITAs.

- Private lands (or "fee" lands) - Private lands can be trust or non-trust lands. There are generally no trust responsibilities[5] for archeological resources found on non-trust private lands, whether owned by Indians or non-Indians. Clarification should be sought when the term "private lands" is used, as the term is often used to refer only to non-trust lands.

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

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

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

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[3]This term defined below in Part II.

[4]43 CFR § 7.13(b)

[5]This term discussed below in Part II.

[6]e.g., 16 U.S.C. § 470cc(b)(3)

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

Part II: Other background concepts and definitions

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

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

II-2 - What are Indian trust lands?

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

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

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[7] 25 U.S.C. § 3001(15) and § 3002

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Part III: Applying the procedures

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

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

Part IV: Assessing impacts to ITAs

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

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

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

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

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

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

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

Public disclosure for NEPA is governed by the Freedom of Information Act. An exception is provided for cultural resources covered by the National Historic Preservation Act. This latter statute authorizes Reclamation to withhold from public disclosure information about the location, character, or ownership of a cultural resource if the disclosure may cause an invasion of privacy, risk harm to the resource, or impede the use of a traditional religious site.[8] No disclosure exemption is currently available for purely

[8] 16 U.S.C. § 470-2(a)

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

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

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

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

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

"No" can be checked in the following situations:

- When there are no impacts.

- When all impacts are positive and non-significant. Any impacts should be documented and attached to the CEC.

- When impacts are negative, non-significant, can be adequately mitigated or compensated, and the adequacy of the mitigation or compensation is not in dispute. Any impacts and mitigative commitments should be documented and attached to the CEC.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ITAs held in trust for individual tribal members.

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

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

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

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

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

> *No adverse impacts to Indian trust assets are anticipated from the preferred alternative. However, flood frequency reduction measures for other alternatives may include dedicating up to one million acre-feet of lake space to flood control. The ___ Tribe is concerned that this flood frequency reduction method would prevent the full development of its irrigation project.*
>
> *Reclamation concluded that no Indian trust assets were located within the river corridor. However, the ___ Tribe has asserted that it does have trust assets within its reservation boundary and that these are affected by dam operations. The claimed resources include fish, vegetation, wildlife, and cultural resources. Even though Reclamation does not agree with*

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

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

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

Part V: Mitigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

None of Reclamation's other cultural resource responsibilities under NEPA,[9] NHPA,[10] and ARPA[11] are affected by the changes in its NEPA procedures. These responsibilities are briefly summarized below:

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

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

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[9]42 U.S.C. § 4331 (b)(4)

[10]16 U.S.C. § 470 *et seq.*

[11]16 U.S.C. § 470aa-470mm

[12]40 CFR § 1506.6(b)(3)(ii)

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

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

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

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

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

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[13]36 CFR § 800.13(c)

[14]36 CFR § 800.1(c)(2)(iii)

[15]16 U.S.C. § 470cc

[16]42 U.S.C. § 1996