

Series: Intergovernmental Activities
Part 510: Working with Native American Tribes
Chapter 1: The Service's Native American Policy
Will supersede the policy dated 6/28/1994

WORKING DRAFT 11-14-2014

1. INTRODUCTION AND PURPOSE

This Native American policy (policy) articulates the principles that serve as the framework for government-to-government relationships and interactions between the U.S. Fish and Wildlife Service (Service) and federally-recognized tribes to conserve fish and wildlife and protect cultural resources. We established this policy to help us accomplish our mission while we continue to fulfill the Department of the Interior's trust responsibilities to tribal governments. The Service and tribal governments recognize the need for strong, healthy communication and relationships so that we can work together to achieve the Service mission.

We wrote this policy by respectfully collaborating with representatives from a variety of tribes. We intend for the policy to allow Service-tribal relations to evolve and adapt as needed and as is consistent with Federal policy supporting tribal self-determination. We recognize that strong partnerships with tribal governments are important to effective and efficient management of fish, wildlife, and cultural resources. While the major components of this policy are about cultivating and maintaining effective relationships and partnerships with tribes, our ultimate goal is to improve long-term conservation of fish and wildlife resources.

We should work to enhance our relationships with tribes by improving communication and cooperation, providing fish and wildlife management expertise, sharing training and assistance, and respecting and using the traditional knowledge, experience, and perspectives of Indian people to manage fish, wildlife, and cultural resources. We acknowledge and respect the Native American understanding of ecosystems and continue to work to strengthen and advance our mission and our collective, mutual goals to achieve on-the-ground conservation of fish and wildlife resources.

The Service's involvement with tribes is guided primarily by reserved right doctrines, Executive Orders, Secretarial Orders, judicial mandates, statutes, and treaties between the Federal Government and tribes. We have an established legal foundation that guides our interaction with tribal governments.

This policy establishes a consistent framework nationwide, yet remains flexible to reflect regional and local variations in history, knowledge systems, applicable laws, and Service-tribal relationships. This policy applies to all Service employees who have official duties that may affect tribal interests.

2. AUTHORITY

Alaska National Interest Land Conservation Act, Title VIII (ANILCA);
American Indian Religious Freedom Act, as amended (Public Law 95-341, 42 U.S.C. sections 1996, 1996a) (AIRFA);
Archaeological Resource Protection Act of 1979, as amended (Public Law 96-95, 16 U.S.C. sections 470aa-470mm) (ARPA);
Bald and Golden Eagle Protection Act, as amended, (16 U.S.C. sections 668-668d) (BGEPA);
Fish and Wildlife Act of 1956, as amended (16 U.S.C. 741 et seq.);
Indian Self-Determination and Education Assistance Act of 1975, (Public Law 93-638) (ISDEAA);
Marine Mammals Protection Act (16 U.S.C. sections 1361-1407) (MMPA);
Migratory Bird Treaty Act, (16 U.S.C. section 703 et seq.) (MBTA);
National Historic Preservation Act of 1966 as amended Public Law 89-665, (16 U.S.C. section 470 et seq.) (NHPA);
Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.) (NAGPRA);
Executive Orders and Presidential Memoranda:
 Executive Order 13007, Indian Sacred Sites, May 24, 1996;
 Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, (Nov. 06, 2000);
 Presidential Memoranda: Government-to-Government Relations with Native American Tribal Governments (April 29, 1994);
 Government-to-Government Relationship with Tribal Governments, (Sept. 23, 2004)
Secretarial Orders:
 Secretarial Order 3206, American Indian Tribal Rights, Federal Trust Responsibilities, and the Endangered Species Act (Jun. 5, 1997);
 Secretarial Order 3225, Endangered Species Act and Subsistence Uses in Alaska (Jan. 19, 2001);
 Secretarial Order 3317, Department of the Interior Policy on Consultation with Indian Tribes (Dec. 01, 2011), 303 Departmental Manual 2;
 Secretarial Order 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries (Aug. 20, 2014);
Attorney General Memo, Possession or Use of Feathers or Other Parts of Federally Protected Birds for Tribal Cultural and Religious Purposes, (Oct. 12, 2012).

3. SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONS

The U.S. Government's legal and trust relationship with tribal governments as set forth in the Constitution, treaties, statutes, Executive Orders, and court decisions, serves as the foundation for our interactions with tribes.

The United States recognizes the right of tribal governments to self-govern and supports tribal sovereignty and self-determination in accordance with E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*. Tribal governments exercise sovereign powers over their members and territory. The United States works on a government-to-government basis with tribes to address issues concerning self-governance, tribal trust resources, and Indian tribal treaty and other rights. We adopt this policy in the spirit of the United Nations Declaration on the Rights of Indigenous Peoples with respect to federally-recognized tribes.

Our policy is to maintain government-to-government relationships with tribal governments by working directly with them, observing legislative mandates and trust responsibilities, and respecting Native

American cultural values whenever we develop policies, plan projects, and implement programs that affect tribal interests. In most situations, we are working with tribal fish and wildlife departments and cultural resource departments. For major joint initiatives, we should enter into agreements with tribal governments that are: mutually agreed upon; developed by both parties; and clearly identify the roles, responsibilities, and obligations of the Service and tribal government(s).

4. COMMUNICATIONS AND RELATIONSHIPS

Our core principles for communicating with tribal governments include: acknowledgment, open and honest dialogue, and interpersonal interactions that depend on mutual respect and understanding. The Service expects ongoing communications with tribal governments will occur throughout various levels of our organization. We should designate formal points of contact and rely on tribal governments to identify formal contacts to represent them in government-to-government interactions.

While we use formal communication in government-to-government communications, we also encourage day-to-day staff-level discourse. This type of communication is only “government-to-government” when the Service and tribal governments have designated those individuals who are communicating to speak on the behalves of their respective governments. Both our employees and those of tribal governments should follow protocols in established agreements.

When we are revising or developing policies, programs, or actions that may affect a tribe or its legally-recognized rights or resources, we should work with the tribal government(s) to respect and provide for their interests throughout development. We may work with inter-tribal organizations and Alaska Native Organizations (ANOs) to the extent the related tribal governments have given those organizations the authority to communicate, coordinate, or carry out resource management responsibilities on their behalf.

We must communicate on matters affecting the rights and interests of tribal governments in accordance with Secretarial Order 3317, *Policy on Consultation with Indian Tribes*, 303 DM 2. For details on tribal consultation procedures, see the U.S. Fish and Wildlife Service Tribal Consultation Handbook.

If there are disagreements about this policy, the Service and tribal government(s) should work together to resolve them on a government-to-government basis at the appropriate level. A disagreement between the Service and tribal government(s) should be handled at the appropriate local or regional levels, using the specific mechanisms contained in Memoranda of Understanding (MOU) or Memoranda of Agreement (MOA) where such agreements exist. Cross-Regional disagreements concerning this policy should be brought to the attention of the National Native American Program Coordinator and appropriate Assistant Director. The Service and tribal government(s) may agree to employ a mutually acceptable neutral facilitator within statutory timeframes, as long as both governments realize the results are not intended to apply in the context of investigative or prosecutorial law enforcement activities.

Information Sharing – Tribal Knowledge

We must use the best available scientific and commercial data and solicit and consider information, traditional knowledge, and expertise of affected tribal governments in policies that have tribal implications. Service points of contact should work collaboratively with tribal governments to incorporate, as appropriate, tribal traditional knowledge, experience, and perspectives in managing fish, wildlife, and cultural resources.

The Service should give tribal government representatives access to technical information from such sources as our Fish and Wildlife field offices, fish health centers, refuges, Ecological Services offices, and other field offices. The Service may assist tribal governments to identify other agencies that could provide technical assistance.

We should not share or release information we obtain from tribes without the explicit consent of the tribe(s) or as required by law. Because we have a limited ability to protect sensitive tribal knowledge (e.g., in response to Freedom of Information Act requests), we should work collaboratively with tribal governments to protect and prevent disclosure of confidential or sensitive information.

5. CO-MANAGEMENT

The Service and tribal government(s) as independent sovereigns, to the maximum extent allowed by law, should meaningfully participate in co-management where we have shared responsibility to actively protect, conserve, enhance, or restore fish, wildlife, and cultural resources. Co-management should be tailored to specific circumstances based on such factors as history, knowledge systems, applicable laws, and affected communities.

We support the rights of tribal governments to self-govern and to manage or co-manage, fish and wildlife resources where there is a legal basis for such. In Alaska, co-management also includes cooperative agreements we enter into with Alaska Native Organizations (ANOs) to conserve marine mammals and to provide for subsistence use by Alaska Natives, *see*, 16 U.S.C. § 1388 Section 119(a). We encourage the development of agreements to partner with tribes to manage and conserve fish and wildlife and cultural resources.

Indian Lands

The Service recognizes that Indian lands are not Federal public lands or part of the public domain, and that in certain circumstances tribal governments have authority to manage fish and wildlife resources on Indian lands. In some situations, a tribal government may have fish and wildlife authority affecting non-member reservation lands. In such cases, we must give proper recognition to the rights of both the tribal government and the affected State(s), according to the specific nature of the case. In addition, we should work with tribal governments when managing migratory birds and eagles, and other species where Federal laws apply, in accordance with applicable statutes such as the Migratory Bird Treaty Act, 16 U.S.C. section 703 et seq.; Bald and Golden Eagle Protection Act, as amended, 16 U.S.C. sections 668-668d; Secretarial Order 3206, American Indian Tribal Rights, Federal Trust Responsibilities, and the Endangered Species Act (Jun. 5, 1997); Secretarial Order 3225, Endangered Species Act and Subsistence Uses in Alaska (Jan. 19, 2001).

When managing species and habitat on Indian lands under the Endangered Species Act, the Service should consult and collaborate with tribal governments as we develop plans and regulations, in accordance with Secretarial Orders 3206 and 3225.

Non-Indian Lands

The Service recognizes and supports the rights of tribal members to use fish and wildlife resources on non-Indian lands where there is a legal basis for such use. As a result of treaties, statutes, Executive Orders, and judicial decrees, certain tribal governments, along with State governments, may have shared responsibilities to co-manage fish and wildlife resources. In such cases, we should consult and collaborate with tribal governments and affected State or local resource management agencies to help meet the objectives of all parties while honoring the Federal trust responsibility.

Service Lands

When managing Service lands, we should consult and collaborate with affected tribal governments to provide meaningful tribal input on resource use and management for those lands.

6. CULTURE /RELIGION

The Service should meaningfully involve tribal governments in our actions when we or the tribal government(s) determines the actions may affect their cultural or religious interests, including archaeological resources, cultural resources, and sacred sites, consistent with the American Indian Religious Freedom Act, the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the Archaeological Resources Protection Act. We should work collaboratively with tribal governments to protect confidential or sensitive information, including locations and use of cultural resources and sacred sites to the extent allowed by law (see E.O. 13007 and 512 DM 2).

Access for Cultural, Archaeological, and Historic Resources, and Indian Sacred Sites

The Service should provide Native Americans access to Service-managed or controlled lands and waters for exercising cultural, ceremonial, medicinal, and traditional activities recognized by tribal governments to the extent practicable, permitted by law, and not inconsistent with essential Service functions. In doing so, we should: 1) avoid adversely affecting the physical integrity of sacred sites while managing our lands; 2) accommodate and, as needed, collaborate with tribal governments for access to and appropriate settings for, ceremonial use of Indian Sacred Sites; and 3) rely on tribal government protocols and procedures to give their members access to and use of cultural resources.

We should also consult with tribal governments in the geographic vicinity when considering non-member requests for access to areas that have cultural resources.

Tribal Cultural Uses of Plants and Animal Parts

The Service recognizes that many Indians use federally-protected birds, bird feathers and parts, and other animal and plant material for their tribal cultural and religious expression. We should work in collaboration with tribal governments to protect traditional, customary, ceremonial, medicinal, spiritual, and religious uses of plants and animals where it is not contrary to our legal mandates and conservation goals.

We should process and distribute, as expeditiously as possible eagle feathers and parts for recognized religious, ceremonial, and cultural purposes in accordance with Federal law. Timeliness of processing and distributing eagle feathers and parts depends on availability and on our need to conduct scientific and law enforcement investigations. We should process such items with dignity in recognition of the sacred nature of their use in a manner consistent with tribal traditions and practices.

We are committed to balancing enforcement of wildlife laws with acknowledgement of tribal cultural and religious needs. Upon request, the Service should work with tribal governments to develop agreements, protocols, and processes that would enable them to distribute plant and animal parts to their members in a timely and appropriate manner. Such agreements may include preference to return eagle feathers and eagle parts to the areas from which they originated.

7. LAW ENFORCEMENT

The Service recognizes that tribal governments have responsibilities for managing Indian lands and tribal resources. We should encourage cooperative law enforcement as an integral component of tribal, Federal, and State activities to enforce fish and wildlife resource laws. Service and tribal law enforcement officers should cooperate to enforce Federal or tribal laws and regulations pertaining to fish, wildlife, or cultural resources by: (1) identifying opportunities for joint enforcement operations or investigations; (2) collaboratively developing techniques and methods for detecting and apprehending violators; and (3) exchanging law enforcement information.

When a tribal government requests it, we should review their law enforcement capabilities and, if warranted, recommend ways to improve their capabilities.

We should collaborate with tribal governments to recruit Native Americans for Service law enforcement officer positions especially where Service managed public lands are within traditional tribal territories.

We should coordinate with tribal law enforcement officers about our law enforcement operations on or adjacent to Indian lands when it's feasible and appropriate. We should help tribal governments, when appropriate, to coordinate fish and wildlife law enforcement investigations that require the use of the Federal court system.

While tribal governments have their own authority and jurisdiction to process violations under tribal natural resource laws, when a criminal prosecution is deemed appropriate for a non-Indian we may work with them to prepare certain Lacey Act violations for referral to the Department of Justice for prosecution

8. TRAINING AND EDUCATION

Tribal Awareness Training

The Service should work with tribal governments to develop cultural awareness training for employees whose duties may affect tribal interests. This training should improve understanding of regionally-specific Native American traditional, cultural, and religious values and practices; natural resource values; treaty and other federally-reserved rights; and appropriate law enforcement policy issues.

Education of the General Public

The Service should work with tribal governments to inform and educate the public about tribal treaty and federally-reserved rights, laws, regulations, and programs related to fish, wildlife, and cultural resources.

9. CAPACITY BUILDING AND ASSISTANCE

Technical Expertise and Assistance

When a tribal government requests it, the Service should make our technical experts available to help them develop their own technical expertise in fish and wildlife conservation and management. The Service and tribal governments should collaborate on the kinds of technical assistance that each can provide. We should work together to prioritize technical assistance needs at the local and regional levels.

Service Assistance for Tribal Development of Fish and Wildlife Plans and Codes

The Service, upon request from a tribal government, should cooperatively review and assess tribal conservation measures for species that may be included in tribal resource management goals and objectives.

Agreements

The Service supports tribal governments and their missions and objectives to assume program management roles and responsibilities through contracting, including Indian Self Determination and Education Assistance Act (Public Law 93-638, as amended) (ISDEAA) agreements and other mechanisms. If a tribal government requests it, we may develop agreements with them to work together and to exchange personnel, expertise, and information.

Support for Self-Determination

In accordance with the ISDEAA, the Service is committed to entering into contracts, cooperative agreements, annual/multi-year funding agreements, or grants with tribal governments for the administration of fish and wildlife conservation programs under the terms, conditions, and to the extent provided by the ISDEAA and subject to the availability of funding. We should work together to develop implementation plans, pilot projects, policies, plans, and standard operating protocols that are consistent with the Service's obligation under the Department's rules and regulations for implementing the provisions of the ISDEAA.

The Service may actively assist tribal governments to identify Federal and non-Federal funding sources that may be available for fish and wildlife resource management activities including, but not limited to, annual and multi-year agreements.

Training

The Service should provide tribal governments and their staff the same access to fish and wildlife resource training programs as we provide to our employees and those of other government agencies. We encourage our employees to attend tribally-offered training. In addition, we should work together to develop, conduct, and attend joint training programs to increase awareness and sensitivity and to cross-train our employees and tribal staff on each other's responsibilities for resource stewardship.

Law Enforcement Training

As our resources permit, we should provide our law enforcement expertise and capabilities to tribal governments. If a tribal government requests it, we may provide guidance and assistance in developing, maintaining, or improving tribal fish and wildlife law enforcement programs. The basic and refresher fish and wildlife law enforcement training courses we provide to other governmental agencies should also be available to tribal law enforcement officers.

Professional Development

The Service may facilitate and assist in the education and development for Indians by providing educational programs and on-the-job training opportunities. We may establish partnerships and

cooperative relationships with Indian educational institutions to assist in such areas as developing natural resources curricula or implementing cooperative education programs. We may also include Indian schools and children in our environmental education outreach programs.

10. IMPLEMENTATION AND MONITORING

The Service is committed to implementing this policy in a way that ensures effective outcomes. We should work together with tribal governments to develop methods for making this policy work in the field and to ensure it's adaptive as Service and tribal priorities, resource requirements, and laws change.

We should continually monitor Service programs and projects that affect tribal interests to determine if they are in compliance with this policy. We also may collaborate with tribal governments to monitor fish and wildlife resources, particularly when it involves evaluating trends in species and environmental conditions.

Every 3 to 5 years the Service, with assistance from tribal governments, should evaluate the implementation and effectiveness of the policy across our regions and programs. This review should include an analysis of disagreements and resolutions as they pertain to this policy and report their findings and recommendations to the Director and tribal governments.

Work Force Diversification

The Service should develop active recruitment programs to attract qualified personnel so that its workforce is representative of the cultural diversity of the nation. We encourage qualified Native Americans to apply for jobs with the Service, especially for positions managing fish and wildlife resources where tribal governments have management authority or interests.

11. SCOPE AND LIMITATIONS

We have adopted this policy for guidance purposes only, consistent with all applicable laws and regulations. It does not preempt or modify the Service's statutory mission and authorities, position in litigation, applicable privilege, or any professional responsibility obligations of Service employees. Implementation of this policy is subject to the availability of resources and the requirements of the Anti-Deficiency Act. This policy must not be used to arbitrate differences in opinion between government agencies or to interpret any authorities, laws, or judicial findings. This policy does not negate or supersede the diverse mandates and priorities of the Service.

This policy is intended only to improve the internal management of the Service. and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

This policy does not supersede, amend, or otherwise modify or affect the implementation of existing agreements or understandings between the Service and individual tribal governments except through mutual agreement.

12. DEFINITIONS

The following definitions help to clarify the policy:

Agreement – a document approved by two or more parties that identifies their roles and responsibilities in achieving mutual objectives (e.g., Memoranda of Agreement, Memoranda of Understanding, Cooperative Agreements, Grants, and Contracts).

Alaska Native Organizations – a group designated by law or formally chartered that represents or consists of Indians, Aleuts, or Eskimos residing in Alaska, *see*, 16 U.S.C, sec 1632(23).

Collaborate – the Service and tribal governments working together.

Co-Management – two or more governmental entities, each exercising its sovereign authorities, working collaboratively to achieve mutually agreed or compatible objectives to protect, conserve, enhance, or restore natural and cultural resources.

Consult – to conduct mutual, open, and direct two-way communication in good faith to secure meaningful participation in the decision-making process, as allowed by law.

Fish and Wildlife Resources – all fish and wildlife (including invertebrates), plants, and their habitats.

Fish and Wildlife Resource Management – all activities that are intended to contribute directly or indirectly to the preservation, use, maintenance, mitigation, or enhancement of fish and wildlife resources.

Indian Lands – any lands where title is either: 1) held in trust by the United States for the benefit of an Indian tribe or individual Indian, or 2) held by an Indian tribe or individual Indian subject to restrictions by the United States against alienation.

Lands – includes all uplands, wetlands, and open waters such as streams, lakes, estuaries, and bays.

Native American *or* Indian – refers to American Indians in the conterminous United States and Alaska Natives (including Aleuts, Eskimo, and Indian) who are members of federally-recognized tribes.

Sacred Site – any specific, discrete, narrowly delineated location on Federal land that is identified by a tribal government or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, and Indian religion; provided that the tribal government has informed the agency of the existence of such a site.

Tribal Governments *or* Federally-Recognized Tribes – all Indian tribes (including Alaska Native entities) identified in the most recent list of “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs” published in accordance with section 104 of Public Law 103-454 (108 Stat. 4792; 25 U.S.C. §479a-1) and any other Indian tribes acknowledged by the BIA and identified for inclusion on such a list.