



[3411-15-P]

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**RIN 0596-AD15**

**Final 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 final directives.

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**SUMMARY:** The Forest Service has revised its internal Agency directives for American Indian and Alaska Native Relations to update existing direction for the Agency to work effectively with Indian tribes. The directives were last revised in 2004, with an Interim Directive issued in 2012. The final issuance of these directives, effective upon publication, will provide consistent overall internal Forest Service policy to: explain the methods used to engage with tribes on a government-to-government basis, describe the authorities for working with tribes, delineate meaningful consultation procedures, and outline dispute resolution options. The tribal and public comment period closed concurrently on September 22, 2015. The Agency considered all comments in developing these final directives.

**DATES:** These directives are issued **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The Forest Service Manual and Handbook are available online at <http://www.fs.fed.us/spf/tribalrelations/>. Single paper copies are available by request to the Office of Tribal Relations, US Forest Service, at [OTR@fs.fed.us](mailto:OTR@fs.fed.us). Additional information of how

the Agency considered public comment can be requested in writing to Office of Tribal Relations, US Forest Service, Sidney R. Yates Building, 201 14<sup>th</sup> Street SW, Washington, DC 20250-0003.

**FOR FURTHER INFORMATION CONTACT:** Fred Clark, Director, Office of Tribal Relations, US Forest Service, 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.

**SUPPLEMENTARY INFORMATION:**

**1. Background and Need for the Final Directive**

On January 18, 2013, the U.S. Department of Agriculture (USDA) adopted Departmental Regulation No. 1350-002 on tribal consultation, coordination, and collaboration. Departmental Regulations institutionalize the broad programmatic direction for all USDA agencies to develop and implement processes for tribal consultation, coordination, and collaboration. This Departmental Regulation explicitly holds the head of each USDA agency accountable for the implementation of this policy. In March 2013, the Forest Service (Agency) Office of Tribal Relations (OTR) began to review the Forest Service manual and handbook to ensure it was consistent with the Departmental Regulation as well as the 2012 Report to the Secretary, USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites, and legislation (specifically the Culture and Heritage Cooperation Authority provisions of the Food, Conservation, and Energy Act of 2008 [Public Law 110-246; the Farm Bill]).

Upon reviewing these documents, it was necessary to amend the Agency manual and handbook, and OTR began to draft proposed directives which included tribal implications as defined by Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” OTR began an initial 120-day consultation with tribes on June 6, 2013, but

extended the consultation period for almost two years to thoroughly discuss the proposed directives in various locations throughout the U.S. On July 24, 2015, the Forest Service published the notice of proposed directives and request for comment (80 FR 44019), and the comment period ended on September 22, 2015.

## **2. Content of Final Directives**

The following is an overview of the content of the directives.

### ***a. Forest Service Manual 1560***

*1563 – Tribal Relations.* This Forest Service Manual section outlines the Forest Service Tribal Relations policy generally. It sets forth direction 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 section provides information on Constitutional Articles corresponding to Indian tribes, statutes (e.g., Tribal Forest Protection Act of 2004 [25 U.S.C. 3115a]), executive orders, policies, Indian treaty rights, and provides context for the Federal trust responsibility to tribes.

*1563.02 – Objectives.* This section expands the objectives of the Forest Service in meeting its trust responsibility and adds support for the UN Declaration on the Rights of Indigenous Peoples.

*1563.03 – Policy.* This section expands Agency policy to consult with tribes in a meaningful way, document all consultation processes, and keep confidential any information that is tribally sensitive or proprietary.

*1563.04 – Responsibilities.* This section outlines the responsibilities in fulfilling the trust responsibility and consultation mandate to the following Agency personnel: Chief, Deputy Chiefs, Director of the Washington Office of Tribal Relations, Regional Tribal Relations Program Managers, Forest/Grasslands Supervisors, District Rangers, and all Tribal Liaisons within the Forest/Grassland, Research and Development, and State and Private Forestry divisions.

*1563.05 – Definitions.* This section provides definitions of the terms commonly used to describe the Federal-Tribal relationship.

*1563.10 – Consultation with Indian Tribes and Alaska Native Corporations.* This section outlines the steps in the consultation process generally, including subsections outlining the roles for consulting officials, associated timelines, evaluations, and additional considerations.

*1563.2 – Dispute Resolution.* This 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 section expands guidance on repatriation and reburials, including general considerations as well as reviews.

*1563.4 – Closures for Traditional and Cultural Purposes.* This section describes closures for temporary and cultural purposes per 25 U.S.C. 32A § 3054.

*1563.6 – Prohibition on Disclosure.* This section covers prohibition against disclosure per 25 U.S.C. 32A § 3056.

*1563.7 – Information and Technology Sharing.* This section describes working with tribes to incorporate traditional ecological knowledge as well as traditional tribal practices and

locations that should be considered in Forest Service land management planning and research activities.

*1563.8 – References.* This section elaborates in the authorities identified in section 1563.01.

***b. Forest Service Handbook 1509.13***

*10.01 – Authorities.* This section includes statutes, Executive Orders, and regulations that govern Federal agencies' relationship with tribes.

*11 – Consultation with Tribes.* This section expands on consultation roles and responsibilities, timelines, consultation process, and monitoring and evaluation processes for compliance monitoring.

*12 – Compensation.* This section includes funding authorities for compensation for consultation, historic preservation.

*13 – Training.* This section includes suggestions for mandated training on sacred sites and related core competencies.

*14 – Exhibits.* This section references additional authorities for management of Indian sacred sites.

**3. Public Comments**

The Agency received only 15 comments on the proposed directives. However, because of strong outreach, coordination, and consultation conducted with tribal partners by OTR in the development of these directives, the Agency did not anticipate receiving many comments. The comments were generally supportive of these directives, and most were from tribes or tribal offices that interact with the Forest Service in a fairly routine manner. The following is a

breakdown of the comments provided about the directives and the Agency's response to those comments.

### ***FSM 1563***

#### *Categorization of the Manual Title*

Several comments stated that the emphasis should be on the government-to-government relationship because a federal-tribal relationship is not "External Affairs," but instead "Internal Affairs" and believe these directives are mislabeled within this category heading.

After considering this request, the Agency took no action. The reason Forest Service Manual 1500, Chapter 1560, Section 1563 is listed under the heading "External Affairs" is because it involves a party that is not officially employed by the US Forest Service. Many other relationships with organizations outside of the Agency are described within Manual 1500, such as counties and local agencies, which are under Section 1562. The heading is not intended to minimize the government-to-governmental relationship Federal agencies have with Indian tribes; rather, in this context, when a Forest Service employee engages with any person or organization that is not an employee of the US Forest Service (i.e., an internal party), it is external to the Agency.

#### *Federal Trust Responsibility*

Several comments stated that although various individuals, communities, intertribal organization, enterprises, or education institutions may publicly identify as "tribal," it is important to note that these groups do not have the same legal status or rights as federally recognized tribes (i.e., Federal trust responsibilities).

The Agency agrees and has modified the text accordingly. Forest Service Handbook Section 1509.13, Chapter 10 reads: “The rights of tribal governments and their officials are not the same, nor should they be treated the same as the general public.” This language was inserted into Manual 1500, Chapter 1560 for consistency. Moreover, the trust responsibility is discussed at length in two separate sections in the FSM 1560 – the language has been slightly amended to ensure consistency throughout the document.

Several respondents also noted the relationship between treaties reserved rights and how they correlate under the trust responsibility. Commenters want the Forest Service to understand how tribes regulate their members’ exercise of such rights, rights that are reaffirmed individually through unique statutory references (e.g., individual tribal treaty) as well as off-reservation treaty rights, separate reservation homelands, and other reserved rights.

After considering these comments, the Agency did not take any specific action. The directives explain the basis for treaty rights, how tribes continue to exercise such rights today, and the trust responsibilities the Agency holds. These directives were specifically written for Forest Service employees to understand the broad applicability and expansive nature of the Federal trust responsibility as well as the more specific obligations under reserved treaty rights. Using general descriptions encourages a flexible interpretation of legal responsibilities and encourages building strong relationships with individual Indian tribes, in the context of that tribe’s treaty status.

*Federal Status of Tribes*

Several comments identified that the authority to work with federally recognized Indian tribes does not address relationships with non-federally recognized tribes who may have a stakeholder interests in the Federal agency actions.

After considering these comments, there is no clear legal standing for the Forest Service to include non-federally recognized tribes, or even other indigenous communities from the US (such as Native Hawaiians), or from foreign territories that border US lands. Executive Order 13175 “Coordination and Consultation with Indian Tribes” specifically defines Indian tribes as “an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List of 1994, 25 USC 479a.” This is the baseline authority for all Federal agencies to engage and consult with Indian tribes and (through other laws) Alaska Native Corporations. Therefore, it is important to provide a framework within the context of these directives for Forest Service employees to understand how the Agency is legally obligated to engage with tribes affected by the Federal trust responsibility, which is only extended to federally recognized tribes, and with Alaska Native Corporations.

However, the Forest Service strongly supports working with tribes and tribal communities notwithstanding federal acknowledgment. The mechanisms and procedures used to accomplish those interactions and partnerships are those contained in the Agency’s overall authorities, rather than in those for Indian tribes and Alaska Native Corporations.

*Native American Graves Protection and Repatriation Act (NAGPRA).*

There were a few comments on Alaska Native Corporations (ANCs) having no legal standing as proper authorities for consultation for the purposes of NAGPRA. If a corporation wishes to be a party to a NAGPRA consultation, they should have express written consent from the tribe that clearly identifies the corporation is acting as their agent.

The Agency agrees and has modified the text accordingly. The following language has been inserted: “Alaska Native Corporations (ANCs) do not have legal authority to consult for NAGPRA purposes; however, if an Alaska tribe expressly gives consent in writing that an ANC is acting as their authorizing agent in a NAGPRA consultation, the request should be considered.”

#### *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*

One comment suggests that Article 19 should be included because “consent” is an important term to incorporate for tribes to enter into any sort of relationship with a Federal entity.

After much consideration, the Agency agrees and has modified the text accordingly. The US endorsed the UNDRIP in 2010. Simply, Article 19 calls on governments to secure the consent of indigenous peoples on matters of general public policy. The US Department of State has yet to issue guidance on the meaning and implications of consent in this context, and the Agency therefore considers the UNDRIP as an ideal the Federal Government should strive toward in its dealings with indigenous peoples and as an important international perspective.

#### *Role of Coordination and Collaboration*

Several commenters noted there was no definition of collaboration in the directives and if collaboration is to serve a purpose in support of consultation, it should be clearly defined in the definitions section. It should also be made clear that collaboration is not the primary way the

Forest Service intends to meet its trust responsibilities with tribes nor is coordination ever to be done in lieu of consultation.

The Agency agrees and has modified the text accordingly. The Forest Service has included the definition of collaboration published in the USDA Departmental Regulation on Tribal Consultation, Coordination, and Collaboration (DR1350-002: January 18, 2013) to maintain consistency across Agency guidance documents. Further, in Section 1563.03.e, language was inserted that reads: “To be clear, coordination and collaboration with tribes are key to building long-term, meaningful relationships and should be viewed as a component of daily operations; however, tribal coordination and collaboration efforts do not supersede or substitute tribal consultation on a specific topic.”

### ***FSH 1509.13, Chapter 10***

#### *Treaty Rights*

Several people commented on FSH1509.13, Section 13.3, Core Competencies, subsection (1)(e) which is titled Legal Context. In working with Indian tribes, there is nothing mentioned regarding unratified treaties or unextinguished land titles, and these should be specifically identified in this section.

After considering these comments, the Agency agrees and has clarified and modified the text accordingly. The FSH is specifically written for Forest Service employees to understand the broad applicability and see the expansive nature of the federal trust responsibility and treaty obligations. Using general descriptions encourages a flexible interpretation of legal responsibilities and encourages building strong relationships with individual Indian tribes, while keeping their land title and treaty status in mind. The topics of unratified treaties and

unextinguished land titles (and the additional topic of unsettled land claims) are now included in the section on Core Competencies.

### *Sacred Sites*

Many comments suggested that the Forest Service should request sacred sites trainings be hosted by tribes and include tribal staff in the development of internal Forest Service trainings. The Agency reviewed the language and concluded this request was included that in the proposed directives. Federal agencies often lack the framework to contextualize tribal knowledge systems. However, Tribal staff and other Native people can often more clearly identify and accurately assess sacred sites issues. Language in section 13.2 states that Forest Service employees should “Invite AI/AN people to assist in developing and delivering core curricula.” Further, Forest Service units are instructed to “reach out to local Indian tribes to ask for their assistance in both developing and delivering training to Forest Service employees” and to “coordinate with local Tribes when sponsoring Forest Service workshops and training to include tribal perspectives.” These aspects are incorporated directly from the 2012 Sacred Sites Report.

## **4. Regulatory Certifications**

### *Environmental Impact*

This final directive revises national Forest Service policy to update existing direction for the Agency to effectively work together with Indian tribes. Forest Service regulations at 36 CFR 220.6(d)(2) exclude 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 has concluded that this final directive 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*

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant regulatory actions. OIRA has determined that this final policy action is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovated, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed these directives in a manner consistent with these requirements.

### *Regulatory Flexibility Act*

The Agency certifies that these directives will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et. seq.). These directives will not impose record-keeping requirements on small entities; they will not affect their competitive position in relation to large entities; and they will not affect their cash flow, liquidity, or ability to remain in the market.

### *Small Business Regulatory Enforcement Fairness Act*

These directives are not considered major under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. They will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year. The directives' requirements will not result in a major increase in costs or prices for

consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor will these directives have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises because the rule is limited to consultation with federally acknowledged Indian tribes.

*Unfunded Mandates Reform Act*

The directives do not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 Million per year. The directives do not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.) is not required.

*No Takings Implications (E.O. 12630)*

Under the criteria in Executive Order 12630, these directives do not affect individual property rights protected by the Fifth Amendment nor do they involve a compensable “taking.” A takings implication assessment is therefore not required.

*Federalism (E.O. 13132)*

Under the criteria in Executive Order 13132, this document has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

*Civil Justice Reform (E.O. 12988)*

These directives comply with the requirements of Executive Order 12988. Specifically, these directives were reviewed to eliminate efforts and ambiguity and written to minimize litigation; and are written in clear language and contains clear legal standards.

*Consultation with Indian Tribes (E.O. 13175)*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," 59 FR 22951 (May 4, 1994), supplemented by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000), the Agency assessed these directives to have tribal implications as defined in E.O. 13175. The 120-day consultation with Indian tribes and Alaska Native Corporations was conducted from June 6, 2013, to October 6, 2013, as required, and was further extended over a nearly two-year period.

Because of strong outreach, coordination, and consultation conducted with tribal partners in the development of these directives, the Agency received only 15 comments. The comments were generally supportive of these directives, and most were from tribes or tribal offices that interact with the Forest Service in a fairly routine manner. Additional outreach to Indian tribes and intertribal organizations will convey the availability of the final directives.

*Paperwork Reduction Act*

These final directives do not contain any 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.

*National Environmental Policy Act*

These directives do not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. See 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

*Effects on the Energy Supply (E.O. 13211)*

This final policy action is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

February 8, 2016

Date

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Chief,  
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