Best Practices of Tribal Trust Consultation

Presentation to Missouri River Basin Interagency Roundtable
January 2015

Developed by MRBIR Tribal Federal Relations Committee
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.

Pevar, Stephen. 2012. The Rights of Indians and Tribes
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

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
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.”
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.

From NOAA Tribal Consultation Handbook 2013
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](https://www.noaa.gov/)

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<table>
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<tr>
<th>Organization</th>
<th>Document Name</th>
<th>Year</th>
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<tr>
<td>Forest Service (USFS)</td>
<td><strong>Forest Service Handbook (FSH) 1509.13, Chapter 10 - Consultation with Tribes; Interim Directive No.: 1509.13-2014-1; Effective Date: April 1, 2014</strong></td>
<td>2014</td>
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<td>Animal Plant Health and Inspection Service</td>
<td><strong>APHIS Directive 1040.3 Consultation with Elected Leaders of Federally Recognized Indian Tribes</strong></td>
<td>2012</td>
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<td>Natural Resources Conservation Service (NRCS)</td>
<td><strong>Tribal Consultation - A Guide for NRCS Employees</strong></td>
<td>2009</td>
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<td>National Weather Service (NWS)</td>
<td><strong>NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations</strong></td>
<td>2013</td>
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<td>Western Area Power Administration (WAPA)</td>
<td><strong>DOE American Indian and Alaska Natives Trial Government Policy</strong></td>
<td>2006</td>
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<td>US Army Corps of Engineers (USACE)</td>
<td><strong>US Army Corps of Engineers Tribal Consulation Policy and Related Documents</strong></td>
<td>2013</td>
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<td>Fish &amp; Wildlife Service (FWS)</td>
<td><strong>US Fish and Wildlife Service Tribal Consulation Handbook</strong></td>
<td>2011</td>
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<td>Bureau Indian Affairs</td>
<td><strong>BIA Government-to-Government Consultation Policy</strong></td>
<td>2000</td>
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<td>National Park Service (NPS)</td>
<td><strong>NPS Management Policies 2006  (See 1.11 Relationship with American Indian Tribes and 5.2.1 Consultation)</strong></td>
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<td>Geological Survey (USGS)</td>
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<td>Office of Surface Mining (OSM)</td>
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<td>Bureau of Land Management (BLM)</td>
<td><strong>BLM General Procedual Guidance for Native American Consultation H-8120-1</strong></td>
<td>2004</td>
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<td>Maritime Administration</td>
<td><em>could not find general consultation policy for Maritime Administration</em></td>
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<td>Federal Highway Administration (FHWA)</td>
<td><strong>U.S. Department of Transportation Tribal Consultation Plan</strong></td>
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<td>Coast Guard</td>
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<td>Federal Emergency Management Agency (FEMA)</td>
<td><strong>FEMA Tribal Consultation Policy</strong></td>
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<td>Environmental Protection Agency (EPA)</td>
<td><strong>EPA Policy on Consultation and Coordination with Indian Tribes</strong></td>
<td>2011</td>
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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.

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