



SHPO Guidelines for Tribal Government Consultations in National Historic Preservation Act Decision Making Processes



SHPO Guidance Point No. 8

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INTRODUCTION

In accordance with Sections 106 and 110 of the National Historic Preservation Act (NHPA), Federal agencies have a legal responsibility to consult with Indian Tribes on a government-to-government basis. One of the roles of the State Historic Preservation Office (SHPO) is to advise and assist Federal agencies in carrying out their responsibilities under the NHPA in order to ensure that historic properties are taken into consideration at all levels of planning and development. Specifically, the SHPO can work with Agencies to help them to comply with their obligations under Section 106 to consult with Tribal governments that attach religious and cultural significance to historic properties that may be affected by an undertaking (36 CFR Part 800.2(c)(2)).

36 CFR 800.16(f) defines consultation as: "... seeking, discussing, and considering the view of other participants, and, where feasible seeking agreement with them." Based upon years of working with Agencies, and from meeting with, and listening to, Indian Tribes, SHPO staff have found that the key to productive consultation is to have it be timely, thoughtful, open, and on-going. SHPO believes that Agencies should move away from conceiving of Tribal consultations solely as a "process" that is mandated, and instead try to engage in true dialogues. In other words, consultation includes direct conversations between two or more people in which ideas and opinions are exchanged in a way that is meaningful, thorough, and productive.

By providing guidance on when and how to consult with Indian Tribes, it is the Arizona SHPO's hope that these guidelines will help achieve a successful consultation dialogue that is beneficial to all parties, as well as to the state's cultural resources that are basis of all our concerns.

WHEN TO CONDUCT TRIBAL GOVERNMENT CONSULTATION

1) Integrate Tribal Consultation into Long range, Agency-wide Planning:

Agencies that begin Tribal consultation with the project-specific Section 106 or National Environmental Policy Act (NEPA) scoping process may actually be starting too late. The SHPO encourages Agencies to initiate a dialogue with Indian Tribes long before the Agency has an actual project for which legal compliance is needed. Government-to-government consultation should begin, at the latest, with any Agency's land use planning effort. Most federal agencies, especially those that manage land, have internal planning processes that should include consideration of, and consultation on, Traditional Cultural Places (TCPs), sacred sites, and other issues of concern to Indian Tribes. Agency planning meetings that include discussions with the Indian Tribes can serve as the beginning of the consultation relationship for proposed projects that arise in the future. Agencies can also submit annual work plans directly to Indian Tribes, with specific projects clearly identified. Non-land managing agencies can provide Indian Tribes with information on applicant proposals or plans. This allows

Indian Tribes to identify those projects early in the planning process that are important to them for future dialogue, as well as those projects for which a given Indian Tribe may not feel further consultation is necessary.

2) Hold Regular Consultation Meetings with Indian Tribes:

It is helpful to meet regularly with appropriate Tribal representatives. The SHPO recommends that this should be done at least twice a year, but the actual schedule should be coordinated with individual Indian Tribe and Agency needs. Some Indian Tribes may want more frequent meetings, while other Indian Tribes may feel that it is not necessary to meet on a semi-annual basis. These meetings are important as they provide an opportunity for face-to-face consultation, rather than a situation in which Indian Tribes are reacting to written documents received through the mail. This is critical if an Agency desires to conduct meaningful planning with Tribal input versus ad hoc reactions by Indian Tribes to projects. If an Agency or an Indian Tribe cannot meet in person on a regular basis, it is advisable for the Agency to regularly contact the Indian Tribe by telephone or e-mail. This provides the Indian Tribes with an on-going opportunity to express their needs and concerns within the context of government-to-government interaction. The SHPO has observed that it is often positive to hold meetings with the Indian Tribes in the field or outside of the bureaucratic setting; it is also helpful to host meetings that are sensitive to the specific Indian Tribe's lifestyles with regard to time, travel, and health concerns.

3) For Project-specific Consultations, Begin Early:

At the project level, it is critical that consultation occur at the beginning of project planning so that the Agency and Indian Tribe can determine what level (i.e., type and frequency) of consultation will be necessary. Doing so avoids discovery in the middle of a project that Tribal consultation has not occurred, with the result that a few letters get sent to Indian Tribes as an afterthought. Once this has occurred, it is rare that meaningful consultation can be achieved, and the trust relationship between the Indian Tribe and the Agency may be damaged.

HOW TO CONDUCT TRIBAL CONSULTATION

1) Develop Memoranda of Understanding, Consultation Protocols, or Agreements with Individual Tribal Governments:

The SHPO recommends that Agencies and Indian Tribes jointly agree to and develop a set of consultation guidelines. Many Agencies have written procedures for consulting with Indian Tribes, but guidelines or consultation protocols can also be articulated in a Memorandum of Understanding (MOU), as defined in 36 CFR 800.2(c)(2)(ii)(E), negotiated between the Agency and a given Indian Tribe.

The MOU, consultation protocol, or agreement can be tailored to individual Tribal interests and needs, specifying the types of planning and projects on which the Indian Tribe wants to be consulted, as well as the frequency and format of consultation. Since both Agencies and Indian Tribes are inundated with paperwork, these agreements can structure and streamline the consultation dialogue, as appropriate. The MOU can also discuss the identification and evaluation of TCPs and can include NAGPRA issues, if the Agency and the Indian Tribe so desire. MOUs can also allow for flexibility, as needed by an Agency, given the nature of certain projects. For example, some projects, such as fire suppression activities, may involve loss of life if they are not undertaken immediately. In such cases, the MOU can articulate an agreement on how Indian Tribes and the Agency would like to see these types of situations handled before they actually happen. It is important that MOUs be re-examined regularly, in dialogue with the Tribal government, and updated as needed.

Since these protocols are entirely between the Indian Tribe and the Agency, the SHPO has no oversight role or authority in these agreements; however, the Agency needs to file copies of these MOUs with the SHPO. The SHPO encourages Agencies and Indian Tribes to negotiate MOUs, and has often observed positive communication result when MOUs are executed and implemented.

Many Agencies have already executed successful MOUs with one or more Indian Tribes; Attachment 1 provides a sample MOU between the Coronado National Forest and the Hopi Tribe. The SHPO recommends that Agencies attempt consistency with other Agencies regarding how issues related to TCPs and other tribal concerns are handled, and to work together on these issues, as they can learn from each other about what has worked well and what can be improved.

2) Recognize that there are no Thresholds to Tribal Dialogue:

SHPO is often asked if there are thresholds, or specific types or sizes of projects, for which Indian Tribes should be consulted. We have observed that there is no definitive answer to this question, as even a very small project (such as the development of a one-acre home site) could be located on a sacred site or be a visual intrusion into a cultural landscape that has traditional value to an Indian Tribe. This is where a MOU/consultation protocol or agreement could streamline dialogue by specifying the types of projects and plans for which an individual Indian Tribe wants to be consulted.

3) Identify One Person to Act as the Agency's Liaison with the Indian Tribes:

SHPO has often heard Indian Tribes state that it is helpful when Federal agencies have one person to handle all tribal consultations relating to cultural resource issues; many Agencies have implemented this policy, and Indian Tribes have expressed appreciation for their effort. SHPO has observed that, when an Agency has only one liaison or contact person that works with Indian Tribes throughout the consultation, more meaningful dialogue can result as the effort is potentially less confusing and/or redundant for both the Indian Tribes and the Agency. If an Agency uses an applicant or a private consultant to consult with the Indian Tribes on their behalf, the Agency should manage the process carefully from the very onset in order to fulfill their government-to-government consultation obligations, and to encourage the building of trust relationships directly between the Agency and the Indian Tribes.

4) Determine the Indian Tribes with Whom your Agency Needs to Consult:

Generally, any Indian Tribe that claims cultural affiliation with the project area (i.e., ancestral lands, aboriginal lands, and reservation lands) should be consulted. If an Agency is in doubt whether a specific Indian Tribe should be consulted, it is good practice to contact them as a matter of course. Maps of tribal affinity for the state of Arizona are available from the State Burial Coordinator at the Arizona State Museum (ASM). In addition, Agencies can go to the National Park Service's NAGPRA website at www.cr.nps.gov/nagpra/documents/claimsmap.htm and access a map of judicially established Indian Lands based on information provided by the Indian Claims Commission. The SHPO also provides a list of tribal leadership, Tribal Historic Preservation Officers (THPOs), and cultural resource department contacts. With regard to whom to contact within an Indian Tribe, the SHPO recommends that all correspondence go to both the elected official and the cultural resources coordinator. For Tribal government contact information, Agencies can also go to the Arizona's Commission on Indian Affairs (<http://www.indianaffairs.state.az.us>). It is helpful if appropriate Tribal contacts are listed in an MOU or consultation protocol between the Agency and the Indian Tribe. Agencies should maintain a contact list of Tribal Government contacts and Tribal Cultural Resources personnel; this list should be checked frequently and updated for changes.

5) Determine the Kind of Information that Indian Tribes Need:

It is helpful if Agencies and Indian Tribes can agree on the types of information that each require before Section 106 and NEPA scoping consultations even begin. Again, SHPO encourages the Agency to enter into an MOU or develop a consultation protocol/agreement with the Indian Tribe that specifies the level of consultation needed, as different Indian Tribes may require different types and amounts of information. The type of undertaking and the nature and intensity of effects to cultural resources, especially TCPs, may necessitate that the Indian Tribes need more information than is usually provided by the Agency. The “bottom line” is: Agencies should specifically ask the Indian Tribes what kind of information they would like to review as part of a mutually meaningful consultation process. Keeping in mind that some information provided by Indian Tribes to assist Agencies in their planning may be sensitive, Agencies should develop security procedures and policies for keeping Tribal information confidential.

6) Document all Tribal Consultation Efforts:

For Section 106 compliance purposes, the SHPO and the Advisory Council on Historic Preservation need to know that an Agency has consulted with specific Indian Tribes, the nature of the consultation, and the results of the dialogue. Thus, Agencies need to document their Tribal consultations in writing so that they can provide SHPO and the Advisory Council with a record of these efforts. This documentation should consist of, at a minimum, the name of the Indian Tribe, the name of the Tribal contact, the date of the contact, the type of contact (letter, e-mail, phone call, meeting, field visit, etc.), the purpose of the contact, and the result of the contact (i.e., a summary of any Tribal response). Documentation of an Agency’s Tribal consultation may consist of maps, paper records, recordings, photographs, locational information, and other data that should be maintained as confidential according to Section 106 statute (36 CFR 800.11(c)) and Tribal wishes.

7) Determine Appropriate Time Schedule for Consultation and Tribal Responses:

The SHPO often hears Agencies state that it takes too long for Indian Tribes to respond to their requests for information, especially during the identification stage of an undertaking. As a result of multiple TCP workshops that the SHPO held with Arizona Indian Tribes in the 1990s, Indian Tribes indicated that they need at least 60-90 days to review and comment on submittals. By statute, THPOs only have 30 days to respond to a request for a review of a finding of effect or a determination of eligibility as stated in the Section 106 regulations (800.3(c)(4)). Although Indian Tribes need to be as responsive as they can in order to help ensure that meaningful dialogue can occur, Agencies should remember that the usual 30 day deadline that applies to SHPOs and THPOs with regard to findings of effect and determinations of eligibility does not apply to Indian Tribes that are not THPOs. Also, many Indian Tribes do not have adequate staff to process the large numbers of consultations that they receive and often need the extra time. Additionally, Indian Tribes may need to send their review comments through their Tribal Councils, a process that may also take additional time. Time constraints such as these are another reason why consultation should begin early in the planning stages of a project. Meaningful consultation works both ways; however, and for Indian Tribes to have their concerns regarding cultural resources adequately considered during project planning, they also need to be as timely as possible in their response to the Agency’s consultation.

CONCLUSION

Government-to-government Tribal consultation should be seen as a dialogue that has a beginning, but does not have a definitive end, as it represents a formal, continuing relationship between the Indian Tribe and the Agency. Ideally, consultation should be continuous, beginning well before the life of a specific project and

pervading the Agency's internal management and planning framework. Thus, Tribal consultation should not only be project-specific; in fact, it is best to establish a meaningful working relationship with an Indian Tribe first, independent from a specific project. Agencies need to approach Tribal consultation with the mindset that they are seeking advice on how to accomplish an activity and that the Indian Tribe is a partner in the decision-making process. One of the best ways to accomplish this goal is to develop formal consultation agreements (such as MOUs or formal protocols) with individual Tribes that contain a mutually meaningful framework for talking about cultural resources that are important to their community.

Additional References

For further information on Tribal consultation practices:

- 1) The National Association of Tribal Historic Preservation Officers' 2005 document entitled: "Tribal Consultation: Best Practices in Historic Preservation." This document can be downloaded from their website at www.nathpo.org/projects.html.
- 2) The Advisory Council on Historic Preservation also provides guidance in their "Native American Program: Guidance for Federal Agencies" at www.achp.gov/nap.html.

Prepared by SHPO Staff/AVH

Approved by James Garrison, State Historic Preservation Office

Attachment #1
Example of Memorandum of Understanding

(Executed January, 2001)

MEMORANDUM OF UNDERSTANDING
Between the
USDA FOREST SERVICE
CORONADO NATIONAL FOREST
and the
HOPHI TRIBE CULTURAL PRESERVATION OFFICE

This Memorandum of Understanding (MOU) is entered into by and between the Hopi Tribe Cultural Preservation Office and the United States Department of Agriculture, Forest Service, Coronado National Forest.

I. Purpose:

The purpose of executing this MOU is to formalize the relationship between the Hopi Tribe Cultural Preservation Office and the Coronado National Forest that has previously existed on an informal basis.

Upon its acceptance by both parties, it establishes the responsibilities through which the Forest Service will carry out consultations with the Hopi Tribe under the National Forest Management Act (NFMA), National Environmental Policy Act (NEPA), the Archaeological Resources Protection Act (ARPA), the National Historic Preservation Act (NHPA), the American Indian Religious Freedom Act (AIRFA), The Native American Graves Protection and Repatriation Act (NAGPRA), Endangered Species Act, Bald Eagle Protection Act, the Migratory Bird Act, Executive Order 13007 - Indian Sacred Sites and Executive Order 13084 - Consultation and Coordination with Indian Tribal Governments.

This MOU also establishes areas of mutual interest and concern that can be pursued jointly to maintain the cordial relationship between the Hopi Tribe and the Coronado National Forest.

It is mutually understood that financial resources may be required to conduct consultations. The Hopi Tribe Cultural Preservation Office and the Coronado National Forest agree to work in good faith to identify such resources.

II. Statement of Mutual Interest and Benefit:

Cooperation between the Coronado National Forest and the Hopi Tribe will strengthen the government to government relationship and foster a shared stewardship approach to managing public land.

III. The Coronado National Forest Shall:

- A. Designate a person to serve as a liaison with the Hopi Tribe.
- B. Approximately twice a year, send a copy of the Coronado National Forest's National Environmental Policy Act (NEPA) schedule of proposed actions calendar identifying the nature and location of proposed Forest projects to the Tribal Chairman, with a copy to the Cultural Preservation Office.
- C. Schedule a meeting on an annual basis (usually in May or June) between the Coronado National Forest and Cultural Preservation Office to review the National Environmental Policy Act calendar schedule of proposed actions and other relevant projects of particular concern to the Hopi Tribe. Project-specific scoping letters will also be sent to the Tribe according to schedule.
- D. Allow access to shrines and resources on the Forest to Hopi people for traditional uses of natural and wildlife resources, including the collection of medicinal and ceremonial plants from traditional use areas. Such access is assured through the American Indian Religious Freedom Act and Executive Order 13007 (Sacred Sites), provided the activity is in compliance with other laws and regulations (Forest Service Manual 1563 and the Code of Federal Regulations). Hopi individuals are encouraged to obtain a free-use permit and information on local availability and access by contacting the Coronado National Forest Tribal Liaison who will consult with the Hopi Tribe, Cultural Preservation Office, on a case by case basis on visits to culturally sensitive areas. Coronado National Forest will afford Hopi people privacy in their access and use of shrines and resources on the Forest.
- E. Maintain, as confidential, records, maps, photographs, and other information about places significant to the Hopi Tribe, including prehistoric or historic resources. The confidentiality of these places is assured through exemption number 3 to the Freedom of Information Act, the Archeological Resource Protection Act, and the 1992 Amendments to the National Historic Preservation Act. This information shall not be made available to the general public without the prior approval of the Hopi Cultural Preservation Officer. The Tribal Liaison and Forest Archaeologist shall ensure the location of such places remain confidential, except on a need to know basis to Forest officers charged with the protection of these places. The Coronado National Forest will work with the Hopi Tribe to establish an agreement on guidelines to ensure confidentiality of this information.
- F. Provide copies of all archaeological reports, other than project clearance reports (unless requested), to the Hopi Tribe.
- G. Send copies of proposals necessary for the issuance of Archaeological Resources Protection Act permits to the Hopi Tribe for review and comment. Additional topics of interest to the Hopi Tribe may be identified at that time for incorporation into the proposed archaeological project.
- H. Maintain a policy of prohibiting the purposeful excavation of American Indian human remains for educational purposes such as research or field schools.
- I. Notify the Hopi Cultural Preservation Officer as soon as possible of any emergency or discovery situations involving human remains so that Native American Graves Protection and Repatriation Act consultations can be made to determine appropriate disposition of the remains.

- J. Consult with the Hopi Tribe to reintroduce or foster conditions in the Forest that encourage natural regeneration of plants that have traditional importance to the Hopi, in compliance with applicable environmental laws and regulations as specified in the Code of Federal Regulations.
- K. Refer independent researchers to consult directly with the Hopi Tribe on matters specific to the Hopi people.

IV. The Hopi Tribe Shall:

- A. Designate the Director of the Hopi Cultural Preservation Office as primary Hopi Liaison with the Coronado National Forest.
- B. Arrange annual review and consultation meetings (usually in May or June) between the Hopi Cultural Preservation Office and Coronado National Forest to discuss interests and concerns about proposed Coronado National Forest projects to determine an appropriate course of action.
- C. Through the Director of the Hopi Cultural Preservation Office continue to work with knowledgeable people to identify issues, locations, and areas of special importance to Hopi people that may be located on the Coronado National Forest and work with the Forest Liaison to physically locate these places on the Forest. All Hopi information shall be subject to exemption number 3 of the Freedom of Information Act, the Archaeological Resources Protection Act, and the 1992 Amendments to the National Historic Preservation Act to protect confidentiality.
- D. Assist the Coronado National Forest in developing and presenting orientation, educational, and interpretive material as it relates to the Hopi people.

V. The Coronado National Forest and the Hopi Tribe Shall:

- A. Through the Cultural Preservation Officer and Coronado National Forest Heritage Resource Program, work with traditional Hopi people to determine topics of interest (e.g. clan migration traditions) that may be learned through the use of ethnographic, ethnohistoric, and/or archaeological research. This research also includes, but is not restricted to the examination of petroglyphs, architecture, traditional access routes and trails, etc.
- B. Through the Cultural Preservation Officer and Coronado National Forest Heritage Resource Program, work with Hopi young people to establish internships at the university level. Internships can function in assistance to and implementation of Provision A (above), or in the Coronado National Forest Heritage Resource Program.
- C. Ensure that archaeological projects conducted on the Forest make an effort to address these topics in the final project, as necessary and appropriate.

VI. IT IS MUTUALLY AGREED AND UNDERSTOOD BY AND BETWEEN THE SAID PARTIES THAT:

1. PARTICIPATION IN SIMILAR ACTIVITIES. This Instrument in no way restricts the Forest Service or the Hopi Tribe from participating in similar activities with other public or private agencies, organizations, and individuals.
2. RESTRICTION FOR DELEGATES. Pursuant to Section 22, Title 41, United States Code, no member of, or Delegate to, Congress shall be admitted to any share or part of this Instrument, or any benefits that may arise therefrom.
3. NON-FUND OBLIGATION DOCUMENT. This Instrument is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement or contribution of funds between the parties to this Instrument will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This Instrument does not provide such authority. Specifically, this Instrument does not establish authority for noncompetitive award to the Hopi Tribe of any contract or other agreement. Any contract or agreement for training or other services must fully comply with all applicable requirements for competition.
4. MODIFICATION. Modifications within the scope of the Instrument shall be made by mutual consent of the parties, by the issuance of a written modification, signed and dated by both parties, prior to any changes being performed.
5. TERMINATION. Either party upon mutual agreement, in writing, may terminate the Instrument in whole, or in part, at any time before the date of expiration.
6. COMPLETION DATE. This Instrument is executed as of the last date shown below and expires no later than January 1, 2005; at which time it is subject to review, renewal, or expiration.
7. PRINCIPAL CONTACTS. The principal contacts for this instrument are:

Mary M. Farrell, Forest Archaeologist
Coronado National Forest
300 W. Congress
Tucson, AZ 86046

Leigh J. Kuwanwisiwma, Director
Cultural Preservation Office
Hopi Tribe
P.O. Box 123
Kykotsmovi, AZ 86039

IN WITNESS WHEREOF, the parties hereto executed this MOU as of the last date below:

John M. McGee
Forest Supervisor
Coronado National Forest

Date

Wayne Taylor Jr.
Chairman
Hopi Tribe

Date