

Tribal Consultation and Cultural Resources Management Practitioners Panel

Sustaining Military Readiness Conference
Wednesday, August 15, 2018, 1:30 – 3:00 pm
Workshop Summary

Facilitators

Michelle Volkema, OASD(EI&E), DFPO
Alicia Sylvester, OASD(EI&E), Incoming Senior Advisor and Liaison for Native American Affairs

Panelists

Kathleen McLaughlin, Deputy Federal Preservation Officer, Department of the Army
John McDonagh, Associate General Counsel, EE&I, Department of Defense
Kate Kerr, Advisory Council on Historic Preservation (ACHP)
Justin Buller, Office of General Counsel, Department of the Army

Workshop Summary

Michelle Volkema: Workshop and Speaker Introduction

Maureen Sullivan, Deputy Assistant Secretary of Defense, Environment, Safety and Occupational Health

- In opening the session, Ms. Sullivan encouraged all participants to listen, ask questions, share their experiences and challenges, and seek best practices to enhance their work across organizational lines on the installation to support the military mission.

Kathleen McLaughlin, Department of the Army

- Why we consult – the legislative mandate
- Types of military training and the types of impacts it may have on cultural resources – a snapshot of best practices
- Consultation requirements are always pre-decisional or it is merely notification; how to consult, when to consult, the roles of the installation/SHPO/ACHP/tribes in consultation
- Review of the process for NHPA, Section 106-related tribal consultation

John McDonagh, DoD Office of General Counsel

- Federal laws and regulations regarding cultural resources management and tribal consultation
 - Obligations of federal agencies rooted in Federal Trust Responsibility, Treaty Reserved Rights, Laws, Executive Pronouncements, and DoD consultation policies – DoDI 4715.16 and DoDI 4710.02, highlights of Component consultation policies
 - DASD(ENV) released a memo in March 2018 on maintaining the confidentiality of information about Indian Sacred Sites. Key elements of DoD guidelines include:
 - Don't request information regarding sacred sites unless absolutely necessary and instruct consultants and contractors to do the same
 - Where the potential for a sacred site exists, collect information in the most general possible terms – plan actions to avoid the area of sensitivity
 - When necessary to collect information about a sacred site, consult orally, document that the consultation took place
 - In response to disclosure requests, National Historic Preservation Act (NHPA) Section 304 and/or Archeological Resources Protection Act (ARPA) Section 9 may provide legal authority to withhold sensitive information. The duty to withhold information is non-discretionary if statutory prerequisites are met
 - Key confidentiality provisions in Section 304 of the NHPA
 - Limited authority for an agency to withhold information – when releasing may cause significant invasion of privacy; cause risk of harm to the historic property; or impede use of a traditional religious site by practitioners
 - If these requirements are met, the agency can withhold information regarding the historic resource's location, character, and ownership

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- Key confidentiality provisions in Section 9 of the ARPA
 - Section 9 requires that managers responsible for protecting archeological resources hold information about the location and nature of the resources confidential unless providing the information would further the purposes of the statute and not create a risk of harm for the resources

Kate Kerr: Advisory Council on Historic Preservation – Case Study

- How Proactive Planning and Meaningful Consultation Supports Range Management – Pohakuloa Training Area on Hawaii Island.
- Army Garrison Hawaii – originally a Platoon Battle Area, the expansion of the training range involved consideration of three areas, all of interest to Native Hawaiians
 - The number of archeological sites is significant and included excavated pits, lava tubes
 - Significant amounts of ordnance debris covered the area so clearance was conducted to facilitate surveys to identify cultural resources and features
- Programmatic Agreements (PA) – can cover programs, complex undertakings and can involve internal and external participants
 - Range operations related to triggering Section 106 – open air training, live fire, electronic combat, maneuvers, use of airspace at new or existing ranges
 - Use of PAs can help support operational security regarding range operations; helps build relationships with internal audiences on the installations as well as with external partners; helps build appreciation of current inventory of historic properties and ones of traditional religious and cultural importance; and helps build awareness of current and planned training infrastructure
 - In developing the PA, Army Garrison Hawaii and the ACHP, the Native Hawaiian community reviewed the proposal in three stages – pre-construction, construction, and post-construction. In addition, the ACHP was involved in discussion of and agreement about mitigation measures included in the PA – requirements for additional surveying, tours of the site, and monitoring of ongoing training operations to ensure protection of cultural resources.

Justin Buller and Kathleen McLaughlin

- Carlisle Indian Industrial School on the site of the Carlisle Barracks, PA
 - Site of the school that housed up to 10,000 American Indian and Alaska Native students from 1879 to World War I.
 - Students were taken from their families and transported to the school. The students were forced to speak English and abandon all practices of their tribal cultures and were forced to wear school uniforms
 - Out of the 10,000 students who attended, only about 150 graduated
 - Sadly, the site of the school includes the graves of students who died while attending, many from sicknesses for which they had no immunity. The manner and cause of death for many others was not always recorded
 - The Army seeks to return the remains of these young people to their families so they can be reinterred at home. The Army has consulted with some tribes and families listed among the records for the school and will continue to do so.
 - Challenges and successes based on lessons learned.

Michelle Volkema: facilitator wrap up