

U.S. Department of
Homeland Security

United States
Coast Guard



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CGD17INST 5726.1

FEB -9 2004

SEVENTEENTH DISTRICT INSTRUCTION 5726.1

Subj: ALASKA NATIVE CONSULTATION GUIDANCE

1. PURPOSE. This guidance is designed to enhance government-to-government consultations between the United States Coast Guard and Tribes in Alaska. It provides information to assist Coast Guard units in Alaska identify when consultation with Tribes may be necessary and describes the procedure to initiate consultation with Tribes when Coast Guard action may affect tribal rights or protected tribal resources. This guidance establishes no new requirements for consultation, but merely consolidates for ease of reference existing consultation requirements. This guidance was prepared by the D17 Native Liaison for Coast Guard units operating within the D17 AOR. Please direct any comments or questions to LT Jon Alexander, D17 Native Liaison, at (907) 463-2053.
2. ACTION. District Seventeen commanding officers and executive officers shall ensure compliance with this guidance. Internet release is authorized.
3. DIRECTIVES EFFECTED. None
4. BACKGROUND. Executive Order 13084 of May 14, 1998 requires consultation between federal entities and Native Americans/Alaska Natives prior to the federal entity taking any action that may affect the Native Americans/Alaska Natives. This Executive Order applies to Coast Guard actions in Alaska that may affect Alaska Natives.

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5. GUIDANCE.

a. Tribes In Alaska

Government-to-government relations should be conducted with recognized Tribes that are eligible to receive services from the Department of the Interior Bureau of Indian Affairs (BIA) and listed in the most recent Federal Register listing (see enclosure (1), Tribal Listings in Alaska). Government-to-government relations need not be conducted with Native Corporations (Regional or Village) formed under the Alaska Native Claims Settlement Act (ANCSA), nor with other governments established under the Alaska State Constitution, such as boroughs or first and second class cities that may represent Alaska Natives.

b. Definitions

- (1) Tribal Rights are those legally accruing by virtue of inherent sovereign authority, treaties, statutes, judicial decisions, executive order or agreement that give rise to legally enforceable remedies.
- (2) Protected Tribal Resources are those natural resources or properties of traditional or customary religious or cultural importance, either on or off Indian Land, retained by or reserved for Indian Tribes through treaties, statutes, judicial decisions or executive orders, including tribal trust resources.
- (3) The Alaska Native Claims Settlement Act (ANCSA) is a federal law passed in 1971 that extinguished all claims in Alaska based on aboriginal right, title, use, occupancy of land or water, or based on statute or treaty of the United States relating to Native use or occupancy. The ANCSA also extinguished aboriginal title to all prior conveyances of public land and water areas in Alaska. After extinguishing aboriginal title, ANCSA then made available to the Native Corporations tracts of land, which are now owned by Corporations for the benefit of the Natives in the region.
- (4) Indian Land is land held in trust by the United States for the benefit of a tribe or Native individual, or held by such tribe or individual subject to restriction by the United States against alienation. The majority of land occupied by Native Tribes in Alaska is not considered Indian land. (For further explanation see section c.(3).)
- (5) Subsistence is the traditional use of wild renewable resources for direct or family consumption as food, shelter, fuel, clothes, tools or transportation, and the making of handcrafts out of non-edible byproducts of fish and wildlife.

c. Tribal Rights and Protected Tribal Resources in Alaska

Coast Guard Units in Alaska have a responsibility to guard both tribal rights and protected tribal resources. When it is determined that Coast Guard action may significantly affect tribal rights and protected tribal resources, consultation will be required. The following sections attempt to identify those tribal rights and protected tribal resources and other interests unique to Alaska Natives.

(1) Cultural, Religious and Historic Rights

Tribes have a protected interest in access to sacred sites, use and possession of sacred objects, and the exercise of traditional religions. These are protected under Executive Order 13007 (Indian Sacred Sites, 24 May 96).

Tribes also have a protected interest in identification and rightful disposition of funerary objects, sacred objects, and items of cultural patrimony that are in Federal possession or control. Such objects and items are protected by the Native American Graves Protection and Repatriation Act (NAGPRA), 25 USC §§ 3001-3013 and the Archeological Resources Protection Act (ARPA), 16 USC § 470aa-II. NAGPRA provides for the return of funerary objects, sacred objects and items of cultural patrimony from federally funded museums and from collections from Federal and Indian Lands. It also provides for repatriation of these items and of Native American human remains discovered on Federal and Indian Lands.

Under the National Historic Preservation Act (NHPA), 16 USC 470a-470w and 300 CFR 800, "tribal land" is defined as lands within the boundaries of a reservation or dependent Indian community. The Metlakatla Indian Community (MIC), as the only Federally recognized tribe in Alaska with such lands, may assume the role of the State Historic Preservation Officer (SHPO) with approval of the Secretary of the Interior, through the National Park Service, for actions on its tribal lands. If MIC does not assume the role of SHPO, it still has the right to be a consulting party on all Federal undertakings on its tribal lands. All other Federally recognized tribes in Alaska have the right to be consulting party for historic properties, or Federal undertakings that may affect historic properties, when the Tribe attaches religious and cultural significance to those properties.

Tribes have an interest in the National Environmental Policy Act (NEPA), 42 USC §§ 4321-4347, scoping process under 40 CFR Part 1501.7(a)(i). Tribes also have an interest in the notice and comment process when tribal interests may be affected by a proposal (40 CFR Part 1503.1(a)(3)), and as a cooperating agency when the proposed Federal action will affect trust lands as defined in this guidance, under 40 CFR Parts 1503.1(a)(2)(ii) and 1508.5.

Alaska Native individuals who dwell on the coast of the North Pacific Ocean or the Arctic Ocean have an interest in marine mammals for food, handicrafts, or clothing. This interest is protected by the Marine Mammal Protection Act, 16 USC § 1371(b).

Tribes have an interest in the taking of bald or golden eagle for religious purposes under the Bald Eagle Protection Act, 16 USC § 668a.

(2) Subsistence

Under the Alaska National Interest Lands Conservation Act (ANILCA), 16 USC 3101-3126, Congress granted a subsistence preference for both Alaska Natives and non-native rural residents. The preference means that when it is necessary to restrict taking of fish and wildlife, subsistence uses shall be given priority over other consumptive uses. Because Alaska Natives enjoy a subsistence preference in Alaska, Coast Guard units must determine whether their actions may have the potential to significantly affect the renewable resources relied upon for subsistence. Congress has noted that subsistence use is essential to the Native physical, economic, traditional, and cultural existence. Thus, if a Coast Guard action may significantly affect a renewable resource, such as fish and game, consultation may be required.

(3) Indian Land in Alaska

Indian Land is land held in trust by the United States for the benefit of a tribe or Native individual, or held by such tribe or individual subject to restriction by the United States against alienation. If it is determined that Coast Guard action may significantly affect Indian Land, then consultation will be required. The Metlakatla Indian Community Federal Reservation on Annette Island is the one major tract of Indian Land in Alaska. There are also numerous lot-sized parcels of Indian Land scattered throughout Native Villages. These lots are difficult to identify without the assistance of the landowners in the area in which you may be planning to take action. Because of this difficulty, notification prior to taking action in or near a Native Village is necessary. Therefore, if you plan actions on Annette Island or near or within a Native Village, please notify the D17 Native Liaison for guidance.

Land held by the 12 for-profit ANSCA Corporations and land held by Native Village Corporations is not considered Indian Land.

d. Trust Responsibility in Alaska

Congress has declared that the United States has a trust responsibility to Federally recognized Indian Tribes. The federal government maintains a government-to-government relationship with those tribes and recognizes the sovereignty of those tribes. This trust responsibility invokes a duty amongst the Coast Guard and other Federal entities to protect Indian interests due to their status as domestic dependant nations within the United States. The trust responsibility owed to

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the tribes in Alaska applies to tribal rights and protected tribal resources as described in section IV. It also applies to Indian Land such as the Metlakatla Reservation.

The Tribes listed in enclosure (1) to the cover letter participate in this trust relationship with the United States. There is no trust responsibility with respect to land held by the ANCSA corporations. However, there is a trust obligation for identified tribal rights and protected tribal resources that may exist on those lands.

e. Government-to-Government Relations

Coast Guard units should consult on a government-to-government basis with Tribes concerning Coast Guard actions that may affect tribal rights and protected resources. This consultation is not satisfied by compliance with general existing statutory public participation requirements, such as a public hearing held prior to the promulgation of a regulation, but requires a separate consultation with the Tribe on identified tribal interests. Consultation Procedures, set forth in the next section, describe how Coast Guard units should identify those interests and initiate consultation.

Coast Guard units should recognize that though it may be necessary to do business with ANCSA Corporations as landowners, these ANCSA Corporations are not tribal governments and, as such, consultation with ANCSA Corporations is not required. However, even though your planned action may take place on ANCSA Corporation land, the action you plan may affect Tribal Rights and Resources. Thus, you may still need to consult with the area's Tribal Leaders.

If it is determined that a Coast Guard action does not have a potential to affect an identified tribal right, resource, or interest in Indian Land, consultation with the Tribe on a government-to-government basis is not required for that action; however, this should not discourage a unit from maintaining open communications with the Tribes.

It is the responsibility of the Coast Guard unit taking an action to identify potential effects to known tribal rights and resources and initiate consultation early in the planning process with affected Tribes. It is anticipated that Tribes will assist the Coast Guard in this effort by identifying rights, protected resources, or interests in Indian Land that may be affected by Coast Guard action. The Tribal response to the Coast Guard unit should provide the information necessary to determine whether government-to-government consultation is necessary.

f. Consultation Procedures

Notification and consultation is triggered when a proposed Coast Guard action may have the potential to significantly affect tribal rights and protected resources or Indian Land as described above. Because of extensive renewable resources, cultural, and religious interests in Alaska, which are not limited to Indian Land, notification of any Coast Guard action should be provided to Tribes in the area that may be potentially affected by the action.

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Notification letters may be prepared by staff members, but should be signed by the unit's Commanding Officer. The D17 Native Liaison is available to assist in preparing the notification letter. A copy of each notification letter should be forwarded to the Native Liaison. The notification letter may designate a Unit Liaison, Project Manager or the D17 Native Liaison to coordinate logistics for potential consultation. The notification letter will notify the prospective affected Tribe of the proposed action and request the Tribe to identify what tribal rights, protected resources, or interest in Indian Land may be affected. If the Tribe identifies any such interests, consultation will be required. If the Tribe does not respond within a reasonable period after notification, (typically, 30-60 days depending on the project) the unit may proceed with the action, but should continue to make reasonable efforts to receive a Tribal response by telephone or email before making a decision to proceed.

If consultation is required, the Coast Guard unit, with the assistance of the Native Liaison, and the Tribe should establish a consultation process setting forth representatives, an agenda of issues to be discussed, logistics, schedules, procedures, etiquette and any other such matters. The D17 Native Liaison should be notified when consultation is required. The Coast Guard unit may also need to advise other affected Federal agencies of its requirement for Tribal consultation.

g. Protocol

When tribal chiefs/presidents enter an installation for the purposes of government-to-government consultation, they should be afforded the protocol of an official government visitor.

h. Roles, Responsibilities, and Dispute Resolution

Primary responsibility for implementing this policy rests with unit Commanding Officers. Commanding Officers are encouraged to contact the D17 Native Liaison whenever it is determined that their actions may have an effect on Tribal rights.

If a conflict arises in the consultation process that cannot be resolved at the unit level, the unit should notify its Chain of Command of the conflict for guidance on resolution.



D.W. RYAN
Chief of Staff

Encl: (1) Tribal Listings in Alaska



U.S. DEPARTMENT OF THE INTERIOR
ALASKA REGION

MAILING LIST OF
TRADITIONAL AND IRA TRIBES
SERVED BY
THE
BUREAU OF INDIAN AFFAIRS

<http://www.ak.bia.gov/AROTribalinfo/>

2003

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