

## ELD/AEC COMMENTS

### ON AN INSTALLATION

#### CULTURAL RESOURCES COOPERATIVE AGREEMENT

Document should be named a "cooperative agreement" for consistency with the authorizing legislation, Army Regulation 200- 1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, and past practice.

The term "paleoenvironmental resources" should not be included in the express purpose section of the agreement. The authorizing legislation for the cooperative agreement, National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, §2862, 110 Stat. 2422 (1996), allows execution of cooperative agreements for management of cultural resources. The Department of the Army, in the draft and soon to be released, Army Regulation 200-4, CULTURAL RESOURCES MANAGEMENT (AR 200-4) , defines cultural resources to include "archeological resources." That definition does not include "paleoenvironmental resources." The implementing regulations to the Archeological Resources Protection Act (ARPA); however, define "archeological resources" in a manner that would likely cover "paleo-environmental resources." 43 C.F.R. §§7.3(a)(2)(iv)-(x) (1996).

The following legal requirements may be triggered by activities undertaken pursuant to the cooperative agreement. Procedures for compliance should be included in the Agreement:

(1) The cooperator may need to obtain a permit pursuant to ARPA and its implementing regulations if the cooperator excavates archeological resources. Draft AR 200-4, Section 2-6, provides permitting procedures with reference to applicable statutes and regulations. Issuance of permits is generally an Installation Commander responsibility that is carried out through the support of a USACE District Real Estate Office.

(2) The cooperator may need to comply with the procedures for dealing with the intentional excavation or inadvertent discovery of "cultural items" as defined by the Native American Graves Protection and Repatriation Act (NAGPRA) and its implementing regulations. See 25 U.S.C. §§3001 et seq.(1994); 43 C.F.R. §10 (1996). Draft AR 200-4, Section 2-5, establishes procedures for complying with these requirements.

(3) To the extent that the cooperator may impact traditional cultural properties (TCPs) or other sites of historic significance, the requirements for

consultation pursuant to the National Historic Preservation Act (NHPA), Section 106, and its implementing regulations may be triggered. See 16 U.S.C. 470 (1994); 36 C.F.R. §800 (1996). Draft AR 200-4, Section 2-3, establishes procedures for consulting.

(4) Archeological resources excavated pursuant to the cooperative agreement must be managed in accordance with the requirements of 36 C.F.R. §79 (1996) and Draft AR 200-4, Section 2-7.

(5) If activities undertaken pursuant to the cooperative agreement require coordination with Federally recognized Indian Tribes, communications must occur consistent with the "Presidential Memorandum for Heads of Executive Departments dated April 29, 1994: Government to Government Relations with Native American Tribal Governments", referenced in Draft AR 200-4, Section 2-8.

(6) The proponent should review proposed activities under the cooperative agreement to determine whether such activities trigger the environmental impact analysis process set forth in the National Environmental Policy Act (NEPA), the regulations published by the Council on Environmental Quality, and Army Regulation 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIVITIES. See 42 U.S.C. §§ 4321 et seq.(1994); 40 C.F.R. H1500-1508 (1996).

The Agreement should be consistent with ARPA, to require that an item shall not be treated as an archeological resource - unless it is a minimum of 100 years old.

With respect to the cooperative agreement's treatment of Installation responsibilities, we suggest the following:

(1) The Agreement should require coordination with "culturally affiliated Federally recognized tribes."

(2) The Installation should take steps to ensure that the cooperative agreement is carried out consistent with the requirements of any existing or prospective Integrated Cultural Resource Management Plan (ICRMP) and Integrated Natural Resource Management Plan (INRMP) for the installation.

(3) The Installation should also be responsible for processing and issuing the appropriate ARPA authorization for excavation of archeological resources prior to allowing ground-disturbing activities on post. The cooperators are responsible for applying for and obtaining necessary authorization.

(4) The Installation should also be responsible for Native American notification and consultation under NAGPRA, consultation under Section 106 of the NHPA, any environmental documentation required by NEPA; and, proper management of archeological resources.

The proponent should consider whether, and to what extent, the cooperator should provide the resources necessary to achieve compliance with the legal requirements of the Installation as discussed above.

The cooperative agreement should contain a property rights clause that ensures that the Installation remains the owner of any archeological resources collected and any other data generated as a result of this effort. As presently drafted, the agreement merely allows the installation access to "books, papers, and documents ... related to this agreement. The cooperator should receive appropriate licenses and/or authorizations to utilize resources and data generated under the agreement.