

**NCHRP PROJECT 25-25 TASK 79**

**SUCCESSFUL PRACTICES FOR  
EFFECTIVE TRIBAL CONSULTATION**

*Prepared by:*

**The Louis Berger Group, Inc.  
Morristown, New Jersey**



**September 2013**

The information contained in this report was prepared as part of NCHRP Project 25-25, Task 79, National Cooperative Highway Research Program, Transportation Research Board.

**SPECIAL NOTE:** This report **IS NOT** an official publication of the National Cooperative Highway Research Program, Transportation Research Board, National Research Council, or The National Academies.

## **Abstract**

This report represents the results of the National Cooperative Highway Research Program (NCHRP) 25-25 Task 79 study on Successful Practices for Effective Tribal Consultation. This research was conducted on behalf of the NCHRP and the American Association of State Highway and Transportation Officials Standing Committee on the Environment. The principal objective of this research was to learn what works best in sustaining successful tribal consultation programs for surface transportation projects as driven by Section 106 of the National Historic Preservation Act.

The Louis Berger Group, Inc. (Louis Berger), identified existing programs that best exemplify successful and effective consultation and then analyzed them more closely to identify the guiding principles and practices most responsible for the programs' success. This study also identified common elements in working assumptions and activities that seem to make the greatest difference, and highlights those elements for other programs to consider adopting.

As this study used an interview process, data regarding non-Section 106 tribal consultation activities also became available. Therefore this study combines successful practices used in other surface transportation planning contexts while maintaining the focus on tribal consultation relevant to Section 106.

## Acknowledgements

This study was requested by the American Association of State Highway and Transportation Officials (AASHTO) and conducted as part of National Cooperative Highway Research Program (NCHRP) Project 25-25. The NCHRP is supported by annual voluntary contributions from state Departments of Transportation. Project 25-25 is intended to fund quick-response studies on behalf of the AASHTO Standing Committee on Environment. The work was guided by the NCHRP Project 25-25/Task 79 Panel: Anthony F. Opperman, Virginia Department of Transportation (DOT); Linda L. Aitken, Minnesota DOT; Margaret M. Barondess, Michigan DOT; Jim Pomfret, Georgia DOT; H.A. “Hal” Gard, Oregon DOT; Terry H. Klein, SRI Foundation; Joseph Myers, National Indian Justice Center; Richard Rolland, Eastern Washington University; Michael A. Stanilla, ASC Group, Inc.; June Hansen, South Dakota DOT; Mary Ann Naber, Federal Highway Administration; and Stephen J. Andrie, Transportation Research Board. The project was managed by Nanda Srinivasan, NCHRP Senior Program Officer.

The Louis Berger Group, Inc. (Louis Berger), was the contractor for this study. Senior Environmental Planner Laura Sliker served as the Project Manager, and Vice President-Cultural Resources Hope Luhman, Ph.D., oversaw the work. Principal Investigator Randy Withrow and Archaeologist Rebecca Brodeur conducted background research for the project, and Mr. Withrow compiled the literature review. Ms. Sliker and Dr. Luhman conducted interviews with state DOT representatives, and Ms. Brodeur and Dr. Luhman interviewed tribal representatives for the study. Ms. Brodeur, Ms. Sliker, Dr. Luhman, and Mr. Withrow authored the report. Senior Editor Anne Moiseev was responsible for editing.

Louis Berger would like to acknowledge the participation of all state DOT and tribal representatives as well as the NCHRP Task 79 Panel members who provided comments and guidance for this study. Their participation in this research is greatly appreciated.

### *Disclaimer*

The opinions and conclusions expressed or implied are those of the research agency that performed the research and are not necessarily those of the Transportation Research Board or its sponsors. The information contained in this document was taken directly from the submission of the author(s). This document is not a report of the Transportation Board or of the National Research Council.

NOTE: The Transportation Research Board of the National Academies, the National Research Council, the Federal Highway Administration, the American Association of State Highway and Transportation Officials, and the individual states participating in the National Cooperative Highway Research Program do not endorse products or manufacturers. Trade or manufacturers' names appear herein solely because they are considered essential to the object of this report.

## Table of Contents

<i>Chapter</i>	<i>Page</i>
Abstract .....	i
Acknowledgements .....	ii
List of Tables .....	v
 Executive Summary .....	 1
1. Introduction .....	2
1.1 Overview .....	2
1.2 Research Objectives.....	3
1.3 Research Approach.....	3
2. Literature Review .....	5
2.1 Requirements for Consultation.....	5
2.1.1 Statutes .....	6
2.1.2 Presidential Executive Orders and Memoranda .....	8
2.1.3 Policy Statements and Guidance.....	9
2.1.4 State Practices .....	13
3. Online Screener Survey .....	30
3.1 Findings .....	30
3.1.1 States Selected for Follow-up Interviews .....	35
4. Program Case Studies .....	38
4.1 Interview Results and Responses .....	38
4.1.1 Arizona Department of Transportation .....	39
4.1.2 California Department of Transportation.....	44
4.1.3 Florida Department of Transportation .....	48
4.1.4 Georgia Department of Transportation .....	50
4.1.5 Illinois Department of Transportation.....	52
4.1.6 Iowa Department of Transportation.....	54
4.1.7 Maine Department of Transportation.....	57
4.1.8 Minnesota Department of Transportation .....	59
4.1.9 North Dakota Department of Transportation .....	62
4.1.10 Oklahoma Department of Transportation.....	65
4.1.11 Oregon Department of Transportation.....	68
4.1.12 Pennsylvania Department of Transportation .....	70
5. Tribal Perspective to Transportation Consultation Programs.....	74
5.1 Interview Results and Responses .....	74
5.1.1 Alabama-Coushatta Tribe if Texas .....	74

## Table of Contents (continued)

<i>Chapter</i>	<i>Page</i>
5.1.2 Caddo Nation .....	79
5.1.3 Confederated Tribes of the Grand Ronde Community of Oregon.....	82
5.1.4 Muscogee (Creek) Nation–Respondent 1 of 2.....	84
5.1.5 Muscogee (Creek) Nation–Respondent 2 of 2.....	86
5.1.6 Passamaquoddy Tribe of Indians .....	88
5.1.7 The Sovereign Miami Tribe of Oklahoma.....	90
5.1.8 Thlopthlocco Tribal Town .....	92
5.1.9 Three Affiliated Tribes–Mandan, Hidatsa, Arikara .....	94
5.1.10 United Keetoowah Band of Cherokee .....	95
5.1.11 Yurok Tribe .....	98
6. Consultation: Key Practices and Perceived Pitfalls.....	101
6.1 Communication .....	101
6.1.1 Guidance, Policies, and Agreements.....	101
6.1.2 Programmatic versus Project-by-Project: Section 106 Tribal Consultation .....	103
6.1.3 Web-based Tools.....	106
6.2 Cost Efficiency, Effectiveness, and Productive Collaboration.....	110
6.2.1 Funding for Tribal Participation in Section 106 Consultation.....	111
6.2.2 Analysis of Funding.....	112
6.3 Lessons Learned from Individual Case Examples.....	112
6.3.1 North Dakota Department of Transportation, FHWA, and Regional Tribes .....	112
6.3.2 Arizona Department of Transportation and Cordes Junction Interchange Environmental Assessment .....	114
6.3.3 Caltrans and the Reservation Transportation Authority.....	114
6.4 Insights on Effective Strategies .....	116
6.5 Innovative Strategies and Overcoming Obstacles .....	119
6.5.1 Point of Contact/Tribal Liaison.....	119
6.6 Promotion of Trust and Cooperation .....	122
6.7 Continuing Consultation and Follow-up .....	123
7. Recommendations and Next Steps .....	124
8. Bibliography .....	126
List of Participants .....	137
Appendix A: Task 1 Online Survey Questionnaire	
Appendix B: Task 2 Interview Questions	
Appendix C: List of Acronyms	

## List of Tables

<i>Table</i>		<i>Page</i>
6.1	Written Policies – State DOT Programs .....	102
6.2	State DOTs Web-based Formulas.....	107
6.3	State DOTs Communication Tools.....	120

## **Executive Summary**

Consultation is essential for compliance with historic preservation law in the United States, but for many involved in the consultation process, achieving effective and successful consultation continues to be a significant challenge. This is particularly true for federal agencies charged with the responsibility of consulting with Indian tribes. In 1992 Congress amended the National Historic Preservation Act (NHPA) to give Indian tribes and Native Hawaiian organizations a significantly greater role in the historic preservation process. The 1992 amendments clarified federal agency responsibilities with regard to tribal sovereignty and the government-to-government trust relationship between the federal government and tribes. A path was also cleared for tribes to assume the functions of the State Historic Preservation Officer (SHPO) for matters affecting tribal lands, including establishment of a Tribal Historic Preservation Officer (THPO). For those tribes without a THPO, consultation regarding undertakings affecting tribal lands is still pursued on the same basis but also involves consultation with the SHPO. Federal agencies are also required to consult with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to historic properties regardless of their location.

In the context of increased emphasis on the importance of federal agency consultation with Indian tribes, the consultation process continues to evolve. As participants strive to conduct meaningful consultation, they are often confronted with different worldviews that share little common ground. Different styles of communication, interpersonal and group interaction, and patterns of decision making must be commonly understood to achieve a mutually positive outcome. Participants also face new challenges created by increased levels of participation. Administrative workloads have greatly expanded as consultation is employed more broadly and applied to greater numbers of projects, and costs have increased.

Our goal for this study is to identify those key principles and practices that ensure effective tribal consultation and also to understand how and why they work so that they may be reinforced, further enhanced, and developed for sustainability as the dynamic process of consultation evolves.

It is important to remember that federally recognized tribal nations are sovereign and therefore should not be treated monolithically. If nothing else, agencies must first recognize the great diversities of culture, history, geography, language, government, religion/belief systems, economy, infrastructure, and worldview prior to choosing the right practices to use. There is no single “cookbook” approach to tribal consultation.

Our study found that the most successful programs involve tribes at the earliest stages and continue that involvement through project delivery. Participants operate with respect, promote relationship building, understand the government-to-government trust relationship, and are knowledgeable in tribal culture and history. Several state DOTs have established specific procedures for consultation with tribes, but flexibility is still needed as many tribes prefer to operate on a project-specific basis. Obstacles encountered mostly relate to funding shortfalls and limited staff but also to misunderstandings, lack of trust, false perceptions, and cultural barriers.

# 1. Introduction

The primary goal of this study is to learn what works best when it comes to building and maintaining successful tribal consultation programs. Although some state Departments of Transportation (DOTs) have been able to build effective programs for consulting with Indian tribes, other state DOTs have struggled to achieve positive results and some continue to have very little experience at all working with tribes. This study compiles new guidelines for creating, establishing, and maintaining effective and successful consultation with Indian tribes based on (1) a review of federal and state regulatory documents and established consultation plans and programs, and (2) surveying and interviewing participants involved in this process, including representatives of both agencies and tribes.

For transportation projects in receipt of federal funding, the federal agency is the lead agency responsible for consultation with Indian tribes, but the role of different state DOTs in the consultation process is also important. Lead federal agencies, such as the Federal Highway Administration (FHWA), are responsible for tribal consultation in the Section 106 process; and under Section 106 of NHPA, the federal agencies are able to oversee state DOTs as they perform appropriate and project-specific consultation. This level of consultation must first be agreed to by the federally recognized tribal nations involved. This stipulation, presented under NHPA Section 800.2 (c)(4), states: “The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized.”<sup>1</sup> Because state DOTs routinely consult with federally recognized tribes while operating under the administrative capacity of a lead federal agencies, it is important to make this distinction as this study examines what practices are considered successful characteristics of these exchanges.

Although this document was intended primarily for application by state DOTs, the need for substantive tribal participation was clear. As such, this research was oriented to provide a more inclusive perspective by actively engaging tribal representatives who consult on surface transportation projects.

## 1.1 Overview

In May 2012 The Louis Berger Group, Inc. (Louis Berger), was awarded the National Cooperative Highway Research Program (NCHRP) Project 25-25 Task 79, Successful Practices in Tribal Consultation. For this contract Louis Berger began work in July 2012 with the literature review (Task 1) of this study. Interviews and follow-up questions were conducted between February and June 2013.

---

<sup>1</sup> National Historic Preservation Act Section 800.2 (c)(4), accessed online May 2013 at <http://www.tribalplanning.fhwa.dot.gov/tcqa.aspx#r8>

## *1.2 Research Objectives*

Louis Berger's goal was to identify existing programs that best exemplify successful and effective consultation and then analyze them more closely to identify the guiding principles and practices most responsible for the programs' success. These principles and practices are presented to highlight those successful projects and provide guidelines for incorporating their collective best principles and practices into other new and existing programs. This study therefore analyzes successful programs, identifies common elements in both working assumptions and activities that appear to make the greatest difference, and highlights those elements for other programs to consider adopting.

## *1.3 Research Approach*

Under Task 1 Louis Berger sought to identify existing programs that best exemplify successful and effective consultation and then analyze them more closely to identify the guiding principles and practices most responsible for their success. During Task 1 Louis Berger completed a review of transportation-related federal regulatory documents and policy statements regarding tribal consultation.

Subsequently, Louis Berger conducted an online survey to provide a basic overview of how the state DOTs approach tribal consultation. A list of 10 questions was developed and approved by the NCHRP Project 25-25/Task 79 Panel members to create the online survey. Once the survey was created, a web link was sent to contacts via email. The contacts were determined and reached through conversations with the Task 79 Panel as well as by requesting the assistance of the AASHTO Standing Committee on the Environment (SCOE) representative at each state DOT. Through both of these methods, over the course of one month, the survey achieved an 82 percent response rate, which is considered quite successful. An effort was made to include programs that have garnered positive attention, recognition, or awards from AASHTO, FHWA, the Transportation Research Board (TRB), the Advisory Council on Historic Preservation (ACHP), or Indian tribes.

Louis Berger used the results of Task 1 to formulate a list of 12 programs to include in the interviews presented under Task 2. To provide a comprehensive perspective for the study, Louis Berger also conducted interviews with 11 tribal representatives who were identified as key actors in the programs selected for this study. As part of this task (Task 2), Louis Berger confirmed the availability of key DOT personnel for interviews and inquired about any Indian tribes and tribal government representatives who have participated in consultation and who could be contacted to participate in the project.

Louis Berger developed interview questions, which were presented to the Task 79 Panel for approval. Interview questions were formulated to address two principal topics: participant satisfaction with the existing consultation program with the intent to gauge measures of program effectiveness, and strategies or practices designed to address or overcome perceived obstacles to positive consultation. Similar questions were presented to both agency and tribal participants to facilitate comparison of perspectives on the consultation process and its overall effectiveness or need for change. Participants were asked to provide examples of successful consultation as well

as specific examples that illustrate perceived problems or obstacles to productive or satisfactory consultation. Participants were also asked to provide suggestions for improvements to the consultation program.

The interviews were conducted with the specialist identified by the Task 1 online survey participant for each DOT as the person that would be available and most suitable for participation in the Task 2 interview. In some cases this person was the same DOT person who completed the online survey. All DOT and tribal interview participants were sent a copy of the questions that would be discussed during the phone interview. Interviews allowed flexibility in terms of schedule and/or flow and presentation of the interview. At times this flexibility led to discussions that elaborated on pertinent issues for both the state and tribal representatives. One of the participants provided Louis Berger with a written interview via email. At least one cultural resource specialist from Louis Berger (the consultant conducting the interviews) was present during the telephone interviews to be sure that the appropriate follow-up questions were asked of each state DOT and tribal representative (Appendix B). Additional follow-up questions were provided to participants through email; however, some phone conversations also took place. At the conclusion of Task 2, each state DOT and tribal representative was provided a copy of their transcribed interview results for review, comment, revision, and approval.

This report constitutes Task 3, presenting successful practices in tribal consultation and providing guidelines on how to build and maintain successful tribal consultation programs. It provides insights on effective strategies used as part of existing tribal consultation programs, emphasizing key principles and practices common to those programs that receive high marks for cost efficiency, effectiveness, and productive collaboration. Lessons learned from individual case examples and innovative strategies developed to overcome obstacles and promote greater levels of trust and cooperation among consulting parties are also highlighted.

In consultation with the Task 79 Panel, the final report will be posted on various transportation, tribal, and historic preservation websites. Louis Berger will work with the panel to identify the appropriate list of websites. Additionally, the final report provided at the conclusion of Task 3 will be supplemented by a PowerPoint presentation that includes speaker notes. Under Task 4 this presentation will undergo refinements as necessary for presentation as a national webinar.

## 2. Literature Review

A significant body of literature has been developed over the past two decades pertaining to U.S. government consultation with Indian tribes. This literature includes many guidelines and policy statements authored by government agencies, tribes, and private consultants. The following overview summarizes relevant laws, regulations, and executive orders that require federal agencies to consult with tribes.

### 2.1 *Requirements for Consultation*

In 1994 the special relationship that exists between the U.S. government and federally recognized Indian tribal governments was acknowledged in a Presidential Memorandum signed by President Clinton, which stated that federal agencies should respect the legal status of federally recognized tribes as sovereign nations and operate within a government-to-government relationship when dealing with those sovereign tribal governments (59 *Fed. Reg.* 22951-22952; April 29, 1994).<sup>2</sup> As cited in that memorandum, the legal basis for this special relationship is rooted in “the Constitution of the United States, treaties, statutes, and court decisions.” This government-wide policy was later updated by Executive Orders 13084 (63 *Fed. Reg.* CFR 27655; May 14, 1998) and 13175 (65 *Fed. Reg.* 67249-67251; November 6, 2000) and was most recently reinforced in 2009 by a Presidential Memorandum signed by President Obama (November 5, 2009).

---

<sup>2</sup> The tribal nations, highly varied as individual entities, often meet a number of criteria necessary to be considered states; certainly many, if not most, could be considered nation-states. Their sovereignty is subject to the plenary power of Congress. Overall, the legal status of American Indians has been a source of debate, as many tribes, states, lawmakers, and scholars seek to establish the full breadth of tribal rights. Various aspects of this debate include the historical relationship between American Indians and the federal government, the political ideologies at time of contact and the consequent fragility of the federal-Indian relationship through history, various federal laws and court cases, and the development of Indian citizenship. As Chief Justice Marshall noted in 1831, while presiding over *Cherokee Nation v. Georgia*, “the relation of the Indians to the United States [was] marked by peculiar and cardinal distinctions which exist nowhere else.” For more information on these subjects, see: Vine Deloria and David E. Wilkins, *Tribes, Treaties and Constitutional Tribulations*, Austin: University of Texas Press, 2000, ix; the Indian Non-Intercourse Acts (25 U.S.C. §177), as discussed by Cornell University Law School, Legal Information Institute Website, accessed 2013 at <http://www.law.cornell.edu/uscode/text/25/177>; a series of cases now coined the Marshall Trilogy (*Johnson v. Macintosh* [1823], *Cherokee v. Georgia* [1831], and *Worcester v. Georgia* [1832]); Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2007), 178-188; Arlo Kempf, *Breaching the Colonial Contract: Anti-Colonialism in the US and Canada* (New York: Springer, 1st edition, April 1, 2010), 63; Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1988), 156; David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court* (Austin: University of Texas Press, 1997), 21; John R. Wunder, *Native American Sovereignty* (Abingdon, England: Routledge, 1999, 101); Olson and Wilson, *Native Americans in the Twentieth Century* (Chicago: University of Illinois Press, 1986), 24; Sharon O’Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1993), 82; William A. Brophy and Sophie D. Aberle, *The Indian: America’s Unfinished Business* (Norman: University of Oklahoma Press, 1996), 20-21; the Indian Reorganization Act (Wheeler-Howard Act 25 U.S.C.A.461), as discussed in Deloria and Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 99-100.

Requirements for government-to-government consultation with Indian tribes, Eskimos, Aleuts, and Native Hawaiians are also found in a number of statutes and regulations. In 2009 the White House–Indian Affairs Executive Working Group, Consultation and Coordination Advisory Group compiled a list of these legal authorities along with related policy statements, advisory documents, and procedural documents that illustrate the increasing emphasis placed on developing and maintaining proper consultation. This *List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance* includes a summary list of government-wide statutes, regulations, orders, and memoranda that require tribal consultation along with others governing the activities of two or more federal agencies. It also references policies and procedural guidelines on a departmental basis, including the Department of Transportation, with helpful web links to pertinent documents.<sup>3</sup>

### 2.1.1 Statutes

*National Environmental Policy Act of 1969 (42 U.S.C. 4321)*. The National Environmental Policy Act (NEPA) was signed into law on January 1, 1970. It established the President’s Council on Environmental Quality (CEQ) and requires federal agencies to consider the impacts of federal actions on natural, cultural, and socioeconomic resources. The CEQ’s implementing regulations include specific requirements for federal agencies to consult with affected Indian tribes early in the NEPA process (43 FR 55992 §1501.2) and invite affected tribes to participate in scoping and identification of potential concerns (43 FR 55992 § 1501.7).<sup>4</sup>

*National Historic Preservation Act, 1966 (Public Law 89-665; 16 U.S.C. 470, as amended)*. The National Historic Preservation Act (NHPA) was signed into law on October 15, 1966. The NHPA established the National Register of Historic Places (NRHP) and the Advisory Council on Historic Preservation (ACHP) to oversee the implementation of the NHPA. Section 106 of the NHPA requires federal agencies to consider the effects of their actions on historic properties. Its implementing regulations are located at 36 CFR 800 (Protection of Historic Properties).

Regulations listed under 36 CFR 800.2(c)(2) stipulate that federal agencies be cognizant of the cultural and/or religious significance of historical properties to a tribe, and that such properties may be in whole or in part located on “ancestral, aboriginal, or ceded lands of that tribe.”<sup>5</sup> The federal agency that administers government-to-government consultation responsibility must make a “reasonable and good faith effort to identify Indian tribes that attach such significance but may now live at great distances from the undertaking’s area of potential effect” (APE).<sup>6</sup>

---

<sup>3</sup> White House–Indian Affairs Executive Working Group, Consultation and Coordination Advisory Group, List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance, January 2009, accessed online May 2013 at [http://www.achp.gov/docs/fed%20consultation%20authorities%202009%20ACHP%20version\\_6-09.pdf](http://www.achp.gov/docs/fed%20consultation%20authorities%202009%20ACHP%20version_6-09.pdf)

<sup>4</sup> National Environmental Policy Act, 1969 (42 U.S.C. 4321), accessed online May 2013 at [http://www.cr.nps.gov/history/online\\_books/fhpl/nepa.pdf](http://www.cr.nps.gov/history/online_books/fhpl/nepa.pdf).

<sup>5</sup> ACHP, 36 CFR Part 800 – Protection of Historic Properties, 2004, accessed online April 2013 at <http://www.achp.gov/regs-rev04.pdf>.

<sup>6</sup> ACHP, 36 CFR Part 800.

This section further specifies the need for federal agencies to conduct tribal consultation in a government-to-government manner. This stems from legislation, such as that presented explicitly in the commerce clause of the U.S. Constitution, that designates federally recognized tribes as sovereignties. It is important that tribes be able to reach agreements with federal agencies in light of consultation under Section 106 and project review; however, “the agreement may provide the Indian tribes with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.”<sup>7</sup>

Amendments to the NHPA passed in 1992 greatly expanded the role of Indian tribes in the Section 106 review process. Changes allowed tribes to assume the role of the SHPO for projects on tribal land [Section 101(d)(2)]; recognized that historic properties of religious and cultural significance to Indian tribes or Native Hawaiians may be eligible for the NRHP [Section 101(d)(6)(A)]; and required that federal agencies consult with any Indian tribe or Native Hawaiian organization that attaches significance to such sites [Section 101(d)(6)(B)].<sup>8</sup>

*Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm)*. The Archaeological Resources Protection Act of 1979 (ARPA) became law on October 31, 1979. It requires federal agencies to consult with Indian tribes prior to approving permits for archaeological excavations that could cause harm to places of religious and cultural importance to tribes [(16 USC 470cc(c)] and prior to approving permits for archaeological excavations on tribal land [(16 USC 470cc(g)].<sup>9</sup>

*American Indian Religious Freedom Act (16 U.S.C. 1996)*. The American Indian Religious Freedom Act became law on August 7, 1978, and established U.S. government policy 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.” Federal agencies are directed to consult with tribal governments in evaluating their policies and procedures for compliance with this policy.<sup>10</sup>

*Native American Graves Protection and Repatriation Act (25 U.S.C. 3001)*. The Native American Graves Protection and Repatriation Act (NAGPRA) became law on November 16, 1990. It requires federal agencies and museums that receive federal funding to consult with Indian tribes and Native Hawaiian organizations to inventory and repatriate human remains and other cultural items to tribes and lineal descendants who have cultural affiliation with those remains or items. It also requires consultation with tribes regarding the excavation of human remains and associated items on federal and tribal land.<sup>11</sup>

---

<sup>7</sup> ACHP, 36 CFR Part 800.

<sup>8</sup> National Historic Preservation Act, 1966 (Public Law 89-665; 16 U.S.C. 470, as amended), accessed online May 2013 at <http://www.achp.gov/docs/nhpa%202008-final.pdf>

<sup>9</sup> Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm), accessed online May 2013 at [http://www.cr.nps.gov/history/online\\_books/fhpl/arpa.pdf](http://www.cr.nps.gov/history/online_books/fhpl/arpa.pdf).

<sup>10</sup> American Indian Religious Freedom Act (16 U.S.C. 1996), accessed online May 2013 at [http://www.cr.nps.gov/history/online\\_books/fhpl/indian\\_relig\\_freedom.pdf](http://www.cr.nps.gov/history/online_books/fhpl/indian_relig_freedom.pdf).

<sup>11</sup> Native American Graves Protection and Repatriation Act (25 U.S.C. 3001), accessed May 2013 online at [http://www.cr.nps.gov/history/online\\_books/fhpl/nagpra.pdf](http://www.cr.nps.gov/history/online_books/fhpl/nagpra.pdf).

### 2.1.2 Presidential Executive Orders and Memoranda

Presidential Memorandum (April 29, 1994), *Government-to-Government Relations with Native American Tribal Governments* (59 Federal Register No. 85, 22951-22952). On April 29, 1994, President Clinton issued a memorandum affirming the federal government's commitment to respect the legal status of federally recognized tribes as sovereign nations and to operate within a government-to-government relationship with federally recognized tribes. The memorandum directs each executive department and agency to consult "to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that have substantial direct effects on federally recognized tribal governments."<sup>12</sup>

Executive Order 13007 (1996), *Indian Sacred Sites*. This executive order pertains to the preservation of tribally acknowledged sacred sites. Stipulations include provisions for tribal access to such sites located upon federal lands and efforts to circumvent potential disturbances to these sites.<sup>13</sup>

Executive Order 13084 (1998), *Consultation and Coordination With Indian Tribal Governments*. This EO was issued as a supplement to the Presidential Memorandum dated April 29, 1994. It affirms government policy to establish regular and meaningful consultation and collaboration with Indian tribal governments in developing regulatory practices on federal matters that significantly or uniquely affect their communities, to reduce the imposition of unfunded mandates on Indian tribal governments, and to streamline the application process for and increase the availability of waivers to Indian tribal governments. Each federal agency was instructed to 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.<sup>14</sup>

Executive Order 13175 (2000), *Consultation and Coordination with Indian Tribal Governments*. This executive order supersedes EO 13084. It seeks to establish consistent and meaningful consultation and collaboration with tribal officials in the development of federal policies, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. The order directs each federal agency to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."<sup>15</sup>

Presidential Memorandum (September 23, 2004), *Memorandum: Government-to-Government Relationship with Tribal Governments*. This memorandum reiterated the Bush administration's

---

<sup>12</sup> Presidential Memorandum (April 29, 1994), *Government-to-Government Relations with Native American Tribal Governments*, accessed online May 2013 at <http://www.gpo.gov/fdsys/pkg/FR-1994-05-04/html/94-10877.htm>.

<sup>13</sup> Executive Order 13007 (1996), *Indian Sacred Sites*, accessed online May 2013 at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-05/pdf/2011-19849.pdf>.

<sup>14</sup> Executive Order 13084 (1998), *Consultation and Coordination With Indian Tribal Governments*, accessed online May 2013 at <http://www.gpo.gov/fdsys/pkg/FR-1998-05-19/pdf/98-13553.pdf>.

<sup>15</sup> Federal Register, Vol. 65, No 218. Executive Order 13175 (2000), *Consultation and Coordination with Indian Tribal Governments*, accessed online April 2013 at <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>

commitment to government-to-government relationship and support for tribal sovereignty and self-determination.<sup>16</sup>

Presidential Memorandum (November 5, 2009), *Memorandum: Tribal Consultation*. This memorandum requires executive departments and agencies to engage in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications and strengthen the government-to-government relationship between the United States and Indian tribes. Each agency was required to prepare a plan for implementing the policies and directives of EO 13175 in consultation with Indian tribes and tribal officials and provide annual progress reports on the status of implementation.<sup>17</sup>

### 2.1.3 Policy Statements and Guidance

*Advisory Council on Historic Preservation*. Drafted in 2000, the *ACHP Policy Statement Regarding the ACHP's Relationships with Indian Tribes* outlines the purpose, policy, and implementation strategy for government-to-government relationships carried out between the United States agencies and federally recognized Indian tribes, as it relates to the Section 106 process.<sup>18</sup>

In 2003 the ACHP drafted the *Action Plan on Advisory Council on Historic Preservation Native American Initiatives*, in response to the *ACHP's Policy Statement Regarding the Council's Relationships with Indian Tribes* (2000). This plan sets out the following six objectives for implementing the ACHP's policies for Tribal consultation: assisting federal agencies, establishing a body of Native American advisors, working with individual Native communities and organizations, improving communication for all ACHP participants, ensuring ACHP implementation, and amending NHPA to add a tribal member to the ACHP.<sup>19</sup>

In 2005 the ACHP compiled *Consulting with Indian Tribes in the Section 106 Process*. This updated ACHP guidance document uses a question-and-answer format to help clarify federal agency requirements to consult with Indian tribes under Section 106 of the NHPA. The guidance addresses when agencies must consult with Indian tribes, the respective roles of SHPOs and THPOs, and what consultation must address, but it does not include specific guidance on how consultation should be conducted.<sup>20</sup>

Three years later the ACHP drafted the *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (2008). This is a reference guide for federal agencies to use during

---

<sup>16</sup> Presidential Memorandum (September 23, 2004), *Memorandum: Government-to-Government Relationship with Tribal Governments*, accessed online April 2013 at <http://www.gpo.gov/fdsys/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf>.

<sup>17</sup> Presidential Memorandum (November 5, 2009), *Memorandum: Tribal Consultation*, accessed online April 2013 at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>

<sup>18</sup> Advisory Council on Historic Preservation [ACHP], *Policy Statement Regarding the ACHP's Relationships with Indian Tribes* (2000), accessed online April 2013 at [www.achp.gov/policystatement-tribes.html](http://www.achp.gov/policystatement-tribes.html)

<sup>19</sup> ACHP, *Action Plan On Advisory Council on Historic Preservation Native American Initiatives* (2003), accessed online April 2013 at [www.achp.gov/docs/napactionplan.doc](http://www.achp.gov/docs/napactionplan.doc).

<sup>20</sup> ACHP, *Consulting with Indian Tribes in the Section 106 Process* (2008), accessed online May 2013 at <http://www.achp.gov/regs-tribes.html>

tribal consultation pursuant to the Section 106 process. The ACHP manual outlines the legal context and requirements for tribal consultation and provides a discussion of the Section 106 tribal consultation process, information regarding agreements with tribes, and successful consultation strategies.<sup>21</sup>

Developed in accordance with Executive Order 13175 and President Obama's November 5, 2009, Memorandum on Tribal Consultation is the ACHP's 2010 tribal consultation plan, *Consultation Process Pursuant to E.O. 13175: Consultation and Coordination with Indian Tribal Governments*. The document discusses the role of the ACHP and ACHP-driven actions, including policy development, advising congressional and executive branches of government, ACHP reactive actions such as offering comments, review of programs, and taking part in substitution agreements with tribes.<sup>22</sup>

*U.S. Department of Transportation, Federal Highway Administration*. In 2010 The USDOT prepared a Tribal Consultation Plan in compliance with EO 13175 and the 2009 Presidential Memorandum on Tribal Consultation, titled *The U.S. Department of Transportation Tribal Consultation Plan*.<sup>23</sup>

The *Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes*, Department Order 5301.1 affirms the Department's and the U.S. DOT Modal Administration's unique legal relationship with Indian tribes, establishes the DOT's consultation and coordination process with Indian tribes for any action that may significantly or uniquely affect them, and lists goals for Modal Administrations to meet when carrying out policies, programs, and activities affecting American Indians, Alaska Natives, and tribes.<sup>24</sup>

The FHWA established a Tribal Transportation website to provide technical assistance and guidance to federally recognized tribes for tribal transportation projects.<sup>25</sup> The website has information on transportation project planning within tribal communities and reservations and includes project planning, regulations, policies, training information, technical resources, and contact information.

The FHWA newsletter *Successes in Stewardship, Improving Project Delivery and Planning Through Outreach and Guidance to Tribes* presents methods used by the FHWA in expanding its relationship with tribes. This newsletter also demonstrates tribal involvement in different stages of transportation projects and includes various departmental roles within the FHWA that are tasked with the execution of improved tribal consultation, addresses the implementation of

---

<sup>21</sup> ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (2008).

<sup>22</sup> ACHP, *Consultation Process Pursuant to E.O. 13175: Consultation and Coordination with Indian Tribal Governments* (2010), accessed online May 2013 at [www.achp.gov/docs/tribal\\_consultation\\_plan.pdf](http://www.achp.gov/docs/tribal_consultation_plan.pdf).

<sup>23</sup> *The U.S. Department of Transportation Tribal Consultation Plan* (2010), accessed online May 2013 at <http://www.fhwa.dot.gov/tribal/news/consultation.htm>.

<sup>24</sup> U.S. Department of Transportation (USDOT), *Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes*, November 16, 1999, accessed online May 2013 at <http://isddc.dot.gov/OLPFiles/OST/009273.pdf>.

<sup>25</sup> Federal Highway Administration (FHWA), Tribal Transportation website, accessed online May 2013 at <http://www.tribalplanning.fhwa.dot.gov/>.

programs to foster improved tribal consultation practices, and provides some case studies of successful consultation by state DOTs.<sup>26</sup>

In 2009 the FHWA Office of Planning and Valerie J. Southern Transportation Consultant, LLC., Technical Communication Consultants, Inc., prepared the *Tribal Transportation Best Practices Guidebook*. This *Guidebook* showcases successful program management practices in tribal transportation and shares this information with the larger transportation community.<sup>27</sup> The FHWA's *Transportation Decision Making, Information Tools for Tribal Governments: Developing the Tribal Transportation Improvement Program* details the process by which transportation planners and tribal government leaders can successfully communicate through the establishment of the Tribal Transportation Improvement Program (TTIP). It outlines procedures to planning, how the TTIP is developed, funding, public participation and outreach, and utilization and collection of data.<sup>28</sup>

*National Association of Tribal Historic Preservation Officers (NATHPO)*. NATHPO collaborated with the ACHP and the National Park Service (NPS) to research best practices for tribal consultation. This 2005 document, *Tribal Consultation, Best Practices in Historic Preservation*, presents the results of a survey conducted among tribes and agencies to gather information about the consultation process and how participants measured successful consultation. Informants identified early and open communication and maintaining mutual respect between agencies and tribal governments as key components of successful consultation.<sup>29</sup>

*Transportation Research Board, National Research Council*. As presented in the 2002 Transportation Research Circular, No. E-C039, the *Conference on Transportation Improvements, Experiences Among Tribal, Local, State, and Federal Governments* document discusses the results of the 2001 TRB conference dealing with successful tribal consultation for transportation programs. The conference booklet presents a series of case studies deemed to demonstrate preferred outcomes in past tribal consultation as a means to develop future successful policies and procedures.<sup>30</sup>

*Native American Transportation Issues Committee (ABE80), Transportation Research Board*. Working with the Committee on Historic and Archaeological Preservation in Transportation (ADC50), this committee "is concerned with research and practice pertaining to transportation issues on or near tribal lands and communities or affecting tribal historical or cultural properties

---

<sup>26</sup> FHWA, *Successes in Stewardship, Improving Project Delivery and Planning Through Outreach and Guidance to Tribes*. FHWA Newsletter (2011), accessed online May 2013 at <http://www.environment.fhwa.dot.gov/strmlng/newsletters/mar11nl.asp>.

<sup>27</sup> USDOT, FHWA, *Tribal Transportation Best Practices Guidebook* (2009), accessed online May 2013 at [http://www.tribalplanning.fhwa.dot.gov/bestPractices\\_guidebk.aspx](http://www.tribalplanning.fhwa.dot.gov/bestPractices_guidebk.aspx).

<sup>28</sup> FHWA, *Transportation Decision Making, Information Tools for Tribal Governments: Developing the Tribal Transportation Improvement Program*, accessed online May 2013 at [http://www.tribalplanning.fhwa.dot.gov/training\\_tt看\\_exec.pdf](http://www.tribalplanning.fhwa.dot.gov/training_tt看_exec.pdf).

<sup>29</sup> National Association of Tribal Historic Preservation Officers (NATHPO), *Tribal Consultation, Best Practices in Historic Preservation* (2005), accessed online May 2013 at [www.nathpo.org/PDF/Tribal\\_Consultation.pdf](http://www.nathpo.org/PDF/Tribal_Consultation.pdf).

<sup>30</sup> Transportation Research Board, National Research Council (TRB NRC), *Conference on Transportation Improvements, Experiences Among Tribal, Local, State, and Federal Governments* (2002), Transportation Research Circular, No. E-C039, Transportation Research Board, Washington DC, accessed online May 2013 at <http://onlinepubs.trb.org/onlinepubs/circulars/ec039.pdf>.

wherever located.” Involving a variety of agencies (i.e., tribal, state, federal, regional, and local providers) the ABE80 committee deals with a wide range of transportation-related matters, such as “laws, policies, plans, programs, and projects.”<sup>31</sup>

*National Cooperative Highway Research Program (NCHRP)*. A 2005 synthesis dealing with the streamlining of the archaeological component of transportation projects, including tribal consultation practices, was presented in *Managing Archaeological Investigations, A Synthesis of Highway Practice, National Cooperative Highway Research Program, Synthesis 347*. In dealing with tribal consultation, the report addresses agency and tribal relationships as well as issues relevant to past archaeological work performed under Section 106.<sup>32</sup>

The 2009 NCHRP Project 25-25, Task 49, titled *Effective Practices for Considering Historic Preservation In Transportation Project Planning and Early Project Development*, examines how transportation agencies include tribal consultation as part of early project planning and development. The study profiles several case studies that highlight the importance and benefits of maintaining regular scheduled consultation with tribes.<sup>33</sup> The following year NCHRP presented the *Web-Only Document 171: Identification of Results-Oriented Public Involvement Strategies between Transportation Agencies and Native American Tribal Communities*. This document presents a literature review of programs and initiatives intended to facilitate collaboration between transportation agencies and tribes. The guide also examines communication and coordination resulting in best practices and presents the results of a survey of transportation professionals to uncover common concerns with respect to tribal consultation on transportation projects.<sup>34</sup>

In 2011 the NCHRP compiled the *National Cooperative Highway Research Program, NCHRP Report 690, A Guidebook for Successful Communication, Cooperation, and Coordination Strategies Between Transportation Agencies and Tribal Communities*. This report outlines tribal consultation guidelines aimed at successful working relationships between tribes on transportation projects. The guide forwards a more flexible approach and discusses interviews, workshops, and case studies of successful tribal consultation initiatives.<sup>35</sup>

---

<sup>31</sup> Transportation Research Board, *Native American Transportation Issues Committee (ABE80)* website. Accessed online August 2013 at <https://sites.google.com/site/trbcommitteeabe80/>.

<sup>32</sup> National Cooperative Highway Research Program, *Managing Archaeological Investigations, A Synthesis of Highway Practice, National Cooperative Highway Research Program, Synthesis 347*, 2005, accessed online May 2013 at [www.trb.org/publications/nchrp/nchrp\\_syn\\_347.pdf](http://www.trb.org/publications/nchrp/nchrp_syn_347.pdf).

<sup>33</sup> Terry H. Klein, David Cushman, Danny Kwan, and Elizabeth Stepp (2009), National Cooperative Highway Research Program, Project 25-25, Task 49, *Effective Practices for Considering Historic Preservation In Transportation Project Planning and Early Project Development*, accessed online May 2013 at [http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25\(49\)\\_FR.pdf](http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25(49)_FR.pdf)

<sup>34</sup> Giovanni C. Migliaccio, Geri Knoebel, and Rebecca M. Martinez (2010), National Cooperative Highway Research Program, *Web-Only Document 171: Identification of Results-Oriented Public Involvement Strategies between Transportation Agencies and Native American Tribal Communities*, accessed online May 2013 at <http://www.trb.org/Main/Blurbs/165473.aspx>

<sup>35</sup> NCHRP, ATR Institute, Giovanni C. Migliaccio, Geri Knoebel, Rebecca Martinez, Dexter Albert, and Jason Hurd (2011). *National Cooperative Highway Research Program, NCHRP Report 690, A Guidebook for Successful Communication, Cooperation, and Coordination Strategies Between Transportation Agencies and Tribal Communities*, accessed online May 2013 at <http://www.trb.org/Main/Blurbs/165472.aspx>

#### 2.1.4 State Practices

The summary information presented in this section was compiled primarily from a survey of state DOT websites and information posted on the tribal consultation section of AASHTO's Center for Environmental Excellence website.<sup>36</sup>

Information about tribal consultation activities and practices at the state level is not uniformly accessible and in many instances was very difficult to find. Relevant information was gathered for the following states, which appear to represent best candidates for further research and development of case studies.

##### *Alabama Department of Transportation*

Alabama DOT's Cultural Resource Coordinator is consulted on all projects that require tribal consultation pursuant to the requirements of Section 106. Alabama DOT is currently working with the FHWA state office and tribes to develop a programmatic agreement that will allow the state DOT to handle the consultation process for FHWA and serve as the initial contact point for consultation.

Source:

[http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/organizations.aspx#bookmarksubAlabamaDepartmentofTransportation](http://environment.transportation.org/environmental_issues/tribal_consultation/organizations.aspx#bookmarksubAlabamaDepartmentofTransportation)

##### *Alaska Department of Transportation and Public Facilities*

The state of Alaska developed the *Millennium Agreement* in April 2001 to establish a policy for state-level consultation between state government and Alaska's 229 federally recognized tribes. The Millennium Agreement and state Administrative Order 186 (adopted September 29, 2000) "provide a framework for the establishment of lasting government-to-government relationships and an implementation procedure to assure that such relationships are constructive and meaningful and further enhance cooperation between the State government and Alaska tribes. It acknowledges the mutual sovereignty of the State and Alaska's federally recognized tribes." The agreement establishes guiding principles for consultation, encourages inter-departmental cooperation in consultation efforts, and provides for an annual State-Tribal Forum for maintaining dialogue among participants.<sup>37</sup>

In addition, the Alaska DOT&PF has its own Tribal Consultation Policy (issued March 18, 2002). "This policy provides guidance to all employees of the department involved in any departmental action(s) that significantly or uniquely affect a tribe in Alaska, and pertaining to any tribal action that significantly or uniquely affects this department. It also reinforces the foundation for establishing and maintaining effective government-to-government communications between the department and the tribes in Alaska, and promotes consultation and

---

<sup>36</sup> AASHTO, Center for Environmental Excellence, Tribal Consultation, Recent Developments (2013), accessed online May 2013 at [http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/recent\\_dev.aspx](http://environment.transportation.org/environmental_issues/tribal_consultation/recent_dev.aspx)

<sup>37</sup> Alaska DOT, *Millennium Agreement between Federally Recognized Sovereign Tribes of Alaska and the State of Alaska*, accessed online April 2013 at <http://www.dot.alaska.gov/cvlrts/forms/Millennium-agree.PDF>

coordination with these tribes, with the goal of ensuring that the department conducts consultation in a culturally sensitive manner.”<sup>38</sup>

The Alaska Tribal Technical Assistance Center (Alaska TTAC) based at the University of Alaska Fairbanks/Interior-Aleutians Campus is supported by the FHWA and provides training and assistance to tribes interested in transportation planning. Services include providing information resources and seminars and other training on topics of concern to tribes. An annual transportation symposium sponsored by the Alaska TTAC is held to provide tribal and transportation representatives with an opportunity to discuss transportation issues.

Source: <http://www.dot.alaska.gov/cvlrts/tribal.shtml#mill>

#### *Arizona Department of Transportation (ADOT)*

The Arizona DOT developed a department-wide Native Nation/Tribal Government Consultation Policy in 2011 that serves to “guide ADOT personnel when interacting with the Native Nations/Tribal Governments in Arizona. To support the implementation of this policy, a detailed process is described in the *Tribal Transportation Consultation Process Reference Manual* developed for use by ADOT personnel (October 2009). The *Manual* describes the role and practice of tribal consultation throughout the ADOT program and project development process” and is currently being updated.<sup>39</sup>

The department’s consultation policy was developed in response to EO 2006-14 *Consultation and Cooperation with Arizona Tribes*, issued by Governor Napolitano on September 14, 2006. This order directed all executive departments to (1) develop and implement tribal consultation policies to guide their work and interaction with federally recognized tribes in Arizona, (2) designate a member of their staff to assume responsibility for implementation of the policy and to act as a point of contact (POC) for tribal issues, (3) review their tribal consultation policy each year, and (4) submit an electronic report annually to the Governor, State Legislature, and Tribal Leaders that describes all actions undertaken to implement the policy.

The Arizona DOT’s Tribal Transportation website includes links to pertinent laws, regulations, and guidance documents as well as case studies in consultation and partnership initiatives.

Source: <http://www.aztribaltransportation.com/aztt/index.asp>

#### *Arkansas Highway and Transportation Department (AHTD)*

The FHWA Arkansas Division and the AHTD are negotiating a Memorandum of Understanding (MOU) with two Native American tribes that will outline coordination activities associated with transportation projects that may affect areas in the state of cultural or religious significance to the

---

<sup>38</sup> Alaska DOT, *Policy and Procedure: Government-To-Government Relations with the Federally-Recognized Tribes of Alaska*, accessed online April 2013 at [www.dot.state.ak.us/admsvc/pnp/assets/chapt\\_1/01\\_03\\_010.pdf](http://www.dot.state.ak.us/admsvc/pnp/assets/chapt_1/01_03_010.pdf)

<sup>39</sup> ADOT, *Policies and Procedures, MGT-16.1 Department – Wide Native Nation/Tribal Government Consultation Policy*, accessed online May 2013 at [http://www.aztribaltransportation.com/aztt/PDF/MGT\\_1601.pdf](http://www.aztribaltransportation.com/aztt/PDF/MGT_1601.pdf)

tribes. The MOU stems from early coordination efforts conducted to support Interstate 69 projects in Arkansas.

Source:

<http://www.environment.fhwa.dot.gov/strmlng/searchresults.asp?id=4&keyword=&StateSelect=Arkansas&ShowNewPractices=&CategorySelect=all&startrow=1&ResultsSelect=10&ShowDescription=true&print=&InnovativePract=#R4>

*California Department of Transportation (Caltrans)*

Caltrans has written policy regarding consultation with Indian tribes. *Working with Native American Communities* was issued by the Director of Caltrans in August 2001 and states that the “Department establishes and adheres to government-to-government relationships when interacting with federally recognized California Native American Tribes.” Caltrans acknowledges tribal sovereignty, seeks to avoid or minimize adverse impact to cultural resources, respects Indian rights, sites, traditions and practices, and consults with tribal governments prior to making decisions, taking actions, or implementing programs that may impact tribal communities.<sup>40</sup>

Caltrans has developed a detailed Environmental Handbook that describes the department’s policy and implementing procedures for compliance with federal and state laws, including requirements for consultation with the state’s 109 federally recognized Indian tribes. The department’s policies and procedures for tribal consultation are presented in Volume 2 of the Handbook regarding Cultural Resources (Chapter 3; updated in 2004).<sup>41</sup>

Native American Coordinators and Native American Liaisons serve at both the state and district level in the Environmental and Transportation Planning units and advise and assist department staff and regional transportation agencies regarding tribal consultation requirements and procedures.

A Native American Advisory Committee (NAAC) consisting of tribal representatives from throughout the state was established in 1996 to “ensure that Caltrans management receives direct advice from the Indian community on issues pertaining to all modes of transportation in California. This advisory committee contributes to the Tribal Governments’ ability to take advantage of transportation opportunities and to participate within Caltrans in planning, developing and implementing transportation projects and services. It offers a chance to further the government-to-government working relationship.”

Source: <http://dot.ca.gov/hq/tpp/offices/ocp/nalb/index.html>

---

<sup>40</sup> Caltrans, *Working with Native American Communities*, accessed online May 2013 at

[http://dot.ca.gov/hq/tpp/offices/ocp/nalb/index\\_files/DP-19-Working\\_with\\_Native\\_American\\_Communities.pdf](http://dot.ca.gov/hq/tpp/offices/ocp/nalb/index_files/DP-19-Working_with_Native_American_Communities.pdf)

<sup>41</sup> Caltrans, *Standard Environmental Reference, Vol. 2 Cultural Resources*, accessed online May 2013 at <http://www.dot.ca.gov/ser/vol2/vol2.htm>.

### *Colorado Department of Transportation (CDOT)*

In February 2001 FHWA delegated coordination responsibility for Section 106-related tribal consultation on federal-aid transportation projects undertaken by CDOT. A protocol for consultation had been established one to two years previously. CDOT's Cultural Resource Section Manager is the primary POC for tribal consultation. Consultation activities include correspondence with tribes via letters, phone calls, and meetings and communication with the FHWA tribal coordinator and CDOT project managers and consultants involved in Section 106 and NEPA reviews.

The Statewide Transportation Advisory Committee (STAC) represents 15 Transportation Planning Regions (TPRs) throughout the state. Colorado has five metropolitan planning organizations (MPOs) and 10 rural transportation planning regions (TPRs). There are also non-voting representatives from the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe in southwest Colorado. The STAC members provide advice to CDOT and the Transportation Commission on the needs of the transportation system in Colorado and review and comment on all regional transportation plans submitted by the transportation planning regions and/or CDOT. Tribal governments are invited to participate in monthly STAC meetings. In addition, joint cooperative meetings among Colorado Tribal Governments, CDOT, FHWA, the Bureau of Indian Affairs (BIA), and the New Mexico, Utah, and Arizona DOTs take place every year, or as needed to discuss transportation issues specific to the Indian tribal governments.

Sources:

<http://www.coloradodot.info/programs/statewide-planning/stac.html> and [http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/organizations.aspx#bookmarksubColoradoDepartmentofTransportation](http://environment.transportation.org/environmental_issues/tribal_consultation/organizations.aspx#bookmarksubColoradoDepartmentofTransportation)

### *Florida Department of Transportation (FDOT)*

FDOT and FHWA are currently involved in meetings and discussions with representatives of the six federally recognized tribes living in or culturally affiliated with Florida. This dialogue began in 1999 with Section 106 workshops and project-related coordination. Representatives of FHWA and FDOT also traveled to South Florida, Alabama, and Oklahoma to meet with tribal chairpersons and historic preservation officers to discuss agency goals and stress the desire for meaningful consultation. Following this, a series of meetings was held in Tampa, Coral Gables, and the Big Cypress Seminole Reservation to identify key issues, increase mutual understanding, forge a workable protocol, and create positive opportunities for future consultation. The consultation process established during these meetings continues to evolve and improve.

In 2004 FDOT's Environmental Management Office produced a Cultural Resource Management Handbook that describes policies and procedures for compliance with environmental review requirements including tribal consultation.<sup>42</sup> Exhibit 2-1 of this document describes the department's consultation policy and procedures and identifies several consultation priorities or issues of concern to both agencies and tribes, including establishing effective communication

---

<sup>42</sup> FDOT, *Cultural Resource Management Handbook*, accessed online April 2013 at [http://www.dot.state.fl.us/emo/pubs/cultmgmt/Handbook\\_11-04.pdf](http://www.dot.state.fl.us/emo/pubs/cultmgmt/Handbook_11-04.pdf).

channels, establishing appropriate communication protocols, enhancing mutual respect and understanding, encouraging growth of cultural sensitivity, understanding roles and responsibilities under pertinent laws and regulations, respecting tribal sovereignty, understanding agency concerns for production schedules and costs, understanding tribal concerns for Native American sacred and cultural resources, and streamlining the consultation process. The handbook states that “The ultimate goal of this Native American consultation effort is to complete a Memorandum of Understanding between the agencies and tribes that will ensure compliance with Section 106 of the NHPA and expedite the consultation process.”

Source: <http://www.dot.state.fl.us/emo/NA%20Website%20Files/Dialogue.shtm>

#### *Georgia Department of Transportation (GDOT)*

GDOT’s policy statement for compliance with tribal consultation requirements is incorporated in the Department’s Environmental Procedures Manual, Chapter V, Section 3.0 regarding Cultural Resources. GDOT notifies Regional Commissions (RCs), local governments, and federally recognized Indian tribes to request their input during project development. Consultation is also performed at other specified points in the identification and assessment of effect processes.

Source:

[http://www.dot.ga.gov/doingbusiness/PoliciesManuals/roads/Environmental/GDOT-EPM-Chap05\\_3.pdf](http://www.dot.ga.gov/doingbusiness/PoliciesManuals/roads/Environmental/GDOT-EPM-Chap05_3.pdf)

#### *Idaho Department of Transportation*

The Idaho DOT’s policy statement regarding tribal consultation is incorporated as Section 1800 of the DOT’s *Environmental Process Manual* (2011). The manual advises that consultation with the tribe(s) be initiated early and continue throughout the project unless notice is received that there is no interest in continued involvement. No single protocol exists for tribal consultation “[b]ecause each tribal government is unique in its structure and delegation of authority....Satisfying the legal intent of tribal consultation prescribed by law is augmented and reinforced by developing ongoing working relationships characterized by person-to-person, face-to-face communication between districts and tribes. Once initial introduction is made by FHWA, contact is established by district officials with their tribal counterparts. District and tribal officials then identify technical staff who will work together on a project-specific or an ongoing basis. The best means of communication is negotiated according to tribal or staff preference. Again, satisfying the legal intent of tribal consultation is accomplished through mandate procedure as well as ‘good faith effort.’”<sup>43</sup>

Source: <http://itd.idaho.gov/enviro/cultural/cultural.htm>

---

<sup>43</sup> Idaho DOT, *Title VI Plan*, March 2009, accessed online March 2013 at [http://itd.idaho.gov/manuals/online\\_Manuals/current\\_manuals/environmental/1800.pdf](http://itd.idaho.gov/manuals/online_Manuals/current_manuals/environmental/1800.pdf).

### *Illinois Department of Transportation (IDOT)*

FHWA and IDOT organized two workshops with tribes in 2008 and 2009 to gain input on historical and tribal land issues and work toward developing an MOU among Illinois highway and historical agencies and tribes interested in Illinois lands. FHWA brought in the U.S. Institute for Environmental Conflict Resolution to help bring the parties together. The workshops allowed tribal and agency participants to exchange ideas for increased tribal involvement and early notification. The meetings were the foundation for developing tools and formal agreements to improve consultation including an online tool for project notification. The web-based interactive Project Notification System (PNS) allows tribes to view new transportation projects in their area of interest online. The system was developed by IDOT and the Illinois State Archaeological Survey at the University of Illinois, with review and input from agency and tribal representatives.

The workshops also laid the groundwork for the development of an MOU to help determine what consultation should be done with tribes and bands (currently numbering 27) that have an interest in Illinois lands.<sup>44</sup>

#### Sources:

[http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/case\\_studies.aspx#bookmarkIllinoisDOTWorkshopsHelpBuildCooperativeRelationshipsConsultationTools](http://environment.transportation.org/environmental_issues/tribal_consultation/case_studies.aspx#bookmarkIllinoisDOTWorkshopsHelpBuildCooperativeRelationshipsConsultationTools) and [http://www.isas.illinois.edu/transportation\\_research/index.shtml](http://www.isas.illinois.edu/transportation_research/index.shtml)

### *Indiana Department of Transportation (INDOT)*

Procedures for tribal consultation have been incorporated into INDOT's (INDOT) 2008 Cultural Resources Manual. The procedures (Chapter 3 of the Manual) authorize INDOT to initiate Section 106 consultation on behalf of FHWA for projects listed in the INDOT Statewide Project Monitoring System. Required Section 106 documentation can be incorporated into a project's Environmental Impact Statement (EIS), streamlining the NEPA process. In addition, the procedures address concerns related to the role of consultants and assure government-to-government contact with Native American tribes. Per a request by the ACHP, FHWA incorporated several Section 106 consultation meetings into the procedures to ensure that all consulting parties become involved early and comment on documents and decisions.

The Cultural Resources Manual incorporates the *Programmatic Agreement (PA) Among the Federal Highway Administration, the Indiana Department of Transportation, the Advisory Council on Historic Preservation and the Indiana State Historic Preservation Officer Regarding the Implementation of the Federal Aid Highway Program in the State of Indiana* (also known as the "Minor Projects PA"). The final PA was completed in October 2006.

---

<sup>44</sup> Illinois State Archaeological Survey, *Memorandum of Understanding Among the Federal Highway Administration, Illinois State Historic Preservation Officer, Illinois Department of Transportation and Federally Recognized Tribes Interested in Illinois Lands, Regarding Tribal Consultation Requirements for the Illinois Federal Transportation Program*, accessed online April 2013 at [http://www.isas.illinois.edu/transportation\\_research/moa\\_pa\\_pdfs/Tribal\\_Consultation.pdf](http://www.isas.illinois.edu/transportation_research/moa_pa_pdfs/Tribal_Consultation.pdf)

This agreement allows INDOT to independently perform the work and consultation described in sections 36 CFR Part 800.3, 800.4, and 800.5 on behalf of FHWA. FHWA will continue to be responsible for making a finding of “adverse effect” and for the resolution of those effects. The Minor Projects PA also developed a list of undertakings that generally do not affect historic properties. This listing falls into two categories: major projects that require review by INDOT Cultural Resources staff, and minor projects that do not require such documentation and review. FHWA continues to perform the lead role in identifying and establishing consultation with the Indian tribes consistent with 36 CFR § 800.2(c)(2); however, if the tribe is agreeable, further consultation may be conducted between the tribe and INDOT.

Sources: [http://www.in.gov/indot/files/January\\_2008\\_Manual.pdf](http://www.in.gov/indot/files/January_2008_Manual.pdf)

and

<http://www.environment.fhwa.dot.gov/strmlng/searchresults.asp?id=2&keyword=&StateSelect=Indiana&ShowNewPractices=&CategorySelect=all&startrow=1&ResultsSelect=10&ShowDescription=true&print=&InnovativePract=#R2>

### *Iowa Department of Transportation*

In 2001 the Iowa DOT, FHWA, and the Center for Transportation Research and Education at Iowa State University organized a tribal summit and tribal workshop that resulted in creation of the *Iowa Tribal Consultation Process*.<sup>45</sup> The process developed in Iowa calls for notification of interested tribes using a standardized form and information package early in the planning process. Tribes are further consulted during property identification and assessment of effect and receive copies of final project documentation. The Iowa DOT is the POC for tribes until there has been a determination that the project will adversely affect a prehistoric site, or there is a conflict, at which time the FHWA becomes actively involved in the consultation process. Individual programmatic agreements are developed with each participating tribe to institute a formal commitment of all parties to follow the process. The DOT and FHWA meet with tribes on a bi-annual basis to review the process and its performance.

Source: [http://www.iowadot.gov/program\\_management/StatePublicParticipationProcess.pdf](http://www.iowadot.gov/program_management/StatePublicParticipationProcess.pdf)

### *Kansas Department of Transportation*

FHWA has formally delegated their tribal consultation responsibilities to the Kansas DOT. The DOT reviews all projects early in the planning stage and sends out letters to tribal contacts as soon as a description of the proposed project is available. If significant changes are made in the project between the early planning stage and the field check plans, a second round of letters is sent to notify tribes of these changes. Follow-up letters are sent to notify tribes if archaeological sites are encountered during field investigations, and copies of archaeological reports are sent to tribes that have requested them. Copies of all outgoing and incoming correspondence are maintained in the project files and are tracked in a database that also generates the initial notification letters.

---

<sup>45</sup> Iowa State University, Center for Transportation Research and Education and the FHWA, *Iowa Consultation Process, Initiatives and Recommendations*, accessed online May 2013 at <http://www.ctre.iastate.edu/reports/tribal.pdf>

Source:

[http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/organizations.aspx#bookmarksubKansasDepartmentofTransportation](http://environment.transportation.org/environmental_issues/tribal_consultation/organizations.aspx#bookmarksubKansasDepartmentofTransportation)

### *Maine Department of Transportation*

As the result of a recent EO, Maine DOT is in the process of developing a Tribal Consultation Policy that promotes government-to-government communication and collaboration with Maine's Native American tribes. The department-wide policy is intended to encourage communication between Maine DOT and Maine's Native American tribes and establish a method for the tribes to provide meaningful input into the department's decision making processes.

Source: <http://www.maine.gov/mdot/ppp/planprogdev.htm>

### *Michigan Department of Transportation*

Michigan DOT has ongoing government-to-government communication with 12 federally recognized sovereign tribal governments whose lands are situated in Michigan. In 2004 Governor Granholm issued an Executive Directive (2004-5) that "each executive branch department and agency shall establish guidelines to accommodate requests for meaningful and timely consultation with Indian tribes prior to the enactment of legislation, promulgation of regulations, or adoption of policies that have tribal implications."<sup>46</sup>

A set of Department Operating Guidelines implementing these directives became effective in March 2005. The policy statement on tribal affairs reaffirmed the state's commitment to government-to-government relationships with federally recognized Michigan Indian tribes. The document established guidelines for consultation and areas of responsibility within Michigan DOT for administering relationships with tribes.<sup>47</sup>

The FHWA Michigan Division issued a formal letter to Michigan DOT authorizing Michigan DOT to engage in tribal consultations on FHWA's behalf. In the event a tribe refuses to consult with Michigan DOT regarding any matter in which Michigan DOT is acting on behalf of FHWA, then FHWA assumes control of that specific consultation.

Source: [http://www.michigan.gov/mdot/0,1607,7-151-9625\\_55003---,00.html](http://www.michigan.gov/mdot/0,1607,7-151-9625_55003---,00.html)

### *Minnesota Department of Transportation (MnDOT)*

In 2002 MnDOT and the FHWA-Minnesota Division signed an accord with 11 federally recognized tribes with ancestral interests in the state to develop a working partnership to improve communication and working relationships. The parties agreed to meet at least once a year to

---

<sup>46</sup> Michigan DOT, Executive Directive No. 2004-5, accessed online April 2013 at [http://www.michigan.gov/mdot/0,4616,7-151-9625\\_55003-92821--00.html](http://www.michigan.gov/mdot/0,4616,7-151-9625_55003-92821--00.html)

<sup>47</sup> Michigan DOT, Michigan Federally Recognized Tribes, Michigan Department of Transportation (MDOT) (Implementing Executive Directive No. 2004-5, Department Operating Guidelines, accessed online April 2013 at [http://environment.transportation.org/pdf/Michigan\\_DOT\\_Policy\\_and\\_Guidelines\\_for\\_Tribal\\_Affairs.pdf](http://environment.transportation.org/pdf/Michigan_DOT_Policy_and_Guidelines_for_Tribal_Affairs.pdf)

review practices and activities and discuss measures to foster improved success.<sup>48</sup> The MnDOT and the FHWA-Minnesota Division are currently consulting with the 11 federally recognized Native American tribes in Minnesota to create PAs to help streamline the consultation process for certain types of resources and projects under Section 106. Agreements have been signed with six of the 11 tribes.

Source: <http://www.environment.fhwa.dot.gov/strmlng/newsletters/aug04nl.asp> and <http://www.dot.state.mn.us/mntribes/pdf/execorder2003.pdf>

#### *Missouri Department of Transportation (MoDOT)*

FHWA and the Missouri DOT have communicated with a large number of modern Indian tribes and nations with historical ties to Missouri to identify areas of tribal interest and concern. To date, 22 federally recognized Indian tribes have requested consultation about transportation projects in some portion of Missouri. Each tribe has identified specific counties in Missouri and the age of archaeological remains on which they wish to consult. Because federally recognized tribes are legally considered independent and sovereign nations, tribal consultation is initiated by and conducted through the federal agency, which for MoDOT projects is usually the Missouri Division of the FHWA.

Procedural guidance, including consultation with Indian tribes, is incorporated into MoDOT's environmental and cultural resource requirements document.<sup>49</sup>

Source: <http://www.modot.mo.gov/ehp/TribalMap.htm>

#### *Montana Department of Transportation*

Montana state law recognizes a unique government-to-government relationship between state government and the eight tribal governments in Montana. "In formulating or implementing policies or administrative rules that have direct tribal implications, a state agency should consider the following principles: a commitment to cooperation and collaboration; mutual understanding and respect; regular and early communication; a process of accountability for addressing issues; and preservation of the tribal-state relationship" (§ 2-15-142, MCA).

In 2005 the Governor established an internal workgroup of policy advisers designed to build and maintain productive and stable government-to-government relationships between the state and tribal governments. The workgroup functions as a policy forum, internal to the executive branch

---

<sup>48</sup> MnDOT, *Government to Government Accord by and Among The Bois Forte Band of Chippewa, Fond du Lac Band of Lake Superior Chippewa, Grand Portage Lake Superior Band of Chippewa, Leech Lake Band of Ojibwe Indians, Lower Sioux Indian Community, Mille Lacs Band of Ojibwe Indians, Prairie Island Indian Community, Red Lake Band of Chippewa Indians, Shakopee Mdewakanton Sioux Community, Upper Sioux Indian Community, White Earth Band of Ojibwe, The Minnesota Department of Transportation, and the Federal Highway Administration - Minnesota Division*, accessed online May 2013 at <http://www.dot.state.mn.us/mntribes/pdf/accord2002.pdf>

<sup>49</sup> Missouri DOT, *Environmental and Cultural Resource Requirements*, accessed online April 2013 at <http://www.modot.mo.gov/business/lpa/documents/Chapter6EnvironmentalandCulturalResourcesRequirementsFINAL.pdf>.

and centered in the Governor's Office, which broadly guides and facilitates the Governor's policies on state-tribal relations throughout all state agencies, and oversees state-tribal revenue sharing agreements and gaming negotiations. State agencies are directed to consult with the Governor's office concerning any new or changed agency initiative, program, or contract with tribal governments; Indian law questions; problems that arise in implementing existing agreements or programs; or policy initiatives in Indian Country.

The Montana DOT's environmental guidance document, the *Montana Environmental Manual* (2010), includes a chapter entitled Tribal Lands/Issues. The document provides an overview of the tribes that have reservations or ancestral interests in the state and identifies the Montana DOT Environmental Services Bureau (ESB) as the unit responsible for tribal coordination and consultation. The Montana DOT Director is formally designated as Tribal Liaison for the Department.<sup>50</sup>

Source: <http://tribalnations.mt.gov/statetribalpolicy.asp>

#### *Nebraska Department of Roads (NDOR)*

NDOR is required by state law to maintain regular and meaningful consultation and collaboration with tribal officials in the development of policies that have tribal implications. Tribal governments are given the opportunity to submit input into the Department's Long-Range Transportation Plan (LRTP) and the Strategic Transportation Improvement Plan (STIP). Prior to updating the LRTP (currently done every five years), the Department holds a public participation workshop to receive public input for completing the final LRTP. Stakeholders, which include the respective tribal governments, are invited to attend. Comments may then be submitted by the tribal governments through the Department's website at [www.transportation.nebraska.gov](http://www.transportation.nebraska.gov). Each year the Department sends the respective tribal governments a notice of those projects included in the STIP. At each of the Department's Annual District Transportation Program Meetings, the tribal governments are invited to attend and given the opportunity to comment on the STIP. Tribal government comments received are considered and addressed by the Department following the program meetings.

Source: <http://www.transportation.nebraska.gov/docs/public-involvement.pdf>

#### *Nevada Department of Transportation*

At the Nevada DOT tribal consultation responsibilities are shared by the Chief Archaeologist and a consultation coordinator, both of whom work for the Department's Cultural Resource Section. The Cultural Resource Section is one of three Sections in the DOT's Environmental Services Division. Generally, the Chief Archaeologist determines the need for consultation for each project, acquires the necessary project description and project limits, and gives the information to the consultation coordinator (who is an anthropologist). The consultation coordinator then determines which tribes/groups need to be consulted and writes the FHWA letters initiating formal consultation. FHWA signs the letters and sends them out (FHWA has not delegated tribal

---

<sup>50</sup> Montana DOT, *Montana Environmental Manual*, Chapter 31 Tribal Land Issues. Accessed online May 2013 at <http://www.mdt.mt.gov/publications/docs/manuals/env/Chapter%2031%20TRIBAL%20LAND%20ISSUES.pdf>

consultation responsibilities to the state DOT). Unless serious problems develop with a tribe, the consultation coordinator does all the follow-up work, as well as site visits, etc. The coordinator also routinely contacts tribes regarding the state DOT's overall program and obtains information on any issues that the tribes may have. Once the tribes have responded, or have had enough time to respond, the coordinator writes an "FHWA Consultation Report," which is submitted through FHWA to the Nevada SHPO as part of the Section 106 compliance package.

Source:

[http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/organizations.aspx#bookmarksubUtahDepartmentofTransportation](http://environment.transportation.org/environmental_issues/tribal_consultation/organizations.aspx#bookmarksubUtahDepartmentofTransportation)

#### *New Mexico Department of Transportation (NMDOT)*

NMDOT created a Native American Transportation Liaison Program in 2003 in response to the addition of historic preservation issues to the state's LRTP process and a state executive directive to improve tribal consultation at the state level. NMDOT also adopted measures with local planning organizations to ensure that tribal consultation was included in the planning process. As members of these local planning organizations, the state's 22 resident tribes have an opportunity to raise concerns about the effects a project may have on historic resources, including properties of religious and cultural significance to tribes.

The creation of the Tribal Liaison Program has helped tribes understand and participate in the transportation planning process. There is a greater understanding among tribes of how to present their needs and meet state planning and development requirements. Departments within the NMDOT have also become more aware of tribal needs and concerns. The liaison is able to meet with tribal representatives, identify issues and concerns, and convey these to NMDOT staff. When government-to-government meetings are needed, these can be more easily arranged. The tribal liaison is able to provide guidance on both the policy level and on the level of individual transportation projects.

Source: [http://environment.fhwa.dot.gov/histpres/nm\\_shpo.asp](http://environment.fhwa.dot.gov/histpres/nm_shpo.asp)  
and

<http://dot.state.nm.us/content/nmdot/en/Planning.html#NATTP>

#### *North Dakota Department of Transportation (NDDOT)*

NDDOT and FHWA-North Dakota Division Office (ND Division) have developed an innovative approach to tribal consultation with 12 tribes in North Dakota, South Dakota, Montana, and Minnesota. NDDOT and ND Division developed a PA with the tribes that tailored the consultation process to NDDOT's requirements while addressing tribal concerns about cultural resources that may be affected by NDDOT projects. This agreement creates a Tribal Consultation Committee that includes representatives from each tribe, the NDDOT, and the FHWA. The Committee meets at least twice a year for two- to four-day sessions to focus on

specific projects, educational opportunities, impediments to effective tribal consultation at all levels, and other topics of interest to the members.<sup>51</sup>

The FHWA, NDDOT, and the Tribal Consultation Committee have developed a Cultural Heritage Manual to aid tribal consultation efforts. The manual, completed in 2008, is designed to help expedite tribal consultation efforts and address undertakings that could affect properties with religious and cultural significance. The manual offers a tribal perspective on cultural heritage issues and provides an overview of relevant laws. The manual also describes key tribal consultation “best practices” and protocols. The manual employs a unique visual aid, called the “Heritage Wheel,” that helps the user to locate critical information at a glance and identify interrelated topics of importance.

*In Their Own Light, a Case Study in Effective Tribal Consultation* (2006) studies the tribal consultation process in North Dakota and the implementation of the North Dakota Programmatic Agreement.

Source: <http://www.dot.nd.gov/divisions/environmental/culturalresources.htm>

#### *Ohio Department of Transportation (ODOT)*

In 2005 FHWA and ODOT sponsored a workshop for members of the Potawatomi Nation, Eastern Shawnee Tribe, Absentee Shawnee Tribe, Ottawa Tribe, Seneca-Cayuga Tribe, and Wyandotte Nation to encourage tribal input for streamlining the Section 106 consultation process as well as to improve government relationships. An important goal of the workshop was to build stronger working relationships that might lead to agreement documents designed to streamline the consultation and Section 106 review process. Participants decided not to pursue agreements at the time of the workshop.

According to ODOT’s cultural resources manual (Chapter 2), all federally recognized tribes with demonstrable ancestral/cultural ties to Ohio are included in Native American Indian tribal consultation for ODOT projects. In accordance with 36 CFR Section 800.3(f)(2) and the Section 106 PA, FHWA and ODOT-Office of Environmental Services (OES) consult with federally recognized Native American Indian tribes that might attach religious and cultural significance to historic properties in the APE of the undertaking and invite them to be consulting parties. ODOT-OES conducts tribal consultation on behalf of FHWA pursuant to the Section 106 PA.

Source:

<http://www.dot.state.oh.us/Divisions/Planning/Environment/training/Agreements%20%20Manuals/Tribal%20Consultation%20Report%202005.pdf>

and

[http://www.dot.state.oh.us/Divisions/Planning/Environment/Cultural\\_Resources/Pages/CulturalResourcesManual.aspx](http://www.dot.state.oh.us/Divisions/Planning/Environment/Cultural_Resources/Pages/CulturalResourcesManual.aspx)

---

<sup>51</sup> NDDOT and FHWA, *Programmatic Agreement*, accessed online May 2013 at <http://www.dot.nd.gov/divisions/environmental/docs/programmatic-agreement-tribal-consultation.pdf>.

### *Oklahoma Department of Transportation*

Oklahoma DOT has a dedicated Tribal Liaison in the Oklahoma DOT Cultural Resources Program (ODOT-CRP). The CRP, which is housed at the University of Oklahoma, Norman, is supported through an interagency agreement with the University. The CRP is an adjunct of the Department's Environmental Studies Branch in the Planning & Research Division. The Tribal Liaison handles all Section 106 related correspondence and contacts appropriate tribes for all proposed Department projects, using project information provided to the CRP by the Department's in-house NEPA coordinators or outside NEPA consultants. At a minimum this involves initial consultation (letters) with appropriate tribes and later submission of cultural resource reports to them for all projects that qualify as "undertakings" requiring formal Section 106 consultation. All project-specific consultation goes directly between the Tribal Liaison and the tribes on ODOT CRP letterhead. FHWA is not directly involved in this process. The Liaison also handles the coordination for any extra meetings and agreements that may be needed to complete Section 106 coordination with the tribes.

An important part of the Liaison's job is to establish and maintain broader general contacts with colleagues in the tribal preservation offices and with traditional people to keep abreast of internal tribal issues and changes. The Tribal Liaison also helps coordinate efforts with the state FHWA office in the negotiation of general programmatic agreements for tribal consultation.

Oklahoma DOT and FHWA are in the process of negotiating individual Memoranda of Agreement (MOA) and programmatic agreements with Oklahoma tribes. These agreements will formally delegate FHWA's tribal consultation responsibilities to Oklahoma DOT.

Source:

[http://www.dot.state.oh.us/Divisions/Planning/Environment/Cultural\\_Resources/Pages/CulturalResourcesManual.aspx](http://www.dot.state.oh.us/Divisions/Planning/Environment/Cultural_Resources/Pages/CulturalResourcesManual.aspx)

### *Oregon Department of Transportation*

Oregon DOT conducts government-to-government consultation as mandated under Section 106, on behalf of FHWA and under Oregon Revised Statute 182.162. In meeting the mandate, ODOT Archaeologists conduct consultation pertaining to cultural resources with federally recognized tribes for transportation-related activities as needed. Oregon DOT archaeologists fulfill the role of agency tribal liaisons for Oregon DOT. Oregon DOT Archaeologists meet regularly with all nine of the federally recognized Oregon tribes. Such meetings provide Oregon DOT Archaeologists and Oregon DOT Region Environmental Staff an opportunity to present project information and consult face-to-face with official tribal representatives. Consultation provides the tribes the opportunity to ask questions about project details, to voice their concerns or praise for a project, and to provide input to affect a project. Tribal consultation continues for the duration of all projects via phone calls, emails, letters, etc., and is not complete until the project is constructed.

*Oregon DOT and Siletz Tribes Protect Culturally Significant Dogbane.* FHWA Newsletter (2011). This is an example of successful consultation among Oregon DOT, the Oregon

Department of Fish and Wildlife, and the Siletz Tribes, which discusses collaborative efforts to protect the culturally significant Dogbane plant. In this study Oregon DOT worked with the Siletz to transplant Dogbane, completed as a result of habitat disturbance related to environmental impediments caused by highway infrastructure.<sup>52</sup>

Source:

<http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/Pages/archaeology1.aspx>

*Pennsylvania Department of Transportation (PennDOT)*

Tribal consultation at PennDOT occurs at two levels. The Central Office Tribal Contact works in the Environmental Quality Assurance Division. The Central Office contact's responsibilities include policy-level consultation with tribes to develop letters of understanding on protocols, in addition to developing a handbook on these protocols. The Central Office Contact is the POC for FHWA questions to PennDOT and general non-project-specific questions from tribes. With few exceptions, all of the PennDOT archaeologists are tasked to the Environmental Quality Assurance Division within the Bureau of Design but are physically located in the District Environmental Units. The exceptions are District employees tasked to the District Environmental Units.

The District archaeologists typically handle project-specific issues or questions. Generally, a tribe will receive initial notifications on a project from a District archaeologist and that individual will be the first POC. The District archaeologist will convey knowledge of tribal interest in a project to a PennDOT project manager as well as to FHWA. General policy or statewide questions are handled by the Central Office. The Central Office is also responsible for keeping current the list of tribal contacts. FHWA may get involved in consultations at any point, or a tribe may contact FHWA directly.

In 2006 PennDot prepared a Tribal Consultation Handbook to guide staff in consultation efforts with tribes. The document is also designed to provide tribes with background on the process from design to maintenance for a transportation project in Pennsylvania and where consultation takes place during that process. PennDOT has also posted the Handbook and other information, including guidance and regulations related to tribal consultation, on their website.<sup>53</sup>

Source:

<http://www.dot.state.pa.us/Internet/Bureaus/pdCulturalResources.nsf/CultResHomepage?OpenFrameSet&Frame=main&Src=%2FInternet%2FBureaus%2FpdCulturalResources.nsf%2FTribal%3FReadForm%26AutoFramed>

---

<sup>52</sup> FHWA, *Successes in Stewardship Newsletter*, accessed online April 2013 at <http://www.environment.fhwa.dot.gov/strmlng/newsletters/nov11nl.asp>.

<sup>53</sup> PennDOT, *Tribal Consultation Handbook*, accessed online May 2013 at <ftp://ftp.dot.state.pa.us/public/bureaus/BEQ/thb.pdf>

### *South Dakota Department of Transportation (SDDOT)*

In South Dakota annual STIP meetings with tribes form the backbone of the relationship between tribes and SDDOT. At these meetings representatives from the tribes, the state, FHWA, and the BIA exchange information about their needs and upcoming planned projects. The participation of senior staff from SDDOT emphasizes the commitment of high-level decision makers to address tribal transportation needs within the planning process. In addition to annual meetings, staff from the FHWA South Dakota Division Office and SDDOT hold follow-up meetings with tribes on an ad-hoc basis to discuss specific needs and prospective projects. These meetings often take place on tribal lands.

The annual STIP meeting is viewed as useful by both the tribes and state and federal government participants. Part of the success of the annual STIP meeting can be attributed to the presence of high-level decision makers across many agencies and governments. Tribal chairmen and planners attend the meeting along with senior SDDOT transportation officials, region engineers, BIA staff from Aberdeen, the FHWA district tribal liaison, and SDDOT planners. The presence of these leaders facilitates the dialogue between the state government and tribes, sometimes resulting in decisions for action by the conclusion of the meeting.

Source: [http://www.tribalplanning.fhwa.dot.gov/caseStudy\\_soDakota.aspx](http://www.tribalplanning.fhwa.dot.gov/caseStudy_soDakota.aspx)

### *Texas Department of Transportation (TxDOT)*

Since 2002 FHWA and the TxDOT have signed PAs with 14 Indian tribes to streamline the Section 106 consultation process with the tribes. TxDOT develops approximately 1,000 projects per year, and nearly all are subject to tribal consultation under the NHPA. The tribal PAs foster more meaningful consultation because the tribes can look at just those projects where they may actually have a concern. The tribal PAs streamline the review process in several ways. Under the PAs, TxDOT directly coordinates with the tribes on behalf of FHWA. FHWA will approve all outcomes. TxDOT only contacts the tribes when a site with Native American artifacts has been found in the area of concern to the tribes. At present, tribes without PAs are provided information on virtually all projects, regardless of whether sites have been found. The Tribal PAs greatly reduce the amount of correspondence TxDOT sends and the amount of information the tribes review. The PAs clarify for the tribes the process that TxDOT will use in consultation on eligibility, effect, and mitigation, improving communication with the tribes and preventing delays. The PAs also provide the process that TxDOT will use under NAGPRA.

TxDOT is also using Geographic Information Systems (GIS) as a tool for the mapping of traditional cultural properties for Native American tribes. This tool demarcates areas of interest for specific tribes in Texas and has proven to be effective for the reduction of redundant paperwork sent to tribes.

Sources:

<http://environment.fhwa.dot.gov/strmlng/searchresults.asp?id=2&keyword=&StateSelect=Texas&ShowNewPractices=&CategorySelect=all&startrow=1&ResultsSelect=10&ShowDescription=true&print=&InnovativePract=#R2>

[http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/case\\_studies.aspx#bookmarkTexasDepartmentofTransportation](http://environment.transportation.org/environmental_issues/tribal_consultation/case_studies.aspx#bookmarkTexasDepartmentofTransportation)

*Utah Department of Transportation*

The NEPA/NHPA specialists in each of Utah's four regions manage Native American consultation on a project-by-project basis. FHWA sends the first contact letter on a project, on their letterhead, to the tribes. Utah DOT, sometimes with the assistance of a cultural anthropologist consultant, conducts any follow-up calls, produces the administrative record for the project, and works with tribal representatives on confidentiality issues. The NEPA/NHPA Specialist coordinates with tribes on the results of cultural resources inventories, findings of effect, mitigation commitments, and execution of any MOA.

Source:

[http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/organizations.aspx#bookmarksubUtahDepartmentofTransportation](http://environment.transportation.org/environmental_issues/tribal_consultation/organizations.aspx#bookmarksubUtahDepartmentofTransportation):

*Vermont Agency of Transportation (VTrans)*

In the past the FHWA-Vermont Division had a temporary employee to work with VTrans on tribal consultation. During that time FHWA and VTrans contacted 18 non-resident tribes concerning involvement with future VTrans projects. Four tribes did not want to participate in consultation. Six tribes did not respond. Eight tribes wanted to be involved or consulted on Vermont highway projects: the Cayuga Nation of Indians, the Mashautucket-Pequot Tribe, the Narragansett Indian Tribe, the Onondaga Indian Nation, the Passamaquoddy Tribe-Pleasant Point Reservation, the Wampanoag Tribe of Gay Head (Aquinnah), the Stockbridge Munsee Band of Mohicans, and potentially the Tuscarora Nation.

Since August 11, 2006, VTrans has been working directly with the federally recognized tribes owing to Vermont FHWA's continuing lack of staff qualified to handle this aspect of federal compliance. Two additional tribes, the Penobscot Indian Nation and Passamaquoddy Tribe-Indian Township Reservation, have asked to be involved in VTrans projects. This brings the total number of tribes that VTrans consults regularly to 10.

Sources: <http://www.aot.state.vt.us/TechServices/EnvPermit/CulturalResources.htm> and [http://environment.transportation.org/environmental\\_issues/tribal\\_consultation/organizations.aspx#bookmarksubVermontAgencyofTransportationVTrans](http://environment.transportation.org/environmental_issues/tribal_consultation/organizations.aspx#bookmarksubVermontAgencyofTransportationVTrans)

*Washington Department of Transportation (WSDOT)*

WSDOT maintains government-to-government relations with 34 federally recognized tribal governments. In 2008 WSDOT developed a comprehensive consultation process designed to address federal, state, and agency policy requirements for projects where FHWA is the lead federal agency. The model process aims to incorporate these requirements into one process for greater consistency and more thorough and holistic review. The manual discusses consultation objectives, and when and how to consult. The manual also has a document toolkit with templates for letters, consultation plans, and sample agreements.

Since 1993 WSDOT has met with tribes on an annual basis to address mutually identified transportation issues. At the 2003 Tribal/State Transportation meeting the Tribal Transportation Planning Organization was formally established. The purpose of the organization is to help tribes take an active role in statewide transportation planning by providing a forum to discuss and participate in tribal transportation system needs and opportunities. In July 2004 bylaws were adopted for the TTPO stipulating its purpose to promote tribal transportation planning in Washington State and foster intergovernmental cooperation and coordination. The bylaws also specify that the TTPO will provide a forum for the advancement of professional skills and knowledge among transportation professionals employed with Indian governments and encourages effective use of planning principles, cooperation, and education among transportation agencies at the local, regional, state, and federal level.

Sources: <http://www.wsdot.wa.gov/NR/rdonlyres/BF49CED8-B7C7-46A4-BA89-93153AB70FF3/0/TribalManual.pdf>  
and <http://www.wsdot.wa.gov/tribal/>

#### *Wisconsin Department of Transportation (WisDOT)*

In May 2005 WisDOT and the Wisconsin Division office of FHWA were joined by 11 Indian tribes in signing the Wisconsin Native American Partnering Agreement. The Agreement promotes communication and cooperation between the state and the tribes on transportation issues with the overall goal of fostering economic growth. Other components of the agreement will assist Native American-owned firms in bidding on transportation projects, establish additional coordination between WisDOT and tribes when transportation projects impact Native American archaeological sites, and provide for cultural competency training to educate WisDOT staff on Native American customs and traditions. The agreement establishes a WisDOT Tribal Task Force composed of WisDOT and tribal officials that will serve as a forum to discuss transportation issues and policies impacting tribes.<sup>54</sup>

Since it was signed, the Agreement has fostered creation of a Tribal Task Force, a Tribal Historic Preservation Project, a Tribal Transportation Conference, a Tribal Transportation Safety Project, and a Tribal Road Safety Summit, held in March 2010. An integral component of this process has been the annual tribal leaders' consultation meeting, hosted by WisDOT's Secretary, which provides tribal leaders an opportunity to continue a dialogue on a shared vision for future tribal initiatives at WisDOT.

Sources: <http://www.dot.state.wi.us/localgov/aid/tribal-affairs.htm>  
<http://www.environment.fhwa.dot.gov/stmlng/searchresults.asp?id=1&keyword=&StateSelect=Wisconsin&ShowNewPractices=&CategorySelect=all&startrow=1&ResultsSelect=10&ShowDescription=true&print=&InnovativePract=#R1>

---

<sup>54</sup> WisDOT, *Partnership Agreement between Wisconsin's Eleven Federally Recognized Tribes Bad River Band of Lake Superior Chippewa Indians, Forest County Potawatomi, Community, Ho-Chunk Nation, Lac Courte Oreilles Band of Lake Superior, Chippewa Indians, Lac Du Flambeau Band of Lake Superior Chippewa Indians, Menominee Indian Tribe of Wisconsin, Oneida Tribe of Indians of Wisconsin, Red Cliff Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community, St. Croix Band of Chippewa Indians, Stockbridge-Munsee Band of Mohican and Wisconsin Division-Federal Highway Administration and Wisconsin Department of Transportation*, accessed online May 2013 at <http://www.dot.state.wi.us/localgov/docs/partnership.pdf>

### 3. Online Screener Survey

A total of 41 states completed the screener survey questions on tribal consultation, which represents 82 percent participation nationwide. The completed screener surveys as received from the state DOTs is included in Appendix A. In most cases the survey was completed by one person, usually a Tribal Coordinator or Liaison, at each DOT; however, three states had more than one respondent, for a total of 45 responses. To assure that the data reporting would not be skewed, in the cases where multiple responses from one state were received, the responses were carefully considered and only one response was chosen to represent that state's approach to tribal consultation most accurately. This response was included in the summary report; however, each individual response is still part of the record and was considered in selection of states for Task 2 interviews.

Emails were sent throughout the month of October 2012, and the survey was open for responses from October 1 to November 2. Both group emails and individual emails were sent in an effort to obtain participants and follow up with those identified by the Task 79 Panel and AASHTO SCOE members.

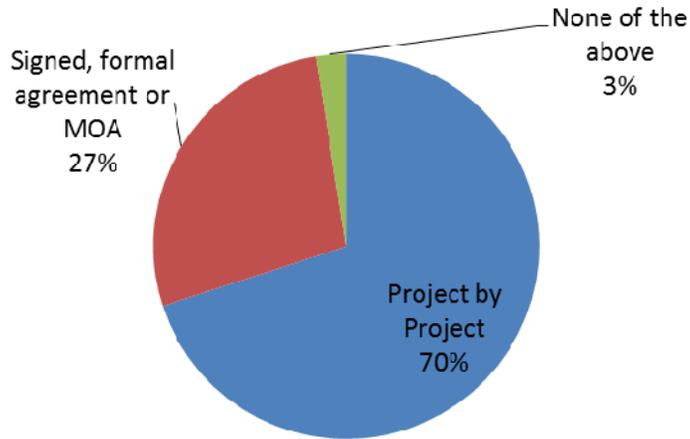
#### 3.1 Findings

The results summarized below are based on the responses of 41 state DOTs.

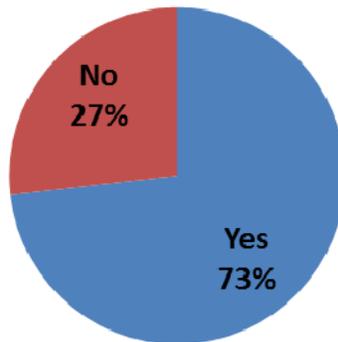
The results of the screener survey indicate that 75.6 percent of the states that participated in the survey have written guidance for consulting with tribes, and 24.4 percent do not. A total of 27.5 percent of the states indicated that they have a signed formal agreement or MOA type of document that establishes a process or protocol for tribal consultation; alternatively, 70 percent of the states indicated that they consult with tribes on a project-by-project basis. The remaining 2.5 percent indicated that neither of these mechanisms applies to their state process.

Of the states who participated in the survey, 73.2 percent indicated that they have tribal land within state boundaries, and the remaining 26.8 percent do not. Of the states responding, 14.6 percent do not have an established POC for tribal consultation within their transportation agency, and 85.4 percent do. The survey asked those who responded affirmatively to this question to provide the title typically associated with this POC. Many survey respondents simply provided their own name, but other responses include "Tribal Liaison," "Tribal Coordinator," "Planners," "Archaeologists," "THPO," and other environmental staff. A few states indicated that there are several points of contact depending on the region. Five of the states indicated that they do not contact tribes themselves and that FHWA is the POC for government-to-government consultation.

**Does your agency consult with tribes on a project-by-project basis? Or do you have a more programmatic approach for tribal consultation?**

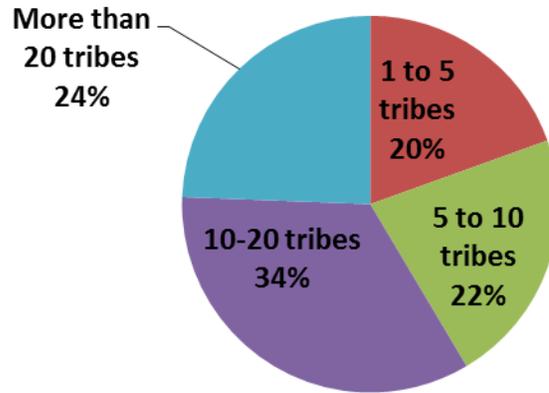


**Does your state have tribal land within its boundaries?**



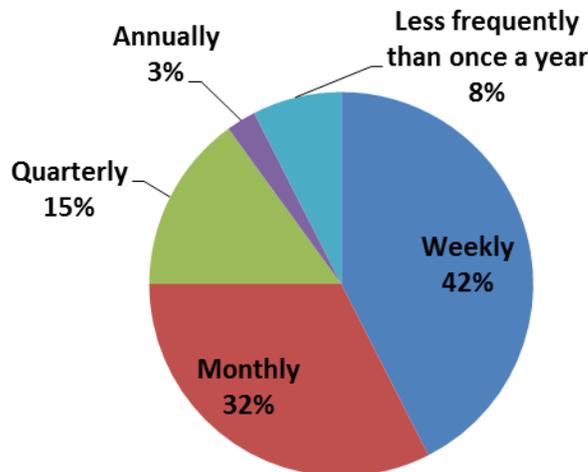
The number of federally recognized tribes that the states consult with varies. The majority of states in the survey (34.1 percent) indicated that they consult with 10 to 20 tribes, 24.4 percent indicate that they consult with more than 20 tribes, and 19.5 percent consult with between one

### With how many federally recognized tribes does your agency consult?

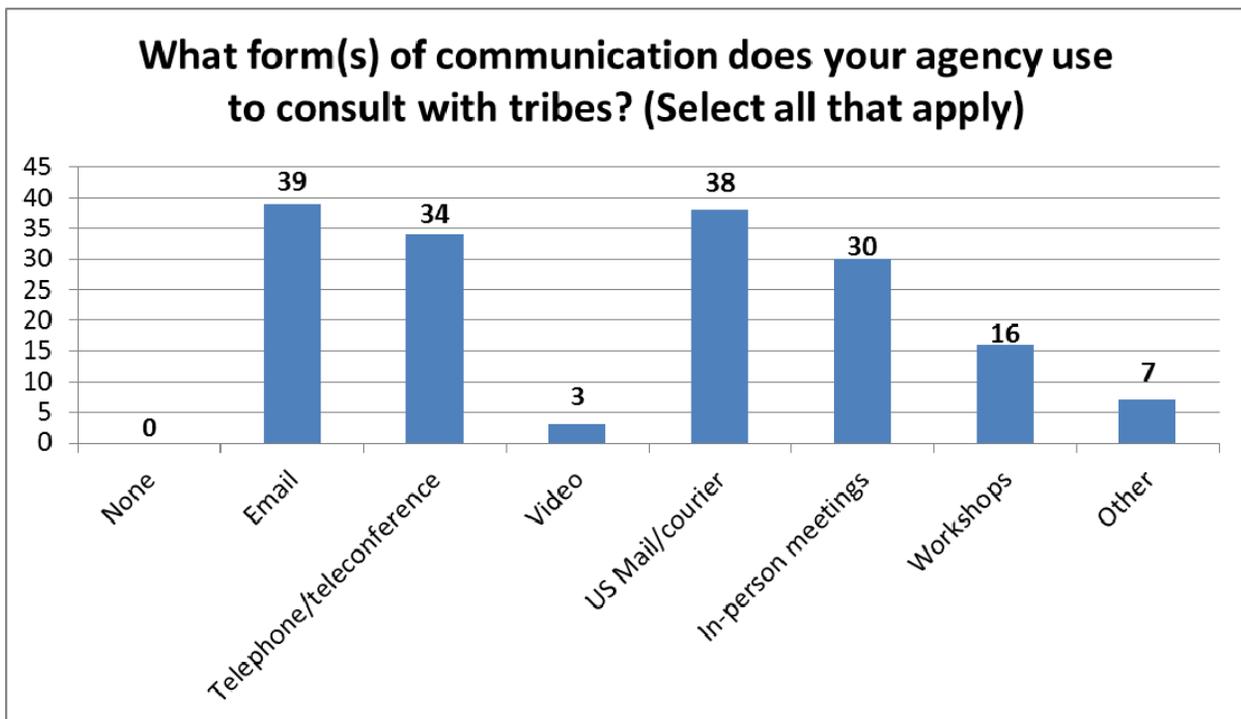


and five tribes at their state agency. The remaining 22 percent consult with five to 10 tribes. The survey also inquired about the frequency of contact with tribal government representatives: 42.5 percent of the states responding indicated that they have weekly contact with tribes in their state, and 32.5 percent have monthly contact. Six states (15 percent) reported that they have quarterly contact with the tribes. Only one state indicated that their contact was annual, and three states (7.5 percent) responded that they communicate less than once a year.

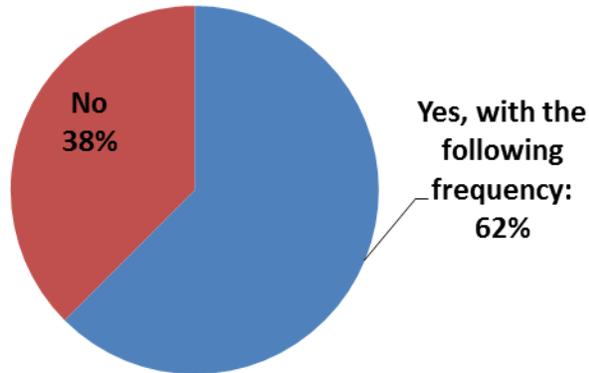
### On average, how often does your agency have contact with tribal government representatives?



The survey asked the states which forms of communication they use to consult with the tribes. The most popular forms were U.S. Postal Service (USPS)/courier (92.7 percent), email (95.1 percent), telephone/teleconference (82.9 percent), and in-person meetings (73.2 percent). States also chose workshops (39 percent) and video (7.3 percent). This question was open-ended, allowing other methods to be shared. Most of the responses indicated that special working relationships have been established with tribes, which result in designated conferences, meetings, and partnerships. The survey also inquired as to whether the state transportation agency has ever conducted consultation meetings on tribal land. In response, 62.5 percent indicated that they have and 37.5 percent have not.

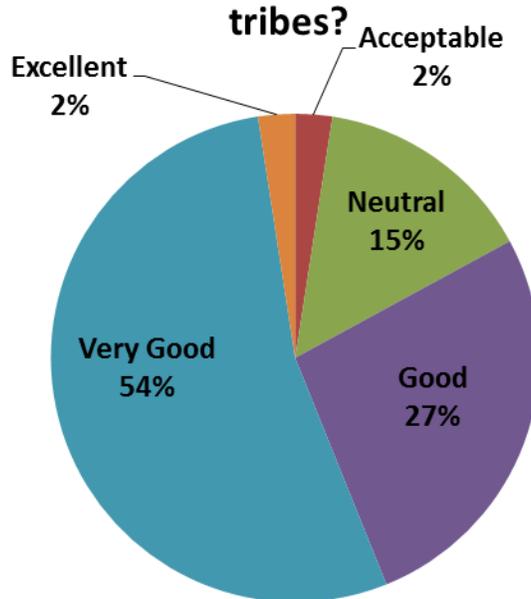


### Has your agency ever conducted consultation meetings on tribal land?



The survey asked the respondents for their opinion on the agency’s working relationship with the tribes. Just over half of the respondents (53.7 percent) indicated that they feel that their agency’s working relationship with the tribes in their state is “very good,” 26.8 percent indicated that the relationship was “good,” 14.6 percent responded that they felt “neutral” on the relationship, 2.4

### How would you rate the overall quality of your agency's working relationships with tribes?



percent indicated that the relationship was “acceptable,” and 2.4 percent said “excellent.” When asked to rate the overall effectiveness of the agency’s current program for consulting with tribes, 42.5 percent said that felt it was “very good” and 30 percent reported that it was “good.” Those who responded that they felt “neutral” on the effectiveness totaled 15 percent. Only 2.5 percent of respondents felt that the effectiveness was “poor”; 5 percent rated it “acceptable” and 5 percent rated it “excellent.”



The survey also asked respondents if they would be willing to share more information with us on the responses they provided and other practices their transportation agency might have for tribal consultation. Thirty-nine of those responding indicated their willingness to participate in further research under the Task 79 Panel. Of these, 12 states were chosen for a telephone interview (see Section 3.1.1). The interviews were conducted with the person who completed the screener survey (or the person suggested as appropriate in the survey) along with up to two available tribal government representatives associated with the transportation agency.

### *3.1.1 States Selected for Follow-up Interviews*

As previously discussed, the next task in this research involved focusing on 12 candidate programs to develop case studies designed to illuminate the process of consultation from a program-wide perspective. It is the intent that these case studies provide a diversity of practices among various states and across different geographical regions with the focus on both the DOT process and tribal perspectives.

*Selection Criteria.* State selection was designed to sample a range of approaches to tribal consultation and considered geographical location, states with and without resident tribes, the existence of a liaison program, the breadth and depth of the existing consultation practices and overall program (in varying degrees of development), and the existence of an agreement-based or programmatic approach.

States were asked in the screener survey whether they were willing to participate in follow-up interviews as part of this research. None of the states responding indicated that they were not willing; however, seven respondents left this question blank. Taking into consideration both the results and participation in the online screener survey, the states listed below were selected for Task 2 follow-up interviews. A brief rationale for selection is provided with each listed state. Two states were retained as “alternates” in case one of the selected states was unable to participate.

#### *States Selected*

1. **Alaska.** Consults with a large number of tribes. Alaska has a very active program at the state level, which includes a separate university-based facility for coordinating training and other assistance to tribes.
2. **Arizona.** Appears to have a well-developed consultation process and has a large tribal land area.
3. **California.** One of the largest states and consults with many tribes. California’s program is implemented at both the state and district levels, suggesting some potential for contrast with other more centralized states.
4. **Florida.** Has an interactive GIS-based system used for planning and has been working to bring tribal groups into this process. Other states may benefit from learning about this collaboration.
5. **Georgia.** Consults with 10 to 20 tribes on a weekly basis. Provides further representation of the eastern region.
6. **Illinois.** Has an FHWA-award-winning system for tribal consultation and expressed a great interest in participating in and contributing to this research project.
7. **Maine.** Maine DOT provides a perspective on northern New England issues and practices.
8. **Minnesota.** MnDOT has been successful in negotiating agreements with several resident tribes that have helped streamline the consultation process.
9. **North Dakota.** NDDOT’s tribal consultation program has received a great deal of attention over the past several years. The department has a PA that structures the

consultation process and includes regular review of its effectiveness. Participants have developed their own best practices manual and protocols.

10. **Oklahoma.** Has a large resident tribal population, and Oklahoma DOT has a dedicated tribal liaison who is in the process of negotiating agreements with a number of tribes.
11. **Oregon.** Appears to have a well-developed tribal consultation program with a planning organization established to encourage active participation of tribes in the transportation planning process.
12. **Pennsylvania.** Consults at both the central office and district levels and has a tribal consultation handbook designed to share project development information with tribes as well as soliciting information from tribes.

*Alternates:* **Iowa** has one of the oldest consultation programs. **New Mexico** has developed a Transportation Liaison Program for improved communication with the tribes.

## 4. Program Case Studies

The program review and participant interviews focused on the process of program development and maintenance. Some DOTs have well-established programs and a performance track record, allowing more detailed analysis, while others are in the formative stages of development. Attention focused on those state programs that have been in place for a longer time.

As noted previously, interviews were conducted with state DOT representatives during the months of January and February, 2013. Interview participants were selected based on the results of the survey that was open to all state DOTs to complete during October 2012. In general, participants were interviewed about their involvement in the process of program development, including specific details of agency staff investment, funding, and overall development time. Louis Berger compared program content in terms of structure, format, frequency of participant involvement, and consultation procedures. Louis Berger structured interview questions to learn if clear patterns exist across programs and whether this was an independent process or the result of borrowing and duplication. Differences were explored in the context of local circumstances and the extent to which they provide solutions to specific needs, interests, or challenges faced by program developers.

### 4.1 *Interview Results and Responses*

#### *Task 2 Interview Results: State Departments of Transportation*

The telephone interviews conducted with the state DOT representatives are summarized below. The responses are grouped by topic, such as how to define “meaningful” or “effective” consultation, different approaches to consultation (i.e., written guidelines vs. project-by-project approach), issues related to travel and meetings, points of contact, and obstacles to effective consultation. In some cases a topic heading may not appear because a response was not provided on that particular subject. In some cases a DOT provided additional background information to the interviewer, and those details are provided under an initial “background” section.

The interview questions were provided to the DOTs in advance of the interview and are attached as Appendix B. After reviewing the interview results, the Task 79 Panel requested additional information, and these follow-up questions were submitted to the DOTs by email:

1. If you are a DOT with multiple POCs, how do you keep everyone on the same page?  
What techniques seem to work best?
2. Is your position at the DOT full-time on tribal consultation?
3. How does your DOT track staff changes in the tribe and announce changes among DOT staff?
4. What is the frequency of group meetings on non-project-related topics and who pays for travel?
  - a. What funds are used for travel expenses? State program funds or project funds?
  - b. How are summits funded?

The responses to these follow-up questions are incorporated into the topic or subject of the original interview where they fit best. In some cases the question was not applicable to a particular state DOT and a response was not provided. State DOTs were also given a chance to review and provide edits or additional information to their individual write-ups.

#### *4.1.1 Arizona Department of Transportation (ADOT)*

##### *Background*

From 2000 to 2006, the Governor of the State of Arizona held a number of tribal summits. Invitations were extended to all 22 federally recognized tribes in Arizona. The agenda was left to the tribes to determine what would be addressed; the state was open to discussing any issues that the tribes wished to bring up, including water, natural resources, etc. One summit focused specifically on transportation and was held in March 2004 to discuss issues and priorities at the statewide level. At this summit, the Navajo Nation asked the Governor (Napolitano) to give a directive to ADOT to re-establish a formal partnering process that had been initiated several years prior (but eventually waned) and to work with the Nation to enter into an MOU on government-to-government relations. After a few years and extensive coordination these directives came to fruition and both the Nation and ADOT have been able to improve their relationship so that actions could be implemented to address intergovernmental transportation issues.

There are also several other ADOT sponsored forms of tribal consultation that have been initiated. The Arizona Tribal Strategic Partnering Team (ATSPT) was established in 1999 as a means of improving state-tribal relations in transportation at the statewide level. ATSPT brings together representatives from state, tribal, federal, and local agencies to address tribal-related transportation issues. ATSPT has held regional forums and statewide tribal transportation summits and most recently in 2011 held regional workshops in coordination with selected Councils of Government (COGs) and Metropolitan Planning Organizations (MPOs) in their respective areas of the state. The purpose of the regional workshops was to meet with tribes to increase program coordination and build strong relationships between them and the regional planning organizations. Five of these types of workshops were held and they involved eight tribes.

Other ongoing tribal-specific partnerships include:

- Hopi Tribe/BIA/FHWA/ADOT/Coconino County/Navajo County/Navajo Nation/Navajo DOT Partnership
- Navajo Nation/Navajo DOT/ADOT/BIA/FHWA/Hopi Tribe/Coconino County/Navajo County/Apache County Partnership
- San Carlos Apache Tribe/State/Federal/Counties/Railroad/Private Organization Partnership

In addition, the following are significant tribal consultation-related efforts not sponsored by ADOT undertaken in Arizona.

The Arizona Commission of Indian Affairs (ACIA) was established in 1953 to consider and study conditions among the tribal members residing within the State of Arizona. ACIA facilitates partnerships and educates the public and private sectors about the unique government-to-government relationships among the state, federal government, and tribal entities.

The Inter Tribal Council of Arizona was established in 1952 by tribal leaders to promote tribal sovereignty and strengthen tribal governments. In 1975 the council established the Inter Tribal Council of Arizona, Inc. (ITCA), as a private, non-profit corporation to provide independent analysis, information, and advocacy vital to tribal community self-development. Membership consists of elected officials from each tribe except for the Navajo Nation and San Juan Southern Paiute Tribe (SJSPT). The Navajo Nation is so large that its tribal governmental structure includes the staff and capacity to undertake its own initiatives. SJSPT currently does not have land in federal trust status; however, both it and the Navajo Nation are still invited to participate in ITCA transportation related meetings. ADOT provides regular transportation updates and status to tribal representatives at these meetings.

### *Defining “effective consultation”*

Effective tribal consultation consists of different levels of communication that are undertaken between tribal and state agency representatives. For ADOT’s purposes these include the “executive level,” involving tribal leaders, the state governor and/or state DOT director; the “management level,” involving tribal and state DOT/division directors/managers; and the “staff level,” involving tribal and state staff persons. For the state DOT, tribal consultation is also based on FHWA guidelines and state policies, all of which acknowledge tribal sovereignty. It is important to make sure everyone understands the purpose, need, and expected results for the consultation.

### *Written policies and guidance for consultation*

As a result of the Arizona Governor’s tribal summits held from 2000 to 2006, the Governor issued Executive Order 2006-14 directing all state executive branch agencies to develop and implement tribal consultation policies. Consequently ADOT’s tribal consultation policy was established in September 2006. To supplement the policy ADOT developed an *ADOT Tribal Transportation Consultation Process Reference Manual for ADOT Personnel Use* in 2009.

The written policy is absolutely necessary for informing department personnel of ADOT’s recognition of the sovereign status of tribal governments and its commitment to ensure working with tribes on a government-to-government basis. Also the manual provides guidance to existing ADOT personnel and provides a means for training incoming staff. ADOT has had a frequent turnover of staff and there are new employees coming in from different parts of the country and the world who need to be informed on ADOT’s relationships with tribes and how they work together.

Aside from numerous transportation construction projects on tribal land, one example of a program where the policy and guidance comes into play is in the ADOT Planning Assistance for Rural Areas (PARA) Program. Under this program ADOT transportation planners are

responsible for managing transportation planning studies. Tribes are eligible to receive transportation planning technical assistance through this program. As a result ADOT planners have the opportunity to work with individual tribes to update their reservation-wide long-range transportation plans or conduct issue area transportation studies. It is imperative that they understand their responsibilities as outlined in the ADOT tribal consultation policy and understand the processes (outlined in the reference manual) that must be followed to carry out their work with the tribes.

### *Project-by-project consultation v. programmatic approach*

There are advantages to both approaches and ADOT actually accomplishes its activities either way depending on the need. However, prior to 1998, tribal consultation normally occurred on a project-by-project basis. There was no designated tribal consultation POC within the department at that time. Today with two POCs on staff more effort is placed on working to establish ongoing relationships with the tribes so that when projects or issues arise the foundation is in place to help with the communication process.

ADOT's Multimodal Planning Division also recently published an *ADOT Transportation Planning and Programming Guidebook for Tribal Governments*, in January 2012. This document has been distributed to all tribes in Arizona for the purpose of informing them on ADOT's project development processes and to improve communication for project-specific implementation.

### *Liaisons and DOT POCs*

ADOT has two full-time positions that work as transportation planners/tribal liaisons and both focus on working with tribal governments. This position manages tribal transportation planning studies (working with individual tribes to update their reservation-wide plans and/or conduct issue area studies). The position also works in an advisory role to ensure that tribal interests, issues and needs are addressed in regional and statewide transportation planning activities, projects and programs.

ADOT has multiple POCs, including a separate liaison for right-of-way (ROW) issues in the northern as well as the southern portions of the state. In addition to the transportation planners who work as tribal liaisons, there are Section 106 consultation POCs. Additionally, there are nine ADOT engineering districts in the state and each district's engineer serves as a POC for tribes with land in those regions.

ADOT is also working on an online training program on tribal transportation consultation for existing and incoming staff, "ADOT Tribal Transportation Consultation Online Training Course for ADOT Personnel." This training is comprehensive with five one-hour modules that are meant to introduce and provide department personnel with the knowledge, tools and resources needed to effectively consult with tribal governments in Arizona. The training was released in May 2013 and is currently going through a trial phase. The tribal POC's hope is that it will become mandatory at some point regardless of the role of new incoming staff.

Additionally, ADOT plans to bring on a tribal partnering facilitator to organize and oversee all partnership meetings. The hope is that this will further improve outreach and coordination with tribal governments. Currently ADOT evaluates performance of the POCs through its annual performance management evaluation process and an established performance plan. This process is completed for all ADOT personnel based on their job responsibilities.

### *Managing multiple POCs*

Two of ADOT's transportation planners/tribal liaisons are the designated lead POCs on tribal related matters. They coordinate internal communication with other department POCs and/or determine whether there is a need for them to become involved in certain matters that arise. As liaisons they also conduct regular communication with the various other POCs in the department. Knowing who needs to be involved when working on certain issues or projects is necessary and challenging and can only be accomplished through constant open lines of communication. They feel that they have established this process to the point that most districts, divisions, sections and groups within the department are familiar with their role.

Having various POCs works well for ADOT and they work to keep each other apprised either through direct communication or by way of an ADOT annual tribal consultation report. Tribal consultation progress information is also posted on the Arizona Tribal Transportation website that has been established. The website address is: <http://Aztribaltransportation.com>.

Email, teleconference and in-person meetings are the methods ADOT finds to work best to ensure that all POCs are advised on status, progress or needs on tribal-related matters.

### *Tribal staff changes*

ADOT manages a tribal contact database that lists tribal leadership and department staff persons for each tribe, particularly those working in the areas of transportation, transit, cultural resources/historic preservation, and air quality. They become informed of tribal staff changes either through notice directly from the tribes, through meetings with tribal staff, by contacting the tribes directly, or by checking the tribal department directories that are posted on the tribal websites. The database is kept on an internal shared drive so that ADOT personnel may access it for their use.

### *Maintaining good relationships*

The three factors that are most important in maintaining good relationships with tribes are communication, building trust, and working one-on-one through the planning process. It is important to make sure that tribes are aware of upcoming projects in the long-range planning process. Tribes have indicated concerns about not getting enough advanced notice of upcoming projects.

It is also helpful when tribal contacts remain the same for a significant amount of time. This is because they are knowledgeable on the history of a project or issue and help to move processes

forward. Trust is built through the people who have had success in completing the various steps of a project.

### *Forms of communication*

ADOT uses many different types of communication, including email, telephone/teleconference, video, in-person meetings, and workshops and their success depends on the situation at hand. In-person meetings are usually requested by the tribal representatives at least at the start of consultation. Some considerations are the great distances that some tribal representatives would need to travel and the need to involve necessary tribal representatives to address a project or issue without having them to travel.

The Arizona Tribal Transportation website is designed as a central location for state-tribal transportation-related partnerships, projects, activities, groups, links, and other related information and aids in improving communication between the tribes and ADOT.

ADOT also maintains a tribal transportation contact list with email addresses that is shared internally to help ADOT personnel communicate with tribal representatives when needed.

### *Meeting in-person, venue and travel*

Meeting venues are very important and ADOT is willing meet with tribes in their communities or will host meetings if it is more convenient. ADOT frequently has meetings on tribal land for statewide issues, and sometimes the meetings are project-specific. ADOT has not experienced travel restrictions. Traveling to the tribal communities allows tribal representatives to point out issue areas for visual understanding of their needs and it also improves relationships. This occurs when tribes host State Transportation Board Meetings and also through the tribal-specific partnership meetings referenced previously.

In previous years ADOT held annual tribal transportation summits and quarterly meetings under the statewide partnership effort: ATSPT. Under that effort ADOT received consistent comments from tribal representatives indicating that they wanted ADOT to put effort into conducting more outreach through one-on-one consultation meetings located in their communities. This was partly due to concerns of their need to travel great distances and also they wanted to provide the opportunity for more tribal staff and officials to participate in the discussions. This has led to ADOT carrying out two distinct tribal consultation meeting efforts. The first involves formal quarterly partnership meetings with the Navajo Nation, Hopi Tribe and San Carlos Apache Tribe. ADOT has also recently initiated the process of working with the FHWA AZ Division Office to conduct Section 106 consultation meetings with other individual tribes.

### *Funding*

Travel for state personnel to in-person meetings is covered under individual program funding. For tribal representatives when they need to travel they cover their own expenses as well. It is understood that some tribal staff may use their federal Tribal Transportation Program (TTP) or tribal general funds to travel. There are also quarterly tribal transportation working group

meetings conducted by the ITCA that are held in Phoenix. Tribal staff and officials often attend those meetings and travel using their TTP and general funds as well.

The majority of funds for ADOT personnel travel come from the various federal programs. State funds are rarely available for these types of activities. For the ADOT Planning Division we use the federal Statewide Planning and Research Program funds.

#### *Obstacles to effective consultation*

One of the greatest obstacles to effective tribal consultation can be when tribal leaders are not present at critical meetings. It is important to have decision makers present so that the process can move efficiently. ADOT has asked tribal leaders to designate a proxy in the event that they cannot attend meetings where decisions need to be made. This has worked in most cases where it occurred.

#### *Additional factors*

It is critical to successful consultation to keep the communication ongoing. Transportation agencies need to make an effort to inform and communicate with tribes far enough in advance so that they have adequate time to make comments. This is particularly necessary in the Section 106 tribal consultation process. In Arizona tribes have indicated that they also want to be notified about projects that are off their tribal land as this could impact aboriginal cultural sites anywhere within the state, and that they want to be more involved in the early phase of the planning process.

It is also critical to have good leadership support and involvement within the state transportation department. When staff have guidance and understanding of their limitations it will help them to know when and who else within the department should be involved to move tribal consultation forward.

#### *4.1.2 California Department of Transportation (Caltrans)*

##### *Background*

There are 110 tribes in California, along with three non-resident tribes. Each Caltrans district (of which there are 12) has one or more District Native American Coordinators for Section 106 compliance with 16 in total statewide. Headquarters has a Statewide Native American Coordinator in the Cultural Studies Office who works with the District Native American Coordinators. There are federally recognized tribes in 10 of the 12 Caltrans districts.

Caltrans has transportation planners in the 10 districts that act as Native American Liaisons to consult outside the Section 106 process and assist in Caltrans government-to-government activities with the federally recognized tribes. Headquarters has a Native American Liaison Branch who works with the Native American Liaisons and the Statewide Native American Coordinator, and acts as staff to the Caltrans Native American Advisory Committee (see below).

### *Defining effective consultation*

Effective consultation gives tribes the opportunity to provide meaningful input before decisions are made. It is important that the DOT listen to the tribe's comments and concerns and be sure they are reflected in DOT documents. If comments and concerns cannot be addressed, it is important to communicate the reason. Effective consultation means being respectful and being responsive. It is important to understand tribal structure and also important for the tribe to understand what Caltrans is doing and why by keeping the tribe informed.

### *Written policies and guidance for consultation*

In September 2011 an Executive Order was issued by the Governor of California (Brown) directing that all state agencies establish an agency-wide Native American consultation policy (Executive Order B-10-11).

In response to this order, Caltrans will likely update their current policy on working with Native American communities, which has been in place since 2001. The Caltrans cultural resources studies handbook has a section on consultation that is often used as guidance for practitioners. Regional planning guidelines also discuss the need for consultation.

Caltrans policies also allow for tribal monitors to be present on projects in certain circumstances where there is the potential for certain issues to arise.

Having a written policy adds validity to the act of consultation. It articulates the vision and goals of the department and makes clear what is expected. It also allows for follow up if these expectations are not met. It is sometimes difficult to achieve 100 percent compliance across the board with such a large agency.

### *Project-by-project consultation v. programmatic approach*

Consultation under Section 106 is on a project-by-project basis. A programmatic approach would be helpful but current resources do not allow for the time involved in developing one that would be suitable.

At the district liaison level, there are some MOUs that document how tribes and the transportation agency will work together on projects. These are at a very high level and mainly address issues such as chain of contact.

### *Liaisons and DOT POCs*

Since California has so many tribes and is such a vast state, it is not possible to have one POC to coordinate tribal consultation. The district coordinators and liaisons are generally the first POC for tribes, and in some cases quarterly meetings are held.

Like other states, Caltrans describes a moderate turnover rate at the agency, as well as changes in contacts within the tribes. Caltrans is working to develop a system for more efficient transfer of

the knowledge and protocol that are usually lost when positions change and turnover occurs. Ideally, full-time positions for tribal coordinators would be developed, but in the meantime staff resources are limited unless work is tied to a specific project.

Performance has not been evaluated, nor is it clear how it could be. Staff has received both positive and negative feedback from tribes. During a training conducted by a well-known expert and consultant to tribes, the trainer indicated that California's program has been very successful. Caltrans acknowledges that there is always room for improvement.

### *Managing multiple POCs*

In order to keep all of the POCs on the same page, information is regularly provided by emails; video conferences (Native American Liaison Branch has monthly videoconferences, Cultural Studies Office less frequently); workshops specifically for DNACs or in conjunction with Statewide Cultural Functional workshops; training specific to consultation, or an aspect of Section 106 training, the Environmental Academy, and the Transportation Planning Academy; encouraging attendance at the quarterly Caltrans Native American Advisory Committee meetings.

As Statewide District Native American Coordinator the POC interviewed is engaged in assisting the Districts in their consultation efforts, either directly or through guidance and training. Twenty percent of her time is devoted to Section 106 and other activities, exclusive of Native American consultation efforts, as a staff Senior Environmental Planner. Only two of the 16 District Native American coordinator positions are full-time.

### *Tribal staff changes*

Notice of staff changes is provided in emails within the district and to headquarters. Currently staff have various ways of tracking changes, running the gamut from word of mouth to occasional phone calls, to checking lists online, to obtaining information during regular meetings. In initiating cultural studies, staff obtains the California Native American Heritage Commission's most recent lists of contacts for a given area. Staff is requested to be aware of elections and keep up to date on staffing. Caltrans will be developing a more systematic way to keep information up to date.

### *Maintaining good relationships*

Based on both positive and negative feedback received by Caltrans from the tribes, Caltrans has indicated they have a "good" relationship with the tribes. However, this is something that is difficult to measure. Staff is encouraged to keep apprised of tribal news and elections and to visit the tribal council when changes in positions occur so that they can introduce themselves.

### *Forms of communication*

Email, telephone/teleconference, video, in-person meetings, and workshops are all utilized by Caltrans in tribal consultation. Technological capabilities of the tribes vary greatly, and while

some tribes can participate in video conferences, some still do not have access to the Internet. However, face-to-face meetings are best because people do not always communicate well on the phone and misunderstandings can occur.

#### *Meeting in-person, venue and travel*

Caltrans encourages liaisons and coordinators to go to non-project events, but they must be aware of the appearance of favoring one tribe over another and need to project a neutral stance. Since the act of developing personal relationships with tribes is not a statutory requirement but is necessary for effective consultation, it can be difficult to justify the time devoted to this from a business perspective. Again, there is a lack of resources and time spent can be scrutinized.

Caltrans Native American Advisory Committee (1997-present) held quarterly group meetings on non-project-related topics. From 1997-2000 the Tribal Transportation Conferences were held annually. Additionally, for a period of five years in the 2000s, Caltrans held an annual Tribal Transportation Academy. The intent is to resume the Academy but this has not happened yet. Some districts have quarterly meetings with tribes individually to update on status of all projects.

#### *Funding*

The Native American Advisory Committee meeting is held quarterly and tribes pay for their own travel.

#### *Obstacles to effective consultation*

The greatest obstacles currently faced by Caltrans are related to funding and resources (staff and time). The business culture itself is not always conducive to effective consultation—there is a push to get projects done in a timely fashion, and sometimes the space needed for consultation and the time needed to develop productive relationships are not provided.

As noted previously, Caltrans hopes to resurrect the Tribal Transportation Academy program to promote more understanding between tribes and the agency and provide more training for staff, such as with the California Indian Dispute Resolution Center.

Caltrans has observed that tribes are becoming much more active in their government-to-government relationships and the agency is trying to adapt to that change.

#### *Additional factors*

To garner needed support for consultation programs within the agency, it is helpful to look to the laws and statutes to support each program and provide a strong foundation.

It is important to remember that consultation is not unique to tribal relations—it is reflected in daily life and practitioners should be aware of how they communicate in their personal lives and acknowledge how easy it is to miscommunicate.

### 4.1.3 Florida Department of Transportation (FDOT)

#### *Defining “effective consultation”*

Effective tribal consultation occurs when tribal contacts are willing to share the concerns of the tribe and when FDOT can accommodate those concerns and continue to develop the project without major delays or problems.

#### *Example: Miccosukee Tribe*

An enhancement funded project of a trail through an area in northeast Florida had potential high probability for finding human remains of importance to the Miccosukee Tribe. The tribal contact wanted a flexible survey method used to identify human remains with more frequent testing (than would be used along road projects). FDOT and the tribal contact worked out a method using posthole testing at reduced intervals to try to find anything indicative of human remains. If human remains were found, it was agreed that a permeable surface would be used so as not to interfere with the passage of the spirits. No remains were found and therefore the permeable pavement was not necessary, but the fact that FDOT was flexible and willing to accommodate the tribe’s requests improved their relationship.

#### *Written policies and guidance for consultation*

The State of Florida has set up a Native American Coordination website, <<http://www.dot.state.fl.us/emo/NA%20Website%20Files/index.shtm>>, which answers many of the common questions regarding Section 106 consultation. Consultation policy is laid out in the cultural resources management handbook as well as the project development/environmental handbook. The handbook is currently under revision.

#### *Project-by-project consultation v. programmatic approach*

Consultation on a project-by-project basis is necessary because some tribes are somewhat reluctant to sign agreements and they prefer to see consistency in the personnel they work with on projects. Florida uses the Efficient Transportation Decision Making (ETDM) advanced notification system. Some tribes are very specific about what type of material they want to see and do not want to receive. Not all tribes are contacted in the same way because not all have the same sensitivities. There are also various degrees of connectedness. For example, one tribal contact is “off the grid” and therefore cannot communicate via electronic mail (email) and can only receive mail via USPS.

#### *Liaisons and DOT POCs*

The Tribal Liaison for Florida is not full time on consultation. This position also serves as the Cultural Resources Professional for FDOT as well as the Recreational and Refuge Resources Coordinator.

### *Managing multiple POCs*

For tribal consultation, FHWA serves as the conduit that keeps the various de-centralized district offices on the same page and allows for the Central Office to remain cognizant of trends as well as problems that may arise.

### *Tribal staff changes*

When staff changes occur within the tribe, the contact is made initially with FHWA and then they inform the DOT.

### *Maintaining good relationships*

Tribes need to be confident that their concerns are being taken seriously. Having a POC increases confidence and helps tribes understand that you have an institutional mission to accommodate all goals while building good roads.

Early planning and early recognition needs to be part of the process.

### *Example: Episcopalian Church Site*

The Episcopalian Church Site in southwest Florida along U.S. Route 41 was a project where the Seminole wanted remote sensing conducted for a potential cemetery extending into an existing road. The tribe had concerns because there are and have been Native American members of the congregation and they were concerned that any work would disturb the spirits associated with the interments; they wanted to observe the work being performed.

### *Meeting in-person, venue and travel*

In the past, FDOT has met with tribes on tribal land. Currently, they hold a quarterly meeting with the tribes to discuss broader transportation goals. For a typical project, consultation is undertaken on a project-by-project basis. Sometimes FDOT and the tribes will meet at the project site and, in general, meetings take place wherever it is necessary to accomplish common goals.

### *Funding*

Funding for travel expenses depends upon the purpose of the meeting. Generally speaking, most meetings between cultural resources staff and the tribes are conducted in relation to projects and so it is from the project funds that these efforts are funded.

### *Obstacles to effective consultation*

The need for effective tribal consultation can pose limitations to project design, as avoidance of cultural resources may need to be addressed. Another concern relates to government-to-government level interaction. Because tribes are sovereign nations, some tribes prefer

consultation at the federal level as opposed to the state level. However, FDOT indicated that FHWA relies on the DOT as their consulting agent, suggesting that the DOT has the expertise to do Section 106 studies. Finally, consultation can lead to an overabundance of paperwork, which can consequently burden the tribes.

#### *Additional factors*

It is important to establish POCs in tribal consultation and any consultation must have an inherent flexibility so that it can accommodate the needs of the tribes. The representation of FHWA is also important to tribes, and professionals must be involved in the process.

#### *4.1.4 Georgia Department of Transportation (GDOT)*

##### *Defining “effective consultation”*

For GDOT’s Tribal Liaison, effective consultation means treating the tribes as equal partners, finding out their individual needs, and doing their best to fulfill those needs. GDOT consults with 18 different tribes and each has different needs.

##### *Written policies and guidance for consultation*

GDOT does not have written policy or guidance for consulting with tribes. However, this has not been an issue because the Tribal Liaison position has remained stable and consistent for the past 12 years. Since the practice evolves quickly, GDOT has not found it necessary to have a written policy, which would need to be continuously updated.

##### *Project-by-project consultation v. programmatic approach*

To preserve the good relationships and processes in place, and after much research, GDOT’s Tribal Liaison has been working to develop a tribal protocol agreement with each tribe that would be general in nature but spell out their day-to-day consultation activities. However, only one out of 18 tribes has signed an agreement. The tribes have not indicated urgency for a written protocol as they have expressed that they are pleased with the current relationship. GDOT does feel that it could be beneficial to have things written down.

##### *Liaisons and DOT POCs*

The current Tribal Liaison is the single POC at GDOT, following the first GDOT liaison, who was in that role for 10 years. The continuity in this position has allowed GDOT to develop very open and close relationships with tribal representatives. The tribal liaison position at GDOT is not full-time; it is one of the duties of the Archaeology Unit Manager.

### *Tribal staff changes*

Staff changes in the tribe are tracked by a tribal contacts and a tribal consultation protocol document that the GDOT tribal liaison keeps updated. When changes are made, the liaison notifies the DOT staff and FHWA.

### *Maintaining good relationships*

Treating the tribes as equal partners is critical to maintaining good relationships with tribes. It is important to make sure they know they are an important part of the process. Relationships need to be maintained, even between projects. It is good to check in on a regular basis.

### *Forms of communication*

In addition to visits, workshops, and communication via email and phone calls, GDOT began utilizing webinars recently, at the request of one of the tribes, and realized it was a very useful tool for collaboration and to present information to the tribes. Since the reporting process for archaeological work can be somewhat untimely, it is a good way to get information out to the tribes faster. The webinars are conducted via “GoTo Meeting,” which allows participants to see the presentations on their own computers. A call-in phone number is provided so that participants can hear everyone during the webinar. The webinars were assembled by emailing all of the tribes with a Meeting Agenda, GoTo Meeting link, and a call-in phone number. At least two reminder emails were then sent before the webinar (usually at one week and then the morning of the webinar). The tribes typically do not have input into the webinar agenda; however, they have full input once the webinar begins.

### *Meeting in-person, venue and travel*

Since the tribes that GDOT consults with are non-resident tribes, they rarely meet on tribal land. For project-related consultation, GDOT has brought the tribes in for site visits on large mitigation projects and it was a great success. In fact, it seemed that it may have helped to alleviate some tribal concerns about the process. The visits were written into the budget for mitigation, and although all of the tribes were invited, only one accepted. However, the visit was considered a success and GDOT plans to continue this practice in the future.

Although none of the tribes that GDOT consults with are resident in Georgia, GDOT makes a point of meeting at least once a year with the tribes. The To Bridge a Gap (TBAG) conference held annually in Oklahoma has been a great opportunity for GDOT to meet with those tribes.

### *Funding*

GDOT held their own 2011 Intertribal Meeting at TBAG and invited all of the tribes they consult with. Out of the 16 tribes invited, 10 attended, and GDOT provided meals and covered travel expenses and conference attendance fees for the tribes. This has been GDOT’s only non-project-related intertribal meeting, although GDOT would like to see them happen every three to four years.

For one of the tribes that could not attend, GDOT traveled to them after the workshop to give them the opportunity to participate. Federal project funds are almost always used for travel expenses related to tribal meetings.

#### *Obstacles to effective consultation*

One of the greatest obstacles that GDOT faces in tribal consultation is that the tribes are not resident in the state. This limits what can be accomplished, since face-to-face meetings and site visits are preferable. Tribal representatives are frequently involved in travel and are not always available. GDOT has found that the use of webinars is helping to overcome some of this difficulty. Also, because of frequent travel and other demands, it is difficult to reach tribal representatives by telephone. GDOT has found that email tends to be more successful. Some tribal representatives have provided mobile (cell phone) numbers and this has helped increase communication as well.

#### *Additional factors*

It is important to treat the tribes as equal partners that are important to the success of your project. DOTs need to work constantly at maintaining relationships. It is also critical to follow through on what you say you are doing to do. GDOT's tribal liaison noted that tribes have mentioned that they are just as interested in the actions of the DOT as the words: "It's not what you say at the meeting, it's what you do afterwards." Maintaining a personal connection with tribal representatives is a must.

#### *4.1.5 Illinois Department of Transportation (IDOT)*

##### *Defining "effective consultation"*

Effective consultation is a timely and meaningful exchange of information and viewpoints.

##### *Written policies and guidance for consultation*

The value in having the policy written out is that it is predictable. It sets expectations. When things are in writing, the rules are essentially laid out and everyone knows how to communicate.

##### *Project-by-project consultation v. programmatic approach*

IDOT has a programmatic approach documented in an MOU developed with tribes resulting from two tribal consultation workshops (2008, 2009). When there is a large project or one that is expected to have an adverse effect, IDOT will consult on a project-by-project basis and do whatever is needed to do to work through concerns and comments of tribes.

In 2008-2009 IDOT decided to host a set of workshops with the tribes to lay the groundwork for effective tribal consultation. The purpose of these workshops, which were funded by FHWA and IDOT, was to develop principles and procedures, which led to the development of a web-based

PNS. The system was up and running by 2009, and the final details of the MOU were negotiated with the tribes into 2010.

Prior to the workshops, tribes were often only notified of the larger projects at the level of an NEPA EIS. At the workshops, the tribes indicated that they would like to be informed of more projects, basically anything that involved an archaeological survey. The PNS is geared toward smaller projects, Categorical Exclusions (CEs), and Environmental Assessments (EAs).

Tribes must provide a POC to the DOT so that they can get notifications through the system. Tribes make comments, which are only visible to the IDOT POC and the FHWA counterpart. Tribes are notified three times: first notification is of the existence of the project; second notification is that the survey report has been posted, which they have 30 days to review; and the third notification is that the SHPO concurrence letter is posted.

IDOT and FHWA are looking into hosting another tribal consultation workshop in 2013 or 2014 to discuss some potential opportunities to further streamline the process.

#### *Liaisons and DOT POCs*

A single POC is very important because it helps build trust and predictability; however, no metrics to evaluate performance have been developed because there has not been the need.

Tribal consultation is just one of the many responsibilities of the Cultural Resources Unit Chief, which is a full-time position.

#### *Tribal staff changes*

Staff changes in the tribes are tracked by the IL Division FHWA, which maintains the current tribal contact list, with assistance from IDOT via the PNS.

#### *Maintaining good relationships*

It is important to (1) have a single POC, (2) develop and maintain trust, and (3) be timely about communications even if the tribes are not always responsive.

In order to maintain the relationship, it is important to develop trust, maintain trust, and develop consistent procedures so that tribes know what to expect. IDOT suggests developing personal relationships face-to-face and maintaining them with emails and phone calls. Try to be as predictable, timely, and responsive as possible.

#### *Forms of communication*

The tribes with which IDOT consults were asked to provide a POC and an active email account in order to receive notifications through the PNS. To date, there have been no technological communication barriers or issues with the tribes in Illinois. In-person meetings have been infrequent but productive. In-person meetings are needed during (1) programmatic efforts (e.g.,

developing an MOU or PA) and (2) complex projects with human remains/burials (e.g., New Mississippi River Bridge project).

#### *Meeting in-person, venue and travel*

Since there is no tribal land in Illinois, tribes do not often request to meet with the DOT. If they do request to meet, the State of Illinois arranges a tour and always accommodates the request. IDOT would like to invite tribes more often, but the number of tribes and participants interested in an area may make that cost-prohibitive (to accommodate travel).

#### *Obstacles to effective consultation*

The greatest obstacles are lack of communication and lack of trust. It is important for the DOT to develop and maintain trust, and having a designated POC helps. Another obstacle is the issue of inviting tribes to the site (discussed above).

#### *Additional factors*

In the process of developing the MOU and PNS during the workshops, trust was developed because of face-to-face (in-person) meetings. It is important to maintain this trust by timely and consistent/standardized communications, showing the tribes that DOT is fulfilling their part of the Section 106 process.

### *4.1.6 Iowa Department of Transportation (Iowa DOT)*

#### *Background*

Iowa DOT just executed a new statewide PA with FHWA Iowa Division, Iowa SHPO, and ACHP. This process took nearly two years and now FHWA Iowa Division/Iowa DOT are in the process of developing multiple PAs with individual tribes with a focus on what they want to see and how they want to consult, as a lot of what they do is project-specific.

#### *Defining “effective consultation”*

For Iowa DOT, the concept of good faith is very holistic and the DOT recognizes that it is necessary to go beyond the minimum. Sometimes this means follow-up phone calls, emails and even traveling out of state. It is important to build trust, provide information sometimes repeatedly, and it is important to begin consultation early in the process. Therefore, the three key things for effective consultation are that you operate in good faith, you maintain open lines of communication, and that you work to build trust.

#### *Example: U.S. Route 30 Tama Toledo Bypass Project*

Iowa DOT just wrapped up the U.S. Route 30 Tama Toledo Bypass project, for which Iowa DOT sent out consultation letters, provided public notice about what the project looks like, held open public meetings, and then completed various resource studies. Through word of mouth

(likely through the construction office), it was learned that one tribe had some concerns, and the DOT worked to get in touch with the tribe.

The project was located near a wide variety of historic properties, including Traditional Cultural Properties (TCPs) and landscape features with significance to the tribe. The early consultation resulted in a map of areas to avoid prepared by the tribe, which the Iowa DOT was able to accommodate. The willingness of tribes to reach out to the DOT was key.

#### *Written policies and guidance for consultation*

The Iowa DOT PA identifies the consultation process as do the standing agreements with tribes. For the most part they follow a stepwise process, which includes some excluded project types. Consultation for each individual project continues with most tribes and some have modified agreements to their tribe's needs, which can be personality- and trust-driven.

Iowa DOT feels that all of their agreements are valuable. In 2011 Iowa DOT sent out a mailer to tribes regarding their forthcoming statewide PA because it was important to them to acquire tribe buy-in where possible. One advantage to a formal policy is that it gives you a place to start. Tribes often ask what has been done in the past and what has been done with other tribes; however, one size does not fit all. There is no overarching guidance because consultation is in constant motion and change. With the turnover in tribal governments, flexibility is important. This should not be considered reluctance to a standard operating procedure as that exists in the structure of the consultation.

#### *Project-by-project consultation v. programmatic approach*

There is value to employing both a programmatic approach as well as the project-by-project approach to tribal consultation. Written agreements may be tailored to geography or other issues. Iowa DOT/FHWA also engage in project-by-project consultation with tribes where there are no agreements. This is because project impacts can change and what we know about the places we impact can change because we seek input from tribes when we have additional data. Iowa DOT does not provide the STIP.

#### *Liaisons and DOT POCs*

Iowa DOT does not have a single POC, rather three personnel who deal with the geographic area/districts they represent. These three positions are not full-time tribal consultation positions, as the state has a required vacancy factor. There are advantages to this approach in that it keeps the person with the most information about the project in communication with the tribes, which can be very helpful when there is turnover in tribal government. Iowa DOT does see advantages to having a single POC, such as giving tribes one person to consistently work with, which would provide for stronger relationships. The disadvantage is that an established POC may not have the detailed knowledge of each individual project.

### *Managing multiple POCs*

To keep all three POCs on the same page, communication between staff and management on a daily basis is encouraged, and with FHWA on an as-needed basis. It is important to have a staff that is small enough to manage.

### *Tribal staff changes*

To track staff changes in the tribe and announce changes among DOT staff, Iowa DOT has a database connected to project scheduling within the cultural resources extension.

### *Maintaining good relationships*

Iowa DOT/FHWA feels that they have a good to very good relationship with tribes, but the tribes may have a different perspective. To get an accurate gauge of the relationship, a good place to start is determining how IowaDOT/FHWA meets the needs of the tribes.

- Trust—this can be hard in new relationships.
- Listening—emphasis needs to be on listening, particularly when dealing with tribes as they need to understand.
- Fairness—tribes need to know what you can and cannot do.

### *Forms of communication*

Iowa DOT/FHWA are trying to push for a web-based tool (Illinois and Pennsylvania used as examples) as there is a great deal of paper to exchange that can be dramatically reduced with such a tool in place, as well as providing quicker access to information when working to meet the needs of tribes.

When working to develop agreement documents, in-person meetings are important. When there is a project-specific issue, such as an unexpected discovery, then in-person meetings are often a must. Often the procedure uses a mailing with a follow-up call when a meeting is not necessary. The means by which you communicate should be dictated by the tribes, and some view a web-based method as a strong option, although there is no substitute for face-to-face consultation.

### *Meeting in-person, venue and travel*

In-person meetings often happen on-site, and Iowa DOT/FHWA feels that it is important to travel to the tribes. Consultation must be involved in decision making; and the kind of meetings and place of the meetings will be state-specific and associated with where the tribes are (in state/out of state) with which the state needs to consult. Iowa DOT/FHWA consults with 32 tribes, and only one of those tribes resides in Iowa. Of these tribes, Iowa DOT is engaged in active consultation with 12 tribes. The consultation approach used by Iowa DOT is more than 10 years old and is the result of the 2001 tribal summit.

### *Funding*

The DOT pays for tribes' travel expenses using the state general office fund. Summits are also state funded, and the DOT may look for a joint funding effort with FHWA in the future.

### *Obstacles to effective consultation*

It is important to maintain open communication, be candid, and share information. Be respectful and articulate what avoidance and minimization measures can be taken.

One obstacle that can limit good consultation is simply time. Often tribes may want to consult with DOT, but they simply do not have the time to share regarding the DOT projects. As a result the DOT works to provide multiple ways to consult, in hopes of minimizing the time needed on behalf of any tribe.

### *Additional factors*

It is important to stress and acknowledge that DOTs are not the federal agency. All Iowa DOT letters strive to be up-front and honest about their role in the process and make sure that the tribe understands that the contact is FHWA, with Iowa DOT having a delegated responsibility in government-to-government consultation. All tribes are welcome to contact FHWA directly if they would prefer to work only with FHWA.

The influence of personalities and trust should not be overlooked and any advanced training should focus on how you build a good relationship early on in the consultative process. This is especially important given the amount of turnover in tribal governments, which can be overwhelming and place you in a situation of starting over and have to build a new relationship. Be cautious: do not assume anything and maintain balance in your approach.

Relationship building and acting in good faith in consultation build partnerships, which can often lead to creative approaches to answer project questions and solve problems.

As cultural resource professionals it is important to be able to match different styles of communication and to bridge those styles. For example, on any given project cultural resources staff work with engineers who by their nature use terms of engineering. Tribal representatives may have an entirely different style of communication in addition to an entirely different view of a project. The key and the goal are to be able to convey the importance of what each is communicating.

#### *4.1.7 Maine Department of Transportation (Maine DOT)*

##### *Defining "effective consultation"*

"Effective consultation" involves communication capable of resolving potential issues in a timely fashion. Moreover, successful consultation should include all involved parties, comprehensive accounting of the actions to be taken and the effects of the proposed undertaking.

## Example: Suspected Cultural Resources

As an example of effective consultation, a private resident believed that a cultural site, characterized as possible burials or an archaeological site, existed on her property. The resulting consultation effort involved comprehensive communication among interested and affected parties. As a result, the issue was resolved in a timely fashion.

### *Written policies and guidance for consultation*

The SOP for Maine DOT includes the use of a PA with FHWA and the Maine Historic Preservation Commission. The lead federal agency, in this case FHWA Maine Division, dictates responsibilities of Maine DOT in terms of consultation with tribes. The FHWA Maine Division is preparing a PA with the four federally recognized Maine tribes. Maine DOT hopes that this PA will establish new protocols that streamline the consultation process, provide guidance for all parties, and standardize communication. As such, the PA is expected to save time and money.

### *Project-by-project consultation v. programmatic approach*

Through the project-by-project approach, Maine DOT carries out consultation with four tribes via USPS. This approach uses a standard consultation letter format in which the project is described and includes a map depicting the project location. In addition, two of the tribes also request emails. Letters such as these are sent out when an U.S Army Corps of Engineers (USACE) permit is required for the project or there is a federal action within the project including the use of federal funding. Currently, without a PA in place with the tribes, sending out letters for multiple projects with major and minor scopes, sometimes weekly, can become a time-consuming task. If and when there is a PA in place, this will help streamline what projects are sent to the tribes for their review.

### *Liaisons and DOT POCs*

Tribal coordination under Section 106 on a project-planning basis is one of the responsibilities of the Maine DOT Historic Coordinator. Maine also has a POC who communicates with tribes on transportation-related studies. The FHWA Maine Division also has its own tribal liaison. For Maine DOT, the POC position fosters consistency in tribal consultation, thereby streamlining the process.

### *Tribal staff changes*

Staff changes in the tribe and DOT staff are announced by FHWA Maine Division, who passes on the information to the appropriate people.

### *Maintaining good relationships*

Trust, respect, and communication are important factors. Maine DOT also upholds values of integrity, confidence, and service. There is concern about issues related to timely consultation, as

well as issues related to the use of letters as a means to inform tribes of consultation requests (i.e., letter not received/lost). Subsequently, Maine DOT has opted to use certified mail.

#### *Forms of communication*

Maine DOT has representatives who meet with tribes on project sites. It is a rare occasion that Maine DOT needs to meet with the tribes for Section 106 purposes. However, if a meeting is required or requested, there is a concerted effort to communicate and meet in a capacity acceptable to the tribes.

#### *Meeting in-person, venue and travel*

The representative for Maine DOT had not participated in a meeting on tribal land at the time the interview was given; however, Maine DOT participates in meetings at the convenience of the tribes with which it consults.

#### *Obstacles to effective consultation*

The major obstacles are time, communication, and misunderstanding. Maine DOT is in the process of addressing issues like these with a PA being developed by the FHWA Maine Division.

### *4.1.8 Minnesota Department of Transportation (MnDOT)*

#### *Defining “effective consultation”*

Effective consultation consists of ongoing and continued dialogue. It is not a one-time occurrence. It is an ongoing relationship and a continuous conversation where participants can discuss a multitude of issues that may affect the tribes. Bring all resources and stakeholders together to discuss possible alternatives, and everyone has their needs met.

#### *Written policies and guidance for consultation*

Minnesota has a general Accord signed in 2002 with the tribes that states its intention to work together on transportation issues in the state, especially on or near reservations. It sets the tone for working together.

MnDOT has different agreements in the form of MOUs and PAs with various tribes that chose to have agreements. Several tribes have PAs with regard to Section 106 consultation, which provides protocols for communication, etc.

MnDOT has agreements on Indian employment that follow a state policy on Indian employment; MnDOT works with the tribes and contractors to encourage Indian employment. MnDOT also has some MOUs on roadside vegetation management and in the management of hazardous materials in the tribal ROW (communication index).

Traditionally, the DOT has less contact with tribes that have few or no state roads on their reservation. They would still like to make the connection but not as many issues come up. Issues that do arise might be county issues, on which the DOT will assist the tribes as needed.

#### *Project-by-project consultation v. programmatic approach*

MnDOT's goal is to meet with each of the tribes to discuss the STIP annually in order to give the tribes an opportunity to affect the outcome of DOT projects. A model has been developed by the Advocacy Council for Tribal Transportation (ACTT) to include more than just the tribe and the state in the consultation process and to bring in other transportation jurisdictions and even the U.S. Forest Service (USFS). This way, everyone shares their transportation improvement plans, including the tribes. This new goal resulted from a miscommunication on a project where departments were not communicating properly with regard to ongoing maintenance work. It was felt that if all of the departments had been present, the situation could likely have been avoided. Having all transportation departments and all tribal departments meet promotes partnering on overlapping projects and coordination on timing.

Minnesota's ACTT is made of all transportation agencies in the state and representatives from each of the 11 tribes. Established in 2006, the Council has a defined purpose, membership, strategies, and goals and meets on a quarterly basis. Membership consists of high-level representatives from the transportation entities in the state as well as federal agencies such as the BIA, FHWA, and county and city representatives.

The ACTT is a group that was proposed to and endorsed by the MN Indian Affairs Council. While not under any organization, ACTT does report back to the MIAC on any issue that may need their approval. MnDOT supports the group administratively. The meeting facilities and meals are provided by the hosting tribe.

#### *Liaisons and DOT POCs*

As the first tribal liaison for MnDOT (since 2001), the representative for MnDOT feels that the tribes have trust in her, especially since she comes from the tribal community. The Tribal Liaison position is full-time within the MnDOT Commissioner's Government Affairs Office.

#### *Tribal staff changes*

It is difficult, and there is no formal means of tracking staff changes in the tribe. If the staff person is a frequent contact, the likelihood of early notice is greater and the news can be forwarded to other DOT staff.

#### *Maintaining good relationships*

As a member of the tribal community, the MnDOT POC was able to build off the relationships that had already been established prior to coming to MnDOT. There is turnover within the tribes and there is a need to work to keep the relationships current. Districts work directly with the tribes and also develop relationships.

The three factors most important in maintaining good relationships with tribes are:

- Establish a good working relationship by meeting with tribes at tribal locations.
- Be dependable and be honest. Have a “can-do” attitude. Be open to looking at ideas and solutions and collaborate in your partnerships.
- Keep the relationship going, as you would nurture any relationship, and be willing to step out and be creative in working together.

For example, a tribe approached MnDOT about paying for resurfacing to a road that was not slated for improvements for a few years according to the STIP. This unique situation required the involvement of the DOT contracting branch and other agencies, such as the BIA and FHWA. The tribe used money from the American Recovery and Reinvestment Act (ARRA) through the BIA.

#### *Forms of communication*

Video conferencing is not used in communicating with the tribes. The ACTT has four meetings a year and they are all held at tribal locations in addition to the annual conference of Tribes and Transportation (every other year now). Each member pays for their own travel-related costs. District people visit the tribes in their district so travel is not an issue.

#### *Meeting in-person, venue and travel*

The purpose of the conference is to provide a venue at which relationships are developed and partnerships result.

#### *Funding*

The cost of the Tribes and Transportation conferences are purposely kept low to be affordable for those attending. The funds for the past conferences have been provided by FHWA and registration fees of the participants. MnDOT at times pays for specific purchases. In-kind contributions by MnDOT, BIA, FHWA, and the tribes also contribute to keep down the expenses of the conference. All conferences are held at tribal conference and hotel centers, which are affordable for both conference facilities and hotel accommodations.

#### *Obstacles to effective consultation*

A very high priority should be education on tribal issues. State employees are often not equipped with the knowledge or tools to effectively perform tribal consultation duties. Employees are often expected to consult with tribes without having any knowledge of the tribes. There is a lack of education and awareness throughout the school system on Indian affairs. Particularly there are no studies on laws, treaties, and the history of how relations have developed. There is not enough awareness of the Indian way of life and culture or how the tribal government works and what the rights, responsibilities, and protocols of tribes are.

MnDOT, along with other state agencies, the University of Minnesota-Duluth, and the tribal governments, is working to develop a comprehensive tribal-state relations training. The intended outcome is to have effective state employees and greater efficiencies in tribal-state government-to-government relations.

#### *Additional factors*

The ACTT has been the one consultation process that has had many successes benefiting MnDOT and the tribes. It has allowed them to look at common tribal issues to help develop awareness and educate on issues and to develop and implement successful practices.

#### *4.1.9 North Dakota Department of Transportation (NDDOT)*

##### *Defining “effective consultation”*

NDDOT defines “effective consultation” as a partnership. In other words, this represents consultation that allows the agency, as well as the tribes, to openly discuss concerns and expectations regarding Section 106 undertakings and general cultural resource issues. Exemplifying this form of consultation is the NDDOT 2006 PA currently signed by 10 tribes with two having resolutions to sign. The development of the PA took place over a two-year period and consisted of consultation with individual tribes at their reservations and three formal agency-tribal meetings.

##### *Written policies and guidance for consultation*

A written policy is valuable as long as it is worked on together. As noted above, the NDDOT has a PA with a number of tribes. Prior to the PA (signed in November 2006) NDDOT had no formal consultation document. A subsequent document was completed in 2008 (*North Dakota’s Cultural Heritage Manual*) and was the result of multi-agency collaboration (FHWA, NDDOT, and the North Dakota Tribal Consultation Committee [NDTCC]) to provide background and understanding of the tribal consultation process for NDDOT and FHWA personnel. This document outlines the necessary protocols used in consultation and takes into account the tribal perspectives and addresses applicable legislation. There are also plans to write a Cultural Resources Management Plan in order to put in writing the policies of the DOT, particularly when it comes to state funded projects, which are currently and in the past addressed as 106 undertakings.

##### *Project-by-project consultation v. programmatic approach*

NDDOT holds semi-annual meetings, in April and September. Interested tribes travel to Bismarck for this meeting and NDDOT provides travel reimbursement, per diem, and a \$300 stipend. On average the meeting draws 22 to 32 participants representing 15 tribes. The meeting spans a period of two to three days to discuss projects listed on the STIP as well as any other issues that need to be discussed. The meetings are conducted as an open dialogue forum where all participants are equals in the process.

## Example: How to Record Stone Features

There has been extensive discussion over many years in an attempt to come to a consensus on how to approach recording of stone features/sites. Questions surrounding this issue include such topics as what is appropriate to record, what can be shared, and how to define boundaries for these sites. The NDDOT is committed to avoiding stone features with their construction projects, as these are deemed ceremonial features and of religious importance to tribes. There is great value in discussing these issues as a group and coming to consensus in advance of a specific project and its time constraints.

### *Liaisons and DOT POCs*

In addition to the tribal consultation duties, the POC reviews all highway projects (Section 106/NEPA compliance on cultural resources and working with engineers to make sure everything is done ahead of NEPA reporting needs). The POC works with DOT contracting to hire archaeological consultants under their two-year RFP process or through contracted engineering firms. The POC feels it is a big job and could really use another person.

### *Managing multiple POCs*

NDDOT's POC communicates on cultural resource/NEPA issues with cultural resource personnel affiliated with the tribes. DOT planning staff coordinate the STIP with tribal transportation personnel. DOT upper management communicates on program/political issues as they arise. There is rarely overlap of issues. We talk with one another when an issue arises from one area that applies to another.

### *Tribal staff changes*

The POC keeps apprised of cultural resource personnel and chairperson changes by talking with her contacts and checking out news in regard to all the elections (many times not available on tribal websites or in news).

NDDOT has Tribal Historic Preservation Investigators (THPIs) in the field with archaeologists doing Class III intensive inventories on their projects. It is a joint effort to identify cultural resources that may be of concern in archaeology and/or to the tribes. This helps to ensure that all cultural resources are identified and none are missed because an archaeologist does not have the cultural background [that the tribes do] to recognize all of the sites.

### *Maintaining good relationships*

Quality consultation is derived from listening to the tribes and following through on their suggestions and recommendations. People must be aware of cultural and language differences. For example, tribal elders might communicate through oral history, which initially may seem like an indirect form of communication.

### *Forms of communication*

Beyond the regular meetings, the POC conducts consultation through a variety of formats, such as phone calls, text/letters, and emails. In-person meetings are the preferred method because meeting as a group in person allows everyone to do virtually all of the really important consultation. It allows the group to come to one conclusion and allows the discussion and resolution of issues that could never be addressed effectively in isolation.

### *Meeting in-person, venue and travel*

NDDOT feels it is important to meet as you can at each reservation, individually. Group meetings are never held on any of the reservations and they are not held in the NDDOT or FHWA buildings. They are always at a hotel meeting room, which offers a neutral setting for the involved parties.

### *Funding*

NDDOT pays for travel, per diem, and a \$300/meeting fee for everyone who attends the semi-annual meetings from the tribes. NDDOT has a contracted archaeological consultant who helps set up the meetings (hotel/food) and provides the checks to each tribal participant when they arrive. NDDOT provides breakfast and lunch in the meeting rooms, which allows participants to work fairly straight through the day with good participation. The funding is state and not through FHWA.

Since Congress directs the federal government to consult in a sensitive manner with tribes, the POC feels it is odd that they do not provide the funding process to do so. Funding through FHWA is project-specific and would require costs to be separated across projects, which is not feasible because meetings cover various topics and projects.

### *Obstacles to effective consultation*

Miscommunications and misunderstandings are the biggest obstacle to effective consultation, not only between the POC and the tribes but within the NDDOT—central office, cultural resource section, and districts. Having the support of upper management at the DOT and being given the ability to make decisions has been of critical importance to being an effective POC. Reaction time, follow-through and consistent, frequent communication are most important.

### *Additional factors*

NDDOT suggests that the most important aspect of tribal consultation is to have an open dialogue and discussion about the DOT's needs and tribal concerns. The DOT must communicate their constraints and listen to tribes about their needs and come to an agreement about what will work for both. Further stressing the importance of listening, respect and trust are built over time working together as partners with tribes. Showing friendliness and humanity should trump formality and bureaucracy.

#### *4.1.10 Oklahoma Department of Transportation (Oklahoma DOT)*

##### *Defining “effective consultation”*

Effective consultation consists of getting everyone to the table and engaging in meaningful dialogue. It is important to remember it is not just about talking but about listening.

##### *Example: Unmarked Burials*

A project that serves as a good example of effective consultation is an Oklahoma state highway project for which the cultural resources study found unmarked burials in the project area. After researching the matter, Oklahoma DOT located and contacted the actual family members of the deceased. Oklahoma DOT met with the descendants and presented a plan for redesign to avoid disturbing the graves. However, instead the family indicated a desire to have the burials moved to a family cemetery plot. Oklahoma DOT accommodated this request by covering all costs associated with the burial move, including traditional ceremonies/practices associated with the move as well as coffins and headstones.

Successful listening is demonstrated by results. The outcome of the burial move was a positive result for both parties and emphasized that Oklahoma DOT is listening to tribal concerns. Another example is that of a bridge replacement project that was expected to affect a traditional cultural property. Oklahoma DOT was attempting to redesign to avoid effects, but a miscommunication was occurring and during a field meeting it became evident to the Oklahoma DOT Liaison that the tribal elders were unhappy. At this point the Liaison made a personal connection with one of the elders, in which she expressed that she was listening to their concerns and would do her best to address them. This type of connection goes a long way toward establishing good relationships with tribes.

##### *Written policies and guidance for consultation*

Oklahoma DOT policy is to contact the tribe regarding a proposed project, providing a map that shows the footprint of the project, and request that the tribe contact them with concerns. After a 30-day waiting period, a field study is conducted. After the field report is completed, Oklahoma DOT follows up by sending a copy of the report to tribes asking about any concerns. Having a written policy has helped educate tribes on what to expect, as well as other divisions in the DOT, as other departments may be unfamiliar with the Section 106 process and the duties and function of the Liaison.

Written guidance was in place before the current Liaison came on board (2005); there was no consultation with tribes in developing the guidance as far as the Liaison is aware. Oklahoma DOT has been consulting with tribes since 1999.

##### *Project-by-project consultation v. programmatic approach*

Consulting with tribes on a project-by-project basis allows a better flow of information between Oklahoma DOT and tribes and allows for better communication. They also have PAs with six

tribes; however, these agreements mostly document the process and do not provide alternative approaches. Some of the PAs specify certain types of projects that the tribe does not need to be consulted on, such as sidewalk improvements. Some PAs highlight areas or counties of special concern where consultation must always occur. It is important to note that there are specific concerns for specific tribes and that each PA is tailored to that tribe's history within the state. ODOT has a very individual approach for each tribe and is very respectful of each tribe's sovereignty.

### *Liaisons and DOT POCs*

The Tribal Liaison position at Oklahoma DOT is a funded, full-time position. It is important for agencies not to be a faceless, nameless entity to the tribes. With a Liaison, tribes have an actual contact person, phone number, email address, and they know they can get in touch any time. This helps in building a positive relationship. There are no metrics in place to measure success; however, FHWA distributes an annual questionnaire. Oklahoma DOT also has a Tribal Coordinator that mainly works with the BIA on the Reservation Roads Program.

### *Tribal staff changes*

To keep apprised of tribal staff changes and changes in leadership in the tribe, the Liaison visits tribal websites and reads tribal newspapers and reaches out to tribes to update contact information a few times a year, especially during the summer, when a lot of tribal elections occur. The Liaison sends tribal contact information to the DOT Environmental Programs Division several times a year so that the NEPA project managers have the most up to date information.

### *Maintaining good relationships*

Maintaining the flow of information between the DOT and tribes is very important. Being responsive to tribal concerns when they come up demonstrates that DOT hears and acknowledges tribal concerns. Additionally, Oklahoma DOT's Liaison is very involved in tribal activities in the community outside of the office. This has a very positive effect on her relationships with tribes because they can associate her with the community and not just the DOT. When asked if having a background in cultural anthropology is beneficial for this role, the Liaison explained that it is extremely beneficial because anthropologists are trained to listen to people and see the whole picture and how things fit together. One example is plants of value to tribes. Ceremonies in a certain location make the location important even if a ceremony has not been held there in decades.

### *Forms of communication*

Oklahoma DOT often uses USPS mail to communicate with the tribes; however, in-person meetings are preferred. It is much easier for miscommunications to occur over the phone. Meeting in person and on tribal land allows more opportunities to learn about the tribe. Going to the tribe, rather than having them come to Oklahoma DOT, provides more balance in the relationship.

### *Meeting in-person, venue and travel*

Group meetings on non-project-related topics occur pretty rarely, except when the DOT is in the process of developing a PA. Most meetings begin as project-related but almost always end up discussing general consultation issues (if there are any). The Liaison strongly advocates for the DOT to visit the tribes at tribal offices. She feels that it puts the tribal representatives at ease, leading to more productive consultation.

### *Funding*

The budgets for THPOs are often stretched very thin, so it is not expected that the tribes will pay for travel when the DOT can easily use state vehicles. Travel to visit tribes, whether for general consultation or a project-specific issue, is included in the DOT program's annual budget.

### *Obstacles to effective consultation*

Miscommunication is a common problem on both ends. A project might be perceived as a threat by a tribe but as meeting a safety need by the DOT.

Making sure that everyone understands the Section 106 process can also be difficult. Liaison duties may overlap with other projects, and other departments sometimes ask for assistance from the Liaison. For example, projects where ROW acquisition involves tribal land are not part of the 106 process. To help with this, Oklahoma DOT Cultural Resources does a lot of outreach with other departments, such as NEPA coordinators, project managers, and field divisions, and offers practical training by archaeologists in the field. SHPO conferences offer 106 training to tribes and interested members of the public. An example is the To Bridge a Gap conference, which began with USFS and several tribes and has grown to become a huge success, with many agencies and tribes now participating. ODOT has been very supportive of its Liaison's attending conferences and other tribal activities that help to foster relationships with tribes.

### *Additional factors*

It is important to be proactive in the consultation process. It should not be assumed that if a tribe does not respond to a letter, there are no concerns. A great example of being proactive is the database that the Oklahoma DOT Liaison has put together to help maintain the institutional knowledge she has built over the years at Oklahoma DOT. The database records the locations of potentially sensitive areas (PSAs) on USGS quads that come from a GoogleEarth overlay. The database includes a description and source of the information, which often comes directly from tribes and may or may not be recorded formally elsewhere.

For example, construction of a recent bridge replacement was initially expected to potentially affect the annual ceremonies of a tribe. Oklahoma DOT's Liaison first learned of the annual occurrence of this ceremony at a previous public meeting. Although the tribe did not respond to the ODOT letters, the Liaison reached out personally and found that they were expecting to make other arrangements for their ceremony. The Liaison informed the tribe that Oklahoma DOT was willing to arrange their construction schedule around the ceremony.

Keeping in touch with community events and reading local newspapers and tribal publications are all very important ways to stay abreast of important issues and facilitate relationships with tribes.

Oklahoma DOT's PAs are available online at: <http://www.odotculturalresources.info/tribal-consultation.html>

#### *4.1.11 Oregon Department of Transportation*

##### *Defining "effective consultation"*

"Effective consultation" is meaningful consultation that happens early and often in the process. Oregon DOT holds face-to-face meetings quarterly or at least twice a year with most tribes, and feels that this facilitates good communication throughout the process. Effective consultation should be more than letter writing and emails.

For example, the Beatty Curve Correction Project (lead: USACE) required multiple face-to-face meetings with tribes to negotiate design changes. The project spanned many years, requiring frequent on-site visits with tribal members. Close coordination and strong relationships led to positive solutions and allowed the project to move forward.

On a normal or typical project, Oregon DOT conducts face-to-face meetings early on to work out the details of the APE, and to develop a plan for coordination moving forward. This early coordination with tribes to determine the APE and to identify resources in the project area often leads to agreements to respect requests from the tribes to participate in fieldwork and survey monitoring, providing an opportunity for tribes to participate in the process.

##### *Written policies and guidance for consultation*

Oregon DOT has general guidance on the subject in a PA with FHWA regarding their responsibilities in the Section 106 process.

Oregon DOT has program guidance with regard to consultation; however, it is of a general nature. The generality of the guidance is appropriate because each tribe requires and requests different types of consultation. This may change based on the relationship, level of trust, or as tribal representation and members change roles.

##### *Project-by-project consultation v. programmatic approach*

Going one step beyond project-by-project consultation, Oregon DOT holds quarterly or semi-annual meetings with each tribe in person, where all DOT projects are discussed. A spreadsheet has been developed and is presented to each tribe for review during face-to-face meetings, containing projects within their areas of interest. This type of consultation allows early coordination and allows for the DOT to build and maintain relationships with tribes.

At the request of some tribes, Oregon DOT also meets with various tribal cultural resource committees to go over all DOT projects they are interested in, and then follows up with the tribal cultural resource department on specific program- and project-related issues.

### *Liaisons and DOT POCs*

Having multiple POCs works well for Oregon DOT because it allows staff with different areas of expertise and different backgrounds to develop relationships with tribes. This is beneficial to the consultation process because it fosters different types of relationships between the DOT and the tribes, and allows for more availability and responsiveness of DOT staff. Oregon DOT encourages all staff members to develop and foster their tribal relationships so that issues can be handled as they arise.

### *Managing multiple POCs*

To keep multiple POCs on the same page, Oregon DOT has team meetings once a month (cultural resources staff) to check in on tribal consultation and other items. Staff also talk frequently outside the meetings. Additionally, they have a shared digital folder to keep track of contacts, IGAs, templates, and other information that may be of importance to the program and tribal coordination.

### *Tribal staff changes*

Tracking staff changes in the tribe is done through the Oregon Legislative Commission on Indian Services (<http://www.leg.state.or.us/cis/>), which tracks all tribal staff changes, initiatives, and bills. They are an excellent resource and keep all the state agencies informed and updated on current developments.

The Oregon DOT Cultural Resources Program Manager currently spends about 30 to 50 percent of her time on Tribal Coordination, but it changes month to month. Oregon DOT has an official agency-appointed Tribal Liaison, which resides with the agency's Chief Environmental Officer position. Importantly, Oregon DOT also conducts tribal coordination as mandated under ORS 182.162, which not only requires agency-wide coordination with tribes but also requires annual reporting on those consultation, activities such as meetings and agreements.

### *Maintaining good relationships*

For Oregon DOT, the key to maintaining good relationships with tribes is “early and often communication.” It is critical to keep the lines of communication open and to engage the tribes early in the process. Oregon DOT feels strongly that face-to-face meetings strengthen and build relationships, and encourages two-way communication.

### *Forms of communication*

The quarterly or semi-annual meetings that Oregon DOT holds with the tribes are the most effective way of communicating for them. Follow-up occurs as necessary and depends on the

project. Some tribes prefer formal consultation and documentation when a project is proposed, and ODOT also accommodates these requests.

#### *Meeting in-person, venue and travel*

ODOT conducts nearly all tribal coordination meetings on tribal land. Traveling to the tribe provides an opportunity to meet with more members, and learn more about the culture, land, and facilities. It is appropriate to make the effort to travel to them because the DOT is requesting the tribe's assistance. Meetings are attended by other staff, including environmental managers, NEPA coordinators, FHWA operations engineers, and local government as needed.

#### *Funding*

Either state program funds or project funds may be used to fund travel expenses. If they are working on an initiative, the costs could be covered by state funds. If the work is related to a project, then project funds are used.

#### *Obstacles to effective consultation*

One of the biggest obstacles would be trying to conduct effective tribal consultation in the absence of an actual relationship with the tribes. This is why face-to-face meetings are valued as an opportunity to nurture relationships.

#### *Additional factors*

States seeking to develop effective consultation should focus on building relationships. It is also helpful to think outside the box. For example, Oregon DOT has developed strong relationships with tribes by working on non-project-related, outreach-type projects.

One example is the Culturally Significant Dogbane Project, with the Confederated Tribes of Siletz Indians of Oregon. This project entailed harvesting native Dogbane from the Oregon DOT ROW and transplanting the material to a more accessible and safer environment. The project was awarded the 2009 FHWA Exemplary Human Environmental Initiatives award and an Exemplary Ecosystem Initiatives award. More information can be found at:

<<http://environment.fhwa.dot.gov/strmlng/newsletters/nov11nl.asp>>

#### *4.1.12 Pennsylvania Department of Transportation (PennDOT)*

##### *Defining "effective consultation"*

Effective consultation is accomplished when both parties feel their expectations have been met. Because Pennsylvania does not have tribal land, the conversations and dynamics are different from those in states with tribal land. The history is important in terms of ancestral ties to the land, remembrance, and acknowledgment that these tribes were there at some point in history. Some tribes are more active than others in visiting their ancestral lands.

Effective consultation from a tribal perspective is to be kept informed on projects that may affect their historical and/or archaeological interests in the land. PennDOT strives to provide as much information as it can, and then it is up to the tribes as to how much they want to participate. Tribes likely feel the process is effective when they are kept in the loop and given the opportunity to make comments and feel that their comments have been heard. For the DOT consultation is effective when they are able to provide information in a timely manner and afford tribes an opportunity to participate actively or passively.

Example: U.S. Route 15

An example of a negotiation occurred on the U.S. Route 15 project. Seneca Nation artifacts were uncovered and PennDOT agreed to have them curated at a Seneca museum, rather than a state museum. Standard protocol is that they would go to the state museum, but PennDOT negotiated a 99-year loan of the artifacts to the Seneca, which helped the tribe-DOT relationship greatly. This was one of the projects that triggered the desire to hold meetings with the tribes on consultation with the goal of establishing a consistent protocol.

#### *Written policies and guidance for consultation*

PennDOT has five PAs with five different tribes that apply to both federal-aid projects and state-funded projects. The PAs address both spatial and temporal elements of interest. Consultation prior to the PAs (about 10 years ago) established maps with boundary polygons for each of the tribes interested in developing PAs.

Other tribes have a verbal “understanding” for how consultation will be conducted. As long as there is no objection from the tribes, PennDOT is assuming they are in agreement. The standard protocol is that any project that breaks ground and requires an archaeological survey triggers notification to the tribes, usually by mail or email. Copies of the survey report are also sent. PennDOT has a web-based email system called the Project Path notification system. The notification system often directs tribes to the FTP site for secure archaeological data and further information on a project.

#### *Project-by-project consultation v. programmatic approach*

Project-by-project consultation is done at the engineering district office level by the archaeologist assigned to that district. There are 11 districts in PennDOT. Some archaeologists cover more than one district.

#### *Liaisons and DOT POCs*

PennDOT has a consultant that provides approximately one-quarter time support on tribal consultation policy. Otherwise, each of the district archaeologists handles project issues.

### *Managing multiple POCs*

As a DOT with multiple POCs, it helps to have a handbook to keep everyone on the same page. The POCs also talk among themselves regularly, and PennDOT's central office serves as a clearinghouse for best practices.

### *Tribal staff changes*

Staff changes within the tribes are tracked by a contact sheet that is posted on the PennDOT web site and updated when needed. Project PATH contacts are also updated so that emails through that system are automatically current.

### *Maintaining good relationships*

The most important factors are trust, respect, and honesty. It is crucial to respect the nation-to-nation relationship and for DOTs to remain aware that they are only an agent of the federal government and not the federal government itself. It is important to be forthright and to broker honestly. If there is bad news to be delivered, it is better to sit down at the table together and talk about it.

### *Meeting in-person and travel*

Since Pennsylvania does not have resident tribes, PennDOT has traveled to other states for face-to-face meetings. PennDOT feels it is appropriate and a sign of respect to make the effort to travel to the tribes. If there is a project that they expect the tribes may like to observe in person, they try to be proactive and extend an invitation to the interested tribes.

### *Funding*

Meetings on non-project-related topics are infrequent. Travel funds have been tight in recent years and PennDOT faces difficulty in justifying to the public funding for the travel that would be required to meet with non-resident tribes.

In the past state program funds have been used to fund summits. FHWA has been able to provide some funding for summits and travel to Pennsylvania. Additionally, PennDOT has shared summit funding with FHWA.

### *Obstacles to effective consultation*

Traveling is an obstacle in the current economic climate. It has been a number of years since PennDOT and tribes have met face-to-face. The time has come to revisit agreements, fine tune and talk about current issues. Policy development is best done face-to-face.

### *Additional factors*

There is a fear of the unknown. It is important to come to the table with the idea that everyone has common interests and wants to develop a good working relationship. It is important not to have presumptions. PennDOT recommends taking a proactive approach, and not to wait until there is a “problem project.” Always be respectful of the government-to-government relationship. Build the level of trust so that tribes feel comfortable with the DOT acting as a federal agent. FHWA also needs to be comfortable with the arrangement, but it is in FHWA’s interest to delegate routine coordination to PennDOT. It is much more efficient for the DOT to be able to communicate directly with the tribes.

## 5. Tribal Perspective to Transportation Consultation Programs

Louis Berger representatives interviewed one representative from each of 10 tribes; however, in one case Louis Berger interviewed two members from the same tribe, for a total of 11 interviews. Each tribal participant was asked to provide feedback on issues such as the importance of consultation with state DOTs, how they define “meaningful” or “effective” consultation, different approaches to consultation (i.e., written guidelines and project-by-project approach), issues related to travel and meetings, points of contact, and obstacles to effective consultation. Tribal representatives were referred to Louis Berger by state DOT representatives, who were also interviewed for this study (see Chapter 4) as well as by members of the Task 79 Panel reviewing this work.

The Native American participants in this study function as THPOs for their respective tribal nations. The NATHPO defines this position as an individual functioning in an official capacity to oversee a federally recognized tribal nation’s historic preservation program. In all cases these programs have been approved by the NPS, as implemented under an amendment to the NHPA under Section 101(d)(2).<sup>[1]</sup> THPOs oversee these historic preservation programs in the same capacity as many SHPOs; however, there are important differences, such as cultural knowledge and traditions exclusive to tribes. The National Tribal Preservation program, moreover, provides evidence of increasing federal- and state-level support for Native American self-determination initiatives as well as tribal nation sovereignty. The NATHPO suggests that “[i]ncorporating Tribal cultural values into the historic preservation program has been consistently cited as a priority.”<sup>56</sup>

The respondents consult under Section 106; however, some are also NAGPRA specialists and some oversee other cultural heritage programs/events for their tribal nations.

### 5.1 Interview Results and Responses

#### 5.1.1 Alabama-Coushatta Tribe of Texas

(The tribal representative responded via email, and therefore the responses presented below are essentially unchanged as they reflect the most accurate presentation of the respondent’s perspective).

---

<sup>55</sup> NATHPO, About THPOs, accessed online May 2013 at <http://www.nathpo.org/aboutthpos.htm#THPOs>. Also see National Park Service (NPS), *Connecting with Native Americans*, accessed online May 2013 at [http://www.nps.gov/tribes/Tribal\\_Historic\\_Preservation\\_Officers\\_Program.htm](http://www.nps.gov/tribes/Tribal_Historic_Preservation_Officers_Program.htm). This document outlines the grant program as stipulated under the 1992 amendment to the NHPA as it pertains to the Tribal Heritage and THPOs grants. These grants support ongoing Native American self-determination efforts through the establishment a National Tribal Preservation program as implemented by the Secretary of the Interior and administered by the NPS.

<sup>56</sup> NATHPO, About THPOs.

### *Importance of Consultation*

Meaningful consultation is an important aspect of our Tribal government, most effectively when in recognition of the government-to-government relationship. Section 106 of the National Historic Preservation Act defines the relationship between the federal government and federally recognized tribes in acknowledgement of the sovereignty status possessed by either nation. While Section 106 permits the delegation of this responsibility to a lower entity, such action must be permissible by the tribe(s) being consulted. While state DOTs are better knowledgeable about projects and processes, the federal level possesses higher authority in certain instances.

### *Defining “effective consultation”*

By law, a federal entity must consult with federally recognized tribes. However, nothing in the law requires anything beyond presenting the tribe(s) a discussion of the proposed undertaking. Effective consultation occurs when a federal/state agency comes to the table, listens to the tribal input, reconsiders available options, implements procedures to address those issues, and returns to the table to address other concerns. Again, by law, a federal entity must consult and many agencies do announce, “We have to consult because of Section 106.” The strength of an effective consultation implements a sound partnership between consulting agencies and tribes, wherein consultation occurs because of that relationship rather than regulatory obligation. The goal of consultation should be to develop partnership so there is a reliance upon each other when the time comes for a variety of discussions or support.

In discussions with a federal contractor for archaeological services, the Alabama-Coushatta Tribe of Texas advised of the possibility of mobile cultural properties. Though the firm was well versed in 106 and NEPA, the contractors did not feel comfortable in moving forward with the project. Instead, they attended additional training courses and later verified our concerns were valid.

### *Written policies and guidance for consultation*

A written policy is only effective when it is implemented into standard operating procedures. All agencies, entities, and tribes have policies written for a variety of operations; however, implementation cannot be discretionary or obligatory when needed. Standard operating procedures are the routine to be followed regardless of the level of authority, when, and where. The effectiveness can only become realized when tribes have the opportunity to provide both input and evaluation. This is also where agencies can voice the inability to execute certain standards.

### *Project-by-project consultation v. programmatic approach*

According to the law, agencies must consult for any ground-disturbing activities with the potential to affect resources significant to the tribe(s). Furthermore, the regulation also states that only the tribes can determine what they have an interest in and why. Notwithstanding, the sovereignty status of each tribe defines its role in whether it wishes to participate in certain undertakings. Each tribe has its own governing authority and cannot be a collective authority

unless a written expression has been developed. Therefore, it is up to each tribe to determine the types of projects, the level of concerns, and where those concerns are presented. Some tribes prefer all projects, some for certain areas, and some for only certain instances. In further complication, tribes can decide to alter their current expectations based upon new governing representatives. Either way, it would be important for agencies to secure what the current expectations are and anticipate the possible revision. Programmatic agreements can be effective to achieve this; however, many tribes do not want to invest in the time to produce a satisfying document to streamline the process. Then again, such agreements are only effective if implemented as standard operating procedure. Tribes can decide how they want to consult, and agencies should be willing to accommodate whatever method is offered with evaluative anticipations.

#### *Liaisons and DOT POCs*

One and only one responsibility. The POC becomes aware of what consultation is occurring and where such action is at. The agency has only one (or limited) authorized personnel to ensure this responsibility is occurring and the tribes have only that POC to be aware of. Tribes can be inundated from various states and agencies with too many personnel to address certain concerns. A limited POC ensures tribes are aware of who is contacting them for what purposes.

#### *Quality of Consultation and Maintaining Relationships*

There is much room for improvement. Consultation from state DOTs expresses the appearance of the federal level delegating the responsibility because of staff or knowledge limitations. In turn, state DOTs attempt to consult although there has been no training or have no ability to adhere to tribal concerns. All too often, state DOTs are consulting because they have to, since the federal has passed this monumental task onto them without full comprehension of the transfer of the government's sovereignty. The uncertainty is quite visible when tribes receive notification of a project and that within 30 days, the tribe must forward sensitive information. And that only occurs when a state DOT does send notification. Others are not aware of which tribes they should be consulting with.

- Training – ensuring the appropriate personnel and administrators are fully aware of the regulatory obligations, the current consultation procedures, and an effective transfer of obligations when necessary. The reliance of one individual can set back years of effective consultation as well as impede progress. Administrators should be trained so they are aware that consultation is more than the law and implement procedures to ensure transitions are seamless.
- Openness – providing tribes all the preferred materials necessary for each to develop a determination on an undertaking. The absence of certain materials imparts a degree of concealment. Agencies tend to rely upon state authorities to finalize their input long before tribes are approached, a view of complying with the law. Tribes have information state and federal authorities do not and the degree of acceptance should not be depreciated. The value of partnerships cements the level of friendship and knowing how to support each other when necessary.

- Appreciation – becoming fully aware of each other’s position. Change can occur rather quickly. Some entities limit their level and/or area of interest while some are statewide with expansive interests. Some are short staffed while others are able to delegate consultation to certain staff. Some are financially secure while others struggle. Some have the full backing of their government while others proceed cautiously. Knowing the successes, obstacles, or consequences can invoke support from the other. When consultation occurs because there is a desire, appreciation is developed from all parties.

### *Meeting in-person, venue and travel*

When schedules permit, this can be accomplished. The Alabama-Coushatta has interests in seven states and consults with only four. Only one visit has been conducted with a state DOT and one site visit.

First acquaintance, periodically scheduled meetings, and when the level of concern is high are preferred. As state DOTs begin their effective consultation procedures, it is important to meet directly with the tribal representatives to ensure transition has occurred and which POC will be dealing with which POC. Periodic meetings should be annual or bi-annual events for tribes to meet and discuss successes and opportunities of consultation. Finally, when projects have a high degree of impact to sensitive resources, direct meetings are necessary so clarity can be optimized.

Direct discussions on tribal lands invoke a sense of office separation and a desire to feel the tribe’s perspective. In some cases, tribes do not have the opportunity to leave their offices for a variety of reasons. Typically, there are no certain circumstances for these meetings to occur. “Just a visit” certainly is appreciated and imparts a casual discussion. Most certainly, there is a need when the level of concern increases and the DOT believes a personal perspective may be impeded without the face-to-face connection. To my awareness, there may not have been a meeting on our lands.

Christianity serves as a lesson for this type of direct consultation. The spread of the gospel could not have been as success if there were not missionaries, volunteers to take the Word from their home church. These individuals were willing to leave their home, their comfortable surroundings, their families to venture unfamiliar territory. While there are issues with Christianity and its implementation on tribal people, it is the sense of leaving the familiarity to diminish the limitations of those unaware.

### *Obstacles to effective consultation*

Communication, implementation, support, and funding are the greatest setbacks. Consultation is a meaningful discussion, not a notification of project. When certain aspects are withheld from discussion, there is a level of suspiciousness. Again, effective consultation leads to partnerships and friends. The tribes know the law and can hold agencies to the fire. But open communication and friendships can lead into directions other agencies will desire to follow.

There remains the issue of implementation. Consulting because the law says so is not an excuse and nothing good will result. The delegation of consultation also is a negative attribute as this implies the matter is not important enough. Further, reliance upon one representative (POC) dictates failure when he/she departs and someone else must be selected to assume this responsibility. Agencies must invest in tribal consultation as a standard operating procedure, a priority in high regard as a financial increase. Training POTENTIAL representatives is much more effective than the necessity of an immediate replacement. Mistakes will occur but when consulting is repetitive, those mistakes go away.

When administrators are aware of what the regulations say, how consultation can be effective, and have direct participation in these events, those delegated the responsibility (POC and tribes) can observe the importance of implementation, rather than what the law requires. Too often, administrators attend the meeting to show support and leave subordinates to carry on. In few cases, administrators sign the necessary documents but make no appearance. These instances impart the importance of consultation from the higher and highest levels of agency authority. U.S. Army, Fort Benning Military Reservation has for years had the Garrison or Deputy Garrison Commander attend Tribal Consultation meetings, often twice a year. For each meeting, the leader has stayed throughout the meetings and even attended meals outside the meetings. In some instances, the leader had to leave for official business but has made it a point to return and engage in discussions.

Finally, funding is an issue. The tribes have no money and the government is offering none. “We don’t have money to consult” is not an excuse, despite however many times this has been expressed. The NHPA does not refer to the need of money for consultation. The law says consult. The most effective manner may be on-site and direct consultation; however, money becomes a necessity. Tribes have enjoyed the opportunity to visit agencies, see what is being accomplished, and to share experiences. Often, these have been through the expenses of the agency since tribes do not have the financial resources to venture outside tribal borders. While this not a necessity for consultation, it is appreciated.

We have suggested agencies to think beyond the personal piggybank. One suggestion has been to meet in locales where tribes are centered, diminishing the level of costs to be incurred. In some instances, tribes have offered their facilities to host consultations. We have also suggested, but have to see, a collaborative consultation. In most cases, one agency in a state is not the only entity who must consult with tribes. Each agency also must decide when and how consultation will occur with the tribes, often resulting in separate visits on an annual basis. Therefore, there is the potential to have one lengthy meeting between a number of agencies and tribes at one setting, a collaborative consultation. Instead of one agency scrapping the piggybank, there can be a shared financial responsibility. Say, there are 12 tribes to be consulted among six agencies; instead of one agency funding all 12 tribes, there could be an agreement to fund two tribes. Thus, there is cost-sharing with a decreased financial obligation, tribes can limit the number of visits to a state, and both agencies and tribes can hear from each other to hear successes and opportunities.

### *Additional factors*

Acceptance of tribal expertise remains a critical component to successful consultation. Too much reliance exists upon the files of the SHPO, local and staff archaeologists. This realm offers the scientific explanation of what is evidenced. A police investigator surely can surmise how a situation had developed and its circumstances based upon his/her instruction from textbooks and training. However, unless he or she speaks with those involved, there is no true sense of how the situation came to existence. Archaeologists rely upon training given in classrooms and field training from those who spent years in the trenches. However, their knowledge is only half formed since the tribal perspective has not been acquired. Tribal history and stories have sustained the membership long before European and American introduction. If these have existed for 500 years or more, then why are these not as important as those of European and American origin? The simplicity of writing these literary occurrences should not diminish the level of competency or accuracy. Our ancestors witnessed many events and have shared those experiences to impart wisdom to the followers. It is not imagined.

Tribes are concerned beyond historic properties. The NHPA also refers to traditional properties of cultural significance. While there have been attempts to clarify (Bulletin 38), only the culturally related entity can determine what is traditionally significant. Mounds, burials, trails, medicinal plants, sustainability resources (river cane), and ceremonial depiction and sites are a few concerns tribes have that will be impacted by development. Many of these are not in SHPO files or in archaeological training. Nevertheless, the law requires consultation for these resources because tribes are concerned about these things. Effective consultation leads to these discussions and often future sustainability.

Finally, with all these concerns, there is a need to invoke tribal monitoring programs with DOTs. Since many resources cannot be divulged and there is a sense of mistrust in certain areas, tribal monitors serve as the eyes and ears of the tribes during an undertaking. The expertise presented can be very beneficial to agencies by diminishing multiple consultation segments and increase trust. Funding of course is an issue but by prioritizing partnerships, can be helpful to move forward.

#### *5.1.2 Caddo Nation*

The following questions and answers present the responses given by the representative for the Caddo Nation for this study.

##### *Importance of consultation*

Consultation with state DOTs can be either important or not depending on the project circumstances. For example, it is important for the Caddo Nation to consult with the lead agency. If a project is federally funded, then the Caddo prefer to consult with the federal agency, such as FHWA. This is the preference because, in the case of federal funding, FHWA is responsible for directing the funding. However, the Caddo suggest that if the project is fully state-funded, then state DOT consultation is appropriate. For the Caddo Nation, having the lead agency direct the consultation can lead to overcoming issues related to projects involving multiple state DOTs.

### *Defining “effective consultation”*

There are two levels of consultation, which consequently facilitate “effective consultation.” The first is the government-to-government consultation. In this case, federal agencies need to develop relationships with the tribes, meeting area tribes and councils to discuss how they function and to establish better consultation frameworks. The second type of consultation is agency-to-agency consultation. The Caddo Nation defines this level as projects involving THPOs and state DOTs working together, mainly representing projects involving Section 106.

#### Example: Highway 71 project

The Highway 71 project in Arkansas (involving the Caddo Nation, AHDT, and FHWA) is representative of effective consultation for the Caddo Nation. This work, being 15 years old, laid the foundation for good consultation practices between the Caddo Nation and AHDT. A contrasting example is the Keystone Pipeline project, which demonstrates poor consultation practices.

### *Written policies and guidance for consultation*

When addressing written policies, it is only effective if implemented, and because some such policies have been followed in the past, they do not necessarily bear weight with tribes today. Effective consultation is further demonstrated through fulfillment of Section 106 laws.

### *Project-by-project consultation v. programmatic approach*

The Caddo do not feel that consultation directly with state DOTs is appropriate, unless that state DOT is the lead agency and uses only state funding, further noting that the lead federal agency—in the case of highway projects where federal funds are being used, FHWA—cannot delegate consultation responsibilities when tribes request government-to-government consultation. In terms of approach, the Caddo Nation acknowledges the project-by-project method as the most effective approach to consultation. For the Caddo, this approach allows tribes to overcome erroneous paperwork, which in turn decreases irrelevant work, and thus facilitates consultation streamlining. The project-by-project approach was the early method for tribal consultation, as seen through initial agreements between FHWA and DOTs.

### *Liaisons and DOT POCs*

Having an established POC is very important to the Caddo Nation. For example, the POC, or tribal liaison, provides the tribe with a person to email or call and someone specific that can hear the tribe’s concerns. Moreover, the POC serves to overcome potential miscommunications. The representative stresses that a failure to establish and maintain a POC can lead to feelings of disrespect when communications fail. In light of the bilateral levels of consultation, there could be a POC at the higher levels, such as a POC at the senior FHWA level, who can be a liaison to a senior level tribal member, such as a tribal chairman.

### *Quality of consultation and maintaining relationships*

Overall, consultation with DOTs has been a satisfactory experience for the Caddo Nation. However, it has been difficult to integrate the FHWA. Moreover, the Caddo have had to travel to take part in government-to-government consultation with involved federal agencies. Consultation at the federal level seems to be lacking with several of the FHWA representatives, i.e., Oklahoma and Louisiana, whether due to their time schedules, lack of staffing, or any number of factors; however, DOT consultation, such as with AHTD and TxDOT, has been very successful because there is an FHWA liaison who works directly with these DOTs and the tribes on a regular basis. In Arkansas, the Arkansas FHWA Environmental Specialist is the contact person for all of their Arkansas DOT projects. For the Caddo Nation, the following three factors represent important issues relevant to maintaining good consultation relationships:

- First, there must be continued communication where all involved parties keep in touch about projects.
- Second, an annual meeting should be conducted between tribes and agencies with whom they are consulting on projects.
- Finally, follow-through is necessary.

### *Meeting in-person, venue and travel*

The Caddo Nation does travel for the purpose of consultation. In the past tribal members have traveled to such states as Texas, Arkansas, and Louisiana. For the Caddo Nation, this type of interaction is very important. These face-to-face meetings are imperative, as it allows tribes to put faces with names. Moreover, for the Caddo Nation in-person meetings also allow confidentiality in communication.

#### Example: TransCanada/Keystone XL Pipeline Project

A concern for the Caddo Nation is the occurrence of tribal requests for government-to-government consultation that have not always been honored. An example is the TransCanada/Keystone XL Pipeline project. In this case, the Department of State, as the lead federal agency, had conducted public meetings, inviting tribes to take part. Some tribes involved in the project had requested government-to-government consultation; however, the requests were not always honored. As a result, some tribes did not get to voice or advise the agency official on confidentiality concerns or traditional cultural property concerns.

In-person meetings on tribal land are considered necessary to fulfill government-to-government consultation for the Caddo Nation. For the Caddo, this provides the sharing of information in a reciprocal fashion, thus lending to accomplishments in consultation. Moreover, in-person consultation can alleviate biases.

#### Example: AHDT (Arkansas)

For the Caddo Nation, the work and representatives at FHWA and AHDT characterize this type of positive consultation. This state agency maintains a variety of professionals in the

environmental and cultural resource specialties, and work directly with the FHWA who have traveled from Little Rock to the Caddo Nation. There is also an excellent level of communication and listening with the Arkansas DOT and the FHWA in Little Rock.

#### *Obstacles to effective consultation*

Those involved in the process need to know the goal they wish to achieve (e.g., to avoid sites). Participants in the consultation process should also become active in the process, and engage themselves by listening and learning. Moreover, some tribal members might not always speak up during consultation meetings.

#### *Additional factors*

The most important thing is the involvement of the tribes. This involvement should be fully executed, suggesting that the consultation itself is the easy part. Full implementation of the process, for example, in cases where tribes need to monitor, can present issues, but tribal involvement is necessary. The Caddo Nation also feels that it is important that tribes receive some funding to complete their required consultation work. The “participation in the resolution of adverse effects” is allowed to tribes in the regulations.

### *5.1.3 Confederated Tribes of the Grand Ronde Community of Oregon*

#### *Importance of consultation*

Consultation with state DOTs is very important, in large part because of the scale of the Grand Ronde’s traditional lands, which account for a large portion of the state (approximately one third). As such, most infrastructure projects do have some type of impact on TCPs.

#### *Defining “effective consultation”*

For the Grand Ronde, successful consultation relates to good communication among all parties. Exemplar of this would be the way that Oregon DOT manages tribal consultation, with open lines of communication, and an emphasis on early contact with all necessary information. In these terms the tribe is able to communicate amicably and with ease.

#### *Written policies and guidance for consultation*

The representative for the Grand Ronde believes that it is important to have written policies. However, it is more important to have meaningful communication, and that DOT personnel should have a culturally appropriate philosophy and have an understanding of tribal history.

#### *Project-by-project consultation v. programmatic approach*

The use of both a PA and the project-by-project approach, as with the Oregon DOT, is the best method. Addressing consultation on a project-by-project basis creates a platform for getting

“boots on the ground,” and the PA is also a good tool for facilitating information sharing, such as with emails and exchanging project mapping.

### *Liaisons and DOT POCs*

For the Grand Ronde, a tribal liaison can be good if that person is knowledgeable with respect to tribal issues, history, and culture. However, should that person not possess the proper familiarity with the tribe and/or the consultation process, the POC station can create an added bureaucratic hurdle.

### *Quality of consultation and maintaining relationships*

The Grand Ronde feel that quality in consultation is good with some agencies, like Oregon DOT, while others are lacking. The tribal representative for the Grand Ronde cites the following three factors in the maintenance of good consultation relationships:

- Face-to-face time. The Grand Ronde feel that meetings are necessary to forming a trusting relationship and provide an opportunity to develop and maintain relationships.
- The forwarding of concise and clear information. For example, the Grand Ronde THPO reviews 3,000 to 6,000 projects a year and notes that consulting is best and most timely when a clear map is provided with a short description, such as a paragraph, as opposed to a full report that does not distill the relevant project information.
- Adequate, clear mapping that depicts the project in terms of easily locatable sections.

### *Meeting in-person, venue and travel*

The Grand Ronde are able to travel to project sites and feel that when DOT personnel can come to their location, that creates an air of equalized conversation. Moreover, when tribes travel to DOT offices, some might have inadequate space. However, Oregon DOT has proper meeting space, and they also reimburse for travel, which facilitates consultation. In discussing the topic of travel reimbursement, the Grande Ronde note that it can function to bridge economic gaps that might exist in terms of tribal economic circumstances. Therefore, the application of travel reimbursement can make possible these face-to-face meetings, which are deemed necessary and are preferred by the tribe.

In-person meetings on tribal land are important to the Grande Ronde and can be conducted on a case-by-case basis. In the case of projects involving third parties, for example, it can be very useful to have the representatives from each agency travel to tribal land. Exemplifying the benefits of this type of consultation is the detachment from what might otherwise be an overly structured or corporate atmosphere. When the involved parties are able to converse on tribal land, they are able to drop their guard and the consultation ultimately becomes more fluid and effective.

### *Obstacles to effective consultation*

The largest obstacles relate to personalities, and in particular issues stemming from agency employees who are not accustomed to more recent developments in tribal consultation law and policy. In these terms, agency personnel who might feel that they are not required to consult with tribes, or do not give tribal perspectives equal weight, can create barriers in effective consultation.

### *Additional factors*

Though not citing additional factors, the Grand Ronde reiterate that Oregon DOT represents a good example of a state DOT that practices exemplary ongoing consultation practices.

#### *5.1.4 Muscogee (Creek) Nation - Respondent 1 of 2*

### *Importance of consultation*

The representative for the Muscogee (Creek) Nation notes that it is very important for them to consult with state DOTs because there are a lot of projects being carried out in their areas of interest. For example, the representative notes that they are a large tribe that has a large area of interest, so they do consult with many DOTs. For the Muscogee (Creek) Nation, face-to-face meetings with state and federal agencies are very important as these types of meetings allow them to discuss projects and also serve as a means to get to know each other.

### *Defining “effective consultation”*

The representative notes that to be effective you must communicate with each other. In this way, the representative notes that the utilization of face-to-face communication as a way to build trust. The representative states that the Fort Benning, Georgia, project offers an excellent example of successful consultation.

### *Example: Fort Benning, Georgia*

The representative for the Muscogee (Creek) Nation feels that long-term and ongoing consultation with representatives at Fort Benning, Georgia, is representative of good consultation and an example of how some agencies go a step further in the process. In this case, the Muscogee (Creek) Nation travels to Fort Benning twice a year for consultation. During the meeting the tribal representatives have an opportunity to actually view the TCPs and archaeological sites that are present on the Fort Benning property. This example is notable for another reason: the representative notes that representatives at Fort Benning have set aside land that the Muscogee (Creek) Nation uses for repatriation under NAGPRA. This is notable as transportation projects have resulted in inadvertent discoveries of Muscogee (Creek) Nation burials.

#### Example: GDOT

The representative credits the GDOT with good communication and notification of projects, and GDOT also provides information when there are no effects to Historic Properties from a project. Moreover, GDOT has also invited members of the Muscogee (Creek) Nation to project and archaeological sites where they have taken part in archaeological excavation during consultation with GDOT.

#### Example: To Bridge a Gap

In addition, the representative cites the To Bridge a Gap Conference hosted by the Oklahoma Tribes and the USFS as a good example of effective consultation.

#### *Written policies and guidance for consultation*

The representative notes that the written policies ensure that there is continuity of protocols used in consultation. In the case of staff turnover, for example, the written policy will serve as a guide for new employees.

#### *Project-by-project consultation v. programmatic approach*

The representative notes that the Muscogee (Creek) Nation feels that the project-by-project approach works well in the case that DOTs are involved in a PA, but it may be more appropriate to create an MOA/MOU.

#### *Liaisons and DOT POCs*

The POC is deemed useful to the Muscogee (Creek) Nation. The representative suggests that it would be very helpful for state DOTs and other agencies to make updates, perhaps every six months. The representative also notes that is useful to have a secondary representative.

#### *Quality of consultation and maintaining relationships*

The representative cites communication, project notification, and the use of site visits as three factors, while also noting the problems that can occur when early consultation does not take place (i.e., project stops, cost overruns, and the need for project redesign to avoid TCPs).

#### *Meeting in-person, venue and travel*

The Muscogee (Creek) Nation does travel to DOT offices, which is deemed important. The representative stresses the necessity of face-to-face meetings, particularly in the case of inadvertent discoveries. The representative notes that the tribes might be able to determine cultural affiliation based on visually assessing a burial site. Face-to-face meetings also foster relationships through the sharing of history and culture of the tribes.

The representative believes that meetings at tribal offices are important and might be driven by circumstances. For example, such meetings are a good way to establish relationships in the case of a controversial project, allowing the reinforcement of trust and collaboration with tribal members who are unsure about the circumstances. Such a circumstance might involve a project where a site is found and is undergoing archaeological excavation. In this case, it might be beneficial for the archaeologist to travel to the tribal offices and speak with the tribal representatives. Activities like this can also overcome misconceptions that some tribal members might have regarding state or federal representatives based on past experiences with federal agencies.

#### *Obstacles to effective consultation*

The representative calls attention to the importance of communication in consultation, in that they have seen problems in cases where an agency representative or representatives were not functioning in a hospitable way, which consequently works against trust building.

#### *Additional factors*

(See discussion of Question 10 with Respondent 2, below.)

#### *5.1.5 Muscogee (Creek) Nation - Respondent 2 of 2*

#### *Importance of Consultation*

Another representative for the Muscogee (Creek) Nation, having been involved with consultation activities for many years, stated that there has been much improvement in the process. However, the representative indicates that some agencies still lack improvements in how they conduct consultation. The representative also calls attention to the issue of tribal cultural knowledge in discussing the need for consultation and in particular through the process of face-to-face communication.

Moreover, the importance of early and continuous consultation was discussed as a very important factor, as well as the need for agencies to follow up with tribal representatives to see if they received information that was sent. The representative cites Mr. Chris Stephens stating “relationships between governments are important, but relationships between people are the foundation to mutual understanding” as an example of the need for respect and the formation of relationships in the consultation process.

#### *Defining “effective consultation”*

See answers to Question 1.

#### *Example: Consultation with Oklahoma DOT*

The representative offers the example of an Oklahoma DOT project where a highway project alignment was going to have an adverse effect on burials. In this case, the tribe was able to establish the names and family of the individuals. The consultation efforts led to the repatriation

of these individuals to a family plot. The project was funded by Oklahoma DOT. This project and the consultation are regarded as a positive experience and helped to build trust between the tribe and Oklahoma DOT.

#### *Written policies and guidance for consultation*

The Muscogee (Creek) Nation feel that the use of written policies, such as an MOU, works well. These written agreements form the basis for everyone's obligations in the process. The representative also calls attention to the fact that these agreements are typically limited in duration, thus allowing a set time when they must be reevaluated/revised/renewed as necessary.

#### *Project-by-project consultation v. programmatic approach*

It is important to maintain acknowledgement of tribal sovereignty and the understanding that tribes are their own government and they deal with consultation on a government-to-government basis, also emphasizing the importance to the Muscogee (Creek) Nation as a federally recognized tribe.

#### *Liaisons and DOT POCs*

The POC is deemed useful to the Muscogee (Creek) Nation. The representative suggests that it would be very helpful for state DOTs and other agencies to make regular updates to POC lists.

#### *Quality of consultation and maintaining relationships*

The representative notes that most DOTs do a good job in their consultation programs, but some are a little lacking. For the three factors, the representative cites:

- Communication;
- Project notices;
- Site visits.

#### *Meeting in-person, venue and travel*

Yes, the Muscogee (Creek) Nation does travel to DOT offices. The representative notes that in early consultation projects, there might not have been funding allocated for this type of travel; however, today much has changed and travel is more commonly accounted for in federal and state transportation budgets. Moreover, the Muscogee (Creek) Nation note that it is very important to travel to project areas to meet face-to-face with agency representatives, as this is cited as a notable factor in the formation of relationship and trust building. Face-to-face meetings also foster relationships through the sharing of history and cultural of the tribes.

#### *Obstacles to effective consultation*

The representative stresses that the Muscogee (Creek) Nation as well other tribes have traditional ways and the To Bridge a Gap conference developed so that tribal representatives may share

perspectives with not only transportation agencies but also other agencies. The representative goes on to call attention to the overarching need for respect and an understanding that Native Americans are spiritual people who maintain traditional ways. It is very important for agencies to understand the status of elders, and the need to offer respect to them especially if they are attending consultation meetings.

Example: Highway Project – Jackson, Mississippi

The representative suggests that there are economic reasons to take part in early and continuous consultation. In the 1990s a highway project was under construction in Jackson, Mississippi, which was impacting a very important American Indian site. Because of the late consultation, however, the highway had to be redesigned, resulting in unanticipated project costs.

#### *Additional factors*

The representative notes that there has been a large improvement in consultation practices, noting that early meetings were not operated on a platform of equal footing, respect, and trust. However, today much has changed.

#### *5.1.6 Passamaquoddy Tribe of Indians*

##### *Importance of consultation*

The representative for the Passamaquoddy Tribe of Indians notes that consultation with state DOTs is very important due to the amount of transportation projects that are conducted, as well as the number of water bodies that are located nearby transportation projects. As such, they have many traditional cultural properties close to DOT projects and consultation is therefore deemed necessary.

##### *Defining “effective consultation”*

The Passamaquoddy Tribe of Indians cites the U.S. Route 1 Bridge Project as an example of effective consultation with the Maine DOT. This project involved the replacement of an existing bridge, which was going to result in an expansion of the original footprint on both sides of a watercourse. In this case, the representative notes that they took part in face-to-face meetings on-site, but also traveled to the DOT offices to meet and look over project blueprints to delimit their areas of concern. The consultation activities resulted in a Phase II investigation, in which the Passamaquoddy were also participants.

##### *Written policies and guidance for consultation*

For the Passamaquoddy Tribe of Indians, written policies can form the baseline for consultation. However, the representative notes the need for flexibility to address project-specific issues as they arise.

### *Project-by-project consultation v. programmatic approach*

The Maine DOT consults with the Passamaquoddy Tribe of Indians on each project, and the project-by-project system is good for them; however, the representative also calls attention to the usefulness of MOUs and MOAs, which can remove areas for consultation in the case of locations predetermined not to possess TCPs or areas of interest for the tribe.

### *Liaisons and DOT POCs*

The Passamaquoddy Tribe of Indians communicates through a POC and feels that the position is very important. The centralized POC circumvents potential communication delays that can occur when correspondence, for example, is sent to other levels of the tribal government. Therefore, communication through a POC becomes more streamlined and more effective.

### *Quality of consultation and maintaining relationships*

The Passamaquoddy Tribe of Indians describes its consultation with Maine DOT as being very good. The representative notes that communication is excellent and the tribe is able to submit comments on most every project. Three factors that are deemed most important for the maintenance of good relationship with the state DOT are: (1) having open lines of communication, (2) being informed, and (3) having meetings.

### *Meeting in-person, venue and travel*

On occasion the Passamaquoddy Tribe of Indians have traveled to the Maine DOT offices in Augusta; however, this is four hours away from their home.

Person-to-person, or face-to-face, meetings on tribal land are very important to the Passamaquoddy Tribe of Indians.

### *Obstacles to effective consultation*

One of the biggest obstacles for the Passamaquoddy Tribe of Indians is gaps in the consultation process, in particular with projects carried out at the town or city level that might not result in the Section 106 process. In one example, the representative notes that the tribe learned about an ongoing project in Madison, Maine, in the newspaper. It was later determined that the work, a new trail, might impact a TCP or area of tribal interest. As such, the tribe notified the town and consultation was consequently carried out.

### *Additional factors*

The representative for the Passamaquoddy Tribe of Indians is in the process of reaching out to state and local entities, speaking to local officials about TCPs and what can be done to address tribal concerns around the state, even for projects that do not necessarily fall under Section 106.

### 5.1.7 *The Sovereign Miami Tribe of Oklahoma*

#### *Importance of consultation*

The Miami feel that consultation with state DOTs is indeed important. Consultation is needed in light of pre-colonial and historical territory concerns. Because the Miami occupied a larger land base historically, they would like to be brought into tribal consultation with other state DOTs who are conducting work in such states as Wisconsin, Michigan, Iowa, Indiana, and Kentucky, where the Miami occupied territory prior to displacement by western expansion initiatives. This example demonstrates a pertinent tribal issue, as many Native Americans lost substantial territory between first contact with Europeans and the passing of the Indian Reorganization Act in 1934.

Delving further into this issue, the Miami suggest that a lack of extra provincial consultation activity could relate to such issues as limited resources and a limited focus on larger transportation projects, but tribes need to explore territorial land rights under their historical treaties. The Miami feel that online database systems provide an excellent vehicle for initiating successful consultation, as exemplified by the Illinois online database system.

#### *Defining “effective consultation”*

The Miami Tribe feel that “effective consultation” involves several factors. Among these, the Miami call out the need for good communication. In this respect, site visits with cultural resource professionals, such as archaeologists, are cited as a means to substantiate good communication. Here, the Miami also call attention to the benefits of a “boots on the ground” approach for successful consultation.

#### *Example: The Interstate 70 Project*

To exemplify effective consultation, the Miami recall the I-70 project. In this case, the Miami were not only involved early in the process, but it was made clear that the DOT was concerned with the impacts on cultural resources. The representative for the Miami Tribe cites project delays and design adjustments made explicitly to avoid cultural resource impacts. It was further noted that DOT and their affiliated staff were respectful, an important factor in tribal consultation.

#### *Written policies and guidance for consultation*

The Miami feel that a written protocol is essential; however, these written guidelines should not replace early personal communication in consultation. Nonetheless, the Miami consider the guidelines good in terms of Section 106 streamlining to facilitate timely consulting. Moreover, the guidelines could serve as a second step in the process; the Miami raise the issue of federal recognition, in that many tribes claim cultural association to areas from which they were removed and the guidelines may narrow the consultation process to those federally recognized tribes. Currently, the Miami, and other regional tribes, are using the Iowa DOT guidelines as a template for consultation with other state institutions.

### *Project-by-project consultation v. programmatic approach*

The Miami suggest that the use of a PA is good when dealing with the establishment of an APE for a project, which delineates the extent of potential impacts to traditional cultural properties in the immediate area; however, the project-by-project basis works well as there can be differences in historical and/or cultural factors. Moreover, the Miami suggest that these two work in tandem to facilitate timely consultation.

PAs can also support inclusion of other state agencies, such as SHPOs, which can provide the tribes with new cultural information (e.g., that derived from archaeological investigations) to which they may not already have access.

### *Liaisons and DOT POCs*

Having a determined POC at state DOTs is important to the Miami, as it establishes both a feeling of trust and security in consultation. For the Miami, the establishment of a POC lays the foundation for expedient and effective consultation.

### *Quality of consultation and maintaining relationships*

The pursuit of quality in consultation with state DOTs is important to the Miami. When asked to describe what three factors best characterize the maintenance of good relationships with state DOTs, the Miami offer the following.

- The importance of having a state-level representative who serves as an intermediary, a person at the SHPO's office, for example, who should be a proactive person that forwards a trusting relationship. Possible issues with not having such a person are a potential lack of consultation, where a tribe is contacted at the last stages of a project and has no input.
- The utilization of online electronic systems, which will foster early consultation and remedy delays. In noting the 30-day review period, the Miami call attention to the benefits of using an online database to overcome redundant paperwork and further facilitate timely consultation.
- The Miami note the importance of a proactive exchange of information. This is exemplified by the need for adequate response time, which provides tribes the ability to ask questions and pose concerns regarding new projects.

### *Meeting in-person, venue and travel*

The Miami tribe of Oklahoma does make visits to project sites as part of the consultation process. For the Miami, traveling to project sites is important, as it promotes a preemptive effort to protect and learn new information about the group's own prehistory. In these terms, the Miami call attention to potential issues stemming from a lack of proactive consultation. Here, it is noted that detachment in communication can result in a major loss of information in archaeological data for the tribes.

The Miami feel that it is important for state DOTs to meet with tribes on tribal lands. Such meetings are most effective when performed early in the consultation process. These meetings, when conducted on their own historical territory, can form a foundation from which tribes feel comfortable asking questions on a person-to-person basis.

#### *Obstacles to effective consultation*

Many states and federal agencies today understand the importance of tribal consultation. In terms of obstacles, there are several examples, such as problems that relate to the actions of individuals, or a need to stress the importance of including tribes who possess historical ties to a location. It is suggested that direct consultation with DOT personnel, those who are administering projects, will facilitate circumvention of these types of obstacles. Tribes need to have the opportunity to take part in the Section 106 consultation process as it is intended under the law. The Miami also stress that tribes can offer important data and perspectives for DOTs and federal undertakings.

#### *Additional factors*

One issue for tribes, in terms of consultation, is the need for more formally educated representatives. The suggestion here focuses on the formal education of the tribe's youth, to foster more continuity in tribal programming.

### *5.1.8 Thlopthlocco Tribal Town*

#### *Importance of Consultation*

The Thlopthlocco Tribal Town feel that consultation with state DOTs is very important because of the alignment correlation between many transportation infrastructure elements and American Indian settlements/trails. The representative for the Thlopthlocco Tribal Town also brings up the need to examine disturbances relating to repairs/modifications to older transportation infrastructure, noting that some early infrastructure elements might not have been subject to cultural resource studies.

#### *Defining "effective consultation"*

GDOT's Tribal Liaison took part in the To Bridge a Gap Conference three or four years ago, and Thlopthlocco's representative cites this experience as having had a positive effect on their consultation relationship with GDOT. Of the positive influences gained through this effective consultation example, the representative cites the formation of a trust, the establishment of a good working relationship, and the collaborative effort made to streamline paperwork.

#### *Written policies and guidance for consultation*

MOAs or MOUs are deemed useful in the sense that they form the basis for consultation. Therefore, they provide the framework for consultation, notifications, and mutual

correspondence. However, the representative cautions that these documents are binding only through the good will of the involved parties.

#### *Project-by-project consultation v. programmatic approach*

The representative for the Thlopthlocco Tribal Town suggests that a PA would be useful as it could help to streamline the consultation process and reduce erroneous paperwork. Currently, they consult on a project-by-project basis, which can result in an overabundance of paperwork.

#### *Liaisons and DOT POCs*

The POC is deemed very useful to the Thlopthlocco Tribal Town. In the past, correspondence might have been addressed to different departments of tribal government, resulting in delays in receiving paperwork. However, with the use of a POC, all necessary consultation documents are sent to the Tribe, and the THPO also receives electronic communications from the POC.

#### *Quality of consultation and maintaining relationships*

Personal contact, and a POC whom the Thlopthlocco Tribal Town know that they can contact, is an important contributing element to quality consultation. The representative notes that they need to have a particular person whom they can discuss issues with, someone who represents the starting point for voicing their concerns.

#### *Meeting in-person, venue and travel*

The Thlopthlocco Tribal Town representative feels that having in-person meetings, such as those on a project site, is very important. These types of face-to-face meetings are a necessary mode by which the tribal representatives and involved agencies can meet and discuss the project in context. One example given was the Birmingham Beltway project in Alabama, where face-to-face meetings were carried out on-site, as well as in the case of the proposed freeway loop around the Ocmulgee Old Fields in Macon, Georgia. According to the representative, the ability to examine the project area visually can be a necessary part of the preservation of TCPs.

Meetings on tribal/ancestral land are also important to the Thlopthlocco Tribal Town. The representative notes that GDOT does participate in meetings in Oklahoma, which are hosted by the tribes. These meetings are typically attended by key DOT personnel who can meet with many tribes at one time, and therefore this meeting can be more economical than having all the tribes travel to the DOT offices.

#### *Obstacles to effective consultation*

The representative notes that overall consultation has been good. However, one major obstacle is the need for involved parties not to take each other for granted. Moreover, there is a need to place more emphasis on tribal perspectives, in particular through the education of non-tribal members by tribes for the dissemination of their history. Problems can also stem from the failure to uphold parameters outlined in an MOU. Other factors that should also be considered, such as

tribal concerns regarding prehistoric and historical territories, which can result in complications in the case of repatriation, for example. But even these types of concerns, as described by the representative, have been resolved through consultation practices.

### *Additional factors*

When asked about issues not addressed, the Thlopthlocco Tribal Town representative calls attention to the issue of curation of cultural materials. The representative cites the “SHED” storage facilities used by GDOT, suggesting the need to curate these materials and disseminate the prehistoric and historical information to the public, noting that \$20 million is spent annually to store American Indian artifacts and remains across the United States. The representative states the need to then get the data “out of the shed and into the head, of our young people.”

### *5.1.9 Three Affiliated Tribes—Mandan, Hidatsa, Arikara*

#### *Importance of Consultation*

The Three Affiliated Tribes—Mandan, Hidatsa, Arikara—feel that consultation with state DOTs is important. The tribes maintain a long-standing consultation relationship with NDDOT. Because the region is experiencing a natural resource boom, a number of transportation-related projects require consultation.

#### *Defining “effective consultation”*

A good example of effective consultation is the street construction project in Mandan, North Dakota, described below. In this case, the identification of an archaeological site led to tribal, state, federal, and local groups collaborating and creating an outreach program.

#### *Example: “Environmental Excellence”*

Representatives of the Three Affiliated Tribes collaborated on a project to provide interpretative and educational resources to the public, through the Scattered Village Exhibit at the Mandan Public Library. As a result of this collaboration, the Three Affiliated Tribes (along with the NDDOT, Mandan Public Library, Mandan Public Schools, and others) were recipients of a 2007 FHWA Environmental Excellence Award for Excellence in Cultural and Historical Resources (see <[http://environment.fhwa.dot.gov/eea2007/historical\\_resources.htm](http://environment.fhwa.dot.gov/eea2007/historical_resources.htm)>).

#### *Written policies and guidance for consultation*

The Three Affiliated Tribes feel that written policies are valuable. These establish the ground rules, allowing for give and take in consultation.

#### *Project-by-project consultation v. programmatic approach*

The Three Affiliated Tribes have utilized tribal caucuses for the last decade or so. In doing so, they hold meetings with area tribes who share ancestral territory. These meetings allow the tribal

representatives to address construction projects, roadwork, and ROW concerns relating to tribal lands. They address a range of cultural resource issues, from effects on TCPs to mitigation measures. In these terms, the Three Affiliated Tribes focus on a comprehensive yet project-by-project approach to tribal consultation.

#### Example: Semi-Annual Meeting

The Three Affiliated Tribes hold a semi-annual meeting with NDDOT to address projects and how these might affect their traditional cultural properties.

#### *Liaisons and DOT POCs*

Having a POC has been helpful for the Three Affiliated Tribes, as it allows the tribal chairmen to stay informed while also compartmentalizing the consultation in terms of the THPO's office and the state POC.

#### *Quality of consultation and maintaining relationships*

Quality is achieved through cultural awareness. In this case, consultation would be carried out by parties are able to communicate without barriers.

#### *Meeting in-person, venue and travel*

Three Affiliated Tribes members do travel to DOT offices to take part in consultation activities. The Three Affiliated Tribes feel that consultation on tribal land is an important component of the process. It is common for tribal members to meet with DOT and FHWA representatives on tribal land. Designated tribal members look at TCPs and/or features to provide spiritual advice.

#### *Obstacles to effective consultation*

The Three Affiliated Tribes call attention to the need for emphasis on education in indigenous culture, pointing to the need to overcome cultural barriers that can obstruct successful consultation.

#### *Additional factors*

No additional factors were discussed.

### *5.1.10 United Keetoowah Band of Cherokee*

#### *Importance of consultation*

United Keetoowah Band of Cherokee feels that consultation with state DOTs is important for two reasons. First, consultation with state DOTs provides a more intimate consultation atmosphere. The second reason, however, relates to the fact that many state DOTs tend to carry

out consultation because the FHWA has delegated Section 106 consultation to the state agencies, so state-level consultation essentially facilitates federal consultation.

### *Defining “effective consultation”*

Effective consultation requires that both parties take part in a conversation and collaborate to reach a compromise. Therefore an equitable approach is needed. The United Keetoowah Band of Cherokee cite issues regarding the use of letters from states in lieu of interactive consultation.

#### Example:

There may be a situation in which effective consultation might be conducted in the following manner. An agency notifies the tribe early, sends an archaeological report (for example), and cites potential concerns for the project impacts. This consultation, according to the example, would then be followed by consultation with all involved tribes and may employ an MOA, thus forming the foundation for continued tribal consultation for the duration of the undertaking.

### *Written policies and guidance for consultation*

The United Keetoowah Band of Cherokee feels that written policies can be useful only if they are thoughtfully written, where all appropriate laws are represented and a plan of adherence is present. Moreover, such policies should be developed in consultation with tribes and should be shared with the tribes so they are equally aware of the parameters of each state policy.

#### Example: The Review Period

If a shorter 15-day review period is being implemented by a DOT, the written policy should reflect that, and the written policy should be accessible to the tribes, who will also be required to meet that review schedule when possible, although federal law gives the tribes 30 days.<sup>57</sup>

### *Project-by-project consultation v. programmatic approach*

United Keetoowah Band of Cherokee suggest that the use of PAs is only valuable if it addresses projects generally. The project-by-project basis is very important. This relates to the necessity of tribal cultural knowledge, which DOTs do not have and therefore must consult regarding specific project impacts and circumstances.

### *Liaisons and DOT POCs*

For the United Keetoowah Band of Cherokee, the tribal liaison, or POC, is very important as they establish for the tribe a consistent person to contact, thus alleviating the need to track down different agency representatives. The POC serves to establish a good working relationship with tribes, which facilitates effective consultation. Moreover, the United Keetoowah Band of Cherokee stress that the use of the POC lifts feelings of intimidation and instills confidence in the process.

---

<sup>57</sup> Under 36 CFR Part 800, there are no time limits for tribal review, only for SHPO review (30 days).

### *Quality of Consultation and Maintaining Relationships*

The United Keetoowah Band of Cherokee notes that out of the 13 states with which they consult, the tribe has established very strong working relationships with three. Three factors exemplify traits and procedures utilized in these three effective consultation relationships.

- First, these agencies maintain good project-by-project contact and consultation with the Cherokee.
- Second, they all uphold good levels of information sharing.
- Finally, each forwards a platform and ideology of cultural awareness.

### *Meeting in-person, venue and travel*

United Keetoowah Band of Cherokee Indians' historic preservation staff travels to DOT offices for the purpose of consultation. Considering the large number of projects reviewed by the THPO's office (approximately 3,000 per year), this travel would not be possible without the travel reimbursement they receive.

United Keetoowah Band of Cherokee feels that it is important for agency representatives to take part in person-to-person meetings on tribal land, as it facilitates the creation of a cultural/historical context for the tribes they are consulting with. In discussing project site meetings, this mode of consultation is necessary, for example, in cases of burials and the need to examine line-of-sight in the field with the tribes present for discussion. In-person visits also allow the tribes and agencies to establish the limits of APEs and to locate their sites.

### *Example: Harvesting Cultural Practice*

An example of an in-person meeting is one at which DOT representatives visited with elders at a traditional harvesting site, where they were able to watch a cultural practice take place. This activity established the cultural context for the non-tribal persons. For the United Keetoowah Band of Cherokee, this form of consultation creates an atmosphere of ease.

### *Obstacles to effective consultation*

For the United Keetoowah Band of Cherokee, the principal obstacle for effective consultation is tied to the lack of knowledge of policies within agencies, or with persons tasked with tribal consultation duties.

### *Additional factors*

The United Keetoowah Band of Cherokee feels that there is a need for more collaborative consultation. It is suggested that there is a belief among some agencies that they need to consult with every tribe one-on-one. However, this can also be done with a collection of all interested tribes. A collaborative approach like this might allow the involved tribes to come to a consensus

more quickly and allow them more time to participate in a tribal caucus, where they can gather and discuss pertinent issues without the involved agency present. It is further noted that this type of approach would be more cost-effective.

#### *5.1.11 Yurok Tribe*

##### *Importance of consultation*

The Yurok Tribe feels that consultation is very important as several major transportation thoroughfares (such as State Highways 169 and 196) traverse their reservation land. Because of correlations between DOT infrastructure and some of the tribe's ancestral lands, the tribe routinely consults with Caltrans under Section 106.

##### *Defining "effective consultation"*

The Yurok define "effective consultation" on a case-by-case basis. However, it is very important to the Yurok to have early consultation, i.e., consultation that begins at the initial stages of a proposed project, because it is necessary for success. Involvement at the very earliest stages of a project is essential for the tribe, as it allows them the appropriate time to weigh in.

The benefits of early tribal consultation are shown by the example of the Yurok Tribe's own cultural resource inventory system. Without the early involvement of the tribe, the full benefits of their knowledge might not be fully realized. For the Yurok, the historic preservation department benefits not only from the experience of its staff but also from their consultation with the tribal elders on Section 106 projects.

There is also an example of an older DOT project where tribal input was not equitably weighted. In this example, the Yurok instituted a tribal monitor for the excavation work on a project where sensitivity for cultural resources appears to have been deemed low or limited. In this case, cultural resources were recovered immediately. This example highlights older failings in consultation; however, over the years, the tribe and DOT have built a collaborative atmosphere in which consultation is much improved.

Effective consultation is consultation resulting in the protection of cultural resources and the completion of projects.

##### *Written policies and guidance for consultation*

The Yurok believe that there is value in having a written policy. For them, the value lies in the reinforcement of Section 106 consultation requirements. However, they also place emphasis on the relationships formed with state DOTs, and Caltrans in particular.

##### *Project-by-project consultation v. programmatic approach*

The project-by-project approach is the primary approach to consultation, representing the favored method of the Yurok. The tribal representative notes that standard Section 106

consultation might not cover emergency situations. However, with the long-standing relationship that exists between the tribe and DOT, consultation activities are upheld as a standard part of emergency maintenance activities.

Example: “Maintenance Season”

An annual consultation practice is carried out between the Yurok and representatives of Caltrans. They hold an in-person meeting to address potential maintenance activities at the start of their maintenance season. At that time, the THPO provides mapping depicting general areas of tribal concern in the vicinity of DOT infrastructure.<sup>58</sup> The THPO also takes time to speak with the DOT maintenance staff. The DOT maintenance staff is then aware of any areas that will require further consultation prior to performing maintenance work. This forms a collaborative effort, allowing the DOT to perform maintenance work without disruption to TCPs. The Yurok believe that consultation practices like this help to break down walls between DOTs and the tribes and allow better and more fluid communication.

#### *Liaisons and DOT POCs*

Caltrans has a tribal liaison who works with multiple tribes within districts; for example, the Yurok and several other tribes are in District 5. The Yurok do feel that the establishment of a tribal liaison or POC is necessary, in particular when dealing with advanced issues in consultation. However, the representative for the Yurok notes that they enjoy a good working relationship with “people on the ground.”

#### *Quality of consultation and maintaining relationships*

Regarding quality of consultation with state DOTs, early consultation is an important factor. For the Yurok, three factors detail the importance of maintaining good relationships with state DOTs:

- Maintaining quality consultation with state DOTs ultimately leads to the protection of tribal places of worship and TCPs.
- Ongoing relationships must be maintained by addressing concerns and developing a mutual understanding of constraints.
- Respecting the values of tribes is also a very prominent factor in the maintenance of sound relationships.

#### *Meeting in-person, venue and travel*

Yurok Tribe staff travel to DOT offices as part of the consultation process. It is important to note that the Yurok reservation is very isolated geographically, so the Yurok must travel to Caltrans offices.

Field visits are routinely conducted by Caltrans staff and Yurok cultural resource management staff.

---

<sup>58</sup> This practice does not represent tribal consultation practices as dictated by Section 106 of the NHPA; rather this is representative of tribal consultation associated with state-level transportation planning.

Caltrans makes approximately six to 12 trips to the Yurok reservation each year. As part of these meetings, Caltrans and the Yurok might visit cultural sites, with each group offering their unique perspectives on locations that might be involved in undertakings. These meetings involve discussions of a variety of project-specific matters. In addition, the field visit allows discussions relating to line-of-sight and other cultural view issues.

Exemplifying this is the installation of an overhead utility line. In this case, when the line was close to a Yurok ceremonial site, consultation efforts resulted in routing the line below ground to avoid adverse effects to that site.

#### *Obstacles to effective consultation*

The Yurok call attention to their sovereign status and the need for a high standard of government-to-government respect when conducting consultation activities. There are also problems tied to specialist preconceptions. In support of a respectful consultation environment, specialists should be open and willing to learning new information from tribes who are involved in the consultation process. This is considered particularly relevant when a specialist engages in discussions relevant to a tribe's cultural systems, such as ceremonial practices. This calls attention to respecting how a tribe preserves its own culture and history.

#### *Additional factors*

The Yurok have a long history of consultation; however, the Yurok have a very limited cultural staff of a THPO, one archaeologist, and one field technician. In California there are as many as 30 THPOs, and levels of tribal participation in consultation can vary, which is sometimes tied to a tribe's access to financial resources.

## 6. Consultation: Key Practices and Perceived Pitfalls

Studies previously completed by the ACHP, FHWA, and NCHRP have outlined some common strategies and successes in tribal consultation. The results of the current study support these findings.

A study by the ACHP (2008) outlines the necessary components of effective consultation as respect, good communication practices, and early/often consultation. This includes such practices as allowing for time, considering differing opinions for different tribal nations, the need to listen to tribal representatives, follow-up with tribes, developing an understanding of the particular tribal government, establishing open and direct lines of communication, and constant awareness of cultural differences through respectful actions in consultation. The ACHP also stresses the importance of tribal sovereignty and the government-to-government trust relationship in tribal consultation. Key to this relationship is respect and adopting a culturally appropriate perspective that is underscored by familiarity with a tribe's culture and history. The ACHP (2008) study notes the use of agreements (i.e., PAs or MOUs), summits/meetings, and guidance materials/training in successful consultation.

The FHWA outlines the following key practices in federal level tribal consultation: presentations, data collection/exchange systems, handbooks, newsletters or bulletins, mailings and response forms, training, and the use of tribal monitors. State DOTs seem to be adopting very similar protocols and approaches when addressing tribal communications and general consultation for surface transportation planning and project delivery.

In recent years state DOTs have been working toward new approaches to early tribal involvement. These approaches include consultation on statewide transportation planning (i.e., review of STIPs) and using web-based notification systems.

For the current study Louis Berger asked state DOT and tribal respondents to provide their perspective on the general definition of "effective consultation." Louis Berger analyzed the results of the interviews, found some notable themes, and identified some guiding principles for successful consultation practices. Common responses include the need for respectful communication and listening, collaboration, and relationship building.

### 6.1 *Communication*

#### 6.1.1 *Guidance, Policies, and Agreements*

For nearly all the interviewees, written guidance, policies, and agreements foster effective consultation programs (Table 6.1). These tools can validate the process, establish a framework, and can clarify expectations for all involved parties. Some suggest that agreements, such as PAs or MOAs, also serve to streamline the process, saving both time and resources. It is important to note that both tribes and agencies suggest that such guidance, policies, and agreements be flexible, particularly when they will be applied to multiple tribes with unique histories and cultural value systems. It is also common to develop individual agreements for each tribe so that

*Table 6.1*  
*Written Policies - State DOT Programs*

STATE DOT	DOCUMENT USED	UTILIZATION/USEFULNESS
Arizona	<i>Manual/Handbook</i>	Necessary training tool owing to large staff turnover.
California	<i>Manual/Handbook</i>	Clarifies expectations and allows follow-up if expectations are not met.
Florida	<i>Manual/Handbook</i>	Used to inform Section 106 expectations, tribal histories, statutory requirements, and human remains protocols.
Georgia	<i>None</i>	No written policy owing to consistent changes; any written policy would have to be updated continuously.
Iowa	<i>Programmatic Agreement</i>	Protocols, standardizes communication, and provides guidance.
Illinois	<i>Manual/Handbook</i>	Makes clear expectations.
Maine	<i>Programmatic Agreement (in progress)</i>	Will establish protocols, standardize communication, and provide guidance.
Minnesota	<i>General Accord with tribes as well as MOUs and PAs.</i>	MOUs regarding non-Section 106 projects such as roadside maintenance work.
North Dakota	<i>Programmatic Agreement and Manual/Handbook</i>	PA outlines protocols, tribal perspective, and applicable legislation. Manual serves to educate about cultural sensitivity.
Ohio	<i>Manual/Handbook</i>	Used to inform Section 106 expectations.
Oregon	<i>Programmatic Agreements</i>	Outlines responsibilities for Section 106 process.
Pennsylvania	<i>Programmatic Agreement and verbal agreements</i>	Protocols, standardizes communication, and provides guidance.

their unique concerns are addressed in a manner that they consider apropos. For tribes these polices can also establish the legal foundations for consultation. More generally, tribes place more emphasis on the actions of individuals involved in the process.

The issue of confidentiality is of great concern to tribes. Many regulatory documents, guidelines, and written polices detail this issue. The ACHP acknowledges that many Indian tribes require that the location and even the existence of traditional religious and cultural properties not be revealed. It is thus vital that the federal agency work with tribes to identify sensitive locations while respecting tribal desires to withhold specific information about such sites. The ACHP's regulations at 36 CFR Section 800.4(b)(i) state, in part, that

[t]he agency official shall take into account any confidentiality concerns raised by Indian tribes during the identification process.” Moreover, the issue of confidentiality is written into the NHPA Section 304 allowing “Federal agencies to withhold sensitive information from public disclosure. Issues surrounding confidentiality concerns can also be included in an agreement document between the Tribe and Federal Agency as provided under Section 800.2(c)(2)(ii)(E) of the regulations.<sup>59</sup>

In discussing confidentiality, many interviewees focused on projects where archaeological sites, or burials, had been the source of mitigation or NAGPRA activities. In another instance confidentiality was mentioned in the context of in-person meetings: the tribal representative suggested that such meetings support confidentiality in communication. It is also pertinent to note that many PAs include a confidentiality clause; this is also important when considering the

<sup>59</sup> ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (2008).

usefulness of these more generalized/regulatory consultation documents. Also mentioned were methods employed by the tribes and DOTs to uphold confidentiality regarding to the location of TCPs in the course of regular maintenance activities. In this discussion the involved parties, not through Section 106 but rather state transportation consultation, used map handouts. These maps offered blocked-out areas of concern, thus not divulging specific site or cultural locations to state DOT workers.

### *6.1.2 Programmatic versus Project-by-Project: Section 106 Tribal Consultation*

A major concern in tribal consultation is streamlining the process through the statewide implementation of Section 106 statewide PAs. As presented under the FHWA Environmental Review webpage, recent legislation helps streamline federal-level environmental review (Section 1309 of the Transportation Equality Act and Public Law 105-178). Today such states as Vermont, New Jersey, Maryland, Pennsylvania, and Washington all utilize these statewide PAs. In this way the PA allows these state DOTs to complete Section 106 project review for the FHWA. The FHWA's "Every Day Counts" program further emphasizes the need for project delivery streamlining:

The continued and expanded use of programmatic agreements (PAs), where procedures have been standardized and agreed upon, has been very effective in saving time. When prior agreements exist for avoiding, minimizing, and mitigating impacts, projects are reviewed quicker and trust is developed that results in improved relationships between DOTs and regulatory agencies. The goal of this initiative will be to identify and assist in the expansion of new and existing programmatic agreements to a regional or national level.<sup>60</sup>

The Moving Ahead for Progress in the 21st Century Act, or MAP-21 (P.L. 112-141), was established in 2012. According to the FHWA, MAP-21 will provide more than \$105 billion for surface transportation funding in fiscal years 2013 and 2014. As stated by FHWA, "MAP-21 is a milestone for the U.S. economy and the Nation's surface transportation program. By transforming the policy and programmatic framework for investments to guide the system's growth and development, MAP-21 creates a streamlined and performance-based surface transportation program and builds on many of the highway, transit, bike, and pedestrian programs and policies established in 1991."<sup>61</sup> It is further noted that:

Some MAP-21 provisions are designed to improve efficiency in project delivery, broadening the ability for States to acquire or preserve right-of-way for a transportation facility prior to completion of the review process required under the National Environmental Policy Act of 1969 (NEPA), providing for a demonstration program to streamline the relocation process by permitting a lump sum payment for the acquisition and relocation if elected by the displaced person, enhancing contracting efficiencies, and encouraging the use of innovative technologies and practices. Other changes target the environmental review process, providing for earlier coordination, greater linkage between the planning and environmental review processes, using a programmatic approach where possible, and consolidating environmental documents. MAP-21 establishes a framework for setting deadlines for decision making in the environmental review process, with a process for issue resolution and referral, and penalties for agencies that fail to

---

<sup>60</sup> FHWA, Environmental Review Toolkit, *Statewide Section 106 Programmatic Agreements: A Streamlining Initiative*, accessed online May 2013 at <http://www.fhwa.dot.gov/everydaycounts/projects/toolkit/programmatic.cfm>.

<sup>61</sup> U.S. Department of Transportation and the FHWA, MAP-21 – *Moving Ahead for Progress in the 21<sup>st</sup> Century*, A Summary of Highway Provisions, accessed online September 2013 at <http://www.fhwa.dot.gov/map21/>

make a decision. Projects stalled in the environmental review process can get technical assistance to speed completion within four years.<sup>62</sup>

The FHWA asserts that these streamlined PAs will reduce project delivery times by:

- Outlining the roles and responsibility of all agencies/governments;
- Offering a standardization regarding compliance and coordination;
- Fostering and building relationships among DOT and agency staff members; and
- Focusing efforts on essential tasks.

Despite the inclusive nature of a streamlined PA, the FHWA indicates the need for state-specific language and adherence to a state's philosophies when addressing historic preservation. For tribes the streamlined PA should take into account the following:

- 1) Tribes should be consulted during the drafting process.<sup>63</sup>
- 2) Those who are drafting the PA should consider the incorporation of archaeological interpretations and/or traditional stories.
- 3) There will be no delegation for undertakings occurring on tribal lands.<sup>64</sup>

Although these types of PAs emphasize the state DOT staff's review capacity, the lead federal agency is still the responsible consulting party, as per the federal government-to-government trust relationship, and these PAs explicitly outline that relationship.

The way the tribes perceive the use of PAs as a tool in their consultation under Section 106 is very important. For many of the tribal representatives in this study, the emphasis is clearly on the adherence to the law and the upholding of the government-to-government relationship in Section 106 and other forms of tribal consultation. In many cases, however, the practical use of the PA is not always the primary concern; instead many of the tribes see it as a useful legal document. Most of the tribal representatives feel that the PA represents only one factor involved in the consultation process and that it is certainly not the primary tool for successful consultation. In many ways the tribal perspective is to focus on the PA as an outline for what is more important: project-by-project consultation with face-to-face participation, as well as clear, respectful, informed, early, and frequent communication.

There is a notable contrast when comparing the federal aspirations for streamlining Section 106 through statewide, or even national, PAs to tribal aspirations to maintain and strengthen the project-by-project approach. This raises the question: does the use of streamlined processes through the implementation of large-scale, geographically binding documents run counter to strategies already proven successful in tribal consultation? Would moving toward a legislation-based framework focused on PAs, or documents that intend to streamline or unify consultation

---

<sup>62</sup> U.S. Department of Transportation and the FHWA, MAP-21 – *Moving Ahead for Progress in the 21<sup>st</sup> Century*

<sup>63</sup> The ACHP cautions that these agreements should not be considered required precursors to agency-tribal consultation. See Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (2008), 26.

<sup>64</sup> FHWA, Environmental Review Toolkit, *Statewide Section 106 Programmatic Agreements: A Streamlining Initiative*, accessed online May 2013 at <http://www.environment.fhwa.dot.gov/histpres/section1.asp>.

approaches, actually work against consultation when considering the sovereign status of American Indian tribal nations and the context of tribal self-determination initiatives?<sup>65</sup>

The responses of the tribal representatives involved in this study indicate that most feel that the action of the consultation is as important, or more important, than the execution of the PA itself. Several suggest that the PA must be flexible while also including provisions specific to the tribes wishes. NATHPO (2005) highlights the necessity of flexibility in the tribal consultation process, as supported by transparent communication and information sharing. The prerequisite for flexibility seems to be in keeping with the focused state-specific language used by the FHWA with respect to the statewide PA initiative.

It may work best to establish PAs on an individual tribal nation basis. This is the process used by the Oklahoma and Minnesota DOTs, for example, which tailor each PA to the tribe's specific needs. However, in the past many PAs have involved multiple tribes, and the PAs did not always have negative impacts on consultation outcomes. It would seem that successful consultation, whether carried out through a PA, MOU, or verbal agreement, is best executed when agencies make a concerted effort to establish tribes as equal partners through transparent Section 106 consultation processes. Some tribal representatives cautioned that in the past stipulations of some written policies were not upheld, therefore straining the confidence of tribes in its application and effectiveness. This could present hurdles for the implementation of streamlined PAs for some tribes. The tribal perspective on written policy also hinges on their culture; Migliaccio et al. (2008) argue that some tribes prefer direct interactions, such as face-to-face meetings, as opposed to a written policy.<sup>66</sup> This view was expressed in many of the tribal interviews.

Nonetheless, some inclusive PAs have been successful when carried out through a collaborative, respectful, and trusting atmosphere, such as with the North Dakota Department of Transportation Tribal Consultation Programmatic Agreement:

The Federal Highway Administration (FHWA) and the North Dakota Department of Transportation (NDDOT) consulted with federally recognized Tribes with historic ties to territory within the State on a project-by-project basis. In 2004, NDDOT met with the Tribes to discuss ways of improving the Department's Tribal consultation efforts. The Tribes wanted a single consensus document that was negotiated concurrently with all parties. Multiple meetings were held between NDDOT and the Tribes to draft the PA, during which NDDOT continued to consult

---

<sup>65</sup> The concept of self-determination with respect to American Indians was made official federal policy in 1975 by the Indian Self-Determination and Educational Assistance (ISDA) Act (Public Law 93-638). The act set forth the doctrine, and some governing regulations, to make tribal governments the primary decision-makers in administrating and distributing federal funds and programs. The act did not, however, clearly establish control over tribal lands, which was still subject to the plenary power of the United States federal government, and the Congress can exercise this power directly regarding any aspect of Indian nations. See HPAIED, *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination* (New York: Oxford University Press, 2007); and Dudas, *The Cultivation of Resentment, Treaty Rights and the New Right* (Palo Alto, CA: Stanford University Press, 2008), 20.

<sup>66</sup> Migliaccio et al., *NCHRP Web-Only Document 171: Identification of Results-Oriented Public Involvement Strategies between Transportation Agencies and Native American Tribal Communities* (2010), accessed online May 2013 at [http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp\\_w171.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_w171.pdf)

with the Tribes on a project-by-project basis. The PA took two years to develop and was signed in 2006.<sup>67</sup>

Although some tribal representatives do not object to the use of the PA, almost all agree that the project-by-project approach, unilaterally supported by a variety of formal and informal face-to-face meetings, should be maintained in the Section 106 consultation surface transportation planning. NATHPO (2005) holds that established successful consultations between tribes and agencies can buffer the effects to changes in DOT staff or tribal duties. Nonetheless, not all tribes share this perspective, as some respondents to this study suggest that continuity of personnel is an important factor to the maintenance of successful consultation regarding Section 106, and other surface transportation planning projects.<sup>68</sup>

### *6.1.3 Web-Based Tools*

The ACHP suggests that tribal consultation should be initiated in tandem with the onset of project planning for any surface transportation project (ACHP 2008:29). NATHPO (2005) advises that the timing of tribal consultation is “critical to success,” meaning success in consultation should indeed begin at the earliest possible stages. The NATHPO further states that early consultation allows tribes to take part in more meaningful consultation because they are able to work without the pressure of approaching project deadlines (NATHPO 2005:28).

The findings of this study support this and it is recommended that state DOTs follow this general guidance. Moreover, following initiation, tribal consultation should be a fluid and continuous process with active engagement and consistent follow-up.

#### *Early Notification and Web-based Systems*

The application of early notification systems is noted as a successful tool for initiating consultation by some of the state DOT and tribal representatives. Most participants in the study cite early and continuous consultation as an important element of successful DOT consultation programs. Although letters have been the primary tool for initiation of tribal consultation, other forms such as telephone calls, meetings, teleconferences, and email correspondence are also common. However, federal and state agencies are developing more web-based systems as part of larger project delivery streamlining measures. Examples of several internet-based data sharing systems utilized by state DOT programs addressed in this study are given in Table 6.2.

#### Florida DOT: ETDM system

FDOT utilizes the ETDM process as a tool for the review of potential environmental effects resultant of transportation projects. The ETDM system is supported through highway and transit funds, which were made more accessible with the signing of the 2005 SAFETEA-LU highway

---

<sup>67</sup> FHWA, North Dakota Department of Transportation Tribal Consultation Programmatic Agreement (Washington, DC: U.S. Department of Transportation, 2012), accessed online May 2013 at [http://environment.fhwa.dot.gov/histpres/nd\\_pa.asp](http://environment.fhwa.dot.gov/histpres/nd_pa.asp).

<sup>68</sup> NATHPO (2005), accessed online May 2013 at [http://www.nathpo.org/PDF/Tribal\\_Consultation.pdf](http://www.nathpo.org/PDF/Tribal_Consultation.pdf).

*Table 6.2  
State DOT Web-based Formats*

STATE DOT	FORMATS	CONSULTATION APPLICATIONS
Arizona	Historic Preservation Portal (HPT)	Data sharing, notification.
California	N/A	-
Florida	ETDM system	Data sharing, notification, comment.
Georgia	Webinars	Data sharing, notification, instruction, comment.
Iowa	N/A*	
Illinois	Project Notification System	Data sharing, notification, comment.
Maine	N/A	-
Minnesota	MnModel	Data sharing, currently being upgraded .
North Dakota	NDDOT GIS	-
Oklahoma	Okla DOT in-house database	In-house database/mapping
Oregon	Environmental Data Management System	Data sharing
Pennsylvania	Project Path	Data sharing, notification, comment

*\*Iowa DOT expressed interest in the establishment of a system like PNS*

and transit law.<sup>69</sup> For the most part EDTM is utilized by members of the public, MPOs, TPOs, federal and state agencies, and tribes. This system provides interested parties the opportunity to offer comments regarding possible impacts, i.e., cultural or physical, that may result from a project, allowing the ETDM system to draw out any potential issues during the planning phase of Florida’s surface transportation projects.

This system utilizes a two-part screening system. First, transportation projects are prioritized during the “Planning screening” based on comments received. Second, all qualifying projects, those that can be included in FDOT’s Cost Feasible LRTPs, are subsequently addressed for funding.

The ETDM system utilizes GIS for Internet users to access project-related data and associated mapping. Another useful characteristic of the ETDM system is the incorporation of an electronic comment system.<sup>70</sup> Also, as part of program maintenance and advancement, FDOT has established direct connectivity with the Florida SHPO master site file system.

The FHWA offers some insight into the ETDM, its use and issues encountered. The program has wide-ranging applicability, such as:

Historic Preservation in Transportation Planning; Historic Preservation in Early Project Development; Interagency Cooperation and Collaboration; Geographic Information Systems; Historic Property Database; Historic Property Screening Tool; Historic Property “Red Flags”; Process for Tribal Consultation; Streamlined Decision-Making Process.”<sup>71</sup>

<sup>69</sup> FDOT, Web Application – Florida’s ETDM Process, accessed online May 2013 at <https://etdmpub.fl-estat.org/est/>.

<sup>70</sup> FDOT, Environmental Management Office, FDOT Efficient Transportation Decision Making (ETDM) Process Overview, accessed online May 2013 at <http://www.dot.state.fl.us/emo/ETDM.shtm>.

<sup>71</sup> FHWA, Environmental Review Tool Kit, Digital Screening Tool and Decision-Making Process, Florida Department of Transportation, Efficient Transportation Decision-Making (ETDM) Process, accessed online May 2013 at [http://environment.fhwa.dot.gov/histpres/fl\\_etdm.asp](http://environment.fhwa.dot.gov/histpres/fl_etdm.asp).

One of the primary issues highlighted by the application of ETDM system relates to trust barriers among agencies/entities involved.

#### Georgia DOT: Webinars

GDOT has been utilizing webinars for intertribal consultation meetings to share information on archaeological findings and public outreach initiatives. Additionally, the webinar format is favored because 18 federally recognized tribes take part in long-distance consultation with GDOT, with many of these tribal members residing more than 500 miles from the state capital. A 2012 PowerPoint regarding consultation between GDOT and non-resident tribes suggests that the webinar format “[p]rovides a forum for holding intertribal meetings and sharing information with live feedback”; moreover, this format “has proved to be a very effective consultation tool... much more dynamic and instantaneous than email or snail mail.” Webinars also allow professionals working in the field to prepare video data of significant finds while in the field, which can be quickly relayed to tribes via the Internet.<sup>72</sup>

Moreover, one tribal representative suggested that the format was well received, provides a good mode for communications, and saves on costly travel expenses. However, the webinar format is not applied to consultation regarding NAGPRA and reburial because in-person visitation/presence is necessary.

#### Illinois DOT: Project Notification System (PNS)

As previously noted, IDOT and the Illinois State Archaeological Survey at the University of Illinois developed the web-based interactive PNS, allowing tribes to view new transportation projects in their area of interest online. This system is now a highly regarded and award-winning component for Section 106 consultation efforts. The system supports online information sharing, offering new project data bilaterally to IDOT and FHWA personnel and tribes and allowing them the opportunity to respond instantaneously with concerns.<sup>73</sup> This system provides tribes first with notification of a project, then when a report is available, and finally when the SHPO has issued a concurrence letter.

PNS is secured with password protection and was used to disseminate project information for more than 250 projects in 2009.<sup>74</sup> The PNS system provides project mapping, descriptions, burial locations, and, if requested, a copy of cultural resource survey documents.<sup>75</sup> As described by the one of the systems developers, “The PNS grew out of a FHWA-IDOT desire to ensure transparency in its Section 106 process with the tribes—in the last year or so it has grown

---

<sup>72</sup> GDOT and Jim Pomfret Tribal Liaison, *Consultation with Non-Resident Tribes*, accessed online June 2013 at <http://www.slideshare.net/preservationcombination/consultation-with-nonresident-tribes>.

<sup>73</sup> Illinois State Archaeological Survey website, *ISAS in the News: ISAS/IDOT Project Notification System Receives Federal Highway Administration Award*, accessed online May 2013 at [http://www.isas.illinois.edu/news/fhwa\\_award.shtml](http://www.isas.illinois.edu/news/fhwa_award.shtml).

<sup>74</sup> USDOT and FHWA website, *Exemplary Human Environment Initiatives Award: Process Improvements*, accessed online May 2013 at <http://www.fhwa.dot.gov/environment/ehei/awards/2010/illinois.cfm>.

<sup>75</sup> AASHTO, tribal consultation case studies, accessed online May 2013 at [http://www.environment.transportation.org/environmental\\_issues/tribal\\_consultation/case\\_studies.aspx#bookmarkIllinoisDOTWorkshopsHelpBuildCooperativeRelationshipsConsultationTools](http://www.environment.transportation.org/environmental_issues/tribal_consultation/case_studies.aspx#bookmarkIllinoisDOTWorkshopsHelpBuildCooperativeRelationshipsConsultationTools).

beyond that original concept and become a significant tool in IDOT's archaeological project management system."<sup>76</sup>

#### Minnesota DOT: MnModel – Archaeological Site Predictive Model

Beginning in 1995, MnDOT began creating an online data sharing system known as the MnModel. This system is an archaeological site predictive modeling tool, which utilizes GIS for analysis. As technology and data sharing have improved, MnDOT has made several enhancements to the MnModel. Between 2002 and again in 2009, the system was updated with new geomorphic and statistical data, a GIS model map that utilizes historical maps, soils, geomorphology, and water sources in the predicting of pre-1837 archaeological sites.

Through the receipt of both state and FHWA funds, MnDOT is in the process of another MnModel upgrade. Now, the focus is to incorporate a statewide digital elevation model, digital survey plat maps, and digital survey and archaeological site boundaries, although the current upgrade will not include sites dating from 1650 to 1837. This new upgrade to the MnModel is expected to be used not only by archaeologists and state and federal agencies but also tribes and is expected to be available through the Internet. According to FHWA, “[f]unding for the current refinement comes from FHWA, with a 20 percent State match.”<sup>77</sup>

#### Pennsylvania DOT: Project Path System

Currently, PennDOT utilizes the Project Path system as a platform to offer information regarding STIP projects falling under Section 106 of NHPA. A PA executed among PennDOT, FHWA, the Pennsylvania SHPO, and the ACHP in 2010 outlines the utilization of electronic documentation. The PA states, “[o]ne of the goals of the PA was to create a transparent process by making documents and findings easily accessible to the SHPO, Tribes, consulting parties and the public. This project, which receives 100 percent of its funding from PennDOT, was launched in November 2010. Project Path is hosted by Preservation Pennsylvania.”<sup>78</sup>

The system works through the loading of Section 106 data by PennDOT's cultural resource professionals (CRPs), who in turn issue notifications to various consulting parties. A 2012 addition to Project Path is tribal notification. At present, reports and archaeological site information are stored on the Indiana University of Pennsylvania server, which is only accessible to consulting parties with a password. Project Path does not supply sensitive information to the public.

---

<sup>76</sup> Illinois State Archaeological Survey website, *ISAS in the News: ISAS/IDOT Project Notification System Receives Federal Highway Administration Award*, accessed online May 2013 at [http://www.isas.illinois.edu/news/fhwa\\_award.shtml](http://www.isas.illinois.edu/news/fhwa_award.shtml).

<sup>77</sup> FHWA, Environmental Review Toolkit, Archaeological Predictive Modeling, Minnesota Department of Transportation, MnModel – Archaeological Site Predictive Model, accessed online May 2013 at [http://environment.fhwa.dot.gov/histpres/mn\\_arch.asp](http://environment.fhwa.dot.gov/histpres/mn_arch.asp).

<sup>78</sup> PennDOT Cultural Resources Management Program, Section 106 Programmatic Agreement; 2011-12 Annual Report, accessed online May 2013 at <http://www.paprojectpath.org/docs/penndot-crm---general-documents/section-106-pa-annual-report-may-2011-may-2012-final.pdf?sfvrsn=2>.

## *Analysis of Online Tools*

In many ways online systems may signify a new approach to tribal consultation. For example, some of the existing systems, such as the MnModel, will make site information available to tribes over the Internet, and some programs such as Project Path already do. As new web-based systems are developed, it would be more effective for them to use the practices of the PNS notification system so tribes can readily offer comment and receive all necessary data and materials as they consult on Section 106 projects. Moreover, these web-based approaches, if appropriate, can also help to reduce some of the paperwork associated with consultations. If applied in a collaborative way, these applications would not only allow streamlining of Section 106 initiation with tribes but would further facilitate notification of non-resident tribes.

Research has indicated that in some cases these systems represent a departure from more traditional personal communication for project notification, a practice which is well considered by some tribes. In many ways it is difficult to adopt generalized approaches to tribal consultation without assuming all tribes are the same. This issue might be best overcome through the utilization of practices such as the highly regarded GDOT webinar format for meetings/training, which would allow tribes to provide input regarding the implementation and applications of such systems. Nonetheless, some tribes simply cannot interact via electronic systems because of economic and infrastructure limitations. As always, it is important to take into account any limitations regarding tribes who are involved in consultations.

### *6.2 Cost Efficiency, Effectiveness, and Productive Collaboration*

Many respondents cite funding constraints as an obstacle to effective consultation. Some state agencies cite concerns linked to resource limitations that can impede the types of practices that are known to be the most successful (e.g., face-to-face meetings). A few tribes note similar concerns, such as the necessity of travel reimbursement, which in many cases allows them to take part in the consultation process, especially as more tribes take a role in out-of-state consultation on projects within their pre-colonial or historical territories.<sup>79</sup> Migliaccio et al. (2010) note the necessity of resource sharing to facilitate tribal participation in consultation.<sup>80</sup> This study found that the need for travel reimbursement ties directly to participation, and many tribes also indicate the need for funding at the review level and in other areas.

---

<sup>79</sup> NPS, *Connecting with Native Americans*. This website discusses the implementation of the Tribal Historic Preservation program under the 1992 NHPA amendment. NPS makes the following statement with respect to THPO funding: "Eligibility for the THPO program is limited to federally recognized tribes with a reservation and/or tribal trust lands. An interested tribe submits a request by tribal resolution to assume certain State Historic Preservation Officer (SHPO) responsibilities on tribal lands and provides a THPO program plan describing how those SHPO duties are performed. Once approved, the THPO takes control of those duties from the state(s) in which the tribal lands lay, and then becomes eligible for operational support from the Historic Preservation Fund (HPF). The THPO Grant is similar to the support provided to the states SHPO programs in that the HPF appropriation is approved by Congress. Once the THPO program plan is complete, a Partnership agreement between the Tribe and the Secretary is executed and the THPO then becomes eligible for HPF grant support on an annually recurring basis." Accessed online May 2013 at <http://www.nps.gov/tribes/>.  
[http://www.nps.gov/tribes/Tribal\\_Historic\\_Preservation\\_Officers\\_Program.htm](http://www.nps.gov/tribes/Tribal_Historic_Preservation_Officers_Program.htm)

<sup>80</sup> Migliaccio et al., *NCHRP Web-Only Document 171: Identification of Results-Oriented Public Involvement Strategies Between Transportation Agencies and Native American Tribal Communities* (2010), accessed online May 2013 at [http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp\\_w171.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_w171.pdf)

### 6.2.1 Funding for Tribal Participation in Section 106 Consultation

Of interest to the current study is how FHWA can assist in compensating tribes for their work under Section 106 of the NHPA. Recently, the FHWA legal counsel offered the following opinion with respect to tribal funding/reimbursement:

In March 2000, a legal opinion by FHWA's Chief Council stated that, under specific circumstances, the FHWA *can* use federal-aid funds to participate in such payments, concluding when a state so requests, FHWA may participate in eligible project-specific consultation costs and/or expenses incurred by a THPO (Tribal Historic Preservation Officer) or designated tribal representative. However, (1) FHWA participation is expressly limited to reimbursing those reasonable costs, (2) participation must be approved in advance, (3) FHWA's approval must be supported by an MOU or written contract and (4) prior to approval, the Division should make a determination that the requirements of 23 CFR 771.105(d) are satisfied.<sup>81</sup>

FHWA provides information regarding what types of consultation activities are eligible for reimbursement, such as field visits or research specific to a project. Travel expenses are also reimbursed for consultation meeting the approved criteria. Moreover, FHWA also calls out some specific activities that are not covered: "FHWA cannot participate in the review of documents, or in the establishment and general operating costs of a THPO such as the cost of securing office space and utilities, paying salaries of administrative personnel, and purchasing office equipment."<sup>82</sup>

When addressing the issue of funding, NATHPO (2005) suggests that successful tribal consultation is beneficial to cost efficiency; however, that study did not analyze issues related to funding shortfalls. As part of the current study, agency and tribal representatives were asked to outline issues they encounter in tribal consultation under NHPA. Many respondents cited limitations to funding, as well as staff and time constraints, as major obstacles. Five of the tribal representatives interviewed specifically call attention to the necessity of travel reimbursement in support of Section 106 consultation activities. As stated by some of the tribal respondents, many receive several thousand project notifications for review under Section 106 each year. This often presents an economic burden to tribes, as they are consulting parties not only by choice but under the law. Many state and federal programs have been more conscientious of incorporating travel reimbursements for tribes into their budgets. Some state DOTs also make available travel reimbursements for meetings and workshops, which makes it possible for some tribes to participate. For example, NDDOT provides tribal attendants per diem, a stipend, and travel reimbursement to attend semi-annual meetings.

Falling under the adherence to the government-to-government trust relationship existing between the United States and federally recognized tribal nations, one tribal representative brought up the issue of state versus federal funding. In this case the representative cited a tribe's choice to

---

<sup>81</sup> FHWA Chief Council, Legal Opinion Re: Federal-Aid Participation in Payments for Tribal Services Under the National Historic Preservation Act (March 17, 2000), accessed online May 2013 at [http://environment.fhwa.dot.gov/guidebook/thpo\\_1.asp](http://environment.fhwa.dot.gov/guidebook/thpo_1.asp). Also see the Arizona Department of Transportation, *Tribal Transportation Consultation Process Reference Manual* developed for use by ADOT personnel (October 2009), accessed online at [http://www.aztribaltransportation.com/aztt/PDF/MGT\\_1601.pdf](http://www.aztribaltransportation.com/aztt/PDF/MGT_1601.pdf).

<sup>82</sup> FHWA, Questions and Answers webpage, accessed online June 2013 at <http://www.tribalplanning.fhwa.dot.gov/tcqa.aspx#r13>

consult directly with the lead federal agency during Section 106 projects. This is in keeping with Section 106: a tribe may choose not to consult with state DOT when federal money or lands are involved.

### 6.2.2 *Analysis of Funding*

Overall, funding for tribal consultation seems to vary except in the case of project-related travel reimbursement/per diem/fees, where funding is accessed through project funds. Non-project-related meetings can receive funding from multiple sources, such as DOT, FHWA, staff members, tribes, or even the BIA. Several tribal and DOT representatives cite the issue of staff and resource limitations, which can make funding difficult for non-project-related or outreach events.

## 6.3 *Lessons Learned from Individual Case Examples*

Over the years several state DOTs have established successful practices for tribal consultation that aid in successful project delivery. The following section details three examples that not only demonstrate successful practices but also present three very different types of tribal consultation: establishment of a programmatic agreement, a project-specific example, and a high-level surface transportation planning example.

### 6.3.1 *North Dakota Department of Transportation (NDDOT), FHWA and Regional Tribes*

In 2006 NDDOT, FHWA, and FHWA Resource Center published *In Their Own Light, a Case Study in Effective Tribal Consultation*. The case study examines effective tribal consultation among the FHWA, the NDDOT, and several regional tribes, including the Mandan, the Turtle Mountain Band of Chippewa Indians, Fort Peck Assiniboine Crow Tribe or Apsáalooke Nation, Northern Cheyenne Tribe, Assiniboine Tribe, Sioux Tribes, Arikara Nation, Spirit Lake Dakota Nation, Standing Rock Sioux Tribe, Sisseton Wahpeton Oyate, and the Lower Sioux Indian Community.<sup>83</sup>

The study outlines the approaches taken by all involved parties as they worked together to establish a Section 106 PA. *In Their Own Light* applies tribal perspective to consultation practices through successful case studies highlighting the need for historical and cultural context in tribal consultation, collaboration with tribes, and forming partnerships. Further, the case study addresses the anticipation of future developments resulting from transportation projects and consequent agreements, such as with PAs. The approach used in this case study was in keeping with the DOT Order 5301.1, *Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes* (November 11, 1999).

The foundations of NDDOT's collaborative approaches to tribal consultation were built over years through project-by-project consultation activities, meetings, regular site visits by DOT

---

<sup>83</sup> FHWA, USDOT, Federal Highway Administration Resource Center, *In Their Own Light, a Case Study in Effective Tribal Consultation* (2006), accessed online at <http://www.dot.nd.gov/divisions/environmental/culturalresources.htm>

staff, and trips to various reservations. NDDOT demonstrated respect for the government-to-government relationship through concerted efforts to travel to each reservation and personally discussing each tribe's wishes regarding DOT's taking part in day-to-day consultation under Section 106. The case study also concluded that implementing the PA would likely reduce future expenditures.

Some of the key successful practices identified in this study are listed below.

- Consultation driven by mutual trust and respect
- Transparency in consultation
- The application of ongoing meaningful cross-cultural training and discourse
- Adherence to confidentiality
- Demonstrating both knowledge of and respect for the government-to-government relationship between tribes and U.S. government
- Forward thinking regarding potential for reducing future expenses
- Forming partnerships

The PA is sensitive to tribal concerns and recognizes the inherent rights of the consulting tribes to retain and preserve those places that they value. It also affirms the joint commitment of NDDOT, FHWA, and the consulting tribes to establish and sustain a relationship of mutual trust and respect through open communication and collaborative problem solving. The PA encourages early involvement of the consulting tribes in project planning by providing them with the opportunity to review projects well in advance of project development. The PA looks beyond project-specific consultation and provides a solid framework for establishing and achieving common goals. Foremost among these goals is building and maintaining relationships through open communication in a culturally sensitive setting. The steps involved in developing and implementing a PA of this nature should be viewed as part of a continuum that begins by building relationships, sharing knowledge, and then progresses to ongoing collaboration in an atmosphere of mutual respect and trust.

The PA as written is sensitive to the sovereignty of individual tribes and allows planning for future concerns, partly by utilizing a Tribal Consultation Committee (TCC). The TCC, a composite of representatives from each of the eight tribal reservations, "embodies the principles of the PA and looks beyond project-specific consultation in establishing and achieving mutually determined goals."<sup>84</sup>

NDDOT staff, the POC, FHWA, and the tribes all took part in drafting the PA, which includes stipulations for two meetings each year for participating tribes, while the NDDOT will continue to consult on an individual basis with any non-participating tribes. The PA outlines provisions for on-site meetings and the inclusion of tribal elders and/or other tribal members who maintain specific cultural knowledge relating to a project area or resource. In light of more collaborative and early initiation measures to surface transportation planning, NDDOT and FHWA arranged to provide TCC members with the STIPs for advance review and comment.

---

<sup>84</sup> Federal Highway Administration [FHWA] Resource Center and North Dakota Department of Transportation [NDDOT], *In Their Own Light, a Case Study in Effective Tribal Consultation* (2006), accessed online at <http://www.dot.nd.gov/divisions/environmental/culturalresources.htm>.

### 6.3.2 Arizona DOT and Cordes Junction Interchange Environmental Assessment

Another example of a successful Section 106 consultation effort is the collaborative document titled *Tribal Consultation and Cultural Resources Assessment*, compiled by ADOT, FHWA, the Salt River Pima-Maricopa Community, and the Hopi Tribe. This document describes Section 106 consultation efforts and outcomes resulting from the Cordes Junction Interchange Environmental Assessment for ADOT. As noted in the document, heavy traffic volume at the junction of Interstate 17 and State Route 69 in Yavapai County required a redesign and reconstruction project. Federal funding associated with the project necessitated tribal consultation under Section 106, which “requires that these tribes be informed of, and involved in any decision-making process that may affect their historic and cultural legacy.”<sup>85</sup>

FHWA and ADOT call attention to the two main types of projects that result in tribal consultation in Arizona: first, any federally funded transportation project that will impact any part of contemporary tribal land, and second, any such project that will impact ancestral tribal lands. Tribal consultation in this case began in 1999 with the issuance of letters and copies of the Archaeological Assessment for the project to seven tribes. This was followed by site tours and both formal and informal communications, including phone calls, additional letters, and meetings (some tribal representatives were paid for their work in reviewing an identified site). Through consultation and Section 106, several cultural resource concerns were identified as part of the project. Federally recognized tribes, such as the Hopi, were able to weigh in on a continuing basis.

The FHWS/ADOT study outlines key tribal consultation practices. First, the state and federal agencies focused on a government-to-government consultation policy, which hinged on notification to tribes having an interest in the project. ADOT and FHWA also kept tribes apprised of project changes so they could express any concerns regarding new information (i.e., when additional features or artifacts were found in conjunction with known resources). The process also supported both formal and informal information sharing. Furthermore, the participation of tribes and their unique knowledge of the area resulted in a more comprehensive evaluation of the historical activity in the project area. The authors note that ADOT and FHWA’s adherence and compliance with NHPA/Section 106 historic preservation laws lent to an improved consultation atmosphere and successful outcomes in this case.<sup>86</sup>

### 6.3.3 Caltrans and the Reservation Transportation Authority

This example of surface transportation projects and consultation with Indian tribes in California describes successful practices regarding state DOT programs as well as local transportation planning agencies. The participants were Caltrans, 24 tribes<sup>87</sup>, the San Diego Association of

---

<sup>85</sup> ADOT, FHWA, the Salt River Pima-Maricopa Community and the Hopi Tribe, accessed online May 2013 at [http://www.fhwa.dot.gov/environment/environmental\\_justice/case\\_studies/az.pdf](http://www.fhwa.dot.gov/environment/environmental_justice/case_studies/az.pdf)

<sup>86</sup> Federal Highway Administration [FHWA] and Arizona Department of Transportation [ADOT], *Tribal Consultation and Cultural Resources Assessment*, accessed online May 2013 at [http://www.fhwa.dot.gov/environment/environmental\\_justice/case\\_studies/az.pdf](http://www.fhwa.dot.gov/environment/environmental_justice/case_studies/az.pdf).

<sup>87</sup> Involved tribes are as follows: Agua Caliente Band of Cahuilla Indians, Augustine Band of Mission Indians, Barona Band of Mission Indians, Capitan Grande Reservation, Cahuilla Band of Mission Indians, Campo Band of Mission Indians, Inaja and Cosmit Bands of Mission Indians, Jamul Indian Village, La Jolla Band of Luiseno

Governments (SANDAG), and the Reservation Transportation Authority (RTA). Issues addressed included expanding tribal transportation concerns, improving tribal consultation and coordination, and identifying new avenues to address transportation funding shortfalls. This example also demonstrates the successful tribal consultation practices often associated with tribal consultation under Section 106 that are being applied to other state surface transportation planning programs.

Created in 1998, the RTA “sought to assume responsibility for BIA road maintenance funding to conduct their own construction and maintenance projects...RTA is governed by an Executive Council of tribal leaders from member tribes.”<sup>88</sup> The regional organization of the 24 Southern California tribes allowed an otherwise poorly funded and limited tribal transportation staff to combine funds to address their respective concerns, with the majority of funding derived from the BIA. With the creation of the RTA, these 24 tribes established new laws allowing the RTA, as an organization, to negotiate on the behalf of tribes with outside agencies. The cooperation between Caltrans the RTA proved successful.

In 2002 Caltrans provided a Senior Transportation Planner to the RTA. As a member of the RTA, this planner was able to compile pertinent transportation documents for involved reservations. The implementation of this position represents Caltrans standard practices in regard to staffing planning agencies such as MPOs.

The formation and function of the RTA is exemplified through *The State Route 76 Corridor Study*. The SR 76 corridor study discusses Section 106 consultation methods such as coordination with county officials, localities, the BIA, the USACE, and the U.S. Fish and Wildlife Service. This project was deemed successful for its integration of tribal comment as well as funding, with Caltrans providing 80 percent of the study funding and the Pala Band of Mission Indians contributing the remaining 20 percent.

The processes used in the SR 76 corridor study are in keeping with those practices used in Section 106 consultation, including relationship/trust building, training, formal and informal communications, and meetings. Also, the source clearly notes that tribal members were knowledgeable in Section 106. This example illustrates the crossover, and potential concerns related to that crossover, from consultation on Section 106 projects to other forms of tribal consultation related to transportation planning. This obstacle, as well as the suggested solution, is outlined as follows:

Many tribes are more familiar with the requirements of Section 106 of the National Historic Preservation Act than the transportation planning process. As a result, tribes often are contacted after a project already has been planned to discuss potential impacts on tribal lands, at a time when any changes in the project are costly and difficult. Earlier involvement of tribes in working with

---

Indians, La Posta Band of Mission Indians, Los Coyotes Band of Mission Indians, Manzanita Band of Mission Indians, Mesa Grande Band of Mission Indians, Rincon San Luiseno Band of Mission Indians, San Pasqual Band of Mission Indians, Santa Rosa Band of Mission Indians, Santa Ynez Band of Mission Indians, Santa Ysabel Band of Mission Indians, Soboba Band of Mission Indians, Sycuan Band of the Kumeyaay Nation, Torres-Martinez Desert Cahuilla Indians. See FHWA, San Diego, California, *A Tribal Consortium Enhances Tribal/State Coordination Efforts*, accessed online May 2013 at <http://www.tribalplanning.fhwa.dot.gov/caseStudies/sanDiego.pdf>.

<sup>88</sup> FHWA, *San Diego, California: A Tribal Consortium Enhances Tribal/State Coordination Efforts*.

Caltrans, MPOs, and other entities in the transportation planning process would help tribes play a more meaningful role in shaping planning decisions and in developing projects that are more sensitive to the context of their lands and the transportation needs of tribal members. The State Route 76 corridor study, for example, has the potential to form a valuable basis for input to the region's long-range transportation plan.<sup>89</sup>

The study suggests improvements to government-to-government relations with regional tribes, a more comprehensive and multi-tiered philosophy regarding interest in tribal consultation, and the development of an outlet for groups of tribes, such as the Native American Advisory Committee, who can assure communication follow-through to meet the needs of the involved groups. Perhaps the most important suggestion is the need for “*increased and earlier involvement in the transportation planning process.*” This is a common method among many of the most successful transportation-based Section 106 consultation programs. It has been demonstrated time and again that conducting tribal consultation both early and often is key to successful delivery of surface transportation projects.<sup>90</sup>

#### 6.4 *Insights on Effective Strategies*

Many effective consultation strategies have been established over a number of years that use successful practices in a variety of contexts. Understanding what practices are considered successful in terms of the transportation community is not as thoroughly studied and understood. Common successful practices include the use of meetings (formal and informal) and consultation that begins early during planning and continues through delivery/completion. Many transportation agencies are striving today for more collaborative tribal consultation programs, built on a foundation of mutual respect and cultural understanding. Other successful programs exhibit a heightened emphasis on the government-to-government relationship between the federal government and tribal nations where FHWA, for example, takes a more hands-on role. Collaboration among consulting entities (FHWA, DOT, resident and non-resident tribes) has proved effective and efficient. Some of these successful programs have led to the execution of streamlined PAs and new guidance documents as well as training. Other successful strategies and principles include POCs/tribal liaisons, transparency of information and intent by DOTs and involved agencies, flexibility in meeting locations and types of meeting formats, and approaching consultation as equal partners.

Moreover, it is commonly understood today that consultation is not simply about adherence to regulation and efficient project delivery, although that is a reasonable goal. For tribes consultation also represents an arrangement through which they preserve their heritage and culture and that is supported through legislation.

Through this study it became clear that almost every DOT and tribal respondent agrees that face-to-face consultation is the preferred method. This is the most widely accepted mode to ensure that a relationship of trust is formed. Not all programs arrange these meetings in the same way; many cite a variety of methods under which they meet, such as quarterly meetings, semi-annual meetings, or workshops. Many state agencies and tribes note that on-site visits are driven by specific project needs or unexpected discoveries. Some tribal respondents note the necessity of

---

<sup>89</sup> FHWA, *San Diego, California: A Tribal Consortium Enhances Tribal/State Coordination Efforts.*

<sup>90</sup> FHWA, *San Diego, California: A Tribal Consortium Enhances Tribal/State Coordination Efforts.*

on-site meetings for several reasons, such as trust building, clarity of communications exchange, visual line-of-sight issues (i.e., establishing viewsheds), and problem solving.

More recently, some state DOTs have begun to include tribes in the statewide planning process as a method for early consultation. For example, the DOTs in Arizona, North Dakota, Florida, and Minnesota include tribes in long-range planning as a means to provide tribes with the earliest possible notification of future potential projects. The application of this form of early notification supports transparency in information sharing. As already discussed, FDOT's utilization of the ETDM system upholds the same basic principles applied to Project Path (PennDOT) and PNS (IDOT) systems, which support Section 106 projects.

Agency-wide programs can also have a positive impact on the success of Section 106 tribal consultation. On one hand, these higher-level frameworks may reinforce the federal government-to-government trust relationship that tribes are in the process of strengthening. Programs such as Arizona's TSPT promote collaborative relationships using a statewide network of tribes and agency staff. The TSPT also utilizes outreach through the workshops and meetings to educate and train. Arizona Liaisons also serve in an advisory capacity on issues pertinent to statewide transportation planning activities as well as regional programs and projects.

The TSPT strives to craft strategic partnering and processes.<sup>91</sup> Some common themes identified following a 2011 TSPT forum include networking/sharing information, updates on programs, making contact with tribes listening to them, forming relationships, and developing an understanding of how tribes perceive ADOT/FHWA as well as COGs/MPOs. In this context Section 106 is addressed as a topic falling under specific environmental and cultural concerns in the context of the TSPT. It should hold true that if the TSPT strives to formulate good relationships with tribes, then Section 106 consultation should also be undertaken in a positive way. However, not all successful Section 106 consultation programs use long-range or statewide planning.

Also notable is the NDDOT Transportation Alternatives Program (TAP). This program supplants funds previously drawn from several other programs (i.e., Safe Routes to School Program or Transportation Enhancements). According to the NDDOT final 2013-2016 STIP, "TAP funds are administered by the LG Division to large and small urban areas, rural areas, and counties. Using a competitive process, a committee comprised of state, local, MPO, and other officials will select from proposed projects submitted by eligible entities. The match for these projects is generally 80.93 percent federal and 19.07 percent county or city."<sup>92</sup> As per 23 U.S.C. 213(c), tribal governments are eligible to receive TAP funds. Through TAP "the NDDOT distributes news releases to all North Dakota daily and weekly newspapers and broadcast media outlets notifying the public of the application process and how to locate TAP information on the NDDOT web site. NDDOT meets individually with each tribal entity to discuss items and/or concerns of each respective tribe, and to remind them of the STIP process."<sup>93</sup>

---

<sup>91</sup> Arizona Department of Transportation, Arizona Tribal Transportation, Arizona Tribal Strategic Partnering Team, accessed May 2013 at [http://www.aztribaltransportation.com/aztt/atspt/mission\\_goals.asp](http://www.aztribaltransportation.com/aztt/atspt/mission_goals.asp).

<sup>92</sup> North Dakota DOT and Grant Levi, P.E., *Statewide Transportation Improvement Program, 2013-2016*, accessed online June 2013 at <http://www.dot.nd.gov/manuals/planning/stip/final-stip.pdf>.

<sup>93</sup> North Dakota DOT and Grant Levi.

The Tribal Technical Assistance Program (TTAP) is tailored specifically to the needs of tribal governments who are engaged in the transportation sector. This program, made possible under the 1991 Intermodal Surface Transportation Equality Act (ISTEA), provides tribal governments the tools needed to address a variety of transportation-related issues.<sup>94</sup> The program disseminates information and training through seven centers administered through educational institutions, including the Alaska Tribal Technical Assistance Center (Alaska TTAC),<sup>95</sup> based at the University of Alaska Fairbanks/Interior-Aleutians Campus, and the Colorado State University technical assistance program (CSU-TTAP)<sup>96</sup> servicing tribes in Arizona, Colorado, New Mexico, and Utah. Perhaps the most wide-ranging geographically would be the Michigan Tech University TTAP-MTU, which provides technical assistance to tribes in 31 states: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin.<sup>97</sup> The Northern Plains center (NPTTAP) is at the United Tribes Technical College and services Eastern Montana, Northern Nebraska, North and South Dakota, and Wyoming.<sup>98</sup> Assisting tribes from Idaho, Oregon, Washington, and Western Montana, the Northwest TTAP is operated out of Eastern Washington University Department of Urban Planning, Public and Health Administration.<sup>99</sup> The Southern Plains, or Oklahoma TTAP, operates from Oklahoma State University and reaches tribes in Kansas, Southern Nebraska, Oklahoma, and Texas.<sup>100</sup> Finally, the Western TTAP is operated out of the National Indian Justice Center and services tribal governments located in California and Nevada.<sup>101</sup>

Through these programs American Indian governments receive training in areas such as road construction contracts, tribal land ROW issues, highway finance, historic and cultural resource management for transportation projects, or transportation planning.<sup>102</sup> The primary goal of these programs is to “relate the latest technology and information on tribal roads and bridges, tourism and recreation, and related economic development to tribal transportation and planning personnel.” These programs provide tribes involved in the transportation sector technical support, training, and data using a variety of methods such as newsletters, publications, video,

---

<sup>94</sup> A portion of the funding that supports the Tribal Technical Assistance Program (TTAP) is provided through MAP-21. “MAP-21 authorizes \$24 million per year for continuation of training and education programs.” See <http://www.fhwa.dot.gov/map21/>.

<sup>95</sup> University of Alaska Fairbanks, Alaska Tribal Technical Assistance Program, accessed online August 2013 at <http://www.uaf.edu/akttap/>.

<sup>96</sup> Colorado State University, Tribal Technical Assistance Program, accessed online August 2013 at <http://ttap.colostate.edu/>.

<sup>97</sup> Michigan Tech, Tribal Technical Assistance Program, accessed online August 2013 at <http://www.ttap.mtu.edu/index.php>

<sup>98</sup> United Tribes Technical College, Northern Tribes Technical Assistance Program, accessed online August 2013 at <http://www.uttc.edu/about/forum/ttap/>.

<sup>99</sup> Eastern Washington University, Northwest Tribal Technical Assistance Program, accessed online August 2013 at <http://www.ewu.edu/nwttap.xml>.

<sup>100</sup> Oklahoma State University, Southern Plains TTAP, accessed online August 2013 at <http://ttap.okstate.edu/>.

<sup>101</sup> National Indian Justice Center, Western Tribal Transportation Training and Technical Assistance Program, accessed online August 2013 at <http://www.nijc.org/ttap.html>.

<sup>102</sup> North Dakota DOT and Levi.

and training workshops.<sup>103</sup> Funding is typically allocated through cooperative agreements with FHWA.<sup>104</sup>

## 6.5 *Innovative Strategies and Overcoming Obstacles*

A few practices do not lead to successful outcomes in tribal consultation. Several interviewees cite miscommunication as an obstacle that can create trust issues and feelings of resentment. In at least one case, the damage resulting from a miscommunication led to the formulation of new approaches to consultation. Many of the programs addressed in this study have employed a POC or tribal liaison to overcome problems in agency-tribal relationships. The POC is a widely used position, and most of the tribal respondents and the state agencies suggest this as a useful and desirable framework for consultation. Other issues seem to stem from staffing turnover and limitations on funding and resources for both state DOTs and tribes. Difficulties tracking contact information were cited by several state DOT and tribal respondents.

### 6.5.1 *Point of Contact/Tribal Liaison*

Many state DOTs, particularly those who consult with many tribes such as ADOT and Caltrans, make clear the necessity of the POC or tribal liaison entity. In some cases, as with GDOT or MnDOT, a single staff member serves in this position. Iowa DOT, which does not have a specific liaison position, notes that having personnel who are well acquainted with project specifics is helpful when consulting with tribes, as opposed to a specific POC who may have only general knowledge about any particular project. In almost every case the position of POC or tribal liaison is not a full-time position.

Regarding the application of tribal POCs and tribal liaison programs, the NATHPO (2005) contends that:

Having a Tribal Liaison is a positive factor in an efficient and successful consultation. Agencies that employ a Tribal Liaison are likely to engage in successful consultation. While the study did not request information on consultations that were not successful, the Tribal Liaison was prominently and consistently referenced in this study.<sup>105</sup>

NATHPO (2005) suggested that “[f]urther study of Tribal Liaisons in consultations, both successful and unsuccessful, would be needed to support their finding.” In consideration of this and other queries regarding tribal liaison programs in Section 106 surface transportation consultation with tribes, the current study asked all participants to address the issue.

Most interviewees responded positively about the effectiveness of these positions. Most DOTs indicated that the POC or tribal liaison is a valuable position. For tribes, this position is deemed good as it can overcome miscommunication. Tribes suggest that the POC should be

---

<sup>103</sup> Michigan Tech, Tribal Technical Assistance Program, accessed online August 2013 at <http://www.ttap.mtu.edu/index.php>.

<sup>104</sup> Eastern Washington University, Northwest Tribal Technical Assistance Program, accessed online August 2013 at <http://www.ewu.edu/nwttap.xml>.

<sup>105</sup> NATHPO.

knowledgeable and have the appropriate training regarding tribal culture/history. Moreover, respondents suggest that a POC can streamline consultation, eliminate issues related to distrust, and instill confidence in participants. For some tribes the POC is also good for dealing with issues on consultation while allowing face-to-face communication. In terms of the government-to-government relationship, one tribal respondent suggests that POCs might be established along administrative/governmental hierarchies. There may be disadvantages related to the utilization of a single POC who has only general project knowledge and may lack specialization.

This study determined that POCs/tribal liaisons use a variety of tools to communicate with tribes. In some cases, such as with NDDOT, letters are never used as a form of tribal consultation, which is in keeping with more progressive tribal consultation programs. Table 6.3 outlines communication tools used by some state DOTs and those often used by the POCs/liaisons.

*Table 6.3  
State DOT Communication Tools*

STATE DOT	FORMATS
Arizona	Visits, workshops, email, phone calls, webinars, teleconference, video, meetings.
California	Emails, telephone/teleconference, video, in-person meetings, workshops.
Florida	*
Georgia	Visits, workshops, email, phone calls, video, TBAG, webinars.
Iowa	*
Illinois	*
Maine	Certified mail, emails (if requested).
Minnesota	*No video conferencing is used.
North Dakota	Email, meetings, text, phone, field visits.
Oklahoma	Mail, prefer to have in-person meetings when possible.
Oregon	*
Pennsylvania	Mail, email, web-based/internet.

*\*specific tools not provided*

### *Conferences/Meetings/Workshops*

Cultural barriers are a particular concern for tribal respondents. Workshops, manuals, and meetings are often used to overcome cultural barriers in tribal consultation. It is also imperative that DOT staff interacting with tribes understand the legal framework of consultation, and particularly under Section 106. For example, at least one tribal representative recalled meeting with an agency staff member who was unaware of legally mandated consultation requirements under the NHPA. Today, training protocols for state DOT and agency staff are being developed by several state DOTs to overcome these types of issues. DOT and agency staff must also be aware that tribes maintain oral histories and traditional/ceremonial information that represent the principal source of knowledge about themselves and their lands. Currently, several state DOTs have programs aimed at training staff about the regulatory and cultural/historical aspects of tribal consultation. For example, ADOT is developing a Tribal Transportation Consultation Training Online Course, MnDOT is developing tribal-state relations, and GDOT already uses webinars for training.

According to the NATHPO, “Cultural sensitivity together with consulting and dispute resolution skills foster successful consultation. Consequently, training on the process and methods of consultation is needed.”<sup>106</sup> The NATHPO considers the locality of tribal consultation to be a notable factor in its success, asserting “[c]onducting consultation at both Agency and Tribal sites or mutually convenient locations shows respect and consideration.” The NATHO notes a general preference for face-to-face and on-site meetings. FDOT suggests that meeting venues are project-dependent, and Oregon DOT conducts nearly all tribal meetings on tribal lands. Again, it is important to apply a specific consultation strategy to the consulting tribe or tribes.

#### Example: Pennsylvania DOT, FHWA, and Non-resident Tribes

In an effort to streamline tribal consultation, as well as to foster improved government-to-government relationships for the successful completion of Section 106 compliance for transportation projects, representatives from FHWA and PennDOT traveled to Wisconsin and Oklahoma in 2004, a result of an intertribal summit held in 2003. Meetings were held with members of the Oneida Nation, the Stockbridge-Munsee, the Delaware Tribe of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, the Shawnee Tribe, and the Eastern Shawnee Tribe of Oklahoma. The goal was to meet with tribes who presented cultural interest in Pennsylvania to solicit input and comment on the methods taken to notify potentially interested tribes of upcoming transportation projects, with a particular interest on the proper treatment of Native American graves. The meetings resulted in MOUs outlining procedures to be utilized by PennDOT to consult on transportation projects with out-of-state tribes.<sup>107</sup>

#### Example: To Bridge A Gap Conference

Since 2001 the USFS has been partnering with federally recognized American Indian tribal nations for the TBAG conference. Although this conference deals with consultation in legal and statutory contexts, such as NAGPRA, Section 106 is also an important component. Having begun as a local meeting involving the Ouachita and Ozark-St. Francis national forests and area tribes, it was subsequently expanded to a conference hosted by the Choctaw Nation the following year. The purpose of the initial meeting, as well as the subsequent conferences, is to establish a multi-agency and tribal approach to cultural and environmental management and protection.<sup>108</sup> This work is underscored by USFS’s Tribal Strategic Plan aimed at creating “great partnerships.”<sup>109</sup> In 2011 two tribal members from each participating tribal nation received funding from the FHWA and GDOT to attend the initial day at TBAG.<sup>110</sup>

---

<sup>106</sup> NATHPO.

<sup>107</sup> FHWA and PennDOT (2005), *On the Road: PA FHWA and PennDOT Staff Travel to Wisconsin and Oklahoma*. Pennsylvania Transportation and Tribal Newsletter, accessed online February 2013 at <ftp://ftp.dot.state.pa.us/public/bureaus/BEQ/newsletter3.pdf>.

<sup>108</sup> USFS, To Bridge A Gap Conference, accessed online May 2013 at <http://www.chickasaw.net/tbagx/about.htm>.

<sup>109</sup> USFS, *Office of Tribal Relations Spring 2012 Newsletter*, accessed online May 2013 at <http://www.fs.fed.us/spf/tribalrelations/documents/news/Spring2012OTRNewsletter.pdf>.

<sup>110</sup> Georgia Department of Transportation, Consultation with Non-Resident Tribes, Jim Pomfret, Tribal Liaison, accessed online May 2013 at <http://www.slideshare.net/preservationcombination/consultation-with-nonresident-tribes>.

The TBAG conference continues to grow in popularity; in 2010 TBAG had an attendance of over 300 people, representing 37 tribes from 11 states, and 20 federal agencies. Aside from the four days of meetings, workshops, and paper sessions, one of the main attractions of TBAG is that it provides the tribes and agencies a forum to meet face-to-face with multiple tribes/agencies at one place. In 2011 GDOT and FHWA held their first ever intertribal meeting at TBAG and invited two members of each of the 18 tribes that considers Georgia part of its ancestral homeland. The meeting was on the first day of TBAG, which is typically reserved for meetings and workshops. GDOT/FHWA reimbursed all attendees for travel costs and TBAG registration. FHWA and other agencies also participate; for example, Oklahoma DOT sends their tribal liaison to TBAG.

TBAG is also a very notable event in terms of this study, as several of the tribes represented this study have been long-term participants.

The Deputy Tribal Preservation Officer for the Muscogee (Creek) Nation...one of the founders of the annual conference, said that in the beginning, Caddo Nation, Cherokee Nation, Chickasaw Nation, Choctaw Nation, Absentee-Shawnee Nation, and Seminole Nation of Oklahoma, and a few other Tribes, with the Forest Service, attended the conference each year. With outreach; however, it grew to 200 people yearly.<sup>111</sup>

As noted in a 2012 flyer, the conference intends to promote “tribal governments...desire and obligation to establish government-to-government relationships where there are mutual interests in managing the cultural and natural resources of the US Forests.”<sup>112</sup> These meetings address a number of agency and tribal concerns, which range from the use of ground penetrating radar (GPR) to specific project concerns. For example, the 2013 conference, hosted by the Delaware Nation Indian Tribe in conjunction with the USFS, examined some of the following areas of concern: GPR, GIS, building government-to-government relationships, TCP discussions, project-specific discussions, conversations regarding constructing federal and tribal agreements under NAGPRA, archaeological predictive modeling, and open discussion segments such as one titled *Tribal, Perspectives on Environmental and Cultural Resources; Impacts and Management*.<sup>113</sup>

## 6.6 Promotion of Trust and Cooperation

Nearly all of the respondents cite obstacles in establishing trust and cooperation, most frequently the need for open lines of communication, the necessity for respect, and collaboration. Many of the state representatives felt that forming a partnership where participants are on equal footing was important. Both agencies and tribes feel there is a need to acknowledge the sovereignty of tribal nations. The occurrence of tribal administrative/governmental turnover also necessitates flexibility among state DOTs who are consulting with tribes.

---

<sup>111</sup> Oklahoma Anthropology Blog page showing the *2013 To Bridge a Gap Conference Agenda*, accessed online May 2013 at <http://okieanth.blogspot.com/2013/03/to-bridge-gap.html>.

<sup>112</sup> Choctaw Nation website, Flyer for the To Bridge a Gap Conference, accessed online May 2013 at <http://www.choctawnationculture.com/TBAG2012>.

<sup>113</sup> Oklahoma Anthropology Blog page showing the *2013 To Bridge a Gap Conference Agenda*.

## 6.7 *Continuing Consultation and Follow-up*

The ACHP states that agencies should “[a]sk tribal representatives to keep you up-to-date on any changes to tribal postal or email addresses and contact information for new tribal leadership.”<sup>114</sup> Many of the tribal representatives in this study also note the need for federal and state agencies to keep them apprised of changes in personnel with whom they might be consulting, noting in some cases the frequent staff turnover in some state DOTs.

Several state DOTs also reported some difficulty tracking administrative and governmental changes for tribes with whom they consult. In most cases the POC or tribal liaison is responsible for tracking this information by reading tribal newspapers, looking at tribal websites, published lists, word of mouth, phone calls, and through scheduled meetings. For some programs, such as Caltrans, staff are encouraged to stay up to date on these changes. Currently, Caltrans has plans to develop a more streamlined way to keep track of changes in tribal government and staff. PennDOT is able to track some of these changes through the Project Path system.

---

<sup>114</sup> ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (2008).

## 7. Recommendations and Next Steps

How do state DOTs create, establish, and maintain effective and successful consultation? Many state DOTs apply some type of written guidance that serves as a regulatory outline for the consultation process. The most successful programs operate on a system of equality, where tribes are brought in at the earliest stages and continue to be involved through project delivery.

Successful consultation practices—those used in Section 106 and other areas of transportation planning—operate with respect, promote relationship building, understand the federal government-to-government trust relationship, and are knowledgeable in tribal culture and history. Some DOTs have POCs who consult with tribes on Section 106 but may also be involved in tribal consultation for other transportation planning, such as STIPs and outreach. Much of the available guidance is also applicable to a variety of consultation contexts, including but not limited to Section 106.

Several state DOTs have established specific protocols, guidance, and procedures for consultation with tribes. Under the umbrella of Section 106, a large variety of transportation projects, regions, and obstacles have been encountered. Most obstacles relate to funding shortfalls, limited staff, but also to misunderstandings, lack of trust, false perceptions and cultural barriers.

It is crucial to remember that federally recognized tribal nations are sovereign and therefore should not be treated monolithically. If nothing else, agency guidance seeking new practices with respect to American Indian nations must first recognize the great diversities of culture, history, geography, language, government, religion/belief systems, economy, infrastructure, and worldview prior to choosing the right practices to use. As previously noted, there is not a cookbook approach to tribal consultation. With this in mind, perhaps state DOTs and tribes might first outline what successful tools are most appropriate. Some identified examples of successful approaches to tribal consultation are as follows.

- Establish an atmosphere of equal footing in Section 106 consultations.
- Recognize and respect the government-to-government trust relationship.
- Employ a philosophy of respect and transparency in all consultation activities.
- Institute early and continuous consultation; involve tribes during the planning phases.
- Follow-up and follow-through are fundamental.
- “Boots on the ground”—face-to-face interaction in consultation is essential.
- Flexibility is key (not all tribes have the same concerns and not all use the same approaches).
- Actions count as much as words.
- Participation in activities not related to projects is proven to aid in trust and relationship building.
- Avoid presumptions—ask questions.
- Project-specific consultation is still the preferred method for many tribes.
- Having educated/informed tribal liaisons furthers the success of Section 106 tribal consultations and transportation project delivery.

- Conferences, meetings, and workshops are successful tools for relationship building and training.

Also suggested:

- Agencies and tribes should identify/address limitations in infrastructure, money, time, and staff resources when considering what tools and practices will be used for tribal consultations.
- Incorporate new formats for training and information sharing, such as webinars/data sharing platforms (if possible and acceptable).
- Incorporating unique tribal knowledge at the earliest stages of the process, such as tribal involvement in STIPs, may overcome major project redesigns and cost overruns.
- Streamlined written approaches can be valuable, but tribes must concur and be active in their approach.
- State DOTs and tribes might develop a mutually approved process in which staff/tribal contact changes can be tracked.
- With so many formal agreements existing between transportation agencies and tribes, it would be useful to see them compiled in a single location for ease of access and reference. It is suggested that these documents be made available through AASHTO's Center for Environmental Excellence website.

## 8. Bibliography

Advisory Council on Historic Preservation [ACHP]

- 2000 *Policy Statement Regarding the ACHP's Relationships with Indian Tribes*. Accessed online April 2013 at [www.achp.gov/policystatement-tribes.html](http://www.achp.gov/policystatement-tribes.html)
- 2003 *Action Plan On Advisory Council on Historic Preservation Native American Initiatives*. Accessed online April 2013 at [www.achp.gov/docs/napactionplan.doc](http://www.achp.gov/docs/napactionplan.doc).
- 2004 36CFR Part 800 – Protection of Historic Properties, 2004. Accessed online April 2013 at <http://www.achp.gov/regs-rev04.pdf>
- 2005 *Consulting with Indian Tribes in the Section 106 Process*. Accessed online at <http://www.achp.gov/regs-tribes.html>
- 2008 *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*. Accessed online at [www.achp.gov/regs-tribes2008.pdf](http://www.achp.gov/regs-tribes2008.pdf).
- 2010 *Consultation Process Pursuant to E.O. 13175: Consultation and Coordination with Indian Tribal Governments*. Accessed online at [www.achp.gov/docs/tribal\\_consultation\\_plan.pdf](http://www.achp.gov/docs/tribal_consultation_plan.pdf).
- 1966 National Historic Preservation Act, 1966 (Public Law 89-665; 16 U.S.C. 470, as amended). Accessed online at <http://www.achp.gov/docs/nhpa%202008-final.pdf>

Alaska Department of Transportation and Public Facilities

- 2001 *Millennium Agreement between Federally Recognized Sovereign Tribes of Alaska and the State of Alaska*. Accessed online April 2013 at <http://www.dot.alaska.gov/cvlrts/forms/Millennium-agree.PDF>.
- 2013 Tribal Relations and Alaska DOT&PF webpage. Accessed online April 2013 at <http://www.dot.alaska.gov/cvlrts/tribal.shtml#mill>
- 2002 Policy and Procedure: Government-To-Government Relations with the Federally-Recognized Tribes of Alaska. Accessed online April 2013 at [www.dot.state.ak.us/admsvc/pnp/assets/chapt\\_1/01\\_03\\_010.pdf](http://www.dot.state.ak.us/admsvc/pnp/assets/chapt_1/01_03_010.pdf)

American Association of Transportation Officials [AASHTO]

- 2013 Tribal consultation case studies. Accessed online May 2013 at [http://www.environment.transportation.org/environmental\\_issues/tribal\\_consultation/case\\_studies.aspx#bookmarkIllinoisDOTWorkshopsHelpBuildCooperativeRelationshipsConsultationTools](http://www.environment.transportation.org/environmental_issues/tribal_consultation/case_studies.aspx#bookmarkIllinoisDOTWorkshopsHelpBuildCooperativeRelationshipsConsultationTools)

American Indian Religious Freedom Act (16 U.S.C. 1996)

1996 Accessed online at

[http://www.cr.nps.gov/history/online\\_books/fhpl/indian\\_relig\\_freedom.pdf](http://www.cr.nps.gov/history/online_books/fhpl/indian_relig_freedom.pdf).

Arizona Department of Transportation [ADOT]

2009 *Tribal Transportation Consultation Process Reference Manual*. Developed for use by ADOT personnel. Accessed online at

[http://www.aztribaltransportation.com/aztt/PDF/MGT\\_1601.pdf](http://www.aztribaltransportation.com/aztt/PDF/MGT_1601.pdf).

2013a Policies and Procedures, MGT-16.1 Department–Wide Native Nation/Tribal Government Consultation Policy. Accessed online May 2013 at

[http://www.aztribaltransportation.com/aztt/PDF/MGT\\_1601.pdf](http://www.aztribaltransportation.com/aztt/PDF/MGT_1601.pdf)

2013b Tribal Coordination Report, Inter Tribal Council of Arizona–Transportation Working Group. Accessed online May 2013 at

<http://www.aztribaltransportation.com/aztt/index.asp>

ATR Institute, Giovanni C. Migliaccio, Geri Knoebel, Rebecca Martinez, Rebecca Albert, Dexter and Hurd Jason

2011 National Cooperative Highway Research Program, NCHRP Report 690, A Guidebook for Successful Communication, Cooperation, and Coordination Strategies Between Transportation Agencies and Tribal Communities. Accessed online May 2013 at

<http://www.trb.org/Main/Blurbs/165472.aspx>

Banner, Stuart

2007 *How the Indians Lost Their Land: Law and Power on the Frontier*. Harvard University Press, Cambridge, Massachusetts.

Brophy, William A., and Sophie D. Aberle.

1996 *The Indian: America's Unfinished Business*. University of Oklahoma Press, Norman.

California Department of Transportation [Caltrans]

2001 Directors Policy: *Working with Native American Communities*. Accessed online May 2013 at

[http://dot.ca.gov/hq/tpp/offices/ocp/nalb/index\\_files/DP-19-Working\\_with\\_Native\\_American\\_Communities.pdf](http://dot.ca.gov/hq/tpp/offices/ocp/nalb/index_files/DP-19-Working_with_Native_American_Communities.pdf).

2012 *Standard Environmental Reference*. Vol. 2, Cultural Resources. Accessed online May 2013 at <http://www.dot.ca.gov/ser/vol2/vol2.htm>.

2013 Native American Liaison Branch webpage. Accessed online May 2013 at

<http://dot.ca.gov/hq/tpp/offices/ocp/nalb/index.html>

Choctaw Nation of Oklahoma Cultural Services  
2012 To Bridge a Gap Conference webpage. Accessed online May 2013 at  
<http://www.choctawnationculture.com/TBAG2012>.

Colorado Department of Transportation [CDOT]  
2013 Statewide Transportation Advisory Committee webpage. Accessed online at  
<http://www.coloradodot.info/programs/statewide-planning/stac.html>.

Colorado State University  
2013 Tribal Technical Assistance Program. Accessed online August 2013 at  
<http://ttap.colostate.edu/>.

Cornell University Law School  
2012 Legal Information Institute Website. Accessed online June 2012 at  
<http://www.law.cornell.edu/uscode/text/25/177>.

Deloria, Jr., Vine, and Clifford M. Lytle  
1983 *American Indians, American Justice*. University of Texas Press, Austin.

Deloria, Jr., Vine, and David E. Wilkins  
2000 *Trials, Treaties, and Constitutional Tribulations*. University of Texas Press, Austin.

Dudas, Jeffery  
2008 *The Cultivation of Resentment, Treaty Rights and the New Right*. Stanford University Press, Palo Alto, California.

Federal Highway Administration [FHWA] and Arizona Department of Transportation [ADOT]  
n.d. *Tribal Consultation and Cultural Resources Assessment*. Accessed online May 2013 at  
[http://www.fhwa.dot.gov/environment/environmental\\_justice/case\\_studies/az.pdf](http://www.fhwa.dot.gov/environment/environmental_justice/case_studies/az.pdf)

Federal Highway Administration [FHWA] and New Mexico Department of Transportation [DOT]  
2013 Staff Liaison Programs, New Mexico Department of Transportation. Accessed online May 2013 at  
[http://environment.fhwa.dot.gov/histpres/nm\\_shpo.asp](http://environment.fhwa.dot.gov/histpres/nm_shpo.asp) and  
<http://dot.state.nm.us/content/nmdot/en/Planning.html#NATTP>

Federal Highway Administration [FHWA] and Pennsylvania Department of Transportation [PennDOT]  
2005 *On the Road: PA FHWA and PennDOT Staff Travel to Wisconsin and Oklahoma*. Pennsylvania Transportation and Tribal Newsletter. Accessed online February 2013 at  
<ftp://ftp.dot.state.pa.us/public/bureaus/BEQ/newsletter3.pdf>

- Federal Highway Administration [FHWA], San Diego, California  
2013 *A Tribal Consortium Enhances Tribal/State Coordination Efforts*. Accessed online May 2013 at <http://www.tribalplanning.fhwa.dot.gov/caseStudies/sanDiego.pdf>.
- Federal Highway Administration [FHWA] and South Dakota Department of Transportation [DOT]  
2013 *Tribal Transportation Planning webpage. South Dakota: State/Tribal Planning Coordination Meetings Achieve Results*. Accessed online June 2013 at [http://www.tribalplanning.fhwa.dot.gov/caseStudy\\_soDakota.aspx](http://www.tribalplanning.fhwa.dot.gov/caseStudy_soDakota.aspx)
- Federal Highway Administration [FHWA] Resource Center and North Dakota Department of Transportation [NDDOT]  
2006 *In Their Own Light, a Case Study in Effective Tribal Consultation*, 2006. Accessed online at <http://www.dot.nd.gov/divisions/environmental/culturalresources.htm>
- Florida Department of Transportation [FDOT]  
2004 *Cultural Resource Management Handbook*. Accessed online April 2013 at [http://www.dot.state.fl.us/emo/pubs/cultmgmt/Handbook\\_11-04.pdf](http://www.dot.state.fl.us/emo/pubs/cultmgmt/Handbook_11-04.pdf).
- 2013a Environmental Management Office webpage. Accessed online May 2013 at <http://www.dot.state.fl.us/emo/NA%20Website%20Files/Dialogue.shtm>
- 2013b Florida Department of Transportation, Web Application–*Florida’s ETDM Process*. Accessed online May 2013 at <https://etdmpub.fl-a-etat.org/est/>
- 2013c Florida Department of Transportation, Environmental Management Office, FDOT Efficient Transportation Decision Making (ETDM) Process Overview webpage. Accessed online May 2013 at <http://www.dot.state.fl.us/emo/ETDM.shtm>
- Georgia Department of Transportation [GDOT]  
2008 Environmental Procedures Manual, Chapter 5 Environmental Studies. Accessed online May 2013 at [http://www.dot.ga.gov/doingbusiness/PoliciesManuals/roads/Environmental/GDOT-EPM-Chap05\\_3.pdf](http://www.dot.ga.gov/doingbusiness/PoliciesManuals/roads/Environmental/GDOT-EPM-Chap05_3.pdf)
- Georgia Department of Transportation [GDOT] and Jim Pomfret  
2013 Consultation with Non-Resident Tribes PowerPoint. Accessed online June 2013 at <http://www.slideshare.net/preservationcombination/consultation-with-nonresident-tribes>
- Harvard Project on American Indian Economic Development [HPAIED]  
2007 *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination*. Oxford University Press, New York.

Idaho Department of Transportation [DOT]

2009 *Title VI Plan*. Accessed online March 2013 at  
[http://itd.idaho.gov/manuals/online\\_Manuals/current\\_manuals/environmental/1800.pdf](http://itd.idaho.gov/manuals/online_Manuals/current_manuals/environmental/1800.pdf).

2013 Cultural Resources webpage. Accessed online May 2013 at  
<http://itd.idaho.gov/enviro/cultural/cultural.htm>

Illinois State Archaeological Survey

2011 *Memorandum of Understanding Among the Federal Highway Administration, Illinois State Historic Preservation Officer, Illinois Department of Transportation and Federally Recognized Tribes Interested in Illinois Lands, Regarding Tribal Consultation Requirements for the Illinois Federal Transportation Program*. Accessed online April 2013 at  
[http://www.isas.illinois.edu/transportation\\_research/moa\\_pa\\_pdfs/Tribal\\_Consultation.pdf](http://www.isas.illinois.edu/transportation_research/moa_pa_pdfs/Tribal_Consultation.pdf)

2013 ISAS in the News: ISAS/IDOT Project Notification System Receives Federal Highway Administration Award webpage. Accessed online May 2013 at  
[http://www.isas.illinois.edu/news/fhwa\\_award.shtml](http://www.isas.illinois.edu/news/fhwa_award.shtml)

Indiana Department of Transportation [INDOT]

2008 Indiana Cultural Resource Manual. Accessed online May 2013 at  
[http://www.in.gov/indot/files/January\\_2008\\_Manual.pdf](http://www.in.gov/indot/files/January_2008_Manual.pdf)

Iowa State University Center for Transportation Research and Education and FHWA

2002 *Iowa Consultation Process, Initiatives and Recommendations*. Accessed online May 2013 at <http://www.ctre.iastate.edu/reports/tribal.pdf>.

Iowa Department of Transportation [DOT]

2012 State Public Participation Process for Transportation Planning. Accessed online April 2013 at  
[http://www.iowadot.gov/program\\_management/StatePublicParticipationProcess.pdf](http://www.iowadot.gov/program_management/StatePublicParticipationProcess.pdf)

Kempf, Arlo

2010 *Breaching the Colonial Contract: Anti-Colonialism in the US and Canada*. First edition. Springer, New York.

Klein, Terry H., David Cushman, Danny Kwan, and Elizabeth Stepp

2009 National Cooperative Highway Research Program, Project 25-25, Task 49, Effective Practices for Considering Historic Preservation In Transportation Project Planning and Early Project Development. Accessed online at  
[http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25\(49\)\\_FR.pdf](http://onlinepubs.trb.org/onlinepubs/archive/NotesDocs/25-25(49)_FR.pdf)

Maine Department of Transportation [DOT]

2013 Program Development and Management Division webpage. Accessed online June 2013 at <http://www.maine.gov/mdot/ppp/planprogdev.htm>

Miami Tribe of Oklahoma

2013 Tribal Historic Preservation Office webpage. Accessed online May 2013 at <http://www.miamination.com/mto/thpo.html>

Michigan Department of Transportation [DOT]

2013 Executive Directive No. 2004-5. Accessed online April 2013 at [http://www.michigan.gov/mdot/0,4616,7-151-9625\\_55003-92821--,00.html](http://www.michigan.gov/mdot/0,4616,7-151-9625_55003-92821--,00.html)

2004 Michigan Federally Recognized Tribes, Michigan Department of Transportation (MDOT) (Implementing Executive Directive No. 2004-5, Department Operating Guidelines. Accessed online April 2013 at [http://environment.transportation.org/pdf/Michigan\\_DOT\\_Policy\\_and\\_Guidelines\\_for\\_Tribal\\_Affairs.pdf](http://environment.transportation.org/pdf/Michigan_DOT_Policy_and_Guidelines_for_Tribal_Affairs.pdf)

Michigan Technological University [Michigan Tech]

2013 Tribal Technical Assistance Program. Accessed online August 2013 at <http://www.ttap.mtu.edu/index.php>.

Migliaccio, Giovanni C., Geri Knoebel, and Rebecca Martinez

2010 National Cooperative Highway Research Program. *Web-Only Document 171: Identification of Results-Oriented Public Involvement Strategies between Transportation Agencies and Native American Tribal Communities*. Accessed online at <http://www.trb.org/Main/Blurbs/165473.aspx>

Minnesota Department of Transportation [MnDOT]

2002 Government to Government Accord by and Among The Bois Forte Band of Chippewa, Fond du Lac Band of Lake Superior Chippewa, Grand Portage Lake Superior Band of Chippewa, Leech Lake Band of Ojibwe Indians, Lower Sioux Indian Community, Mille Lacs Band of Ojibwe Indians, Prairie Island Indian Community, Red Lake Band of Chippewa Indians, Shakopee Mdewakanton Sioux Community, Upper Sioux Indian Community, White Earth Band of Ojibwe, The Minnesota Department of Transportation, and the Federal Highway Administration-Minnesota Division. Accessed online May 2013 at <http://www.dot.state.mn.us/mntribes/pdf/accord2002.pdf> <http://www.environment.fhwa.dot.gov/strmlng/newsletters/aug04nl.asp> and <http://www.dot.state.mn.us/mntribes/pdf/execorder2003.pdf>

Missouri Department of Transportation [MoDOT]

2013 Tribal Consultation webpage. Accessed online June 2013 at <http://www.modot.mo.gov/ehp/TribalMap.htm>

Montana Department of Transportation [DOT]

n.d. Environmental and Cultural Resource Requirements, Chapter 6. Accessed online April 2013 at <http://www.modot.mo.gov/business/lpa/documents/Chapter6EnvironmentalandCulturalResourcesRequirementsFINAL.pdf>.

2010 Montana DOT Environmental Manual, Chapter 31 Tribal Land Issues. Accessed online May 2013 at <http://www.mdt.mt.gov/publications/docs/manuals/env/Chapter%2031%20TRIBAL%20LAND%20ISSUES.pdf>

2013 State Tribal Relations Policy webpage. Accessed online June 2013 at <http://tribalnations.mt.gov/statetribalpolicy.asp>

National Association of Tribal Historic Preservation Officers [NATHPO]

2005 Tribal Consultation, Best Practices in Historic Preservation. Accessed online at [www.nathpo.org/PDF/Tribal\\_Consultation.pdf](http://www.nathpo.org/PDF/Tribal_Consultation.pdf)

National Cooperative Highway Research Program [NCHRP]

2005 Managing Archaeological Investigations, A Synthesis of Highway Practice. National Cooperative Highway Research Program, Synthesis 347, 2005. Accessed online at [www.trb.org/publications/nchrp/nchrp\\_syn\\_347.pdf](http://www.trb.org/publications/nchrp/nchrp_syn_347.pdf).

National Park Service [NPS]

1969 National Environmental Policy Act of 1969 (42 U.S.C. 4321). Accessed online at [http://www.cr.nps.gov/history/online\\_books/fhpl/nepa.pdf](http://www.cr.nps.gov/history/online_books/fhpl/nepa.pdf).

1990 Native American Graves Protection and Repatriation Act (25 U.S.C. 3001). Accessed online at [http://www.cr.nps.gov/history/online\\_books/fhpl/nagpra.pdf](http://www.cr.nps.gov/history/online_books/fhpl/nagpra.pdf).

2006 Federal Historic Preservation Laws, The Official Compilation of U.S. Cultural Heritage Statutes. Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm). Accessed online at [http://www.cr.nps.gov/history/online\\_books/fhpl/arpa.pdf](http://www.cr.nps.gov/history/online_books/fhpl/arpa.pdf).

2013 Connecting with Native Americans website. Accessed online May 2013 at [http://www.nps.gov/tribes/Tribal\\_Historic\\_Preservation\\_Officers\\_Program.htm](http://www.nps.gov/tribes/Tribal_Historic_Preservation_Officers_Program.htm)

Nebraska Department of Roads [NDOR]

2009 Pursuing Solutions Through Public Involvement. Accessed online May 2013 at <http://www.transportation.nebraska.gov/docs/public-involvement.pdf>

North Dakota Department of Transportation [NDDOT]

2013 Cultural Resources webpage. Accessed online May 2013 at <http://www.dot.nd.gov/divisions/environmental/culturalresources.htm>.

North Dakota Department of Transportation [NDNOT] and the Federal Highway Administration [FHWA]

2007 Programmatic Agreement. Accessed online May 2013 at <http://www.dot.nd.gov/divisions/environmental/docs/programmatic-agreement-tribal-consultation.pdf>.

O'Brien, Sharon

1993 *American Indian Tribal Governments*. University of Oklahoma Press, Norman.

Ohio Department of Transportation [DOT]

2013 Division of Planning webpage, Cultural Resources Manual. Accessed online May 2013 at [http://www.dot.state.oh.us/Divisions/Planning/Environment/Cultural\\_Resources/Pages/CulturalResourcesManual.aspx](http://www.dot.state.oh.us/Divisions/Planning/Environment/Cultural_Resources/Pages/CulturalResourcesManual.aspx)

Oklahoma Anthropology

2013 Blog page. To Bridge a Gap Conference Agenda. Accessed online May 2013 at <http://okieanth.blogspot.com/2013/03/to-bridge-gap.html>.

Olson, James Stuart, and Raymond Wilson

1986 *American Indians in the Twentieth Century*. University of Illinois Press, Chicago.

Oregon Department of Transportation [ODOT]

2013 Oregon DOT webpage. Accessed online at <http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/Pages/archaeology1.aspx>.

Pennsylvania Department of Transportation [PennDOT]

2011 Cultural Resources Management Program, Section 106 Programmatic Agreement; 2011-12 Annual Report. Accessed online May 2013 at <http://www.paprojectpath.org/docs/penndot-crm---general-documents/section-106-pa-annual-report-may-2011-may-2012-final.pdf?sfvrsn=2>

2013 Tribal Consultation Handbook webpage. Accessed online May 2013 at

<ftp://ftp.dot.state.pa.us/public/bureaus/BEQ/thb.pdf> and <http://www.dot.state.pa.us/Internet/Bureaus/pdCulturalResources.nsf/CultResHomepage?OpenFrameSet&Frame=main&Src=%2FInternet%2FBureaus%2FpdCulturalResources.nsf%2FTribal%3FOpenForm%26AutoFramed>

Presidential Memorandum

2004 Government-to-Government Relationship with Tribal Governments (September 23, 2004). Accessed online April 2013 at <http://www.gpo.gov/fdsys/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf>

2009 Memorandum: Tribal Consultation (November 5, 2009). Accessed online April 2013 at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>

Transportation Research Board National Research Council [TRB NRC]

2000 FHWA Chief Council, Legal Opinion Re: Federal-Aid Participation in Payments for Tribal Services Under the National Historic Preservation Act, March 17, 2000. Accessed online May 2013 at [http://environment.fhwa.dot.gov/guidebook/thpo\\_1.asp](http://environment.fhwa.dot.gov/guidebook/thpo_1.asp).

2002 Conference on Transportation Improvements, Experiences Among Tribal, Local, State, and Federal Governments, Transportation Research Circular, No. E-C039, Transportation Research Board, Washington DC, accessed online at <http://onlinepubs.trb.org/onlinepubs/circulars/ec039.pdf>.

United States Department of Transportation [USDOT]

1999 Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes, November 16, 1999. Federal Highway Administration. Accessed online at <http://isddc.dot.gov/OLPFiles/OST/009273.pdf>.

2005 State Practices Database: Arkansas Department of Transportation, Tribal Negotiation MOU. Accessed online May 2013 at <http://www.environment.fhwa.dot.gov/strmlng/searchresults.asp?id=4&keyword=&StateSelect=Arkansas&ShowNewPractices=&CategorySelect=all&startrow=1&ResultsSelect=10&ShowDescription=true&print=&InnovativePract=#R4>

2007 *Excellence in Cultural and Historical Resources: Scattered Village Exhibits and Curriculum*. Accessed online May 2013 at [http://environment.fhwa.dot.gov/eea2007/historical\\_resources.htm](http://environment.fhwa.dot.gov/eea2007/historical_resources.htm).

2009 *Tribal Transportation Best Practices Guidebook*. Accessed online at [http://www.tribalplanning.fhwa.dot.gov/bestPractices\\_guidebk.aspx](http://www.tribalplanning.fhwa.dot.gov/bestPractices_guidebk.aspx).

2010 Tribal Consultation Plan. Accessed online May 2013 at <http://www.fhwa.dot.gov/tribal/news/consultation.htm>.

2011a *Successes in Stewardship, Improving Project Delivery and Planning Through Outreach and Guidance to Tribes*. FHWA Newsletter. Accessed online at <http://www.environment.fhwa.dot.gov/strmlng/newsletters/mar11nl.asp>

2011b *Successes in Stewardship Newsletter*. Accessed online April 2013 at <http://www.environment.fhwa.dot.gov/strmlng/newsletters/nov11nl.asp>

2013a Department of Transportation Programs and Federal Highway Administration website. Exemplary Human Environment Initiatives Award: Process Improvements. Accessed online May 2013 at <http://www.fhwa.dot.gov/environment/ehei/awards/2010/illinois.cfm>

2013b *Transportation Decision Making, Information Tools for Tribal Governments: Developing the Tribal Transportation Improvement Program*. Accessed online at [http://www.tribalplanning.fhwa.dot.gov/training\\_ttip\\_exec.pdf](http://www.tribalplanning.fhwa.dot.gov/training_ttip_exec.pdf)

- 2013c Environmental Review Toolkit, *Statewide Section 106 Programmatic Agreements: A Streamlining Initiative*. Accessed online May 2013 at <http://www.fhwa.dot.gov/everydaycounts/projects/toolkit/programatic.cfm>
- 2013d Environmental Review Toolkit webpage, *Archaeological Predictive Modeling, Minnesota Department of Transportation, MnModel–Archaeological Site Predictive Model*. Accessed online May 2013 at [http://environment.fhwa.dot.gov/histpres/mn\\_arch.asp](http://environment.fhwa.dot.gov/histpres/mn_arch.asp)
- 2013e Federal Highway Administration Tribal Transportation website. Accessed online at <http://www.tribalplanning.fhwa.dot.gov/>.
- 2013f Questions and Answers webpage, accessed online June 2013 at <http://www.tribalplanning.fhwa.dot.gov/tcqa.aspx#r13>
- 2013g Environmental Review Tool Kit, *Digital Screening Tool and Decision-Making Process, Florida Department of Transportation, Efficient Transportation Decision-Making (ETDM) Process*. Accessed online May 2013 at [http://environment.fhwa.dot.gov/histpres/fl\\_etdm.asp](http://environment.fhwa.dot.gov/histpres/fl_etdm.asp)
- 2013h Section 106 Tribal Consultation Q&A's webpage. National Historic Preservation Act Section 800.2 (c)(4), accessed online May 2013 at <http://www.tribalplanning.fhwa.dot.gov/tcqa.aspx#r8>
- 2013i U.S. Department of Transportation and the FHWA, MAP-21 – *Moving Ahead for Progress in the 21<sup>st</sup> Century, A Summary of Highway Provisions*. Accessed online September 2013 at <http://www.fhwa.dot.gov/map21/>.
- United States Forest Service [USFS]
- 2012 Office of Tribal Relations Spring 2012 Newsletter. Accessed online May 2013 at <http://www.fs.fed.us/spf/tribalrelations/documents/news/Spring2012OTRNewsletter.pdf>
- United States Government Printing Office
- 1996 Executive Order 13007. Indian Sacred Sites. Accessed online at <http://www.gpo.gov/fdsys/pkg/FR-2011-08-05/pdf/2011-19849.pdf>.
- 1998 Executive Order 13084. Consultation and Coordination With Indian Tribal Governments <http://www.gpo.gov/fdsys/pkg/FR-1998-05-19/pdf/98-13553.pdf>.
- 2000 Presidential Documents, Executive Order 13175, November 6, 2000, Consultation and Coordination with Indian Tribal Governments. Accessed online April 2013 at <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>.
- Vermont Agency of Transportation [VTrans]
- 2013 VTrans Cultural Resources Webpage. Accessed online May 2013 at <http://www.aot.state.vt.us/TechServices/EnvPermit/CulturalResources.htm>

Washington Department of Transportation [WSDOT]

2008 WSDOT Model Comprehensive Tribal Consultation Process for the National Environmental Policy Act. Accessed online June 2013 at <http://www.wsdot.wa.gov/NR/rdonlyres/BF49CED8-B7C7-46A4-BA89-93153AB70FF3/0/TribalManual.pdf> and <http://www.wsdot.wa.gov/tribal/>

Wilkinson, Charles F.

1998 *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*. Yale University Press, New Haven, Connecticut.

Wilkins, David E.

1997 *American Indian Sovereignty and the U.S. Supreme Court: the Masking of Justice*. University of Texas Press, Austin.

Wisconsin Department of Transportation [WisDOT]

2010 Partnership Agreement between Wisconsin's Eleven Federally Recognized Tribes Bad River Band of Lake Superior Chippewa Indians, Forest County Potawatomi, Community, Ho-Chunk Nation, Lac Courte Oreilles Band of Lake Superior, Chippewa Indians, Lac Du Flambeau Band of Lake Superior Chippewa Indians, Menominee Indian Tribe of Wisconsin, Oneida Tribe of Indians of Wisconsin, Red Cliff Band of Lake Superior Chippewa Indians, Sokaogon Chippewa Community, St. Croix Band of Chippewa Indians, Stockbridge-Munsee Band of Mohican and Wisconsin Division-Federal Highway Administration and Wisconsin Department of Transportation. Accessed online May 2013 at <http://www.dot.state.wi.us/localgov/docs/partnership.pdf>

2013 Tribal Affairs webpage. Accessed online May 2013 at

<http://www.dot.state.wi.us/localgov/aid/tribal-affairs.htm> and <http://www.environment.fhwa.dot.gov/strmlng/searchresults.asp?id=1&keyword=&StateSelect=Wisconsin&ShowNewPractices=&CategorySelect=all&startrow=1&ResultsSelect=10&ShowDescription=true&print=&InnovativePract=#R1>

Wunder, John R.

1999 *Native American Sovereignty*. Routledge, Abingdon, England.

## List of Participants

### *State DOT Interview Participants*

Arizona Department of Transportation (ADOT), Donald Sneed, Senior Planner and Tribal Liaison.  
California Department of Transportation (Caltrans), Tina Biorn and Lonora Graves, Native American Liaison Branch Chief(s).  
Florida Department of Transportation (FDOT), Roy Jackson, State Cultural and Recreational Resources Coordinator  
Georgia Department of Transportation (GDOT), Jim Pomfret, Archaeology Team Leader  
Iowa Department of Transportation (Iowa DOT), Brennan Dolan, Office of Location & Environment.  
Illinois Department of Transportation (IDOT), Brad H. Koldehoff, RPA Cultural Resources Unit Chief (Acting) Chief Archaeologist  
Maine Department of Transportation (Maine DOT), Megan Hopkin, Historic Coordinator.  
Minnesota Department of Transportation (MnDOT), Linda Aitken, Project Manager  
North Dakota Department of Transportation (NDDOT), Jeani Borchert  
Oklahoma Department of Transportation (Oklahoma DOT), Rhonda Fair, Ph.D., Tribal Liaison  
Oregon Department of Transportation (ODOT), Carolyn Holthoff, Cultural Resources Program Manager and Tribal Liaison  
Pennsylvania Department of Transportation (PennDOT), Ira Beckerman, Cultural Resources Unit Chief

### *Tribes Interview Participants*

Alabama-Coushatta Tribe of Texas, Bryant Celestine, Tribal Historic Preservation Officer  
Caddo Nation, Robert Cast, Tribal Historic Preservation Officer  
Confederated Tribes of the Grand Ronde Community of Oregon, Eirik Thorsgard, Tribal Historic Preservation Officer  
Muscogee (Creek) Nation, Emman Spain, Tribal Historic Preservation Officer, and Jerry Cole, Deputy Tribal Historic Preservation Officer and NAGPRA Specialist  
Passamaquoddy Tribe of Indians<sup>115</sup>  
The Sovereign Miami Tribe of Oklahoma, George Strack, Tribal Historic Preservation Officer  
Three Affiliated Tribes – Mandan, Hidatsa, Arikara<sup>116</sup>  
Thlopthlocco Tribal Town, Charles Coleman, Tribal Historic Preservation Officer and NAGPRA Specialist  
United Keetoowah Band of Cherokee, Lisa LaRue-Baker, Tribal Historic Preservation Officer  
Yurok Tribe, Robert McConnell, Tribal Historic Preservation Officer

---

<sup>115</sup> Written permission to include the name of this participant was not provided prior to completion of report.

<sup>116</sup> Written permission to include the name of this participant was not provided prior to completion of report.

## **Appendix A: Task 1 Online Survey**

## NCHRP Task 79 Tribal Consultation

Thank you for taking the time to participate in this research on Successful Practices for Effective Tribal Consultation: NCHRP 25-25 Task 79, being conducted by The Louis Berger Group, Inc. This study was requested by the American Association of State Highway and Transportation Officials (AASHTO), and conducted as part of National Cooperative Highway Research Program (NCHRP) Project 25-25. The NCHRP is supported by annual voluntary contributions from the state Departments of Transportation. Project 25-25 is intended to fund quick response studies on behalf of the AASHTO Standing Committee on Environment. The intent of this survey is to determine appropriate candidates for further research. We appreciate your time and ask that you please provide contact information for follow up.

Next

0%

## NCHRP Task 79 Tribal Consultation

### 1. Does your agency have written guidance for consulting with tribes?

- Yes
- No

### 2. Does your agency consult with tribes on a project-by-project basis? Or do you have a more programmatic approach for tribal consultation?

- Project by Project
- Signed, formal agreement or MOA
- None of the above

### 3. Does your state have tribal land within its boundaries?

- Yes
- No



**4. Does your agency have a Tribal Liaison or established point of contact for tribal consultation?**

- No
- Yes, please provide the individual's title:

**5. With how many federally recognized tribes does your agency consult?**

- None
- 1 to 5
- 5 to 10
- 10-20
- More than 20

**6. On average, how often does your agency have contact with tribal government representatives?**

- Weekly
- Monthly
- Quarterly
- Annually
- Less frequently than once a year

**7. What form(s) of communication does your agency use to consult with tribes? (Select all that apply)**

- None
- Email
- Telephone/teleconference
- Video
- US Mail/courier
- In person meetings
- Workshops
- Other, please specify:



**8. Has your agency ever conducted consultation meetings on tribal land?**

- No
- Yes, with the following frequency:

**9. How would you rate the overall quality of your agency's current working relationship with tribes?**

- Poor    Acceptable    Neutral    Good    Very Good    Excellent
- 

**10. How would you rate the overall effectiveness of your agency's current program for consulting with tribes?**

- Poor    Acceptable    Neutral    Good    Very Good    Excellent
- 

**11. Are you willing to participate in a follow-up interview regarding the information you have provided?**

- Yes
- No

**13. Please provide your information below to assist with data collection. If you answered "no" to the above question, you will not be contacted.**

**First Name**

**Last Name**

**Title**

**State/Agency Name**



**Email Address**

**Phone Number**

Back

Submit

50%

## NCHRP Task 79 Tribal Consultation

Thank you for taking our survey. Your response is very important to us.

100%

Survey Software powered by SurveyGizmo



## **Appendix B: Task 2 Interview Questionnaires**

## Appendix B: Task 2 Interview Questionnaires

### *State DOT Interview Questions*

1. How would you define “effective” consultation? What does it look like? Can you describe a project or situation that you think met or came close to meeting your expectations for effective consultation?
2. You responded that your agency has written policy or guidance for consulting with tribes and native organizations. Do you think there is value in having a written policy with respect to consultation activities?
  - a. What do you see as the value of having such policies or guidance with respect to consultation activities?
  - b. Can you provide any specific examples related to a project or program in your state?
3. You indicated that your agency consults with tribes and native organizations on a project-by-project basis. Others have adopted a more programmatic approach. Do you think there are advantages to either approach? Can you think of any projects in your state that illustrate those advantages?
4. You indicated that you are the established point of contact (POC) to coordinate and facilitate consultation. What are the advantages of having an established POC for consultation purposes? Can you think of instances where this has helped facilitate consultation? How does your state agency evaluate the performance of the POC; are there specific metrics employed?
5. You indicated that you have a “very good” relationship with tribes. What three factors do you consider most important in maintaining good relationships with tribes?
6. Effective communication is essential for consultation and state DOTs use a wide variety of communication formats including email, telephone/teleconference, video, in-person meetings, and workshops to meet their needs. Under what circumstances are in-person meetings necessary or preferred? Do you think you have too many in person meetings, too few, or just enough? How would you compare the effectiveness of video-conferencing or teleconferencing? Are there certain circumstances where this type of interaction is more appropriate?
7. How important is the venue selected for in-person meetings? Do you think it is important to have in-person meetings on tribal land? Under what circumstances do you feel this might be necessary or preferred? If you have participated in meetings on tribal land, can you cite instances where you felt this may have had a positive influence on the overall consultation effort?
8. What do you think are the greatest obstacles to effective consultation? How well do you think the consultation process in your state is designed to avoid these pitfalls? Can you cite any specific examples of how you have worked to anticipate and avoid these obstacles? Following from the question above, can you describe a project or situation where consultation was unsuccessful? Why do you think it fell short? What corrective actions if any were implemented to avoid a similar situation from developing in the future?
9. Are there other factors that are critical to a successful consultation that we have not discussed? What are they and why do you think they are important? Can you provide any specific examples from your state that showcases the importance of these other factors?

### *Tribal Nation Interview Questions*

1. Is consultation with state DOTs important to your tribe? Why or why not?
2. How would you define “effective” consultation? What does it look like? Can you describe a project or situation that you think met or came close to meeting your expectations for effective consultation?
3. The majority of state DOTs have told us that they have written policy or guidance for consulting with tribes and native organizations. Do you think there is value in having such a written policy?
4. The majority of state DOTs have indicated that they consult with tribes and native organizations on a project-by-project basis. Others have adopted a more programmatic approach. Do you think there are advantages to either approach? Can you think of any examples that illustrate those advantages?
5. The majority of the responding state DOTs have an established point of contact (POC) to coordinate and facilitate consultation with tribes. What are the advantages of having an established POC for consultation purposes?
6. How do you feel about the quality of consultation with state DOTs? What three factors do you consider most important in maintaining good relationships?
7. Is travel to DOT offices and/or the project site an option for you or others for the tribe you represent? Under what circumstances are in-person meetings necessary or preferred?
8. Do you think it is important to have in-person meetings on tribal land? Under what circumstances do you feel this might be necessary or preferred? If you have participated in meetings with DOT representatives on tribal land, can you cite instances where you felt this may have had a positive influence on the overall consultation effort?
9. What do you think are the greatest obstacles to effective consultation? Can you cite any specific examples of how you have worked to anticipate and avoid these obstacles?
10. Are there other factors that are critical to a successful consultation that we have not discussed? What are they and why do you think they are important. Can you provide any specific examples that illustrate the importance of these other factors?

## **Appendix C: List of Acronyms**

*List of Acronyms*

AASHTO	American Association of State Highway and Transportation Officials
ACHP	Advisory Council on Historic Preservation
ACIA	Arizona Commission of Indian Affairs
ACTT	Advocacy Council for Tribal Transportation
ADOT	Arizona Department of Transportation
AHDT	Arkansas Highway and Transportation Department
APE	Area of potential effect
ARPA	Archaeological Resource Protection Act
ARRA	American Recovery and Reinvestment Act
ATRI	Alliance for Transportation Research Institute
ATSPT	Arizona Tribal Strategic Partnering Team
BIA	Bureau of Indian Affairs
Caltrans	California Department of Transportation
CDOT	Colorado Department of Transportation
CE	Categorical Exclusions
CEQ	Council on Environmental Quality
COG	Council of Governments
CRP	Cultural Resource Professional
DOT	Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
ETDM	Efficient Transportation Decision Making
FDOT	Florida Department of Transportation
FHWA	Federal Highway Administration
FTP	File Transfer Protocol
GDOT	Georgia Department of Transportation
GIS	Geographic Information Systems
GPR	ground penetrating radar
HTP	Historic Preservation Portal
IDOT	Illinois Department of Transportation
INDOT	Indiana Department of Transportation
ISTEA	Intermodal Surface Transportation Equality Act
ITCA	Inter Tribal Council of Arizona, Inc.
LRTP	Long Range Transportation Planning
MnDOT	Minnesota Department of Transportation
MOA	Memorandum of Agreement
MoDOT	Missouri Department of Transportation
MOU	Memorandum of Understanding

MPO	Metropolitan Planning Organizations
NAAC	Native American Advisory Committee
NAGPRA	Native American Graves Protection and Repatriation Act
NATHPO	National Association of Tribal Historic Preservation Officers
NCHRP	National Cooperative Highway Research Program
NDDOT	North Dakota Department of Transportation
NDOR	Nebraska Department of Roads
NDTCC	North Dakota Tribal Consultation Committee
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NMDOT	New Mexico Department of Transportation
NPS	National Park Service
NRCS	National Resources Conservation Service
NRHP	National Register of Historic Places
ODOT	Ohio Department of Transportation; Oklahoma Department of Transportation
ODOT-CRP	Oklahoma DOT Cultural Resources Program
OES	Office of Environmental Services
ORS 182.162	Oregon Statute 182.162
PA	Programmatic Agreement
PAC	Political Action Committee
PARA	Planning Assistance for Rural Areas
PennDOT	Pennsylvania Department of Transportation
PNS	Project Notification System
POC	Point of Contact
PSA	Potentially sensitive area
RC	Regional Commission
ROW	Right-of-way
RTA	Research in Transportation Authority
SANDAG	San Diego Association of Governments
SCOE	Standing Committee on the Environment
SDDOT	South Dakota Department of Transportation
SHPO	State Historic Preservation Officer
SJSPT	San Juan Southern Paiute Tribe
STAC	Statewide Transportation Advisory Committee
STIP	Statewide Transportation Improvement Program
SOP	Standard operating procedure
TAP	Transportation Alternatives Program
TBAG	To Bridge a Gap Conference
TCC	Tribal Consultation Committee
TCP	Traditional Cultural Property
THPI	Tribal Historic Preservation Investigator
THPO	Tribal Historic Preservation Officer
TPR	Transportation Planning Region
TRB	Transportation Research Board
TTAC	Tribal Technical Assistance Center
TTAP	Tribal Technical Assistance Program

TTIP	Tribal Transportation Improvement Program
TTP	Tribal Transportation Program
TxDOT	Texas Department of Transportation
USACE	U.S. Army Corps of Engineers
USDOT	United States Department of Transportation
USFS	United States Forest Service
USPS	United States Postal Service
VTrans	Vermont Agency of Transportation
WisDOT	Wisconsin Department of Transportation
WSDOT	Washington Department of Transportation