

TRANSPORTATION DECISIONMAKING

Information Tools for Tribal Governments

Statewide, MPO, and FHWA Role in Tribal Consultation



U.S. Department
of Transportation
Federal Highway
Administration

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FHWA Federal Lands Highway

FHWA Resource Center

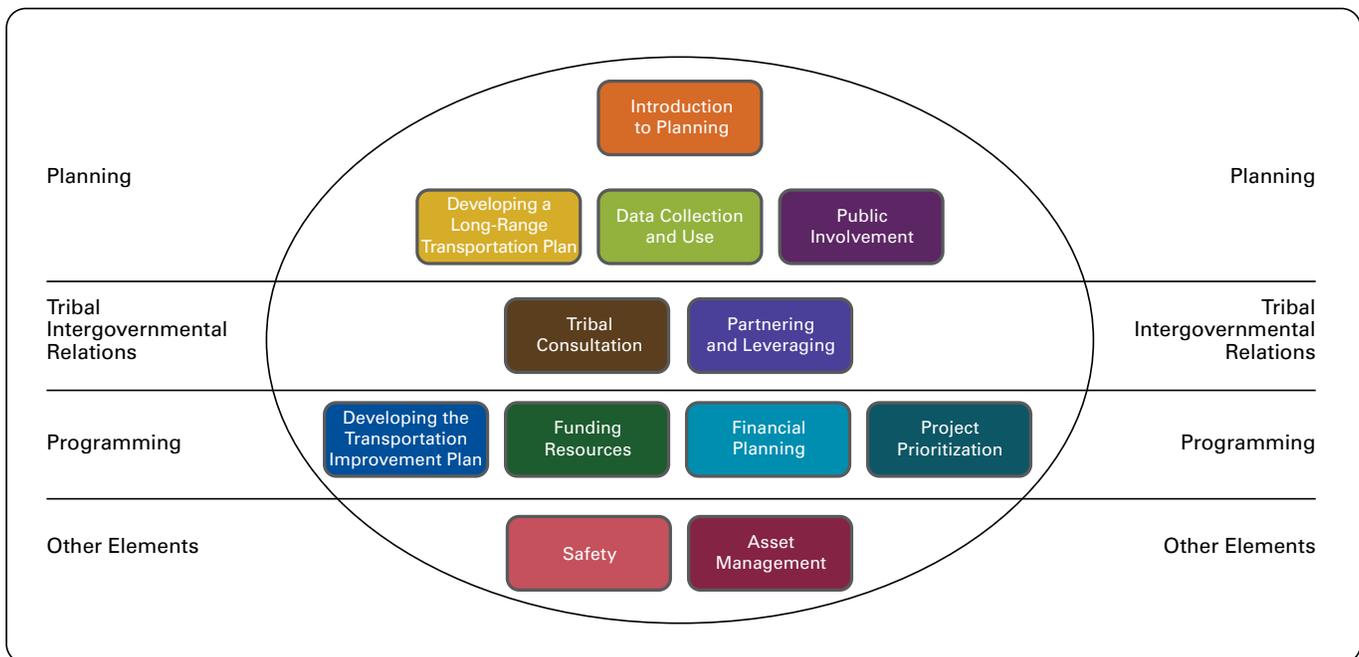


U.S. Department
of Transportation

OVERVIEW

You are participating in a training session sponsored by the U.S. Department of Transportation Federal Highway Administration (FHWA). It is part of a continuing educational series designed for tribal governments entitled *Transportation Decisionmaking: Information Tools for Tribal Governments*. The series offers modules in transportation planning, transportation programming, intergovernmental relations, safety and asset management. This is shown in Figure 1.

Figure 1: Training Modules for Tribal Transportation Decisionmaking¹



This module topic is **Tribal Consultation**. Let's begin!

¹ The *Transportation Decisionmaking Series* modules are available on the FHWA Tribal Planning web site at http://www.tribalplanning.fhwa.dot.gov/training_series.aspx.

I. INTRODUCTION

What is Tribal Consultation? Tribal consultation is the federally mandated process for timely and meaningful notification, consideration and discussion with tribes on actions proposed by Federal, State and local governments that may impact tribal lands and property.

Who should participate in this training? Any official involved in tribal transportation planning.

How will I benefit? You will learn what tribal consultation is and how it works.

Why is Tribal Consultation important? Actions taken by Federal, State and local governments may negatively impact tribal lands and property. Consultation is the orderly process for early notification by these governments to tribal governments. It enables discussion, consideration and input from the tribal government before the action is taken.

How does this module relate to other modules in the training series? This topic is closely aligned to the **Partnering and Leveraging** module which, along with this module, helps foster government-to-government relationships between the Federal government and tribes.

What can I expect from this module? The learning objective is to explain tribal consultation and what it involves. This module offers definitions of tribal consultation and tribal sovereignty and how

they are related. It explains the Federal laws and executive orders that govern tribal consultation. Examples of the consultation practices of Federal and State governments and Metropolitan Planning Organizations (MPOs) are also provided. This is followed with a toolbox of concepts, key points and a convenient checklist that will assist your understanding and work in tribal consultation. Another aid is the *Practice While You Learn!* in Figure 2. Here a hypothetical problem in tribal consultation is presented. As you read through and study this module, consider ways to solve the problem. The appendix contains a reading list and one possible answer to the *Practice While You Learn!* problem.



This module has six parts:

I. **Introduction.** Topic description and *Practice While You Learn!*

II. **Tribal Sovereignty.** Definition and Federal directives.

III. **What Is Tribal Consultation?** Definition and overview.

IV. **Federal, State DOT and MPO Practices.** Examples of consultation practices.

V. **Toolbox, Key Points and Checklist.** Summary.

VI. **Appendices.** For Further Reading. *Practice While You Learn!* - One Possible Answer.

Figure 2: *Practice While You Learn!*

Tribal-State DOT Consultation

The scenario below is referenced throughout the module to help you “Practice While You Learn” about the consultation process.

Today the Tribal Planning Director received notification from the State DOT on proposed action to improve State Route 456. This route is 5 miles north of the reservation. It will be widened and extended to serve a new housing development. The notice says previous consultation notices were sent to the tribe as part of the State-Tribal consultation process but no responses were received.

This notice states the proposed action:

- Was endorsed in the MPO Comprehensive Land Use Plan three years ago.
- Is programmed for funding in the State and MPO TIPs.
- The design of the corridor will end in 16 months and construction will begin in 24 months.
- The tribe’s response is due in 30 days.

The Tribal Planning Director immediately informed the Tribal President, the Tribal Council and the Tribal Elders. All expressed alarm and disbelief. The proposed SR456 extension will cross over a sacred burial ground containing the remains of four generations of tribal descendents. Tribal leadership will hold an emergency meeting in 24 hours. It has asked you to attend and provide:

- A summary of any previous consultation notices and the tribe’s response to them, and
- A strategy for responding to this notice.

The purpose of *Practice While You Learn!* is to apply your learning to a hypothetical problem as you study the contents of this module. You will find useful information and tools in your reading. At certain points, you will be asked if the lesson you have just learned will help solve the problem described here.

One possible answer is also provided in [Appendix B](#).

II: TRIBAL SOVEREIGNTY

Tribal sovereignty is the basis and reason for tribal consultation. It is the right of tribal government to self-governance, self-determination and economic self-sufficiency. Tribal sovereignty is defined by the U.S. Department of Transportation as:

“...the unique legal status of federally recognized Indian tribes as set forth in the U. S. Constitution, treaties and Federal statutes, executive orders and court decisions, which establish...tribes, as domestic dependent nations...”²

In this, each federally recognized tribe is respected as a sovereign nation that stands equal to the Federal government. This is why any activity between the tribe and the Federal government is defined as a ‘government-to-government’ activity that fosters ‘government-to-government’ relations. Readings on tribal sovereignty and its history are provided in [Appendix A](#).

Recent Federal Mandates. The most recent Federal actions that recognize tribal sovereignty and influence tribal consultation practices are from several sources.

1994: Presidential Memorandum: Government-to-Government Relations with Native American Tribal Governments.

This memorandum requires Federal agencies to undertake consultation in a manner that respects tribal sovereignty. Its guiding principles, shown in the text box, continue today. The memorandum is available at <http://www.justice.gov/archive/otj/PresidentialStatements/presdoc1.htm>

Federal guiding principles for respecting tribal sovereignty:

- Operate within a government-to-government relationship with federally recognized tribal governments.
- Consult with tribal representatives before taking actions that affect federally recognized tribes.
- Assess the impact of activities on tribal trust resources and assure that tribal interests are considered before activities are undertaken.
- Remove procedural impediments to working directly with tribal governments.

² DOT Order 5301.1: Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes, Office of the Secretary, U.S. Department of Transportation, 1999, page 5. <http://isddc.dot.gov/OLPFiles/OST/009273.pdf>.

TIP #1: Make a copy of the Federal guiding principles. Keep them handy. They will guide and inform your consultation work. Also create a list of Federal government contacts that your tribal leadership may reference on consultation issues and activities.

1996: Presidential Executive Order 13007: Indian Sacred Sites.

This directs Federal agencies to protect tribal sacred sites and accommodate tribal access to them. The executive order is available at <http://www.em.doe.gov/tribalpages/eo13007.aspx>

2000: Presidential Executive Order 13175: Consultation and Coordination with Indian Tribal Governments.

This executive order mandates Federal consultation with tribal governments. The executive order is available at <http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html>

2009: Presidential Memorandum on Tribal Consultation.

This most recent presidential action affirms Executive Order 13175 (above) stating:

“History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.”

The memorandum is available at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>

TIP #2: None of the Federal executive orders or memoranda, discussed above, has been rescinded. In fact, each reinforces the prior one. This strengthens and legitimizes the tribal government’s position, influence and role in Federal tribal consultations.

TIP # 3: The recognition of tribal sovereignty and the Federal obligation to work with tribes on a government-to-government basis is reserved only for federally recognized tribes.

TIP #4: Tribal Land and Properties: According to 36 CFR PART 800—Protection of Historic Properties (<http://www.achp.gov/regs-rev04.pdf>): “Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes.” Given this, consultation considerations must include tribal land and properties located on the reservation as well as off the reservation.

Practice While You Learn!

- Which presidential executive order or memorandum best addresses the hypothetical consultation problem on [page 3](#)?
- **Ask yourself:** Should the Tribal Planner inform the Council members and the Elders of these Federal policies and directives? Why?

III: WHAT IS TRIBAL CONSULTATION?

According to the U.S. Department of Transportation, tribal consultation is:

“meaningful and timely discussion in an understandable language during the development of regulations, policies, programs, plans...that significantly or uniquely affect federally recognized American Indian and Alaska Native tribes and their governments.”³

The process is still relatively new but continually strengthened by presidential orders and Federal laws. One such law is the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users*, enacted in 2005. Known as SAFETEA-LU, this law governs how transportation is administered in the United States and affirms the importance of tribal consultation in the transportation planning process.

SAFETEA-LU may be accessed at <http://www.fhwa.dot.gov/safetealu/legis.htm>. Additional Federal laws that mandate tribal consultation are listed in the text box.

It is important to note that the Federal consultation process takes precedence over a State, regional or metropolitan tribal consultation process.

The relationship between governments in tribal consultation is illustrated in Figure 3.

Given the increase in collaboration and partnership on transportation issues, however, the number of State and metropolitan government-to-government laws, executive orders, policies and programs are also increasing. Examples of this are provided in Section IV of this module.

Additional Federal Laws

- **Title 23 USC—Highways**—for impacts on tribal properties by Federal aid projects.
- **National Environmental Policy Act (NEPA)**—for environmental impacts on tribal properties.
- **National Historic Preservation Act (NHPA)**—for impacts on tribal historic, religious and cultural properties.

³ DOT Order 5301.1: Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes, Office of the Secretary, U.S. Department of Transportation, 1999, page 4. <http://isddc.dot.gov/OLPFiles/OST/009273.pdf>.

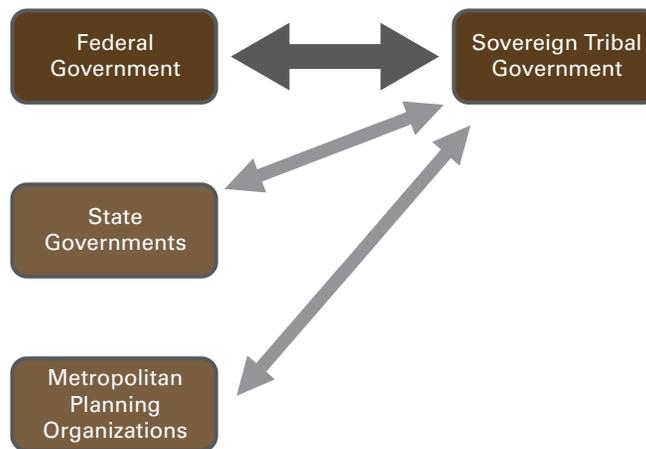


Figure 3: Relationship between Federal and State Governments, Metropolitan Planning Organizations and Tribal Governments in Tribal Consultation

Guiding Principles in Tribal Consultation.

Tribal consultations among governments can be contentious, complicated and span many years. It is made easier when the parties have a healthy and respectful working relationship before, during and after the consultation. According to a recent national research study, the most successful tribal consultations are governed by three principles: **communication**, **coordination** and **cooperation**.⁴ These principles are defined here.

Execution of these principles will strengthen the interpersonal relationships, knowledge and trust among the consulting parties.

Principles in Tribal Consultation	
Communication	The process for the exchange of information, data or knowledge through speech, writing and visual tools.
Coordination	The process for defining and organizing activities, events and tasks for achieving a mutual goal.
Cooperation	The process in which the consulting parties agree to work together in planning, programming and project delivery.

⁴ A Guidebook for Successful Communication, Cooperation, and Coordination Strategies between Transportation Agencies and Tribal Communities, Transportation Research Board, National Cooperative Highway Research Program, Report 690, 2011. (referenced in Appendix A).

Tribal Consultation Principles: Activities and Tools

[Before, during and after consultations]



Communication

- **Presentations:** Oral presentations, with aids such as hand outs and PowerPoint slides, educate on issues of common interest and concern to the parties. They are effective when followed with questions and answers.
- **Data Collection:** The collection and organization of project data aids information sharing and exchanges.
- **Standards and Handbooks:** These documents are from neutral organizations such as the American Indian Research and Policy Institute and the American Association of State Highway and Transportation Officials. They facilitate understanding of complex cultural and technical issues.
- **Newsletters and Bulletins:** These tools keep the consulting parties up-to-date on project activities and progress.
- **Mailings and Response Forms:** Mailings with response forms (tear off or attachments) solicit immediate responses from the consulting participants on how the effort is progressing.
- **Tribal Monitor:** This neutral and knowledgeable third-party monitor may be requested by the parties to attend meetings and participate in consultation conversations.
- **Training:** Either party may sponsor training to heighten group knowledge on a range of topics.

Coordination

- **Meetings, Summits and Workshops:** Regular meetings between the consulting parties have a stabilizing effect. Summits and workshops help to identify the next steps in the consultation process.
- **Tribal Consortium:** A consortium may represent several tribes from a specific region. The contributions of these entities broaden and diversify the resources and knowledge of the parties engaged in consultation.
- **Tribal Liaisons and Coordinators:** Tribal liaisons and coordinators are the experts for their agencies. They educate on issues and coordinate the exchange of critical information among the consulting parties.
- **Formal Agreements:** Consultation agreements may be forged at the program level and project level. They memorialize the terms and conditions agreed to by the consulting parties.
- **Regional and State Conferences:** Regional and State conferences are forums for networking and the exchange of views and information.



Cooperation

- **Planning Organizations:** Planning organizations are entities charged with developing the Long-Range Transportation Plan and the Transportation Improvement Program. They have the potential to encourage cooperation among consulting governments and may commit their resources to the process.
- **Regional Transit Districts and Coalitions:** Regional transit districts or coalitions may have multiple tribal memberships within their service areas. Their use and involvement strengthens already established relationships.
- **Resource Sharing:** Consulting partners may agree to pool and share resources for a specific transportation project or activity.

Practice While You Learn!

In addressing the hypothetical problem on [page 3](#), ask yourself:

- Will any of the three tribal consultation principles and their resulting activities help solve the problem?
- Which principles and activities would work best? Why?

IV: FHWA, STATE DOT AND MPO PRACTICES

This chapter describes the tribal consultation practices of Federal and State governments and regional and Metropolitan Planning Organizations.

A. Federal Tribal Consultation in Transportation.

The Federal Highway Administration (FHWA) is the U.S. Department of Transportation administrative unit that is responsible for implementing the Federal-aid highway program and for ensuring tribes are protected from Federal-aid projects that impact their lands and properties.

There are specific Federal guidelines on tribal consultation that must be followed regardless of the size or complexity of a transportation project. The most widely and commonly used guidelines are from Section 106 of the National Historic Preservation Act.⁵ Responses to frequently asked questions on Federal tribal consultation practices are provided here.

Frequently Asked Questions on Federal Tribal Consultation Practices.

Which tribes are consulted? Any federally recognized tribe that may be impacted by a project funded with Federal-aid highway transportation dollars.

How does FHWA identify the tribes that need to be notified? FHWA uses a number of resources to identify tribes for notification. One is the Native American Consultation Database which may be accessed at <http://web.cast.uark.edu/other/nps/nacd/>. Other resources include:

- Bureau of Indian Affairs website:
<http://www.bia.gov/WhoWeAre/AS-IA/OFA/index.htm>
- Federal Register /Vol. 75, No. 190/Friday, October 1, 2010: a listing of federally recognized Indian tribes: [Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs](#)
- Federal Register/Vol. 75, No. 207/Wednesday, October 27, 2010: a supplemental listing of federally recognized tribes: [supplemental listing](#)

Other resources include the tribal governments themselves and the historic preservation records and personnel within State and regional agencies.

⁵ "Section 106 Tribal Consultation Q & A's", Federal Highway Administration, <http://www.fhwa.dot.gov/tribal/topics/historic/tcqa.htm> and "Consultation with Indian Tribes in the Section 106 Review Process—A Handbook", Advisory Council on Historic Preservation, November 2008. <http://www.achp.gov/regs-tribes2008.pdf>.

Who initiates contact? FHWA is responsible for contacting the tribe. Once the contact is made, FHWA will:

- Describe the project;
- Listen, document concerns and engage in dialogue;
- Request consultation; and
- Seek agreement on how the consultation process will proceed.

Who is contacted? The initial contact is from the Federal government to the highest ranking tribal official or officials. This may be the Tribal Chief, Tribal Chairperson, Tribal Governor and/or Tribal President.

How does consultation start? A FHWA letter is sent to the tribal official describing the proposed action. The letter may be followed with a phone call to ensure the correspondence was received.

Does the State DOT assume the FHWA role? No. FHWA cannot delegate Federal consultation responsibility to the State. The State DOT may assist, if FHWA and the tribe agree.

What if a tribe does not want to divulge information on a property? Some tribes believe the location of a sacred site or its existence cannot be divulged. In this, FHWA is required to follow the provisions of the National Historic Preservation Act, which permit withholding sensitive information from public disclosure.

Does FHWA fund consultation activity? Yes. Consultation activity is eligible but only under certain circumstances. The activity must be the result of a FHWA action and deemed eligible by the agency.

What is a Memorandum of Agreement (MOA)? The MOA is a formal agreement which memorializes the actions FHWA will take, in consultation with a State and the tribe or tribes, to mitigate the impact of a Federal-aid project on tribal lands or property. The tribe has the option to sign or not sign the MOA. A decision to not sign does not invalidate the agreement, prevent the tribe from continued involvement or terminate government-to-government relations.

What is a Memorandum of Understanding (MOU)? An MOU is a signed agreement between the consulting parties on the process and framework they will use to work together toward a goal such as completing or mitigating the impacts of a project.

What is a Programmatic Agreement (PA)? The Programmatic Agreement is the signed and binding agreement among the consulting parties that memorializes the procedures, processes and steps they agree to follow for consultation or to address a specific issue.

May FHWA assign special rights to an individual tribe? No tribe is accorded special rights in the consultation process. For example, one tribe may say the project is within an area defined by a treaty that affords it special rights and request other tribes be dropped from consultation. Alternatively, one tribe may consider a site to be directly tied to its ancestors and ask FHWA to exclude other tribes from the consultation. FHWA may not exclude the other tribes. It may, however, contact all of the tribes and ask whether any wish to defer their consultation to a single or limited number of tribes. FHWA may limit the number of consulting parties if consent is given by all of the impacted tribes.

TIP #5: Contact the FHWA Division Office in the State or States where the tribe's land and cultural properties are located.

- Request information on how FHWA conducts tribal consultation in the State. Keep this for future reference.
 - Ask if any of your tribe's properties are listed or eligible for listing in the National Registry of Historic Places. Request a copy of these records. If there are errors, inform your tribe's leadership so that the records are current and correct.
-

An Example of FHWA Tribal Consultation.

One good example of Federal tribal consultation in transportation is in the State of North Dakota where FHWA-North Dakota (FHWA-ND), the North Dakota DOT and sixteen tribes are involved. The process complies with Federal law that requires agencies to consult with federally recognized tribes if their lands and properties are affected by Federal action.

The consulting parties in North Dakota use a Programmatic Agreement (PA) that empowers the tribes to participate in and shape the tribal consultation process that FHWA-ND oversees. The North Dakota DOT provides day-to-day administrative support.

Programmatic Agreement (PA).

While North Dakota DOT had been consulting with tribes for many years, it was determined (by the tribes) that a more formal and coordinated effort was needed. The PA eliminated redundancies and streamlined the process. Its focus is on how the parties consult on cultural resources affected by State DOT projects. These issues include:

- How to address identification, recording and confidentiality issues related to stone feature sites;
- Identification needs on material sources;
- Protection of information and confidentiality through FHWA, the North Dakota DOT and the State Historic Preservation Office (SHPO); and
- Project specific cultural resources and consultation methods.

Tribes in North Dakota Engaged in FHWA-State Consultations

- Cheyenne River Sioux Tribe
- Crow Creek Sioux Tribe
- Crow Tribe (Apsáalooke Nation)
- Fort Peck Assiniboine and Sioux Tribes
- Lower Sioux Indian Community
- Mandan, Hidatsa, Arikara Nation (Three Affiliated Tribes)
- Northern Cheyenne Tribe
- Oglala Sioux Tribe
- Rosbud Sioux Tribe
- Santee Sioux of Nebraska
- Sisseton-Wahpeton Oyate Tribe
- Spirit Lake Dakotah Nation
- Standing Rock Sioux Tribe
- Turtle Mountain Band of Chippewa Indians
- Wahpekute Band of Dakotah Sioux
- Yankton Sioux Tribe

The North Dakota process is featured in the FHWA publication *In Their Own Light: A Case Study in Effective Tribal Consultation*.

The collaborative approach involves a **Tribal Consultation Committee** (TCC) comprised of representatives from each tribe and the Federal and State agencies. Under the terms of the PA:

- The TCC meets regularly to discuss the projects requiring consultation.
- The TCC routinely reviews the Statewide Transportation Improvement Program (STIP), which gives advanced notification and knowledge on the nature, scope and location of State transportation projects; well in advance of project development.
- The TCC members routinely engage in cross-training on cultural resource and transportation issues and agree to protect confidential spiritual and cultural records from public disclosure.

North Dakota Tribal Consultation Framework

- Programmatic Agreement
- Consultation Committee
- Information Exchanges
- Resource Sharing
- Heritage Manual
- Training

State DOT Assistance.

The North Dakota DOT follows the direction it receives from FHWA. Its defined role is to:

- Provide information summarizing upcoming State DOT projects prior to TCC meetings.
- Meet annually with the consulting tribes individually and with tribes not party to the PA.
- Host the TCC meetings and cover the travel expenses for two representatives from each participating reservation.
- Develop a Cultural Heritage Manual on issues that may hinder government-to-government consultations if not understood.

According to Mark Schrader of the North Dakota FHWA Division Office:

“The tribal consultation method North Dakota uses is going great. It continues to be an effective and efficient consultation process. And we are very satisfied with the results as are the tribes we work with. They are also very pleased with the continued success of this process.”

Practice While You Learn!

- Does the FHWA example in this section help solve the hypothetical consultation problem from [page 3](#)?
- **Ask yourself:** Did the State DOT in the hypothetical problem correctly follow FHWA consultation procedures? Why or why not?

North Dakota Tribal Consultation Programmatic Agreement Honorees, November 2006.



Back row: Byron Olson, Archaeologist Standing Rock THPO; Conrad Fisher, THPO Northern Cheyenne; Mark Schrader, FHWA; Curley Youpee, Director Cultural Resources Department Fort Peck Assiniboine and Sioux Tribes; Franky Jackson, Consultant to Lower Sioux Indian Community; Calvin Grinnell, Cultural Resource Specialist, Mandan Hidatsa and Arikara Nation; Allen Radliff, FHWA; Kent Good, Consultant to NDDOT; Elgin CrowsBreast, Cultural Preservation Program Director, Mandan, Hidatsa, and Arikara Nation.

Front Row: Francis Ziegler, NDDOT Director; Jeani Borchert, NDDOT Tribal Consultation Specialist; Pam Halverson, THPO Lower Sioux Indian Community; Ambrose Littleghost, Cultural Advisor, Spirit Lake Dakota Nation; Richard Bird, Jr., Chairman Economic Committee and Councilman at Standing Rock Sioux Tribe; Scott German, Vice-Chairman, Sisseton Wahpeton Oyate; Shannon Blue, President Lower Sioux Indian Community; Dianne Desrosiers, THPO Sisseton Wahpeton Oyate.

B. State-Tribal Consultation in Transportation.

The Federal laws and regulations, referenced in the text box, require States to communicate, coordinate and cooperate with tribes in the development of statewide long-range transportation plans and State Transportation Improvement Programs (STIPs). When it is determined that tribal lands or properties may be impacted by State actions, States are required to develop and document their mitigation procedures in consultation with the affected tribes.

An Example of State-Tribal Consultation.

One good example of ongoing State-Tribal consultation is in the State of Minnesota. There are eleven federally recognized tribes within the State. Recognizing the independent sovereign status of each, the State, with its Department of Transportation (MnDOT) and in partnership with FHWA, has developed a framework for tribal consultation, which has strengthened over the years.

Federal Laws and Regulations Governing State-Tribal Consultation

23 USC 135 (e)-(g); 23 USC 135 (f) (4)(B)

23 CFR:

450.104

450.208(a)(5)

450.210(c)

450.214(h)(i)

450.216(d)

36 CFR 800

Statewide Consultation Framework.

Minnesota's tribal consultation policies and initiatives are summarized here.

- **Government to Government Transportation Accord.**

In 2002, the federally recognized tribes, the State of Minnesota, MnDOT and FHWA signed an Agreement of Understanding pledging to communicate, coordinate and cooperate in transportation planning and program administration. The agreement is a collaborative approach that brings the parties together for information-sharing; reviews of transportation policy and programs; and decisionmaking. It also offers training and education to promote knowledge and understanding on complex issues.

The Minnesota Accord may be accessed at <http://www.dot.state.mn.us/mntribes/pdf/accord2002.pdf>.

- **Executive Order 03-05.**

Following the signing of the Accord, the Governor of Minnesota issued an executive order in 2003 that affirms the relationship between the State and the Indian tribes within it. The order states:

- State agencies must recognize the legal relationship between the State and Indian governments and accord these governments the same respect accorded to other governments.
- When undertaking policies or programs that directly affect tribes, the State must, whenever feasible, consult with the tribes affected by the proposed action.

Executive Order 03-05 may be accessed at <http://www.dot.state.mn.us/mntribes/pdf/execorder2003.pdf>.

- **Programmatic Agreements.**

Since 2001, six Minnesota tribes have signed agreements with FHWA, with concurrence by MnDOT. This is in accordance with 36 CFR 800 under Section 106 of the National Historic Preservation Act. These agreements pledge to mitigate State transportation impacts on important cultural resources identified by the tribes including, but not limited to, archaeological sites, architecturally significant properties, burial areas, other sacred areas and landscapes. This includes impacts on current and

Indian Tribes in Minnesota

- Bois Forte Band of Chippewa
- Fond Du Lac Reservation
- Grand Portage Band of Chippewa Indians
- Leech Lake Band of Ojibwe
- Lower Sioux Indian Community
- Mille Lacs Band of Ojibwe
- Prairie Island Indian Community
- Red Lake Band of Chippewa Indians
- Skakopee Mdewakanton Sioux (Dakota) Community
- Upper Sioux Community
- White Earth Reservation

Minnesota Tribal Consultation Framework

- Government to Government Transportation Accord
- Executive Order 03-05
- Programmatic Agreements
- Highway Contracting
- Indian Employment Memorandum of Understanding
- State Department of Transportation Tribal Liaison
- Advocacy Council for Tribal Transportation

past tribal properties. The agreements set forth how the consultation process will take place. Although each agreement is unique to each community, the agreement signed with the Bois Forte Band of Chippewa in 2003 is representative of the others. It seeks to:

- Develop a process for consultation,
- Simplify procedural requirements,
- Eliminate unnecessary paperwork,
- Acknowledge the importance of tribes,
- Commit time and energy to the process, and
- Be creative in solving problems.

The agreement may be accessed at <http://www.dot.state.mn.us/mntribes/pdf/boisforte.pdf>.

Currently, FHWA and MnDOT are working to develop programmatic agreements with the remaining six Minnesota tribes. Verbal agreements are in place for consultation with an additional five tribes located in adjoining western States. If a MnDOT project is proposed within any of the Minnesota reservation boundaries, the agency always consults with the tribes on potential cultural resource concerns, whether or not a formal agreement is in place.

- **Highway Contracts with Tribal Governments.**

In 2005, the State legislature enacted Statute 161.368—*Highway Contracts with Tribal Authorities*. This permits the Commissioner of Transportation to enter into agreements with tribal authorities to perform maintenance, design and construction on State highways within tribal lands.

- **Indian Employment Memorandum of Understanding (MOU).**

Also in 2005, after discussions resulting from a State-Tribal transportation summit, MnDOT meetings with the tribes and encouragement from FHWA, a new MOU was forged. It sets State procedures and objectives for employing tribal members in State highway projects on or near reservations. MnDOT and representatives of seven tribes meet annually to agree on which projects to target. Progress is tracked through Tribal Employment Rights Office (TERO) forms submitted by private contractors. The tribes' responsibilities are to:

- Identify tribal members with appropriate skills,
- Recruit tribal members for training,
- Discuss membership requirements with unions, and
- Educate contractors on tribal employment goals.

The MnDOT Policy Position on Indian Employment may be accessed at <http://www.dot.state.mn.us/mntribes/pdf/employmentpolicy.pdf>.

- **State DOT Tribal Liaison.**

There is a full-time tribal liaison to oversee and coordinate the State of Minnesota tribal consultation activities and programs. According to Tribal Liaison Linda Aitken:

“As tribal liaison, I serve as the point of contact between MnDOT and the tribes from the Commissioner’s (of Transportation) Office. Because we receive Federal funds for transportation projects, we have Federal legal requirements to consult with the tribes on issues such as environmental, historical and cultural preservation and sacred site issues.”



Linda Aitken
MnDOT Tribal Liaison

- **Advocacy Council for Tribal Transportation.**

Much of the Tribal Liaison’s coordination work is with the Advocacy Council for Tribal Transportation (ACTT). This is a tribal transportation policy and decisionmaking group with representatives from all of the tribes and co-chaired by tribal members. According to Aitken, much of the State-Tribal consultation policy development and decisionmaking occurs in this forum. The tribe representatives are the only voting members. Non-voting ACTT participants include:

- FHWA-MN: Division Administrator
- BIA: Civil and Highway Engineers
- US Forestry: Transportation Planner
- Michigan TTAP: Assistant Director
- MnDOT: District Engineers
- Minnesota Counties: County Engineer, Cass County
- Minnesota Cities: Project Manager, City of Virginia
- Minnesota Indian Affairs Council: Executive Director

ACTT meets quarterly at rotating tribal reservation locations across the State. Its tribal transportation policy and program review, consultation and meeting activities may be accessed at: <http://www.dot.state.mn.us/mntribes/advocacycouncil.html>

Practice While You Learn!

- Does the State example in this section help solve the hypothetical consultation problem from [page 3](#)?
- **Ask yourself:** Did the State DOT have a tribal consultation framework, policy and personnel in place when undertaking the SR456 extension project. What was missing?

TIP #6: Contact the State DOT in the State or the States where the tribe’s resources and properties are located.

How does the State conduct State-Tribal consultations? Who is responsible? What is the tribe’s role in the process? Keep this handy as it will assist your consultation work and activities!

C. Regional and Metropolitan Tribal Consultation in Transportation.

The Federal laws and regulations, listed in the text box, require federally recognized tribal governments to be consulted in the development of regional transportation plans and programs. In an extension of this, tribes in southern California are working with the San Diego Association of Governments (SANDAG) to strengthen regional-tribal relations.

There are seventeen federally recognized tribes in San Diego County, the area served by SANDAG. The Southern California Tribal Chairmen's Association (SCTCA) is the nonprofit corporation representing nineteen federally recognized tribes in Southern California, including the seventeen in San Diego County. The chairs of the nineteen tribes sit on the SCTCA board.

Since 2004, SCTCA has directly consulted with SANDAG through a government-to-government framework. This framework parallels the relationship between tribes and the Federal government, but with modifications for the regional context. This framework responds to the Federal directive that consultation be both 'timely' and 'meaningful.'

Regional Initiatives.

In the regional context, the government-to-government framework between SANDAG and SCTCA includes several initiatives. As described below, these include periodic diplomatic summits at key milestones or decision points, representation on the SANDAG Board and Policy Committee to influence regional policy in a number of areas, a tribal advisory group that delves in depth into regional tribal issues, and counterpart staff between the two agencies who assist with communications between SANDAG and the tribes.

- **Tribal Summits.**

SANDAG and SCTCA periodically hold joint meetings of their boards to discuss policy issues of interest to both groups. The most recent Regional Tribal Summit was held in 2010 for tribal input into the 2050 Regional Transportation Plan (2050 RTP).

One of the priority actions identified in the summit was to include tribal transportation plans in the 2050 RTP. Six tribes agreed to share their plans. The 2050 RTP includes these plans as an appendix. In letters accompanying the tribal plans, several tribal chairpersons expressed pleasure at the opportunity "to highlight the

Federal Laws and Regulations Governing Regional Tribal Consultation

23 CFR:

450.104

450.202

450.312(i)

450.316(a)(c)(d)

450.322(f)(7)



2010 Tribal Summit Participants

importance of tribal transportation planning in the regional process.” Chairwoman Monique La Chappa of the Campo Band of Mission Indians stated “this is an opportunity for the rest of the region to understand our unique needs and to build a dialogue on how best to cooperate.” Chairperson Allen E. Lawson of the San Pasqual Band of Diegueño Mission Indians of California views the inclusion of the plans as “another step forward in including a tribal voice and tribal needs in the Regional Transportation Plan.”⁶



2010 Tribal Summit Co-chairs: Sam Abed, Mayor of Escondido (left) and Chairman Chris Devers (former) of the Pauma Band of Luiseño Indians (right)

- **Membership on the SANDAG Board and Policy Committees.**

In 2007, SCTCA joined the SANDAG Board as an advisory member. The SANDAG Board sets policies and approves the Regional Transportation Plan and other important regional initiatives. The SCTCA advisory seat on the board ensures tribal interests are considered in decisionmaking and policy.

SCTCA is not a voting member of the SANDAG Board. To be able to join as voting members, State law would need to be changed to list tribes as eligible land use authorities of a MPO board. However, this change would raise tribal sovereignty concerns. If, for example, a tribal representative did vote, the tribe he or she represents would in theory be bound by the Board decision and pay dues to support SANDAG. The advisory seat recognizes that the tribes are diplomatic neighbors and not subject to California state law, but they do have a direct and abiding interest in how regional policies affect them. SANDAG has a similar relationship with Mexico.

SCTCA’s first engagement with SANDAG was through the Borders Committee in 2005. The Committee consults with governments that border the region, including the Mexican government, tribes and neighboring counties. Since joining the Borders Committee, SCTCA involvement has steadily increased. In addition to sitting on the Board as an advisory member, SCTCA now has advisory members on every SANDAG policy committee.

- **Interagency Technical Working Group on Tribal Transportation Issues.**

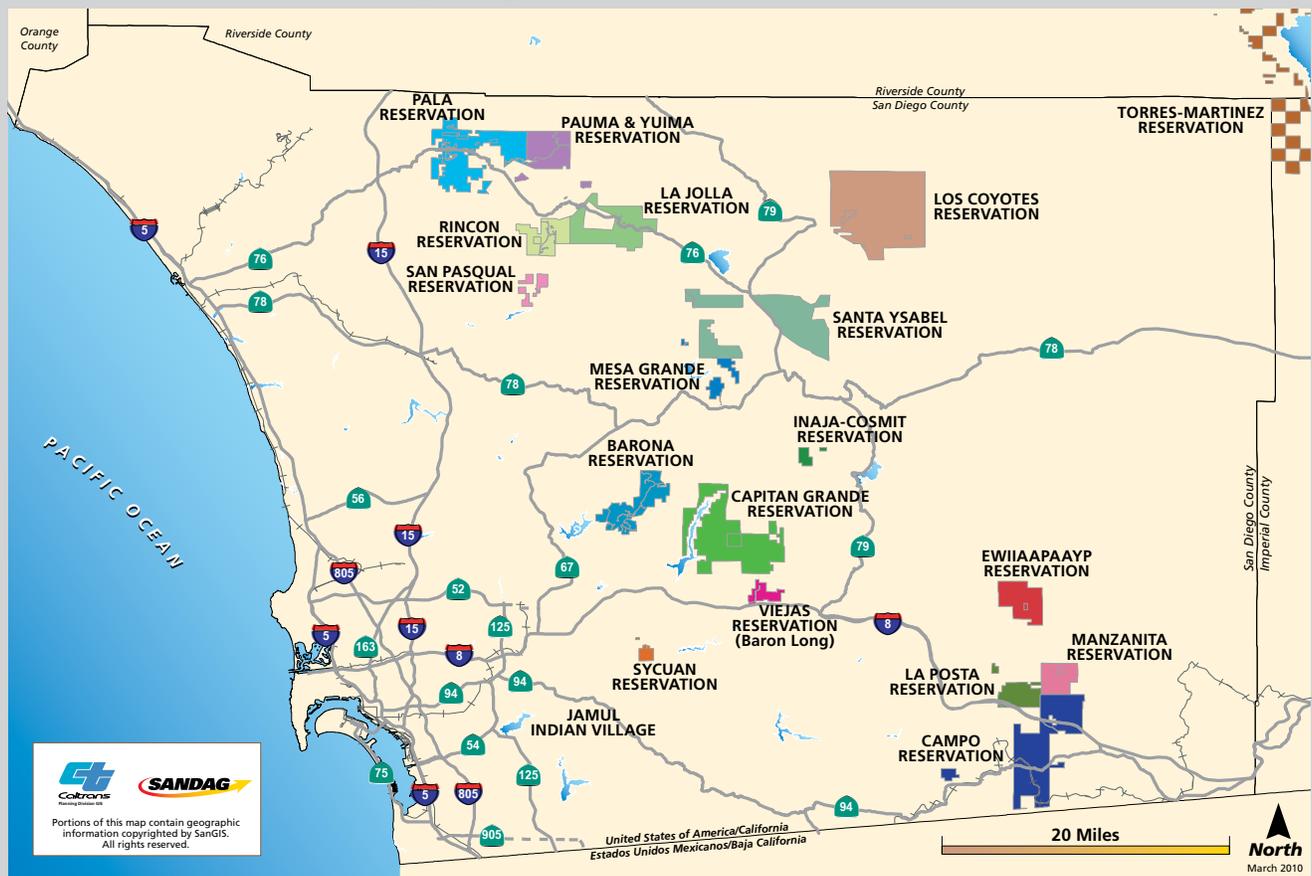
This group is another means for tribal engagement in the regional transportation planning process. Membership is open to all tribes, including those that are not federally recognized. Most tribes in the region actively participate. The working group includes advisory representatives from the California Department of Transportation (Caltrans), the County of San Diego, the Reservation Transportation Authority (RTA), the BIA and regional transit agencies. The group provides an opportunity for tribes to address tribal transportation-related issues with all of the key transportation agencies present. The group reduces the burden on tribes to follow up with different agencies on different projects. The working group is also often the advisory committee for projects affecting multiple tribes, because of the participation and buy-in from the tribes. For example, SANDAG received a Caltrans grant to conduct a Tribal Transit Feasibility Study, and the working group served as the Project Advisory Group for the study.

⁶ Quotations from SANDAG, “2050 Regional Transportation Plan” Technical Appendix 8. Tribal Transportation Plans, October 2011. <http://www.sandag.org/index.asp?projectId=349&fuseaction=projects.detail>

Tribes in the SANDAG Region

- Barona Band of Mission Indians
- Campo Band of Mission Indians of the Kumeyaay Nation
- Ewiiapaayp Band of Kumeyaay Indians
- lipay Nation of Santa Ysabel
- Inaja Cosmit Band of Diegueño Mission Indians
- Jamul Indian Village. A Kumeyaay Nation
- La Jolla Band of Luiseño Indians
- La Posta Band of the Kumeyaay Nation
- Los Coyotes Band of Cahuilla/ Cupeño Indians
- Manzanita Band of Diegueño
- Mission Indians
- Mesa Grande Band of Diegueño Mission Indians
- Pala Band of Mission Indians
- Pauma Band of Luiseño Indians
- Rincon Band of Luiseño Indians
- San Pasqual Band of Diegueño Mission Indians
- Sycuan Band of the Kumeyaay Nation
- Viejas Band of Kumeyaay Indians

Tribal Lands in the San Diego Region



- **Tribal Liaison.**

SANDAG has a tribal liaison on staff to facilitate tribal involvement in the regional planning process. Dr. Jane Clough-Riquelme, the tribal liaison, serves as its point of contact on regional issues. She makes presentations to the SCTCA Board when there are major efforts that will affect many or all tribes, staffs the Working Group, and helps to make sure the individual tribes are aware of plans that may affect them. Caltrans also has a tribal liaison to assist with State DOT-Tribal consultations.

Timely and Meaningful Consultation.

Like other regional, State and local government agencies, SANDAG sends formal notices to tribes to alert them of actions affecting them. These formal notices, however, are not the heart of SANDAG's consultation process. The tribes and the region have sought to build a comprehensive government-to-government framework that respects their sovereignty while providing the opportunity to be involved in the regional decisionmaking process in an ongoing manner rather than simply as part of discrete initiatives, therefore making their engagement more timely and meaningful.

TIP #7: Contact the Metropolitan Planning Organization in your area. How does it conduct Regional-Tribal consultation? Request copies of policies and procedures. Inquire on the role of the tribe. Keep this handy as it will inform your future consultation work!

TIP #8: When looking to build a relationship with another government, talk to people at the top of the organization. Talking to staff is good, but collaboration at higher levels in the organization makes the relationship really work.

V: TOOLBOX, KEY POINTS AND CHECKLIST

TRIBAL CONSULTATION TOOLBOX

The most successful tribal consultations apply the 3 principles and engage in specific activities.

1. Communication

- Presentations
- Data Collection
- Standards and Handbooks
- Newsletters and Bulletins
- Mailings and Response Forms
- Tribal Monitor
- Training



2. Coordination

- Meetings, Summits and Workshops
- Tribal Consortia
- Tribal Liaisons and Coordinators
- Formal Agreements
- Regional and State Conferences

3. Cooperation

- Planning Organizations
- Regional Transit Districts and Coalitions
- Resource Sharing

TRIBAL CONSULTATION KEY POINTS

- Tribal sovereignty is the basis and reason for tribal consultation.
- Federal recognition of sovereignty and the obligation to work with tribes on a government-to-government basis is reserved only for federally recognized tribes.
- FHWA is the lead Federal agency responsible for tribal consultation on transportation projects funded with Federal-aid dollars.
- Federal, State and regional governments must notify and consult with tribal governments if transportation projects they are undertaking impact tribal lands or properties.
- The Federal consultation process takes precedence over State and regional processes. State and regional government-to-government consultation activity however is increasing.

TRIBAL CONSULTATION CHECKLIST

		Date Done
✓	Make a copy of the Federal guiding principles from the <i>1994: Presidential Memorandum: Government-to-Government Relations with Native American Tribal Governments</i> . Keep them handy. They will inform your consultation work.	
✓	<p>Contact the FHWA Division Office in the State or States where the tribe's resources are located.</p> <ul style="list-style-type: none"> • Request information on how FHWA conducts tribal consultation in the State. Keep this for future reference. • Ask if any of your tribe's properties are listed or eligible for listing in the National Registry of Historic Places. Request a copy of these records. If there are errors, inform your tribe's leadership so that the records are current and correct. 	
✓	Contact the State DOT in the State or States where the tribe's resources are located. How does the State conduct tribal consultations? What is the tribe's role in the process? Keep this handy as it will assist your consultation work!	
✓	Contact the Metropolitan Planning Organization in your area. How does it conduct Regional-Tribal consultation? Request copies of policies and procedures. Inquire on the role of the tribe. Keep this handy as it will inform your future consultation work!	
✓	When looking to build a relationship with another government, talk to people at the top of the organization. Talking to staff is good, but collaboration at higher levels in the organization makes the relationship really work.	

You have successfully completed the **Tribal Consultation** training module!

APPENDICES

Appendix A
For Further Reading

Appendix B
Practice While You Learn!—One Possible Answer

APPENDIX A

For Further Reading

- Working in Indian Country, Building Successful Business Relationships with American Indian Tribes, Larry D. Keown, 2010.
<http://www.amazon.com/Working-Indian-Country-Successful-Relationships/dp/1936449005>
- FHWA Glossary of Terms—Planning.
http://www.fhwa.dot.gov/planning/glossary/glossary_listing.cfm
- FHWA Glossary of Terms—Tribal.
http://www.tribalplanning.fhwa.dot.gov/reference_glossary.aspx
- A Guidebook for Successful Communication, Cooperation, and Coordination Strategies Between Transportation Agencies and Tribal Communities, Transportation Research Board, National Cooperative Highway Research Program, Report 690, 2011.
http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_690.pdf
- Identification of Results-Oriented Public Involvement Strategies Between Transportation Agencies and Native American Tribal Communities, Transportation Research Board, National Cooperative Highway Research Program, Web-Only Document 171, 2010.
http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_w171.pdf
- In Their Own Light: A Case Study in Effective Tribal Consultation, North Dakota Federal Highway Administration. http://www.fhwa.dot.gov/resourcecenter/teams/environment/tribal_consult.pdf
- Section 106 Tribal Consultation Q & A's, Federal Highway Administration.
<http://www.fhwa.dot.gov/tribal/topics/historic/tcqa.htm>
- The ACHP Native American Program: Guidance for Federal Agencies, The Advisory Council on Historic Preservation (ACHP). <http://www.achp.gov/nap.html>
- Best Practices in Historic Preservation: Tribal Consultation, National Association of Tribal Historic Preservation Officers (NATHPO), 2005.
<http://www.nathpo.org/publications.html>
- Consultation with Indian Tribes in the Section 106 Review Process—A Handbook, Advisory Council on Historic Preservation, November 2008.
<http://www.achp.gov/regs-tribes2008.pdf>
- Transportation Decisionmaking Series. <http://www.fhwa.dot.gov/hep/tribaltrans/>

Historical References

- The Columbia Guide to American Indians of the Southeast, Theda Perdue and Michael D. Green, November 2001. <http://cup.columbia.edu/book/978-0-231-11570-4/the-columbia-guide-to-american-indians-of-the-southeast>
- The Columbia Guide to American Indians of the Northeast, Kathleen J. Bragdon, February 2002. <http://cup.columbia.edu/book/978-0-231-11452-3/the-columbia-guide-to-american-indians-of-the-northeast>
- The Columbia Guide to American Indians of the Great Plains, Loretta Fowler, June 2003. <http://cup.columbia.edu/book/978-0-231-11700-5/the-columbia-guide-to-american-indians-of-the-great-plains>
- The Columbia Guide to American Indians of the Southwest, Trudy Griffin-Pierce, May 2010. <http://cup.columbia.edu/book/978-0-231-12790-5/the-columbia-guide-to-american-indians-of-the-southwest>

Practice While You Learn! - One Possible Answer

1. Reconnaissance

Your search finds:

- No notifications in tribal records from FHWA, DOT or MPO on the proposed action.
- Tribal records however show there are tribal properties at the proposed SR456 alignment that are sacred grounds. Several are listed in the National Registry of Historic Places.
- When asked, the FHWA and MPO had no record of past notifications to the tribe. The State DOT has no Tribal Liaison and found only one notification sent three years ago to a Tribal Planner who no longer works for the tribe.

2. Literature and Legal Review

Your review finds:

- The proposed housing development is written into the regional comprehensive land use and long-range transportation plans, and was approved by the MPO Policy Board.
- The State DOT STIP shows description, level of Federal funding, start and end dates for the SR456 improvement.
- Federal law states State DOTs and MPOs must consult with tribes for projects that may impact their lands and cultural properties.
- FHWA is responsible for notifying and consulting with federally recognized tribes. This is a Federal responsibility—not the State's.
- Your tribe is federally recognized. Federal consultation and notification procedures were not followed.

3. Report to Tribal Leadership

- Summarize your research and findings.

4. Recommend Strategy

You could recommend:

- Tribal leadership transmit a certified letter to FHWA documenting your findings and requesting FHWA and the State DOT suspend activity and funding for the proposed SR456 extension and any other Federal and State activity supporting the project.
- The letter would include a request for immediate consultation with FHWA.
- The letter would be preceded by a telephone call to FHWA from the Tribal President advising of the tribe's concerns.



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