



[3411-15-P]

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**RIN: 0596-AD15**

**Proposed Directives on American Indian and Alaska Native Relations**

**Forest Service Manual 1500, Chapter 1560 and Forest Service Handbook 1509.13,**

**Chapter 10**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of Proposed Directives; request for comment.

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**SUMMARY:** The Forest Service proposes to revise its internal Agency directives for American Indian and Alaska Native Relations to establish better direction for the Agency to work effectively with Indian tribes. Specifically, the proposed directives modify Forest Service staff roles and responsibilities, establish staff training standards, describe authorities for working with Indian tribes, delineate consultation procedures, explain the historical trust and treaty responsibility underlying the government-to-government relationship, and outline Dispute Resolution options within the Forest Service. The proposed directives cross reference to other Forest Service directives, including those detailing aspects of Business Operations, National Forest System Management, State and Private Forestry, and Research and Development. The proposed directives were reorganized and revised to be consistent with the 2013 U. S. Department of Agriculture (USDA) Departmental Regulation No. 1350-002 “Tribal Consultation, Coordination, and

Collaboration”; *Report to the Secretary, USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites (2012)*, legislation (including the Culture and Heritage Cooperation Authority provisions of the Food, Conservation, and Energy Act of 2008 [Public Law 110-246; the Farm Bill]), and input from Forest Service Field staff. The directives were last revised in 2004, with an Interim Directive issued in 2012. These proposed directives have tribal implications as defined by Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” The 120-day consultation with Tribes was conducted from June 6, 2013, to November 27, 2013, consistent with the Executive Order and the current Forest Service directives. Tribal consultation continued after October 6, 2013, and will end at the same time as the public comment period. All comments received so far have been supportive of the revised directives. Tribal consultation and public comment are invited and will be considered by the Agency in determining the scope of the final directives.

**DATES:** Comments must be received in writing by [Insert date 60 days from date of publication in the **FEDERAL REGISTER**].

**ADDRESSES:** Send comments electronically by following the instructions at the Federal eRulemaking portal at <http://www.regulations.gov>. Comments also may be submitted by e-mail to [otr@fs.fed.us](mailto:otr@fs.fed.us) or by mail to Tribal Relations Directives Comments, USDA Forest Service, Attn: Fred Clark – OTR, 201 14<sup>th</sup> Street, SW, Washington, DC 20024. Hand-delivered comments will not be accepted, and receipt of comments cannot be confirmed. If comments are sent electronically, do not send duplicate comments by mail. Please confine comments to issues pertinent to the proposed directives. Explain the reasons for any recommended changes. Where possible, refer to the specific wording

being addressed. All comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. The public may inspect the comments received at 201 14<sup>th</sup> Street SW, Washington, DC between 8:30 a.m. and 4:30 p.m., Eastern Standard Time, Monday through Friday. Those wishing to inspect comments are encouraged to call ahead at 202-205-1514 to facilitate entry to the building.

**FOR FURTHER INFORMATION CONTACT:**

Fred Clark, Director of the Office of Tribal Relations, 202-205-1514. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

Additional information concerning these documents may be obtained on the Internet at <http://www.fs.fed.us/spf/tribalrelations/bundledconsultation.shtml>.

**SUPPLEMENTARY INFORMATION:**

**Background and Need for the Proposed Directives**

The Forest Service and federally recognized American Indian and Alaska Native tribes (Indian tribes) share the value of restoring, sustaining, and enhancing the nation's forests and grasslands, providing and sustaining benefits to the American people. In many instances, Indian tribes continue their traditional uses of the nation's forests and grasslands to sustain their cultural identity and continuity. The Government's trust responsibilities and treaty obligations make it essential that the Forest Service engages with Indian tribes in a timely and meaningful consultation on policies that may affect one or more Indian tribes. However, consultation alone is not sufficient. In addition to

consultation, coordination and collaboration together lead to information exchange, common understanding, informed decision-making, and mutual benefit. The importance of consultation and coordination with Indian tribes was affirmed through Presidential Memoranda in 1994, 2004, and 2009, in Executive Orders in 1998 and 2000, as well as in numerous statutes and policies. The value of collaboration is fully recognized within the Forest Service for all of its constituents, including Indian tribes. The proposed directives would implement a tribal relations framework that fosters more effective and efficient consultation with Indian tribes and Alaska Native Corporations, and better collaboration with individual American Indians and Alaska Natives, across the Agency.

Every part of the Forest Service involves Tribal relations; every Forest Service employee shares in that responsibility. The proposed directives will help Forest Service employees improve their understanding of the requirements, complexities, and opportunities of Tribal relations. The purpose in revising the directives is to affect changes in behavior that will lead to enhanced relationships with Indian tribes, which in turn will enable the Forest Service to better accomplish its mission. The proposed directives will, therefore, result in more effective and efficient protection of tribal rights and interests, as well as better information for the Agency in its planning, decision making, and program delivery.

Finally, the proposed directives will ensure the Forest Service is in compliance with and is held accountable to several recently enacted authorities, policies, and agreements. Authorities such as the Tribal Forest Protection Act of 2004 (Public Law 108-278) and the Food, Conservation, and Energy Act of 2008 (Public Law 110-246; the Farm Bill) include provisions that will be incorporated into the directives. In addition,

the USDA promulgated a new regulation (DR1350-002, January 18, 2013) on Tribal Consultation, Coordination, and Collaboration, with which the Forest Service must comply. The Secretary has also directed the USDA to implement the recommendations from the 2012 *Report to the Secretary, USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites*. The recommendations require updates to the Forest Service directives. Finally, the Departments of Defense, Interior, Agriculture, and Energy, and the Advisory Council on Historic Preservation entered into a Memorandum of Understanding (MOU) on December 6, 2012, to improve the protection of and tribal access to Indian sacred sites through enhanced and improved interdepartmental coordination and collaboration. Elements of the Action Plan implementing that MOU which pertain to the Forest Service will be reflected in the revised directives.

### **Summary of Proposed Changes**

Under the proposed directives:

- Forest Service staff roles and responsibilities would be modified to emphasize working with Indian tribes. Delegation of the authority to serve as a Consultation Official passes through Line Officers, and the Forest Service Chief would be able to delegate consultation authority to non-line staff on a case-by-case basis as “Chief’s representatives”.
- The requirement for a minimum 120-day tribal consultation period for national consultations from the Interim Directive on Tribal Consultation would continue.
- Guidance would be provided on who in the Forest Service may consult, processes, steps, and monitoring and evaluation measures to increase

accountability.

- Authorities would be provided regarding State and Private Forestry, National Forest System, Research, and Business Operations opportunities to enable Forest Service staff to partner and contract with Indian tribes for mutual interest and/or benefit.
- Tribal history and sovereignty and the Forest Service treaty and trust responsibilities would be clarified.
- Training goals and core competencies would be established based on the 2013 USDA Departmental Regulation on Consultation training and the Sacred Sites Report to guide future training.
- Key definitions would be provided for applying the Tribal Relations directives and fulfilling the Federal trust and treaty responsibility to Indian tribes.
- A Dispute Resolution option for Indian tribes would be explained.
- New sections on closures, forest products, and confidentiality would be added in accordance with the Cultural Heritage Cooperation Act (25 USC 3054-3056).
- A new section including policy on reburial of tribal remains on National Forest System lands would provide guidance.
- Cross-referencing to other Forest Service directives for topic-specific guidance would be added to facilitate use of the directives.

## **Section-by-Section Analysis**

### ***1. Forest Service Manual 1560***

#### **1563 - Tribal Relations**

This proposed section outlines the Forest Service Tribal Relations policy generally. First, it defines Indian tribes per 25 USC 479a. It also emphasizes that Tribal Relations should go beyond consultation to include coordination and collaboration, recognizing the value of collaboration. The section encourages engagement with Alaska Native Corporations, non-federally recognized Tribes, Native Hawaiians, along with American Indian and Alaska Native individuals, communities, intertribal organizations, enterprises, and institutions.

##### **1563.01 - Authorities**

This proposed section emphasizes developing capacity of Agency personnel in fostering effective partnerships and protecting tribal rights, and seeking opportunities to enter into contracts, grants, and agreements. Furthermore, it encourages tribal participation in contracting and agreements as part of the Agency's trust responsibility.

The proposed subsection on the U.S. constitution was revised to reflect the correct Articles corresponding to Indian tribes.

The proposed subsection on treaty rights and the Federal trust responsibility was expanded to include specific citation of all relevant authorities.

The proposed subsection on consultation and coordination listed additional authorities, including for cooperative land use planning on National Forest System lands. The subsection mandates consultation with Alaska Native Corporations under PL 108-199 and PL 108-177. It also emphasizes consultation with Alaska Native Corporations

under EO 13175, the Federal Subsistence Board's Tribal Consultation Policy, and the Draft Alaska Native Claims Settlement Act Consultation Policy.

The proposed subsection on cultural resources was expanded to specifically include consideration of Indian sacred sites per the 2012 *Report to the Secretary, USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites*. It also identifies the Forest Service Heritage Program as lead staff for cultural resources, and the Tribal Relations Program as lead staff for sacred sites, while recognizing overlap between the two categories. It also recognizes that actions protective of cultural resources, watersheds, animal or biological communities, and other natural resources that also protect an American Indian or Alaska Native sacred site may serve a secular purpose, as well as accommodate Tribal religion.

Proposed subsections on National Forest System authorities were added, including one on the Tribal Forest Protection Act of 2004 (25 USC 3115a) and the Cultural and Heritage Cooperation Authority (25 USC 32A).

The proposed subsection on Business Operations, Grants, and Agreements, Contracts, and Procurement with Indian tribes was significantly enhanced to include partnering authorities from the Forest Service Deputy Areas including the National Forest System, State and Private Forestry, and Research and Development. For example, it lists additional authorities for research support, emphasizing opportunities for Joint Venture Agreements with any entity or individual. In addition, numerous additional authorities for support under State and Private Forestry programs were listed, including forest health, fire assistance, and law enforcement.

A proposed subsection on the coordination of law enforcement with authorities for self-determination and self-governance was added.

The proposed subsection for supporting Tribal Colleges and Universities was enhanced and added to as well.

### **1563.02 - Objectives**

This proposed section significantly expands the objectives of the Forest Service in meeting its trust responsibility. It also adds support for the UN Declaration on the Rights of Indigenous Peoples.

### **1563.03 - Policy**

This proposed section expands Forest Service policy to consult with Indian tribes in a meaningful way, adding emphasis on tribal sovereignty. It also increases employee accountability through detailed reporting processes, up-front statements of potential impact on agency activities and proposed policies on Indian tribes (in “Tribal Summary Impact Statements”), and certifications of compliance. The section recommends the use of negotiated rulemaking, mandates Departmental training in tribal relations for all Forest Service staff, and emphasizes the importance of keeping tribal culturally-sensitive and proprietary information confidential, especially regarding repatriation and reburial.

### **1563.04 - Responsibility**

Proposed section 1563.04a expands reserved authority of the Forest Service Chief to delegate consultation authority.

Proposed section 1563.04b expands responsibilities of all Deputy Chiefs to implement the Tribal Relations Program.

Proposed section 1563.04c expands responsibilities and authorities of the Director of the Washington Office of Tribal Relations.

Proposed section 1563.04d expands responsibilities of the Regional Tribal Relations Program Managers to include staff training at the regional and local level, annual reporting, and periodic compliance review.

Proposed section 1563.04j expands responsibilities of Forest/Grasslands Supervisors in fulfilling the trust responsibility mandate and consultation reporting.

Proposed section 1563.04k expands responsibilities of District Rangers in fulfilling the trust responsibility and consultation mandate.

Proposed section 1563.04j is new, expanding responsibilities of Forest/Grasslands Tribal Liaisons in fulfilling the trust responsibility and consultation mandate, including accountability (maintenance of consultation data).

Proposed section 1563.04m is new, expanding responsibilities of Research and Development Tribal Liaisons in fulfilling the trust responsibility and consultation mandate related to research programs and activities, tribal data requests, traditional knowledge, and reporting.

The final proposed section 1563.04n is new, expanding responsibilities of State and Private Forestry Tribal Liaisons in fulfilling the trust responsibility and consultation mandate related to research programs and activities, tribal data requests, traditional knowledge, and reporting.

### **1563.05 - Definitions**

This proposed section includes definitions of terms used in the proposed directive. Several of the material definitions follow.

Indian Tribe is defined as any Indian or Alaska Native tribe, band, nation, pueblo, village, or other community, the name of which is included on a list published by the Secretary of the Interior pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a-1).

Alaska Native Corporations are described as follows: created under the Alaska Native Claims Settlement Act, these corporations manage lands and resources for Alaska Natives. While not federally-recognized Indian tribes, consultation is required with these organizations in some instances as if they were Indian tribes pursuant to Public Law (P.L.) 108-199 and 108-477 directing all Federal agencies to consult with Alaska Native Corporations on the same basis as Indian tribes under E.O. 13175. This type of consultation is considered government-to-corporation, rather than government-to-government.

Trust responsibility is explained as arising from the United States' unique legal and political relationship with Indian tribes. It derives from the Federal Government's consistent promise, in the treaties that it signed, to protect the safety and well-being of the Indian tribes and tribal members in return for their willingness to give up their lands.

Government-to-Government Consultation, or "Tribal Consultation," is the timely, meaningful, and substantive dialogue between Forest Service Officials who have delegated authority to consult, and the official leadership of federally recognized Indian tribes, or their designated representative(s), pertaining to decisions or actions that may have tribal implications.

As defined per Executive Order 13007, a sacred site is any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, 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, 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.

#### **1563.10 - Consultation with Indian Tribes and Alaska Native Corporations**

This proposed section simplifies steps in the consultation process generally, with details outlined in the following sections.

#### **1563.11 - General Consultation Requirements**

This proposed section clarifies protocols for meaningful consultation. It also expands and amends the table of authorities for consultation and coordination.

#### **1563.12 - Consultation, Monitoring, and Evaluation– Consulting Officials**

This proposed section substantially clarifies formal roles and responsibilities in consultation while emphasizing the value of informal staff communication in effective tribal relations.

#### **1563.13 - Consultation Timelines**

This proposed section substantially clarifies timelines for meaningful consultation.

#### **1563.14 - Consultation, Monitoring, and Evaluation**

This proposed section mandates accountability through use and management of a consultation database.

### **1563.15 - Additional Consultation Considerations**

This proposed section addresses additional issues such as where to find additional guidance, compensation, and emergency situations.

### **1563.2 - Dispute Resolution**

This proposed section expands on dispute resolution and appeal procedures for Indian tribes.

### **1563.3 - Reburial of American Indian and Alaska Native Ancestral Remains and Cultural Items**

This proposed section expands guidance on repatriation and reburials, including general considerations as well as reviews.

### **1563.4 - Closures for Traditional and Cultural Purposes**

This proposed new section covers closures for temporary and cultural purposes per 25 USC 32A §3054.

### **1563.5 - Forest products for traditional and cultural purposes**

This proposed new section covers forest products for traditional and cultural purposes per 25 USC 32A §3055.

### **1563.6 - Prohibition on disclosure**

This proposed new section covers prohibition against disclosure per 25 USC 32A §3056.

### **1563.7 - Information and Technology Sharing**

This proposed new section emphasizes that the maintenance of traditional gathering, hunting, fishing, and other activities; and use of certain landscapes, sites, and locations that contain important natural and cultural resources should be considered in

Forest Service land management planning and research activities. It also recommends that the Forest Service seek to identify traditional knowledge that tribal citizens hold regarding ecosystems that may be helpful in meeting management objectives of both the Forest Service and Tribes.

## **1563.8 - References**

This proposed new section contains further explanatory information regarding authorities identified in section 1563.01 – Authorities. Overall, it elaborates on treaty rights and the trust responsibility; cooperative land management and planning with Indian tribes; subsistence rights; tribal cultural resources and sacred sites within the National Forest System, including reburial; the Tribal Forest Protection Act; the Cultural and Heritage Cooperation Authority; grants, agreements, and contracts with Tribes across all Deputy areas; coordination of law enforcement with Tribes; and support of and engagement with Tribal Colleges and Universities.

## ***2. Forest Service Handbook 1509.13***

### **10.01 - Authorities**

This proposed section refers the reader to FSM 1563 for relevant laws, Executive Orders, and regulations that govern Federal agencies' relationship with Indian tribes.

## **11 - Consultation with Tribes**

This section expands on consultation roles and responsibilities, timelines, and processes while also encouraging collaboration prior to or concurrent with formal consultation.

Proposed section 11.1 mandates consultation with Alaska Native Corporations in Alaska and clarifies consultation representatives.

Proposed section 11.2 clarifies consultation timelines, including the fact that tribal consultation for National policies includes a minimum of 120 days.

Proposed section 11.3 substantially expands and clarifies consultation process (type, modes, leveraging meetings) and steps for establishing consultation protocol and procedure with Indian tribes.

Proposed section 11.5 outlines monitoring and evaluation of consultation, adding responsibilities for reporting to include maintenance of a consultation database, outcomes reporting, and compliance monitoring. It further requires that consultation input and outcomes be addressed in resulting policy, plan, project, or action. Finally, it adds additional responsibilities for monitoring and evaluation to include sustainability of cultural resources and sacred sites, successes and additional opportunities for partnerships, socio-economic impacts, and customer (tribal) satisfaction.

## **12 - Compensation**

This proposed section adds additional funding authorities for compensation for consultation, historic preservation.

## **13 - Training**

This proposed section encourages mandated training, including alignment with recommendations in the 2012 *Report to the Secretary, USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites*.

### **13.3 - Core Competencies**

This proposed section establishes core competencies in Tribal relations.

## **14 - Exhibits**

This proposed section provide copies of additional authorities for management of Indian sacred sites.

### **Regulatory Certifications**

#### *Environmental Impact*

These proposed directives would establish direction for Forest Service staff in working with Indian tribes and American Indian and Alaska Native individuals. Section 31.1b of Forest Service Handbook 1909.15 (57 FR 43180, September 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement rules, regulations, or policies to establish service-wide administrative procedures, program processes, or instructions. The Agency's assessment for these proposed directives falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

#### *Regulatory Impact*

These proposed directives have been reviewed under USDA procedures and Executive Order 12866, Regulatory Planning and Review. It has been determined that this is not a significant action. These proposed directives will not have an annual effect of \$100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. These proposed directives would not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, these proposed directives would not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and

obligations of recipients of such programs.

Moreover, these proposed directives have been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that these proposed directives would not have a significant economic impact on a substantial number of small entities as defined by the act because they will not impose recordkeeping requirements on them; it would not affect their competitive position in relation to large entities; and it would not affect their cash flow, liquidity, or ability to remain in the market.

*Federalism and Consultation and Coordination with Indian Tribal Governments*

The Agency has considered these proposed directives under the requirements of Executive Order 13132, Federalism, and has made an assessment that these proposed directives conform with the federalism principles set out in this Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary at this time.

These proposed directives have tribal implications as defined by Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and the 120-day consultation with Indian tribes and Alaska Native Corporations was conducted from June 6, 2013 to October 6, 2013, as required.

### *No Takings Implications*

These proposed directives have been analyzed in accordance with the principles and criteria contained in Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and it has been determined that these proposed directives do not pose the risk of a taking of Constitutionally protected private property.

### *Civil Justice Reform*

These proposed directives have been reviewed under Executive Order 12988, Civil Justice Reform. If these proposed directives were adopted, (1) all State and local laws and regulations that are in conflict with these proposed directives or which would impede its full implementation would be preempted; (2) no retroactive effect would be given to these proposed directives; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

### *Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), which the President signed into law on March 22, 1995, the Agency has assessed the effects of these proposed directives on State, local, and Indian tribal governments and the private sector. These proposed directives would not compel the expenditure of \$100 million or more by any State, local, or Indian tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

*Energy Effects*

These proposed directives have been reviewed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that these proposed directives do not constitute a significant energy action as defined in the Executive Order.

*Controlling Paperwork Burdens on the Public*

These proposed directives do not contain any additional recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

July 6, 2015 \_\_\_\_\_

Thomas L. Tidwell  
Chief,  
Forest Service

(Date)

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