

**U.S. Army Corps of Engineers – Civil Works
DRAFT Tribal Consultation Policy**

1. References.
 - a. U.S. Constitution, Article I, Section 8; Article VI.
 - b. National Historic Preservation Act (54 U.S.C. 3121 et. seq), 15 Oct 1966, as amended.
 - c. Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), 18 Dec 1971, as amended.
 - d. American Indian Religious Freedom Act (42 U.S.C. 1966; Public Law 95-341), 11 Aug 1978, as amended.
 - e. Archaeological Resources Protection Act (16 U.S.C. 470aa-mm; Public Law 96-95), 31 Oct 1979, as amended.
 - f. 33 CFR part 325, Processing of Department of the Army Permits, 13 Nov 1986, as amended.
 - g. Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq; Public Law 101-601), 16 Nov 1990.
 - h. Religious Freedom Restoration Act (42 U.S.C. ch. 21B § 2000bb et seq; Public Law 101-141), 16 Nov 1993.
 - i. Executive Order 13007, *Indian Sacred Sites*, 24 May 1996.
 - j. Department of Defense American Indian and Alaska Native Policy, 20 Oct 1998.
 - k. Engineer Regulation 1105-2-100, *Planning Guidance Notebook*, 22 Apr 2000.
 - l. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000.
 - m. Consolidated Appropriations Act, 2004, as amended, Public Law 108-199, Division H., Section 161.
 - n. Consolidated Appropriations Act, 2005, Public Law 108-447, Div. H., Section 518.
 - o. Army Regulation 200-1, *Environmental Protection and Enhancement*, 13 Dec 2007.
 - p. Engineer Regulation 1130-2-540, Project Operations – Environmental Stewardship Operations and Maintenance Guidelines and Procedures, 11 Aug 2008.
 - q. Presidential Memorandum, *Tribal Consultation*, 05 Nov 2009.

- r. Announcement of Presidential support for the *United Nations Declaration on the Rights of Indigenous Peoples*, Public Papers of the President, December 16, 2010.
 - s. Section 1129 of the Water Resources Development Act of 2018.
 - t. Department of Defense Instruction Number 4710.02: DoD Interactions with Federally Recognized Tribes, 24 Sep 2018.
 - u. Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021.
 - v. Advisory Council on Historic Preservation, Consultation with Indian Tribes in the Section 106 Review Process: The Handbook, June 2021.
 - w. Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights, November 15, 2021.
 - x. Guidance for Federal Department and Agencies on Indigenous Knowledge, November 30, 2022.
 - y. Presidential Memorandum on Uniform Standards for Tribal Consultation, November 30, 2022.
2. Purpose. On January 26, 2021, the President issued a Memorandum to the heads of all federal agencies entitled *Tribal Consultation and Strengthening Nation-to-Nation Relationships*. The Memorandum reaffirmed Executive Order (E.O.) 13175, *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249) signed on November 6, 2000, and the policy announced in the Presidential Memorandum signed on November 5, 2009. The Presidential Memorandum also requires each agency to formulate a detailed plan of actions that it will undertake to implement the policies and directives of E.O. 13175. E.O. 13175 requires all federal agencies to formulate “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This document affirms the U.S. Army Corps of Engineers (USACE) commitment to engage in consultation with federally recognized Tribes and Alaska Native Corporations (ANCs).¹
 3. Background. There are responsibilities to Tribal Nations resulting from the Federal Trust Doctrine, which is derived from Treaties, statutes, regulations, Executive Orders, case law, and agreements between the United States government and Tribal governments. The references in paragraph 1 provide additional guidance on coordination and consultation with Tribal Nations.
 4. For the purpose of this policy, the following definitions apply:
 - a. Alaska Native Corporation (ANC): Any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with 43 U.S.C. §1601, *et seq.*

¹ A separate consultation policy with Native Hawaiian Communities is under development.

- b. Consultation: Regular, meaningful, and robust communication process involving, at times, USACE and Tribal officials with decision-making authority and which emphasizes trust, respect, and shared responsibility between USACE and the Tribal Nation or ANC. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken. Consultation is an active and respectful dialogue concerning actions taken by USACE that have Tribal implications on Tribal resources, Tribal rights (including treaty rights) or lands. Consultations are also conducted for actions which have a substantial direct effect on ANCs including actions on or affecting ANCSA lands.
 - c. Tribe/Tribal Nation: Indian Tribes as defined in E.O. 13175, “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 USC 479a.”
 - d. Policies that have Tribal implications: 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 responsibilities between the Federal Government and Indian Tribes.
5. Applicability. This Policy applies to all Civil Works elements of USACE, including the Regulatory, Planning, and Operations Programs, at HQUSACE, Major Subordinate Commands, District Commands, the Institute for Water Resources, the Humphreys Engineering Center Support Activity, and the Engineer Research and Development Center.
6. The Tribal Policy Principles. USACE will incorporate the following six Tribal Policy Principles into its planning, management, budgetary, operational, regulatory, and legislative initiatives, management accountability systems and ongoing policy and regulation development processes.
- a. Tribal Sovereignty.
 - i. All federally recognized Tribes are sovereign governments and will be treated with dignity and respect.
 - ii. Sovereignty is the foundation of Tribal governments.
 - iii. Tribal governments set their own priorities, and develop and manage Tribal and trust resources.
 - iv. Tribal Nations are responsible for their own governance and management.
 - v. USACE recognizes and respects the distinct, unique, and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between ANCSA Corporations and the Federal Government.
 - b. Trust Responsibility.
 - i. The Trust responsibility will be honored and fulfilled.
 - ii. The federal government has a unique legal and political relationship with Tribal governments that recognizes self-government and self-determination.
 - iii. USACE shall work to meet its trust responsibilities, protect trust resources, and obtain Tribal views of trust and treaty responsibilities for actions related to USACE, in accordance with provisions of treaties, laws and Executive Orders as well as principles lodged in the Constitution of the United States.

- iv. As a matter of Federal law, USACE cannot authorize, approve, or carry out any activities which would result in a violation of a Tribal treaty right. See Appendix A for Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making for USACE use.
 - v. USACE is committed to supporting projects and programs beneficial to Tribal Nations through partnership with them, including co-management where appropriate.
 - vi. USACE will ensure that it considers and addresses Tribal and ANC concerns regarding protected Tribal resources, Tribal rights (including treaty rights) and lands, and ANCSA lands to the maximum extent allowed under law.
 - vii. USACE will protect and allow access to protected Tribal resources under USACE managed lands and water resources development projects to the extent practicable and will work to develop and implement access policies as needed.
 - viii. USACE will ensure reasonable access to sacred sites on USACE managed lands and water resources development projects in accordance with the American Indian Religious Freedom Act and other applicable laws, regulations, and guidance.
 - ix. USACE will share non-privileged information when requested by Tribal Nations and ANCs to the maximum extent allowed under law. In addition, federally recognized Tribes and ANCs do not need to submit a FOIA request for non-privileged information that is otherwise releasable under the law.
 - x. USACE welcomes receiving Indigenous Knowledge on the implementation of Civil Works functions and will respect and consider such Indigenous Knowledge throughout Civil Works implementation.
- c. Government-to-Government and Nation-to-Nation Relations.²
- i. USACE will maintain a government-to-government and Nation-to-Nation relationship with Tribal governments and Nations which may include establishing new means or processes to engage with Tribal Nations, separate from those provided to the general public or other governmental entities.
 - ii. Consultation for decision-making occurs between Tribal Leaders and USACE Commanders/Leader and USACE Commanders/Leaders will work to achieve regular, meaningful, and robust communication with Tribal Leaders.
 - iii. A Tribal Nation or ANC has access to the Chief of Engineers, the Assistant Secretary of the Army (Civil Works), and other high-level individuals.
 - iv. Regular and recurring interactions, which may include processes under Section 106 of the NHPA and environmental compliance, will primarily be staff-to-staff.
 - v. Tribal consultations will be assisted by an appropriate Tribal Liaison. A Tribal Liaison will be designated at each District, MSC, HQ USACE and identified as such on its website. The USACE Tribal Liaisons are assets in implementing Tribal consultation.
 - vi. Each Tribal Nation or ANC shall be consulted with separately, unless Tribal Nations or ANCs agree to act collectively, for example, after receipt of such request from USACE or on their own initiative.
- d. Consultation Elements.

² For purposes of this Tribal Consultation Policy, government-to-government and Nation-to-Nation are equivalent terms regarding fulfillment of Tribal trust responsibility and consultation requirements. The USACE wants to reflect the sovereignty of Tribal Nations in the use of Nation-to-Nation but does not convey any additional legal status or implications through the use of Nation-to-Nation.

- i. Consultation will be an integral, invaluable process of USACE planning and implementation for all of USACE's Civil Works projects and programs.
- ii. Consultation will be triggered by any USACE Civil Works activity that has Tribal implications or substantial direct effect on ANCs, including but not limited to planning for and implementation of individual projects, studies, programs, general permit developments, permit applications, draft approved jurisdictional determinations, real estate outgrants and other actions, Section 408 permission requests, operations and maintenance activities, rulemaking processes, and promulgation of regulations and policies, including policy guidance on treaty rights effect determinations, regardless of land status. USACE will conduct an analysis to determine whether such USACE activities has Tribal implications or substantial direct effect on ANCs regardless of whether a Tribal Nation or ANC requests consultation. Such analysis should be conducted by an individual who effectively interacts with Tribal Nations and/or ANCs.
- iii. USACE should consider conducting consultation even if a determination is made that a policy will not have Tribal implications or will not have substantial direct effect on ANCs if the policy is of interest to a Tribal Nation or ANC.
- iv. Potentially affected Tribal Nations and ANCs, as determined by USACE, including Tribal Nations whose ancestral territories extend to the lands where a proposed activity would occur, will be contacted by the Tribal Nations' and ANCs preferred mode of communication (letter, telephone and/or e-mail) sufficiently early to allow a timely review of the proposed action and for initiation of consultation. A public notice sent to Tribal Nations or ANCs is not sufficient for notification or initiation of consultation protocols, unless requested by a Tribe or ANC.
 1. Sufficiently early means at the earliest known phase of a proposed project, to include scoping meetings; project kick-off meetings; pre-application/request meetings; within the first 10 days of receipt of an application or request (if a pre-application meeting has not occurred); and prior to signature of any partnering agreements.
 2. See Appendix B (Presidential Memorandum on Uniform Standards for Tribal Consultation) for the protocols for the Notice of Consultation. Appendix B does not supersede existing laws and regulations with established comment timelines and requirements.
- v. USACE district Tribal Liaisons will work to use existing resources and information from Tribal Nations and ANCs to develop and maintain a list of Tribal and ANC points of contact, preferred method of communication, and the Tribal or ANC designated decision-maker for ease of reference in consultation. USACE will also provide Tribal Nations and ANCs with points of contact on project-related issues, and issues in general.
- vi. If Tribal Nations, ANCs, or other sources identify that the USACE activity has Tribal implications on other Tribal Nations or has a substantial direct effect on other ANCs, USACE has the responsibility to notify those Tribal Nations or ANCs as well.
- vii. Consultation will provide Tribal Nations and ANCs the opportunity for a collaborative process designed to ensure information exchange, consideration of disparate viewpoints, before and during decision making.
- viii. Consultation will generally be conducted at the district or division level involving USACE and Tribal or ANC officials with decision-making authority assisted by an individual who effectively interacts with Tribal Nations or ANCs, preferably a Tribal Liaison, unless there is a request for HQUSACE (and/or OASA(CW)) input, or if HQUSACE determines input is

- necessary. Consultation will be conducted at the HQUSACE and/or OASA(CW) level for actions which have nationwide implications, such as rulemaking actions.
- ix. Commands will ensure that all Tribal Nations or ANCs with an interest in a particular activity that has Tribal implications or has substantial direct effect on ANCs are contacted, and their comments, views, perspectives, and knowledge are taken into consideration before decisions affecting Tribal or ANC interests are made. USACE will not assume that lack of response by a Tribal Nation or ANC is acceptance of a USACE decision.
 - x. In recognition of the varied organizations and customs of different Tribal Nations and ANCs, written protocols for consultation procedures may be developed and implemented at the local level with a specific Tribal Nation or ANC on an individual or programmatic basis. These protocols could include how and to what extent project proponents or non-Federal interests for water resources development projects may coordinate directly with Tribal Nations or ANCs on specific projects and programs.
- e. USACE will support Tribal self-determination, self-reliance, and capacity building, to the extent permitted by law and policy, by:
 - i. Partnering with Tribal Nations on studies, projects, programs and permitting processes.
 - ii. Providing information on opportunities to compete for requests for proposals or other potential contracts with USACE.
 - iii. Sharing appropriate information on USACE programs, policies and procedures, and public documents.
 - iv. Utilizing Indigenous Knowledge for planning purposes and to inform operational activities and permit application reviews, where appropriate.
 - v. Supporting Tribal efforts to lease, operate, and co-manage water resource projects and lands, where appropriate.
 - vi. Identifying and implementing, within existing authority, other capacity-building opportunities as they occur.
7. Responsibilities of Commanders and other USACE officials interacting with federally recognized Tribes and ANCs, supported by a Tribal Liaison.
 - a. Build relationships with Tribal Nations and ANCs soon after each change of command, preferably by face-to-face interaction when practicable.
 - b. Develop a plan for knowledge management transfer from the previous Commander prior to assuming command.
 - c. Identify and remove procedural impediments to working with Tribal Nations and ANCs whenever possible.
 - d. Share appropriate USACE procedures, regulations, and organizational information with Tribal Nations and ANCs.
 - e. Maintain open lines of communication and transparency through consultation with Tribal Nations and ANCs during the decision-making process for those matters that have implications for Tribal Nations or have substantial direct effect on ANCs.
 - f. Correspondence with Tribal council, chair-people, and other Tribal or ANC governing leadership, will generally occur at the Commander level. Routine correspondence, such as for Section 106 of the NHPA consultation, may be delegated.
 - g. Encourage partnerships on projects with Tribal Nations wherever possible.
 - h. Encourage collaborative partnerships with other federal and state agencies to further Tribal goals and projects.

- i. Shall make efforts to understand the treaties of Tribal Nations in their area of responsibility to ensure they can adequately uphold them.
8. Documenting Tribal Input into USACE Decisions. Each Tribal Nation that is engaged in Nation-to-Nation consultation and ANCs that are engaged in consultation shall receive a timely response, in writing or in person, from the appropriate decision-maker on how its input was considered in decision-making, if provided. The decision-maker shall timely disclose to the affected Tribal Nation or ANC the outcome of the consultation and decisions made as a result of the consultation. Any in person responses provided will be followed with a written response. USACE will also document whether mutual consensus with a Tribal Nation or ANC was achieved in the decision-making and provide reasoning when mutual consensus was not achieved. See Appendix B Section 7.a for a description of the contents of the Record of Consultation. In certain circumstances, USACE responses may be limited by legal or statutory restrictions, such as where the release of information may implicate safety or security functions. In those circumstances, a non-disclosure agreement may be considered to allow Tribal Nations or ANCs to receive a comprehensive response.
9. Alaska Native Corporation Consultation. When taking an action that has substantial direct effects on an ANC, USACE will initiate consultation with the ANC. To the extent concerns expressed by federally recognized Tribes and ANCs substantively differ, USACE shall give due consideration to the right of sovereignty and self-governance of federally recognized Tribes, and to the unique legal status and rights of ANCs.
10. Protocols.
 - a. When participating in a consultation, USACE should take into consideration and respect Tribal protocols. In doing so, keep in mind that:
 - i. Tribal representatives may want to open a meeting with a traditional ceremony, although USACE representatives are not obligated to participate.
 - ii. USACE may need to schedule meetings well in advance in coordination with the Tribal Nation or ANC to enable the Tribal Nation or ANC to decide on appropriate attendees, such as Tribal elders, traditional religious leaders, and translators.
 - iii. Tribal representatives may be reluctant to discuss culturally sensitive information outside the Tribal Nation or at certain times of the year. Tribal representatives may need to clear information with traditional religious leaders or Tribal council members before making commitments.
 - iv. Tribal governments differ from each other in their organizational structures and corporate cultures. USACE representatives should be mindful that these differences may affect formal titles and forms of address (such as chief, governor, president, and chair) and other forms of protocol. Tribal representatives may be elected, political and/or spiritual, and exhibit other variations from Tribal Nation to Tribal Nation.
 - b. USACE will accept culturally specific information (*e.g.*, letter, e-mail, *etc.*) in any format the Tribal Nation or ANC utilizes to share, unless otherwise specified by statute, regulation, policy or agreement.
 - c. Culturally specific information obtained from a recognized leader or the designated representative of a Tribal Nation or ANC in consultation should be respected. USACE will also consider specific details submitted by Tribal members regarding their exercise of a reserved treaty right.

- d. During the consultation process, USACE staff have an obligation to take into account confidentiality concerns raised by Tribal Nations. See reference 1.t. USACE recognizes that a Tribal Nation may wish to keep confidential some of the culturally sensitive information during consultation. To the extent practicable and permitted by law, USACE should:
 - i. Assure Tribal Nations that USACE will make every reasonable effort, consistent with the law, to withhold from public disclosure any specific information that a Tribal Nation identifies as confidential.
 - ii. Inform Tribal Nations that USACE is required to provide public access to its records in accordance with 5 U.S.C. § 552 (also known as the “Freedom of Information Act”), except those records protected from disclosure by a statutory exemption.
 - iii. Encourage Tribal Nations to seek the advice of their own legal counsel before providing sensitive information to USACE.
 - iv. Make an effort to identify confidentiality concerns then develop and agree on a process for dealing with culturally sensitive information as early as possible in the consultation process. In appropriate circumstances, consider the use of Consultation Protocol agreements.
 - v. Agreements can be made in accordance with Section 106 of the National Historic Preservation Act of 1966, as amended, and 36 CFR § 800.2(c)(2)(ii)(E), to memorialize an agreed-on process for handling culturally sensitive information related to historic properties (Section 304 NHPA) or archaeological resources over 100 years old (Section 9 Archaeological Resources Protection Act).
 - vi. In addition, USACE and the Tribal Nation may identify alternative means of providing culturally sensitive information to best ensure confidentiality, such as exploring orally-provided information.

11. Education and Consistency. To develop a proactive well-informed workforce with consistent application of this Policy, in-house trainings and workshops have been developed and should be attended by USACE employees who interact with Tribal Nations and ANCs – liaisons, project managers, program managers, real estate professionals, regulators, leaders, contracting specialist, etc. In addition, an annual meeting of USACE Tribal Liaisons will continue to occur. Trainings shall include coverage of the documents listed in the paragraph 1 references in this Policy. USACE commits to improve understanding of the federal trust responsibility and treaty rights for all USACE employees, including jointly led opportunities with Tribal members. In addition, USACE commits to ensuring regular and robust coordination will occur in all directions, both vertically to/from districts to/from divisions and to/from HQUSACE, as well horizontally within districts, divisions, and HQUSACE. For example, specific business lines within a district will ensure awareness with other business lines within the district when they have engaged in Nation-to-Nation consultation. USACE is encouraged to use the services and expertise of the Tribal Nations Technical Center of Expertise in implementing this paragraph.

12. Accountability. To assess the effectiveness of USACE consultation, USACE will keep records of Tribal and ANC consultation meetings and other Tribal and ANC interactions. These records will be accessible and can be made available for purposes of reporting to the Office of Management and Budget through the Department of Defense. The report will be synthesized at HQUSACE and transmitted to DoD, Office of the Secretary of Defense, on a yearly basis. A copy of this report will be distributed to federally recognized Tribes or ANCs upon request. In addition, under reference 1.s., Tribal consultation on water resources development projects will be reported annually to the Senior Tribal Liaison, HQUSACE, by all MSCs. Districts and divisions will

report all consultations to the designated district and division Tribal Liaisons for roll-up to their designated MSC. HQUSACE will then provide a report on water resources project Tribal consultations to Congress on an annual basis (Section 1120 of Public Law 114-322).

13. General Provisions: This policy is not intended to, and does not grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, repeal, interpret, or modify Tribal sovereignty, any treaty rights, or other rights of any Indian Tribes or ANCs, or to preempt, modify or limit the exercise of any such right.

Appendix A - Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making

Appendix B – Presidential Memorandum on Uniform Standards for Tribal Consultation