

Laws and Regulations

ARMY REGULATION (AR) 200-4, Cultural Resources Management, specifies Army policy for cultural resources management. This section provides an overview of federal statutes and regulations that are applicable to the CRP at Fort Bragg and any and all real property of other federal, state, and local agencies and private parties used by Fort Bragg under license, permit, lease, or other land and/or facility use agreement. The statutes and regulations discussed are as follows:

1. National Environmental Policy Act (NEPA) of 1969
2. National Historic Preservation Act (NHPA) of 1966
3. Archeological Resources Protection Act (ARPA) of 1979 (and Antiquities Act of 1906)
4. Native American Graves Protection and Repatriation Act (NAGPRA) of 1990
5. American Indian Religious Freedom Act (AIRFA) of 1978
6. Executive Order 13007 Indian Sacred Sites, dated 1996
7. Traditional Cultural Properties (NHPA)
8. White House Memorandum dated 29 April 1994 Government-to-Government Relations with Native American Tribal Governments
9. Curation of Federally Owned and Administered Archeological Collections (36 CFR § 79)

Authority

The Installation Commander has responsibility over the extant inventory of historic properties on Fort Bragg. AR 200-4, Section 42, states that it is the responsibility of the Installation Commander to provide for the management of cultural resources in a way that maximizes beneficial effects on cultural resources and minimizes adverse effects and impacts without impeding the installation's mission. The NHPA, as amended [16 USC 470 et seq.] and its implementing regulations [36 CFR § 800] provide the legal basis for this overall cultural resources management policy. State and local cultural resources laws and regulations do not apply to federal

Army property because there has been no waiver of sovereign immunity in this area. IAW AR 200-4, the HQDA Staff Judge Advocate will be consulted whenever a question arises concerning the applicability of a state or local requirement to Fort Bragg's ICRMP. However, DoDI 4715.3 provides "federal or State conservation officials shall be given access to DoD controlled natural and cultural resources to conduct official business consistent with an installation's operational, security, and safety policies and procedures, and with applicable requirements of laws and regulations (e.g., Section 1531 et seq. of 16 USC and 36 CFR 60 (references (f) and (g))."

External Coordination Alternatives

The scope of this ICRMP includes statutes and regulations that are beyond the statutory authority of the Advisory Council on Historic Preservation (ACHP), State Historic Preservation Officer (SHPO), or Indian tribes. Specific compliance actions and procedures contained within this ICRMP relating to Section 106 of the NHPA may be addressed in Programmatic Agreements (PA) and/or Memoranda of Agreement (MOA) with the North Carolina SHPO. Specific Native American Graves Protection and Repatriation Act (NAGPRA) compliance actions and procedures contained within this ICRMP may be addressed in Comprehensive Agreements (CA) or Memoranda of Understanding with the Cherokee of Oklahoma, Eastern Cherokee of North Carolina, and the Catawba Indians of South Carolina. Coordination processes between Fort Bragg, HQDA, and other regulatory agencies and the interested public are identified the Standing Operating Procedures and the Integrated Management chapter of this ICRMP.

Policy

IAW AR 200-4(19), Installation Commanders will:

1. Establish an installation cultural resources program (CRP) by means of an ICRMP.
2. Designate, as appropriate, a Cultural Resources Manager (CRM) to coordinate the installation's CRP. For significant Native American issues, the Installation Commander will designate an installation Native American Coordinator and will ensure that the MACOM and HQDA (USAEC) are notified of such designations.

3. Establish a process that ensures the CRM coordinates with installation staff elements, tenants, and other interested parties early in the planning of projects and activities that may affect cultural resources.

4. Prepare and implement, if appropriate, an installation-wide NHPA Section 106 PA with the SHPO IAW 36 CFR § 800 to address and streamline NHPA compliance procedures for ongoing missions and operations activities that are “undertakings” as defined in the NHPA. If an installation-wide NHPA Section 106 PA is not appropriate, the commander must ensure that NHPA Section 106 compliance procedures are followed for each undertaking.

5. Ensure that cultural resources management is coordinated with the following:

- Installation training and testing activities
- Master Planning
- NEPA/environmental impact analyses
- Natural resources and endangered species and wildlife management planning to include Integrated Natural Resources Management Plans (INRMPs), Endangered Species Management Plans (ESMP), and Wildlife Management Plans (WMP)
- Integrated Training Area Management (ITAM)
- Facilities and Housing
- Forestry management and timber harvesting
- Real estate actions

6. Establish funding priorities and program funds for cultural resources compliance and management activities in the Environmental Program Requirements (A106) Report.

7. Conduct a comprehensive evaluation of the installation’s CRP as part of the environmental compliance assessment required by AR 200-1.

8. Develop, as appropriate, ICRMPs, PAs, MOAs, MOUs, NAGPRA CAs and Plans of Action, and National Register of Historic Places (NRHP)

nominations and coordinate such documents with the MACOM and HQDA (USAEC).

9. Serve as the “Agency Official” as defined in 36 CFR § 800, responsible for installation compliance with NHPA.

10. Serve as the “federal Agency Official,” as defined in 43 CFR § 10, responsible for installation compliance with NAGPRA.

11. Serve as the “federal Land Manager,” as defined in 32 CFR § 229, responsible for installation compliance with ARPA. ARPA permits are issued by the supporting US Army Corps of Engineers (USACE) Savannah District Real Estate Office upon approval by the Installation Commander. Installation Commander approval is provided by issuing the report of availability to the USACE Savannah District Real Estate Office.

12. Sign NHPA PAs, MOAs, MOUs and NAGPRA CAs and Plans of Action after MACOM and HQDA comments have been addressed.

Federal Regulations

NEPA: National Environmental Policy Act

NEPA established a decision-making process that provides for the systematic consideration of alternatives and examination of the direct, indirect, and cumulative environmental impacts associated with implementation of a proposed action. Typically, Army activities or actions that impact a cultural resource will require some level of NEPA documentation in addition to the separate documentation and compliance requirements of the applicable cultural resources statute or regulation. While the NEPA process provides an avenue to facilitate compliance with other statutory and regulatory requirements (e.g., NHPA, NAGPRA, ARPA, AIRFA), its applicability must be considered independently of these other requirements. Compliance with NEPA does not satisfy these other applicable requirements, nor does compliance with other applicable requirements satisfy NEPA’s mandates.

NHPA: National Historic Preservation Act, as amended (1992)

The NHPA established the national historic preservation program, which implements the federal government's policy on historic preservation. NHPA created a federal system for identifying and registering "historic properties," established a federal-State partnership to promote the preservation of such properties, and gave federal agencies responsibility for considering such properties when planning their actions. For the purposes of this ICRMP, the following Sections of the NHPA are relative to long-term management strategies:

1. Section 101 of the NHPA requires that the Installation Commander consult with any federally recognized Indian tribe that attaches religious and/or cultural significance to a property being considered in the Section 106 process.

2. Section 106 requires federal agencies having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking in any state to take into account the effects of their activities and programs on any historic district, site, building, structure, or object that is included or eligible for inclusion in the National Register of Historic Places. The Installation Commander must afford the Advisory Council on Historic Preservation (ACHP), established under Title II of the NHPA, a reasonable opportunity to comment on such actions [16 USC 470f]. The procedures followed in Section 106 review are referred to as the "Section 106 Process" and are set forth in regulations issued by the ACHP. The ACHP is an independent federal agency. Its role in the review of projects under Section 106 is to encourage agencies to consider and, where feasible, adopt measures that will preserve historic properties that would otherwise be damaged or destroyed. The ACHP's regulations, "Protection of Historic Properties" [36 CFR § 800], govern the Section 106 process. The ACHP does not have the authority to halt or abandon projects that will affect historic properties; rather, its regulations emphasize consultation among the responsible federal agency, the SHPO, Indian tribes and other interested parties, to identify, and, if possible, to agree upon ways to protect the affected properties.

3. Section 110 of the NHPA lays out affirmative agency responsibilities with respect to historic properties. The affirmative preservation

responsibilities in Section 110 must be balanced in a manner consistent with the installation's mission and include establishing a historic preservation program to include the identification, evaluation, and nomination of historic properties to the National Register of Historic Places in consultation with the ACHP, SHPO, local governments, Indian tribes, and the interested public, as appropriate.

Prior to acquiring, constructing, or leasing buildings, Installation Commanders must use available historic properties to the maximum extent feasible. The Installation Commander must document historic properties that will be altered or destroyed as a result of Army actions; such actions must be reviewed in accordance with the NHPA, Section 106.

Transferring properties out of direct installation control is defined as a Federal undertaking that has the potential to affect historic properties. In transferring control of Army historic properties, the Installation Commander must ensure that the significant historic values of the property are appropriately preserved. The Secretary of the Army must document decisions to proceed with Army undertakings that adversely affect historic properties when the Installation Commander has been unable to reach agreement through the execution of a Memorandum of Agreement (MOA) or Programmatic Agreement (PA) with the ACHP and the SHPO, and desires to terminate such consultations.

4. Section 111 deals with leases and exchanges of historic properties and entering into agreements for their management.

5. Section 304 calls for withholding from public disclosure information on the location, character, or ownership of a historic resources where such disclosure may cause an invasion of privacy, risk harm to the property, or impede the use of a traditional religious site by practitioners.

6. Specific Fort Bragg Section 106 and Section 110 NHPA compliance responsibilities may be accomplished through Programmatic Agreements (PA), or Memoranda Of Understanding (MOU) with the NC SHPO. PAs may identify specific installation undertakings over a five-year planning cycle. The initial draft of PAs or MOAs prepared by the CRP shall be staffed for review through MACOM to HQDA (AEC), prior to formal

coordination of the agreement with the SHPO, ACHP or consulting parties.

ARPA: Archeological Resources Protection Act of 1979 and the Antiquities Act of 1906

ARPA overlaps with and partially supersedes the Antiquities Act. It provides legal penalties for the unauthorized excavation, removal, damage, alteration, defacement, or the attempt of such acts, of any archeological resources more than 100 years old on federal lands. ARPA defines an archeological resource as any material remains of past human life or activities which are of archeological interest. Such remains include but are not limited to pottery, basketry, bottles, weapons, projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of the foregoing items. Paleontological specimens, deposits and remains are not considered an archeological resource under ARPA unless found in an archeological context.

ARPA requirements for installations:

Ensure that military police, installation legal staff, the installation Public Affairs Office (PAO), and the fish, game, and recreation staff are all familiar with the requirements and applicable civil and criminal penalties under ARPA.

Establish a program to increase public awareness of the significance of the archeological resources on the installation and the need to protect such resources.

NAGPRA: The Native American Graves Protection and Repatriation Act of 1990

The intent of NAGPRA is to ensure the protection and rightful disposition of Native American cultural items located on federal or Native American lands and in the federal government's possession or control. NAGPRA applies to all Army commands, installations, and activities, and places affirmative duties on the Army for the protection, inventory, and disposition of Native American cultural items. These requirements include existing collections that contain Native American cultural items,

as well as any newly discovered items. SOP #4 of this ICRMP describes the procedures at Fort Bragg for complying with NAGPRA. Because violation of NAGPRA may result in significant criminal and civil penalties, as well as adversely impact mission essential activities, HQDA (USAEC) has identified several areas of concern in complying with NAGPRA:

1. Neglecting to determine the full scope of installation NAGPRA responsibilities for lands that are not owned by the agency in free title (e.g., leased or withdrawn property) but are under the installation's "control" through lease or other special use permit or circumstances.
2. Assuming that because a Section 5 Inventory or Section 6 Summary report was completed under the Army-wide NAGPRA Program, that their responsibilities under NAGPRA are complete. The consultation requirements, repatriation, and other mandates set out in NAGPRA can only be met by consultations between the Installation Commander and the appropriate federally recognized Indian tribes or groups.

Planning activities that result in the intentional excavation of cultural items may be controversial. An ongoing consultation program with concerned tribes will aid negotiations in these cases. Appendix II of this ICRMP contains guidelines for Army consultation with Native Americans.

AIRFA: American Indian Religious Freedom Act of 1978

AIRFA applies the First Amendment guarantee of religious freedom to Native Americans. No implementing regulations have been promulgated. Native American religious practices that may affect the Army involve access to sacred sites, use and possession of sacred objects, and freedom to worship through ceremonies and traditional rites.

1. Although there is no affirmative responsibility to consult with Native Americans under AIRFA, complying with the meaning and intent of AIRFA can only be met by consulting with the affected tribes.
2. Consultation should identify sites necessary for traditional religious practices and the time or season during which access is required. Installation Commanders should discuss with Native Americans the terms

and restrictions on access necessary to ensure safety and national security and avoid impact to the military mission. The Installation Commander should assist in sustaining the Native Americans' privacy in practicing religious rites and ceremonies.

3. An important element in complying with the meaning and intent of AIRFA is to consult with the traditional religious leaders. This could be an issue if the traditional practitioners do not wish to be identified. During consultation with tribal government representatives, the installation should request that traditional religious leaders be made aware of the consultation and encouraged to participate.

EO 13007: Executive Order 13007, Indian Sacred Sites, 1996

EO 13007, effective 24 May 1996, provides direction to federal agencies on managing sacred Indian sites. Federal agencies are — within the constraints of the mission — required to do two things: to accommodate Indian tribes' requirements for access to and ceremonial use of sacred sites on public lands and avoid damaging the physical integrity of such sites (EO 13007, Section 1(a), May 26, 1996).

1. Under EO 13007, the installation, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, must provide access and ceremonial use of Native American sacred sites, avoid adversely impacting those sites, and maintain the confidentiality of sacred site locations.

2. "Sacred site" is defined in EO 13007 as 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.

3. Sacred sites can include but may not be limited to burial areas or graves, purification sites, healing sites, special floral and faunal, and mineral areas that contain resources used in religious ceremonies, vision quest sites such as caves or mountain tops, myth and legendary sites associated with

certain geographical landforms, and historic sites associated with specific historic events.

4. Fort Bragg has initiated consultation with the Cherokee Nation and the Catawba Indians of South Carolina to develop procedures to meet the sacred site access and protection requirements discussed above. Fort Bragg will provide reasonable notice to Native American tribes of actions that may impact the integrity of sacred sites. All Fort Bragg actions under EO 13007 will comply with the Executive Memorandum of 29 April 1994, "Government-to-Government Relations with Native American Tribal Governments." EO 13007 applies only to federally recognized Indian tribes.

5. Information relating to the location of sacred sites and their traditional uses is protected under law: "...information about the location, character, or ownership of a historic resource..." can be withheld from disclosure to the public, if the...agency determine(s) that disclosure may:

- (a) cause a significant invasion of privacy,
- (b) risk harm to the historic resources, or
- (c) impede the use of a traditional religious site by practitioners (16 USC 470w3(a)).

Moreover, the NHPA states that "...the Secretary (of the Interior) in consultation with such federal agency head or official, shall determine who may have access to the information for the purpose of carrying out this Act" [NHPA § 304(b)]. Thus, even though such information may be revealed to agency officials at the installation, the decision to reveal information regarding the location of sacred sites and/or traditional practices associated with those sites, must be made in consultation with the Secretary of the Interior.

Traditional Cultural Properties

A traditional cultural property may be defined generally as a place that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that are (a) rooted in that community's history, and (b) important in maintaining the continuing cultural identity of the community (National Register Bulletin

38:1). Traditional cultural properties are most often eligible for the National Register under National Register criterion A [36 CFR § 60.4(a)] because of their association with important events, or patterns of events, in a community's traditional history and culture. Native American sacred sites fall within the definition of traditional cultural properties. The NHPA provides very specifically that certain kinds of traditional cultural places can be eligible for the National Register, and that federal agencies have to consult with cultural communities that may value such sites [16 USC 470a(d)(6)(B)].

White House Memorandum Dated 29 April 1994: Government-to-Government Relations with Native American Tribal Governments

The White House Memorandum on Government-to-Government Relations with Native American Tribal Governments reiterates the federal government's relationship with Native American tribes as one of "government-to-government." This memorandum is applicable whenever there is interaction between federal agencies and federally recognized tribes. To implement the Government-to-Government memorandum, Installation Commanders should:

1. Afford tribal leaders the same respect as any head of state;
2. Coordinate compliance activities through the head of the tribal government;
3. Consult with the appropriate head of the federally recognized tribal government before taking actions that could impact cultural resources of importance to a tribe; and
4. Apply the requirements of EO 12875, Enhancing the Intergovernmental Partnership and EO 12866, Regulatory Planning and Review, to design solutions and tailor federal programs, when necessary, to the specific and unique needs of tribal communities.

For day-to-day activities, installation staff may interact with tribal representatives and tribal staff members, but these actions do not constitute official government to government interaction. The Installation Commander represents the United States in the government-to-

government relationship with the head of the tribal government. Many Indian tribes have developed their own internal regulations, ordinances, resolutions, and protocols for handling government-to-government relations and issues covered under specific federal cultural resources legislation. Such regulations and procedures may describe the relative authority of various tribal representatives, departments, or committees, as well as a process for consultation and preferred methods of resolving issues. The Installation Commander should request such information when first establishing a consultation relationship. Procedures for consulting with Native American tribes are outlined in SOP #16.

36 CFR § 79: Curation of Federally Owned and Administered Archeological Collections

Legislative authority for the long-term preservation and safekeeping of federally owned archeological collections includes the Antiquities Act of 1906 (P.L. 59 209), the Historic Sites Act of 1935 (P.L. 74292), the Archeological Recovery Act of 1960 (P.L. 86523), the National Historic Preservation Act of 1966 (P.L. 89665), as amended, and the Archeological Resources Protection Act of 1979 (P.L. 9695), as amended. In addition to the cited public laws, federal curation regulation 36 CFR § 79 establishes definitions, standards, procedures and guidelines to be followed by federal agencies in the management and preservation of archeological and historical collections recovered from federal properties under their immediate jurisdiction. The implementation of the guidelines and standards presented in 36 CFR § 79 provides a mechanism for the preservation and conservation of the material culture and documents (ie., architectural drawings) associated with the Fort Bragg military reservation, and also provides the basic framework to gain intellectual control over the Fort Bragg archeological collection. Such control is essential to meeting the requirements of the Native American Graves Protection and Repatriation Act (P.L. 101601; 104 Stat. 3048; 25 USC 300113). Commonly referred to as NAGPRA, this law provides a mechanism for the repatriation of Native American skeletal remains, funerary objects, sacred objects, and objects of cultural patrimony recovered from federal properties that are held currently by federal agencies. If cultural affiliation can be established between recovered remains of a culturally identifiable prehistoric or historic aboriginal population and a present-day federally recognized Indian tribe, or if the

lineal descendants can be established and request repatriation of the remains, then it is incumbent upon the federal agency to expeditiously repatriate those remains. Determination of potential cultural affiliation may be difficult or impossible, however, unless recovered artifact collections and their associated documentation can be located, identified, assessed and evaluated. Only then can the reconstruction of the background and history of their deposition and recovery be achieved. Thus, compliance with the inventory, cataloging and accession requirements within 36 CFR § 79 remains a continuing responsibility and challenge to the CRP manager at the installation level. Specific curation procedures are contained within the curation section of this ICRMP.

Department of Defense Regulations

32 CFR 229: Protection of Archeological Resources

The regulations in this part implement DoD provisions of ARPA of 1979, as amended (16 USC 470aamm) by establishing the uniform definitions, standards, and procedures to be followed by all federal land managers in providing protection for archeological resources, located on public lands and Indian lands of the United States. SOP #3 states the procedures for complying with ARPA.

DoD Instruction 4715.3: Environmental Conservation Program

All DoD conservation programs shall work to guarantee continued access to land, air, and water resources for realistic military training and testing while ensuring that the natural and cultural resources entrusted to DoD care are sustained in a healthy condition for scientific research, education, and other compatible uses by future generations. All DoD facilities and installations shall within available resources plan, program, and budget to achieve, monitor, and maintain compliance with all applicable statutes and regulations.

Internal conservation self-assessments shall be conducted at least annually and external conservation self-assessments at least once every 3 years at all installations that require an Integrated Natural Resources Management Plan (INRMP) and/or an Integrated Cultural Resources Management Plan (ICRMP).

The principal purpose of DoD lands and waters is to support mission-related activities. Those lands and waters shall be made available to the public for educational or recreational use of natural and cultural resources when such access is compatible with military mission activities, ecosystem sustainability, and with other considerations such as security, safety, and fiscal soundness.

Native Americans shall have access to DoD sites and resources that are of religious importance, or that are important to the continuance of their cultures (e.g., areas containing traditionally used plants and traditionally used hunting areas), consistent with the military mission, appropriate laws (42 USC 1996, reference (d)), and regulations, and subject to the same safety, security, and resources considerations as the general public.

Personnel assigned duties involving natural or cultural resources shall have the appropriate knowledge, skills, and professional training and education to carry out those responsibilities. Necessary supplemental training to ensure that proper and efficient management of those resources shall be provided quickly.

Army Regulations

AR 200-4

This regulation has been recently revised from AR 420-40, updating the Army's policy concerning the management of cultural resources to meet legal compliance requirements and support the military mission.

Revisions of AR 420-40 included in AR 200-4 are as follows:

- The transfer of responsibilities previously assigned to the Assistant Chief of Engineers to the Assistant Chief of Staff for Installation Management (1-5).
- Provides Installation Commanders greater authority for compliance with cultural resources legal requirements by establishing an Installation Cultural Resources Management Program (1-9). The Installation Commander will ensure that all cultural resources technical work is conducted by individuals who meet the applicable

professional qualifications standards established by the National Park Service in 36 CFR 61, Appendix A.

- Reflects new emphasis on Native American affairs by establishing set guidelines and policies to be followed (2-4, 2-5, 2-8).
- Establishes new policy for preparation of and staffing procedures for cultural resources compliance agreements (3-1, 3-3).
- Establishes new policy for Integrated Cultural Resources Management Plans (4-1). Each installation must create and implement a five-year plan to integrate compliance among the various independent cultural resources legal requirements. The ICRMP shall include, but is not limited to, a planning level survey of existing information, a prioritized plan for field inventory, and internal standing operating procedures for consultation, survey inventory, evaluation, treatment, recordation, monitoring, emergency or inadvertent discovery, reporting, etc., tailored for the particular conditions and specific requirements at the installation.
- Establish new policy for metal detecting activities, by prohibiting such activities unless carried out under an ARPA permit or by CRP staff or contracted cultural resource compliance activities.