

Chapter 31  
TRIBAL LANDS/ISSUES

**MDT ENVIRONMENTAL MANUAL**

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# Chapter 31

## TRIBAL LAND/ISSUES

### 31.1 OVERVIEW

As set forth in the US Constitution and various treaties, statutes, Executive Orders and court decisions, the US government recognizes the right of Indian Tribes to self-government and the right to exercise inherent sovereign powers over their members and territory. This territory includes Indian reservations; lands held in trust by the US government for the use and benefit of Indian Tribes.

Within the State of Montana, there are seven Indian reservations. These reservations serve the Blackfeet Tribe (Blackfeet Reservation), Crow Tribe Apsáalooke Nation (Crow Reservation), Confederated Salish and Kootenai Tribes (CSKT) (Flathead Reservation), Gros Ventre Tribe and Assiniboine Tribe (Fort Belknap Reservation), Sioux and Assiniboine Tribes (Fort Peck Reservation), Northern Cheyenne Tribe (Northern Cheyenne Reservation) and Chippewa Cree Tribe (Rocky Boy's Reservation). The governing body of an Indian reservation usually consists of a Tribal council and Tribal chairman that are elected to conduct activities and make decisions in the interest of the Tribe. The Federal Bureau of Indian Affairs (BIA), represented by a superintendent at the reservation, is the liaison between the Tribe and other Federal agencies. Information regarding contacts for each of the seven listed Tribes and the location of their respective reservations is available on the MDT website. The website also contains contact information for the Little Shell Tribe and shows the location of its Tribal Capital within Montana. Headquartered in Great Falls, this band of the Chippewa Tribe is a State-recognized Tribe without a designated reservation in Montana. The Tribe is petitioning for Federal recognition. Other Tribes that have a presence in Montana but no designated reservations within the State include the Northern Arapahoe Tribe and the Eastern Shoshone Tribe.

For MDT highway projects, coordination and consultation between MDT and Tribal representatives generally is conducted through the MDT Environmental Services Bureau (ESB). For MDT program or policy issues affecting Tribes, the coordination may involve the MDT Director, who is the formally designated Tribal Liaison for the Department.

Lands located within the reservations are identified as Tribal, allotted, patented or privately owned. Tribal councils administer Tribal lands for the benefit of the entire Tribe. Allotted lands are controlled and used (e.g., leased, farmed, grazed) by individual members of the Tribe. Indian owners may apply for and be granted patents to their allotted lands, giving them rights of ownership common to other private property. Tribal and allotted lands are referred to as trust land. Tribal councils and allottees cannot readily dispose of trust lands.

As affirmed in treaties, statutes, Executive Orders and court decisions, the Federal Highway Administration (FHWA) and other Federal agencies have a government-to-government relationship with Indian Tribes. This relationship requires Federal agencies to consult with Tribes regarding regulatory and policy matters affecting their interests. Section 106 of the *National Historic Preservation Act* requires Federal agencies to:

- consult with Tribes for undertakings that may affect properties of traditional religious and cultural significance on or off Tribal lands,

- afford the Tribes a reasonable opportunity to identify concerns about the affected property or properties,
- articulate their views on the undertaking's effects on the properties, and
- participate in the resolution of adverse effects.

In addition, coordination and consultation with certain Tribes in Montana is required in conjunction with permit and water quality certification programs administered by those Tribes for actions affecting waters on reservation lands.

This Chapter provides guidance and procedures for identifying projects that may potentially affect Tribal lands or interests and for accomplishing any required coordination and consultation.

Table 31-1 provides an overview of useful information for consultation and coordination with Tribes in Montana.

Tribe(s)	THPO*	Permits	401 Certification**	Environmental Office
Blackfeet Tribe	Yes	ALPO 90-A		Blackfeet Environmental Office Water Resources Department (for ALPO 90-A permits)
Crow Tribe	Yes			
Confederated Salish & Kootenai Tribes	Yes	ALCO 87-CSKT Tribal Ordinance 64-A	401 Certification for Individual 404 permits and NWPs	Natural Resources Department Shoreline Protection Office (for ALCO 87-A or CSKT Tribal Ordinance 64-A permits) Water Pollution Control Program (for 401 certifications)
Fort Peck Tribes	No		401 Certification for Individual 404 permits and NWPs	Office of Environmental Protection
Fort Belknap Tribes	No			Environmental Department
Little Shell Tribe	No			
Northern Cheyenne Tribe	Yes		401 Certification for Individual 404 permits and NWPs	Environmental Protection Department
Chippewa Cree Tribe	Yes			Water Resources Department

\* (THPO) - Tribal Historic Preservation Officer

\*\* For involvements with Tribes that do not issue 401 Certification, the 401 Certification is obtained through the US Environmental Protection Agency (EPA)

**Table 31-1 — CONSULTATION/COORDINATION WITH MONTANA TRIBES**

## 31.2 LAWS, REGULATIONS AND GUIDANCE

### 31.2.1 16 USC 470f "Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation"

This part of the *United States Code* (USC) codifies Section 106 of the *National Historic Preservation Act*. It provides that, prior to approval of the expenditure of any Federal funds or the issuance of any license for any proposed Federal or Federally assisted undertaking, the responsible Federal agency must take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register of Historic Places.

### 31.2.2 23 USC 139 "Efficient Environmental Reviews for Project Decision-Making"

For projects involving preparation of an environmental impact statement and for environmental assessments being prepared in accordance with the FHWA "SAFETEA-LU Environmental Review Process Final Guidance," this part of the USC requires that, at appropriate times during the study process, the lead agency or agencies for the project collaborate with agencies serving as participating agencies to determine the methodologies to be used and the level of detail required for assessing impacts, including effects on Tribal lands/issues. See [Chapters 11 "Preparing Environmental Documentation," 13 "Environmental Assessment/FONSI" and 14 "Environmental Impact Statement/ROD"](#) for further guidance on this requirement.

### 31.2.3 36 CFR 800 "Protection of Historic Properties"

The regulations in this Part of the *Code of Federal Regulations* (CFR) define how Federal agencies meet the statutory responsibilities established by Section 106 of the *National Historic Preservation Act* (16 USC 470f) for taking into account the effects of their undertakings on historic properties.

### 31.2.4 43 CFR 10 "Native American Graves Protection and Repatriation Regulations"

The regulations in this Part of the CFR carry out provisions of the *Native American Graves Protection and Repatriation Act* (25 USC 3001-3013) by developing a systematic process for determining the rights of lineal descendants and Indian Tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects or objects of cultural patrimony with which they are affiliated.

### 31.2.5 16 USC 470aa-mm "Archaeological Resources Protection"

These USC Sections codify the provisions of the *Archaeological Resources Protection Act* (ARPA). This statute requires Federal agencies to notify Tribes of a permit for excavation of archaeological sites on Federal land that will include sites of religious or cultural importance to Tribes. The *Act* also provides that, on Indian lands, the Federal agency must have the permission of the Tribe to issue an ARPA permit.

### **31.2.6 Tribal Consultation Best Practices in Historic Preservation**

This publication by the National Association of Tribal Historic Preservation Officers (NATHPO) documents the results of a survey of consultation experiences of actual participants in the Section 106 compliance process to identify a best practices model for Section 106 consultation between Federal agencies and Tribes.

### **31.2.7 FHWA “Section 106 Tribal Consultation Q & A’s”**

This set of questions and answers, which is available on the FHWA website, addresses a broad range of issues regarding Tribal consultation under the Section 106 compliance process.

### **31.2.8 Consultation with Indian Tribes in the Section 106 Review Process: A Handbook**

This *Handbook*, published by the Advisory Council on Historic Preservation, includes guidance on Federal Government Consultation with Indian Tribes, Consultation with Indian Tribes in the Section 106 Process, General Questions and Answers, Consultation with Indian Tribes for Proposed Undertakings Off and On Tribal Lands, Consultation Tools, and Principles and Tips for Successful Consultation.

### **31.2.9 MCA 22-3-421, et seq. “Antiquities”**

These sections of the *Montana Code Annotated* (MCA) codify the provisions of the *Montana Antiquities Act*. This statute establishes requirements for the protection of heritage properties (e.g., any district, site, building, structure or object that is significant in American history, architecture, archaeology or culture) or paleontological remains (e.g., fossilized plants and animals of a geological nature which are rare and critical to scientific research) located on lands owned by the State of Montana.

### **31.2.10 MCA 22-3-800, et seq. “Human Skeletal Remains and Burial Site Protection”**

These MCA Sections codify the provisions of the *Montana Human Skeletal Remains and Burial Site Protection Act*. This statute establishes requirements for protection of human skeletal remains, burial sites and burial material, including those in marked, unmarked, unrecorded, registered or unregistered graves or burial grounds located on State or private lands that are not protected as cemeteries or graveyards under existing State law. A key provision of the *Act* indicates the intent of the legislature to recognize the interests, concerns and obligations of those having a kinship, Tribal, cultural or religious affiliation with the burial site and balance those interests against the interests of scientists, landowners and developers.

### **31.2.11 Aquatic Lands Protection Ordinance 90-A (ALPO)**

This ordinance requires permit coverage from the Blackfeet Nation Environmental Office for all construction or fill projects that occur in wetlands, riparian areas and streams on the Blackfeet Indian Reservation.

**31.2.12 Aquatic Lands Conservation Ordinance 87-A (ALCO)**

This ordinance requires permit coverage from the CSKT Shoreline Protection Program Office for any proposed work in, over or near any stream, river, lake or wetland on the Flathead Reservation.

**31.2.13 CSKT Tribal Ordinance 64-A**

This Ordinance authorizes the adoption of regulations regarding the issuance or denial of permits for work in navigable waters within the Tribe's jurisdiction, including work done on the bed and banks below high water mark of all navigable waters within the exterior boundaries of the Flathead Reservation. The adopted regulations for implementing Ordinance 64-A are referred to as "Confederated Salish and Kootenai Tribes Shoreline Protection Regulations."

**31.2.14 "Section 401 Water Quality Certification for Nationwide Permits in Montana" Webpage**

This webpage is accessible through the Omaha District US Army Corps of Engineers home page. The webpage includes links to the Nationwide Permit Section 401 water quality certifications issued by EPA, Montana Department of Environmental Quality and the three Montana Indian nations currently approved to administer Section 401 water quality certification for projects on their lands. These Tribes include the CSKT, the Fort Peck Tribes and the Northern Cheyenne Tribes. The documents include information on which Nationwide Permits have been granted Section 401 certification, which permits have been denied certification and which permits have been granted conditional certification.

**31.2.15 NATHPO Website, Montana Tribal Historic Preservation Officer (THPO) Information**

This webpage is accessible through the NATHPO website (select the link for "Find a THPO," then select Montana on the map of the US). It includes names and contact information for the current THPOs in Montana, which represent the Blackfeet Nation, the Chippewa Cree Tribe of the Rocky Boy's Reservation, the CSKT of the Flathead Reservation, the Crow Tribe of Indians and the Northern Cheyenne Tribe.

**31.2.16 "Indian Nations of Montana" Website**

This website contains links to a general information webpage for each Tribe in Montana. The general information talks about the Tribe's people, location, economy, points of interest and contact information. The contact information for each Tribe includes a link to its official Tribal website that provides a broader array of more specific information about the Tribe.

**31.2.17 Governor's American Indian Nations (GAIN) Council**

The Governor of Montana created this Council to accomplish the following objectives:

- establish and preserve harmonious Tribal/State relationships;
- strive for mutual understanding and respect for the sovereign Tribal and State governments;
- share collective resources and services to achieve equal opportunity for all;
- work cooperatively when the rights of one government to the other are unclear or would result in harm to either government's citizens; and
- use the process established through the GAIN Council to address issues timely and through the appropriate process.

The GAIN Council includes an Executive Team and Core Teams for Economic Development, Human Services, Environmental and Finance, Justice and Education.

### 31.3 PROCEDURES

#### 31.3.1 Information Gathering

The Preliminary Field Review (PFR) is the initial step in evaluating a project's potential involvement with Tribal lands and/or issues. Where Tribal lands or known Tribal issues (e.g., known sites of religious or cultural significance to Tribes) may be affected, the Design Team (DT) notifies and invites appropriate ESB personnel (e.g., the Project Development Engineer (PDE), Historian and/or Archeologist) to the field review. The PDE reviews the list of ESB attendees and includes others as necessary to ensure appropriate ESB personnel are in attendance. The DT also coordinates with the ESB to contact appropriate Tribal representatives (e.g., Tribal President (or Chairman), Planning Director (or Transportation Planner) and Tribal Employment Rights Ordinance (TERO) Director) to invite them, or their designees, to participate.

The PFR includes a preliminary evaluation of the scope of work and how the project may affect Tribal lands and/or issues. Following the field review, the DT prepares a PFR Report summarizing the issues discussed during the field review, including potential involvement with Tribal lands and/or issues. The DT distributes the final PFR Report for review and comment, including coordination with the ESB to provide copies to representatives of potentially affected Tribes. Within ESB, the PDE serves as the document champion to collect and coordinate comments from the other Sections. The PDE compiles the comments into a PFR review memorandum for signature by the Environmental Services Bureau Chief.

After the PFR and receipt of the PFR Report, if it is determined the project may affect Tribal lands and/or issues, the PDE and/or the Historian and/or Archeologist coordinate to obtain the current Tribal Agreements for affected Tribes and to determine if there have been any changes in Tribal borders.

After the PFR, the PDE coordinates with resource agencies and reviews available environmental databases and resource maps to gather additional information on the project area. For projects that are subject to the requirements of 23 USC 139 "Efficient Environmental Reviews for Project Decision-Making," the PDE, in cooperation with FHWA, collaborates with participating agencies in determining the appropriate methodologies to be used and the level of detail required in the analysis of Tribal land/issues affected by project alternatives. The PDE coordinates with staff in the ESB Resources Section to confirm that all wetlands are delineated, classified and evaluated using the US Army Corps of Engineers (COE) Routine Wetland Determination data forms and MDT Montana Wetland Assessment data forms, including wetlands on potentially affected Tribal lands. The PDE also reviews Tribal permitting requirements to determine the specific criteria for applicability to ensure the project complies, as necessary, recognizing that Tribal regulations may impose more stringent requirements.

The Historian and Archeologist review the PFR Report to evaluate the project's potential for impacts to historic properties, including archaeological sites or other sites of significance to Indian Tribes. They also review current Tribal Agreements to identify any requirements for notifying Tribes when projects are in proximity to Tribal lands (e.g., within 1.5 miles (2.5 km) of a reservation). For projects determined to require compliance with Section 106 of the *National Historic Preservation Act* (see [Chapter 30 "Historic and Archaeological Resources"](#)), the Historian and Archeologist determine the Area of Potential Effects (APE). Where projects may affect lands or sites associated with a Tribe that has a THPO (e.g., the Blackfeet, Crow, CSKT,

Northern Cheyenne, Chippewa Cree Tribes), the Historian and Archaeologist coordinate with the THPO in determining the APE. For lands or sites associated with Tribes that do not have a THPO, the Historian and Archeologist coordinate with the State Historic Preservation Officer (SHPO) in determining the APE for those lands/sites. After the APE is established, the Historian and Archeologist then coordinate to gather and document information from any Native American group/Tribe potentially involved within the APE. The Historian and Archeologist use this information to assist in identifying properties, including those Tribal lands that may be of religious and cultural significance and may be eligible for the NRHP, and in determining the need for, and extent of, further identification efforts.

MDT consults with Montana Indian Tribes on many rural highway projects when pre-contact archaeological sites are encountered. The consultation may be early in project development, if the project is within an area known to be of interest to a Tribe. In other instances, the consultation may not occur until after identification of a resource or resources that may be of interest to a Tribe. In determining the appropriate Tribes to contact for consultation, the Historian and Archeologist generally split the State into aboriginal territories along the lines of the early Fort Laramie Treaties (i.e., from the 1850s).

### **31.3.2 Analysis and Findings**

#### **31.3.2.1 Permits/Water Quality Certification**

Based on the information gathered and the proposed project scope, the PDE makes a preliminary estimate of the project's potential impacts on the wetlands, surface water resources and aquatic lands in the project area and makes a preliminary determination of whether the proposed action requires a Section 404 permit or an ALPO, ALCO, or CSKT Tribal Ordinance 64-A permit. The PDE makes this determination based on the likelihood the project may involve:

- discharge of dredged or fill material into waters of the US;
- work in, over or near any stream, river, lake, riparian area or wetland on the Blackfeet Indian Reservation meeting the description contained within ALPO 90-A; and/or
- work in, over or near any stream, river, lake or wetland on the Flathead Indian Reservation meeting the description contained within ALCO 87-A or CSKT Tribal Ordinance 64-A.

The PDE ensures the environmental documentation for the project includes information describing the aquatic resources in the project area and the results of a preliminary determination of jurisdictional authority of various agencies and Tribes. The PDE also ensures the environmental documentation discusses permits that may be required for work affecting the aquatic resources and includes evidence of coordination with the COE (if a 404 permit may be required) and, as applicable, Tribal officials (if an ALPO, ALCO or CSKT Tribal Ordinance 64-A permit may be required) regarding the project's aquatic resource impacts. See [Chapters 11 "Preparing Environmental Documentation," 12 "Categorical Exclusion," 13 "Environmental Assessment/FONSI" and 14 "Environmental Impact Statement/ROD"](#) for further guidance on environmental documentation procedures.

Throughout the design process, the PDE coordinates with the District Biologist (DB) and DT to avoid and minimize the extent to which the project affects aquatic resources, including those on Tribal lands.

Coordination with the appropriate officials of affected Tribes continues during preparation and finalization of the Scope of Work Report and preliminary conceptual design plans, the Plan-in-Hand Review and on through project construction.

Based on the project scope and final construction limits, the PDE determines whether the project will require a Section 404, ALPO, ALCO, or CSKT Tribal Ordinance 64-A permit. If the PDE determines the project will not require a Section 404, ALPO, ALCO and/or CSKT Tribal Ordinance 64-A permit, the PDE ensures this determination is documented in the project file.

If the project requires a Section 404, ALPO, ALCO and/or CSKT Tribal Ordinance 64-A permit, the PDE uses the following guidance to determine applicable requirements for Tribal lands:

- Blackfeet Indian Reservation
  - 404 Permit: Apply to COE.
  - 401 Certification: NWP – Check EPA “Certification of Nationwide Permits in Indian Country Pursuant to Section 401 of the *Clean Water Act*” for requirements.  
Individual Permit – COE contacts EPA directly for Section 401 Certification.
  - ALPO permit: Apply to Blackfeet Nation Environmental Office.
- Flathead Indian Reservation
  - 404 Permit: Apply to COE.
  - 401 Certification: NWP – Check CSKT Section 401 Certification for requirements.  
Individual Permit – Apply to CSKT for Section 401 Certification.
  - ALCO Permit: Apply to CSKT Shoreline Protection Office.
  - CSKT Tribal Ordinance 64-A Permit: Apply to CSKT Shoreline Protection Office.
- Fort Peck Indian Reservation
  - 404 Permit: Apply to COE.
  - 401 Certification: NWP – Check Fort Peck Tribes’ Section 401 Certification for requirements.  
Individual Permit – Apply to Fort Peck Tribes for Section 401 Certification.
- Northern Cheyenne Reservation
  - 404 Permit: Apply to COE.

401 Certification: NWP – Check Northern Cheyenne Tribe’s Section 401 Certification for requirements.

Individual Permit – Apply to Northern Cheyenne Tribe for Section 401 Certification.

- All Other Tribal Reservations

404 Permit: Apply to COE.

401 Certification: NWP – Check EPA “Certification of Nationwide Permits in Indian Country Pursuant to Section 401 of the *Clean Water Act*” for requirements.

Individual Permit – Apply to EPA for Section 401 Certification.

Further action on any required Section 404, ALPO, ALCO and/or CSKT Tribal Ordinance 64-A permits and Section 401 Certification for work affecting Tribal lands (e.g., distributing permits, writing special provisions, coordinating with Construction, monitoring compliance) is accomplished as described in [Chapter 48 “Tracking Environmental Commitments and Permit Obligations.”](#)

### 31.3.2.2 Historic and Archaeological Resources

As discussed in [Chapter 30 “Historic and Archaeological Resources,”](#) when a project involves Tribal lands or issues, the Historian and/or Archeologist accomplish the following actions, as applicable:

- consult with the officials (elders) of affected Tribes to inform them of planned field work for identifying historic and/or archaeological sites on Tribal lands and to determine if there are any Tribal standards or guidelines (e.g., confidentiality concerns) that would affect how the work is conducted; and
- provide the Tribal officials a map or description of the Area of Potential Effects (APE), for projects subject to Section 106 of the *National Historic Preservation Act*, and other available information (e.g., survey reports, information on known sites).

As also discussed in [Chapter 30](#), when the affected Tribe has a THPO, the Historian and/or Archeologist accomplish the following additional compliance actions with the THPO\*:

- provide notification and information regarding the discovery of paleontological sites or human skeletal remains on Tribal lands;
- provide Cultural Resource Reports (CRR) for concurrence in recommended findings regarding NRHP eligibility of identified sites on Tribal land;
- provide additional information and conduct follow-up coordination to address disagreement with findings in a CRR;
- coordinate Section 106 effect findings (e.g., Finding of No Historic Properties Affected, Finding of No Adverse Effect, Finding of Adverse Effect); and

- coordinate preparation and execution of Memorandums of Agreement for addressing adverse effects on historic properties.
- \* *If the affected Tribe does not have a THPO, the Historian and/or Archeologist coordinate with the Montana SHPO in accomplishing these compliance actions.*

Additional Tribe-specific issues may be encountered. For example, on the Blackfeet Indian Reservation project contracts generally include a special provision requiring the contractor to coordinate with the Blackfeet THPO prior to ground disturbing activities to prevent disturbance of prayer cloths.

The PDE ensures any information on Tribal lands or issues, including any associated coordination with Tribal officials, is appropriately reflected in the project environmental documentation (see [Chapters 11 “Preparing Environmental Documentation,” 12 “Categorical Exclusion,” 13 “Environmental Assessment/FONSI”](#) and [14 “Environmental Impact Statement/ROD”](#)) and included in the project file.

### **31.3.3 Mitigation and Commitments**

The PDE coordinates with the DT to ensure the project plans accurately reflect any commitments associated with Section 404, ALPO, ALCO or CSKT Tribal Ordinance 64-A permits and Section 401 certifications affecting Tribal lands. In addition, the Historian and/or Archeologist coordinate with the DT to ensure that all avoidance stipulations, as well as other compliance commitments (e.g., minimization, mitigation measures) associated with Tribal lands or issues are accurately reflected in the project’s Contract Documents (e.g., construction plans, *Standard Specifications*, special provisions). To the extent possible, the PDE/Historian/Archeologist and DT should prepare the contract documents using the *MDT Standard Specifications* to minimize the need for special provisions.

During and after the project’s construction, the Historian and Archeologist monitor the activities to ensure adequate fulfillment of avoidance stipulations and other compliance commitments for historic and/or archaeological resources associated with Tribal lands, including timely completion of agreed-to mitigation reports, documents, etc. In addition, the District Environmental Engineering Specialist and other appropriate ESB personnel, monitor project implementation to ensure that all commitments regarding Tribal lands or issues are fulfilled in accordance with the approved project plans.

