

Tribal Consultation

A
Guide for Natural Resources Conservation Service (NRCS)
Employees

Natural Resources Conservation Service
NRCS



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Introduction

The United States (U.S.) Government and the governments of American Indians and Alaska Natives have a special “government-to-government” relationship based on the U.S. Constitution, treaties, Federal statutes, court decisions and Executive Branch policies which are legally grounded, as well as based in moral and ethical considerations. Pivotal to this relationship is the trust responsibility of the U.S. Government that was originally established through treaties.

The doctrine of “Trust” has been a major element in the U.S. Government’s relationship with American Indians and Tribes over the last 125 years. The U.S. Federal Government is the “fiduciary” of tribal resources, which means the government must act with good faith and loyalty to promote the best interests of the Indians. Indians are the only U.S. group that has its own agency, the Bureau of Indian Affairs, established in 1824, to coordinate and manage the Indian’s trust assets. There was an era, known as the Self-Determination Period, which was marked by the passage of the Indian Civil Rights Act of 1968. This Act acknowledged that Indian Tribes exercised power in civil matters of all people within the jurisdiction of the Indian Tribe. This period lasted until 1982 when the Self-Governance Era was born and continues to the present. This current period reinforces Tribal Sovereignty and government to government relations between all federally recognized Tribes and the U.S. Government.

In 1988, the Secretaries of the Interior and Agriculture signed a Memorandum of Understanding (MOU) in recognition of their respective departmental responsibilities with American Indian Tribes. The MOU focused on meeting the needs of American Indians by working in a Federal partnership to improve the delivery of services and programs. Agencies within the two departments signed additional agency level MOU’s to plan and deliver USDA programs on Indian lands. The unique trust relationship between the Federal government and American Indian governments now meant that other Federal agencies (e.g., NRCS) also carry a responsibility to ensure that agency actions are in the best interest of Indian Tribes.

How would one know what is the best interest of the Indians and Tribal groups? The answer lies in the “Consultation” process, a government-to-government procedure of seeking, discussing, and considering the views of Native Americans on a wide range of environmental and cultural resource management issues. Consultation is an interaction that goes beyond notification and reporting information. It is an open and free exchange of information and opinions between parties that can lead to mutual understanding. Effective consultation requires Federal representatives to understand the historical circumstances of the Tribes in relationship to the U.S. Government, including past conflicts and wars, and any type of treaty, agreement, declaration, statute, etc. An agency employee’s unfamiliarity and insensitivity of historical circumstances might be enough to derail the important consultation process.

There are a number of legislative and Executive orders that provide instruction on consultation. For example, Executive Order 13175 states:

“.....in order to establish regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications, to strengthen the United States government-to-government relationships with Indian Tribes, and to reduce the imposition of unfunded mandates upon Indian Tribes; it is hereby ordered as follows:

“Policies that have Tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indians 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.”

Clearly stated, this means any time an agency develops a new rule, policy, or directive, or takes any action directly impacting one or more Tribes, the agency must consult with those Tribes early and often during the decision-making process.

It is important to remember that U.S. government activities may have a significant and direct impact on the Tribes. The evaluation of these actions should be determined by the Tribes, not the agency. Some actions or rules that may seem innocent to the agency may be interpreted as culturally onerous or extraordinary to the Tribes.

Relationship building is crucial in Indian country. Success in carrying out Federal programs hinge on the consultation and this process relies on building long-term, mutually beneficial relationships. Informal meetings should occur on a consistent basis prior to formal meetings to establish a “trusting” relationship between the Tribal community and the USDA NRCS. There is not one “correct” way to establish this “trust.” A technique that has generated past success is to build confidence by collaborating on small, easy to achieve projects that meet Tribal communities’ natural resource needs. Previously established successful relationships between mid-level NRCS employees (e.g., the Tribal Liaison, which could be a District Conservationist, area engineer, or another individual), and the Tribal community make it more likely that a major Tribal-NRCS project can be completed. Other ways to build relationships are to attend common events and outreach efforts with Tribes. These events, efforts, and meetings may involve the interaction with Tribal organizations on local, regional, and national levels.

Purpose and Goal of Guidebook

This guide is intended to assist NRCS managers and staff whose duties include coordination and consultation of NRCS programs with American Indian and Alaska Native Sovereign Nations. The goal is to assure that Tribal governments, Tribal communities, and individual Tribal members have a sufficient opportunity for productive participation in planning and resource management decision-making. This guide provides flexible suggestions for determining when, where, what kind, and how much consultation is needed.

Definition of Consultation

As defined in NRCS's General Manual 410, part 405.2, the definition of Consultation is as follows: "The responsibility of the NRCS to seek advice, guidance, and counsel from, and to confer with, American Indian and Alaska Native Tribes, with regard to natural resource conservation issues that may affect a tribe." In addition, Departmental Regulation 1350-001, Tribal Consultation, emphasizes the responsibilities of USDA representatives in the consultation process to include notification to tribes of proposed policy, guidelines, plans, projects, or actions and full consideration of information, input, and recommendations received from tribes, including considerations of waivers of statutory or regulatory requirements.

For the purpose of this guide, consultation is an active process that considers American Indian interests as a necessary and integral part of the decision making process. The goal of consultation is to involve Tribes and individuals so they can identify issues and acceptable management options. Consultation is a government-to-government process of engaging in discussions, and considering views of American Indians on a wide range of environmental and cultural resource management issues.

Consultation should occur prior to taking any action that has a potential impact upon Tribes and their lands. The Consultation process can provide for mutually-agreed upon protocols, timely communication, coordination, cooperation, and collaboration. Consultation should involve American Indian and Tribal representatives for assessing impacts of Federal actions on traditional values, cultural resources, natural resources, income, employment, and treaty issues. It must include final decision-making and action implementation as allowed by law, consistent with a government-to-government relationship.

Establishing and maintaining this process is critical to ensuring environmental, cultural, and historical values are preserved for future generations. Consultation is an ongoing communication process that forms a foundation for a reciprocal trust-building relationship.

Documenting the Consultation Process

Before making decisions or approving actions that could result in changes in land use, physical changes to lands or resources, or changes in access, NRCS managers must determine whether Tribal interests would be affected, observe pertinent consultation protocol, and document how the protocol was followed. In the face of a legal challenge, the consultation record will be on the basis for USDA NRCS to demonstrate that the responsible manager made a reasonable and good faith effort to obtain and consider appropriate Tribal input in decision making.

Levels of Consultation

Because different levels of activity can involve cultural and environmental resources, a flexible approach to consultation should be taken. Generally, there are two levels of consultation with Tribes as defined below:

Formal Consultation:

A formal consultation process needs to occur between decision makers of the State or local Federal agency and senior representatives from the Tribal government. After a relationship has been developed, agreements may be reached that recognize and sanction communications between Federally-designated and Tribal representatives. A key component of this type of consultation is the Federal Government's recognition of Tribal sovereignty and getting the appropriate leaders from both the Federal agency and the Tribal organizations to meet and agree. A mistake commonly made by Federal agencies is having someone of insufficient status directly contact higher status tribal leaders. The State Conservationist or their representative is usually considered the highest status NRCS representative in the State and should represent the Federal government for most conservation issues.

Informal Consultation:

This type of communication frequently occurs between Federal middle-level management and technical staff at meetings, through telephone conversations, and during on-site visits. Although generally not recognized by Tribes as communication on a government-to-government basis, it serves as a useful conduit for sharing information, satisfying certain legal requirements, and developing important trust relationships.

Preparing for the Consultation Process

There is not one correct way for the Consultation process to operate. There are over 560 Federally recognized Indian Tribes, and most have their own separate culture, language, values, traditions, and processes. Based on the Tribal differences, a process that works for one tribe may be ineffective for another. For the consultation process to work effectively, agency representatives need to be flexible and have a solid grasp of the Tribe's history, culture, and leadership. This entails knowledge of the following:

(1) Understand the History of the Tribe and its current and historical relationship to the U.S. Government.

Books, tribal newspapers, Web-sites, and other documents can provide an understanding of the Tribe's historical relation with the U.S. Although this has been discussed earlier in this document, it is worthwhile repeating here. One needs to know about the conflicts, wars, treaties, and statutes, and how these have evolved over the years.

(2) Understand the Tribe's culture.

Culture is the sum total of how a group's world-view influence their behavior. This includes a tribes government structure, food preferences, religion, burial traditions, natural resource values, wealth, family structure [matriarchy/patriarchy], education, etc.

(3) Understand the cultural Do's and Don'ts.

Observation, reading, and discussions with Tribal members can provide one with pertinent information about the culture in order to minimize cultural mistakes or offensive behavior.

(4) Understand the tribal perceptions of time and allow enough time to form an ongoing relationship.

Time and perceptions of time vary across Tribal cultures. The agency time-rhythm is typically based on Western culture (e.g., "Time is money."), which can be categorically different than Indian time. One should be aware of differences and exercise patience when time horizons seem to be out of sync.

(5) Understand the Tribal structure(s) and how it got that way.

The U.S. Congress created the Indian Reorganization Act (IRA) in 1934, during Franklin Delanor Roosevelt's administration. This Act has had a long-term effect on the traditional form of tribal organization and leadership. The Act authorized Congress to appropriate funds annually to formalize Tribal governments on reservations and for land acquisitions. At that time, the Act was voted on and approved by a majority of the Tribes, but the law was used to mold and reform Tribes to pattern their structure after the U.S. Constitution, rather than tribal custom and tradition. For many Tribes, a formal U.S. type of bureaucracy was created because the IRA imposed a centralized democratic form of government on Tribes. This led to the creation of Tribal Departments of Agriculture, Justice, Interior, etc. However, a parallel structure, based on Tribal culture and traditions, has persisted.

(6) Identify the Tribal Leadership and power brokers.

As indicated above, there may be a parallel leadership structure operating in which the formal structure has elected officials and cabinet positions (e.g., Secretary of Agriculture), but a Tribal social structure may produce leaders based on tradition, family lineage, age, spiritual authority, political status, skill-set, or other Tribal considerations. To be effective, NRCS needs to deal initially with the "imposed" form of elected/appointed Tribal officials. However, it is crucial to be aware that greater influence and power may come from these parallel, informal leadership positions. Eventually, these "informal" leaders may need to be involved in the consultation process to ensure that the process is fully successful. However, NRCS should not try to bully its way into meeting with these leaders. It is usually best to wait to be invited before consulting directly with traditional Tribal authorities.

(7) Understand the Tribes decision-making process.

All Tribes do not use an identical process to make decisions. Consequently, it is important to understand how their decision making process operates. Some Tribes have full democracy in which everyone in the Tribe must vote “yes” for a measure or action to be approved. One dissenter can kill a proposed action. Other Tribes may require a simple majority for approval, while other Tribes have representatives who vote on measures. Finally, still others require only the leader/Chief to give approval to a proposed action. Knowledge of the decision making process can cause an agency representative to proceed quite differently with the consultation process.

Once you understand these 7 precursors to the consultant process, it may be time to follow some simple guidelines when making initial contacts, arranging meetings, and following through on the meetings.

Initial Contact

Upon initially contacting a Tribe or group of Tribes, it is a good idea to use multiple methods. Ideally, first make informal contact with key Tribal members, such as subject matter experts or Tribal leaders previous to arranging a formal consultation on a government-to- government basis. *(As a side note, we should allow for either “formal consultation”—when leaders meet with agency decision makers—and “informal consultation”—when employees meet with project leaders from the agency).*

- Most tribes prefer face-to-face meetings over other types of contacts, such as telephone calls or letters. Tribal members mostly view personal visits as polite and respectful methods to make contact.
- When a project, policy change, new rule, or additional item that may require consultation arises, contact the Tribe through personal contact, or a letter to a Tribal leader with copies to relevant staff.
- Follow up with a telephone call to ensure the written contact has been received by the appropriate staff person. Ask for their input in the process. An inquiry should be made to the Tribal staff person as to who should receive any correspondence.
- If a Tribe is impacted by our action, we should ask if they want to be cooperators in the NEPA process that accompanies that action. If they want to be involved, NRCS may still need to do a “formal consultation” with the Tribe.

As stated previously, initial meetings should focus on small project activity that can reach a successful conclusion. Activities such as hoop house design and construction, soil survey interpretation, and outreach education, along with other forms of technical

assistance to Tribal staff/council members, would be good choices for developing successful contracts to begin building a trust relationship.

Arranging the Meeting

- If possible, the meeting should take place on Tribal territory or at a preferred Tribal location.
- The agency should make sure an appropriate decision maker is available and briefed on the purpose of the meeting. While most consultations actually only take about two to three hours, it is a good idea to allow the Tribal community as much meeting time as they need to become comfortable with the presented ideas/concepts. Additional time allows officials to speak with one another, with Tribal project coordinators, and with agency representatives to discuss details before and after the consultation session.
- The group may want to have a facilitator conduct the meeting along with a recorder to take minutes and document decisions, disagreements, and/or follow-up items. Facilitators should be trained or have a knack for effectively running meetings. Facilitators may be an outside party, an agency representative, or a Tribal person. Important characteristics of a facilitator are to be open to all suggestions, non-judgmental, and objective. A facilitator may need to introduce all the key people prior to the meeting and make certain the officials are aware of what they are going to be asked to do at the meeting.
- Prior to the meeting, the facilitator should ensure that information has been provided to the Tribe to enable the Tribe to adequately address the issues. This is a respectful way of indicating to them that their input is valued by the Agency.
- Other groups who may need to be involved in meetings are Tribal Conservation Districts, Conservation Districts, Resource Conservation. Development Councils, the Bureau of Indian Affairs, other Federal agencies, and State Conservation Agencies to deliver services.

Meeting Format

- There is usually no “formal agenda” for these types of meetings. It is a good idea to go into the consultation with the assumption that agency personnel will do more listening than speaking at these first meetings.
- The Tribal Chairperson will normally open the meeting and call on the person designated to say the opening prayer (they will always know the appropriate person in the room—it could be them, a vice chair, or an elder spiritual leader). This is often done in their language. A translation may or may not be provided. Normally, all stand during the prayer out of respect for the Tribe and the concept of a higher being.

- Introductions will likely follow the prayer. Often, introductions are far more than just providing the group with your name, position, and office location. People may include information about themselves and their family, as well as their thoughts about what is going on in their life at the time. Agency participants should follow the lead of the Tribal people who speak before them to judge how much information they should provide. With some Tribes, introductions can be a long process, so it is best to relax and listen.
- After introductions, a Tribal leader may call on someone to speak about the history and, perhaps, the culture of the Tribe. Then, he may ask the Agency representative to speak. If a synopsis of the Tribe's history and culture has not yet occurred, it might be a good idea for the Agency representative to ask the Tribal leader if someone could discuss the history and culture of the Tribe. This also may take some time to go through. A suggested way of asking is:
 - "I would like to know more about your Nation, its history, and your membership, if that is acceptable to you, before we begin."
- Once this is accomplished and the Agency representative is called upon to speak, he/she should thank the Chairperson for their time and words, thank the person who shared the prayer, and thank the person who shared the history. It is then a good idea to give the Tribe a short history of the agency and the program, with emphasis on the agency's cultural values, especially in regard to working with the Tribes. For instance, an agency representative could say, "Our goal is to assist the Tribes to achieve their goals in the areas of managing conservation efforts with plants, soil, air, water, wildlife and cultural management, managing conservation issues, and caring for homelands."
- Next, it may be time to explain the project the agency is present to discuss. In doing so, try to use as many "values statements" as possible; minimizing the amount of administrative language. For example, when meeting with the Tribes about watershed management an agency delegate could say:
 - "It is important to let you know that watershed management is very important to us. Our ultimate goal is to have restored watersheds in the ecosystem and make them available to the Tribe."
 - "We want to ensure these valuable watersheds are restored as they affect all partner lands of the Tribe, State, and Agencies."
 - "The problems we are facing are serious, and they need to be addressed."
 - "Our programs are voluntary, if you choose to address these conservation issues, we will partner with you."
 - "We are listening to the Tribe's concerns. We care about the values the Tribe places on their resources."

- Wait for the Tribe and audience to speak about the issues in front of you. Be prepared for some of the input to be stories that can take some time. Storytelling is an important part of many cultures, and is used to express the person's way of relating concerns or insights. Remember, this can take some time.
- Then engage the Tribal leaders in discussions about concerns and what the agency can do to work with the Tribe to solve issues or minimize impacts. As a general rule, try to say "yes" to anything you can. When "yes" is not an option, try to explain why. Once decisions are made and agreed upon, make sure they are recorded and read back to the group so that all have the same understanding.

Important Information

Remember, NRCS is here to listen and learn, and when people think or talk about animals or other natural resources, they may react emotionally. Remember, the Tribes have very busy schedules. Therefore, it has probably taken an incredible amount of effort to become involved with the agency. Be sure to recognize this and thank everyone for their time and thoughts before ending.

Be aware that at a formalized, very public, Tribal Council meeting, a decision may not be forthcoming on the idea/concepts that were presented during that consultation process. In many cases, council members meet with their respective clan members, communities, Tribal elders, Tribal cultural committees, Tribal Historic Perseveration Officers, economic development staff, etc., before they are personally prepared to take a position and make a decision. This inter-Tribal consultation process can take weeks depending on when those committees, staffers, and elders meet. Hence, a follow-up after the initial consultation meeting is very important.

Follow-up

- It takes time and effort to set up consultation sessions, and it takes just as much effort to continue and maintain a sound relationship with the tribe.
- After the meeting, if leaders have time, it is often a good idea for them and key staffers to arrange a one-on-one meeting to see if there are any "nonpublic" thoughts that need to be expressed. Follow up immediately with letters to the appropriate leaders, which may include: the Chief/Chairperson, the key staff, and Tribal attorney.
- Document the decisions and expected actions. If needed, schedule future meetings, especially between project people and staff.
- It may be a good idea to establish a Memoranda of Understanding with the Tribes, if there is not one already, to establish a formal working relationship and to set up regular meetings between appropriate personnel.

- Keep everyone informed on a regular basis about the progression of the project or subject of the consultation. Whenever possible, this should be done in person with the people designated by the Tribe to work with the Agency.

Real Examples of Consultation Processes

Example 1: Establishing and Maintaining a Strong Working Relationship

Working with Tribes is a very complex, but rewarding challenge. It is necessary to realize that, though there are similarities, each Tribe is unique in its government, political, and power structure. It is not a one size fits all. There are different cabinet structures, election cycles, cultural protocols, and sensitivities. The consultation process has to be adapted to fit the Nation being worked with rather than having the Nation adopt our system.

For example, with larger governments, we may work with the Director of Natural Resources or equivalent. In other, instances we work with the Vice President or Tribal Chair. The key is to understand where the authority lies and with whom. A great deal of energy can be expended only to learn that the individual being worked with does not have the authority to speak or sign for the Tribe. It is also very important to maintain a close relationship with key individuals throughout the Tribal governments.

It is important to establish protocols for a government to government relationship. This means that there are different levels of contact. For example, the State Conservationist may work with the Tribal Chair or Tribal Council to establish protocols and policies for program delivery. The protocols would assign the Assistant State Conservationist for Field Operations to work with a natural resources director or natural resource committee chair. Subsequently, the District Conservationist would be assigned to work directly with a government field representative, Tribal District, or tribal member. The protocols may change according to the Tribal government structure or desires of the Tribal Chair or Tribal Council, typically these protocols can be established through a memorandum of understanding with the Tribal Council and/or Tribal Chair.

In one instance, our field office employees worked with the tribal farm manager to apply for an EQIP contract. The farm manager had been the typical point of contact in the past. Following a change in Administration, the new Tribal Attorney questioned the farm manager's authority to sign. As a result, we received a letter from the Tribal Attorney requesting cancellation of several contracts amounting to several hundred thousand dollars in cost-share assistance. Prior to the cancellation, we met with the Tribal Chair to discuss the issue. It was agreed that the practices included in the contract were needed and beneficial. It was agreed to change the participant from the farm manager to the Tribe and have the Tribal Chair designated as the person with authority to sign. Had we not had a close relationship with the Tribal Chair, we would not have been successful, and the relationship with the Tribe would have suffered.

We have been very successful in working out agreements for cultural resource clearances, space arrangements, as well as, administering conservation contracts. This has been accomplished through incorporating the consultation process into our routine business practices. We strive to keep our

Tribal partners informed of program challenges and opportunities, listening to concerns, promoting outreach efforts, and establishing a close working relation that provides for open communication and discussion.

Example 2: Consultation Takes Time

Starting Out, Outreach:

Get to know your clients, see if you can get invited to speak at a community meeting where you can meet Elders and agricultural producers. Go to tribal community pow-wow's or fairs and get to know others to make contacts. If you know someone who is working with a tribe, see if they will introduce you to their contacts. Remember that he or she may be risking their reputation by introducing you to their friends. Keep the introduction short, and leave agency and pertinent Farm Bill information with them. Once you get to know a council member, it is important to remember that they might sit on a Natural Resources Committee within the tribe, so work with that council member to set up any additional meetings. Never send a letter to Tribal leadership, unless you have a real relationship with the leader of that tribe.

Responses:

After the initial meeting, it may take you a few days before you get a response. Sometimes we may get an immediate response to a need, but not often. You may need to schedule a time to go visit with members of the community and tribal leaders.

Conservation projects:

In most cases within this Tribal government, a request for an application must be made with the Tribal Council and then approved by the Council and Chief or Tribal Leader or Leadership. A resolution must then be posted for the tribe to participate in the application process for the grant or conservation program. You will likely be asked to explain the details to the Tribal Council, and answer any questions about the project at this time. After the resolution is posted and the planning is accomplished, another request is submitted to the Tribal Council for funding approval. You have to spend time working with the Community Council and Tribal Administration.

Tribal Real Estate:

It is important to assist the applicant in getting Tribal land deeds updated at FSA and all forms with the appropriate signatures of authority signed.

FSA /NRCS:

See if FSA has an Established Farm & Tract number. If not, you need to establish contact with the tribal real estate office and see if they can assist you with a copy of the deed for the establishment of a farm and tract number for the property. This may be a simple request, or you may have to have a resolution passed. Some times this means going to the Council and having a resolution posted

resending a past authority if any is on file with USDA, and having a new authority designated as example with a FSA/NRCS (Form 211, 12/08) Power of Attorney Form.

The Potential Project:

Sometimes you may have multiple conservation practices on a single tract of land. Each practice may be funded by a different tribal department or Federal agencies. You do not want the tribe to be out of compliance! Do your homework as not to put the tribe in jeopardy of other existing contracts or projects that have accrued in past administrations. BIA, EPA, USFW, and others may have other projects going on the same tract without your knowledge. Work with the landowner to check with all Tribal and Federal departments for potential problems. This also includes Cultural Resources and Economic Development.

Conservation Success:

Tribal Governments and tribal members have completed many conservation practices within the last few years' great success. Some have been funded in part by Tribal and other Federal cost-share programs or other grants worth millions of dollars. Much of the success comes from those who understand the importance of our government to government responsibility to American Indian Tribes. Consistent consultation is the key to understanding the conservation priority needs of each and every Tribe.

Example 3: Establish Mutually Agreed to Protocols

NRCS has established and signed Protection of Cultural Resource Programmatic Protocol Agreements with four Tribes. These agreements among the States, Tribe, USDA NRCS and the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation are relative to conservation assistance on private and public lands. The Protocol outlines a process for consultation with the Tribes prior to implementing or undertaking any practices that will affect lands and resources, especially within reservation boundaries. The consultation ensures interests relating to natural resources and traditional, cultural, and spiritual places are represented and considered in all phase of conservation planning. The agreements continue to strengthen Agency governments-to-government relationship with the Tribes and build on previously-established conservation partnerships.

The agreements are to facilitate NRCS conservation activities. They signify that NRCS will comply with Federal and State laws and regulations pertaining to cultural resources on all tribal lands. The agreements include all of the restored, ceded land within the 1863 Treaty Boundary, and all other lands held in fee title by the Tribes. NRCS and the Tribes agree that the execution of this Protocol provides for implementation of policies and procedures developed by the Tribes and NRCS. They ensure that the effects of conservation activities on cultural resources within the exterior boundaries of American Indian Reservations are thoroughly considered in the earliest planning stages, and that cultural resource protection is accomplished as efficiently as possible.