

# TRIBAL CONSULTATION AND CULTURAL RESOURCES MANAGEMENT PRACTITIONER'S PANEL

Wednesday, August 15, 2018

1:30pm – 3:00pm

Room Midway 7/8

St. Louis, MO



Sustaining Military Readiness Conference  
Restoring Readiness Through Planning and Partnerships



# Session Panelists

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## Facilitators:

- Michelle Volkema, Deputy Federal Preservation Officer, DoD
- Alicia Sylvester, Senior Advisor and Liaison for Native American Affairs, DoD

## Panelists:

- John McDonagh, Associate General Counsel, DoD Office of General Counsel for Environment, Energy, and Installations
- Kathleen McLaughlin, Deputy Federal Preservation Officer, U.S. Army
- Justin Buller, Associate Deputy General Counsel, U.S. Army
- Kate Kerr, Program Analyst, Advisory Council on Historic Preservation (ACHP)



# Welcome

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



## Legislative Mandate for Tribal Consultation

- **Treaties**
- **National Historic Preservation Act 1966 (NHPA)**
- **National Environmental Policy Act (1969)**
- **American Indian Religious Freedom Act 1978 (AIRFA)**
- **Archaeological Resources Protection Act 1979 (ARPA)**
- **Native American Graves Protection and Repatriation Act 1990 (NAGPRA)**
- **Religious Freedom Restoration Act 1993 (RFRA)**
- **36 CFR 800 (NHPA)**
- **40 CFR 1500-1508 (NEPA)**
- **E.O. 13007 (Indian Sacred Sites)**
- **32 CFR 229 (ARPA)**
- **43 CFR 10 (NAGPRA)**
- **E.O. 13175 (Consultation with Tribal Governments)**



## Challenges and Successes Based on Lessons Learned

### *CHALLENGES*

- Training Maneuvers in un-surveyed lands resulting in Adverse effects
- Post Review Discoveries of NAGPRA [No POA in-place]
- NAGPRA Reburial in area of incompatible use
- Impacts to Sacred Sites from live fire training/bombing [Historic/Ongoing]
- Construction on range within TCP viewshed \*
- Training that prevents cultural access \*
- Range clean-up to facilitate access \*
- Legally insufficient agreements [Unenforceable]

### *BEST PRACTICES*

- Consultations to develop Programmatic Agreements covering routine training actions (10 yr duration)
- Advance NAGPRA consultation & written POA
- NAGPRA consultations to resolve cultural identity and repatriate collections
- NAGPRA consultations to identify compatible use area for reburial of collections & discoveries
- Consultation protocol outlining resource types of interest; geographic locations of interest; and processes to follow
- Access agreement outlining who has access; type of access; timing of access requests, etc.

\*Tribes and NHO have successfully sued pursuant to NEPA, NHPA, and RFRA



# Consultation Requirements



- **How to consult?**
  - Invite consultation with tribes/NHO on undertakings that may affect protected tribal resources, tribal rights, or Indian lands
  - Invite consultation with Tribes on a government-to-government basis
  - Consult in accordance with requirements of applicable legislation and signed agreement documents
- **When to consult?**
  - Consult early to ensure meaningful consideration of comments with the ability to affect the decision
- **What tribes do NOT do**
  - Approve or disapprove a federal undertaking (unless effects on tribal lands or affecting tribal treaty rights on installation lands)



# Participants Roles



## Installation

- **Installation Staff (CRM, Project proponent, DPW, Legal, etc)**
  - Determines the undertaking
  - Initiates and carries out the consultation process (4 Steps)
  - Makes determinations at key points
  - Requests concurrence from regulators/mitigates as required
  - Proceed with undertaking
- **Command Staff**
  - Reviews documents for legislative & policy compliance
  - Approve or disapprove proposed mitigation
- **HQ**
  - Reviews contentious consultations
  - Informs leadership (Secretariat and OSD as necessary)
  - Consults with regulators, Commands, and installation to reach agreement and conclude process



# Participants Roles



## SHPO

- **What does it do?**
  - Consult with agencies on undertakings that may affect historic properties
  - Advise and assist agencies in carrying out their preservation responsibilities
  - Consult on sufficiency of plans to protect, manage, reduce, or mitigate harm to historic properties
  - Opines on agency determinations within Sec 106 process/timeframes
- **What it does NOT do**
  - Make determinations of effect
  - Approve or disapprove a federal undertaking





# Participants Roles



## ACHP

- **What does it do?**
  - Mediates between local historic preservation interests and Federal officials when federal action has potential for adverse effect to historic properties
  - Ensure that NHPA Sec 106 review process allows stakeholders a voice in Federal decisions that impact historic properties
  - Provide advice to President, Congress on historic preservation and recommend legislative and/or administrative improvements
  - Education of stakeholders about historic preservation
  - Provide implementing regulations for NHPA Sec 106 at 36 CFR Part 800
- **What it does NOT do**
  - Referee on conflicting opinions of eligibility
  - Approve or deny projects with potential impacts to historic properties



# Participants Roles



## Tribes/NHO

- **When/how to consult?**
  - Consult tribes on a government-to-government basis
  - Consult with tribes/NHO on undertakings that may affect protected tribal resources, tribal rights, or Indian lands
  - Consult in accordance with requirements of applicable legislation
  - Consult early to ensure **meaningful** consideration of comments with the **ability to affect or modify the decision**
- **What tribes do NOT do**
  - Approve or disapprove a federal undertaking (unless effects on tribal lands or affecting tribal treaty rights on installation lands)



# Conclusions



## Challenge

- Disturbance or destruction of cultural resources on training lands is a violation of Federal law(s), and could be easy to do if you are not thinking about it. It can result in lengthy and expensive work stoppage and litigation as well as career implications.

## Solution

- As early as possible in the planning stages to build, alter, dispose of, dig, or train. .
  - - Consult with your installation cultural resources experts to ensure that you are not disturbing cultural resources, and
    - Document your administrative record that you have taken appropriate steps to comply with all requirements and mitigate the damage.



# Best Practices



- Advance Planning & Coordination with installation CRM
- Develop Predictive/Significance Models with consulting party input
- Explain mission requirements and potential affects to historic properties
- Develop PA for routine training activities
  - Exclusionary/mitigative/combination
- Maintain GIS with survey areas, sites, UXO, previous ground disturbance, constraints, etc.
- Briefings and handouts prior to training events
- Site protective measures (Seibert stakes, natural topography/boulders, fencing, site hardening)



# Army Environmental Program Division



- **TYPES OF TRAINING**

- Maneuver
- Non-Vehicle
- Navigation
- Bivouac
- Digging/Earthworks
- Drop Zone

- **TYPE OF IMPACTS**

- Direct
- Indirect
- Cumulative
- Access



# Consultation is always Pre-Decisional



- **Requires Consensus**
  - On tribal land
    - NHPA
    - NAGPRA
  - On agency lands
    - Tribal treaty rights
- **Requires Federal Agency take into consideration**
  - Off tribal lands
    - ARPA
    - NHPA
    - NAGPRA
    - AIRFA/EO 13007
    - RFRA
- **Federal Agency makes decision**
  - RFRA



# Army Environmental Program Division

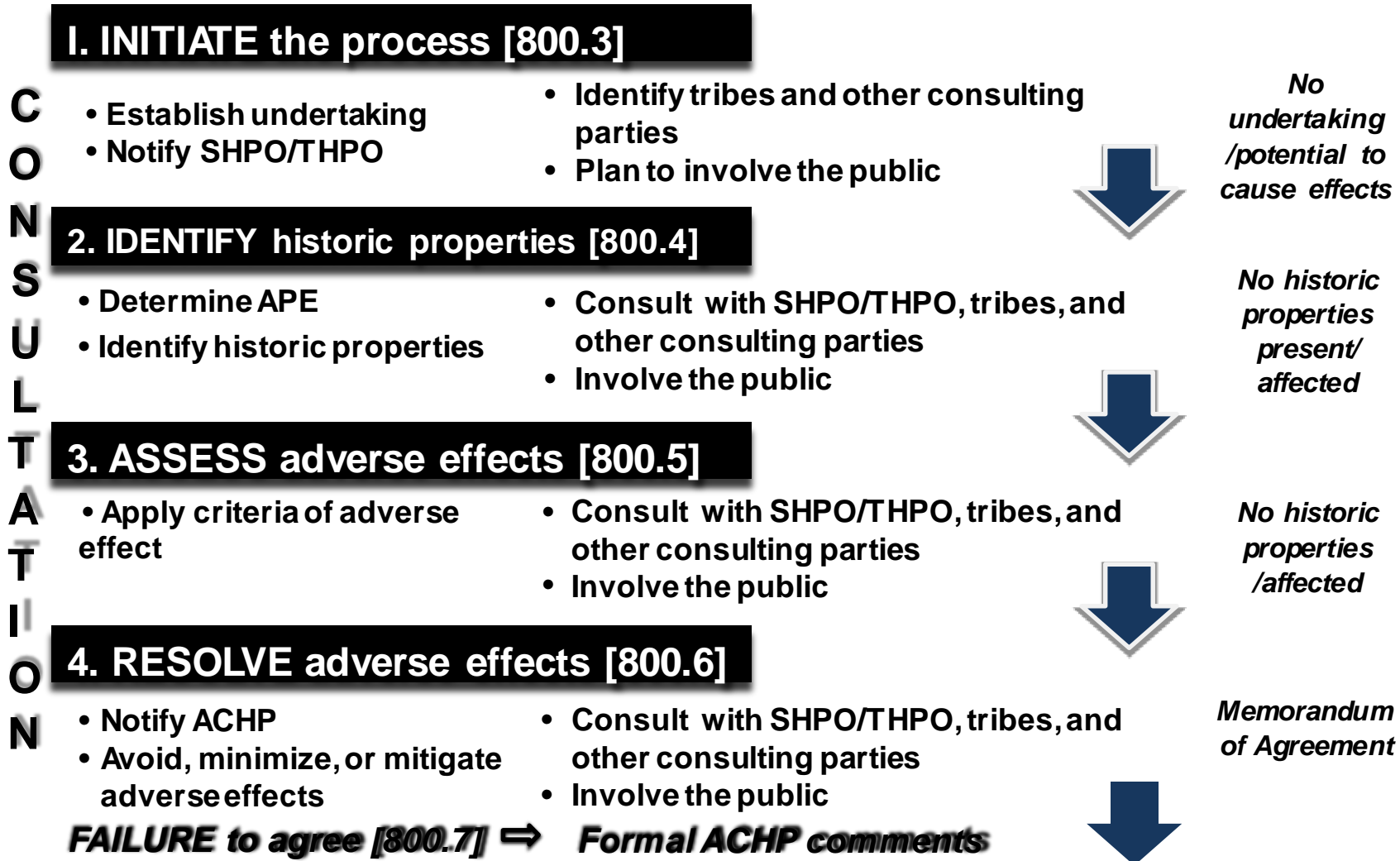


## Consultation Requirements

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# SECTION 106 PROCESS



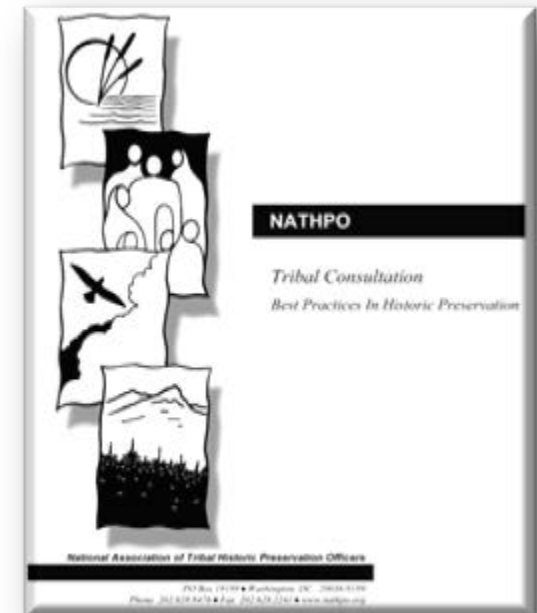




# Tribal Consultation Best Practices



- Coordinate compliance with all applicable statutes
- Early consultation (ASAP)
- Sensitivity to cultural values
- Do **NOT** get involved in tribal politics
- Respect treaty rights
- [https://www.nps.gov/history/tribes/Quick\\_Guides.htm](https://www.nps.gov/history/tribes/Quick_Guides.htm)





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# **DoD and Component Cultural Resources and Tribal Consultation Policies**

Presented by:

John A. McDonagh  
Associate General Counsel  
Environment, Energy, & Installations  
Office of the General Counsel  
Department of Defense



# DoDI 4715.16 – “Cultural Resources Management”

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- Purpose
  - Establishes DoD policy and assigns responsibilities to comply with statutes, regulations, and executive pronouncements for the integrated management of cultural resources on Defense-managed lands
- Scope
  - Applies to all DoD Components
  - Applies to all DoD operations, activities, and real property in the US (including withdrawn lands)



# DoDI 4715.16 – “Cultural Resources Management”

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It is DoD policy to:

- Manage and maintain cultural resources under DoD control in a *sustainable manner* through a *comprehensive CR program*
- Consult in good faith with internal and external stakeholders
- Promote partnerships to manage and maintain cultural resources



# DoDI 4715.16 – “Cultural Resources Management”

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## Key Responsibilities:

- *Integrate* cultural resources planning processes with broader installation management systems, planning activities, and processes
- *Use Integrated Cultural Resource Management Plans (ICRMPs)* as the DoD instrument for CR compliance assurance
  - *Ensure coordination* of ICRMP with installation training and development planning functions.
  - Establish a *systematic process* to identify and evaluate CRs
- *Build* stable and enduring *relations with Tribes and NHOs*
- *Provide* Tribes and NHOs with *access to sacred sites* on DoD-managed lands “to the extent practicable...and not clearly inconsistent with the military mission.



# DoD Component Cultural Resources Management Policies

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- Department of the Army Regulation 200-1, “Environmental Protection and Enhancement”
- Department of the Navy SECNAVINST 4000.35A, “Cultural Resources Program”
- Department of the Air Force Instruction 32-7065, “Cultural Resources Management”



# DoDI 4710.02

## *14 Sept 2006*

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- Formalizes DoD's 1998 AI/AN Policy
- Establishes principles & practices for “meaningful” consultation
  - Consult on *all proposed actions* with potential to significantly affect tribes
  - Consult on *ICRMPs and INRMPs*
  - Develop and memorialize *tribe-specific process* for consultation
  - *Consult early* – when decision may be impacted



# DoDI 4710.02

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- The Guidance establishes expectations that Tribal consultations will be –
  - *Conducted at the installation level*, between the installation commander and the tribal leader, as well as among the staff level contacts they designate
  - *Part of an ongoing effort* to maintain an effective working relationship with each tribe culturally or historically affiliated with installation-managed lands
  - *Initiated as early as possible* in the process of planning a proposed action





# DoDI 4710.02 – Pending Revision

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- DoDI 4710.02 (2006) version currently undergoing update
  - Anticipate publication of revised version in 2018
  - Updated DoDI will be discussed at future sessions of the DoD-sponsored AICCC Course offered annually to Military Departments
  - DoD will promote Tribal awareness of updated DoDI through dissemination via tribal organizations/contacts and DENIX website



# DoDI 4710.02 – Pending Revision

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- Revised DoDI will provide additional clarity regarding --
  - *Circumstances* triggering consultation
  - Appropriate *topics* for consultation
  - Consultation *timing/scheduling*
    - Must be meaningful AND pre-decisional
  - *Who to involve* in consultation
  - Considerations regarding *tribal protocols*
  - Addressing *culturally sensitive information*
  - *Recording* consultation results



# DoDI 4710.03 – Consultation With Native Hawaiian Organizations

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- Establishes policies/responsibilities for consultation with NHOs
- Recognizes special status afforded NHOs through Federal laws, regulations, and policy
- Requires DoD Components to –
  - *Conduct “meaningful” consultation with NGOs* to avoid or minimize the effect of DoD actions on sites of traditional religious or cultural importance
  - *Integrate consultation activities into mission activities* in order to facilitate early and meaningful consultation
  - Develop consultation procedures and provide cultural communications training



# DoDI 4710.03 – Consultation With Native Hawaiian Organizations

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- Provides MILDEPs with direction re conduct of consultations
  - *When* to consult
  - *Whom* to consult
  - *How* to consult
  - Accommodating NHO *access to sites* of traditional religious and cultural importance
  - Developing *written agreements* to promote effective consultation –
    - Agreements to protect confidential/sensitive information
    - Agreements w/ HI SHPO to address effects of proposed DoD undertakings



# Component Consultation Policies

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- Army – AR 200-1 and Secretary of the Army Policy Memorandum: American Indian and Alaska Native Policy. (2012).
  - Echoes principles of DoDI 4710.02
  - Establishes Army consultation policy and implements DoDI at all Army organizational levels
- Navy –SECNAVINST 11011.14A. (2005)
  - Echoes principles of DoDI 4710.02.
  - Establishes Navy policy, responsibilities, procedures, and guidelines for consultation and related relationships with tribes.
  - Commits Navy to training personnel responsible for consultation activities
  - Provides guidance on planning for effective consultation and documenting consultation results



# Component Consultation Policies

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- Marine Corps – MCO P5090.2A (2009).
  - Consultation policy is outlined in the 2009 Appendix to the *Environmental Compliance and Protection Manual's* chapter on “Cultural Resources Management.”
  - References DoDI 4710.02 and SECNAVINST 11011.14A.
  - Commits to establishing a “permanent relationship” with American Indian and Alaska Native tribes and Native Hawaiian Organizations (NHOs) to identify and address resources management concerns.
  - Commits to engage tribes and NHOs as early as possible in the project planning process
  - Commits to respect the confidentiality concerns of tribes and NHOs regarding sensitive cultural information shared during consultations.



# Component Consultation Policies

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- Air Force – AFI 90-2002.
  - First published in 2014
  - Requires Air Force installation commanders to meet at least twice per year with the leader of each tribe culturally or historically affiliated with installation-managed lands.
  - Each commander must appoint an Installation Tribal Liaison Officer.
  - Every installation must develop a Tribal Relations Plan including key contacts and established protocols.
  - Each installation must annually submit a report to Air Force HQ on consultation activities for the previous year addressing compliance with law, DoD policy, and Air Force policy.



# Maintaining Confidentiality of Sensitive Information

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## *Why Care About Confidentiality in Consultations?*

- Provide Protection
  - Privacy: Protection against invasions of privacy
  - Harm: Protection against harm to the resource
  - Use: Protection of traditional use (e.g. religious ceremonies)
- Demonstrate Respect
- Promote Confidence, Credibility, & Constructive Dialogue
- Laws and Policies say so





# **OASD(EI&E) Memorandum, *Guidelines on Maintaining the Confidentiality of Information about Indian Sacred Sites* (23 Mar. 2018)**

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- *Don't request info re sacred site locations unless absolutely necessary – and instruct consultants & contractors not to do so.*
- *Where SS potential exists, collect info only in general terms (e.g., w/in broad "Area of Sensitivity")*
  - *Avoidance Strategy: Where practicable, plan actions so as to avoid AoS (w/o need to know specific SS location)*



# OASD(EI&E) Memorandum, *Guidelines on Maintaining the Confidentiality of Information about Indian Sacred Sites (23 Mar. 2018)*

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- Where it's absolutely necessary to obtain specific/detailed SS info:
  - Consult orally
  - Document that consultation took place
    - Note meeting and site visit times & dates
  - Document that consultation ➔ AoS identification
  - Share AoS (in broad terms) w/ installation planners
- In response to disclosure requests:
  - NHPA § 304 and/or ARPA § 9 may provide legal authority to withhold sensitive SS information
  - The duty to withhold information is non-discretionary *if* statutory prerequisites are met.



# *Confidentiality Under NHPA § 304*

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- NHPA § 304 provides limited authority for an agency to withhold information concerning a historic property when releasing the information may --
  - Cause a *significant invasion* of *privacy*,
  - Cause *risk of harm* to the historic property, or
  - Impede the *use* of a *traditional religious site* by practitioners.
- If the NHPA § 304 prerequisites are met, agency has authority to withhold information regarding the historic resource's --
  - Location,
  - Character, and
  - Ownership



# *Confidentiality Under ARPA § 9*

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--A Straightforward Confidentiality Provision--

**ARPA § 9 requires that *managers responsible* for the protection of archeological resources hold information about the *locations 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.**



# Maintaining Confidentiality of Sensitive Information *Summary*

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- We address confidentiality issues in the consultation context because it's the right thing to do, the smart thing to do...and it's required by law & policy.
  - NHPA § 304: A *convoluted* confidentiality provision with *broad coverage*.
  - ARPA § 9: A *straightforward* confidentiality provision with *narrow coverage*.
  - NAGPRA: No confidentiality provision, but NAGPRA § 3 *loops in ARPA § 9*.
- Early issue identification, consideration, and engagement essential.
  - Establish and maintain positive relationships with tribes/NHOs.
  - Consider using early-stage NHPA § 106 agreements (CPs).
- When dealing with sensitive information:
  - Don't ask for information about sacred sites unless you need it
  - Don't ask for discrete/specific locational information if more general locational info will enable you to make an informed decision.
  - Don't record discrete/specific locational information in writing unless absolutely required to do so to support a key decision.
  - Don't over-promise – you can't always guarantee confidentiality.
  - Please don't hesitate to reach out when you need assistance.



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# **How Proactive Planning and Meaningful Consultation Supports Range Management – Overview of Expert’s Relevant Case Study**

Presented by:

Katharine R. Kerr

Program Analyst

Advisory Council on Historic Preservation



# Infantry Platoon Battle Course

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- United States Army Garrison, Hawaii at the Pohakuloa Training Area
  - Originally an Infantry Platoon Battle Area
    - IPBC
    - Live-fire Shootouse
    - MOUT
  - Three locations considered
    - Western Range (preferred location)
    - Charlie's Circle
    - TA 20

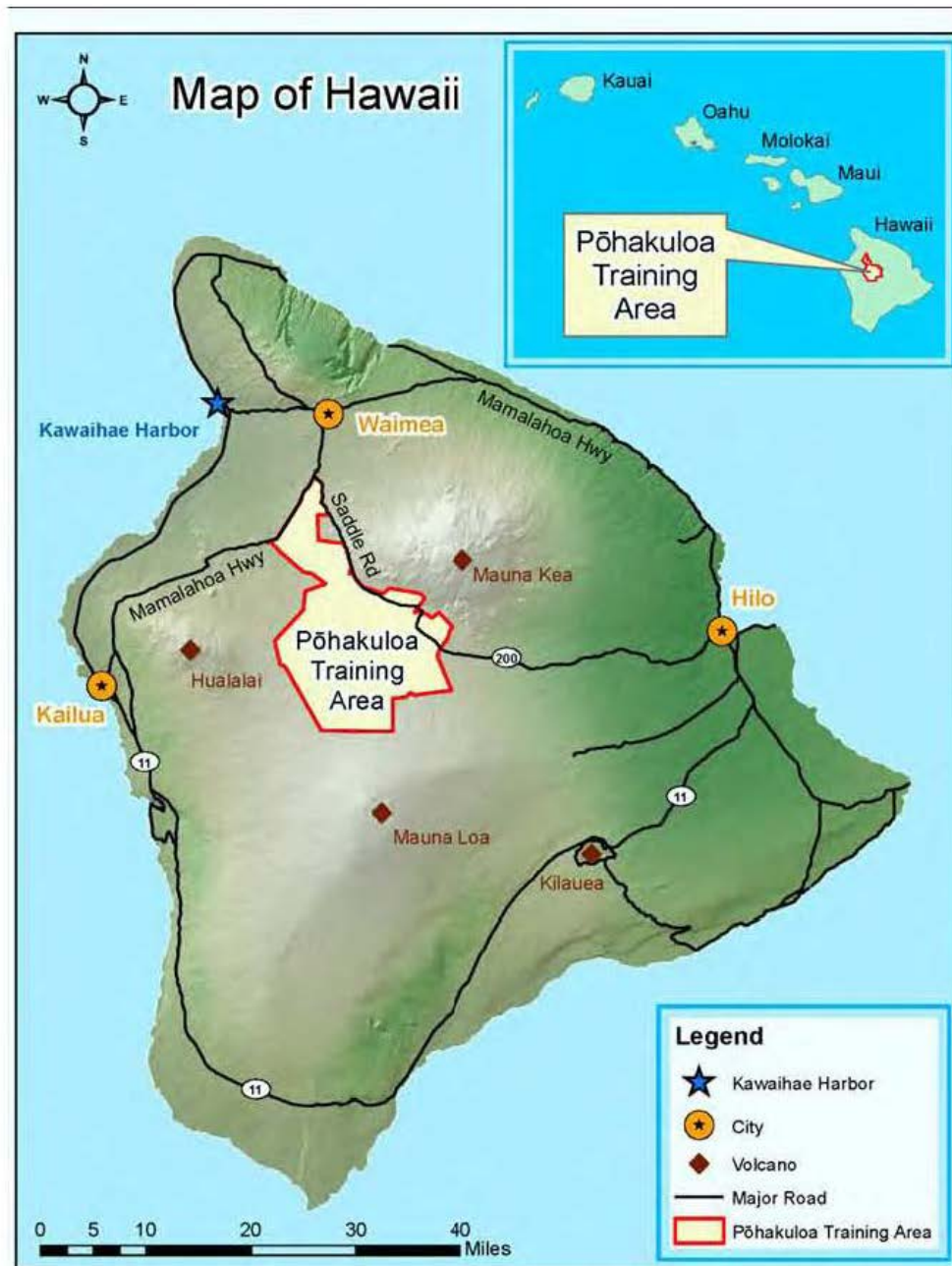


Figure from 2012 draft PEIS, U.S. Army

Figure 1.3-1. Map showing PTA on the Hawai'i Island



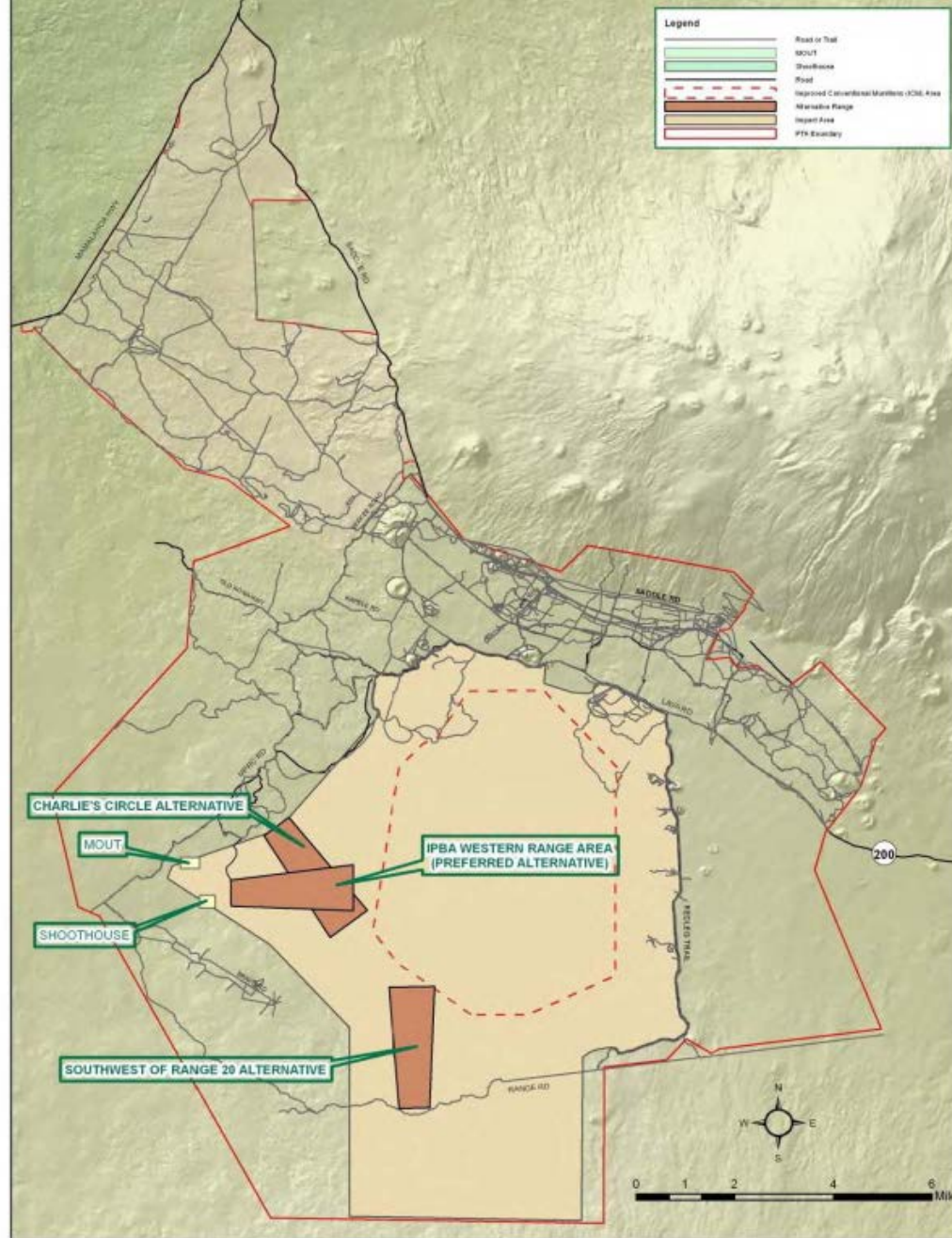


Figure 2.2-2. IPBA Alternatives

Figure from 2012 draft PEIS, U.S. Army



# Why did the ACHP participate?



Chapter 2 Description of the Proposed Action



Figure 2.2-3. Terrain of the Western Range Area showing an a'a flow



Figure 2.2-4. Panoramic view of Western Range Area



Figure 2.2-4. Panoramic view of Western Range Area

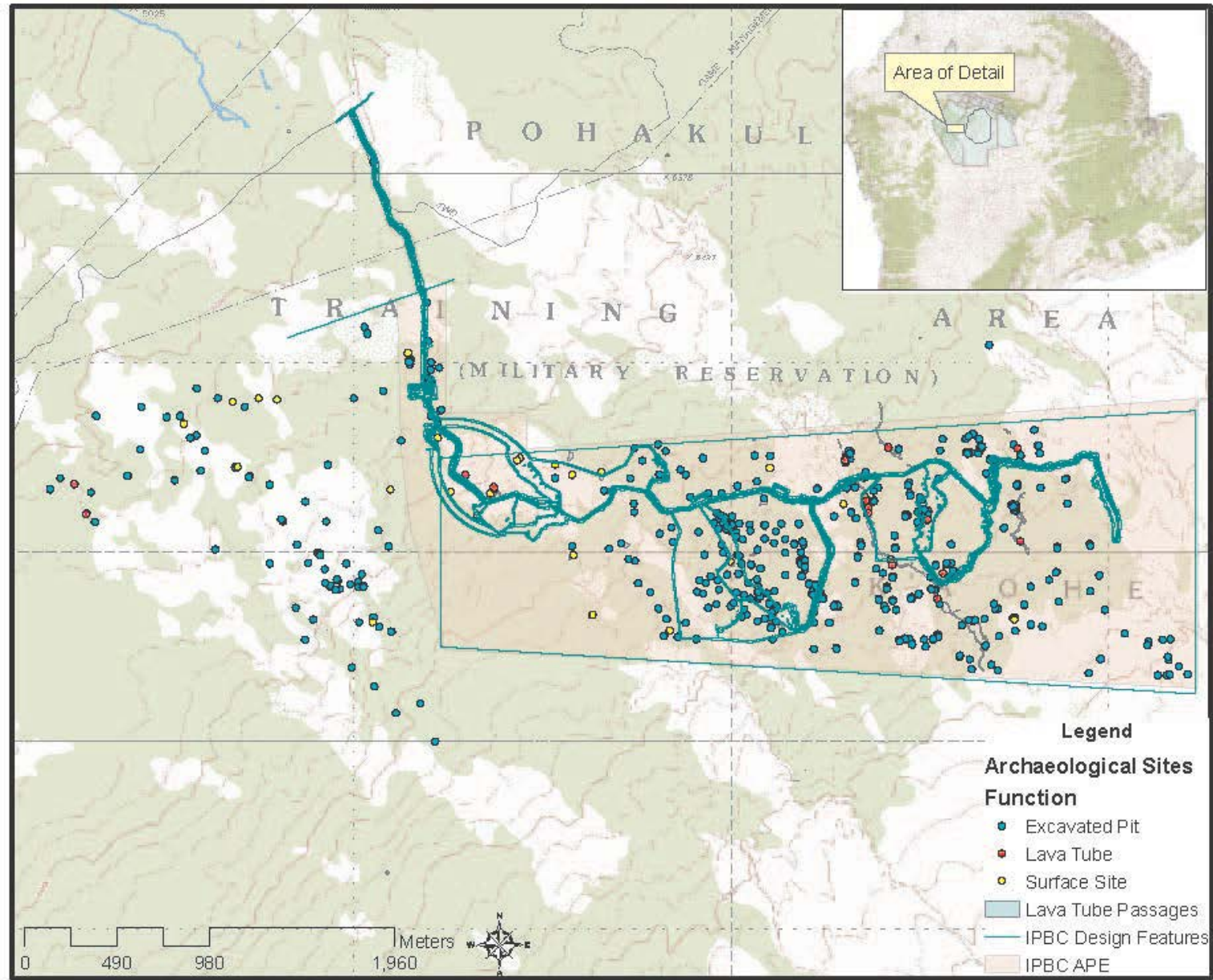
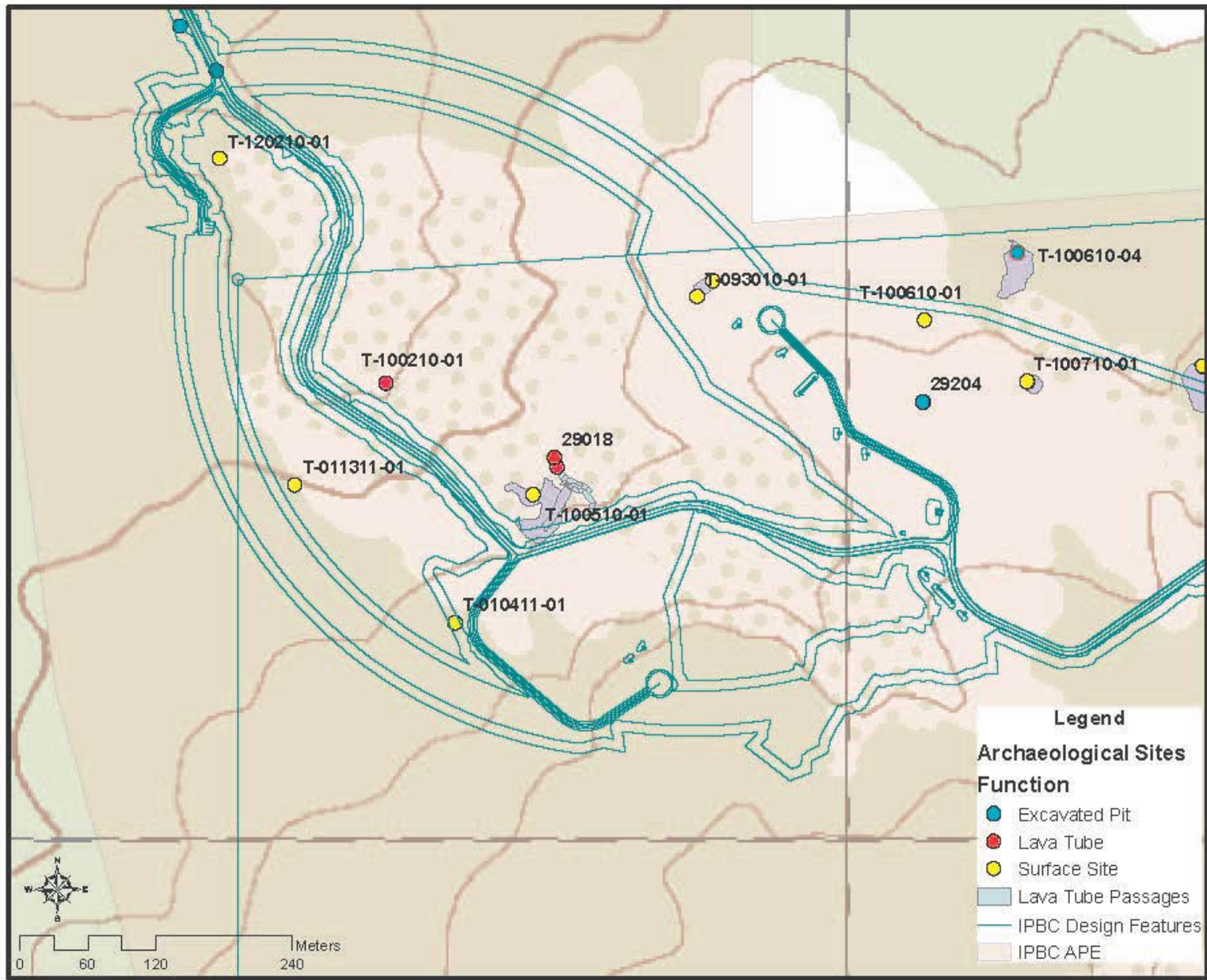


Figure from 2012 draft PEIS, U.S. Army





# Consultation: Development of PA

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- Three phases
  - Pre-construction
  - Construction
  - Post construction
- Mitigation measures
  - Additional survey
  - Significance standards
  - Tours
  - Operational monitoring



# Case Study

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## A NAGPRA Case Study: Challenges and Best Practices

Justin Buller

Associate Deputy General Counsel, U.S. Army

and

Kathleen McLaughlin

Deputy Federal Preservation Officer, U.S. Army

# Tribal Consultation and CRM Practitioner's Panel

## Challenges and Successes Based on Lessons Learned

### *CHALLENGES*

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# Q & A with the Session Panelists