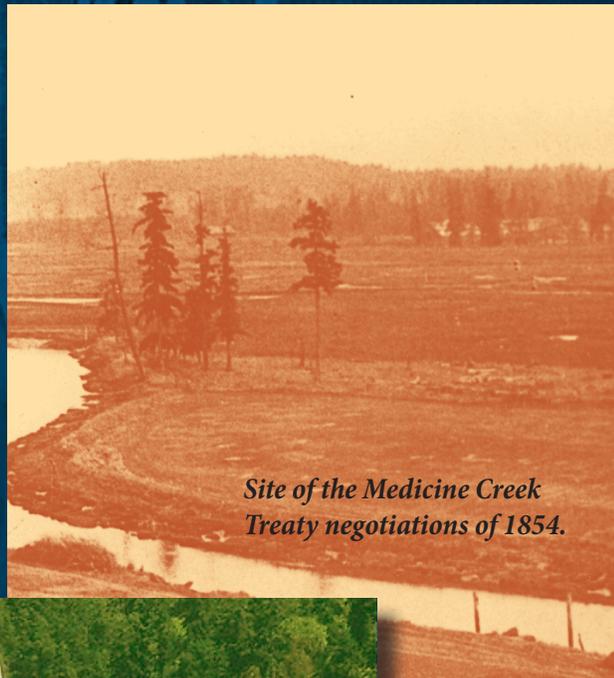


WSDOT Model Comprehensive Tribal Consultation Process for the National Environmental Policy Act



*Site of the Medicine Creek
Treaty negotiations of 1854.*



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U.S. DEPARTMENT OF
TRANSPORTATION

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February 8, 2008

TO: Environmental Staff and Project Teams

FROM: Paula Hammond, Secretary of Transportation, WSDOT
Dan Mathis, Washington Division Administrator, FHWA

SUBJECT: Endorsement of Model Process for Comprehensive Tribal Consultation during
Environmental Review

We are excited to announce that the WSDOT Model Comprehensive Tribal Consultation Process for the National Environmental Policy Act is currently available for your use!

This guidance itself is a product of a cooperative effort – led by WSDOT staff from Environmental Services and the Tribal Liaison Office; and, developed in consultation with the tribes, FHWA, the Attorney General's Office and the former Transportation Permit Efficiency and Accountability Committee. We appreciate the more than two years of work that went into creating this guidance and we thank everyone who participated in the consultation meetings and reviewed the draft document.

FHWA and WSDOT comply with a number of consultation laws and executive orders throughout the environmental review stage. Our goal was to design a comprehensive consultation process that incorporated these requirements into one process (rather than many) for a more thorough and holistic review. We also wanted the model to demystify the relationships among some of the more complex requirements (wherever possible!). While we believe we have created a consistent consultation process, we recognize that each tribe and project is unique and that some flexibility is essential. Thus, this model includes the minimum recommended consultation activities for each type of project under NEPA review (CE, EA, EIS). It also includes answers to over 50 frequently asked questions and 12 key implementation tools including template letters, consultation plans and sample agreements.

The model is available on WSDOT's Environmental Services Office webpage:
<http://www.wsdot.wa.gov/environment/tribal> Hard copies are also available: Call (360) 705-7491.

We encourage you to begin using this model process. Environmental Services and the Tribal Liaison Office will deliver informational training in each region this spring. If you have questions about the model, please contact Megan Beeby at (360) 705-7494, or Carol Lee Roalkvam (360) 705-7126. If you have general questions, please contact Colleen Jollie (360) 705-7025.

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Chapter 1 Introduction

The Washington State Department of Transportation (WSDOT) maintains government-to-government relations with 34 federally recognized tribal governments. Twenty-nine tribes are located in Washington State; the additional five tribes have reservations outside the state, but have traditional homelands and / or treaty rights within the state.

WSDOT's transportation projects primarily seek to improve the safety and capacity of transportation infrastructure and extend their use. WSDOT's environmental policy guides project planning and extends to construction, maintenance and operation of systems and facilities. Through the environmental review process, WSDOT project teams seek ways to avoid, minimize and appropriately mitigate adverse environmental impacts. The environmental review stage of a project occurs in conjunction with the conceptual engineering and design of the project and is thus an optimal time to consult with tribes.

WSDOT project teams comply with a number of federal, state and tribal consultation requirements including, but not limited to the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), the Centennial Accord between the Federally Recognized Tribes in Washington State, the New Millennium Agreement, WSDOT Executive Order 1025.00 on Tribal Consultation, and the WSDOT Centennial Accord Plan. Project teams also consider the effects projects may have on tribal treaty rights. See Chapter 2 for a more in depth description of these consultation requirements. While each of these laws and policies have distinct requirements, the

Consultation during planning

Prior to NEPA and project design, consultation can and should occur during advanced planning studies including the Washington Transportation Plan, Route Development and Corridor Plans.

consultation process to address tribal natural and cultural resources issues is largely conducted under the broader NEPA umbrella. Successful consultation helps WSDOT achieve its mission to deliver transportation projects on time and on budget.

This consultation model was created to guide WSDOT project teams to use on federal-aid transportation projects in which the Federal Highway Administration (FHWA) is the lead federal agency.

What is tribal consultation and who do we consult with?

Each law and executive order defines tribal consultation a little differently even though the principles of consultation are virtually the same. The WSDOT Executive Order 1025.00 on Tribal Consultation defines it as “respectful, effective communication in a cooperative process that works towards a consensus, before a decision is made or action is taken.”

The Implementation Guidelines for the New Millennium Agreement states that consultation requires an enhanced form of communication between parties that emphasizes trust and respect. It requires a shared responsibility that allows an open and free exchange of information and opinions among parties that leads to mutual understanding. Consultation with tribal governments is an endeavor, which is uniquely a government-to-government process. In this government-to-government consultation process, the goal is to reach consensus and understanding during decision making. Consultation is undertaken with a desire to reach a mutually agreeable understanding and decisions that acknowledge the broad interests within the state, including the interests of both state and tribal governments. WSDOT will engage tribes in good-faith consultation, recognizing that agreement cannot always be reached.

In this document, we will generally refer to tribal governments as tribes, and their governing bodies as tribal councils. The leaders of these governing bodies will be referred to as chairs or chairpersons. However, it is important to recognize that

What is the New Millennium Agreement?

In 1999, tribal leaders and state elected officials reaffirmed the Centennial Accord Agreement and agreed to develop a communication process for enhanced intergovernmental relations.

View the agreement at
www.goia.wa.gov

tribes are independently organized and governed, and each has an official name for the tribe or community. These may include nomenclature such as Tribe, Tribes, Nation, Confederacy, or Indian Community. Most tribes have an elected body that makes decisions on behalf of the tribe. Examples include tribal councils, boards of directors, and tribal senates. Many tribes also have committees or commissions that have oversight or decision making authority over specific issues such as cultural resources or fishing issues. In many cases the members of the individual tribes comprise body known as a general council or general membership that has oversight on certain council decisions. Even though we use general terms in this guidance, it is important for WSDOT project teams to observe the specific organization and terminology of the tribes they work with.

Why and how did we create this guidance?

In recent years, WSDOT has diligently worked to improve its tribal consultation policies and procedures. In 2001, the Tribal Liaison Office was moved from a part time position in the planning office to an executive level position in the Government Relations Office. In 2003, WSDOT issued a Tribal Consultation Policy and implementing Centennial Accord Plan.

We created this guidance for a number of reasons. In 2004, the Washington State Legislature directed the Transportation Permit Efficiency and Accountability Committee (TPEAC), of which WSDOT was a member, to develop a “model NEPA tribal consultation process for federal transportation aid projects related to the preservation of cultural, historic, and environmental resources.” Although it is a critical piece of WSDOT’s decision making process, NEPA and its implementing regulations lack specific procedures on how to conduct consultation with Tribes. Furthermore, many WSDOT project teams experienced challenges when they attempted to consult with tribes and the need for additional guidance

What was TPEAC and what did it do?

The Transportation Permit Efficiency and Accountability Committee (TPEAC) sought to improve the permitting process for transportation projects while maintaining high standards for environmental protection. The committee met for five years from 2001 -2006, and brought together state legislators, representatives from state and local agencies, tribes, business associations, the construction industry, and environmental and labor interests.

Check our website for more information on TPEAC and how this work continues:

<http://www.wsdot.wa.gov/environment/streamlineact/default.htm>

or the Office of Regulatory Assistance at:

<http://www.ora.wa.gov/spotlight%2Dseries/tpeac/index.htm>

emerged. WSDOT also has a number of complex projects that necessitate innovative approaches to consultation.

WSDOT environmental and tribal liaison staff initiated a statewide effort to develop a tribal consultation process for NEPA. Beginning in April 2005, WSDOT met with the natural and cultural resource staff of 27¹ of the 29 federally recognized tribes in Washington. The purpose of these meetings was to discuss consultation protocols, identify gaps in the existing consultation process and gather suggestions from the tribes on how to improve consultation.

We created this NEPA consultation process and guidance based on those suggestions and the experiences of WSDOT staff on projects. In addition to staff suggestions, this process incorporates previously developed guidance in the Centennial Accord Plan, Millennium Agreement and Implementation Guidelines and the Washington State Ferries Tribal Handbook, among others.

Who is this guidance for?

This guidance is targeted to WSDOT staff and consultants who work on projects requiring NEPA review and have FHWA as the lead federal agency, including any federally funded local agency transportation projects administered through the Highways and Local Programs Office. Much of the guidance is also relevant for WSDOT policy staff and others who work on projects before and after the environmental review stage.

What's included in this document?

This document is intended to be a practical, “hands on” reference for project teams. It is organized into five separate parts.

- Chapter 1 introduces the history and purpose of the NEPA consultation process and guidance document.

¹ Scheduling conflicts prevented meetings with the remaining two tribes in Washington. Consultation protocols for those tribes were discussed and officially provided by the tribe in letters.

- Chapter 2 describes the goals, principles, legal and policy basis for tribal consultation.
- Chapter 3 focuses on *when* to consult with tribes and outlines the minimum recommended consultation activities for projects under each NEPA classification.
- Chapter 4 focuses on *how* to consult with tribes and includes frequently asked questions and other guidance on consultation with tribes.
- The Appendices contain tools for consultation and additional reference materials.

What's NOT included in this document?

- Governor's Executive Order 05-05 on Archaeological and Cultural Resources
- Consultation process for projects for which FHWA is NOT the federal lead, including Federal Transit Administration (FTA), Federal Aviation Administration (FAA) and Federal Rail Administration (FRA)
- Consultation process for State Environmental Policy Act (SEPA) only projects.
- Non-tribal related compliance requirements for NEPA, Section 106 of the National Historic Preservation Act, and other federal laws.

Chapter 2 Goals, Principles, Legal and Policy Base for Tribal Consultation

This chapter describes the goals of this consultation process as well as federal, state and tribal laws and policies that helped shape it. The list of laws and policies described below are by no means complete, but includes some of the major requirements. It does not include descriptions of laws, such as the Endangered Species Act, for which other federal agencies formally consult with tribes.

1 Goals of the National Environmental Policy Act (NEPA) tribal consultation process

After meeting with representatives from 27 tribes and WSDOT, the WSDOT Environmental Services Tribal Liaison articulated the following goals for this consultation process:

- To create durable intergovernmental relationships with tribes in Washington State based upon mutual respect that promotes coordinated transportation partnerships in service of all our citizens (WSDOT EO 1025.00).
- For WSDOT project teams to take a comprehensive approach to consultation by providing early and on-going consultation opportunities to each affected tribal department during the NEPA review stage of WSDOT projects.
- To work with tribes to identify issues and concerns as early as possible in NEPA review. To attempt to resolve issues before finalizing the NEPA process with the issuance of a

Finding of No Significant Impact (FONSI) or Record of Decision (ROD).

- To avoid project budget impacts and schedule delays by consulting with tribes early to resolve issues.
- When significant adverse impacts to tribal treaty or cultural resources are identified, the project proponents will consult in an effort to reach a consensus on project alternatives, modifications or other specific measures that avoid, minimize or mitigate adverse impacts to tribal treaty or cultural resources in a manner that is compatible with the mutual interests of the tribes, WSDOT, FHWA and the objectives of the project.
- While keeping in mind the unique circumstances of each project, WSDOT will attempt to consistently apply the fundamentals of this consultation process across the different WSDOT regions and offices.

Why doesn't this process focus review under the Washington State Environmental Policy Act (SEPA)?

The majority of WSDOT projects are "federalized" in that they include federal dollars or approvals. WSDOT generally approves / adopts the NEPA environmental documents to comply with SEPA.

2 Principles of Consultation

Key Commitments of Government-to-Government Relations

WSDOT is committed to improving and maintaining effective government-to-government relations with tribes in Washington State. While successful intergovernmental communication and cooperation is not a guarantee of agreement on every issue, it ensures a durable, effective working relationship to the benefit of all of the citizens of Washington State. In the 1999 Millennium Agreement, the state and tribes agreed to the following:

- Work directly with each other in a government-to-government fashion, rather than as subdivisions of other governments.
- Take appropriate steps to remove legal and procedural impediments to working directly and effectively with each other's governments and programs.

- Endeavor to assure that each other's concerns and interests are considered whenever their actions or decisions may affect the other's governments or programs.
- Encourage cooperation between tribes and state to resolve problems of mutual concern.
- Work with federal agencies that have related responsibilities.

Guiding Principles of Consultation between tribes and the State of Washington

The Centennial Accord (signed in 1989) and the New Millennium Agreement (signed in 1999) establish the basic framework and provide the general foundation for tribal/state relations. However, at the 1999 Tribal/State Summit held in Leavenworth, Washington, tribal and state elected officials agreed that a well-delineated communication process was needed in order to provide for a structure to "operationalize" the Accord into a day-to-day working relationship. Tribal and state leaders developed the following "Implementation Guidelines" for state and tribal governments to follow:

1. Commitment to Consultation. The state and tribes, and their agencies and departments, commit to consulting with each other on matters that directly affect the other.
2. Communication and consultation is a two-way street. Communication between tribal governments and state agencies should be direct and involve two-way dialogue and feedback. Face-to-face meetings between the appropriate tribal and state policy and/or technical level staff can increase understanding of any proposed actions and enhance the development of effective outcomes and solutions. While face-to-face meetings are generally desirable, phone calls, correspondence and other methods of communication should also be utilized.
3. Build upon already established and on-going relationships between tribal/state officials. Formation of specific actions, policy and program development can be more productive if conducted within the framework of an on-going

relationship. Additionally, since consultation may demand significant use of time and resources of many individuals, this on-going relationship will assist in best utilizing these resources for all parties.

4. State governments are assuming greater responsibility under the federal government's policy of increased "devolution" of programs. "Devolution" is the delegation of authorities or duties to a different level of government. Before the delegation of these programs, the tribes worked directly with the federal administrators on issues of concerns to them. The tribes have continuing interests in many of these delegated programs, and the tribal interests should be considered in the administration of these programs by the state.
5. Issues that require consultation should be identified as soon as possible in order to involve both parties early on in the process. The need for consultation and who makes the determination may be difficult to define in all cases and will vary among the governments. Consultation can be initiated by either a tribal government or state agency. As a general rule, any decision or action which would directly impact or involve tribal governments, its land base and/or operation of its programs requires consultation with those tribal governments. To ensure sufficient time for input before decisions are made and actions taken, requires early involvement of all parties affected by those actions.
6. State/Tribes should make every effort to respond to and participate in the consultation process. State/Tribal governments should strive to ensure that appropriate communication and response is provided to any request for consultation. If there is no response to an initial request to engage in consultation, it should not be assumed that the state or tribes have no interest in participating in this process. State/Tribal governments and organizational structures will vary. Good faith efforts should be undertaken to involve affected governments.

7. Parties should ensure that consultation occur through the interaction of officials with comparable governmental stature and authority. In order to maintain the government-to-government relationship, tribes and state agencies are encouraged to send policy officials to represent those interests which require joint final decision-making on key policy issues. However, tribes or state agencies may identify program and/or technical staff to attend meetings when appropriate, depending on the nature of the issue, and where similar representation is anticipated.
8. Honesty and integrity must be maintained by all parties in the consultation process. Mutual respect and trust are fundamental elements in establishing a good consultative relationship. Tribal and state officials should be open with information that may be beneficial or critical to making a decision or developing a position.

3 Legal and Policy Base for WSDOT – Tribal Relations

Centennial Accord and Millennium Agreement

In 1989, the State of Washington and the federally recognized tribes signed the "Centennial Accord between the Federally Recognized Tribes in Washington State and the State of Washington." The Accord provides a framework for a government-to-government relationship, and implementation procedures to assure execution of that relationship. The Centennial Accord calls for state agencies and tribal governments to develop procedures by which a government-to-government policy will be implemented.

In 1999, ten years after signing the Centennial Accord, state and tribal leaders held a summit in Leavenworth, Washington to reaffirm their commitment to the Accord and establish enhanced goals and guidelines for intergovernmental relations. The summit concluded with a signed *New Millennium Agreement*. Its principles are described in the "Key Commitments to Government-to-Government Consultation" and "Guiding Principles of Consultation" sections above.

Where can I get a copy of the Centennial Accord and Millennium Agreement?

Copies of the agreements and implementing guidelines are available on the Governor's Office of Indian Affairs website: www.goia.wa.gov

On April 28, 2005 Governor Christine Gregoire issued a proclamation reaffirming the principles of the Accord and Millennium Agreement.

WSDOT Executive Order 1025.00 on Tribal Consultation and WSDOT Centennial Accord Plan

To comply with the requirements of the statewide Centennial Accord and Millennium Agreement, WSDOT Secretary Doug MacDonald signed Executive Order 1025.00 on Tribal Consultation on February 19, 2003. The Executive Order describes WSDOT’s commitment to government-to-government consultation with tribes. It directs WSDOT employees to conduct Tribal consultation with Tribes who have ancestral homelands within the state boundaries, including those with reservations located outside of the state, “on all decisions that may affect Tribal rights and interests.”

The Executive Order defines consultation as “respectful, effective communication in a cooperative process that works toward a consensus, before a decision is made or an action is taken.” It further states that:

“Consultation means more than simply informing affected Tribes about what the department is planning to do. WSDOT acknowledges that consultation is a process, not a guarantee of agreement on outcomes. While dedicated to implementing constructive consultation practices, the department hopes to go beyond issue-specific consultation. The goal is to achieve mutually beneficial priorities, programs and interests.” The Order also describes the specific responsibilities of WSDOT’s Tribal Liaison Office and Departmental Employees.

In March 2003, WSDOT issued a Centennial Accord Plan in which each WSDOT department described their consultation process and available services.

National Environmental Policy Act (NEPA)

NEPA and its implementing regulations require federal agencies to integrate environmental considerations into their decision-making. Tribes can be involved in four capacities during environmental review: as a cooperating agency,

Where can I get a copy of the WSDOT Executive Order 1025 on Tribal Consultation and Centennial Accord Plan?

These documents are available on the WSDOT Tribal Liaison webpage: www.wsdot.wa.gov/tribal

participating agency, consulting party or affected community. The federal lead agency is responsible for inviting appropriate parties to be cooperating agencies.

On July 28, 1999, the Council on Environmental Quality (CEQ) issued a memo “urging agencies to more actively solicit ...the participation of state, tribal and local governments as “cooperating agencies” in implementing the environmental impact statement process under the National Environmental Policy Act (NEPA)” In a February 2002 memorandum to Tribal Leaders the CEQ advised tribes that on “those cases where cooperating agency status is not appropriate, you should consider opportunities to provide information and comments to the agencies preparing the NEPA analysis and documentation. CEQ supports your involvement in ensuring that decision makers have the environmental information necessary to make informed and timely decisions efficiently.” When tribes do not accept an invitation to be a cooperating agency, you still need to consult on a government-to-government basis; they can still participate on interdisciplinary teams and receive NEPA documents for review and comment.

WSDOT’s projects vary greatly both in their scale and in the intensity of environmental impacts. In order to account for the range of project impacts (from minor to significant), NEPA provides for three basic "classes of action" to assess and document environmental impacts:

- A categorical exclusion (CE) is prepared when an action does not individually or cumulatively have a significant effect on the environment.
- An Environmental Assessment (EA) is prepared when the significance of the environmental impact is not clearly established. If the environmental analysis and interagency review find no significant environmental impacts, a finding of no significant impact (FONSI) is issued. If, however, the EA demonstrates that a significant effect on the environment will occur, then an EIS must be prepared.

What is a cooperating agency?

"Cooperating Agency means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment." 40 CFR 1508.5

Who is the CEQ and what do they do?

The Council on Environmental Quality (CEQ) was established in the National Environmental Policy Act of 1969. The CEQ is responsible for ensuring that federal agencies meet their obligations under the Act.

- An Environmental Impact Statement (EIS) is required for projects that will have a significant effect on the environment.

See Appendix A for a more in-depth summary of how NEPA is applied to WSDOT projects.

Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)

This act was signed into law August 10, 2005. Section 6002 of the Act includes additional requirements for environmental reviews and project decision making. These additional procedures are mandatory for Environmental Impact Statements (EIS). The Act requires that the lead federal agency invite any federal or non-federal agencies that may have an interest in becoming a “participating agency” in the environmental review process for the project.¹ Participating agencies have an expanded involvement role that includes the opportunity to review and comment on the project’s Purpose and Need, the Range of Alternatives, and to collaborate with agencies in determining methodologies and detail for alternatives analysis.

Since the tribes in Washington State signed the Centennial Accord and agreed to work on a government-to-government basis with Washington State, WSDOT may send participating agency invitations to the tribes on behalf of FHWA.

FHWA issued additional guidance on Section 6002 of SAFETEA-LU which you can access at:

<http://www.fhwa.dot.gov/hep/section6002/section6002.pdf>

National Historic Preservation Act (NHPA)

Section 106 of this Act requires federal agencies to take into account the effects of their undertakings on historic and traditional cultural properties and consult with any affected tribal governments. NHPA regulations include a number of

¹ Section 6002(d)

Do Tribes qualify as a participating agency?

Yes. The term “agency” means “any agency, department, or other unit of Federal, State, local, or Indian tribal government.” PL 109-59 6002(a)(1)

What is a Historic Property under the NHPA?

“Any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion in the National Register of Historic Places” 36 CFR 800.16(K)(1)

Section 106 regulations describe the specific criteria for National Register eligibility. They are available at www.achp.gov/regs-rev04.pdf

specific tribal consultation requirements. The NHPA regulations define consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process” (36 CFR 800).

Section 106 requires agencies to “consult with any Indian Tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property” 36 CFR 800.2(c)(2)(ii). At a minimum, affected tribes will have the opportunity to review and comment on the Area of Potential Effects (APE), and any cultural resources discipline reports prepared. If a project has an adverse affect to a register eligible historic property and requires a Memorandum of Agreement, the tribes will be invited to consult.

WSDOT consults with non-federally recognized tribes as “additional consulting parties” since they are an “organization with a....concern with an undertaking’s effects on historic properties.” 36 CFR 800.2(c)(5).

In 2007, WSDOT, FHWA, the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation signed a revised programmatic agreement relating to the Section 106 process. Through this agreement, FHWA delegated WSDOT limited administrative authority to conduct tribal consultation on its behalf. This means that while FHWA retains ultimate responsibility for compliance with the NHPA regulations, WSDOT staff sends letters, convenes meetings and otherwise consults with tribes. The agreement requires project teams to provide FHWA and DAHP with advance notice of any Section 106 consultation meetings with tribes. If they cannot attend a meeting, FHWA and DAHP should receive a copy of the meeting notes. The WSDOT Cultural Resource Office has a template email notification project teams can use.

NHPA regulations encourage agencies to coordinate their Section 106 and NEPA compliance efforts: “Agencies should

What are Traditional Cultural Properties (TCPs)?

A traditional cultural property can be defined generally as a site “ that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.” National Register Bulletin #38.

Where can I get a copy of the new WSDOT / FHWA/ DAHP Section 106 Programmatic Agreement?

Contact the WSDOT Cultural Resources Office or visit the following site:

<http://www.wsdot.wa.gov/Environment/CulRes/default.htm>

consider their Section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.” 36 CFR 800.8(a)(1)

Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Issued by President Clinton in 1994, this Order directs federal agencies to make “environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.” The Executive Order applies to “a person having origins in any of the original people of North America and who maintains cultural identification through tribal affiliation or community recognition.”

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Issued by President Clinton in 2000, this Order requires federal agencies to consult with tribes on the creation or implementation of any federal policy. The order also reaffirms the federal government’s trust responsibility to tribes and the right of tribes to self-government.

DOT Executive Order 5301.1 on Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes

Issued in November 1999, this order requires the US Department of Transportation and all of its agencies (including the Federal Highway Administration and Federal Transit Administration) to “consult with Indian Tribes before taking any actions that may significantly or uniquely affect them.”

Federal Trust Responsibility and Tribal Treaty Rights

In order to understand why and how and with whom we consult, it is necessary to examine the principles of tribal sovereignty, the federal trust responsibility and treaty rights. Below is a brief discussion of these concepts with a focus on

how they affect WSDOT. The sources of federal Indian law include the Constitution, Treaties, federal statutes, regulations, executive orders and court decisions. The sovereign status of federally recognized tribes distinguishes them from other ethnic minorities.

European nations and later the United States Government recognized the sovereign status of tribes when they negotiated treaties with tribes. When tribes negotiated treaties with the federal government, they relinquished land and specific rights in exchange for commitments from the US government to provide peace, protection, education, and health care, among others. Tribes retain any rights not expressly relinquished.

A series of early Supreme Court Cases helped shape the legal relationship between the federal government and tribes. These cases, commonly referred to as the Marshall Trilogy, acknowledged that a tribe is a “distinct political society separate from others and capable of managing its own affairs and governing itself,” while at the same time describing tribes as “domestic dependent nations.” [1] The federal government is considered a “trustee” of Tribal rights and interests, and as a trustee it has in some cases “fiduciary obligations” to federally recognized tribes. For example, federal agencies are obligated to honor and uphold tribal treaty rights. Treaties are important to states because as federal law, they supersede conflicting state law. Moreover, much of the federal litigation interpreting Indian treaty rights expressly applies to state entities and activities.

In 1854 and 1855, Territorial Governor Isaac Stevens negotiated treaties with 24 of the 29 modern-day federally recognized tribes in Washington. Virtually all of these treaties included the following clause:

“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.

What does the US Constitution say about treaties?

Article VI, Section II states that, “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.”

This phrase is at the heart of off-reservation Tribal treaty rights, and has given rise to the important concept of “usual and accustomed areas” of the treaty Tribes, also called “U&A areas.” The federal courts have affirmed these rights, which are critical to understanding Tribal perspectives on how WSDOT activities may affect Tribal interests.

Currently unresolved, as of 2007, is the question of whether the treaties require the state (as well as the United States and third parties) to refrain from degrading habitat to an extent that tribal members would not be able to harvest enough fish to meet moderate living needs. This issue forms the basis of a pending lawsuit, commonly referred to as “Boldt II.” This case against the State of Washington alleges that the State has a duty to remove culverts that have the effect of diminishing salmon populations. August 2007, a US District Court issued a partial summary judgment limited to state-owned culverts. The court declared that “the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.” Hearings to determine the remedy for this will begin in September 2007.

Appendix B contains summaries of U&A areas prepared by the Washington Attorney General’s Office. Previously adjudicated boundaries may change as a result of inter-tribal litigation and newly recognized tribes may seek to have their treaty rights adjudicated as well. Where questions arise as to whether a particular project may affect treaty rights, WSDOT staff needs to consult with the WSDOT Tribal Liaison Office to determine which tribes have treaty rights in the project area. If necessary, the Tribal Liaison will consult with the Office of the Attorney General.

Chapter 3 Consultation Activities: When to Consult With Tribes During Project-Level Environmental Review

WSDOT engages tribes in various types of program-level and multi-project consultation activities. For example, each year, or more often as needed, each WSDOT region will host meetings with interested tribes to discuss Section 106 compliance on projects. Another example is the WSDOT Mount Baker Office's annual meetings with local tribes to discuss long-range planning studies and multiple projects. Program and multi-project consultation can help build strong working relationships and aid consultation efforts on individual projects. While this work is very important, this chapter focuses on individual project consultation.

In this chapter, we will describe project-level comprehensive consultation activities for each type of project classification under the National Environmental Policy Act (NEPA): Categorical Exclusions (CE), Documented Categorical Exclusions (DCE), Environmental Assessments (EA) and Environmental Impact Statements (EIS). Each section includes tribal consultation activities required under Section 106 of the National Historic Preservation Act and the Section 106 programmatic agreement between WSDOT, FHWA and the Department of Archaeology and Historic Preservation.

This section will focus on *when* to consult with tribes by identifying the tribal consultation activities in each type of NEPA classification. The chapter is divided by projects' NEPA

What is "comprehensive consultation"?

Comprehensive consultation means engaging all the affected tribal departments early, and on an ongoing basis throughout the life of the project. It means more than complying with one statutory requirement to consult, such as on the Area of Potential Effect under Section 106 of the National Historic Preservation Act.

classification and includes a definition of the class, and a sequential list of consultation activities. Some of these activities are already required by law, policy or procedures; others are new. Activities noted as Section 106 consultations are required by Section 106 or the Section 106 programmatic agreement between WSDOT, FHWA and DAHP. Unless otherwise noted, the other activities listed represent the minimum recommended consultation activities under each NEPA environmental classification.

Depending on the magnitude, potential impacts and unique circumstances of your project, you may need to engage in more intensive consultation with tribes.

Guidance on *how* to consult with tribes including how to identify which tribes and which tribal offices to consult with, protocols for initiating consultation and troubleshooting tips are located in the next chapter.

1 A few things to consider before you start

Who should carry out these consultation activities?

Generally, the consultation activities described in this chapter should be led by the project Environmental Manager or their Environmental Coordinator with whom they closely coordinate. Tribal meetings should include the environmental manager or other staff in charge of consultation. It is important for tribes to have a consistent contact for the project, regardless of the environmental issue. The WSDOT Tribal Liaisons are available to assist you as needed.

What is FHWA's role for these consultation activities?

The Federal Highway Administration (FHWA) acts as the “lead agency” for projects being reviewed under NEPA and thus has the ultimate responsibility for tribal consultation under NEPA and Section 106 of the National Historic Preservation Act. FHWA approves the environmental classification of projects and WSDOT prepares environmental documents for FHWA's approval. Generally, WSDOT will approve / adopt these

documents for the Washington State Environmental Policy Act (SEPA).

WSDOT, on behalf of FHWA will initiate and assist FHWA in consultation on projects. A tribe may request in writing to consult with FHWA in lieu of or in addition to WSDOT, at which time FHWA will assume the primary role for consultation.

You must invite the appropriate FHWA Area Engineer to any meetings with tribes and copy them on any correspondence.

Coordinating Section 106 and NEPA compliance

The Section 106 regulations require you to coordinate Section 106 and NEPA. The tribal consultation process under Section 106 of the National Historic Preservation Act and the Section 106 programmatic agreement between WSDOT, FHWA and DAHP, requires, at a minimum, the following activities:

- Initiate consultation
- Consult with tribes to determine the existence of historic properties including Traditional Cultural Properties (TCPs)
- Consult on the Area of Potential Effects (APE)
- Consult on the Cultural Resources Discipline Report and findings of effect
- If there is an adverse affect to a register eligible historic property, you must invite the tribes to consult on the Memorandum of Agreement (MOA)
- For further guidance on the Section 106 process WSDOT follows, contact the WSDOT Cultural Resources Office.

Where can I get a copy of the Section 106 programmatic agreement between WSDOT, FHWA and DAHP?

Contact the WSDOT Cultural Resources Office or click on the link below:

<http://www.wsdot.wa.gov/Environment/CulRes/default.htm>

2 Categorical Exclusions (CE)

The Council on Environmental Quality (CEQ) regulations define a Categorical Exclusion as “actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in

adoption of these procedures (Section 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 CFR 1508.4

FHWA further defines a Categorical Exclusion as,

“actions which: do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.” 23 CFR 771.117

Though this classification of projects often does not have a significant impact on many environmental resources, they can still impact tribal cultural and treaty resources. For example, if you install a fence that blocks the access of tribal fishers to their Usual and Accustomed Fishing Grounds, you may be affecting their treaty rights.

What are the recommended tribal consultation activities for a project classified as a NEPA Categorical Exclusion?

- On an annual basis, or more often as appropriate, each region should send the tribes a list and map of categorical exclusions in the region. Tribes can then notify the region if they have any concerns with any of the CE projects. Regions may expand their tribal outreach meeting(s) under the WSDOT Section 106 programmatic agreement to include discussion of these CE projects or what types of projects are classified as a CE. WSDOT’s Highways and Local Programs Office (H&LP) will not be able to send a list because local agencies initiate NEPA independent of H&LP.
- You must comply with the Section 106 regulations and / or WSDOT’s Section 106 Programmatic Agreement. If your project is not exempt under the statewide Section 106 Programmatic Agreement, review the consultation steps under “Documented Categorical Exclusion” below.

What are some project examples of a NEPA Categorical Exclusion?

Landscaping; Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices;
Construction of bicycle and pedestrian lanes, paths, and facilities.
See 23 CFR 771.

Documented Categorical Exclusions

Other projects, may also qualify as Categorical Exclusions if appropriately analyzed, documented, and approved by FHWA. These are identified in 23 CFR 771.117(d). WSDOT refers to these types of projects as “Documented Categorical Exclusions” (DCE). The WSDOT Environmental Procedures Manual states that a project normally classified as a CE under 23 CFR 771.1179(c), would be classified as a DCE when any of the following apply:

- Any federal lands are affected or impacted.
- A federal Corps of Engineers Section 10 or Section 404 (Nationwide or Individual) permit is required.
- Substantial or uncertain impact may occur on properties protected by Section 4(f) of the DOT Act or Section 106 of the National Historic Preservation Act.
- Possible impact on habitat or species protected under the Endangered Specific Act (ESA).

For a DCE, the federal agency with jurisdiction over the permit or approval will also engage the tribes in consultation. For example, WSDOT, on behalf of FHWA, will initiate consultation on Section 106 and the Army Corps of Engineers will consult for Section 10 or 404 permits under the Rivers and Harbors Act.

What are the recommended tribal consultation activities for a project classified as a NEPA Documented Categorical Exclusion?

Due to the wide range in scope and impacts of WSDOT’s DCE projects, there are not many standard project milestones and consultation opportunities. Project teams should adjust their consultation efforts based on tribal interest. Though local agencies are not a party to the Programmatic Categorical Exclusion Approvals Memorandum of Understanding between FHWA and WSDOT, the H&LP office is not expected to apply

the following consultation steps to projects otherwise covered by this agreement.

Your regional tribal liaison or HQ Environmental Tribal Liaison is available to assist you with your consultation approach as needed.

- During agency / public scoping, initiate NEPA and NHPA Section 106 consultation with affected tribes via letter. The letter should be addressed to the chairperson and copied to the cultural and natural resources departments. If known, you may also request comment on the Area of Potential Effects (APE) for Section 106 of the National Historic Preservation Act. See Appendix C for a sample consultation and APE letter. Chapter 4 includes suggested content for your letter. For example, you should request information on the existence of historic properties including Traditional Cultural Properties (TCPs). See Appendix F for a response post card that can be attached to the consultation letter and provided to the tribal staff.
- If the tribe has not responded within 30 days, you should follow up with a phone call and / or email.
- For Section 106 compliance, you must send a copy of the Cultural Resources Discipline report and Determinations of Effect to the tribe.
- Send a copy of natural resources discipline reports (if any) to the natural resource office. Continue to consult on natural resource issues based on the tribe's level of interest.
- If the tribe has not responded within 30 days, you should follow up with a phone call and / or email.
- If your project will have an adverse effect on a register eligible historic resource, you must invite the tribe(s) to consult on the Memorandum of Agreement, as required by Section 106 regulations and / or WSDOT's Section 106 programmatic agreement.

Don't forget!

A goal of your consultation efforts is to identify issues and potential conflicts as early as possible. Early conflict identification and resolution reduces future risks to the project (e.g. scope, schedule, and budget overruns).

Tribal Relations Tip:

Whenever you send a document to a tribe for review, include a due date for comments.

3 Environmental Assessments (EA)

WSDOT prepares an Environmental Assessment (EA) when the significance of impacts of the transportation project is uncertain. If the analysis reveals that the project would cause significant impacts, an Environmental Impact Statement process would begin immediately. If FHWA determines that there will be no significant impacts a Finding of No Significant Impact (FONSI) will be prepared to conclude the process and document the decision. (40 CFR 1508.9, WSDOT Environmental Procedures Manual Ch. 411)

What are the recommended tribal consultation activities for a project classified as an EA?

- During agency / public scoping, initiate NEPA and NHPA Section 106 consultation with affected tribes via letter. The letter should be addressed to the chairperson and copied to the cultural and natural resources departments. See Appendix D for a sample letter. Chapter 4 includes suggested content for your letter. For example, you should request information on the existence of historic properties including Traditional Cultural Properties (TCPs). See Appendix F for a response post card that can be attached to the consultation letter and provided to the tribal staff.
- If the tribe has not responded within 30 days, you should follow up with a phone call and / or email.
- We recommend you create a tribal consultation plan for your project, especially if it has the potential to affect resources of interest to tribes. See Appendix G for an example. This plan should include major consultation milestones, frequency of regular meetings, how you plan to coordinate consultation across disciplines (i.e. natural resources and cultural resources). You should share your plan with the tribes and edit as necessary. A goal of this plan is to establish common expectations for the consultation process on your project.

Why should we follow up with tribes if we don't receive a response?

Many tribal governments do not have the administrative capacity to respond to all the consultation requests they receive within the proposed timeframe. By following up with tribal staff, you can better determine if they are interested in your project, if they intend to submit comments and when they are able to do so. You should never assume that a lack of tribal response to your request indicates a lack of interest in your project.

Early conflict identification and resolution reduces future risks to the project (e.g. scope, schedule, and budget overruns).

- Invite affected tribes to any agency scoping meetings (if held).
- Your project team is encouraged to meet with the natural and cultural resources staff of any affected tribes at least once during the project, preferably during environmental scoping. You should schedule meetings at tribal offices whenever possible. Depending on the magnitude and unique circumstances of your project, you may need to meet with the affected tribes more often. For example, you may want to meet with the affected tribes at each of the major NEPA milestones for your project.
- In accordance with Section 106 regulations and / or WSDOT's Section Programmatic Agreement, you must send the tribal cultural resources staff contact(s) a letter describing and requesting comment on the project's Area of Potential Effects (APE) for cultural resources. This is a consultation activity specific to the National Historic Preservation Act and occurs before a cultural resources survey can be prepared. Visit the WSDOT cultural resources website for a template letter.
- Tribes will have 30 days to comment on the cultural resources APE. If the tribe does not respond within 30 days, you should follow up with a phone call and / or email
- You should send a list of environmental discipline reports or technical memos you expect to prepare for the project to the natural and cultural resource staff at the affected tribes. This will help you determine if the tribe is interested in providing information or expertise in the development of any these reports. This is also a good time to consult with tribal cultural resources offices on the level of effort to be used in the identification of historic properties as required by the Section 106 implementing regulations (36 CFR 800.4).
- You should consult on the Preliminary EA / Draft EA including completed discipline reports. For Section 106 compliance, you must send a copy of the Cultural

Don't forget!

The Section 106 Programmatic Agreement requires you to courtesy invite FHWA and DAHP to any Section 106 consultation meetings you have with the tribe(s). Provide them with a copy of the meeting notes if they cannot attend the meeting. Contact the Cultural Resources Office for a template email you can use to invite them.

Can you share draft discipline reports with tribes?

Yes, as long as the reports have been reviewed by the appropriate WSDOT staff in accordance with WSDOT quality assurance and quality control policies. For example, cultural resources discipline reports must be reviewed by a WSDOT cultural resources specialist.

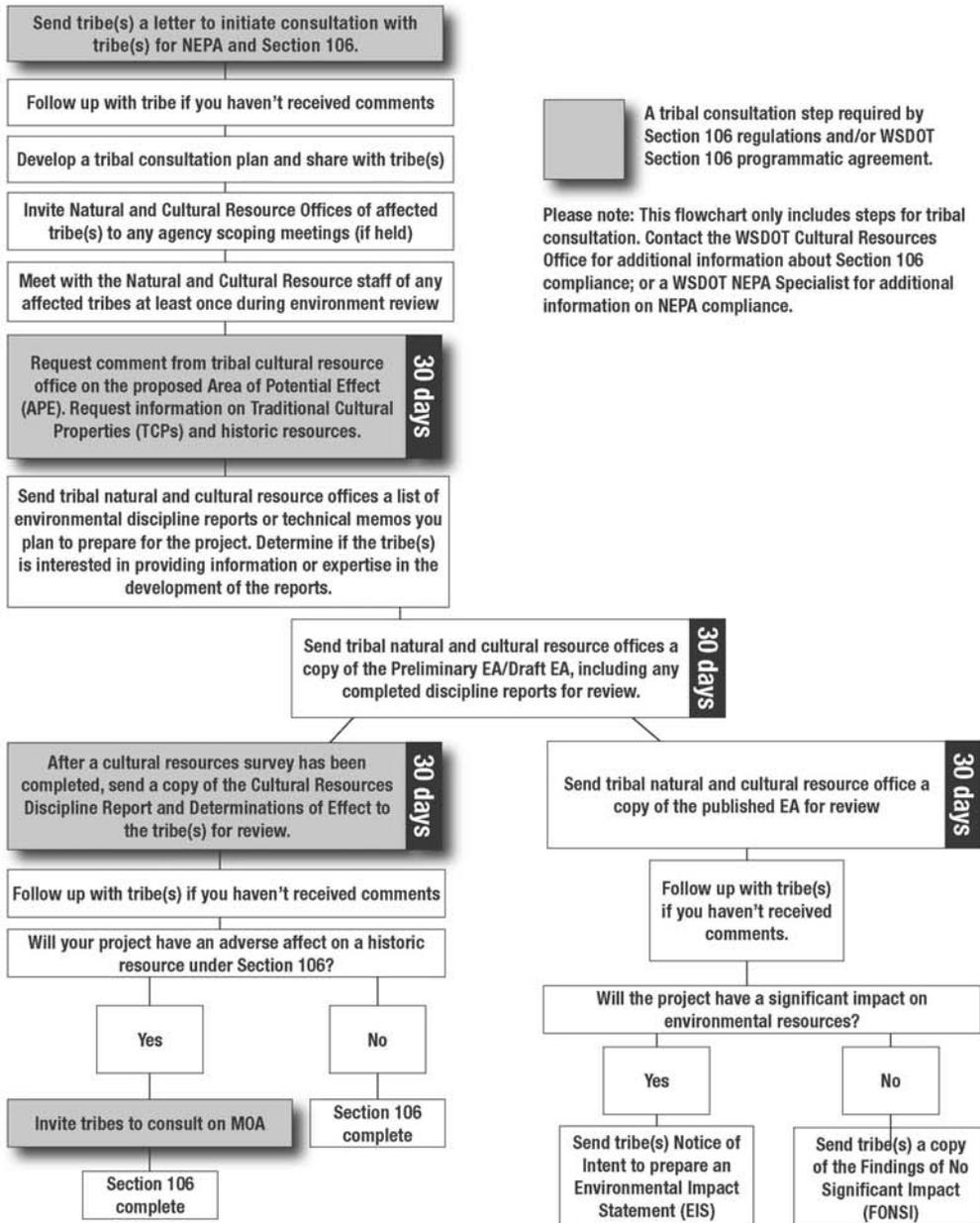
Resources Discipline report and Determinations of Effect to the tribe. You may also send them a copy of Biological Assessment prepared for Endangered Species Act (ESA) once the assessment is sent to the US Fish and Wildlife Service (USFWS) and National Oceanic Atmospheric Administration (NOAA) for consultation. Keep in mind that USFWS and NOAA also have a legal responsibility for tribal consultation under ESA.

- If the tribe has not responded to your request for comments on the EA within 30 days, you should follow up with a phone call, email etc. Remember, your goal is to identify any concerns and issues the tribes may have as early as possible.
- If your project will have an adverse effect on a register eligible historic resource, you must invite the tribe(s) to consult on the Memorandum of Agreement, as required by Section 106 regulations and / or WSDOT's Section 106 programmatic agreement.
- Send the tribe a copy of the published EA.
- If a tribe has been actively consulting on your project, you should follow up with them after 30 days to ensure that there are not any remaining issues on the EA that could resurface during permitting.
- FHWA / WSDOT will send the tribe a copy of the Finding of No Significant Impact (FONSI). If significant issues remain, FHWA will publish a Notice of Intent (NOI) to prepare an Environmental Impact Statement.

Tribal Relations Tip:

Respond to tribal comments!
Whenever you respond to a tribal concern, it is important that you explain your reasoning. This helps demonstrate that you fully considered their concerns. This is especially important if you cannot accommodate their request.

Tribal Consultation for Projects Classified for an Environmental Assessment Under NEPA



4 Environmental Impact Statements (EIS)

NEPA requires Federal agencies to prepare environmental impact statements (EIS) for major federal actions that significantly affect the quality of the human and natural environment. (40 CFR 1501, WSDOT Environmental Procedures Manual Ch. 411).

What are the recommended consultation activities for projects classified as an EIS?

- During agency / public scoping for the project, initiate NEPA and NHPA Section 106 consultation with the affected tribe(s) by sending a letter to the chairperson with copies to the natural and cultural resources departments. You may use this letter to invite the tribes to be a “Participating Agency” under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). See Appendix E for a sample letter. Chapter 4 includes suggested content for your letter. See Appendix F for a response card that can be attached to the consultation letter and provided to the tribal staff.
- Create a tribal consultation plan for that project. This can be a special section within your broader agency coordination / public involvement plan or a separate plan. See Appendix G for a sample plan. The plan should include major consultation milestones, frequency of regular meetings, how you plan to coordinate consultation across disciplines (i.e. natural resources and cultural resources). Share your plan with the tribes and edit as necessary. A goal of this plan is to establish common expectations for the consultation process on your project.
- Invite tribal natural and cultural resources staff to agency scoping meetings.
- You should meet with the natural and cultural resources staff of any affected tribes at least once during the project, preferably during environmental scoping. You should schedule meetings at the tribal offices whenever possible.

Depending on the magnitude and unique circumstances of your project, you may need to meet with the affected tribes more often. For example, you may want to meet with the affected tribes at each of the major NEPA milestones for your project.

- We recommend you follow up with tribes to encourage them to accept Participating Agency Status. This formally invites them to comment on project's Purpose and Need, the Range of Alternatives, and methods for analysis for the project.
- In accordance with Section 106 regulations and / or WSDOT's Section Programmatic Agreement, you must send the tribal cultural resources staff contact(s) a letter describing and requesting comment on the project's Area of Potential Effects (APE) for cultural resources. This is a consultation activity specific to the National Historic Preservation Act and occurs before a cultural resources survey can be prepared. Visit the WSDOT cultural resources website for a template letter.
- Tribes have 30 days to comment on the APE. If the tribe does not respond within 30 days, you should follow up with the cultural resources staff with a phone call and / or email.
- You should send a list of environmental discipline reports or technical memos you expect to prepare for the project to the natural and cultural resource staff at the affected tribes. This will help you determine if the tribe is interested in providing information or expertise in the development of any these reports. This is also a good time to consult with tribal cultural resource offices on the level of effort to be used in the Identification of historic properties as required by Section 106 implementing regulations (36 CFR 800.4)
- Send the Draft Environmental Impact Statement (DEIS) with completed discipline reports to the tribe for review and comment. For Section 106 compliance, you must send a copy of the Cultural Resources Discipline Report / Survey

and Determinations of Effect to the tribe. You may also send them a copy of Biological Assessment prepared for Endangered Species Act (ESA) once the assessment is sent to the US Fish and Wildlife Service (USFWS) and National Oceanic Atmospheric Administration (NOAA) for consultation. Keep in mind that USFWS and NOAA also have a legal responsibility for tribal consultation under ESA.

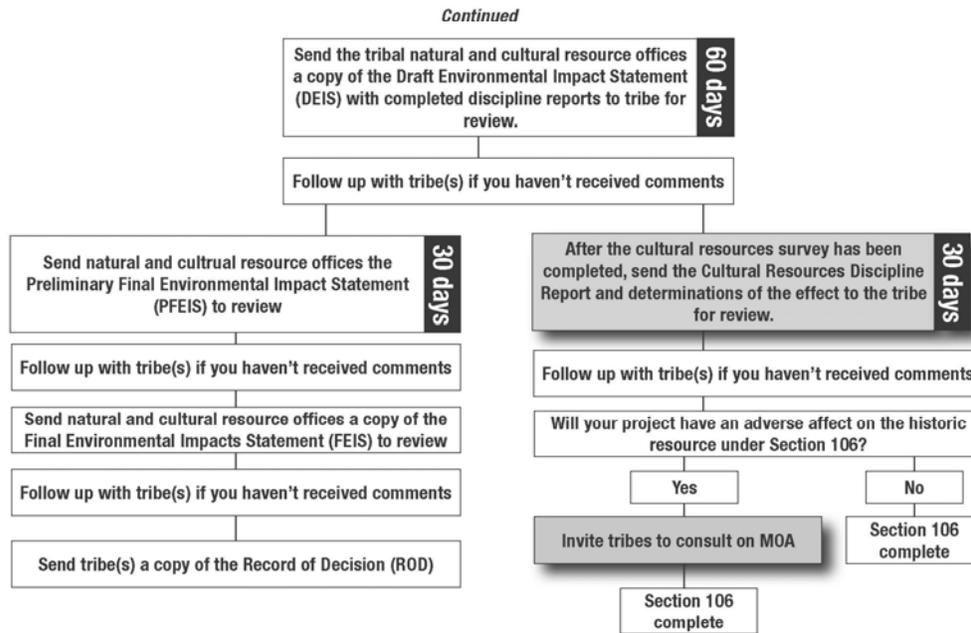
- Your goal is to identify any concerns and issues the tribes may have as early as possible. If they have not responded to your request for comments on the DEIS or discipline reports within 60 days, you should follow up with a phone call, email etc.
- If your project will have an adverse effect on a register eligible historic resource, you must invite the tribes to consult on the Memorandum of Agreement, as required by Section 106 regulations and / or WSDOT's Section 106 programmatic agreement.
- You should send the tribes the Preliminary Final Environmental Impact Statement (PFEIS). This will give you an opportunity to identify any new or remaining tribal concerns that were not addressed in the DEIS.
- If a tribe has been actively consulting on your project, you should follow up with the tribal staff after 30 days to ensure that there are not any remaining issues. If there are remaining issues, you can continue the consultation process and arrange for additional meetings.
- Send Final Environmental Impact Statement to the tribe.
- If a tribe has been actively consulting on your project, you should follow up with them after 30 days to ensure that there are not any remaining issues on the FEIS that could resurface during permitting.
- FHWA / WSDOT will send the tribe a copy of the Record of Decision (ROD).



Tribal Consultation for Projects Classified for an Environmental Impact Assessment (EIS) Under NEPA



3-16 Consultation Activities: When to Consult with Tribes During Project-Level Environmental Review



 A tribal consultation step required by Section 106 regulations and/or WSDOT Section 106 programmatic agreement.

Please note: This flowchart only includes steps for tribal consultation. Contact the WSDOT Cultural Resources Office for additional information about Section 106 compliance; or a WSDOT NEPA Specialist for additional information on NEPA compliance.

Chapter 4 Frequently Asked Questions and Other Guidance on How to Work with Tribes

This section contains answers to frequently asked questions, consultation guidance and troubleshooting tips. Since Chapter 3 addressed *when* you should conduct consultation, this chapter discusses *how* you should consult. Faithfully following the process outlined in Chapter 3 is not a guarantee of successful consultation. The establishment of trustworthy, honorable, mutual relationships is a key component of successful consultation and there are certain protocols of which you should be aware of when consulting with tribes. Treating each project consultation as part of a larger process to build tribal trust, will help you when working with the tribes on future projects. Generally following these principles can help you build trust with tribes, which will in turn help you move more efficiently through the consultation process.

There are nine themes for this guidance and FAQ:

1. Initiating consultation
2. Comprehensive consultation
3. Treaty rights & Natural Resources
4. Cultural Resources
5. Intertribal relations
6. Resolving tribal concerns
7. Tribal Compensation

8. Permitting
9. Resources to help you

1 Initiating Tribal Consultation During NEPA Review

How do I identify which tribes to consult?

The WSDOT Tribal Liaison Office periodically asks each tribe to update their “Consultation Area” for WSDOT projects. The result is a map that you can use to answer this question. These maps were created specifically for WSDOT and in most cases do not represent a legal or firm boundary. WSDOT needs to consult with that tribe on any projects located within that area. See Chapter 3 for the level of consultation recommended for projects based on their environmental classification.

The consultation area maps are available on the WSDOT GIS workbench. If you do not have access to the workbench, you can contact the WSDOT Environmental Tribal Liaison to identify which tribes you should invite to consult on your project. These maps were shared with the agency by special permission and are not for general publication or distribution.

What is the difference between a tribe’s “consultation area” and “Usual and Accustomed Areas”?

At WSDOT’s request, tribes have specifically delineated a “consultation area” for WSDOT projects. These are neither legal nor firm boundaries, but an expressed area of interest. A tribe may refine its consultation area at any time. The sole purpose of these maps is to help project teams answer the question, “Which tribes do I need to consult with on my project?”

“Usual and Accustomed Areas” (U&A) is a legal term that comes from the treaties that tribes in this area signed with the federal government. Tribes reserved the right to fish in their “usual and accustomed grounds and stations”. These U&A areas have been adjudicated by the federal courts. Previously adjudicated boundaries may change as a result of inter-tribal litigation and newly recognized tribes may seek to have their

treaty rights adjudicated as well. Many tribes also reserved the right to hunt and gather in “open and unclaimed lands”. The geographic descriptions of these areas have yet to be determined. Therefore, tribal treaty rights are not limited to a tribe’s U&A.

Both NEPA and Section 106 of the National Historic Preservation Act require WSDOT to consult with interested or affected tribes. These statutes do not limit that consultation by any particular set of legal geographic boundaries. Thus, the only time a project team needs to determine which tribes have treaty protected rights within the project area is when the project has the potential to impact a treaty right (e.g. building a ferry terminal that displaces tribal fishers, or a new alignment through public lands that could affect treaty hunting or gathering rights). If your project has the potential to impact treaty fishing rights, please review Appendix B to determine which tribes have treaty fishing rights in the area. If you have questions or need assistance, contact the Environmental Services Tribal Liaison.

What if my project is within the consultation areas of multiple tribes?

This is very common. You will need to consult with each affected tribe. See the section below entitled “Intertribal Relations” for more information and tips on this process.

Do I need to work with non-federally recognized tribes?

Yes, though they do not have the same legal rights to consultation as federally recognized tribes. Working with non-federally recognized tribes is not considered formal government-to-government consultation. WSDOT may consult with non-federally recognized tribes as “additional interested parties” under Section 106 of the National Historic Preservation act, and as an affected community under NEPA.

You will want to work with non-federally recognized tribes on your project because they may have valuable information about cultural resources located within your project area.

Furthermore, some of these non-federally recognized tribes have applied for federal recognition. Should the federal

Tribal Relations Tip:

With the exception of meetings open to the public, do not invite non-federally recognized tribes to meetings attended by federally recognized tribes. Some federally recognized tribes will refuse to consult on your project if you do not acknowledge their status and legal rights to consultation as distinct from non-federally recognized tribes.

government formally recognize them as a tribe, all of the consultation rights and processes would apply.

Does WSDOT have any programmatic agreements with tribes?

Yes. Before you initiate consultation with a tribe, you should review any applicable programmatic agreements or memorandums of agreement that may be in place. See Appendix H for a copy of these agreements. For example, WSDOT and FHWA are in the process of negotiating agreements with five Tribal Historic Preservation Offices (THPO). WSDOT, FHWA and the Lummi Nation recently entered into Memorandum of Agreement for consultation on natural resource issues. Contact the WSDOT Tribal Liaison Office for the most up-to-date information on tribal agreements.

Who should send consultation letters and conduct consultation?

The person signing letters should be a person of authority on the project and should be as consistent throughout the project as possible. Some WSDOT regions have designated individuals to sign consultation letters for all projects. If your region / mode do not have a designated person for all letters, the regional environmental manager or project manager should sign the consultation letters.

How do I initiate formal consultation with a tribe?

Formal consultation means working with the highest levels of tribal government. It should be initiated by sending a letter to the chairperson of the tribe, with a copy including attachments sent to the designated staff representatives for natural and cultural resources. If your project is located on or near tribal lands, you may also need to include the tribal planning, real estate and Tribal Employments Rights Ordinances (TERO) offices. Some tribes have specific consultation protocols that you should observe when consulting with that tribe. See Appendix I for a table of tribal specific protocols. The Environmental Tribal Liaison will periodically request that

When should I involve the WSDOT Tribal Liaison?

It's important for the WSDOT Tribal Liaison to have a general awareness of the tribal consultation occurring on WSDOT projects. You should involve the Liaison if you need assistance, if conflicts arise on your project, or if questions or issues arise related to tribal policy. Any formal meetings or presentations with tribal leadership should also include the Liaison.

tribes reaffirm or update these protocols. You may contact the Environmental Tribal Liaison to verify these protocols.

Your consultation letter should include the following information:

- Address the Tribal Chairperson as “The Honorable”, followed by their first and last name.
- Identify the project proponents
- Describe the type of consultation is being initiated (NEPA, WSDOT EO 1025.00, Section 106 etc). In most cases you can initiate consultation for multiple laws in one letter. See Appendix C, D and E for sample letters.
- Location of the proposed project (section, township, range, milepost), including a map if available.
- General description of the proposed project activities, in particular any known ground-disturbing activities or in-water work.
- Copy of any applicable environmental studies completed prior to scoping.
- WSDOT and consultant contact information (if applicable or if available at that time).
- Any other information you feel would be helpful in understanding the proposed project and its potential impact to tribal interests.

If you are preparing an Environmental Impact Statement and plan to use this letter to invite the tribes to be a participating agency, you should include the following additional information:

- Clearly request the involvement of the tribe as a participating agency
- Explain why you think the tribe may be interested in the project. Generally, the location of the project within the tribe’s Consultation Area is sufficient.

Example of additional relevant information:

The Columbia River Crossing Project will likely impact Fort Vancouver, a historic trading post that includes Native American burials from across the Northwest and as far away as Hawaii. Simply describing the project location, without mentioning the Fort would not solicit the same level of response from non-local tribes. The project teams wanted to avoid tribes entering the consultation process late in the environmental review, so they mentioned the likely impact to the Fort in their consultation letter.

Remember, your goal is to reduce risks by identifying issues as early as possible!

- Describe the roles and responsibilities of a participating agency
- Specify a deadline (standard is 30 days from receipt of letter) for responding to the invitation.
- Explain that the tribe must accept the invitation in order to become a participating agency.

See Appendix F for a response post card you can attach to your consultation letter. You should attach the post card to the letters sent to the tribal staff, and not just the chairperson.

How do I know which tribal departments and staff to contact within a tribe?

When you initiate formal consultation with the tribal chairperson, you need to copy all affected departments within the tribe. Generally, for a project located off of tribal lands, you will need to contact the cultural and natural resources departments. If the project is located on or near tribal lands, you may need to contact the tribal planning, real estate and Tribal Employment Rights Ordinance (TERO) office.

You do not need to copy all departments on future consultation letters that are specific to one discipline. For example, you should not send an Area of Potential Effects (APE) letter to the tribal natural resources department, since an APE is specific to cultural resources only.

Contact information for the main five tribal departments WSDOT frequently works with (Chair, Planning, Cultural Resources, Natural Resources, TERO) is available on the WSDOT Tribal Liaison webpage:

www.wsdot.wa.gov/tribal/tribalcontacts

You'll notice that some tribes have multiple staff listed for a given department. You will need to contact each of those people when consulting on issues within their discipline. These are the first points of staff contact for the tribe. The tribe may assign a different staff person to work on your project.

If at any time, the tribe informs you that the staff contact has permanently changed, please notify the WSDOT Tribal Liaison Office so we can immediately update the website.

Is working with tribal staff considered government-to-government consultation?

Each tribe has their own standards for what they consider “consultation.” The WSDOT Tribal Liaison Office asked each tribe to define their consultation protocols, including how WSDOT staff may interact with tribal staff. See Appendix I for a table of specific consultation protocols for each tribe. Keep in mind that many tribes do not delegate decision making authority to staff, as the state often does. Some tribal staff do not have authority to make decisions on behalf of the tribal government, while others have been given authority via tribal resolution. It’s generally accepted that once consultation is formally initiated at the highest level of tribal government, WSDOT can consult with tribal staff until and unless they elevate an issue to tribal leadership for a decision. However, some tribes require policy staff or tribal leadership involvement on a project to consider the interaction “consultation.”

When is it appropriate to involve tribal leadership in your consultation etc?

Consultation must always be initiated with tribal leadership. Beyond that, it will depend on the circumstances of your project. If your project is large, controversial or likely to significantly impact tribal interests, you should make an extra effort to consult directly with tribal leadership. Tribal staff will often have to elevate decisions for these types of projects to their leadership, so you want to keep the leadership briefed on your project. You can do this by presenting your project to the tribal council, meeting with any relevant tribal committees or commissions, or by sending periodic consultation reports to tribal leadership.

You need to coordinate through the tribal technical staff to meet with tribal leadership. You also need to coordinate with the WSDOT Tribal Liaison Office whenever you plan to meet with tribal leadership.

Tribal Relations Tip:

If you are unsure of a tribal staff person’s authority to consult or make decisions, ask them what their authority is.

Below are a few examples:

- The SR 99 Alaskan Way Viaduct and Seawall Replacement Project in Seattle is a large project that has the potential to impact tribal burials, archaeological resources and treaty protected fishing rights. After meeting with the technical staff of each tribe individually, the project team hosted a collective meeting with tribal leaders, technical staff, and leaders from FHWA, WSDOT and the City of Seattle.
- The Washington State Ferries Office will make project presentations to the Tulalip Board of Directors and Fisheries Commission at key stages of their projects, including project scoping and as they prepared to release the draft EIS.

Tribal relations tip:

Occasionally, a tribal council member may be employed by the tribe and consult with you in a technical capacity. Generally, they are not representing the tribal council in an official capacity when they work on your project. When in doubt, ask them who they are representing.

Should project teams invite affected tribes to public and agency scoping meetings?

Yes. However, tribes do not generally consider public scoping meetings as consultation. One reason you should still invite tribes to public scoping meetings is because the tribe can conduct outreach to tribal members, who are also citizens of Washington State and may want to participate in the project process as members of the public. When you send the public meeting invitation, it is important that you acknowledge that participation in the public process is not government-to-government consultation, but that you are extending the tribe and its members every opportunity to participate in the environmental review process.

Is it appropriate to have my project's consultant firm work with affected tribes?

Yes. WSDOT often uses consultant firms to prepare environmental documents and do detailed technical analysis. Their work is done on WSDOT's behalf and is not complete until WSDOT accepts the work. It is important to remember that interactions between your firm and tribes are not considered government-to-government consultation unless a WSDOT / FHWA representative is present.

Some tribes have had negative experiences working with certain firms or their staff in the past (on WSDOT and non-WSDOT projects). This can be difficult to resolve in some cases because it is not always possible or appropriate to hire a different firm. For example, there was one WSDOT project with five consulting tribes. Three of the tribes liked the consultant, one did not and the fifth tribe had no previous experience with that consultant. In this case, WSDOT maintained a more formal government-to-government relationship with the tribe that didn't approve of the consultant firm.

The WSDOT tribal liaisons surveyed tribes regarding the firm / tribal interactions and the general consensus was that the following steps should be applied:

- Introduce your representative from the consulting firm to the tribe and describe the work they will be doing and WSDOT's role.
- Acknowledge that any interaction between the firm and the tribe without a WSDOT / FHWA official present will be considered technical consultation and not government-to-government consultation. Direct your firm to include this disclaimer in any correspondence between the firm and the tribe.
- If your consultant firm and tribe(s) have a poor relationship, you should either select another qualified consultant or maintain a more formal government-to-government process and limit the interaction of the firm and the tribe.

What if a tribe does not respond to my request for consultation?

Follow up with a phone call and / or email to the appropriate staff contact. Tribes are often overwhelmed with the number of consultation requests they receive and generally do not have dedicated funding or assigned staff specifically to meet the consultation needs of agencies. Non-response does not mean a tribe is not interested! Early identification and resolution of

issues reduces future risks to the project (e.g. scope, schedule and budget overruns).

The WSDOT Highway and Local Programs Office attaches a self-addressed, stamped response post card to their consultation request letters. This card allows tribes to quickly indicate their level of interest in consulting on a specific project. See appendix F for an example you can use. If you decide to use this card, you need to attach copies to the letters of both natural and cultural resource offices. If one tribal department uses the card to decline consultation, you will still need to consult with the other affected tribal departments unless and until they also decline to consult on your project.

What if a tribe does not want to consult on my project, or wants to defer to another tribe?

Record the tribe's deference, including the name of the tribal official, in your consultation tracking file (see Appendix I) and tribal consultation plan. If possible, ask the tribe to send their position on the project in writing. If one department declines or defers consultation, you still need to consult with other affected departments within the tribe. For example, if a cultural resources department declines to consult on your project, or defers consultation to another tribe, you will still need to consult with the tribal natural resources department.

Keep in mind that this does not preclude the tribe from consulting on future projects in that area or in re-engaging in consultation on your project at a later date. If a tribe does choose to re-engage in consultation at a later date, you are not obligated to revisit past decisions.

2 Comprehensive Consultation

What does Comprehensive Consultation mean?

Comprehensive consultation means engaging all the affected tribal departments early and on an ongoing basis throughout the life of the project. It's about taking a holistic approach to tribal consultation during the environmental review of WSDOT projects. It means more than complying with one statutory

requirement to consult, such as on the Area of Potential Effect for Section 106 of the National Historic Preservation Act.

Legal requirements for consultation are often vague, and require consultation with the “tribe.” Tribes, just like the federal and state governments, have multiple departments who have different interests and priorities. It is important for project teams to consult with all the affected tribal departments in an effort to identify and resolve issues as early as possible.

It is important that you don’t assume one tribal department can represent or notify another department. Consider this analogous example: FHWA has a project and sends the Governor a consultation letter and copies the Department of Archaeology and Historic Preservation (DAHP). FHWA’s project has the potential to impact water quality, but it did not copy the letter to the Washington State Department of Ecology. FHWA assumes that the Governor or DAHP will notify Ecology. By the time FHWA realizes its mistake and consults the Department of Ecology, the project is late in the environmental review stage. With the time it takes to resolve the water quality issue, the project runs into schedule delays.

Even though tribal governments are smaller than the state government, project teams should not assume that if they consult with the tribal cultural resources office, that the tribe doesn’t have any additional concerns, or that the cultural resource office will seek input from other tribal departments on other issues. Again, it’s in your project’s best interest to have all the affected departments consulted so you can identify and resolve any issues as early as possible.

What are the various issues tribes might bring to NEPA discussions?

This list is by no means exhaustive and is subject to change based on the projects proximity to tribal lands or sensitive areas.

- Treaty rights
- Safety

- Fish and Wildlife
- Habitat
- Transit
- Noise
- Water quality
- Real estate
- Economic impacts
- Cultural Resources and Section 106
- Traditional cultural properties
- Traffic
- Hazardous Materials
- Environmental Justice
- Cumulative Effects
- Level of environmental analysis
- Mitigation

Why and how should I coordinate consultation requirements under NEPA with other consultation obligations like Section 106 or treaty rights?

FHWA requires that projects coordinate, “to the fullest extent possible, all environmental investigations, reviews, and consultations be...as a single process...” 23 CFR 109

Unfortunately, due to the individual consultation requirements under different regulations, consultation with tribes and their different tribal departments is often disjointed. For example, in the past, a project team invited the tribal natural resources department to an agency scoping meeting, but limited participation of cultural resource managers to the Section 106 review process, which did not begin until much later when a preferred alternative was identified. Another project formally

initiated Section 106 consultation with the cultural resource department, but never initiated consultation with the natural resource department even though there was a potential to affect treaty fishing rights.

Under this comprehensive NEPA tribal consultation process, you will invite each affected tribal department to consult during project scoping (or equivalent early stage). Chapter 3 outlines the primary recommendations for consultation activities based on each NEPA project classification. While the specific consultation requirements under Section 106, for example, won't disappear, the specific consultation activity required will become part of a broader consultation process. By taking a more comprehensive approach, project teams should experience a smoother transition between key project review milestones while still meeting each legal consultation requirement.

What if a tribe doesn't respond to an invitation to be a Participating Agency for my EIS project?

You should keep trying! Since participating agency status is a new process introduced in August 2005 under SAFETEA-LU, you may need to inform the tribes of the new federal rules. However, through regular government-to-government consultation, you should seek tribal comments on the project's Purpose and Need, Range of Alternatives, and to collaborate with agencies in determining methodologies and detail for alternatives analysis. See Chapter 3 for the recommended consultation activities for requirements for each NEPA classification (CE, EA, EIS).

Under no circumstances should a tribe's decision to decline Participating Agency status be seen as a waiver of meaningful consultation under NEPA, Section 106 of the NHPA or other applicable laws and policies.

Can I share draft discipline reports with tribes?

Yes. You can share draft discipline reports as long as they have been reviewed by the appropriate WSDOT staff in accordance with WSDOT quality assurance and quality control policies. For example, cultural resources discipline reports must be

reviewed by a WSDOT cultural resources specialist. FHWA does not have to approve the draft first.

You may share a biological assessment with the affected tribes if it has been sent to the US Fish and Wildlife Service (USFWS) and National Oceanic and Atmospheric Administration (NOAA) for consultation. Keep in mind if you send a tribe a biological assessment, that USFWS and NOAA also has a responsibility to consult with tribes. Under Secretarial Order 3206, the Services are required to “provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.” Secretarial Order 3206 Sec.3(C)(2)

Can I invite a tribe to pre-BA meetings for the Endangered Species Act?

No. Only the applicant (FHWA, WSDOT and local agency) and the services (USFWS and NOAA) should attend pre-BA meetings. However, if the tribes you are consulting with have expressed interest in ESA issues, you can schedule a separate meeting to discuss their concerns.

What constitutes a “good faith effort” for consultation?

No clear threshold exists. Generally, you must provide the tribe all available opportunities to consult throughout the environmental review stage and follow up with the tribe if you don’t receive a response. Merely sending the tribe a letter or informing them on what you are planning to do would not constitute a “good faith effort.” Project teams should follow up any correspondence or invitations to consult with a phone call, email, fax etc. Tribal staffs are often overwhelmed and unable to respond to each request. You should not view non-response from a tribe as an indication of their disinterest in the project. Project teams are encouraged to contact the tribe until they speak to a representative who can convey the tribe’s level of interest. Make sure to keep track of your consultation efforts! If you have made numerous attempts to contact a tribe and were unsuccessful, you can contact the WSDOT Tribal Liaison Office for assistance.

How do I keep track of my consultation efforts?

See Appendix J for an example of a consultation tracking mechanism. Keeping a thorough record of your consultation efforts, tribal comments, meeting notes, commitments and agreements is extremely important.

Good consultation tracking proved invaluable for one project that had been reactivated after a number of years. When one tribe read about this project in the newspaper, it complained to WSDOT that it had not been consulted on the project.

However, the project team maintained a consultation tracking file for the project and recorded that the tribal administrator had declined to consult on the project. The project team had recorded the date and name of the administrator. The tribe, who had new staff, withdrew its complaint.

3 Treaty Rights

How do I know if my project may affect a tribal treaty right?

As discussed in Chapter 2, most of the treaties signed by tribes in Washington State include the following article: “The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.”

The federal courts have re-affirmed many of these rights. With regard to treaty fishing rights, the courts determined that the right has two parts:

- Tribes have the right to take a “fair share” of fish passing through their Usual and Accustomed Areas. Currently, the courts have determined that a fair share is approximately 50 percent of the fish.
- Tribes have the right to fish in their Usual and Accustomed Grounds and Stations.

Where can I get a copy of the treaties?

The Governor’s Office of Indian Affairs posts the 7 treaties signed in Washington on their website at www.goia.wa.gov

The Tribal Liaison Office encourages everyone to read the treaty applicable to your region.

If your project has the potential to affect fisheries resources or displace tribal fishers, then the project will affect a treaty right. If your project is on federal or public lands, you also need to consider whether your project will impact gathering or hunting resources or access to those resources.

Still unresolved is the question of whether degrading habitat impacts a treaty right. The issue is currently being litigated. In August 2007, a US District Court issued a partial summary judgment limited to state-owned culverts. The ruling stated that “the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.” Hearings to determine the remedy for this will begin in September 2007. What this means for your project is that you may be forced to agree-to-disagree until the issue is settled. Though the state may not acknowledge habitat as a treaty right, you should still consult with the tribes on any habitat concerns they may have on your project. Consultation, however, is not a guarantee of outcomes or agreement. Contact the WSDOT Tribal Liaison Office if you need assistance consulting with a tribe on these issues.

Many of the treaties included a reserved right to hunt and gather in “open and unclaimed lands”. The geographic descriptions of these areas have yet to be determined. A tribal treaty gathering or hunting right is not limited to a tribe’s U&A. An example of an affect to a treaty gathering or hunting rights is if your project is located on public or federal lands and it would restrict access to a gathering site or prevent hunting.

When and how should I start discussing the project’s potential impacts to treaty rights?

Environmental scoping. Discussions with tribes during scoping can help you identify treaty resources located within your proposed project area. Early consultation is your opportunity to explore project alternatives and modifications

that will avoid or minimize impacts to treaty rights or treaty protected resources. You should let the tribe know that addressing potential impacts to treaty rights is one of your consultation goals.

Keep in mind that you will have to resolve any unavoidable impacts to treaty rights the project creates. This may include a monetary settlement. In some cases, resolving these issues has taken a year or more to negotiate. Your goal, though not always possible, is to resolve these issues before finalizing your NEPA review.

If your project has a high potential to impact a treaty right, you should meet with the Tribal Liaison and Office of the Attorney General to discuss your project's specific consultation plan.

How do I know when I have resolved potential impacts to treaty rights?

If your project has an impact to a court adjudicated treaty right, it may be necessary for FHWA / WSDOT to enter into a formal agreement with the tribe before federal agencies agree to release funding or issue permits for your project.

What happens if my project does not resolve its impacts to tribal treaty rights in NEPA?

It may prevent FHWA from approving your NEPA document, because federal agencies have a trust responsibility to protect treaty rights. It may also prevent or delay other federal agencies from issuing you the permits your project may require.

The importance of tribal consultation is illustrated by the 1988 U.S. Court decision in *Muckleshoot v. Hall*, 698 F. Supp. 1504, 1511 (W.D. Wash. 1988). This case concerned a permit issued by the U.S. Army Corps of Engineers ("Corps") under section 404 of the Clean Water Act for construction of a large new marina in Elliot Bay in a location that was within the U&A area for the Muckleshoot Tribe and where Tribal fishers actively fished. The Tribe challenged the permit, despite its various conditions designed to protect Tribal fishing opportunities in the vicinity of the proposed marina. In response to the

litigation, the Corps withdrew the permit, sought further comments from the Tribe and issued a modified permit. The Tribe sued again, and – more than six years after the permitting process began – the federal district court forbade the Corps from granting the permit on the basis that the marina would interfere with the Tribe’s access to treaty-fishing areas.¹

Your goal is to identify and resolve the outstanding issues in order to enable the affected tribe(s) to “withhold objecting” to the issuance of federal permits or approvals required by the project. It may be necessary for FHWA / WSDOT to enter into a formal agreement with the tribe before federal agencies agree to release funding or issue permits for your project.

What if some of the federally recognized tribes I’m consulting with on my project do not have court adjudicated treaty rights?

This distinction is important when your project has the potential to affect treaty rights. There are a few federally recognized tribes in Washington State who either never signed treaties and / or do not have off-reservation fishing rights. There are also a few federally recognized tribes whose claim of formal treaty rights have not been recognized by the federal courts.

If your project is located within a tribe’s consultation area, then you are required to engage in government-to-government consultation, regardless of whether the tribe has court adjudicated treaty rights or not. However, if your project has the potential to affect a tribal treaty right, you will likely need to engage the tribe(s) with treaty rights a focused, and often more frequent consultation to resolve those issues.

The main difference between consulting a federally recognized tribe that has treaty rights and a federally recognized tribe that doesn’t, is you are legally obligated to resolve a treaty effect

¹ The Court held that the treaties had been violated because the developer openly admitted that the Tribes would only be able to continue catching their quota of fish by relying on other parts of their U&A fishing places outside of the project area. Hall, 698 F. Supp. at 1514-15.

the project has in order to receive the federal permits necessary for your project.

Natural resource managers representing federally recognized tribes without court adjudicated treaty rights should be consulted individually and not as a part of any multi-tribal meetings held for the purpose of addressing treaty rights. You will also need to consider the existence of legal rights, such as treaty rights, when weighing any conflicting tribal positions.

4 Cultural Resources

This section is not intended to answer frequently asked questions about Section 106 of the National Historic Preservation Act or the Section 106 programmatic agreement between WSDOT / FHWA and DAHP. These laws and agreements contain detailed consultation requirements you must comply with on your project. For more specific information about cultural resource laws and regulations, please contact the WSDOT Cultural Resources Program in the Environmental Services Office.

Is Section 106 the only framework in which to evaluate and consider cultural resources?

No. Even non-Section 106 eligible cultural resources can be considered as part of the broader analysis of impacts to the human and natural environment as required under NEPA, and as a part of general government-to-government relations. Section 106 of the National Historic Preservation Act requires federal agencies to consider the effect of their actions on historic properties. The Section 106 implementing regulations (36 CFR Part 800) have very specific processes and criteria for the identification, evaluation and mitigation of resources that are determined eligible for listing in the National Register of Historic Places. Sometimes a cultural resource won't meet any of these criteria, despite its importance to a tribe. For example, a previously disturbed archaeological site may not meet any of the Section 106 historic property or traditional cultural property

What kinds of support does the WSDOT Cultural Resources Program Provide?

The WSDOT Cultural Resources Program provides technical assistance to projects, such as how to define an Area of Potential Effects, scopes of work for cultural resources surveys, inadvertent discovery plans and compliance with federal and state laws.

eligibility criteria, but it can still have immense cultural value to a tribe.

What are traditional cultural properties (TCP) and how do I work with tribes to identify them?

A traditional cultural property (TCP) can be defined generally as a site “that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community” (National Register Bulletin #38). Examples include places associated with the traditional beliefs of a tribe about its origins, its cultural history, or the nature of the world; as well as the places where tribes perform traditional religious ceremonies.

Since a TCP is unique to a given community, they are often the only ones who can identify these resources. TCPs should be identified and evaluated as part of a cultural resources survey. Due to their sensitivity, tribes may be reluctant to reveal specifics, including an exact location and meaning of the resource. You should work with the specialists from the WSDOT Cultural Resources Program and Tribal Liaison Office for further guidance if you encounter this issue on your project.

Some TCPs do not meet the strict eligibility criteria under Section 106 of the National Historic Preservation Act. However, you should still consult with the tribes about these resources under NEPA and government-to-government relations.

What if a Tribe does not want to divulge information to agency officials regarding places of traditional religious and cultural significance?

Many tribes’ beliefs systems require that the location and even the existence of traditional religious and cultural properties not be divulged. It is vital that you work with Tribes to identify sensitive locations while respecting tribal desires to withhold specific information about these types of sites. Section 304 of the National Historic Preservation Act permits Federal agencies

Where can I find additional guidance on TCPs?

National Register Bulletin #38 is available online at <http://www.cr.nps.gov/nr/publications/bulletins/nrb38/>

to withhold sensitive information from public disclosure. Issues surrounding confidentiality concerns can also be included in an agreement document between the Tribe and Federal Agency as provided under Section 800.2(c)(2)(ii)(E) of the regulations.

In Washington State, RCW 42.56.300 states that “Records, maps, or other information identifying the location of archaeological sites in order to avoid the looting or depredation of such sites are exempt from disclosure under this chapter.”

What is an Inadvertent Discovery Plan (IDP) and does my project need one?

Inadvertent Discovery Plans describe the laws, procedures and contact information needed for handling situations when a project inadvertently discovers archaeological resources or human skeletal remains. Cultural Resource surveys are conducted for many projects in part to minimize the chance of such inadvertent discoveries, but they still happen. You may not use an inadvertent discovery plan as a substitute for a cultural resources survey.

The WSDOT Cultural Resources Office has a standard plan or template you can use and / or amend as appropriate for your project. All projects that involve ground disturbance should have an inadvertent discovery plan in place before construction. Projects in or near known sensitive areas should have a plan in place for ground disturbing tests conducted for environmental analysis and engineering, such as geotechnical borings or potholing.

If your project will have an adverse effect on a historic property or if it is located in a sensitive area, you should consult with the affected tribes on the plan.

What state and federal laws apply if human remains are found?

The State of Washington has a number of laws relating to human remains including the Indian Graves and Records (RCW 27.44) and Abandoned and Historic Cemeteries and Historic Graves (RCW 68.60). The Washington State Legislature passed House Bill 2624 on Human Remains.

Where can I get a copy of the IDP template?

Visit the WSDOT Cultural Resources webpage at:
<http://wwwi.wsdot.wa.gov/eesc/environmental/culres/default.htm>

These laws provide specific protections and protocols which must be followed. Contact the WSDOT Cultural Resources Office for more information on these laws.

The Native American Graves Protection and Repatriation Act (NAGPRA) and the Archaeological Resources Protections Act (ARPA) only apply if your project is located on federal or tribal trust lands.

Contact the WSDOT Cultural Resources Office for more information on requirements associated with these laws.

Can the consulting tribes curate artifacts recovered during the course of my project?

Yes, if they have a facility that meets the federal curation requirements (36 CFR 79). While none of the consulting tribes on the Granite Falls Alternate Route Project, had an eligible facility, the Memorandum of Agreement on the project included a provision stating that the artifacts would be temporarily curated “until the affected tribes reach a separate agreement concerning the repatriation of the recovered artifacts. Repatriated artifacts must remain in a facility that complies with the curation guidelines established in 36 CFR Part 79.”

5 Intertribal Relations

It is important for project teams to recognize and respect the uniqueness of each tribe. An important principle is to never ask a tribal representative from one tribe a question regarding another tribe. For example, do not ask a tribal representative from the Tulalip Tribes if you should consult with the Swinomish Tribe, or what the Swinomish position on a project is, or what their cultural practices of another tribe etc. Only a tribal representative can speak on behalf of their tribe. FHWA would never ask Oregon DOT to speak on behalf of WSDOT without WSDOT’s explicit authority to do so.

Is it appropriate to invite multiple tribes to the same meeting?

It depends. If the meeting is tribal specific (i.e. not an agency scoping meeting), then you need to ask each tribe if their

preference is for you to consult with them individually or if they would like to participate in multi-tribal consultation, or both.

This principle is true any time you have more than one tribe consulting on a project. For example, the Alaskan Way Viaduct and Seawall Replacement project hosted a successful and productive multi-tribal meeting. Later as the project sought to develop an Inadvertent Discovery Plan for testing in a sensitive area, some tribes preferred to consult individually with WSDOT.

It's important for you to be flexible in your approach to consultation. You may need to use many different methods throughout NEPA review.

Should I consult with non-federally recognized tribes the same way I consult with federally recognized tribes?

No. It is not considered formal government-to-government consultation.

You should work separately with non-federally recognized tribes as appropriate, under Section 106 of the National Historic Preservation act, or as an affected population for Environmental Justice. Non-federally recognized tribes should not be invited to agency scoping meetings or multi-tribal meetings with federally recognized tribes.

What if a tribe wants to be designated a “lead tribe” or does not want WSDOT to consult with another tribe on the project?

WSDOT cannot designate a tribe as a “lead tribe” for consultation, nor can it exclude interested tribes from consulting. The laws and policies that require tribal consultation do not include such a designation. Any federally recognized tribe that has an interest in your project is entitled to the government-to-government consultation. The Advisory Council on Historic Preservation (ACHP) recently supported these statements; see Appendix K for a copy of the ACHP letter. You can consider and evaluate the respective tribal interests when weighing any conflicting tribal position.

However, it is acceptable for a tribe to defer to another tribe or designate another tribe as a “lead” for consultation. It is important for the consulting tribes to discuss and decide this amongst themselves. It is not appropriate for WSDOT to ask a tribe to defer to another tribe. If a tribe would like to defer consultation on your project, ask them to send you an email or letter for your records.

6 Resolving tribal concerns

What if the tribe objects to a specific issue on my project?

You need to engage in good faith consultation with the tribe in an effort to resolve their concerns. Unfortunately, it is not always possible to reach agreement. Whenever you respond to a tribal concern, it is important that you explain your reasoning. This helps demonstrate that you fully considered their concerns, which is especially important if you cannot accommodate their request. In some cases, a tribe may “agree to disagree” with you on a particular issue. If you cannot reach a resolution or cannot “agree to disagree” on a particular issue, contact your regional tribal liaison or the HQ Environmental Services Tribal Liaison .

If you engage tribes in early, on-going and good-faith consultation, then it will be much easier to explain why you may not be able to accommodate a particular request. Regardless of how legitimate your reasons are, if you haven’t engaged the tribe in early, ongoing and good faith consultation, your explanation will be much harder to accept.

What if different tribes have conflicting requests?

You should seek to foster a shared agreement amongst the involved tribes and WSDOT where possible through the use of clear, open communication. You also need to be sensitive to the differences among the tribes and the reasons for those differences. Where it appears that the differences may not be reconcilable, project managers should contact their regional tribal liaison or the HQ Environmental Services Tribal Liaison for assistance.

Who should be involved in resolving conflicts?

You should first attempt to resolve any conflicts at the lowest staff level of the organization through consensus. You should consult or involve the Tribal Liaison and your FHWA Area Engineer in this process. Most project specific conflicts can be resolved at this level.

If you are unable to resolve the disagreement you may need to elevate the issue to decision makers as appropriate. This may include the Governor's Office of Indian Affairs or State Historic Preservation Officer / Tribal Historic Preservation Officer.

Tribal consultation agreements may include specific provisions for dispute resolution, as do some federal laws, including Section 106.

How do I know when I've completed NEPA stage consultation?

There are three ways to determine if you have completed consultation with the tribe:

- The tribe does not have any objections and declines any further consultation on your project.
- You reach a formal agreement with the tribe on your project.
- You have engaged in good faith consultation throughout the environmental review stage, and in the case of disagreement, you have provided a reasonable explanation for your position.

7 Tribal Compensation**Can I compensate a tribe for providing a service for my project?**

Maybe. If you want to use federal funds for compensation, then you must get approval from FHWA. It is generally acceptable to compensate a tribe for services they may provide, similar to any contractor, provided the tribe meets any applicable requirements. These services could include the preparation of

a discipline report, providing data etc. See appendix L for examples of tribal services agreements.

Can I compensate a tribe for consulting (staff time, review, response etc) on my project?

WSDOT is developing guidance on the use project funds to compensate tribes for consultation (staff time, travel, per diem, etc). Contact the WSDOT Tribal Liaison Office to check the status of this effort.

8 Permitting

This section relates to the permitting phase of a project, which occurs after the NEPA process is completed. Tribes are interested in the permitting phase of projects because of how the specific conditions will relate to their interests.

Who is responsible for consulting with tribes on project permits?

As a general principle, it is the responsibility of the entity that authorizes an action to consult with tribes. The federal trust responsibility (see chapter 2) is a major foundation for most consultation requirements. This trust responsibility requires federal agencies to protect tribal treaty rights and consult with tribes on any actions that affect their interests.

For example, the US Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) are subject to *Secretarial Order 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*. The Order includes an appendix of procedures to implement the order. Under the Order, Interagency Cooperation, commonly referred to as Section 7 consultation, requires these Services to “provide timely notification to affected tribes as soon as the Services are aware that the proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.” Secretarial Order 3206 Sec. 3(c)(1). The Services are required to notify tribes of the proposed action, provide copies of biological opinions and provide a written determination that describes

how the “selected alternative is consistent with their trust responsibilities, and the extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.” Secretarial Order 3206 Sec. 3(c)(2)(d)

How can I ensure that WSDOT and federal permitting agency’s consultation efforts are coordinated and effective?

Much of the documentation needed for permit approvals is prepared as part of the NEPA environmental review process. Early in project design, permit requirements are often discussed and negotiated with regulating agencies, though formal applications for permits are submitted after completing the NEPA process. You should involve affected tribes in these discussions.

Ask the permitting agencies how and when they plan to consult with the tribes on permits. Discuss how these agencies might coordinate with you on their consultation efforts.

Keep in mind that some permits have strict timelines from application to approval. In some cases, the permitting agency will not initiate consultation with the tribes until the permit application is formally submitted. Project teams are encouraged to proactively include affected tribes in any pre-application meetings as well as share technical documents. Each time new information relevant to the permit becomes available, the tribes may have comments / concerns. Do not assume that if they agreed to, or did not object to one aspect or condition of the permit, that the same will be true for other conditions or other permits.

Since local agencies are responsibility for acquiring permits, the H&LP office will not be able to coordinate consultation efforts with permitting agencies.

9 Resources to help you

Below is a list of WSDOT staff that can provide assistance on your project. Updated contact information is available on the Tribal Liaison webpage: www.wsdot.wa.gov/tribal

Tribal Liaison

The Tribal Liaison is located in the Government Relations Office and provides executive level, agency wide Liaison support on all issue areas.

It's important for the WSDOT Tribal Liaison to have a general awareness of the tribal consultation occurring on WSDOT projects. You should involve the Liaison if you need assistance, if conflicts arise on your project, or if questions or issues arise related to tribal policy. Any formal meetings or presentations with tribal leadership should also include the Liaison.

Environmental Services Tribal Liaison

The Environmental Services Tribal Liaison specializes in tribal natural and cultural resource issues. This position provides policy and technical support to projects.

It's important for the ESO Tribal Liaison to have a general awareness of the natural and cultural resource tribal consultation occurring on WSDOT projects. You should involve this Liaison if you need assistance on natural or cultural resource issues, if conflicts arise on your project, or if questions or issues arise related to tribal policy.

Tribal Liaisons in Regions / Modes

The Washington State Ferries Office, Southwest Region and Eastern Region each have full-time Tribal Liaisons to support their region. These will be your first point of contact for tribal issues. The statewide Tribal Liaisons from Headquarters can assist when needed.

Regional Tribal Coordinators

Each WSDOT region has a designated Tribal Coordinator who, in addition to their regular duties, serves as a local point of contact in the region for tribes. For example, if a tribe wanted to know who to contact about a specific project, the regional tribal coordinator can provide that information. Questions or concerns on how to consult with tribes should be directed to the appropriate Tribal Liaison.

Cultural Resources Office

The Cultural Resources Office is part of the Environmental Services Office at WSDOT Headquarters. The cultural resources staff reviews projects to ensure they are in compliance with Section 106 of the National Historic Preservation Act, and other federal and state cultural resources laws. Technical questions, such as how to define the Area of Potential Effects or consultation with the Department of Archaeology and Historic Preservation should be directed to the Cultural Resources Office. Questions on how to consult with tribes should be directed to the appropriate Tribal Liaison. In some cases, it may be necessary to contact both offices for assistance on your issue. For example, if your project requires a Memorandum of Agreement under Section 106, you must work with a Cultural Resources Specialist. If the MOA involves tribal resources, then the project team, cultural resource specialist or tribe can request the Tribal Liaison to get involved.