



Attachment 3

Communications Protocol



Communications Protocol August 10, 1999

Communications Protocol for Undertakings Involving Native American Cultural Resources on the INEEL

The Department of Energy, Idaho Operations Office (DOE Idaho) recognizes and appreciates the need to interact and consult directly with the Shoshone-Bannock Tribes, as well as other tribes, regarding the management of the cultural resources on the INEEL. General provisions for consulting with the Tribes are provided for in the Agreement-In-Principle between the DOE Idaho and the Tribes, and consultation is required under the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act as amended in 1999, Executive Order 13007 and the ensuing DOE American Indian and Alaska Native Tribal Government Policy. To accomplish effective and timely consultation in accordance with the applicable laws involving such consultation, and to enhance the informal interaction needed to serve the needs of the agency, contractor and tribal entities who have a stake in the issues, cultural resource interaction and consultation on the undertakings involving Native American cultural resources on the INEEL will be conducted in the manner presented here.

These procedures do not supersede or replace any other provisions for consultation with the Tribes or other regulatory agencies under applicable federal or state laws. Rather, they are intended to supplement them and to provide clarification on how and when interaction and consultation between DOE Idaho and the Tribes regarding cultural resources on the INEEL will occur. To the extent these procedures are inconsistent with any applicable Federal or state laws, the applicable laws will control.

A. Definitions

For the purposes of these procedures, the following definitions are provided.

“Cultural resources”: “Cultural resources” is a broad term, used generally throughout these procedures, which includes the following:

- A. *Historic properties* as that term is defined in the NHPA [36 CFR 800.2(e)], which includes prehistoric and historic sites, districts, structures or objects, with emphasis on those associated with Native American origin or culture;
- B. *Cultural items* as that term is defined in the NAGPRA [43 CFR 10.2(d)], which includes human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony;
- C. *Sacred sites* as that term is defined in Executive Order 13007 [Section 1(b)(iii)], which means any specific, discrete, narrowly delineated location of federal land (specifically for the purposes of these procedures, the INEEL) that is identified by an Indian tribe, or by an Indian individual determined by the tribes to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site;
- D. *Traditional cultural properties* as that concept is discussed in National Register Bulletin #38, published by the National Park Service.

“Consultation”: This term is used in these procedures to indicate a formal conduct of meaningful dialogue between the Tribal Council and the DOE Idaho manager or their duly authorized designees with decision-making authority, which is intended to result in a mutually acceptable agreement on the resolution or disposition of an issue related to cultural resources on the INEEL.

“Interaction”: This term describes the informal, casual, day-to-day working relationship between the Tribal, Federal and contractor technical cultural resources management (CRM) personnel, which is intended to maximize the effectiveness of their working relationships and minimize the administrative barriers to successful, timely and effective management of cultural resources on the INEEL.

“Undertaking(s)”: This term is used as defined in the NHPA and its implementing regulations [36 CFR ‘800.2(o)].

“Effect” and “Adverse Effect”: These terms are used as defined in the NHPA and its implementing regulations {36 CFR ‘800.9}

B. Interaction and Consultation

Differing levels of activity involving cultural resources on the INEEL require a flexible approach to consultation. For this purpose, three levels of interaction and consultation have been developed, and differ by degree of formality and personnel involved. Technical personnel involved in interaction and consultation should work to avoid the use of a more formal level than is required, in order to make the most effective use of time and resources and to minimize the administrative burden on personnel. However, personnel should use discretion in determining which is the appropriate level of consultation, and consideration should be given for the need to present an adequately documented record of consultation in the event of disputes. The appropriate level of interaction or consultation to be implemented will be decided by consensus among the Tribal, Federal and contractor Cultural Resource Management (CRM) technical personnel unless otherwise dictated by law.

Level I: Routine Technical Communication.

This informal level most often involves the direct interaction of DOE Idaho or contractor CRM personnel in the INEEL Cultural Resources Management Office (INEEL CRMO) with Tribal CRM personnel, or between a subcontractor or other researcher/user personnel and DOE Idaho or INEEL CRMO personnel. Routine interaction would usually occur on a daily or weekly basis as needed, and involves telephone calls, electronic mail messages, working meetings, etc. Another mechanism for routine technical interaction is the periodic meeting of the INEEL Cultural Resources Working Group (CRWG), consisting of Tribal, Federal and contractor CRM technical personnel, to discuss issues, activities, project status, or other cultural resource areas of interest.

Two types of formal notification are involved in routine interaction: quarterly summaries of routine, non-impacting undertakings; and notifications of undertakings which occur in previously undisturbed or unsurveyed areas, including caves.

1. *Quarterly Summaries of Routine Non-Impacting Undertakings:* At the end of every quarter of the federal fiscal year, the INEEL CRMO will prepare a summary of undertakings on the INEEL which require CRM clearance recommendations or surveys, and which did not effect (as defined in the NHPA) a Native American cultural resource. This summary will be sent directly to the

designated Tribal CRM personnel, and to DOE Idaho if requested by the DOE Idaho cultural resources coordinator. Tribal CRM personnel may request additional information about the clearances or surveys related to any of the undertakings listed. This request should be made directly by Tribal CRM personnel to the INEEL CRMO, and the Tribal CRM office should provide a courtesy copy of the request to the DOE Idaho cultural resources coordinator.

2. *Notification of Undertakings in previously Undisturbed/Unsurveyed Areas:* If an undertaking is to take place in an area of the INEEL that has not been previously disturbed in any way, or has not yet undergone any degree of archaeological survey, the INEEL CRMO will notify the tribal CRM personnel of the undertaking and the location, upon a determination to begin any activity pursuant to the undertaking. The intent of this notification is to allow the tribes the opportunity to comment on or become otherwise involved in the undertaking at the earliest possible time. The tribal CRM personnel are encouraged to use this opportunity to provide information regarding cultural resources which may assist in the planning or implementation of the work being performed.

This notification may be made by telephone call, faxed message, electronic mail (e-mail) or other informal mechanism. The INEEL CRMO should have additional information, such as maps, project descriptions, etc., ready to provide to the Tribal CRM personnel upon request. As provided in the Agreement-In-Principle, Tribal representatives are permitted to inspect, review or be present at and during any archaeological excavation or survey of interest on the INEEL provided adherence to all security, safety and environmental requirements is met.

DOE Idaho recognizes and supports the need for the tribes to keep certain sensitive or sacred information from being released to non-Tribal members, and does not desire to compromise this need. DOE Idaho, contractor personnel and the Tribes should work to communicate the need to avoid certain areas in a sensitive and respectful manner, which also allows project planners to proceed with their planning in a timely manner.

Level II: Intermediate Interaction.

The second level of interaction is actually a formal consultation between the technical CRM personnel for the DOE Idaho, the Tribes and the INEEL CRMO, 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 State Historic Preservation Office (SHPO) is made for the purposes of conducting a NHPA Section 106 review of undertaking.

1. *Notifications of Undertakings:* The notification method will be an immediate telephone call to the Tribal CRM office by either DOE Idaho CRM or the INEEL CRMO as soon as possible when either the INEEL CRMO or the DOE Idaho determines that an undertaking may have an effect upon a Native American cultural resource. A formal letter of notification should be sent from the DOE Idaho CRM to the Tribal CRM office within 10 working days of the notification call, and to the SHPO if the cultural resource affected is a historic property. This letter should include a request for further consultation. INEEL CRMO should also notify the appropriate contractor management authority, to ensure that their management is aware of the potential effect and the potential need for mitigation measures. If the notification to the SHPO is made for an undertaking involving a historic, but non-Native American, resource (i.e., a built historic property), the Tribal CRM office need not be notified.

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2. *Emergency Notifications.* In the event that an appropriate INEEL authority declares a site emergency in response to a natural disaster or other threat to the environment, facility, the public or personnel, the notifications will be conducted in accordance with the INEEL Emergency Management Plan/RCRA Contingency Plan. Follow-up interaction of CRM personnel to determine if the emergency or emergency response had any effect on Native American cultural resources or to determine how to mitigate any adverse effects of the emergency or emergency response on those resources will be conducted at Level II as soon as possible following cessation of the emergency status. The DOE Idaho cultural resources coordinator should send any formal notification or other documentation to the Tribal CRM personnel within 10 working days of the declaration of the emergency.
 3. *Inadvertent Discoveries:* In the event that an inadvertent discovery of a cultural resource involves human remains or Native American cultural items as defined in NAGPRA, all parties should initiate Level III consultation, and then proceed as mandated in NAGPRA and its implementing regulations at 43 CFR 10, or as provided in any agreement entered into between the DOE Idaho and the tribes pursuant to 43 CFR 10.5(f).

Level III: Government-to-Government Consultation.

This is the most formal level of consultation, and involves communication between the Tribal chairperson and the DOE Idaho manager. Such consultation will be utilized when the INEEL CRMO, in consultation with appropriate parties (including DOE Idaho, the Tribal cultural resource personnel, the SHPO, and project managers), determines that 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.

1. *Notification of Tribes:* In either situation, Government-to-Government consultation shall be initiated with a formal letter of notification from the DOE Idaho manager to the Tribal chairperson within 10 working days of the determination of the adverse effect, or within the time limits mandated by NAGPRA in the case of an inadvertent discovery of human remains or cultural items. The letter should include a request for technical consultation on mitigation of the adverse effect or on the disposition of the remains or cultural items. In the case of human remains, the letter must include other information as required by NAGPRA's implementing regulations [43 CFR 10.4(d)].
2. *Notification of SHPO and others:* The DOE Idaho cultural resources coordinator should also provide notification to the SHPO or the State Archaeologist, as appropriate and per the requirements of NHPA Section 106. Courtesy copies of all notifications should be provided to the distribution list given at the end of these procedures.
3. *Meetings:* If the Tribes desire any personal meetings or presentations about the undertaking, the effect, the remains or the resource, DOE Idaho and INEEL CRMO and their respective project managers should coordinate to prepare and deliver the information in a manner and location requested by the Tribes.
4. *Technical Mitigation:* Once the initial letter of notification and request for consultation has been sent to the Tribal chairperson, the respective CRM technical personnel should implement lower levels of consultation or interaction to work out the details of mitigation or disposition, at the discretion of the Tribal chairperson and the DOE Idaho manager. The cultural resource technical personnel will define the project history, recommend mitigation or disposition alternatives,

coordinate with any project or program managers whose projects may be effected by the disposition or mitigation, assist in preparing formal correspondence, provide assistance to the Government and Council officials, and assist in the project mitigation or disposition as deemed necessary by the Government and Council officials.

5. *Letter of Proposed Disposition or Resolution:* A final letter documenting the agreed-upon course of resolution and any implementation plan developed should be sent from the DOE Idaho Operations manager to the Tribal chairperson, and should include a courtesy copy to INEEL CRMO and any appropriate contractor and DOE Idaho managers. In the case of an inadvertent discovery of human remains or cultural items, per NAGPRA, DOE Idaho will proceed with the specified requirements in NAGPRA's regulations at 43 CFR '10.4 et al.

C. Conflict Resolution

If resolution or consensus cannot be reached after reasonable effort and discussion on the part of the respective Tribal, Federal and contractor CRM technical personnel, the next highest level of consultation will automatically be implemented. If resolution or consensus cannot be achieved at Level III, a professional mediator, amenable to all parties, shall be invited to participate in the decision making process.

D. Revision of Procedures

These procedures may need to be periodically revised or updated to reflect changes in law, agreement, organization or other factors. Such revision should be accomplished after the DOE Idaho, INEEL CRMO and Tribal cultural resource personnel agree on the need for changes to these procedures, and should be done in a mutually agreeable manner. DOE Idaho will take the lead on preparing the revisions, and distributing drafts to the Tribal and INEEL CRMO cultural resource personnel. Proposed revisions should be reviewed by all appropriate and affected federal agency, contractor and tribal personnel, including but not limited to project managers, legal advisors, technical personnel, and regulatory personnel. DOE Idaho, INEEL CRMO and Tribal cultural resource personnel should consider any comments or suggestions received by reviewers, and incorporate consensually agreed upon changes where appropriate.

Communications Protocol June 8, 1999

Correspondence List

Courtesy copies of relevant correspondence, including letters of notification prepared during Level II or Level III consultation, should be provided to the following list of personnel:

DOE Idaho

Environmental Programs manager, Tribal liaison officer, cultural resources coordinator

Project manager

Office of Chief Counsel

INEEL Contractor Cultural Resource Management Office

Project manager

Regulatory Affairs manager and other senior level managers (in case of Level III consultation)

Tribal

Tribal Attorney

Tribal Business Council (in case of Level III consultation)

Tribal cultural resources coordinator

Other (depending on situation and level of consultation)

Idaho State Historic Preservation Office

This distribution list should be kept current, and revised as personnel and titles change. The respective CRM personnel are responsible for notifying the INEEL CRMO of changes as soon as possible. Revisions to the list should be prepared by the INEEL CRMO, and provided to DOE Idaho and Tribal CRM personnel as soon as possible.



Attachment 4

Memorandum of Agreement Between United States Department of Energy, Idaho Operations Office and the Shoshone-Bannock Tribes



MEMORANDUM OF AGREEMENT
BETWEEN

UNITED STATES DEPARTMENT OF ENERGY
IDAHO OPERATIONS OFFICE

and the

SHOSHONE-BANNOCK TRIBES

I. INTRODUCTION AND PURPOSE

The United States Department of Energy (DOE), a federal executive agency, through its Idaho Operations Office (DOE-ID), owns and operates the Idaho National Engineering Laboratory (INEL), an approximately nine hundred square mile nuclear facility site in southeastern Idaho. Under the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, and the Department of Energy Organization Act, functions performed at the INEL include research and development in nuclear and other energy areas, and projects and programs related to environmental restoration and waste management.

The Shoshone-Bannock Tribes ("Tribes") are a federally-recognized Indian tribe. The Fort Bridger Treaty of July 3, 1868, 15 Stat. 673, secured the Fort Hall Reservation as the permanent homeland of the Shoshone-Bannock peoples. The aboriginal rights reserved by the 1868 Treaty extend to areas of land in Idaho and surrounding states, and the Treaty reserved for Tribal members hunting, fishing, and gathering rights on surrounding unoccupied lands of the United States. While the parties acknowledge that the INEL Site is occupied land, it is recognized that certain areas on the INEL Site have cultural and religious significance to the Tribes. The INEL is located within the aboriginal territory of the Shoshone-Bannock Tribes.

DOE Order 1230.2, and DOE's American Indian Policy of November, 1991, establish DOE's commitment to assure that tribal rights and concerns are considered, and to avoid unnecessary interference with traditional religious practices. This policy also provides for access to sacred areas and traditional resources located on DOE lands in accordance with safety, health, and national security considerations.

In order to preserve and protect the cultural and religious interests of the Tribes, DOE and the Tribes are entering into this Memorandum of Agreement ("MOA") to provide the Tribes access to the Middle Butte area, and other INEL 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. The Middle Butte area is defined generally as that area within the boundaries of the INEL, directly south of Highway 20 and east of Highway 26, legally described as Sections 15, 16, 17, 20, 21, and 22 of T 2 N, R 32 E, Bingham County, Idaho. A map of the area is attached hereto and incorporated herein to this MOA.



II. LEGAL AUTHORITY

Legal authority for this MOA is as follows:

A. The Department of Energy Organization Act, 42 U. S. C. Section 7101 et seq., which envisions consultation, coordination, and cooperation with Federal departments and agencies to assure coordinated and effective administration of Federal energy policy and programs. The Act also establishes the statutory responsibility to ensure incorporation of national environmental protection goals of restoring, protecting, and enhancing environmental quality, and assuring public health and safety.

B. DOE Order 1280.1A delegates authority to the Manager of DOE-ID to enter into Memoranda of Understanding.

C. The Tribes as a sovereign government are obligated to protect both the individual and communal interests of the Tribes pursuant to the 1868 Treaty. The Fort Hall Business Council, governing body of the Tribes, has authority under the Tribes' Constitution and Bylaws to enter into agreements.

III. SCOPE

This MOA addresses access by the Tribes to the Middle Butte area and other INEL areas that may be identified for access in the future, in a manner which assures that safety, security, and cultural resource protection concerns are met.

IV. GUIDELINES

DOE-ID and the Shoshone-Bannock Tribes understand that the following guidelines will apply to activities conducted by the Tribes at the INEL:

A. DOE shall provide access to the Middle Butte area for the Shoshone-Bannock Tribes. Such access shall be for the purposes of allowing Tribal members to perform sacred or religious ceremonies or other educational or cultural activities in the Middle Butte area.

B. The Tribes shall notify Protective Technologies Idaho (PTI) Security Headquarters at least 24 hours prior to entry onto the INEL, and shall provide them with the name of the Tribal member who will be responsible for the group, an approximate number of people who will be at the Middle Butte area, and an estimated time of their arrival and departure from the INEL.

C. DOE shall provide a briefing to the Tribes within 30 days of the signing of this MOA. The briefing will address concerns with unexploded ordnance which exists on the INEL. This briefing may be periodically updated, as necessary. To ensure the members' continued safety, the Tribes agree to apprise all members who may seek access to the Middle Butte area of the potential risks from unexploded ordnance. DOE has not confirmed through ground survey that no unexploded ordnance is in the access area. The access area is as close as two miles from the perimeter of areas known to be used for ordnance testing. The Tribes recognize and assume the risk of the potential for unexploded ordnance and take responsibility for the safety of its people while in the Middle Butte area. The Tribes agree to notify DOE of the location of any ordnance discovered.

D. DOE and the Tribes recognize that there are certain cultural and archaeological resources located on the INEL, and that such resources should be protected from damage, alteration, removal or destruction. Both parties agree to avoid any damage, alteration, removal or destruction of such cultural or archaeological resources, or any other resources which may be encountered at the INEL, and to conduct activities consistent with other applicable requirements, including the National Historic Preservation Act, the Archaeological Resources Protection Act, Native American Grave and Repatriation Act, and any other act preserving cultural resources. Ceremonial offerings shall be permitted but must be reported to the Tribal Cultural Resource Department and made a part of the Middle Butte area record. Motorized vehicle access shall be limited to existing roadways.

E. This MOA shall not confer any rights upon members of the Tribes for purposes of hunting or fishing on the INEL other than what is reserved by treaty, nor shall it confer any property interest (e.g., an easement or license) to the Tribes.

V. FUNDING

This MOA does not in and of itself obligate any funds of the United States.

VI. WORKING AGREEMENT

The DOE-ID and the Tribes agree that this MOA is not and will not be interpreted as being inconsistent or in violation of any provision of the Working Agreement entered into on September 29, 1992.

VII. AMENDMENT


This Memorandum of Agreement may be modified or amended by written agreement between DOE and the Shoshone-Bannock Tribes.

VIII. EFFECTIVE DATE


This Memorandum of Agreement is effective when signed by both parties, and shall continue in effect until mutually terminated by both parties, or upon 30 days' written notice by either party.

Fort Hall Business Council for
the Shoshone-Bannock Tribes

U. S. Department of Energy
Idaho Operations Office



Keith Tinno, Chairman



Augustine A. Pitrolo, Manager

Date Jan 26, 1994

Date 1/26/94