

# **HISTORIC PRESERVATION AND CONSULTATION WITH NATIVE AMERICANS**

## **A Responsibility of Every Federal Agency**

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### **Why Must Agencies Consult?**

The Federal government and Indian Tribes have a special political relationship that is “government-to-government.” The requirements for this special relationship are described in Executive Order 13175. Among them is the duty of each Federal agency to establish programs that describe and maintain the consultative relationship with Tribes on matters that have substantial direct effects on them.

### **What does this mean for Consultation about Cultural Heritage?**

- It must take place according to the general policies and programs that each Federal agency has to establish and maintain its government-to-government relationships with Tribes.
- The Federal **Preservation** Officer (FPO) for each agency is charged with statutory responsibilities for developing, maintaining, and implementing cultural heritage programs, consistent with their agencies’ respective missions [National **Historic Preservation** Act (NHPA); 16 U.S.C. 470h-2]. Their statutory responsibilities also require that planning activities under those programs be carried out through consultation with federally recognized Native American tribes, Alaskan Native villages, and Native Hawaiian organizations.

### **What are the legal authorities?**

*Several Statutes, Regulations and Executive Orders relating to cultural resources impact Native Americans, Alaska Natives, and Native Hawaiians. Some of the most important, with selected text, are:*

- “National **Historic Preservation** Act” [16 U.S.C. 470 et seq.]  
“In carrying out its responsibilities under **section 106** of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties...” **Section 101(d)(6)(B)**
- “National Environmental Policy Act” [43 U.S.C. 4321 and 4331-35]  
“As part of the scoping process the lead agency shall: (1) Invite the participation of...any affected Indian tribe...” 40 CFR 1501.7(a)
- “National Environmental Policy Act, CEQ regulations” [40 C.F.R. Part 1500]  
*Sections 1501.2(d)(2), 1501.7(a)(1), 1502.15(c), 1503.1(a)(2)(ii), 1506(b)(3)(ii), 1508.5, 1508.12*
- “Archaeological Resources Protection Act” [16 U.S.C. 470aa-mm]  
“...before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance.” **Section (4)(c)**
- “Native American Graves Protection and Repatriation Act” [25 U.S.C. 3001 et seq.]  
“Consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations”  
**Section 8 (c)(6)**

- Executive Order 13175 “Consultation & Coordination with Indian Tribal Governments”  
“...in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications...”
- Executive Order 13007 “Sacred Sites”  
“Each executive branch...shall...promptly implement...procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites.” **Section** (2)(a)
- Executive Order 12875  
“Enhancing the intergovernmental partnership”  
“Each agency shall develop an effective process to permit elected official and other representative of State, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals...” **Section** (1)(b)
- Executive Order 12898 “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” “Native American Programs. Each Federal Agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the WorkingGroup, and after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that addresses Federally-recognized Indian tribes.” (**Section** 6-606)

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### **What are agency responsibilities in the consultation process to protect cultural resources?**

- Determine which laws apply to your project.
- Determine which definitions apply to your project.
- Know which Native people to consult with
- Be sure the highest agency official contacts the highest elected official of the Federally recognized Tribe or Alaskan village to establish government-to-government relations.
- It is your responsibility to identify which official or individual(s) to contact. Some internet resources that can help you are:
  - National Association of Tribal **Historic Preservation** Officers [http://www.nathpo.org/THPO\\_Members/member\\_list.html](http://www.nathpo.org/THPO_Members/member_list.html)
  - National Council for State **Historic Preservation** Officers <http://www.ncshpo.org/stateinfolist/>
  - Comprehensive list of Tribal Chairs <http://www.hanksville.org/sand/contacts/tribal/>
- Provide tribes with notice of agency’s plans by either telephone or letter.
- Obtain a document reply of comment or no comment.

### **What is the Benefit of Consulting with Native Americans?**

- Access to traditional procedures on how to preserve or display cultural resources.
- Understanding what cultural resources are important to Native Americans.
- Personal contact one to one interactions—get to know the tribes personally.
- Prevent delays.
- Prevent lawsuits.

- Lower cost of retrofit over time.

## Internet Resources

- Advisory Council on **Historic Preservation** <http://www.achp.gov>
- Code Talk (sponsored by the Department for Housing and Urban Development) <http://www.codetalk.fed.us>
- Consultation Resource (sponsored by the Federal **Preservation** Institute) <http://www.codetalk.fed.us/SpecialTrust/fpi.html>
- Listing of Government wide Indian Program websites <http://www.asu.edu/clas/history/h-amindian/usgovt.htm>

## 10 Helpful Tips

- Meet face to face. Get to know one another and learn how each other's organizations work.
- Consult early and often. Meet often, even before there is an issue under review. Make sure there is an on-going exchange of information.
- Be honest. Don't promise what you can't give.
- Learn Tribal organization and legal codes. Know to whom you are talking.
- Create a detailed administrative record. You know you have one when you meet the requirements of the Administrative Procedures Act.
- Build consultation into your planning process.
- Inform Native people about your agency's mission, goals, programs, and typical actions.
- Avoid information overload. Know the administrative limitations faced by Native people.
- Stay in touch.
- Recognize cultural differences in approaches to consultation and **preservation** of cultural resources.

## What is enough to know that you consulted?

One of the most frequent kinds of consultation occurs in projects that involve NAGPRA. NAGPRA regulations (43CFR10.8)(2) describe when consultation must begin:

“Museum and Federal agency officials must begin summary consultation no later than the completion of the summary process. Consultation may be initiated with a letter, but should be followed up by telephone or face-to-face dialogue with the appropriate Indian tribe official.” While this process of notification and subsequent consultation is perhaps the most practiced; it is by no means the only action. It is important that you first establish which laws apply to your specific case, and then begin the process outlined in the statute.

Moreover, Federal **Preservation** Officers continually state that consent or agreement must be obtained before the consultation process can be concluded. Indeed, it is clear from this brief example that a letter is NOT enough and notification does NOT constitute the complete consultation process. Once a well-documented administrative history of government-to-government discussions (face-to-face preferred) of the proposed undertaking is ready, and a plan of action is agreed upon, consultation is complete.

**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’s “Standards and Guidelines for Federal Agency **Preservation** Programs pursuant to the National **Historic Preservation** Act” provide further guidance on consultation. (36CFR 800)

**Indian Tribe** means an Indian tribe, and, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in **section 3** of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (36CFR 800)

**Indian Tribe** means any tribe, band, nation or other organized Indian group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaskan Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (NAGPRA) (ARPA)

**Indian Tribe** means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and “Indian” refers to a member of such an Indian Tribe...(EO 13007)

**Indian Tribe** means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. (EO 13175)

**Native American** means of, or relating to, a tribe, people, or culture that is indigenous to the United States. (NAGPRA)

**Native Hawaiian Organization** means any organization which serves and represents the interests of Native Hawaiians; has a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of **historic preservation** that are significant to Native Hawaiians.(36CFR 800)

**Native Hawaiian Organization** means any organization which,

- serves and represents the interests of Native Hawaiians
- has a primary and stated purpose the provision of services to Native Hawaiians, and
- has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai’i Nei (NAGPRA)

**Hui Malama I Na Kupuna O Hawai’i Nei** means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues. (NAGPRA)

**Native Hawaiian** means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. (36CFR 800) (NAGPRA)