

Best Practices of Tribal Trust Consultation

**Presentation to Missouri River
Basin Interagency Roundtable
January 2015**

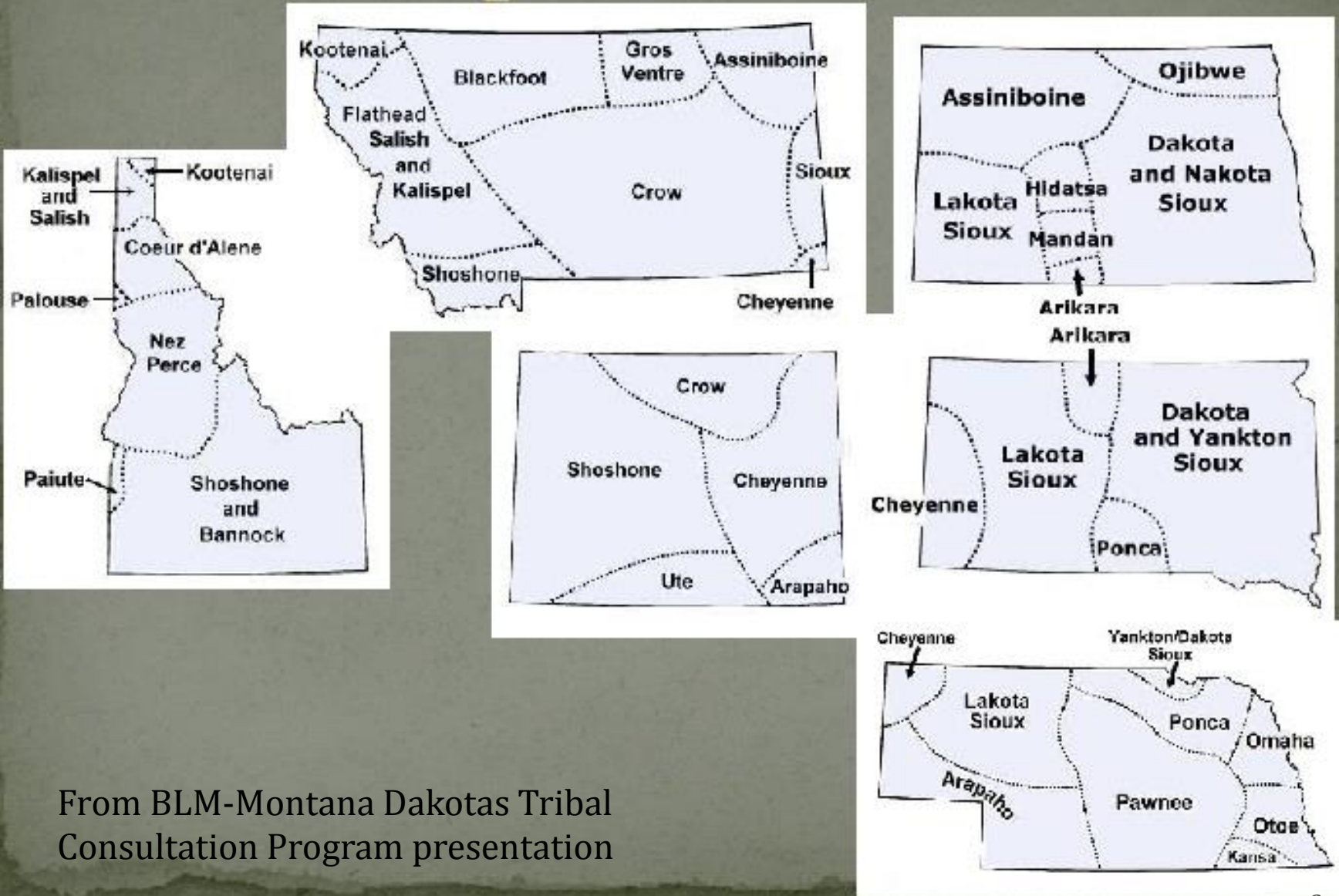
**Developed by
MRBIR Tribal
Federal Relations
Committee**

Active/Dynamic Presentation

This presentation includes links to documents or websites with useful information for future use.



Aboriginal Territories



From BLM-Montana Dakotas Tribal Consultation Program presentation

The Trust Doctrine

- The Tribes placed their **trust** in the United States to fulfill the guarantees made to them in exchange for their land.
- The Federal government has a **duty** to fulfill its promises.
- **Trust Responsibility** can only be extinguished, expressly, by Congress.

Legal and Policy Directives:

Executive Directives

- Presidential memorandum of April 29, 1994:
 - Affirmed federal recognition of tribal governments as sovereign nations.
 - This relationship is unique.
- Executive Orders:
 - #12875 – Enhancing the Intergovernmental Partnership 1993
 - #13175 – Consultation and Coordination with Indian Tribal Governments 2000 replaced EO #13084

Government to Government Executive Order 13175 (2000)(reaffirmed 2009)

Agencies must:

- ✓ **Respect** Indian tribal self-government and sovereignty,
- ✓ **Honor** tribal treaty and other rights, and
- ✓ **Strive** to meet the responsibilities of the unique legal relationship
- ✓ Grant Indian tribal governments the maximum administrative **discretion** possible

Guidance for Implementation of Executive Order 13175 (2010)

Commitment to “**regular and meaningful consultation** and collaboration with tribal officials in **policy decisions** that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175.”

Guidance for Implementation of Executive Order 13175 (2010)

Executive departments and agencies are charged:

- ✓ Engage in **consultation and collaboration** with Indian tribal governments;
- ✓ Strengthen the **government-to-government** relationships
- ✓ Reduce the imposition of **unfunded mandates** upon Indian tribes.

Importance of Consultation

- ❑ **Critical** part of trust doctrine
- ❑ Process just as important as substance

Process:

- 1. Inform** early
- 2. Give time** to consider
- 3. Maintain dialogue**
- 4. Document** process
- 5. Accept** recommendations **or** provide detailed written reasons **why not**

Consultation is:

- ✓ **Formal** process of communication between Agency and the government of a Federally-recognized Tribe,
- ✓ **Understood** by both to be a government-to-government meeting.
- ✓ **Recognition** of the sovereignty of Federally-recognized Tribes
- ✓ **Implements** the government-to-government relationship
- ✓ **Used** to exchange information, deliberate, and address Federal policies that have tribal implications.

Consultation is Not:

- ✓ Format for **consensus** decision-making; rather, it is a process for the Federal government to consider the sovereignty, rights, and resources of Indian Tribes.
- ✓ **State** governments are **not** a part of this relationship and should not be used to implement government-to-government consultation obligations.

From [NOAA Tribal Consultation Handbook 2013](#)

Tribal Consultation Policies or Handbooks for Missouri River Basin Interagency Roundtable

	Organization	Document Name	Year
Department of Agriculture (DOA)	Forest Service (USFS)	Forest Service Handbook (FSH) 1509.13, Chapter 10 - Consultation with Tribes; Interim Directive No.: 1509.13-2014-1; Effective Date: April 1, 2014	2014
	Animal Plant Health and Inspection Service	APHIS Directive 1040.3 Consultation with Elected Leaders of Federally Recognized Indian Tribes	2012
	Natural Resources Conservation Service (NRCS)	Tribal Consultation - A Guide for NRCS Employees	2009
Department of Commerce (DOC) National Oceanic and Atmospheric Administration (NOAA)	National Weather Service (NWS)	NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations	2013
Department of Energy (DOE)	Western Area Power Administration (WAPA)	DOE American Indian and Alaska Natives Tribal Government Policy	2006
Department of Defense (DOD)	US Army Corps of Engineers (USACE)	US Army Corps of Engineers Tribal Consultation Policy and Related Documents	2013
Department of Interior (DOI)		DOI Policy on Consultation with Indian Tribes	
	Fish & Wildlife Service (FWS)	US Fish and Wildlife Service Tribal Consultation Handbook	2011
	Bureau Indian Affairs	BIA Government-to-Government Consultation Policy	2000
	National Park Service (NPS)	NPS Management Policies 2006 (See 1.11 Relationship with American Indian Tribes and 5.2.1 Consultation)	2006
	Geological Survey (USGS)	<i>could not find general consultation policy for USGS</i>	
	Bureau of Reclamation (BOR)	Reclamation's Protocol Guidelines: Consulting with Indian Tribal Governments February 3, 1998 (Revised February 9, 2001) Reissued September 21, 2012	2012
	Office of Surface Mining (OSM)	<i>could not find general consultation policy for OSM</i>	
	Bureau of Land Management (BLM)	BLM General Procedural Guidance for Native American Consultation H-8120-1	2004
Department of Transportation (DOT)	Maritime Administration	<i>could not find general consultation policy for Maritime Administration</i>	
	Federal Highway Administration (FHWA)	U.S. Department of Transportation Tribal Consultation Plan	?
Department of Homeland Security (DHS)	Coast Guard	<i>could not find general consultation policy for Coast Guard</i>	
	Federal Emergency Management Agency (FEMA)	FEMA Tribal Consultation Policy	2014
Environmental Protection Agency (EPA)		EPA Policy on Consultation and Coordination with Indian Tribes	2011

Common throughout Guidance documents

- ❑ **Clear understanding** consultation is occurring
- ❑ Need tribal input on the **best method** to reach them and adequate timelines for responses
- ❑ Consultation starts **early and continues** throughout process of the project or policy development
- ❑ **Formal and documented**
- ❑ **Consistent** but not rigid

Successful Consultation

- **Agreement** on what constitutes consultation, how it should be conducted, and what constitutes successful consultation.
- Mutual **respect** must be the basis upon which successful consultation builds
- **Promote** relationship building - coming to a final agreement is not as important as building ongoing channels of communication.
- Begins **early** in the planning stages, and **continues** throughout project/policy development.

From [NATHPO Tribal consultation Best practices 2005](#) and [NCHRP25-25\(79\) Successful consultation 2013](#)

Successful Consultation (Continued)

- Predicated on each party being **knowledgeable** about the project and the priorities and desires of the other parties.
- Understand the government-to-government **trust relationship**
- Knowledgeable in **tribal culture and history**
- Though not without cost, results in **better and longer lasting** final agreements.
- **Flexibility** is still needed

From [NATHPO Tribal consultation Best practices 2005](#) and [NCHRP25-25\(79\) Successful consultation 2013](#)

Questions

