



## **Appendix B**

### **Native American Interests: DOE Policy and Regulatory Guidance**





## Appendix B

# Native American Interests: DOE Policy and Regulatory Guidance

## INTRODUCTION

Native Americans tribes have several concerns centered around protection and renewal of their cultures:

- Treaty rights and tribal sovereignty
- Contemporary political and social rights, and economic viability
- Preservation of language and customs
- Freedom to practice native religions and to protect and have access to religious and traditional sites
- Protection of archaeological sites, treatment of human burials and associated artifacts, and repatriation of human skeletons and sacred objects.

DOE Idaho has addressed these concerns by:

- Adhering to the U.S. Department of Energy American Indian and Alaska Native Tribal Government Policy (see Attachment 1)
- Entering into an AIP Between The Shoshone-Bannock Tribes and the United States Department Of Energy (see Attachment 2)
- Developing a communications protocol for undertakings involving Native American cultural resources on the INEEL (see Attachment 3)
- Developing an MOA Between the United States Department of Energy, Idaho Operations Office and the Shoshone-Bannock Tribes (Middle Butte Cave Agreement) (see Attachment 4).

## SUMMARY OF THE U.S. DEPARTMENT OF ENERGY AMERICAN INDIAN AND ALASKA NATIVE TRIBAL GOVERNMENT POLICY

The U.S. DOE American Indian and Alaska Native Tribal Government Policy (see Attachment 1) outlines the principles to be followed by DOE in its interaction with federally-recognized American Indian tribes. This policy is based on federal policy, treaties, federal law and DOE's responsibilities as a federal agency to ensure that tribal rights and interests are identified and considered in pertinent decision-making processes. Under this policy, DOE will:

1. Recognize the federal trust relationship and fulfill its trust responsibilities to American Indian and Alaska Native nations.

- 
2. Recognize and commit to a government-to-government relationship and institute appropriate protocols and procedures for program and policy implementation.
  3. Establish mechanisms for outreach, notice, and consultation, and ensure integration of Indian nations into decision-making processes.
  4. Comply with applicable federal cultural resource protection and other laws and Executive Orders to assist in the preservation and protection of historic and cultural sites and traditional religious practices.
  5. Initiate a coordinated effort for technical assistance, business and economic self-determination development opportunities, education, and training programs.
  6. Ensure that the secretary of Energy conducts an annual Tribal Leaders summit for performance review of policy implementation and issue resolution.
  7. Work with other federal agencies and state agencies that have associated responsibilities and relationships to their respective organizations as they relate to tribal matters.

## **SUMMARY OF THE AGREEMENT IN PRINCIPLE BETWEEN THE SHOSHONE-BANNOCK TRIBES AND THE UNITED STATES DEPARTMENT OF ENERGY**

The AIP (see Attachment 2) specifically defines a working relationship between the Shoshone-Bannock Tribes and DOE Idaho. The AIP reflects an understanding and commitment between the Tribes and DOE to facilitate the Tribes' greater level of assurance that activities being conducted at the INEEL address Tribal interests in DOE-administered programs and protect the health, safety, environment, and cultural resources of the Tribes. The AIP states the roles that the Tribes and DOE will play in the following areas:

- Environmental management
- NEPA compliance
- Environmental monitoring
- Release reporting requirements for DOE
- Emergency management
- Protection of cultural resources
- Risk assessment or health studies
- Tribal self-sufficiency.

---

## Protection of Cultural Resources as Stipulated in the AIP

The AIP recognizes that protection of cultural resources, access to sacred sites and sites of traditional use, and repatriation of Native American human remains and cultural items are of paramount importance to the Tribes and DOE. As stewards of these important resources on the INEEL, DOE Idaho further agrees to continue coordination and consultation with the Tribes in their cultural resource compliance responsibilities and in the continued development of a relationship of trust and openness with the Tribes. Protection of cultural resources entails:

1. **Definition of cultural resources.** DOE understands the Tribes' position that cultural resources include, but are not limited to, natural resources, sacred sites, traditional cultural properties, camps, burial areas and associated funerary objects, and other items of cultural patrimony to the Tribes. DOE further understands that objects that are of religious, traditional, or historic importance to the Tribes include, but are not limited to, traditional plants, wildlife, and landscapes.
2. **Tribal involvement.** DOE will provide access to cultural resource investigations on the INEEL and opportunities for tribal participation in project planning and determination of effects (NHPA Section 106). DOE will also provide reasonable opportunity and adequate timeframes for tribal comment and response to specific undertakings. The Tribes will provide timely response to DOE, within 30 days or as otherwise agreed.
3. **Consultation.** DOE and the Tribes will use the communications protocol (see Attachment 3) as a guide and a starting point, not as a substitute, for achieving the consultation requirements of applicable federal laws, regulations, orders, and policies.
4. **Management of discovered human remains and cultural artifacts.** In the event that human remains or burial sites are inadvertently discovered, accidentally exposed, or potentially threatened, the Tribes will be contacted immediately and consultation, as outlined in the communications protocol will be initiated (see Attachment 3).

DOE agrees that Tribal representatives will be permitted to view any discoveries of remains and cultural artifacts, will be authorized to do site inspections of any archaeological discovery or excavation, and will be permitted to be present during any archaeological excavation, survey, study, or testing on the INEEL.

5. **Tribal access for cultural and religious purposes.** The 1994 memorandum of understanding (MOU) between the Tribes and DOE regarding access to the Middle Butte area will continue to be in effect (see Attachment 4). Access to other undeveloped areas of the INEEL for cultural or religious purposes will be considered and accommodated on a case-by-case basis.
6. **Protection of information.** The Tribes, DOE, and DOE contractors will not release or allow the release of any information pertaining to the exact location of any Native American burial sites, archaeological sites, or significant sites identified as Native American to the public, unless required by law or legal authority.

DOE will coordinate with the Tribes prior to approving for external publication any documents that have been prepared as a result of the study, analysis, research, or other work done under the direction and control of DOE on or in relation to Native American human remains or archaeological resources on the INEEL. In the event that the Tribes disagree with portrayal of

---

Tribal cultural matters in a DOE-controlled publication, DOE will provide for inclusion of a Tribal historical position in such publication.

7. **Cultural resource management plan.** DOE and the Tribes will finalize and implement a cultural resource management plan that outlines procedures to ensure appropriate management, consultation, and protection of Native American human remains, sacred sites, archaeological sites, and other cultural resource issues.

## COMMUNICATIONS PROTOCOL FOR UNDERTAKINGS INVOLVING NATIVE AMERICAN CULTURAL RESOURCES ON THE INEEL

DOE Idaho recognizes and appreciates the need to interact and consult directly with the Shoshone-Bannock Tribes regarding the management of cultural resources on the INEEL. A communications protocol (see Attachment 3) has been developed cooperatively to accomplish effective and timely communication and to enhance the formal and informal interaction and consultation required to serve the needs of DOE, contractor, and tribal entities who have a stake in the issues. The communications protocol does not supersede or replace any other provisions for consultation with the tribes or other regulatory agencies under applicable federal laws. Rather, it is intended to supplement them and to provide clarification on how and when communication, interaction, and consultation will occur between DOE Idaho and the Tribes regarding cultural resources on the INEEL.

### Interactions and Consultations

Differing levels of activity involving cultural resources on the INEEL require a flexible approach to communication, interaction, and consultation. For this purpose, three levels of exchange between DOE and the Tribes have been developed, with each level differing according to degree of formality and the personnel involved. Briefly, the three levels of exchange are:

1. **Level I: Routine technical communication.** This is the most informal level and often involves the direct interaction of DOE Idaho or INEEL CRM Office personnel with personnel from the Heritage Tribal Office (HETO; formerly Tribal CRM Office). Routine communications would usually occur on a daily or weekly basis as needed, and involve telephone calls, electronic mail messages, working meetings, etc. Another mechanism for routine technical interaction is the regular meeting of the INEEL CRWG, consisting of Tribal, federal, and contractor cultural resource management technical personnel.
2. **Level II: Intermediate interaction.** The second level of interaction is actually a formal consultation, with the technical cultural resource management personnel for DOE Idaho, the Tribes, and the INEEL CRM Office acting as the designees of their respective agencies. This level is entered into when it is determined (either through Level I interaction or other means) that an undertaking has the potential to affect a Native American cultural resource. This level is also the level at which formal notification of the Idaho SHPO is made for the purposes of conducting a NHPA Section 106 review of undertaking.
3. **Level III: Government-to-government consultation.** This is the most formal level of consultation and involves communication between the Tribal chairperson and the manager of DOE Idaho. It is utilized when an undertaking will have an “adverse effect” upon a Native American

---

resource and mitigation needs to be performed, or when Native American human remains or other cultural items, as defined by NAGPRA, are inadvertently discovered.

## **MIDDLE BUTTE CAVE AGREEMENT**

In the “Middle Butte Cave Agreement,” formerly known as “Memorandum of Agreement Between United States Department of Energy, Idaho Operations Office and the Shoshone-Bannock Tribes,” (see Attachment 4), DOE Idaho recognizes that certain areas on the INEEL have cultural and religious significance to the Tribes. This agreement provides Tribal access to the Middle Butte area and other areas that may be identified for access in the future for the performance of tribal sacred or religious ceremonies or other cultural or educational activities.

## **TRADITIONAL CULTURAL PLACES**

According to the 1990 National Register Bulletin 38, “Guidelines for Evaluating and Documenting Traditional Cultural Properties,” a traditional cultural property is a place that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that are rooted in that community’s history, and are important in maintaining the continuing cultural identity of the community. Non-Native American places can also be traditional cultural properties. An urban neighborhood that has cultural value—for example, a Chinatown—or a rural community like the traditional communities of the Amish, or a cowboy community in the west can also be eligible for the National Register as a traditional cultural property.

Shoshone-Bannock Tribal homelands, including the Fort Hall Indian Reservation, aboriginal territories, and ceded areas, are acknowledged to be the “cultural, political, and economic center of the Tribes and are essential to their survival.” The INEEL is located on federal land that is recognized as part of this aboriginal territory and contains cultural resources important to the Tribes. Protection of these cultural resources, access to sacred sites, sites of traditional use, and repatriation of Native American human remains and cultural items are of paramount importance to the Tribes and DOE (Agreement In Principle Between the Shoshone-Bannock Tribes and the United States Department of Energy, August 6, 1998, p. 8).

DOE Idaho recognizes its trust responsibility to prudently manage the natural and cultural resources within its jurisdiction in consultation with the Tribes. Towards that means and for the purposes of this CRMP, the AIP and the communications protocol for undertakings involving Native American cultural resources on the INEEL will be used to address procedures for all cultural resource issues including, but not limited to, traditional cultural places, sacred sites, and AIRFA and NAGPRA issues. The aforementioned guidelines and policies recognize the importance of procedural flexibility, earliest possible involvement, meaningful and culturally appropriate consultation, early planning consideration, respect for religious and other cultural beliefs, and the legitimacy of confidentiality. DOE understands that, based on confidentiality concerns, it may be inappropriate for the Shoshone-Bannock Tribes to provide maps, descriptions, or lists of known sacred sites or traditional cultural places to non-tribal members.







## **Attachment 1**

# **U.S. Department of Energy American Indian and Alaska Native Tribal Government Policy**





---

## U.S. DEPARTMENT OF ENERGY AMERICAN INDIAN AND ALASKA NATIVE TRIBAL GOVERNMENT POLICY

### BACKGROUND

Indian nations are sovereign with unique political and legal standing derived from a longstanding relationship as stated in the Purpose Section of this document. The Indian nations retain an inherent right to self-governmental authority, and therefore, Federal activities affecting self-governance rights and impacting upon trust resources require policy implementation in a knowledgeable and sensitive manner protective of tribal sovereignty and trust resources. DOE released its Indian Policy in 1992 and subsequently issued DOE Order 1230.2 that established the responsibilities and roles of DOE management in carrying out its policy. At the request of Indian nations in 1998, the Secretary of Energy agreed to revise the 1992 American Indian Policy and effect comprehensive implementation. This revision was based in part on comments from Indian nations and their leadership and replaces the 1992 Policy that is part of the 1992 Order.

### DEFINITIONS

*Indian Nation* means any American Indian or Alaska Native Tribe, Band, nation, Pueblo, or other organized group or community, including any Alaska Native village [as defined or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)], which is acknowledged by the Federal government to constitute a tribe with a government to government relationship with the United States and eligible for the programs, services, and other relationships established by the United States for indigenous peoples because of their status as American Indian and Alaska Native tribes, Bands, nations, Pueblos or communities.

*American Indian and Alaska Native Tribal Government* means the recognized government of an Indian nation and any affiliated or component band government of such nation that has been determined eligible for specific services by Congress or officially recognized in 25 CFR Part 83, “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,” as printed in the Federal Register.

*Trust Responsibility* includes, but is not limited to: promotion and protection of tribal treaty rights, federally recognized reserved rights, and other federally recognized interests of the beneficiary American Indian and Alaska Native nations; determining, documenting, notifying, and interacting with tribal governments with regard to the impact of Departmental programs, policies, and regulations to protect American Indian and Alaska Native traditional and cultural lifeways, natural resources, treaty and other federally recognized and reserved rights.

*Consultation* includes, but is not limited to: prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship.

---

*Cultural Resources* include, but are not limited to: archaeological materials (artifacts) and sites dating the to prehistoric, historic, and ethnohistoric periods that are located on the ground surface or are buried beneath it; natural resources, sacred objects, and sacred sites that have importance for American Indian and Alaska Native peoples; resources that the American Indian and Alaska Native nations regard as supportive to their cultural and traditional lifeways.

*Treaty and Trust Resources and Resource Interests* include, but are not limited to: natural and other resources specified and implicit in treaties statutes, and agreements, or lands or other resources held in trust by the United States for the benefit of tribes or individual Indian beneficiaries, including land, water, timber, fish, plants, animals, and minerals. In many instances, Indian nations retain hunting, fishing, and gathering rights, and access to these areas and resources on lands or waters that are outside of tribally-owned lands.

## **POLICY PRINCIPLES**

### **I. DOE RECOGNIZES THE FEDERAL TRUST RELATIONSHIP AND WILL FULFILL ITS TRUST RESPONSIBILITIES TO AMERICAN INDIAN AND ALASKA NATIVE NATIONS.**

The DOE will be diligent in fulfilling its federal trust obligations to American Indian and Alaska Native governments in policy implementation and program management activities. The DOE will pursue actions that uphold treaty and other federally recognized and reserved rights of the Indian nations and peoples. The Department recognizes that some Tribes have treaty-protected and other federally recognized rights to resources and resource interests located within reservation boundaries, aboriginal territories, and will, to the extent of its authority, protect and promote these treaty and trust resources and resources interests, and related concerns in these areas.

When internal policies, regulations, and statutes, or other barriers prohibit or hinder the DOE trust protection actions or participation in eligible program initiatives, the Secretary will direct the agency to seek corrective protection measures, and tribal government program inclusion.

The DOE is committed to protecting treaty compliance and trust interests of Indian nations during interactions with state and local governments and other stakeholders with regard to DOE actions impacting upon American Indian and Alaska Native governments and peoples. The Department will inform and educate stat and local governmental entities and other stakeholders about the DOE's role and responsibilities regarding its trust relationship with Indian nations.

The DOE will seek to determine the impacts of Departmental-proposed legislation upon Indian nations, in extensive consultation and collaboration with tribes. The Secretary will implement this notice and consultation effort consistent with the intent and purpose of this policy.

### **II. THE DEPARTMENT RECOGNIZES AND COMMITS TO A GOVERNMENT TO GOVERNMENT RELATIONSHIP AND WILL INSTITUTE APPROPRIATE PROTOCOLS AND PROCEDURES FOR PROGRAM AND POLICY IMPLEMENTATION**

The DOE recognizes Tribal governments as sovereign entities with primary authority and responsibility for the protection of the health, safety, and welfare of their citizens. The Department will recognize the right of each Indian nation to set its own priorities and goals in developing, protecting, and managing its natural and cultural resources. This recognition includes separate and distinct authorities that are independent of state governments.

---

The Department, in keeping with the principle of self-governance, recognizes American Indian and Alaska Native governments as necessary and appropriate non-Federal parties in the federal decision-making process regarding actions potentially impacting Indian country energy resources, environments, and the health and welfare of the cities of Indian nations. The DOE will establish protocols for communication between tribal leaders, the Secretary, and federal officials. The DOE will ensure consistent application of program and policy implementation with Indian nations through periodic review, assessment, and collaboration with tribal representatives to audit protocol systems. Principles of consistent policy implementation will be tempered with consideration of the diverse cultures and ideals of the Indian nations.

### III. THE DEPARTMENT WILL ESTABLISH MECHANISMS FOR OUTREACH, NOTICE, AND CONSULTATION, AND ENSURE INTEGRATION OF INDIAN NATIONS INTO DECISION-MAKING PROCESSES.

To ensure protection and exercise of tribal treaty and other federally recognized rights, the DOE will implement a proactive outreach effort of notice and consultation regarding current and proposed actions affecting tribes, including appropriate fiscal year budget matters. This effort will include timely notice to all potentially impacted Indian nations in the early planning stages of the decision-making process, including predraft consultation, in the development of regulatory policies on matters that significantly or uniquely affect their communities. As appropriate, the DOE will provide delivery of technical and financial assistance related to DOE-initiated regulatory policy, identifying programmatic impacts and determining the significance of the impact. The DOE will continue to conduct a dialogue with Indian nations for long and short term decision-making when DOE actions impact Indian nations. The DOE will comply with the consultation and Coordination With Indian Tribal Governments Executive Order 13084, May 14, 1998, and the Government to Government Relations with Native American Tribal Governments Executive Memorandum, April 29, 1994.

The DOE will implement permanent workshops and programs for field and headquarters staff on American Indian and Alaska Native cultural awareness and tribal governance.

Due to the nature of the trust responsibility to tribal governments, performance reviews of consultation activities will be conducted, in collaboration with tribal governments.

### IV. DEPARTMENT-WIDE COMPLIANCE WITH APPLICABLE FEDERAL CULTURAL RESOURCE PROTECTION AND OTHER LAWS AND EXECUTIVE ORDERS WILL ASSIST IN PRESERVATION AND PROTECTION OF HISTORIC AND CULTURAL SITES AND TRADITIONAL RELIGIOUS PRACTICES.

The Department will consult with any American Indian and Alaska Native tribal government with regard to any property to which that tribe attaches religious or cultural importance which might be affected by a DOE action. With regard to actions by DOE in areas not under DOE control or when an action of another federal agency takes place on DOE land, DOE will consult with tribes in accordance with this Policy. Such consultation will include tribal involvement in identifying and evaluating cultural resources including traditional cultural properties; facilitating tribal involvement in determining and managing adverse effects; collaboration in the development and signing of memoranda of understanding with DOE, when appropriate.

Departmental consultation will include the prompt exchange of information regarding identification, evaluation, and protection of cultural resources. To the extent allowed by law, consultation will defer to

---

tribal policies on confidentiality and management of cultural resources. Consultation will include matters regarding location and management methodology; repatriation and other disposition of objects and human remains; access to sacred areas and traditional resources located on DOE lands, consistent with safety and national security considerations; and cultural resources impact assessment of potential loss to tribal communities.

The DOE will comply with current and forthcoming cultural resource protection laws and Executive Orders including Native American Graves Protection and Repatriation Act; Archaeological Resources Protection Act; American Indian Religious Freedom Act; National Historic Preservation Act; National Environmental Policy Act, Freedom of Information Act; Privacy Act; Indian Sacred Sites Executive Order 13007; May 24, 1996, Consultation and Coordination with Indian Tribal Governments Executive Order 13084, May 14, 1998; Government to Government Relations with Native American Tribal Governments Executive Memorandum, April 29, 1994; Tribal Colleges and Universities Executive Order 13021; Executive Order 12898 on Environmental Justice.

**V. THE DEPARTMENT WILL INITIATE A COORDINATED DEPARTMENT-WIDE EFFORT FOR TECHNICAL ASSISTANCE, BUSINESS AND ECONOMIC SELF-DETERMINATION DEVELOPMENT OPPORTUNITIES, EDUCATION, AND TRAINING PROGRAMS.**

The Department will implement a consistent national outreach and communication effort to inform tribal leaders and tribal program officials about access to internships and scholarships; availability of technical assistance and training opportunities; conventional and renewable energy development programs; related tribal business and individual member business enterprise, service-provider, and contracting opportunities.

The DOE recognizes the need for direct funding and technical assistance from applicable DOE-sponsored programs within the Department and the national Laboratories which deal with regulation, energy planning, and development of energy resources on tribal lands and Alaska Native site-controlled and trust lands.

The Department will provide information and outreach programs to tribal and individual member businesses on opportunities to participate, compete, and participate in renewable and conventional energy generation, transmission, distribution, marketing and energy services, grants, and contracts. The Department will assist in development of balanced, sustainable, and viable American Indian and Alaska Native communities by continuing to implement Title XXVI, Indian Energy Resources, of the national Energy Policy Act that provides for the promotion of resource development and energy integration.

The Secretary will create programs that encourage and support the establishment of federal, private, tribal and intertribal partnerships. The Department will provide assistance and coordinate with other federal agencies in the development of energy-related projects.

**VI. THE SECRETARY OF ENERGY WILL CONDUCT AN ANNUAL TRIBAL LEADERS SUMMIT FOR PERFORMANCE REVIEW OF POLICY IMPLEMENTATION AND ISSUE RESOLUTION.**

The Secretary will engage tribal leaders in an annual dialogue, to discuss the Department's implementation of the American Indian and Alaska Native Policy. The dialogue will provide an opportunity for tribal leaders to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.

---

VII. THE DEPARTMENT WILL WORK WITH OTHER FEDERAL AGENCIES, AND STATE AGENCIES, THAT HAVE RELATED RESPONSIBILITIES AND RELATIONSHIPS TO OUR RESPECTIVE ORGANIZATIONS AS THEY RELATE TO TRIBAL MATTERS.

The DOE will seek and promote cooperation with other agencies that have related responsibilities. The Department's mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The DOE will encourage early communication and cooperation among all governmental and non-federal parties regarding actions potentially affecting Indian nations. The DOE will promote interagency and interdepartmental coordination and cooperation to assist tribal governments in resolving issues requiring mutual effort.

