The Cultural Heritage Program: A Course for Managers

Module 4: The Basics of Tribal Consultation

Many federal laws and policies require consultations with Indian tribes, for whom cultural resources are a key topic of interest. The lands and resources that we manage today are connected to the cultural heritage of North America's indigenous people. Many places and resources continue to retain their cultural importance for Native Americans.

Legal Authorities

The National Historic Preservation Act of 1966 as amended and its implementing regulations require tribal consultations. In this way, Indian tribes can identify their concerns about historic properties, including those of traditional religious and cultural importance; provide advice on the identification and evaluation of such properties; articulate their views on the potential effects of an undertaking; and participate in resolving adverse effects. This applies to both land use planning and the Section 106 process.

The Archaeological Resources Protection Act of 1979 protects resources on federal and Indian lands and requires consultation prior to issuance of a permit for investigations that could threaten the integrity of a resource valued by an Indian tribe.

The American Indian Religious Freedom Act of 1978 provides protection for rights to practice traditional religions, which may involve access to public lands.

The Native American Graves Protection and Repatriation Act of 1990, also known as NAGPRA, established Native American rights of ownership of human remains and associated burial objects, as well as sacred objects and "objects of cultural patrimony." It established penalties for illegal possession, sale, and exchange of the protected items. NAGPRA established criteria for determining the cultural affiliation of such materials and for resolving related disputes. The law addresses procedures for the treatment of protected materials when they are discovered during scientific excavations, construction projects, or situations of unanticipated discovery. These procedures address consultations and establish strict deadlines for notification of Indian tribes.

NAGPRA also required federal agencies to complete inventories of all protected remains and objects held by museums, agencies, and other institutions holding collections taken from federal lands. BLM and other agencies devoted a great deal of effort to these inventories. The law addresses procedures to enable the repatriation, or return, of these remains and objects to their culturally affiliated tribes.

Executive Order 13007, relating to Indian Sacred Sites, was issued in 1996 to accommodate access and ceremonial use of sacred sites. Agencies are to maintain the confidentiality of sacred sites and strive to avoid adversely affecting their physical integrity.

Subsequent executive orders, as well as policies established by the Department of the Interior and the BLM, provide further guidance on tribal consultation. These include Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Secretarial Order 3317; and the Department of the Interior Tribal Consultation Policy, issued in 2011. The BLM Manual Series also contains detailed guidance for consultation for BLM managers and staff.

Managers need to be aware that tribal consultations may identify and address issues that are unrelated to cultural resources. For example, in the context of preparing an analysis required by the NEPA, Indian tribes may express concerns about potential effects on air quality, water resources, tribal economies, or environmental justice issues. It's important for managers to consult with tribes early in the land use planning process and to maintain ongoing relationships to stay aware of the issues. In order to achieve a more effective consultation process, the BLM may work with interested tribes to establish formal or informal agreements on consultation procedures.

Principles and Procedures of Tribal Consultation

The BLM's national Programmatic Agreement for compliance with the National Historic Preservation Act emphasizes certain principles relating to tribal consultation.

- The sovereign legal status of tribal governments requires a process of government-to-government consultation. Therefore, State Directors and line managers will represent the United States in formal consultations. District and field office managers shall establish working relationships with tribal officials. These relationships will be comparable to their relationships with other government officials.
- Information from Indian tribes will be given good faith consideration.
- Managers shall consider whether their decisions may inhibit or destroy tribal access to public lands for religious or traditional uses. To the extent consistent with law, BLM's decisions should not substantially burden the pursuit of traditional religious and cultural practices.

The national PA also defined the following general procedures.

- The BLM will offer Indian tribes the opportunity to establish agreements or other formalized procedures for the consultation process.
- Discussions with Indian tribes will seek to identify geographic areas, property types, and undertakings of concern.
- To the extent possible under law and regulation, BLM will protect from public disclosure any sensitive and confidential information about traditional beliefs, practices, and associated locations.
- State Directors will make schedules of impending actions available to Indian tribes on a regular basis.
- Consultations will take place at the outset of land use planning, as well as early and through all phases of the Section 106 process for proposed undertakings.

How do we consult and with whom? For proposed projects and land use plans, BLM should communicate, early and often, with all interested Indian tribes and those affiliated with an area through historical or cultural connections. For example, many offices in Arizona and New Mexico consult with the Fort Sill Apache Tribe, which now resides in Oklahoma but traditionally lived in the Southwest.

Communication begins with a certified letter from the manager, but a letter isn't sufficient. Letters should be followed by personal contacts through telephone or email. Depending on the situation, these can involve contacts and information shared between BLM and tribal staff. BLM

managers should offer opportunities for meetings or field trips. A manager shows good faith in traveling to a tribe to meet with tribal officials or make a presentation to the tribal council.

A good faith effort can require determination and persistence. A lack of response doesn't necessarily mean a lack of interest. Tribal consultation can be a challenging process. It can be difficult to resolve complex issues, such as effects on the spiritual values of areas whose boundaries are difficult to define. It may be impossible to fully mitigate adverse effects on the values of traditional cultural places.

Some tribal officials place a high bar on the meaning of "consultation." They argue that communication, in and of itself, does not equate to consultation. Information sharing and presentations may be more appropriately labeled as "coordination." Consultation requires a sincere effort to listen to tribal concerns and afford them a role in the decision making process.

Roles and Responsibilities

Cultural resource specialists and tribal liaisons compile information on tribal histories, cultures, and traditional territories. They communicate with the appropriate tribal staff and assist managers in setting up and conducting meetings and field trips. Specialists draft correspondence and assist with follow-up contacts. They fully document all contacts and meetings, including email messages and phone calls, to maintain a thorough record of documentation.

Specialists also advise managers on the nature of issues and the need for special studies, such as ethnographic studies or analyses of potential visual impacts on views from traditional cultural places. They provide expert advice on matters relating to compliance with the NAGPRA and other laws.

Contractors and consultants can assist the BLM in preparing correspondence, conducting follow-up contacts, arranging meetings and field trips, and maintaining documentation of consultation efforts. However, they play a support role. BLM's consultation responsibilities can't be delegated to consultants.

Managers are required to play an active role in government-to-government consultations. Thus it benefits managers to establishment ongoing relationships and regular meetings with tribal officials. Conflict resolution may be required in making tough decisions. On the other hand, well-established relationships can offer opportunities to cooperate with tribes in efforts that study and protect cultural resources. Cooperative efforts can also ensure that tribal perspectives are incorporated into interpretive materials and educational outreach to the public.

Ultimately, the BLM manager has decision-making authority on the public lands. The manager's responsibility is to make a good faith effort; to follow up with interested tribes to let them know how their concerns were resolved, or why they were not; and to ensure that all consultation efforts are fully documented in the formal record.