



CONSULTATION WITH NATIVE AMERICANS

A HISTORIC PRESERVATION RESPONSIBILITY

Every Federal
Agency is responsible
for “government-
to-government”
relationships with
Indian Tribes.

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MUST AGENCIES CONSULT?

Yes. The Federal government and Indian tribes have a special political relationship that is “government-to-government.” The basis for this is in the Constitution of the United States (Article 1, Section 8), which recognizes tribes as sovereign. The United States Supreme Court affirmed and clarified the unique relationship in 1831 in the doctrine of “dependent domestic nations.”

The responsibility to develop and maintain formal relationships with tribes has always been part of our nation’s history. Treaties between the United States and Indian tribes have been one of the ways we recognized sovereignty and the right of self-government. Executive Order 13175 (November 2000) requires each Federal agency to establish programs that describe and maintain the consultative relationship with tribes on matters that have substantial direct effects on them.

IS CONSULTATION ONLY ABOUT GIVING NOTICE OF PROJECTS?

No. That’s not enough. Indian tribes are not just part of a list of “interested” parties. Consultation is a specific element of the “government-to-government” relationship and has unique characteristics. Regular and meaningful consultation, particularly about impacts of policies or actions, is central to the mutual respect inherent in recognition of sovereignty.

Over the years there have been many kinds of legal documents that describe the process of consultation as ongoing. To accomplish this, every Federal agency should ensure that the Agency Tribal Liaison, the Federal Preservation Officer, agency decision-makers and other appropriate personnel work together to develop and carry out a consultation policy and protocols in collaboration with Indian tribes. Consultation is part of the on-going mission of every Federal agency.

WHAT DOES THIS MEAN WHEN CONSULTING ABOUT CULTURAL RESOURCES?

- Consultation must take place according to the general policies and programs developed by each Federal agency to establish and maintain its government-to-government relationships with tribes.
- Each agency must designate the officials responsible for conducting government-to-government relationships. In some agencies, this may be the Federal Preservation Officer (FPO) who is charged with statutory responsibilities for developing, maintaining, and implementing cultural resource programs, consistent with their agencies’ respective missions [National Historic Preservation Act]. FPO responsibilities may also include development of procedures for carrying out consultation with federally recognized American Indian tribes and Alaska Native villages; and, with Native Hawaiian organizations.

- Agency protocols for consultation about cultural resources should be incorporated into regulations, manuals, orders, or instructions that consider the agency’s mission and how that conditions the government-to-government relationship.



Representatives of the Eastern Band of Cherokee Indians of North Carolina, the North Carolina State Conservationist, the South Carolina State Conservationist, and the Natural Resources Conservation Service of the U.S. Department of Agriculture sign a consultation agreement at the tribal headquarters in Cherokee, NC, in September 2002.

WHAT ARE THE LEGAL AUTHORITIES?

Several statutes, regulations, and executive orders, relating to cultural resources, impact consultation procedures with Native Americans, Alaska Natives, and Native Hawaiians. Some of the most important, with selected text, are:

National Historic Preservation Act, as amended [16 U.S.C. 470 et seq.], 1966

In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties. . . .

Section 101(d)(6)(B)

National Environmental Policy Act

[43 U.S.C. 4321 and 4331-35], 1969

As part of the scoping process the lead agency shall: (1) Invite the participation of . . . any affected Indian tribe. . . . 40 CFR 1501.7(a)

National Environmental Policy Act, CEQ regulations [40 C.F.R. Part 1500]

Sections 1501.2(d)(2), 1501.7(a)(1), 1502.15(c), 1503.1(a)(2)(ii), 1506(b)(3)(ii), 1508.5, 1508.12

American Indian Religious Freedom Act [42 U.S.C. 1996], 1978

... it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Archaeological Resources Protection Act, [16 U.S.C. 470aa-mm], 1979

... before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Section (4)(c)

Native American Graves Protection and Repatriation Act, 1990

[25 U.S.C. 3001 et seq.]

... consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations. Section 8 (c)(6)



In 1999, members of four different tribes, Northern Arapaho, Cheyenne and Arapaho Tribes of Oklahoma, and Northern Cheyenne Tribe, and the National Park Service's American Battlefield Protection Program staff collaborate on a cultural resources survey of the Sand Creek Massacre site near Eads, CO.

Executive Order 13175, Consultation with Indian Tribal Governments, 2000

... in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications. . . .

Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, 1998

... Each agency shall have an effective process to permit elected officials and other representatives of Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities. Section 3

Executive Order 13007, Indian Sacred Sites, 1996

Each executive branch agency . . . shall . . . promptly implement . . . procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. Section (2)(a)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 1994

Native American Programs. Each Federal

Agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that addresses Federally-recognized Indian tribes. Section 6-606

Executive Order 12875, Enhancing the intergovernmental partnership, 1993

Each agency shall develop an effective process to permit elected official and other representative of State, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals. . . . Section (1)(b)

Indian Self Determination and Education Assistance Act [25 U.S.C. 450a-e], 1975

The Congress . . . finds that . . . the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

The Congress hereby recognizes the obligation of the United States to [assure] maximum Indian participation in the direction of . . .

Federal services to Indian communities to [be] more responsive to the needs and desires of those communities.



Members of the Te-Moak Tribe of Western Shoshone Indians and staff of the Bureau of Land Management gather together on a hill during a tour of the Diamond Mountain Complex near Eureka, NV, as part of consulting about the Fire Defense Project.

INTERNET RESOURCES

- National Park Service Tribal Preservation Program
www.cr.nps.gov/hps/tribal
- Advisory Council on Historic Preservation
www.achp.gov
- Code Talk (sponsored by the Department for Housing and Urban Development)
www.hud.gov/offices/pih/lb/codetalk
- Consultation Training (sponsored by the Federal Preservation Institute and the Department of Justice)
www.historicpreservation.gov/fpi
- Listing of government-wide Indian program websites
www.asu.edu/clas/history/h-amindian/usgovt.htm
- NAGPRA Consultation Database of Tribal Contacts
www.cr.nps.gov/nagpra/onlinedb/index.htm

INTERNET RESOURCES TO HELP IDENTIFY TRIBES AND TRIBAL OFFICIALS

- Tribal Leaders Directory
<http://www.doi.gov/leaders.pdf>
- National Association of Tribal Historic Preservation Officers
http://www.nathpo.org/THPO_Members/member_list.html
- National Council for State Historic Preservation Officers
<http://www.ncshpo.org/stateinfolist/>
- Comprehensive list of Tribal Chairs
<http://www.hanksville.org/sand/contacts/tribal/>

BEST PRACTICES IN CONSULTATION

- Understand and follow the protocols for government-to-government meetings.
- Inform tribes on project details *prior* to consultation session.
- Coordinate with your Agency Tribal Liaison.
- Consult with the tribes as early as possible in the project conceptualization and planning process.
- Communicate with tribes as an on-going process to exchange information, concerns, and priorities and not as a single meeting.
- Consult with Tribes prior to substantive meetings on how and with whom to consult.

[source: *Tribal Consultation: Best Practices in Historic Preservation**]



The Bristol Bay Regional Advisory Council, one of the subsistence advisory councils in Alaska that are composed of many Federal agencies and Alaska Native Villages and Corporations, meets on a regular basis as part of the consultation process in Alaska.

STEPS IN CONSULTATION FOR FEDERAL AGENCIES

- Step One:** Develop planning documents including the scope of the project and the project's boundaries or area of potential effect.
- Step Two:** Identify consulting partners by contacting Tribal Historic Preservation Officers (THPOs), Tribal leaders, regional intertribal organizations, and SHPOs to determine which tribes, including those not necessarily presently residing in the state or vicinity of the project area, may have an interest.
- Step Three:** Make initial contact with the THPO or tribal leader (for tribes not having a THPO) by telephone with follow-up letter containing relevant information about the project and a request for a consultation meeting.
- Step Four:** Arrange with the tribal contacts for a time, place, agenda, and goals for a meeting. Determine if there are any barriers to tribal participation such as the time, cost, and/or location.
- Step Five:** Conduct the consultation meeting in a manner that provides time for meeting participants to get to know each other, for presentations and discussions, and for identifying details for future meetings or consultation, as appropriate.
- Step Six**—Repeat step 5 as necessary.
- Step Seven**—Conclude consultation on the project with a plan, agreement or other documentation that satisfies the requirements of the Federal laws, regulations, or Executive Orders that the consultation is intended to meet.

[source: *Tribal Consultation: Best Practices in Historic Preservation**]

HELPFUL TIPS FOR FEDERAL AGENCIES

- Meet face to face. Know to whom you are talking. Get to know one another and learn how each other's organizations function. Inform the tribes about your agency's mission, goals, programs, and typical actions. Learn about their tribal government and programs. Know the administrative limitations faced by tribes. Avoid information overload.
- Consult early and often. Meet often, even before there is an issue under review. Make sure there is an on-going exchange of information. Build consultation into your planning process. Stay in touch.
- Be honest. Don't promise what you can't deliver.
- Create a detailed administrative record. You know you have one when you meet the requirements of the Administrative Procedures Act.
- Recognize cultural differences in approaches to consultation and preservation of cultural resources.

* *Tribal Consultation: Best Practices in Historic Preservation* by National Association of Tribal Historic Preservation Officers, May 2005. Available at www.nathpo.org or from National Association of Tribal Historic Preservation Officers, P.O. Box 19189, Washington, DC 20036-9189.

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IN THE CONSULTATION PROCESS TO PROTECT CULTURAL RESOURCES, WHAT ARE AGENCY RESPONSIBILITIES?

- Determine which laws apply to your agency's project.
- Determine which definitions within the laws apply to your project [see *Definitions*].
- Determine with which tribes to consult.
- Be sure the highest agency official contacts the highest elected official of the Federally recognized tribe to establish government-to-government relations.
- Identify which tribal official or individual(s) to contact. [see *Internet Resources*].
- Consult with tribes early in the planning process.
- Provide tribes with notice of agency's plans by either telephone and/or letter.
- Carry out consultation meetings or other consultation process agreed to with the tribes.
- Document the results of the agency's consultation.
- Implement all actions the agency agreed to during consultation.

WHAT ARE THE BENEFITS OF CONSULTING WITH NATIVE AMERICANS?

- Knowledge and understanding of the importance of cultural heritage to Native Americans.

Every tribe and every Native American have traditions and places that they and their ancestors have valued for thousands of years and which should be respected. Through consultation, we can learn what cultural resources are important to them. We also learn how to preserve and display, if appropriate, cultural resources in a respectful and traditional manner.
- Personal contacts and one-to-one interactions with tribes.

Getting to know the tribes and the cultural resources they value is essential for ensuring that no Federal program deprives them of the rights afforded by the Constitution of the United States and Federal law.
- Greater project efficiencies and planning.

Consultation allows agencies to take into consideration tribal concerns in time to avoid or reduce delays or project disruption and lawsuits. Timely and successful consultation can reduce the compliance costs of agency projects over time.

WHEN IS CONSULTATION COMPLETE?

Consultation is more than a letter. An agency's notification to a tribe does NOT constitute the complete consultation process. Nor must tribal consent or agreement always be obtained before the consultation process can be concluded.

Consultation is completed once a well-documented administrative history of government-to-government discussions (face-to-face preferred) of the proposed project exists and a plan of action is agreed upon. This may or may not include a memorandum of agreement or a comprehensive statement of understanding.

Tribes and Federal agencies have found that one of the most important results of consultation is opening respectful and ongoing communication. When both partners seek to follow a consultation process, it can clarify issues, define concerns, exchange information, and formulate useful discussion.

Successful consultation leads to future successful consultation. Consultation with tribes is not only the law—it is time well spent.



Successful consultation between the Battle Mountain Field Office, Nevada State Office, Bureau of Land Management and the Te-Moak Tribe of Western Shoshone Indians included a field trip to understand the fragility of small American Indian cultural resources found in Diamond Mountain Complex, managed by the Bureau of Land Management, near Eureka, NV.

DEFINITIONS

There are many terms with formal meanings that pertain to preservation program operations and "government-to-government" relationships. Some definitions of the most useful are given below as well as their legal sources.

CONSULTATION means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation. (36CFR 800)

INDIAN TRIBE means an Indian tribe, and, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (36CFR 800)

INDIAN TRIBE means any tribe, band, nation or other organized Indian group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaskan Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (NAGPRA) (ARPA)

INDIAN TRIBE means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exists as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791, and "Indian" refers to a member of such an Indian Tribe . . . (EO 13007)

INDIAN TRIBE means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994. 25 U.S.C. 479a. (EO 13175)

NATIVE AMERICAN means of, or relating to, a tribe, people, or culture that is indigenous to the United States. (NAGPRA)

NATIVE HAWAIIAN ORGANIZATION means any organization which serves and represents the interests of Native Hawaiians; has a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians. (36CFR 800)

NATIVE HAWAIIAN ORGANIZATION means any organization which,

1. serves and represents the interests of Native Hawaiians
2. has a primary and stated purpose the provision of services to Native Hawaiians, and
3. has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei. (NAGPRA)

HUI MALAMA I NA KUPUNA O HAWAI'I NEI means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues. (NAGPRA)

NATIVE HAWAIIAN means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii. (36CFR 800) (NAGPRA)

ALASKA NATIVE VILLAGES OR CORPORATIONS. See definitions for Indian Tribe.

COVER PHOTOS

Clockwise from top:

Consultation by the Federal Energy Regulatory Commission with the Confederated Tribes of the Warm Springs Reservation and Portland General Electric Company resulted in traditional Indian markings on this hydroelectric dam in Oregon.

To assist in consultation between the Muscogee (Creek) Nation of Oklahoma and Federal agencies, the National Park Service provided training in the use of Geographic Information System (GIS) and Global Positioning Satellite (GPS) technology in Okmulgee, OK.

Credit: James Stein, National Park Service Contractor

A traditional Chinook post-raising ceremony is performed at Cathlapotle in the Ridgefield National Wildlife Refuge, WA, in 2003, as a result of consultation among the U.S. Fish and Wildlife Service, the Chinook Nation, and Portland State University.

Devil's Tower, a National Park Service National Monument in northeastern Wyoming, is historically and culturally associated with more than 20 tribes because of its importance to their traditional beliefs and practices and, through the consultation process, is now managed in a way that respects and lawfully accommodates tribal concerns and the agency's mission.

In 2002, the Bureau of Land Management arrived at an agreement with Governor Lavalto and other officials of the Pueblo of Santo Domingo in New Mexico through consultation on issues related to the traditional cultural uses of land by the Pueblo.



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