



— BUREAU OF —
RECLAMATION

Working With Indian Tribal Governments

Consultation, Cultural Awareness, and Protocol Guidelines

Mission Statements

The U.S. Department of the Interior (DOI) conserves and manages the Nation's natural resources and cultural heritage for the benefit and enjoyment of the American people, provides scientific and other information about natural resources and natural hazards to address societal challenges and create opportunities for the American people, and honors the Nation's trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities to help them prosper.

The mission of the Bureau of Reclamation is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public.

Working With Indian Tribal Governments

Consultation, Cultural Awareness, and Protocol Guidelines

prepared by

**Bureau of Reclamation
Native American and International Affairs Office**

Table of Contents

	<i>page</i>
Introduction	1
Background	3
Basics of Indian Law	3
What Is an Indian Tribe?	3
Federally Recognized Indian Tribes	4
Federally Recognized Indian Tribes Within the 17 Reclamation States.....	4
State Recognized Tribes	4
Tribal Sovereignty.....	5
Federal Trust Responsibility	5
Government-to-Government Relationship.....	6
Consultation	7
Consultation – What Is It?	7
Tribal Perspectives and Expectations.....	7
Points on a Continuum.....	7
Consultation – What Does It Mean?	8
Plain Meaning.....	9
Working Definition	9
With Whom Do You Consult?	9
Consultation Contexts.....	10
To Develop or Improve Relationships	10
To Comply With Federal Statutes, Regulations, and Policies.....	10
At Tribal Request	10
Initiating Consultation	11
Documenting Consultation.....	11
Payment to Tribes for Consultation	11
Costs to Reclamation Associated With Consultation and Protocol.....	12
Other Considerations.....	12
Protocol	13
What Protocol Means.....	13
Framework for Developing Protocols With Tribes	13

Working With Indian Tribal Governments
Consultation, Cultural Awareness, and Protocol Guidelines

Government-to-Government Relations With Native American Tribal Governments	13
Tribal Consultation	14
U.S. Department of the Interior Policy on Consultation With Indian Tribes	14
Protocol Agreements	17
Tribal Discretion	17
What is a Protocol Agreement?	17
Who Should Negotiate the Protocol Agreement?	18
Preparing the Protocol Agreement	18
Background and Preparation	18
Protocol Agreement Format.....	18
Protocol Agreement Content	19
Who Should Sign the Protocol Agreement?	20
Retention and Distribution of Signed Protocol Agreements	20
Caveat About Protocol Agreements	20
Cultural Diversity and Awareness	21
World View, Culture, and History.....	21
Awareness of and Respect for Diversity	22
The Handshake.....	23
Lack of Eye Contact	23
Male-Female Communication	23
Prayers or Blessings Before the Beginning of Meetings.....	23
English as a Second Language.....	23
Humor.....	24
Being Greeted With Silence	24
The Attorney’s Role.....	24
Tribal Caucus	24
Duration of Meetings.....	24
Proper Titles for Tribal Delegates	25
Conflict or Anger.....	25
Cultural Awareness.....	25
Laying the Groundwork: Meeting With Tribes.....	27
Pre-Meeting Activities	27
Identify Whom You Will Be Meeting	27
Identify and Assess the Issues	27
Identify What You Want to Accomplish.....	27

Assess Who Should Attend the Meeting	28
Identify the Type of Meeting.....	28
Meeting Format	28
Meeting Notes.....	28
Assess the Role of Third-Party Participants	29
Meeting Logistics	29
Selecting the Meeting Site	29
Selecting the Meeting Date	29
Promise Only What Can Be Delivered	30
Visual Aids.....	30
Technical Information	30
Media Involvement	30
The Host’s Offer	30
Meeting Closure and Consensus.....	31
Post-Meeting Followup.....	31
Other Issues.....	33
Timeframe for Working With Tribes.....	33
Budget Matters	33
Confidentiality	33
National Historic Preservation Act.....	34
Archaeological Resources Protection Act.....	34
Indian Self-Determination and Education Assistance Act.....	35
Closing.....	35
Appendix A: Legal and Policy Requirements for Consultation.....	37
Statutes	37
Indian Self-Determination and Education Assistance Act.....	37
American Indian Religious Freedom Act (42 U.S.C. 1996)	39
Native American Graves Protection and Repatriation Act (25 U.S.C. 3001).....	39
Archaeological Resources Protection Act (16 U.S.C. 470aa to 470mm).....	40
National Historic Preservation Act (54 U.S.C. 300101 et seq.)	40
National Environmental Policy Act (42 U.S.C. 4321)	41
Executive Orders and Memoranda	42
Government-to-Government Relations With Native American Tribal Governments	42
Indian Sacred Sites	42
Consultation and Coordination With Indian Tribal Governments	42
Government-to-Government Relationship With Tribal Governments.....	43

Working With Indian Tribal Governments
Consultation, Cultural Awareness, and Protocol Guidelines

Tribal Consultation	43
Department Manual and Secretarial Orders	43
Indian Trust Responsibilities	43
Tribal Rights, Trust Responsibilities, and the Endangered Species Act.....	43
U.S. Department of the Interior Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites	44
U.S. Department of the Interior Policy on Consultation With Indian Tribes and Secretarial Order 3317	44
Reclamation Policy and Guidance.....	45
Reclamation’s Indian Policy	45
Indian Trust Responsibilities	45
Government-to-Government Relations	45
Sacred Sites	46
Appendix B: Example Protocol Agreement.....	47

Abbreviations and Acronyms

AIRFA	American Indian Religious Freedom Act
ARPA	Archaeological Resources Protection Act
BIA	Bureau of Indian Affairs
Department/DOI	U.S. Department of the Interior
EO	Executive Order
FAP	Federal Acknowledgment Process
FOIA	Freedom of Information Act
NAGPRA	Native American Graves Protection and Repatriation Act
National Register	National Register of Historic Places
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
POR	Program of Requirements
Reclamation	Bureau of Reclamation
Secretary of the Interior	Head of the U.S. Department of the Interior
U.S.	United States
U.S.C.	United States Code

Introduction

Indian tribes maintain a unique political relationship with the Government of the United States. As part of that special relationship, the Bureau of Reclamation (Reclamation) engages in regular and meaningful consultation with Indian tribes and Reclamation staff are responsible for understanding and strengthening the government-to-government relationships with tribes.

Reclamation is committed to improving the Federal-tribal relationship through ongoing education opportunities for their staff members and through the creation of tools to build and strengthen tribal relationships. A protocol can serve as a highly effective tool for Reclamation to establish mutually agreed-upon principles and procedures for interacting and communicating with tribes. Once established, a tribal-Reclamation protocol can be used as a basis for conducting meaningful and proactive consultations, for strengthening government-to-government relationships, and for entering into partnerships or collaborative efforts that support tribal water resources and the mission of Reclamation.

Each federally recognized Indian tribe is a sovereign nation; federally recognized Indian tribes maintain a distinct legal and political relationship with the United States. This government-to-government relationship is unique for each individual tribe. It is separate and distinct from the relationship Reclamation maintains with States, counties, local municipalities, water districts, irrigation districts, or members of the general public.

Each tribe has its own set of needs, concerns, and interests that are shaped or influenced by cultural values and historical events. Developing a protocol, conducting consultation, or strengthening a government-to-government relationship requires researching and understanding the legal and cultural history of the tribe with which Reclamation is engaged. To implement the protocol or consultation process requires an open mind, an informed and empathetic perspective, patience, flexibility, and an appreciation and acceptance of the unique qualities of each individual tribe.

This reference tool has been prepared to provide Reclamation management and staff members with guidance about protocol, consultation, and the government-to-government relationship. These topics are interrelated and closely connected to a variety of underlying doctrines and concepts. As such, background and advisory information is presented about Indian law, cultural awareness, and planning for and conducting meetings with tribes. It is intended to encourage and facilitate meaningful interactions and communications with tribal governments and their members.

Reclamation originally issued guidance on protocol in early 1998. The document has been revised several times since then; most recently in 2020. This document builds on that framework and draws upon many of the lessons learned. It seeks to incorporate recent legal and policy developments and it is intended to facilitate compliance with the U.S. Department of the Interior's (Department) *Policy on Consultation with Indian Tribes* and the companion Secretarial Order 3317.

Background

Federal Indian policy and Federal-tribal relations are topics deeply rooted in the history of the political relationship between the United States and Indian tribes. As such, they touch upon and are influenced by the United States Constitution, treaties, statutes, executive orders, court decisions, and administrative actions. Against this backdrop, a few of the central tenants of Federal Indian law and policy stand out. This section examines some of those core themes and concepts. For a more in-depth analysis of the history of Federal Indian policy and Federal-tribal relations, refer to Indian law treatises such as *American Indian Law in a Nutshell* by William C. Canby, Jr., and *Handbook of Federal Indian Law* by Felix S. Cohen.

Basics of Indian Law

The history of Federal-tribal relations shows that the national policy toward Indians has been marked by periods of inconsistent or contradictory policy shifts. At times, the Federal policy toward Indians has been supportive of tribal sovereignty (i.e., self-determination and self-governance), at other times, it has caused much hardship for Indians (i.e., removal, allotment, and termination). Although marked by periods of fluctuating policy extremes, there are common themes that have persisted throughout the history of the Federal-tribal relationship.

- Indian tribes are independent entities with inherent powers of self-government.
- The independence of Indian tribes is subject to the exceptionally great powers of the Congress to regulate and modify the status of Indians.
- The power to deal with and regulate Indian tribes is wholly federal.
- The Federal Government is responsible for the protection of Indian tribes and their property, including protection from encroachment by the States and their citizens.¹

What Is an Indian Tribe?

The term “Indian tribe” has two commonly used meanings, based on social-cultural and legal-political concepts. From a sociological or anthropological perspective, an Indian tribe is a group of related people who share a common social, political, economic, and religious way of life in a defined geographic space and speak a common language or dialect. A tribe in this sense derives its origin from a shared social or cultural experience.

Tribes are also legal-political entities that have been recognized by the United States for special governmental purposes. Generally, the Federal Government has determined tribal status for legal

¹ William C. Canby, Jr., *American Indian Law in a Nutshell* (West Publishing Company, St. Paul, Minnesota; 1988), pp. 1-2.

and political purposes using the power granted through the Indian Commerce Clause ([Article I, Section 8, Clause 3](#)) and the Treaty Clause ([Article II, Section 2, Clause 2](#)) of the United States Constitution. A federally recognized Indian tribe will remain in existence as a legal-political entity unless or until the Congress diminishes its status.

Federally Recognized Indian Tribes

Most federally recognized Indian tribes received Federal recognition status through treaties, acts of Congress, Presidential executive orders, Federal administrative actions, or Federal court decisions.

In 1978, the Department issued regulations governing the Federal Acknowledgment Process (FAP) to administer requests for Federal recognition from Indian groups ([25 C.F.R. Part 83](#)). Also, in 1994, the Congress enacted Public Law 103-454, the Federally Recognized Indian Tribe List Act ([108 Stat. 4791, 4792](#)), which formally established three ways in which an Indian group may become federally recognized:

1. By an act of Congress;
2. By the administrative procedures under FAP; or
3. By decision of a United States court.²

There are currently 573 Indian tribes that are recognized by the Federal Government as having a special political relationship with the United States. These tribes and their members are eligible to receive the support, benefit, and protection of Federal programs and services because of their status as Indian people. The Bureau of Indian Affairs (BIA) maintains and annually publishes a list of federally recognized Indian tribes in the Federal Register.³ As tribes receive Federal recognition they are added to the list and, occasionally, a tribe may change its official name, so it is important to be aware of additions and modifications.

Federally Recognized Indian Tribes Within the 17 Reclamation States

Approximately 281 federally recognized Indian tribes reside within the 17 Reclamation states. These tribes, like other water-using entities, are eligible to receive the benefits of the Reclamation program, including opportunities for partnerships and collaborative efforts to develop, manage, and protect their water and related resources.

State Recognized Tribes

A tribe may have State recognition but not Federal recognition. The tribes in this category are not eligible for Federal programs. The Federal government-to-government relationship will not exist until a tribe gains Federal recognition either through the BIA-Federal recognition process or an act of Congress. While State recognized tribes do not have the same legal government-to-government

² <https://www.bia.gov/frequently-asked-questions>.

³ The list of federally recognized Indian tribes is authorized by 25 U.S.C. 479a-1. The list is updated annually by BIA in a release published in the Federal Register.

relationship as federally recognized Indian tribes, Reclamation staff are encouraged to build a relationship and work with the State recognized tribes in the same manner that Reclamation would work with any other stakeholder or interested party. For a current list of tribes awaiting Federal recognition, visit BIA's [Office of Federal Acknowledgment](#).

Tribal Sovereignty

Sovereignty is the power to self-govern. Indian tribes, as descendants of the original indigenous peoples of North America, maintain a distinct, independent, political status with the power to exercise self-government. The right of tribes to govern themselves is derived from pre-contact sovereignty that is affirmed in treaties, executive orders, Congressional legislation, and Supreme Court decisions.

“Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty that has never been extinguished.”⁴

While tribes possess the rights and powers of sovereign nations, their sovereignty has been diminished as a result of their relationship with the United States. This relationship is based on three underlying concepts.

1. Prior to European contact, Indian tribes inherently possessed all powers of sovereignty.
2. Each tribe began its relationship with the United States as a sovereign power; however, the powers of sovereignty have been limited by treaties and laws.
3. What has not been expressly limited by the Congress remains within the domain of tribal sovereignty.

Federal Trust Responsibility

The trust responsibility is a well-established legal principle that has its origins with the formation of the United States Government. The United States Constitution recognized Indian tribes as entities distinct from States and foreign nations. Dating back as early as 1831, the United States formally recognized the existence of the Federal trust relationship toward Indian tribes. The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights.⁵ In the modern era, United States Presidents, the Congress, and Secretaries of the Interior have recognized the trust responsibility repeatedly and have strongly emphasized the

⁴ Felix S. Cohen, *Handbook of Federal Indian Law: 1982 Edition*, edited by Rennard Strickland (The Michie Company, Charlottesville, Virginia; 1982), p. 231, internal quotation marks omitted.

⁵ See, generally, Felix S. Cohen's *Handbook of Federal Indian Law* § 5.04[3] (Nell Jessup Newton ed.; 2012), *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

importance of honoring the United States' trust responsibility to federally recognized Indian tribes and individual Indian beneficiaries.

For more than four decades, nearly every administration has recognized the trust responsibility and the unique government-to-government relationship between the United States and Indian tribes. The Department, likewise, has recognized its obligations as a trustee towards Indian tribes and individual Indian beneficiaries and has the authority to perform certain specific trust duties and manage Indian affairs. As an instrument of the United States that makes policy affecting Indian tribes and individual Indian beneficiaries, Reclamation and the Department's other bureaus and offices share the same general Federal trust responsibility toward tribes and their members.

Additional information and guidance about the trust responsibility is provided in [Secretarial Order 3335](#), "Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries;" Reclamation's Indian Trust Asset Policy; National Environmental Policy Act (NEPA) implementing procedures; and associated guidance documents.

Government-to-Government Relationship

A government-to-government relationship is a bilateral recognition of the sovereignty of the respective parties. As such, it is a concept that draws upon many of the principles found in international law and diplomacy, particularly those used for establishing and maintaining a formal relationship between sovereign nations. In order to successfully engage in this type of relationship, it is necessary for the parties to interact in a manner that is respectful of each other's sovereign position.

When working with tribes, maintaining a government-to-government relationship necessitates the Federal Government to:

- Develop and build a working relationship with the tribe, appropriate tribal officials, and tribal staff.
- Ensure that appropriate senior level officials and managers are present at meetings with tribal governmental officials.
- Understand the tribe's political structure, including the appropriate titles for addressing tribal leaders.
- Conduct communications in a manner that is mindful of tribal preferences.
- Be sensitive to cultural diversity and apply an understanding of cultural awareness.
- Negotiate and develop agreed-upon principles and procedures for conducting interactions, including consultation.

Consultation

Consultation is a term with many meanings, connotations, and expectations; it is a concept that goes to the heart of Federal-tribal interactions and communications.

Consultation – What Is It?

Consultation historically has been a core component of the Federal tribal-relationship. Its early origins can be found in the treaty making process, whereby Federal and tribal sovereigns conducted their discourse on a government-to-government basis. As an outcome of that interaction, the term consultation frequently appears in treaties and is used to denote the process for maintaining and conducting formal Federal-tribal communications. More recently, it is found in a variety of Federal statutes, regulations, and policies as something that is required to be completed. (See appendix A for a summary of the pertinent statutes, regulations, and policies that require tribal consultation.)

Tribal Perspectives and Expectations

In the broadest sense, the term “consultation” probably has at least as many definitions as there are federally recognized Indian tribes. Each tribe has its own understanding of what it means to be a sovereign and know how they prefer to engage in communications with the Federal Government. For example, some tribes only recognize consultation when it takes place between high-ranking government officials and tribal government leaders. Other tribes may be more willing to acknowledge and sanction communications between lower ranking Federal-tribal representatives.

Points on a Continuum

One way to appreciate the mix of meanings that are ascribed to the term consultation is to view it as a continuum. There is a range of meanings, and all points on the continuum are essentially correct; however, some points may be closer to a particular tribe’s expectation about what constitutes consultation. Two points on the continuum stand out as general reference points. For simplicity, these reference points can be thought of as formal consultation and informal consultation.

Formal Consultation.—Formal consultation is communication on a government-to-government basis and is conducted between the leaders of tribal governments and representatives from the Federal Government with decision-making authority. After a relationship has been developed, agreements may be reached that recognize and sanction communications between Federal-tribal designated representatives. A key component of this type of consultation is the Federal Government’s recognition of tribal sovereignty. These types of formal consultations are also reported in Reclamation’s annual report on consultation.

Informal Consultation.—Informal consultation is the type of communication that frequently occurs between designated Federal-tribal middle level management or tribal staff and Federal program or project managers and technical staff at meetings, through telephone contacts, and during

onsite visits. Although it is sometimes not recognized by tribes as communication on a government-to-government basis, it serves as a useful conduit for sharing information, satisfying certain legal requirements, and developing relationships. Typically, this type of consultation is not included in Reclamation's annual consultation report. However, there are times when the work done in informal consultations will transition to more formal consultations on a given project or set of issues.

The distance between these two points on the consultation continuum is at times subtle. It is often shaped by a variety of factors:

- Tribe's political structure
- Tribe's preferred methods of communication
- Subject matter
- Underlying statutory, regulatory, or policy requirements
- Nature and complexity of the issues
- Degree to which the Federal-tribal relationship has developed
- Whether a written protocol has been established

Given this situation, discretion is advised when talking to tribes about consultation—the speaker and the listener may have different expectations about what is meant by consultation and how it should be conducted.

Consultation – What Does It Mean?

The term “consultation” is rarely defined in the Federal statutes,⁶ regulations,⁷ and policies that require Federal agencies to consult with Indian tribes. Although it is seldom defined, the Department's *Policy on Consultation with Indian Tribes* and the companion Secretarial Order 3317, issued on December 1, 2011, provide guiding principles and a general description of the attributes of consultation:

⁶ The “Policy for Indian Control of Indian Education” provides the following definition of consultation: “[T]he term ‘consultation’ means a process involving the open discussion and joint deliberation of all options with respect to potential issues or changes between the Bureau [of Indian Education] and all interested parties.” 25 U.S.C. 2011. This statute requires consultation to ensure quality education for all tribal members. The statute is only applicable to the U.S. Department of the Interior's Bureau of Indian Education.

⁷ A general definition of the term consultation is provided in the regulations implementing Section 106 of the National Historic Preservation Act. That definition provides: “Consultation means the process of seeking, discussing, and considering the views of other participants and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process. The Secretary of the Interior's ‘Standards and Guidelines for Federal Agency Preservation Programs Pursuant to the National Historic Preservation Act’ provide further guidance on consultation. 36 CFR 800.16(f).”

- “Government-to-government consultation between appropriate Tribal officials and the Department requires Departmental officials to demonstrate a meaningful commitment to consultation by identifying and involving Tribal representatives in a meaningful way early in the planning process.”
- “Consultation is a process that aims to create effective collaboration with Indian tribes and to inform Federal decision-makers. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process.”
- “Bureaus and offices will seek to promote cooperation, participation, and efficiencies between agencies with overlapping jurisdictions, special expertise, or related responsibilities when a Departmental action with Tribal implications arises. Efficiencies derived from the inclusion of Indian tribes in all stages of tribal consultation will help ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of tribal input.”⁸

Plain Meaning

In the absence of a controlling definition, and in light of tribal perceptions, it may be useful to turn to the dictionary for a better understanding of the plain meaning of the word consultation. It means to seek an opinion, ask for advice, or to confer; it does not mean obtaining consent.

Working Definition

For purposes of this document, consultation means the process of seeking and considering the views of others. It involves establishing, conducting, and maintaining formal communication with Indian tribal governments and their members. Formal communications include letters, emails, memorandums, project proposals or designs, or any other document that would be part of Reclamation’s administrative record.

With Whom Do You Consult?

Reclamation has an obligation to consult with Indian tribes. This responsibility is based on the unique political relationship that the United States has with federally recognized Indian tribes and is set forth in statutes, regulations, executive orders, memoranda from the President, and Department and Reclamation policies. This body of law and policy requires consultation with one or more of the following entities, depending on the situation or context:

⁸ See Secretarial Order 3317, section 4. Similar language appears in the U.S. Department of the Interior’s *Policy on Consultation with Indian Tribes*.

- Tribal government officials
- Designated tribal representatives
- Traditional religious leaders, identified by tribal officials
- Lineal descendants, identified by tribal officials

Depending on the applicable statutes, regulations, and policies, consultation with tribes may be required for proposed Federal actions located on and off Indian land. This can involve tribes residing outside of the 17 Western States.

Consultation Contexts

Consultation with Indian tribes generally occurs in three contexts:

1. To develop or improve relationships
2. To comply with Federal statutes, regulations, and policies
3. At tribal request

To Develop or Improve Relationships

Consultation is affirmatively initiated by Reclamation and conducted in order to build new or better working relationships with tribes. It is particularly useful as a means to set the tone for future interactions and consultations and to set the stage for partnerships and collaborative projects.

To Comply With Federal Statutes, Regulations, and Policies

Consultation is required by statute, regulation, and policy when Reclamation is proposing legislation, regulations, policies, or actions that have tribal implications⁹ or planning projects or activities that could affect the environment, trust resources, endangered species, cultural resources, sacred sites, or human remains and other cultural items. This has been the traditional approach to consultation.

At Tribal Request

Tribes may request Reclamation to initiate consultation to learn about the Reclamation program, inquire about opportunities for partnerships and collaborative projects, or to express their views or raise questions about potential Reclamation actions. When a tribe requests consultation, receipt of the request should be confirmed in writing and responded to in an expeditious manner. This can mean responding both with an email to acknowledge receipt and following up with a memorandum of acknowledgement in hard copy.

⁹ See the definition of "Policies that have tribal implications" as defined in [Executive Order 13175](#), "Consultation and Coordination with Indian Tribal Governments," section 1(a) and the definition of "Departmental actions with tribal implications" as defined in the U.S. Department of the Interior's *Policy on Consultation with Indian Tribes*, section III. Both definitions are provided in appendix A.

Initiating Consultation

Consultation should be initiated early in the planning process. A written notice, usually in the form of a letter inviting the tribe to consult, should be sent to the tribe's governing official or designated representative at least 30 days prior to the scheduled consultation meeting. The notice should identify the date and location of the consultation and sufficiently describe the topic to be discussed, timelines, and possible outcomes. The notice should explain how the tribe can request additional information, obtain technical assistance, or provide feedback prior to the consultation. If exceptional circumstances do not permit a 30-day notice period, the invitation should explain the reasons for the abbreviated notification. As with all communication with tribes, if a tribe does not respond within a reasonable period of time, appropriate efforts should be made to repeat the invitation, including making telephone contacts.

Documenting Consultation

Because consultation is required by a variety of statutes, regulations, and policies it is important to maintain a reviewable record that documents Reclamation's good faith effort to consult with Indian tribes. Further, the Department's *Policy on Consultation with Indian Tribes* and the companion Secretarial Order 3317, issued on December 1, 2011, require Reclamation to report annually to the Secretary of the Interior on the results of its consultation efforts. The policy provides:

“Reporting is intended to be comprehensive and may include, but is not limited to, the scope of consultation efforts, the cost of these efforts, and the effectiveness of consultation activities. As part of its annual report, Bureaus and Offices shall provide a comprehensive listing of the topics on which consultations were held, training, innovations, and the engagement of senior leadership in these efforts. Where possible, such reports shall include feedback from Indian Tribes with whom the Bureau or Office has consulted.”¹⁰

Additional guidance will be provided by Reclamation's Native American and International Affairs Office based on the Department's annual reporting requirements. Maintaining a reviewable record of the consultations that have been conducted with tribes should make it easier to be responsive to the annual reporting requirement, regardless of the number of categories or information the Department requests.

Payment to Tribes for Consultation

Reclamation has not traditionally paid tribes for consulting with Reclamation, nor for travel or related expenses incurred. This is consistent with the Federal Government's practice of not providing payment or reimbursement to other countries for conducting government-to-government consultation with the United States. However, when Reclamation has requested Indian tribes,

¹⁰ Section IV of the U.S. Department of the Interior's *Policy on Consultation with Indian Tribes*.

organizations, or individual members to perform services that Reclamation would normally pay a contractor or consultant to provide, it is appropriate to provide financial compensation.¹¹

Costs to Reclamation Associated With Consultation and Protocol

The costs associated with Reclamation's involvement in conducting consultation and negotiating protocol agreements are programmatic costs and should be budgeted for accordingly. They are considered to be a normal cost of doing business. The Regional or Area Offices will normally budget for and bear the costs for conducting these activities. However, if Reclamation is performing activities or providing services on a cost reimbursable basis, the costs associated with consultation and protocol will normally be considered to be reimbursable unless otherwise exempt by law.

Other Considerations

Often it is necessary for Reclamation to first consult with an Indian tribe to determine a protocol for consultation, prior to engaging in formal tribal consultation.

Inviting tribes to participate in public meetings, workshops, and similar activities required by NEPA and related regulatory statutes or regulations should not be considered consultation for purposes of Executive Order (EO) 13175 ("Consultation and Coordination with Indian Tribal Governments"). Tribes will generally expect to have separate conversations with their Federal partners in fulfillment of the trust responsibility and with respect to the government-to-government relationship.

Tribes may have off-reservation treaty or aboriginal rights that may be affected by a proposed activity. This may require Reclamation to consult with any of several tribes who may claim such rights, even if none of those tribes or their members are the object of the proposed action.

¹¹ See also Reclamation's *Guidelines for Payment of Consultation Fees Relating to Native American Graves Protection and Repatriation Act* (dated August 7, 1995), issued on August 10, 1995.

Protocol

Protocol is a term that is increasingly being used in the context of Federal-tribal governmental relations. Although the concept of protocol is being used more frequently, its precise meaning and the reasons why it has come into vogue remain somewhat poorly understood. This section focuses on what is meant by protocol and examines some of its policy underpinnings.

What Protocol Means

Protocol is a concept that is based on principles found in diplomacy and international law. In this context, it is both the manners and means for conducting discourse between sovereign nations. As such, it is applicable as a conceptual frame of reference for guiding the conduct of Federal-tribal interactions, including consultation. For purposes of this document, protocol has the following meanings when used in the context of Federal-tribal interactions:

- The etiquette or manners used when conducting Federal-tribal interactions and communication. Particularly, to apply an understanding of cultural diversity and awareness and to be respectful of sovereignty.
- A document that records mutually agreed-upon principles and procedures for conducting consultation, fulfilling the trust responsibility, and facilitating communications of a government-to-government relationship.

Framework for Developing Protocols With Tribes

Recent Federal policy has embraced the use of protocol during Federal-tribal interactions. Federal agencies have been encouraged to develop protocol for conducting consultations with tribes. The following is a brief overview of the authorities that underlie the need to develop protocol with tribes.

Government-to-Government Relations With Native American Tribal Governments¹²

The President's April 29, 1994, memorandum on government-to-government relations set the stage for developing protocol with tribes. The memorandum states that each department and agency is to:

- Respect tribal sovereignty and operate within a government-to-government relationship with federally recognized Indian tribes.
- Consult to the greatest extent practicable and to the extent permitted by law.

¹² https://www.justice.gov/archive/otj/Presidential_Statements/presdoc1.htm.

The memorandum from the Assistant Secretary – Indian Affairs, dated February 24, 1995, provides guidance on how to implement the President’s government-to-government policy. It specifically recommends that each bureau should:

- Design a special protocol for consultation.
- Take a proactive approach to working with tribal governments.

Reclamation’s June 14, 1996, plan for implementing a government-to-government relationship with tribes establishes the framework for designing a special protocol:

- Designate positions responsible for facilitating Reclamation-tribal communication.
- Coordinate with tribal officials to identify appropriate channels of communication.
- Evaluate and modify the processes used to solicit the views of tribal governments.
- Design solutions and tailor programs to address specific or unique needs of tribal communication.

The President’s September 23, 2004, memorandum reaffirmed the government-to-government relationship.¹³

- Supported for and respect of tribal sovereignty and self-determination.

Tribal Consultation

The President’s November 5, 2009, memorandum affirmed EO 13175, “Consultation and Coordination with Indian Tribal Governments” and the government-to-government relationship. It provides, in part:

- Executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials.
- Executive departments and agencies are responsible for strengthening the government-to-government relationship between the United States and tribes.
- Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

U.S. Department of the Interior Policy on Consultation With Indian Tribes

The guidelines implementing the Department’s *Policy on Consultation with Indian Tribes* establish a uniform framework for conducting tribal consultation and provide for the use of protocol:

¹³ <https://www.doi.gov/pmb/cadr/programs/native/Government-to-Government-Relationship-with-Tribal-Governments>.

- The consultation guidelines are to be used during tribal consultation, except when otherwise agreed to by a bureau or office and an Indian tribe through an individual written protocol that conforms to the guidelines.
- Consultation and individual protocols are intended to provide greater efficiency and transparency in Department practices in order to maximize tribal participation.

In subsequent sections, the concept of protocol will be examined from the perspective of understanding cultural diversity and awareness, and guidance will be provided about conducting meetings with tribes. That information will then be used to set the stage for additional guidance on how to develop and enter into protocol agreements.

Protocol Agreements

After initial meetings and consultations, it may be useful to negotiate and enter into an agreement that documents mutually agreed-upon Federal-tribal protocol for conducting consultation. If a formal consultation is planned, Reclamation staff, in discussions with tribal contacts, may determine that entering into a consultation protocol agreement is desired. This type of agreement may be particularly helpful if the subject of the consultation is a specific project or defined action that Reclamation will be undertaking. The following section offers general guidance for developing protocol agreements. It is intended to provide a conceptual frame of reference about the intent, content, and format for such agreements. An example of a Reclamation-tribal protocol agreement is included in appendix B.

Tribal Discretion

Although Reclamation prefers to use written protocol agreements, Indian tribes have the discretion to decide whether they want to negotiate, prepare, and sign a written protocol agreement. If a tribe does not want to sign a protocol agreement, that decision must be respected. Depending on tribal preferences, agreements about protocol may not result in a formal written document. Should that occur, Reclamation staff are encouraged to consider and apply this guidance, as appropriate, to establish with the tribe a general or informal frame of reference for conducting Reclamation-tribal interactions.

What is a Protocol Agreement?

A protocol agreement is usually a written document that records mutually agreed-upon principles and procedures for conducting a Federal-tribal relationship on a government-to-government basis. As such, it is intended to:

- Provide an agreed-upon framework for maintaining a government-to-government relationship.
- Ensure that appropriate levels of Reclamation leadership interact with tribal leadership.
- Establish procedures and designate representatives with authority for conducting consultation.
- Enhance timely, meaningful, and open lines of communication.
- Clarify expectations and promote the recognition of Reclamation and tribal interests.
- Build opportunities for developing partnerships and working collaboratively on Indian water and related resource management projects.

Who Should Negotiate the Protocol Agreement?

Discussions regarding a protocol agreement should include the respective Reclamation Regional Director or Area Office Manager (depending on the scope of the project or topic for consultation), Regional Native American Affairs Program Manager or Area Office Native American Affairs Specialist, and appropriate technical staff. The Regional Native American Affairs Program Manager usually will have the lead responsibility for coordinating Reclamation's involvement during the discussions with the tribe and preparation of the protocol agreement. Reclamation's Native American and International Affairs Office may be invited to participate.

Preparing the Protocol Agreement

Each protocol agreement will be unique and designed to recognize that the tribe entering into the agreement is a separate sovereign with a special relationship with the United States. As such, each agreement needs to be developed in collaboration with the tribe and tailored to the specific needs and circumstances of the Reclamation-tribal relationship. The protocol agreement also needs to be responsive to the particular type of relationship that the tribe has developed or is in the process of developing with Reclamation. For example, a protocol agreement may be developed that acknowledges or reaffirms the processes and procedures that are currently being used to maintain an established ongoing Federal-tribal relationship.

Background and Preparation

Because each protocol agreement must be developed in collaboration with the tribe, it is important that Reclamation staff become knowledgeable about the tribe. As a good starting point, the following should be considered:

- Cultural and historical information
- Tribe's political system and governing processes
- Appropriate channels of communication identified by the tribe

Protocol Agreement Format

There are no set or preestablished requirements regarding a protocol agreement. The format and content of the protocol agreement are to be developed jointly by Reclamation and the tribe, through negotiation, in a manner that is respectful of tribal sovereignty. It is recommended, however, that protocol agreements should be structured to resemble either a memorandum of agreement or a memorandum of understanding. Other less formal protocol agreement formats may be appropriate, depending on tribal preferences and the nature of the Federal-tribal relationship.

Protocol Agreement Content

Each protocol agreement is to be tailored to the specific type of relationship that Reclamation and the tribe have developed or are in the process of developing. The following are examples of stipulations that should be considered, negotiated, and included in the protocol agreement, as appropriate. Other stipulations may be included in the protocol agreement, as necessary.

- That Reclamation and the tribe will maintain a government-to-government relationship by implementing the protocol.
- The types of issues that will require meetings, interactions, and consultations between Reclamation's (specify) Regional Director or Area Office Manager and the tribe's governmental leadership.
- That Reclamation and the tribe will designate representatives (by position or title) to serve as the points of contact for conducting consultation about specified types of issue (e.g., cultural resources, natural resources, and environmental compliance).
- The types of proposed Reclamation activities or actions that the tribe would like to receive notice and the appropriate method, and timeframe, for providing notice.
- The appropriate methods for maintaining communication (e.g., telephone contact, fax, letter, informal meetings, and formal meetings).
- The timeframe for responding to oral and written communications.
- That Reclamation and the tribe will exchange information, research, and technical assistance.
- That Reclamation's (specify) Regional Director or Area Office Manager will meet with the tribe on a periodic basis (e.g., annually, every 6 months, or other specified interval) to exchange information, discuss upcoming projects or activities, and monitor the effectiveness of the protocol.
- That the protocol does not create any legal rights or obligations.
- How to resolve disputes, including the use of alternative dispute processes (e.g., third-party mediation).
- The time period in which the protocol will remain in effect and the specific calendar date on which the protocol will expire, unless Reclamation and the tribe agree to a written extension.
- How to amend or modify the protocol.
- The process for ending or canceling the protocol.

Who Should Sign the Protocol Agreement?

The protocol agreement will be signed by individuals possessing sufficient delegated authority to represent their respective sovereign governments. What this means is that the specific Regional Director or Area Manager will normally sign a protocol agreement for Reclamation. Tribes will sign the protocol agreement according to their established governmental customs and practices.

Retention and Distribution of Signed Protocol Agreements

Duplicate original protocol agreements should be prepared so that Reclamation and the tribe each receive an original signed protocol agreement. Because protocol agreements document agreed-upon principles and procedures for maintaining a government-to-government relationship, it is important that Reclamation retains and maintains an official record.

The Regional Native American Affairs Program Manager usually will be responsible for ensuring that original protocol agreements are retained by the Regional Office in a system that provides for their safekeeping and accessibility for future reference. This individual should also have the lead role in coordinating their distribution. In order to maintain a Reclamation-wide record about protocol agreements with tribes, a copy of each executed protocol agreement should be submitted to the Native American and International Affairs Office. A copy of the protocol agreement should be provided to all other Reclamation offices that may have interactions with the tribe that entered into the protocol agreement.

Caveat About Protocol Agreements

A caveat needs to be considered when negotiating and entering into protocol agreements:

- This protocol agreement is intended to improve Reclamation-tribal interactions by documenting agreed-upon procedures for conducting consultation and maintaining a government-to-government relationship. It is not intended to create any additional rights or responsibilities that may be enforceable against either Reclamation or the tribe. Nor is it intended to take away any rights.

It is recommended that this caveat be included in each protocol agreement to lessen the risk of future misunderstandings. If enforceable provisions are desired to satisfy specific legal responsibilities, transfer funds, or incur obligations, separate and distinct instruments, as appropriate, will be needed to accomplish those intended purposes. Legally enforceable provisions are not to be included in protocol agreements.

Cultural Diversity and Awareness

Reclamation values the relationships it is developing and maintaining with Indian tribes. Because these relationships require understanding, sensitivity, and respect for Indian culture, this section focuses on providing a framework for obtaining an awareness and appreciation of cultural diversity. When reading this section, the following should be kept in mind:

- Each tribe is a unique and distinct cultural entity and should be treated as such.
- Understand that the guidance presented in this document is intended only as a brief look into a cross-cultural frame of reference.
- Although much about working with tribes and their members involves understanding and respect, there is always more to learn about interacting with people from different cultural heritages.
- Even though subsequent consultation experiences may become easier or more comfortable, shifts in tribal politics often change the dynamics of the government-to-government relationship. Remaining mindful and respectful of tribal and individual tribal member perspectives is key to maintaining an open and transparent dialogue.

World View, Culture, and History

Understanding the concept of “world view” is a key to appreciating cultural diversity. World view refers to a cultural frame of reference. As children grow up in family units within a particular cultural system, they develop a world view—a general way of experiencing and interpreting the social, natural, and spiritual events of life. These ways of experiencing life create knowledge and belief systems that people may take for granted, never considering that people from other cultures may perceive things differently.

Even though we may accept variation in the attitudes and beliefs among the individuals in our own cultural group, we may not realize that individuals from other cultural groups might see life through a totally different but equally valid lens. Awareness that there are alternative world views helps in establishing positive relationships with Indian tribes and their members.

Reclamation employees working with Indian tribes should strive to cultivate sensitivity to, and a working grasp of, the unique cultural, historical, and political aspects of the specific tribe(s) with whom they will regularly interact in their region, area office, or specific project location.

The following is a list of people who may be able to provide information about tribes:

- Reclamation’s Native American and International Affairs Office staff
- Reclamation’s Regional Native American Affairs Program Managers
- Reclamation’s Area Office Native American Affairs Program Specialists
- Reclamation’s Cultural Resources Management staff
- Tribal government officials and staff
- Tribal elders and traditional religious leaders
- Bureau of Indian Affairs employees
- Indian Health Service employees

Information about tribes can also be found in anthropological and historical reference materials. Although technical information about water and related resources is frequently relied on when Reclamation is involved with a project that engages a particular Indian tribe, other sources of information are useful for placing the tribe within a broader and richer cultural context. For example, information about traditions (legends, myths, or religious beliefs), customs (marriage, inheritance, and subsistence patterns), and history (prehistoric and contemporary) may provide a more in-depth appreciation and sense of their culture and present-day life ways.

Awareness of and Respect for Diversity

When people from different cultural backgrounds interact, miscommunication can often occur. Communication challenges can stem from cultural differences. Often, the issue relates to misunderstandings about differences in body language, the role of the participants, different cultural views surrounding an issue, or underlying expectations. Reclamation staff can improve their understanding of cultural differences by:

- Attending cross-cultural awareness training about Indian cultures. This type of training is particularly useful for Reclamation employees who are likely to participate in Federal-tribal interactions, including government-to-government consultations. It fosters an appreciation of and respect for cultural differences and helps to provide a framework for developing cross-cultural relationships.
- Being aware of personal biases and expectations and avoid acting on them. Introspection and self-awareness can be useful skills when working with Indian people.
- Cultivating a tribal contact. It is a useful way to learn the customary and acceptable behaviors of the tribe. Building this kind of relationship can provide insight into the tribal dynamics and conventions, while being personally enriching.

The following are examples of some of the cultural differences that may be encountered while interacting with Indian people, along with some suggested interpretations and responses.

The Handshake

In many tribal communities, the practice of shaking hands as part of an introduction or greeting carries a different meaning than that which a non-Indian may have learned. When or if a tribal member shakes the hand of another, the handshake is often a light, gentle touch. While a firm, strong handshake may be the norm from the non-Indian perspective, a gentle handshake may be the cultural norm for the tribe and should not offend. If not offered a hand, a head nod holds the same meaning. Let the tribal member initiate a handshake, if they choose.

Lack of Eye Contact

Many native people refrain from making lengthy eye contact, especially during in-person communications. Do not be offended if a tribal member does not make eye contact.

Male-Female Communication

Some native people do not communicate with members of the opposite sex due to their beliefs. Do not be offended if they will not greet, gesture, look at, etc. a person of the opposite sex. Also, there may be certain actions that only one sex is prescribed to do, such as ceremonies, food preparation, or viewing and/or handling of ceremonial objects.

Prayers or Blessings Before the Beginning of Meetings

When hosting a meeting, many tribes will offer prayers or blessings at the initiation or conclusion of a meeting. These invocations may be handled in a variety of ways, depending upon the cultural traditions of the tribe. Frequently, a tribe will have an elder or spiritual leader bless the meeting with a prayer or traditional song, usually in the tribe's language. Showing respect for the tribe's beliefs and practices, through appropriate behavior, is important for establishing trust and maintaining goodwill. For example, if an elder is providing an opening prayer or invocation and asks the attendees to stand up or sit, it is appropriate to stand, even though you may not share the same spiritual practice in your personal life; it is a sign of respect for the tribe's cultural practice.

English as a Second Language

For some Indian people, especially the elders or more traditional tribal members, English was learned in forced academic settings or fairly late in life. Thus, the English language may have unpleasant connotations, or it may be spoken awkwardly or uncomfortably. Others, however, may exert a command of the English language. Given this range, Reclamation employees need to be mindful of the fact that differences in English speaking abilities can create communication challenges, misunderstandings, or inaccurate expectations.

Although most tribes have their own language, tribal members generally conduct meetings with Reclamation in English or arrange to have translators available. Sometimes this means that the translator will interpret alternately in English for non-Indian participants and in the tribe's language for Indian participants.

Humor

Reclamation employees should be cautious about attempts to be humorous, particularly early in the relationship-building process. Humor sometimes does not translate well between people from different cultures and can occasionally lead to misunderstandings. Indian humor is frequently subtle or understated. Occasionally, tribal participants may exchange jokes in their own language (or they at least appear to be laughing about something). In those situations, Reclamation employees are encouraged to display patience and the tribal participants may decide to let the non-Indian participants in on the humor.

Being Greeted With Silence

Indian people sometimes speak very little at meetings. This is often because many Indian cultures frequently value and encourage quiet and reserved personalities. Always assume that tribal attendees are listening, even if they may not be actively engaging in conversation. Do not feel as if the silence needs to be filled. Sometimes in meetings Indian participants may be waiting to discuss matters more fully with other tribal members, elders, or an attorney before making any verbal statements or commitments. Often, Indian people will observe, be active listeners, and will refrain from comment until after a significant period of time, such as days, weeks, or even years.

The Attorney's Role

Often, a tribal delegation will ask its attorney to attend meetings with Federal officials. Some attorneys will speak for the tribal delegation; others may explain some legal and technical points to the tribal delegation. The attorney is representing the interests of the client tribe, and tribal delegation decides the attorney's role.

Tribal Caucus

Sometimes during meetings, a tribal delegation may request a break to have a tribal caucus—a private, internal meeting and discussion among the members of the tribal delegation. If a separate breakout room is not available, the non-Indian participants may be requested to leave the meeting room so the tribal delegation can conduct a caucus. Reclamation employees should be respectful of the tribe's request and willing to accommodate the tribal delegation's need to confer with its leaders, members, attorney, or technical experts. The amount of time that a tribe will need for its caucus is frequently open ended and will vary in duration depending on subject matter and complexity of the topic that the tribe needs to discuss or evaluate. Be prepared to be patient and flexible.

Duration of Meetings

Generally, Indian people start meetings when everyone arrives, and they finish when everyone has been afforded the opportunity to speak, if they choose. Meetings can start 15 minutes to 1 hour after the scheduled start time and last several hours. Understanding and accepting that other cultures place different priorities on the concept of time will go a long way toward establishing a strong, positive relationship with a tribe. While waiting for meetings to start, Reclamation employees may want to interact with tribal members, make additional meeting preparations, or relax.

Proper Titles for Tribal Delegates

Because meetings with tribal leaders are official meetings with another government, it is important that all tribal delegates are treated with respect and addressed by their proper titles. This can be achieved by finding out in advance the proper terms for addressing their leaders: Chief, President, Governor, Chairperson, Vice-Chairperson, Council Member, and so forth.

Conflict or Anger

The history of Federal-tribal relations has left an indelible mark on Indian tribes. Indian people, like other people, often view Federal employees with distrust or apprehension. If the Federal Government is perceived as having a record of breaking its promises, or using manipulation and deceptive tactics in its relationships, the people who feel that they have been let down may view Federal representatives with anger or suspicion.

When engaging with Indian tribes and their representatives, consider the possibility that conflict or anger occasionally may be encountered, especially early in the relationship-building process. An emotional response in reaction to anger or frustration expressed about historical events or past government actions (that may have nothing to do with Reclamation or its employees) might compound or escalate a negative situation. Displaying sensitivity, listening without becoming defensive, and perhaps showing common interests are some possible appropriate non-confrontational responses to manifested anger or frustration. It is important to not take it personally but view it as a learning opportunity and try to learn more about the tribe and find a positive way to start developing a new, collaborative relationship going forward.

Cultural Awareness

Non-Indians may have cultural expectations that are best left outside of the meeting room. Doing so will help make one more receptive to tribal conventions, even those that may not be completely understood. It also helps to facilitate a greater appreciation of the fact that tribes are distinct cultural, legal, and sovereign entities and each would prefer to be treated as such—strive for awareness, sensitivity, and respect.

Laying the Groundwork: Meeting With Tribes

This section is directed at the practical aspects of organizing and planning for meetings with Indian tribal governments, consortiums, and organizations. It should be recognized that much of the guidance offered is also applicable to meetings with other entities and in different contexts. This guidance is provided to support Reclamation's commitment to meaningful meetings and communications, including tribal consultation. It is intended to increase the likelihood that Reclamation will develop positive long-term relationships with Indian tribes.

Pre-Meeting Activities

Schedule internal Reclamation meetings and coordinate with appropriate tribal counterparts before scheduling meetings with Indian tribes. Use pre-meetings and contacts to identify tribal leaders, clarify issues, plan the meeting, and learn about the tribe's history, culture, and political structure. The following are some useful planning steps and topics to consider.

Identify Whom You Will Be Meeting

Consider the roles of tribal government officials or the status of tribal members within the traditional tribal community.

Identify and Assess the Issues

Evaluate the information collected, decide the kind and level of meeting to hold, determine gaps in information, and prepare a meeting agenda. When possible, share the draft agenda with appropriate tribal representatives and be open to making changes in response to their input. Keep in mind that two different agendas are converging on the table, Reclamation's and the tribe's. Both agendas must be understood, respected, and ultimately integrated. Be prepared to be flexible.

Identify What You Want to Accomplish

Consider why Reclamation is meeting with the tribe and what is expected to be accomplished:

- To exchange information, discuss ideas, or seek advice.
- To obtain reactions to proposed bureau plans or actions.
- To reach agreement on processes or procedures for maintaining communications and solving problems.
- To build opportunities for developing partnerships and working collaboratively.

Assess Who Should Attend the Meeting

Identify who from Reclamation should attend the meeting. Reclamation's participation may include, but not be limited to:

- Regional Director
- Area Office Manager
- Regional Native American Affairs Program Manager
- Area Office Native American Affairs Program Specialist
- Technical staff
- Cultural Resources Management staff
- Native American and International Affairs Office representative
- Facilitator, if one is needed and agreed to by mutual consent

Ensure that Reclamation will have the appropriate staff at the meeting. They will need to be knowledgeable about the subject matter and authorized to speak on behalf of Reclamation.

Depending on the protocol or subject matter, it may be appropriate for the Regional Director or the Area Office Manager to go to the first meeting, or first few meetings, to get the relationship building process started. Their participation is likely to influence the level and type of meeting that will occur with the tribe.

Identify the Type of Meeting

Coordinate with tribal counterparts to determine what type of meeting should be held and understand whether the meeting is expected to be a formal meeting between Reclamation senior staff and tribal government leaders or whether it will be an informal meeting between designated Reclamation and tribal technical representatives. Identifying the type of meeting will help ensure that the appropriate level and type of Reclamation staff will attend the meeting.

Meeting Format

Consider the type of relationship that has been established, or needs to be established, with the tribe and identify the appropriate meeting format. The format for an initial meeting, or first few meetings, with the tribe might conform to tribal preferences and procedures. Subsequent meetings ideally should conform to the procedures agreed-upon in a protocol agreement. Possible meeting formats include presentation followed by discussion, listening session, small group "breakout," question and answer session, or a combination of these. Be prepared to be flexible, particularly during tribal council meetings. Remember that tribes have their own agenda and a successful meeting blends the tribal agenda with the Reclamation agenda.

Meeting Notes

During the planning stage for the meeting, Reclamation and the tribe will normally reach agreement about which party will be responsible for preparing and distributing meeting notes and summaries. Agreement should also be reached about the appropriate Reclamation and tribal points of contact in

the followup phase. If the topics of discussion were complex or controversial, it may be advantageous to circulate draft meeting notes or summaries for review and comment before distributing them as a final document. This review will help to ensure that the views and interests of both parties are accurately characterized and represented.

Assess the Role of Third-Party Participants

Third-party participants at meetings may include, but are not limited to:

- Federal employees from other bureaus and agencies
- State or local government representatives
- Other external entities such as water user groups or associations

Consider the following general questions regarding third-party participants:

- What do they know about the topic?
- What is their stake in the meeting?
- Who are they politically or socially?
- What is their attitude about the meeting and toward Reclamation and the tribe?
- Will their actions have impacts on the proceedings?
- Who are the decisionmakers and will they be present?

Consider the relationship of the third-party participants to the tribe:

- Has the tribe agreed that it is appropriate to have third parties attend and participate in the meeting?
- How are they perceived by the tribe?

Meeting Logistics

Selecting the Meeting Site

Reclamation staff should select meeting locations that are reasonably accessible to the tribe, from both a logistic and economic perspective. Selecting meeting locations on or near a reservation may be one approach. Alternating meeting locations at Reclamation and tribal offices might be an alternative and equitable solution. Also, consider having some meetings in the field where Reclamation management and staff can walk the land with tribal members and possibly generate some mutual understanding. Tribal input should be solicited prior to selecting the meeting location.

Selecting the Meeting Date

Meeting dates should be selected to accommodate the availability of the tribe's leadership. Reclamation staff should be mindful that the tribe's internal political and cultural calendar may place

limitations on the availability of tribal officials. Prior to selecting a meeting date, contact the tribe and identify potential meeting dates that will work for both Reclamation and the tribe. Tribal communities have schedules where times, dates, and places are dynamic, so it is important to be patient and flexible. Best practice is to always call the morning of the meeting, or the day before, to confirm the meeting is still scheduled to take place.

Promise Only What Can Be Delivered

Reclamation participants must make a “good faith effort” to exchange their ideas, views, and information at meetings, not just freely and openly, but also honestly and tactfully. Statements made to tribal leaders will be taken seriously and viewed as representing Reclamation and the United States Government. Offer and promise only what can be delivered.

Visual Aids

Consider the usefulness of visual aids—maps of the area, facility plans, diagrams, organizational charts, flowcharts, and so forth. All people are a combination of audible, kinesthetic, and visual learners so provide information in multiple formats to facilitate understanding.

Technical Information

Some tribal participants, including the decisionmakers, may be unfamiliar with technical information and formats. Arrange for the attendance of Reclamation technical experts with good communication skills who can help explain the technical information. Making allowances for the interpretation of technical terms and concepts is not any different when engaging with Indian people than it is when engaging with non-Indians. It helps to ensure that everyone understands what is being presented. Also, ensure that the tribal participants have sufficient notice that technical information will be presented so they can decide whether they want to invite their own technical experts to the meeting.

Media Involvement

If the media will be present at the meeting, or if Reclamation and the tribe expect to be addressing the media, consider organizing a working group with the tribe to prepare a joint media handout or press release before the meeting. If a cooperative work group is not desirable or feasible, either Reclamation or the tribe may decide to issue its own press release. In the absence of an agreed-upon media protocol, this is a discretionary matter for both Reclamation and the tribe. As with any media involvement for Reclamation activities, it is best practice to engage the Public Affairs Office early.

The Host’s Offer

When Indian tribes host meetings, it is customary to provide food, coffee, tea, or soft drinks for the guest participants. If Reclamation is considered the host for the meeting, try to emulate this behavior by offering similar appropriate food or refreshments as a benefit to the occasion. Discretion, resourcefulness, and personal initiative may be required to be a good host.

Meeting Closure and Consensus

Before leaving the meeting, assess the following:

- Was the agenda covered?
- Did everyone have an opportunity to contribute?
- Did everyone understand the issues?
- Did everyone understand the process for action?
- Did everyone understand what will happen next?
- Did either party request a copy of the other party's meeting notes? (Is there a request to forward meeting notes?)
- Did the participants make any commitments about what will happen next?
- Will a subsequent, followup meeting be needed? If yes, is there a tentative timeframe planned?
- Consider closing tribal leader words or prayers (depending on tribal custom/culture)

Avoid developing a snapshot assessment of the meeting's outcome. An initial evaluation of the meeting's outcome may not be entirely consistent with the tribe's understanding of the meeting's outcome. It can be helpful to solicit input from the tribe to clarify whether there is a common understanding of the meeting's outcome. Further, while some meetings may move quickly to closure or consensus, others may require subsequent discussions and additional meetings. Even if everyone at the meeting seems to agree with the meeting's outcome, the process that the tribe will go through to decide its course of action may take additional time.

Post-Meeting Followup

Questions and answers to be considered after the meeting might include:

- How do you know if you have had a successful meeting?

Answer: Frequently, success can be measured from several levels, contexts, or perspectives. For example, simply obtaining a meeting with a tribe might be considered a success in one situation. In another, a written agreement might cap a series of consultations. If there is an opportunity to talk informally with someone from the tribal delegation, ask for his/her assessment of the meeting. Find out what he or she expects will happen next. Also, consider inviting the tribal leaders to provide feedback.

- What if there is a difference of opinion about what happened at the meeting?

Answer: Attempt to reconcile any differences of opinion by making an oral inquiry into the matter. Since oral communications are often the preferred means for information exchange among many Indian cultures, expect most contacts to be face-to-face and, to a lesser degree, by telephone. After these oral exchanges, send a letter recapping Reclamation's understanding of the meeting.

When Reclamation has the responsibility for providing draft meeting notes or summaries, consideration needs to be given to the timeframe for expecting a reply from the tribe. In a polite letter (via hardcopy mail and email) to the appropriate tribal official, send the draft meeting notes or summary and a reiteration of the agreed to process or next steps for action. In the letter, also state Reclamation's timeframes, processes, or legal constraints. Allow a reasonable time for the tribe to consider and respond. Establishing "a reasonable time" should take into account tribal expectations. Ideally, this interval should have been agreed to as part of the meeting's closure. Even in the absence of this type of agreement, Reclamation's "good faith effort" should include a clear delineation of any required deadlines and procedures. As with all written correspondence with tribes, if a reply is not received within a reasonable amount of time, Reclamation employees are advised to follow up with a telephone call to the designated tribal contact.

Understand that tribes have many competing priorities that take precedence over responding to a Federal request. Be patient when contacting and following up with designated tribal officials regarding responses to Federal requests.

Frequently, a tribe will not make decisions regarding an issue until all involved tribal members have considered and discussed the challenge. Have patience and try not to force issues or expect responses prematurely. Affording a tribe a reasonable opportunity to respond to each action item of a meeting helps in gaining the tribe's trust and good will.

When an agency decision is made following the consultation, the tribe should be notified in writing (letter via hardcopy mail and email) of the decision. The letter should include an explanation of the decision and any changes or decisions that were made as a result of the consultation. If the tribe's desired outcome cannot be accommodated or is not within the agency's authority to accommodate, an explanation of the decision and any limiting or mitigating factors should be provided as well.

Other Issues

This section examines a variety of miscellaneous issues associated with Reclamation-tribal interactions.

Timeframe for Working With Tribes

The timeframe for developing relationships, conducting consultations, and negotiating protocol agreements with tribes is largely open-ended and will vary on a case-by-case basis. These activities are frequently time consuming, particularly when Reclamation-tribal relations have not been established or maintained. In view of this situation, adequate advance planning is advised. Plan for and anticipate that substantial amounts of time and personal involvement may be required to develop relationships that will lead to open and productive consultations and meaningful protocol agreements. Patience is also necessary, so plan to consult early and often.

Sometimes, before a tribe can take action, approval must be obtained from the tribal council or similar governing body. Often approvals and decisions are adopted by a tribe in the form of a tribal resolution. Since a resolution is a formal statement by a tribal government, time will be required for the tribe to deliberate and advance a resolution through the tribe's political process.

When planning meetings with a tribal council, or placing matters before them for their consideration, attention needs to be given to the schedule that the tribe has established for tribal council meetings. The interval between meetings may range from several weeks to several months, depending on the tribe.

Budget Matters

Many tribes are familiar with the budget formulation and consultations conducted by BIA and the Indian Health Service; however, Reclamation does not consult with tribes on agency budget formulation. Reclamation can provide information on projects and programs. This type of information sharing is mutually beneficial, and can afford Reclamation an opportunity to discuss with tribes projects and activities that tribes might be eligible to participate in through the Indian Self-Determination Act, Tribal Self-Governance Act, or other collaborative programs. Ideally, discussions or consultations related to collaborative programs with tribes should be conducted early enough in the budget formulation process so tribes can provide meaningful input.

Confidentiality

Tribes are particularly sensitive about the disclosure of certain kinds of information, including religious practices, sacred sites, traditional knowledge, intellectual property, and cultural resources. In order to minimize the likelihood that confidential information will be released, Reclamation

employees are encouraged to refrain from acquiring sensitive information. Tribes should be informed that they should only submit to Reclamation information that the tribe is willing to release as part of the public record. If tribally sensitive information is disclosed or collected during consultation, Reclamation employees should be mindful of the following:

- Tribal information that has been disclosed or collected should be protected to the maximum extent practicable and permitted by law.
- Information obtained from tribes may become part of the public record and be released under the Freedom of Information Act (FOIA).¹⁴
- When FOIA requests are made for the release of tribal information, Reclamation offices are encouraged to notify and consult with the affected tribe.
- Guidance from Reclamation's FOIA Officer should be sought whenever there are questions about FOIA, including whether there are applicable exceptions for withholding tribal information.

In the event of a FOIA request, three exceptions may be applicable for withholding tribal information:

National Historic Preservation Act

Under the National Historic Preservation Act (NHPA), a Federal agency can withhold from disclosure to the public, after consultation with the Secretary of the Interior, information about a historic resource¹⁵ if the disclosure:

- Causes a significant invasion of privacy.
- Risks harm to a historic resource.
- Impedes the use of a traditional religious site by practitioners; 16 U.S.C. 470w-3(a).

Archaeological Resources Protection Act

Under the Archaeological Resources Protection Act (ARPA), a Federal land manager can withhold information about the nature and location of any archaeological resource¹⁶ that requires an ARPA permit or other permissions under this act or under any other provision of Federal law; 16 U.S.C. 470hh(a).

¹⁴ Note that information collected from a tribe may also be released as part of a discovery request in the event of litigation.

¹⁵ "Historic resource" has the same meaning as "historic property" and is defined at 16 U.S.C. 470w(5).

¹⁶ See 16 U.S.C. 470bb(1) for definition of "archaeological resource."

Indian Self-Determination and Education Assistance Act

Under the regulations implementing the Self-Determination Act, the following types of information are exempt from FOIA:

- Copies of tribal records that are required to be maintained as part of a bureau's record keeping system.
- Records of contractors, including archived records.
- Records maintained solely by an Indian tribe or tribal organization; 25 CFR 900.2(d).

Closing

Although this guidance document provides background and advisory information about protocol, consultation, and the government-to-government relationship, it is important to note that there is always more that can be learned from working with Indian tribes. Reference materials are useful tools for sharing information about Federal-tribal relations and providing practice pointers for improving communications and interactions. However, working directly with Indian tribes and interacting with tribal members often creates opportunities to acquire additional knowledge and firsthand experience, while at the same time being personally enriching and rewarding.

Appendix A: Legal and Policy Requirements for Consultation

Consultation with Indian tribes and tribal members is required by a variety of statutes, executive orders, and policies. The following is an overview of the major legal requirements for consultation that are applicable to Reclamation. The requirements for notification and consent are also addressed in order to distinguish these closely related topics from the subject of consultation. This section is intended to highlight the authorities and contexts that give rise to formal and informal Federal-tribal communications, and the requirements for satisfying those responsibilities. A synopsis of each authority is presented, and pertinent parts are cited for reference. Links to the full text of the authorities can be found on Reclamation's [Native American Affairs Program](#) homepage.

Statutes

The statutory framework for consultation involves three bodies of law pertaining to Indians, cultural resources, and the environment.

Indian Self-Determination and Education Assistance Act

The Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.) establishes a self-determination policy and permits federally recognized Indian tribes to plan, conduct, and administer programs and services that traditionally have been managed by the Federal Government. Only Title I and Title IV are applicable to the Reclamation program.

Title I – Indian Self-Determination Act (25 U.S.C. 450 et seq.).—The Indian Self-Determination Act, directs both the Secretaries of the Interior and Health and Human Services, upon the request of an Indian tribe by tribal resolution, to enter into a self-determination contract¹⁷ with an Indian tribe or tribal organization for planning, conducting, or administering programs and services (including construction) that are funded by the Federal Government for the benefit of Indians because of their status as Indians. It is commonly referred to as the [Public Law] “93-638 process.” The regulations implementing the Indian Self-Determination Act, at 25 CFR Part 900, establish certain consultation requirements:

- Consultation is to be maintained with tribal governments and tribal organizations about the Secretary’s budget process related to the programs, functions, services, and activities available to be performed under self-determination contracts; 25 CFR 900.3(b)(6).
- The parties to a self-determination contract are encouraged to consult during the development of the Program of Requirements (POR) and following submission of the POR to the Federal agency having jurisdiction over the program to be contracted; 25 CFR

¹⁷ See 25 U.S.C. 5304(j) for the definition of “contract,” which includes grants and cooperative agreements.

Working With Indian Tribal Governments
Consultation, Cultural Awareness, and Protocol Guidelines

900.117(b). A POR is a planning document that provides background information and design criteria for use in preparing construction documents; 25 CFR 900.113(g).

- Before spending any funds for a planning, design, construction, or renovation project, consultation is required with the Indian tribe or tribal organization that would be significantly affected by the expenditure to determine and to follow tribal preferences to the greatest extent feasible concerning size, location, type, and other characteristics of the project; 25 CFR 900.119.
- If an Indian tribe or organization is contracting solely to perform construction management services, consultation is required with the Indian tribe or tribal organization during the performance of a self-determination construction contract on a regular basis, as agreed to by the parties, to facilitate the exchange of information; 25 CFR 900.131(a)(1).

It should be recognized that the Indian Self-Determination Act and its regulations have numerous provisions that require either Reclamation or the tribe to provide or respond to formal written notice within prescribed timeframes and procedures. For example, notice is required regarding:

- Allocation and availability of funds
- Intent to contract
- Conflict of interest
- Tort claims
- Awarded funds that are insufficient to complete a project
- Intent to suspend, withhold, or delay payment
- Intent to terminate a construction contract for convenience
- Reassumption of a project
- Emergency reassumption
- Appeals

Title IV – Tribal Self-Governance Act (25 U.S.C. 5361-5368).—The Tribal Self-Governance Act of 1994 expands upon the principles found in the Indian Self-Determination Act and provides greater opportunities for Indian tribes to participate in programs and services conducted by the U.S. Department of the Interior (Department). Under this act, tribes participating in self-governance can negotiate and enter into annual funding agreements to plan, consolidate, and administer certain programs, services, functions, and activities currently administered by the Department. The regulations implementing the Tribal Self-Governance Act, at 25 CFR Part 1000, establish certain consultation requirements:

- Executive Order (EO) 13084, “Consultation and Coordination with Indian Tribal Governments,” issued on May 14, 1998, and any subsequent EO regarding consultation apply to implementation of the self-governance regulations; 25 CFR 1000.4(c)(9). Note that EO 13084 has been revoked and superseded by EO 13175, which is discussed later.

- Consultation is required with tribes participating in self-governance to determine which programs are eligible for inclusion in the annual list of available programs; 25 CFR 1000.131 to 133.
- Consultation is required when negotiating an annual funding agreement for a program that is of special geographical, historical, or cultural significance to more than one tribe; 25 CFR 1000.135.
- When required by law or when appropriate under bureau discretion, a bureau may use a public consultation process in negotiating an annual funding agreement; 25 CFR 1000 Subpart I.

American Indian Religious Freedom Act (42 U.S.C. 1996)

In 1978, the Congress passed a joint resolution regarding American Indian religious freedom. The American Indian Religious Freedom Act (AIRFA) is a Congressional policy statement that recognizes that Indians have the right to practice traditional religions, access sacred sites located on public lands, and use and possess sacred objects. It also directs all Federal agencies and departments to evaluate, within 1 year after passage of AIRFA, their policies and procedures in consultation with traditional Indian religious leaders. AIRFA was amended in 1994, to provide for the traditional use of peyote by Indians for religious purposes.

Although AIRFA does not confer special religious rights to Indians, courts have held that it does impose certain procedural requirements:

- Federal agencies are required to learn about and avoid unnecessary interference with traditional Indian religious practices. See *Crow v. Gullett*, 541 F.Supp. 785, 793 (D.S.D. 1982).
- Federal agencies must evaluate their policies and procedures in light of AIRFA's purpose, and ordinarily should consult with tribal leaders before approving projects likely to affect religious practices; *Id.*
- Federal agencies can satisfy the procedures required by AIRFA by including the consideration of Indian religious concerns in evaluations and documents completed under the National Environmental Policy Act. See *Wilson v. Block*, 708 F.2d 735, 747 (D.C. Cir. 1983), cert. denied 464 U.S. 1056 (1984).

Native American Graves Protection and Repatriation Act (25 U.S.C. 3001)

The Native American Graves Protection and Repatriation Act (NAGPRA) requires consultation with Indian tribes, traditional religious leaders, and lineal descendants of Native Americans regarding the treatment and disposition of specific kinds of cultural items¹⁸—human remains, funerary objects (associated and unassociated), sacred objects, and objects of cultural patrimony. For additional

¹⁸ See 25 U.S.C. 3001(3) for a definition of NAGPRA cultural items.

information on NAGPRA requirements, including consultation, see Reclamation’s [“NAGPRA Discovery and Collection Provisions”](#) training.¹⁹

Archaeological Resources Protection Act (16 U.S.C. 470aa to 470mm)

The Archaeological Resources Protection Act (ARPA) provides a means for protecting archeological resources located on public and Indian lands. This act delimits prohibited activities, establishes civil and criminal penalties, and creates a permitting process. Permits are required prior to excavating or removing archeological resources located on either public or Indian lands. In the case of Indian lands, consent of the tribe or Indian owner is also required prior to the issuance of a permit.

Although ARPA does not specifically require consultation, it does impose notification requirements:

- Indian tribes are required to be notified before an ARPA permit is issued that could result in possible harm to, or destruction of, any tribal religious or cultural site on public lands; 16 U.S.C. 470cc(c) and 43 CFR 7.7(a).
- Notice is to be provided at least 30 days before a permit is issued; 43 CFR 7.7(a).
- Notice is to be sent to the chief executive officer or other designated tribal official; 43 CFR 7.7(a)(1).
- If a tribe requests a meeting during the 30-day period, a meeting may be held with the official tribal representatives to discuss their interests, including ways to avoid or mitigate potential harm or destruction. Any adopted mitigation measures are to be included in the permit; 43 CFR 7.7(a)(3).
- In the event that a permit must be issued immediately because of imminent threat of loss or destruction of an archeological resource, the 30-day period is waived. However, appropriate tribes are required to be notified after the permit is issued; 43 CFR 7.7(a)(4).

National Historic Preservation Act (54 U.S.C. 300101 et seq.)

The National Historic Preservation Act (NHPA), as amended, creates a framework for the preservation of important cultural resources and establishes a procedural process for the consideration of the effects of Federal undertakings on historic properties. The term “historic property” means any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places (National Register).²⁰ NHPA requires Federal agencies to conduct consultation with Indian tribes when carrying out preservation and compliance responsibilities:

¹⁹ Through DOI Talent, and online learning management system.

²⁰ See 16 U.S.C. 470w(5) for the definition of “historic property” or “historic resource.”

- Properties of traditional religious and cultural importance to an Indian tribe may be determined to be eligible for the National Register; 54 U.S.C. 302706(a).
- Consultation is required with any Indian tribe that attaches religious and cultural significance to historic properties; 54 U.S.C. 302706(b).
- Preservation related activities are to be carried out in consultation with Indian tribes; 54 U.S.C. 306102(b)(4).
- The procedures for compliance with Section 106 of NHPA are required to provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with Indian tribes, regarding the means by which adverse effects on such properties will be considered; 54 U.S.C. 306102(b)(5)(B).

The regulations implementing NHPA's Section 106 compliance process also establish procedural requirements for conducting consultation with Indian tribes. See 36 CFR Part 800.

National Environmental Policy Act (42 U.S.C. 4321)

The National Environmental Policy Act (NEPA) establishes a procedural process that requires the preparation of an Environmental Impact Statement for any proposed major Federal action that may significantly affect the quality of the human environment. The regulations implementing NEPA require tribal consultation and involvement during the NEPA process:

- Federal agencies are to consult with Indian tribes early in the NEPA process; 40 CFR 1501.2(d)(2).
- Affected Indian tribes are to be invited to participate in the scoping process; 40 CFR 1501.7(a)(1).
- During the analysis of environmental consequences to an Indian reservation, discussions must consider possible conflicts between the proposed action and the objectives of tribal land use plans, policies, and controls; 40 CFR 1502.16(c).
- Indian tribes must be invited to comment on a draft Environmental Impact Statement when the effects may occur on a reservation; 40 CFR 1503.1(a)(2)(ii).
- 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).
- When effects take place 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 *NEPA Handbook* provides additional guidance about how the NEPA process is used to consider Indian trust assets, sacred sites, and off-reservation effects.

Executive Orders and Memoranda

Government-to-Government Relations With Native American Tribal Governments

The Presidential Memorandum of April 29, 1994, establishes policy for maintaining a government-to-government relationship with Native American tribal governments. It directs that executive agency activities that affect tribal rights or trust resources must be implemented in a knowledgeable and sensitive manner that is respectful of tribal sovereignty. Consultation with tribal governments is required to the greatest extent practicable and permitted by law prior to taking actions that could affect federally recognized tribal governments. All such consultations are to be open and candid.

Indian Sacred Sites

EO 13007, “Indian Sacred Sites,” dated May 24, 1996, establishes additional requirements for the protection and preservation of Indian religious practices. Each Federal agency is required to accommodate access to, and ceremonial use of, Indian sacred sites located on Federal lands by Indian practitioners, and avoid adversely affecting the physical integrity of such sacred sites.

Consultation and Coordination With Indian Tribal Governments

On November 6, 2000, the President signed EO 13175, “Consultation and Coordination with Indian Tribal Governments.” This EO builds on previous administrative actions and is intended to:

- Establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications;
- Strengthen government-to-government relationships with Indian tribes; and
- Reduce the imposition of unfunded mandates upon Indian tribes.

For purposes of this EO, “policies that have tribal implications” refers to:

“Regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and the responsibilities between the Federal Government and Indian tribes.”²¹

Note that EO 13175 revokes and supersedes EO 13084, issued on May 14, 1998.

²¹ See EO 13175, section 1(a).

Government-to-Government Relationship With Tribal Governments

The Presidential Memorandum of September 23, 2004, reaffirms the national policy on self-determination for Indian tribes; EO 13175, “Consultation and Coordination with Indian Tribal Governments;” and the government-to-government relationship with tribal governments.

Tribal Consultation

The Presidential Memorandum of November 5, 2009, reaffirms EO 13175, “Consultation and Coordination with Indian Tribal Governments” and directs each agency to prepare and submit a detailed plan of actions to implement the policies and directives of EO 13175 and fulfill other reporting requirements. On July 10, 2010, the Office of Management and Budget issued updated guidance for implementing EO 13175.

Department Manual and Secretarial Orders

Indian Trust Responsibilities

The Department Manual, Part 512, Chapter 2, articulates the policy, responsibilities, and procedures for consulting with Indian tribes to identify and assess impacts to Indian trust resources (originally issued as Secretarial Order 3175, dated November 8, 1993):

- It is the policy of the Department to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health or safety.
- Heads of bureaus and offices are responsible for assessing impacts to trust resources and for consulting with the recognized tribal government whose trust assets are potentially affected by the proposed action, plan, or activity.
- All consultations are to be conducted in an open and candid manner respectful of tribal sovereignty, so that all interested parties may evaluate for themselves the potential impact of the proposal on trust resources.

Tribal Rights, Trust Responsibilities, and the Endangered Species Act

On June 5, 1997, both the Secretaries of the Interior and Commerce jointly issued Secretarial Order 3206. It provides guidance about the Federal-tribal relationship and implementation of the Endangered Species Act. Tribal consultation is required to maintain effective working relations and mutual partnerships to promote the conservation of sensitive species and the health of ecosystems. The order articulates a set of guiding principles:

- Work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.

- Recognize that Indian lands are not subject to the same controls as Federal public lands.
- Assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.
- Be sensitive to Indian culture, religion, and spirituality.
- Make available to Indian tribes information related to tribal trust resources and tribal lands, facilitate the mutual exchange of information, and strive to protect sensitive tribal information from disclosure.

U.S. Department of the Interior Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites

The Department Manual, Part 512, Chapter 3, establishes the policy, responsibilities, and procedures to accommodate access to and ceremonial uses of Indian sacred sites and to protect the physical integrity of such sites consistent with EO 13007, “Indian Sacred Sites,” dated May 24, 1996. See also the Department’s *Implementation Report: Executive Order No. 13007, Indian Sacred Sites*, dated May 23, 1997.

U.S. Department of the Interior Policy on Consultation With Indian Tribes and Secretarial Order 3317

The Department’s *Policy on Consultation with Indian Tribes* was issued under Secretarial Order 3317 on December 1, 2011. It acknowledges and affirms the Department’s commitment to fulfilling its tribal consultation obligations whether directed by statute; administrative action such as EO 13175, “Consultation and Coordination with Indian Tribal Governments;” or other applicable Secretarial Orders or policies. The policy broadly establishes the framework for enhancing the Department’s consultation processes:

- Requires consultation between appropriate tribal officials and Departmental officials.
- Establishes accountability and reporting requirements.
- Provides commitments to develop and deliver training to improve the Department’s capacity for promoting collaboration and consultation with Indian tribes.
- Promotes innovative and effective consultation practices.
- Establishes roles and responsibilities.
- Requires all bureaus and offices to review existing policies affected by the consultation policy.
- Provides consultation guidelines for use by bureaus when considering a Departmental action with tribal implications.

For purposes of this policy, “Departmental action with tribal implications” means:

“Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe on matters including, but not limited to:

1. Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands;
2. The ability of an Indian Tribe to govern or provide services to its members;
3. An Indian Tribe’s formal relationship with the Department; or
4. The consideration of the Department’s trust responsibilities to Indian Tribes.

This, however, does not include matters that are in litigation or in settlement negotiations, or matters for which a court order limits the Department’s discretion to engage in consultation.”

The companion Secretarial Order 3317 further clarifies the roles and responsibilities for complying with the consultation policy.

Reclamation Policy and Guidance

Reclamation’s Indian Policy

On February 25, 1998, the Commissioner issued Reclamation’s Indian Policy. This overarching policy acknowledges and affirms Reclamation’s commitment to fulfilling the Federal laws and policies of the President and Secretary of the Interior relating to Indians.

Indian Trust Responsibilities

Reclamation’s Indian Trust Asset Policy was announced by the Commissioner on June 2, 1993, and procedures for its implementation through the NEPA process were signed by the Commissioner on November 29, 1993. A guidance document dated August 31, 1994, provides questions and answers about Reclamation’s Indian Trust Asset Policy and NEPA implementing procedures.

Government-to-Government Relations

On June 14, 1996, the Commissioner issued Reclamation’s action plan, dated June 4, 1996, for implementing government-to-government relationships with Indian tribes consistent with the Presidential Memorandum of April 29, 1994.

Sacred Sites

On September 16, 1998, the Commissioner issued final guidance for implementing EO 13007, “Indian Sacred Sites,” dated May 24, 1996.

Appendix B: Example Protocol Agreement

The following is an example of a protocol agreement that has been negotiated and entered into by Reclamation and [*insert name of tribe*]. The format and content of other negotiated protocol agreements may vary from this example, depending upon tribal preferences and the type of relationship that Reclamation and the tribe have developed or are in the process of developing.

Memorandum of Agreement between the _____ Tribe and the Bureau of Reclamation, United States Department of the Interior

The _____ (Tribe) and the Bureau of Reclamation (Reclamation) believe that this agreement to work together within a bilateral government-to-government framework will enhance the productivity of the relationship and reduce the potential for future conflicts. Each party is independent, has its respective responsibilities, yet recognizes the need for better coordination and communication to establish Federal and tribal partnerships for the successful implementation of water management programs. Therefore, the Tribe and Reclamation as parties to this Agreement will cooperate to the fullest extent possible to implement their respective long-range water management programs considering available resources, statutory authorities, and regulations.

I. Guiding Precepts

- The Tribe and Reclamation desire to maintain a government-to-government relationship in a manner that facilitates open communication, protects trust resources, and promotes opportunities for partnerships.
- The Tribe and Reclamation have a common interest in promoting healthy ecosystems.

- Reclamation recognizes the Tribe's aboriginal rights, sovereign authority, and institutional capacity to effectively manage the lands and resources within the _____ Reservation (Reservation) as the self-sustaining homeland.
- The Tribe recognizes that Reclamation's technical expertise in water and related resource management establishes it as a significant resource for the Tribe's management of the water and ecosystems of the Reservation.
- Reclamation will consult with the Tribe, in accordance with Reclamation and U.S. Department of the Interior policies, regarding any of its activities that may affect the Tribe's trust resources to ensure that such activities will support the Tribe's goals and objectives regarding self-determination and economic self-sufficiency.
- The Tribe and Reclamation acknowledge that effective communication is paramount for a successful relationship. Both recognize the importance of early and continuing two-way interactions about issues of mutual interest.
- The Tribe and Reclamation agree to work together by mutually providing input into decision-making processes; maintaining communication, coordination, and cooperation; sharing training opportunities; and promoting mutual respect, support, trust, and honesty.
- The Tribe and Reclamation agree and recognize that this Agreement and any processes established by it do not preempt or modify the respective rights and responsibilities of either entity, nor does it establish any additional rights or responsibilities.
- Authority to carry out specific projects or activities, such as the transfer of funds, technical assistance, or acquisition of services and property will be implemented under separate agreements.

II. Tribal Management

- The Tribe shall provide for continuous, ongoing reviews of all activities conducted under this Agreement, through its internal planning, review, regulation, and enforcement processes, to ensure that any activity on the Reservation is consistent with traditional values of environmental stewardship.
- The Tribe shall take the lead role in identifying and proposing projects potentially eligible for study and funding with Reclamation.

III. Communication

- The government-to-government relationship requires working with the _____ Tribal Government and its resource management authorities, including the sharing of technical personnel and information, to address issues of mutual interest and common concern. Both the Tribe and Reclamation recognize that release of tribal proprietary, commercial, and confidential information may be restricted by either the Tribe or Reclamation, and that information disclosed or collected will be protected to the maximum extent practicable.
- The Tribe and Reclamation encourage open, informal discussion to facilitate proactive, cooperative efforts. Mutual agreement about communications with third parties will promote the innovative and creative process that the Tribe and Reclamation have agreed to pursue.
- The Tribe and Reclamation acknowledge that the Tribe manages access to, and is responsible for, the safeguarding of information about tribal water and ecosystems, including federally endangered, threatened, and candidate species. The Tribe will establish standard protocol for the safekeeping and dissemination of such information.

- Reclamation's _____, or designee, will be the contact person for communications about any Reclamation programs or activities that may involve and affect the Tribe.
- Reclamation's primary point of contact with the Tribe is the _____.
- The Tribe's _____, or designee, will be the contact person for communications about any Reclamation programs or activities that may involve or affect the Tribe.

IV. Coordination

- Upon tribal request, Reclamation may provide technical assistance to the Tribe, for water resources needs within the authorities given to Reclamation by the Congress and subject to the availability of funds.
- In order to achieve the mutual interests expressed in this Agreement, Reclamation will facilitate a Tribal Water Planning Committee to address water resource needs and partnership opportunities.

V. Dispute Resolution

- The Tribe and Reclamation agree to work together to resolve disputes through consultation in a manner that is respectful of their mutual sovereignty. In the event of a dispute, the parties may use alternative dispute resolution processes including, but not limited to, mediation by a mutually agreed-upon third party.

VI. Termination

- This Agreement can be modified or terminated at any time by mutual consent of both parties, or can be terminated by any party giving 60 days written notice to the other party.

IN WITNESS WHEREOF, and pursuant to tribal authorization contained in Resolution _____, the parties hereto have caused this Agreement to be executed at _____ by their duly authorized offices as of the day and year described below.