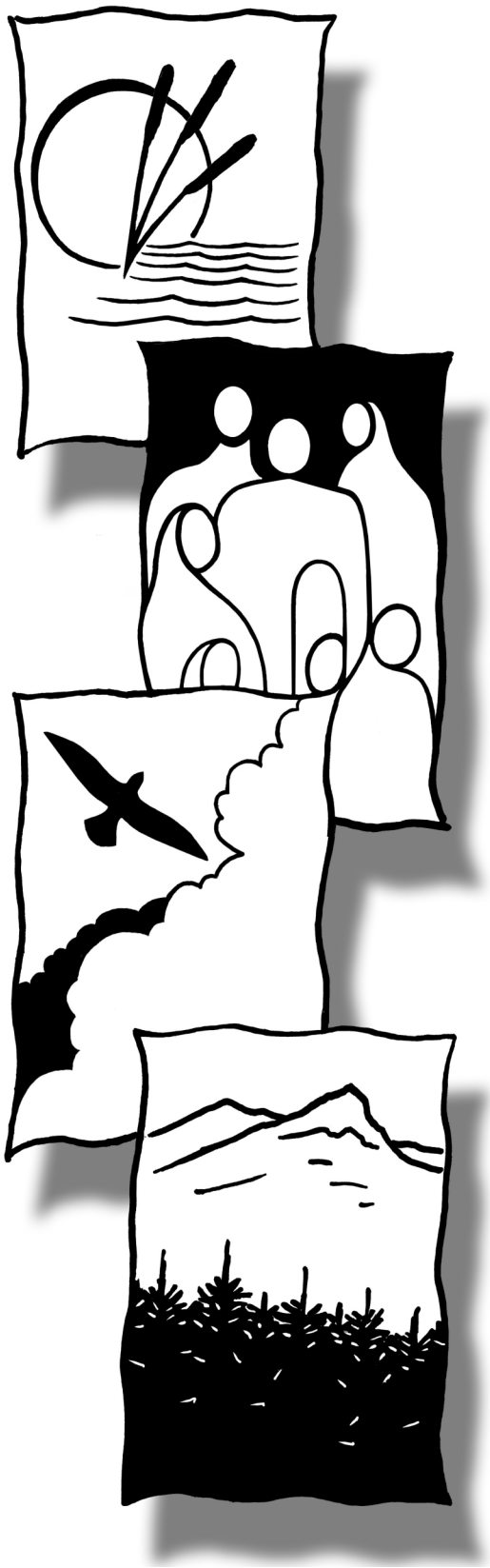

NATHPO

Tribal Consultation

Best Practices In Historic Preservation

National Association of Tribal Historic Preservation Officers

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May 2005
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TRIBAL CONSULTATION:
BEST PRACTICES IN HISTORIC PRESERVATION

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

May 2005
Washington, DC

ABSTRACT

The **"Tribal Consultation: Best Practices in Historic Preservation"** project was conceived by the National Association of Tribal Historic Preservation Officers (NATHPO), Advisory Council on Historic Preservation (ACHP) and National Park Service (NPS), because consultation between Agencies and Tribes is intrinsic to the Section 106 process of the National Historic Preservation Act and an understanding of the necessary components is critical. In order to provide the reader with some indications and effective methods of meaningful consultation, this project bypassed anecdotal experiences in favor of surveying a large body of Agencies and Tribes for their empirical experiences in consultations they deemed to be successful. Their voluntary responses -- compiled and analyzed in this study -- reveal that Agencies and Tribes, for the most part, have similar feelings about what constitutes consultation, how it should be conducted, and what constitutes successful consultation. They tell us that mutual respect must be the basis upon which successful consultation builds, and that coming to a final agreement is not as important as building ongoing channels of communication. Successful consultation begins early in the planning stages, and is predicated on each party being knowledgeable about the project and the priorities and desires of the other parties. Though not without cost, successful consultation results in better and lasting final agreements.

TABLE OF CONTENTS

ABSTRACT iv

I. EXECUTIVE SUMMARY 1

II. INTRODUCTION 3
History 3
Project Goals 3

III. WHY CONSULTATION WITH TRIBES 6
Legal Requirements of Consultation with Tribes 6
Efficiencies Derived from Consultation with Tribes 11
The Right Approach to Decision-Making and the Fiduciary Relationship 11

IV. WHAT IS CONSULTATION WITH TRIBES AND HOW DOES IT OCCUR 13
Defining Consultation 13
The Consultation Process 14
Agency Protocols 15

V. METHODOLOGY: STUDY DESIGN AND IMPLEMENTATION 17
Stage Two: Survey Distribution 17
Stage Three: Survey Solicitation 18
Stage Four: Posting and Analyzing the Data 19
Stage Five: Boolean Assessment 19

VI. THE RESULTS OF THIS STUDY: WHAT MAKES CONSULTATION WITH TRIBES SUCCESSFUL 23
Hypotheses To Be Tested 23
A. Preparing for Consultation 23
B. The Process of Consultation 23
C. Defining Success 23
D. The Formula for Successful Consultation 24
Results 24
A. Preparing for Consultation 24
B. The Process of Consultation 28
C. Defining Success 32
The Formula for Success: Boolean Analysis 35
Tribal Responses 36
Agency Responses 36

Formula of Successful Consultation **37**

VII. STUDY REVELATIONS: BEST PRACTICES THAT EMERGE **39**

VIII. MODEL PROTOCOL STEPS **40**

IX. CONCLUSION **42**
Additional Research and Information **43**

APPENDIX **44**
1. Online Resources **44**
2. Survey Responses **53**
3. Survey Form **61**

I. EXECUTIVE SUMMARY

> I would consider any consultation successful in which there has been a collaborative effort and all parties acknowledge and respect the observations, comments and concerns of the other.
>
> *Dr. Richard L. Allen, Policy Analyst, Cherokee Nation*
> *A Traditional Cultural Property Study of New Echota*

> Successful consultation is a two-way exchange of information, a willingness to listen, and an attempt to understand and genuinely consider each other's opinions, beliefs, and desired outcomes.
>
> *David Grachen, Project Development Manager, FHWA Georgia*
> *A Traditional Cultural Property Study of New Echota*

The Best Practices project was an endeavor of the National Association of Tribal Historic Preservation Offices (NATHPO) in collaboration with the Advisory Council on Historic Preservation (ACHP), and with funding from the National Park Service (NPS). The goal of the project was to identify a best practices model for consultation between Federal Agencies and Tribes on Section 106 consultation of the National Historic Preservation Act, implementing 43 C.F.R. Part 800.

The project surveyed the consultation experiences of actual participants. All Federal Preservation Officers and federally-recognized Tribes were contacted by the project and asked to identify successful consultations, the participants, and the aspects of the enterprise that they deemed led to a successful result. In addition, the respondents were queried on how they measured success. Participants were asked to identify events occurring after the 1992 amendments to the National Historic Preservation Act (NHPA), which enhanced the Tribal role in historic preservation and created the Tribal Historic Preservation Officer (THPO) program. The results of the survey were charted and analyzed in an effort to distill the characteristics of successful consultation and to offer a best practices model for successful consultation in the implementation of Section 106.

Two methods were used to analyze the data: hypothesis testing and Boolean analysis. Tribal Historic Preservation Officers (THPOs), State Historic Preservation Officers (SHPOs) and others primarily involved in historic preservation were interviewed prior to the survey in order to devise the questions for the survey and obtain baseline assumptions about consultation. The survey data was used to test the validity of those assumptions. Boolean analysis was also employed to discern the formula for a successful consultation. This analysis relied upon the frequency of reported criteria for consultation. Through the

analysis a best practices model for consultation between Federal Agencies and Tribes began to emerge.

Some assumptions about successful consultation were consistent with the survey data. For example, consultation must occur early in the project planning process, both sides must plan ahead for meetings and be informed of the project scope and effect prior to attempting consultation, the parties must engage in a dialogue predicated on mutual respect and understanding of the priorities of the other and the challenges that each face, having a THPO and an Agency Tribal Liaison involved in the process contributes to success, as does having adequate funding for Tribal parties to travel to meetings, and for Agency and Tribal participants to view the site together. On the other hand, reaching a Memorandum of Agreement (MOA) was rarely seen as the indicator of success. Both Tribes and Agencies agreed that building relationships is the goal of a successful consultation and that funds and time spent in consultation reap ongoing benefits and efficiencies for future projects. Although congenial personalities make consultation pleasant, the process is bigger than an individual interaction and can indeed be institutionalized and replicated over time.

II. INTRODUCTION

History

The National Association of Tribal Historic Preservation Officers (NATHPO) and the Advisory Council on Historic Preservation (ACHP) collaborated on a project to identify "Best Practices in Tribal Consultation." They agreed to utilize the funds provided by the National Park Service (NPS) to conduct a study, using a survey as the main investigative tool. The goal was to determine the attributes of a successful consultation between Tribes and Federal Agencies[1] in order to assist consulting parties achieve successful results by identifying and promoting meaningful consultation practices.

In January 2004, a Project Advisory Committee[2] was formed. The survey instrument was developed and distributed to all Tribes and Federal Preservation Officers in April. The collection of data was closed on November 24, 2004.

Project Goals

The goal of the study is to use data to identify the attributes of a successful consultation between Tribes and Federal Agencies in the execution of their historic preservation activities. While a growing body of scholarship based on anecdotal experience recommending good consultation practices exists (see Appendix 1, Bibliography), this study was predicated on the idea that: empirical data derived from numerous consultations will yield essential information on the nature and characteristics of successful consultation practices; Agencies and Tribes can learn from these experiences; pioneers in the efforts to perfect consultation skills would see their efforts validated; and Tribes and Agencies that

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[1] "The Council and the National Park Service are currently conducting a guidance project to assist agencies in identifying Indian tribes to be consulted." 65 Fed. Reg. 77702 (Dec 12, 2000)

[2] Alice M. Baldrica (Nevada Deputy State Historic Preservation Officer), David G. Blick (Historic Preservation Officer, HUD), Dr. Melvin Brewster (Skull Valley Goshute THPO Program), Sarah T. Bridges (National Resources Cultural Resources Specialist, USDA NRCS), Dr. Allyson Brooks (Washington State Historic Preservation Officer), Dr. Alan S. Downer (NATHPO Chairman & Navajo Nation Tribal Historic Preservation Officer), Thomas Hales Eubanks, State of Louisiana Archaeologist, James Garrison (Arizona State Historic Preservation Officer & Chief of the Historic Preservation Section), giiwegiizhigookway Martin (Tribal Historic Preservation Officer, Lac Vieux Desert Band of Lake Superior Chippewa Indians), Alina McGeshick (Tribal Historic Preservation Officer Assistant, Lac Vieux Desert Band of Lake Superior Chippewa Indians), Dr. Richard Waldbauer (Assistant Director, Federal Preservation Institute, National Park Service), Sherry White (Cultural Preservation Officer, Stockbridge-Munsee Tribe), and Dr. Rosita Worl (President, Sealaska Heritage).

are regularly involved in decisions on the identification, evaluation, assessment and treatment of cultural properties must work together to achieve lasting agreements on preservation of these sites will benefit from presentation of these results.

This study provides concrete suggestions and protocols for consultation. We hope that, by using it, Tribes and Agencies will institutionalize procedures that foster open communication and engaged interaction in matters of mutual concern. As a result, agencies will not merely see consultation with Tribes on a government-to-government basis (see Section III. Why Consultation with Tribes) as an obligation but as an opportunity to seek a process that is efficient and conserves the time and financial resources of the parties, at the same time it achieves mutual goals.

In order to determine what survey information might lend itself to specific management action for successful consultation (see Appendix 3, Survey Form), Dr. Hutt interviewed members of the Project Advisory Committee, historic preservation professionals, as well as the staff of the ACHP. As a result, several questions emerged:

- Is there a correlation between the consultation process and a successful result?
- Where do Tribes and Agencies look for advice and support in conducting consultation?
- How do Agencies determine the Tribes to consult?
- Are some projects more-or-less problematic and more-or-less likely to be resolved in consultation efforts?
- Do Tribes and Agencies have protocols used in consultation?
- Can consultation be a success and the MOA still elusive?
- Do differing values exist between Tribes and Agency representatives and, if so, does this impact the success of consultation?
- To what extent is having Tribal staff dedicated to Section 106 work important to success in consultation?
- To what extent is consistency in the representatives to consultation from the Tribes and Agencies a factor in successful consultation?
- To what extent is the Tribal or Agency legal staff involved in the process and is their presence a contributing factor to success?
- Is there a correlation between increased hiring of Native American staff in Federal Agencies and success in consultation between Agencies and Tribes?
- How is success defined?
- What does success look like?

The survey questionnaire was designed to obtain information that answered the above questions. Based on responses, certain hypotheses about consultation could be tested. These hypotheses can be grouped into four topic areas: Preparing for

Consultation, the Process of Consultation, Defining Success, and the Formula for a Successful Consultation.

The interviews conducted prior to the study elicited some commonly held assumptions about consultation that, subsequently were validated or negated by this study. Some interviewees assumed:

- That consultation was dependent upon an empathetic and congenial Agency manager and that upon transfer of this individual to another duty location the positive relationship between the Agency and Tribes would be lost.
- That Tribes and Agencies held different expectations of results to be gained from consultation, that is, that Agencies expected an immediate MOA and Tribes desired a long-term plan for the resource.
- That many "consultations" were in fact merely opportunities for Agencies to inform Tribes of decisions that had been made, or that Agencies believed that consultation obligations could be met by sending a letter to Tribes inviting them to a "consultation" without first providing specific information about the proposed project upon which they could be prepared to comment.

The first assumption is addressed in the first set of surveys sent to all Tribes and Federal Preservation Officers. The second assumption is informed by comparing the responses of Tribes and Agencies and the third assumption is resolved by the distillation of the component attributes of successful consultation into a formula.

The surveys revealed the prevailing motivation for consultation. Tribes and Agencies seem to sense that there is a communication gap that must be bridged. Some speak of the "right thing to do," and others of "legal mandates," and still others of "good management planning." The study results demonstrate a correlation between motivation and success.

III. WHY CONSULTATION WITH TRIBES

The history of United States Indian policy evidences an evolving, difficult and complex relationship.[3] With tribes the fundamental basis of required consultation is recognition of Tribal sovereignty. Over the years, the federal government has refined the obligation of Federal Agencies to interact with Tribes on a government-to-government basis in a series of laws, amendments to existing laws, and executive orders, all of which direct Agencies to engage in consultation with Tribes. Today, the relationship of the federal government and federally-recognized Indian Tribes has evolved to the point where consultation on a government-to-government basis is not only the law, it is considered sound management policy and the right way for the United States to do business.

The following discussion of consultation with Tribes identifies the legal mandates of tribal consultation, the efficiencies to be derived from consultation and why consultation is regarded as the right approach to decision-making in undertakings that *might* affect sites of interest to Tribes. This policy assumes that consultation is meaningful, effective and conducted in good faith.

Legal Requirements of Consultation with Tribes

The legal obligation of Federal Agencies to consult with Tribes on a government-to-government basis begins in the Constitution, in Article I Section 8, also known as the *Commerce Clause*, where Congress is empowered to regulate commerce with foreign governments, between the states and with the Indian Tribes. In Federal Indian policy, it is unclear whether Tribes are more like foreign nations or like states, but clearly, the government of the United States has an obligation to consult with Tribes as sovereign nations on matters of interest and concern to Tribes. The constitutional mandate is expressed in statutes, executive orders and the policies of the several Federal Agencies that touch upon Tribal matters. In brief these are:

- NHPA[4] requires consultation with Indian Tribes on places of traditional religious and cultural significance, in identifying and determining treatment modalities within the area of potential effect of an undertaking. Consultation is also required with Tribes that have assumed historic preservation duties as THPOs for sites on Tribal land and with Tribes on the mitigation of effects to

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[3] Charles Wilkinson, *Indian Tribes as Sovereign Governments,* 2ND ED, 2004, at 16. For a more detailed history of Federal Indian policy, see: D. Getches, et.al, *Cases and Materials on Federal Indian Law,* 5th Ed., 2005.

[4] 16 U.S.C. §§ 470a(d)(6)(B) & 470h (1992).

historic and sacred places on federal land[5]. However, 36 C.F.R. 800.2(c), states in part:

> Section 101(d)(6)(B) of the act requires the Agency official 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. Such Indian tribe or Native Hawaiian organization shall be a consulting party.[6]

- National Environmental Policy Act (NEPA)[7] is directed at the impacts to the human environment, which includes the social and cultural relationship of people to the physical environment. Under this law there is an obligation to consult with Tribes concerning impacts to sacred sites and on the mitigation of actions to sites of concern to Tribes that is not limited by the National Register eligibility criteria (36 C.F.R.60.4)

- Archaeological Resources Protection Act (ARPA)[8] is a law directed at protecting "archaeological" sites for the important information that can be retrieved, but the law also requires Federal Agencies to notify Tribes of a permit for excavation on federal land that will include sites of religious or cultural importance to Tribes. On Indian lands, the federal Agency must have the permission of the Tribe to issue an ARPA permit. The federal government has an obligation to keep track of such items when excavated pursuant to a permit in the event that the "Indian owners" may want to retrieve them.[9] All fines and civil penalties collected and all items seized from ARPA civil and criminal prosecutions arising from incidents on Indian lands must be remitted to the Tribe. The costs of reburial of human remains and funerary objects disrupted by looters will be added to the restitution sought from violators.

- Native American Graves Protection and Repatriation Act (NAGPRA)[10] requires that a general summary of the collection be disseminated to all possibly interested Tribes to facilitate consultation which can lead to

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[5] The NHPA in section 101(d)(2) creates the Tribal Historic Preservation Officer Program, and reads: "A tribe may assume all or any part of the functions of a State Historic Preservation Officer with respect to Tribal lands." In section 301(14) "tribal lands" are defined as: "(a) all lands within the exterior boundaries of any Indian reservation, and all (b) dependent Indian communities." This definition of "tribal lands" excludes Alaskan Natives from having a Tribal Historic Preservation Officer program. (U.S. Department of Interior, Office of the Solicitor, Request for Opinion Regarding National Historic Preservation Act of 1966, as Amended, November 2002.)
[6] 36 C.F.R. 800, effective January 11, 2001.
[7] 42 U.S.C. §§ 4321-4335 and 1979 regulations.
[8] 16 U.S.C. § 470cc.
[9] 43 C.F.R. § 7.8 (a)(7)(ii).
[10] 25 U.S.C. §§ 3002-3005 and § 3010 The government-to-government relationship provision.

repatriation and to assist in the preparation of an itemized inventory of human remains and associated funerary items. On federal land, Agencies that do not consult with Tribes prior to exhumation of sites of importance to Tribes and develop an agreement for "Intentional Excavation," are punished by a mandatory 30 day cessation of work for each "Inadvertent Discovery," that is a find in the absence of a plan arrived at through consultation with the impacted Tribes.[11] Consultation is also required to determine the means of transfer of repatriated items.

- Executive Order 12875 (1993) *Tribal Governance*, specifies that the federal government must consult with Indian Tribal governments on matters that significantly or uniquely affect Tribal government. By Executive Memorandum of April 29, 1994, the federal government must consult with federally-recognized Tribal governments prior to taking actions that will affect those Tribal governments (See below for the current administration's Executive Memorandum on the Government-to-Government Relationship).

- Executive Order 12898 (1994) *Environmental Justice*, specifies that the federal Agency will consult with Tribal leaders on steps to be taken to insure that environmental justice requirements are applied to federally-recognized Tribes. This includes research to address issues of adverse environmental impact in areas of low-income and minority populations, which include Tribes generally and with regard to subsistence consumption of fish and wildlife, which pertain to Tribes exclusively.

- Executive Order 13007 (1996) *Sacred Sites*, applies on federal land and directs the Federal Agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, as well as to avoid adversely affecting the physical integrity of such sacred sites. Although Federal Agencies must consult with Tribes to learn the existence of places, which require management decisions to be made, the directive requires Agencies to maintain the confidentiality of sacred sites where appropriate for their protection.[12]

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[11] 43 C.F.R. § 10.5 Consultation, specific requirements.

[12] The National Park Service relied on this Executive Order when it instituted a voluntary climbing ban on Devil's Tower during periods of ceremonial use by tribes which was upheld by the courts in *Bear Lodge Multiple Use Ass'n v. Babbitt,* 2 F. Supp. 2d 1448 (D. Wyo. 1998). More recently the Tenth Circuit Court of Appeals upheld the management plan of the NPS which restricts visitor access to Rainbow Bridge during times of ceremonial use by the Navajo and Hopi, in *Natural Bridge and Arch Society v. Alston,* 98 Fed. Appx. 711, 2004 WL 569888 (10th Cir. Mar. 23, 2004), aff'g 209 F.Supp. 2d 1207 (D.Utah 2002), retreating from the earlier decision in *Badoni v. Higginson,* 638 F.2d 172 (10th Cir. 1980), which declined to uphold a restriction of visitors to Rainbow Bridge during times of religious practice on the basis that to exclude others would foster religion and violate the First Amendment. It has often been argued that quiet enjoyment of a

- Executive Order 13084 (1998) *Consultation and Coordination with Indian Tribal Governments*, reaffirms the unique government-to-government relationship between Agencies and Tribes. The Order makes it clear that the obligation is upon the federal government and not the Tribes to instigate and insure that consultation occurs on a timely basis. The consultation is defined as an activity to obtain meaningful and timely input from Tribes on matters that significantly or uniquely affect Tribal communities. In those instances where Tribal laws exist, the Federal Agencies are to defer to Tribes and waive Agency control. Further, rulemaking on matters of concern to Tribes should include consultation with Tribes, necessitating the development of consensual mechanisms to arrive at agreements. This Executive Order embodies the complete shift in the enfranchised status of Tribes in the post-1960 era of Tribal self-determination and sovereignty. (superceded by E.O. 13175)

- Executive Order 13175 (2000) *Consultation with Indian Tribal Governments*, would seem redundant, but appeared necessary where Agencies were slow to develop Tribal consultation policies and the courts were slow to enfranchise Tribes. This Order firmly establishes the policy of the administrative branch of government as one that institutionalizes regular and meaningful consultation with Tribes in the development of federal policies affecting Tribes. It directs that Agencies respect treaty rights and grants wide discretion to Tribes in self-governance and the development of Tribal policy. Further, this Order directs each Agency to develop a consultation process.

- Executive Memorandum, *Government-to-Government Relationship with Tribal Governments*, (September 2004), recognizes the unique legal and political relationship of Tribes, and reaffirms that each executive department and Agency fully respect the rights of self-government and self-determination in their working relationships with federally-recognized Tribal governments.

- Federal Agency regulations and policies pertaining to consultation with Native Americans are noted briefly below (Note: Some policies are titled protocol, but contain a statement of policy rather than an operational protocol. Agency protocols for consultation are listed in Section IV):

    - NPS Management Policies include the following:
        1. Regarding burials (5.3.4)
        2. Regarding cultural interpretation (7.5.5)
        3. Regarding cultural resources (5.2.1)
        4. Regarding ethnographic resources (5.3.5.3.1)

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traditional place of cultural practice was guaranteed by the First Amendment, not limited by it and that thought seems to be the trend in the court decisions subsequent to this Executive Order.

5. Regarding game harvest regulations (4.4.3)
6. Regarding museum objects (5.3.5.5)
7. Regarding natural resource management (4.1.4)
8. Regarding Sacred Sites (5.3.5.3.2)

In general these polices state that the practices, traditions and beliefs of Native Americans will be considered in any treatment and planning decision of the NPS, and that Native Americans will be a meaningful part of the information gathering process to ascertain knowledge of the sites and concerns and desires of Native Americans.

- The Bureau of Indian Affairs (BIA), which is responsible for over 50 million acres of land held in trust by the federal government on behalf of Tribes and Alaskan Natives, has Guidelines for Integrated Resource Management Planning in Indian Country (IRMP). The IRMP outlines an involved process as a blueprint for consultation with Tribes on the management of cultural resources on Tribal lands by the Tribe.
- United States Department of Agriculture (USDA) Forest Service has a draft general consultation policy process (FSM 1563) which references the regulations to which it applies.
- USDA Natural Resources Conservation Service (NRCS) executed a nationwide Programmatic Agreement, May 2002, with the ACHP and the National Conference of State Historic Preservation Officers, to institute a policy of developing consultation agreements at the state level with individual Tribal governments.
- Department of Defense (DoD) adopted a policy on American Indians and Alaska Natives in 1998, which includes consultation with Tribes concerning proposed military activities that could affect Tribal lands and resources, including sacred sites, on and off military reservations.
- The Department of Transportation's (DOT) Federal Highway Administration (FHWA) has a Native American Coordination Program, which provides guidance and technical assistance to Federally-recognized Tribes, and information for state DOTs on working relationships with Tribes, including a section with individual Tribal programmatic agreements.
- Department of Housing and Urban Development (HUD) has a Government-to-Government Tribal Consultation Policy (2001) and American Indian and Alaskan Native Policy Statement (1994).
- Department of Energy (DOE) has a Native American and Alaska Native Tribal Government Policy (2000) and an Environmental Policy & Guidance, which has a section on the American Indian Religious Freedom and Native American Graves Protection and Repatriation Acts.
- Environmental Protection Agency (EPA) has a Policy for the Administration of Environmental Programs on Indian Reservations (1984) and a Memorandum of Actions for Strengthening EPA's Tribal Operations (1994).

- Federal Communications Commission (FCC) has a Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes (2000).

Efficiencies Derived from Consultation with Tribes

Agencies are required to consult throughout the planning process of an undertaking, beginning with identification and evaluation of property of religious and cultural significance to the Tribe. There are also sound business reasons to conduct early and comprehensive consultation with Tribes, even prior to those mandated in statute. Many Agencies generate management plans in five- to ten-year cycles. The inclusion of Tribes in such planning ensures that the plans will be realistic and comprehensive, and that the significant resources involved in planning will be invested in a truly lasting management document. There are tremendous efficiencies in project planning and implementation to be gained from early identification of resources important to Indian Tribes.

In terms of project planning, consultation with Tribes from the time of the first planning sessions promotes smooth project execution and makes work stoppages to conduct remedial consultation less likely to occur. Consultation during the Section 106 process to resolve the issue of disposition of Native American burials and other cultural items that might be discovered during the project means that the activity is constructively a "Planned Excavation," for NAGPRA purposes and not subject to mandatory 30-day work stoppages for each "Inadvertent Discovery."

Agency protocols for consultation that are, themselves, derived from tribal consultation help to build a continuum of communication between the Agency and the Tribes within the area of Agency management. Although Agencies are only required to consult with the Indian Tribe as to the inclusion of other consulting parties when the undertaking is on Tribal lands, consistency of contact leads to an open working relationship, with an economy of effort and a high likelihood of satisfaction with the final action for all parties. This does not mean that the consulting parties may begin to take each other for granted, but it does mean that the cadence of consultation can pick up when a foundation of trust and mutual respect has been established.

The Right Approach to Decision-Making and the Fiduciary Relationship

Agency officials often describe consultation as the "right thing to do," but it is the nature of the government's trust relationship that mandates consultation. This fiduciary relationship is deeply rooted in the land and resource cessions made by Tribes as part of treaties and treaty-like rights. As a result the Tribes and the

government understood that the federal government would safeguard the autonomy of Native nations, their assets, and their treaty reserved rights, as a common law trustee. This relationship often referred to as the "trust relationship," requires that where the federal government has asserted management and control of Native American assets, either through Federal Agencies or local or state agencies funded by the federal government, it has an obligation to use due care with the assets of the Tribal beneficial owners. In decision-making, that potentially affects cultural assets of Native Americans, on and off Indian Country[13], the government-to-government relationship requires at a minimum the input of Native Americans. Furthermore, Tribes are not merely another consulting party, they are the primary consulting party.

The understanding derived from consultation between Agencies and Tribes contributes to better information about project impacts on the landscape for all Native nations and Federal Agency fiduciaries. Better information, in turn, should produce sounder project planning. Consultation is thus not only legally mandated and efficient project planning, it is also the right course of conduct. However, there also exists disagreement over when meetings are consultation and when they are not.

[13] "Indian Country" is defined in 18 C.F.R. 1151.

IV. WHAT IS CONSULTATION WITH TRIBES AND HOW DOES IT OCCUR

Defining Consultation

The Secretary of the Interior's Standards and Guidelines offers the following definition for consultation:

> *Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed.*[14]

The courts have also defined consultation in a case involving the USDA Forest Service and the Pueblo of Sandia, and a historic property in Las Huertas Canyon, New Mexico.[15] This case exemplifies the status of consultation between Agencies and Tribes at the beginning of the time period covered in this study and merits some elaboration.

In Pueblo of Sandia, the court held that the Agency must make a "reasonable effort" to consult with Tribes in order to take into account the effect of an undertaking on National Register eligible properties known to the Pueblo. The Forest Service had mailed a letter to the Pueblo asking for the specific locations of sites known to traditional cultural practitioners, to be mapped to a scale of 1:24,000 or better, together with information on the activities practiced, the specific dates, as well as documentation of the historic nature of the property. The Forest Service also attended meetings of the All Indian Pueblo Council and informed them of the plans for road construction through the canyon. At those meetings the Agency was informed that there were sites in the area of potential effect, but this information was not acted upon as it lacked the specificity required by the Agency. The court found that the information sought by the Agency exceeded the level of specificity required in order for the Agency to be knowledgeable about the areas of concern to the Pueblo, and take mitigating action. Further, the court noted that the occurrence of cultural practices in the area was well known, including the use of certain paths and sites within the canyon. The court held that, where there is a reasonable likelihood that traditional cultural properties are present in an area, the Agency is obliged to make a reasonable effort to identify those properties, and found that it had not done so in this case.

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[14] Secretary of Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, Federal Register 24 April 1998.
[15] *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

A "good faith" effort to identify properties would have included consultation with the Pueblos beyond the initial letter and briefing.

It is important to note that the key elements of consultation identified by both the court in Pueblo of Sandia and the Secretary of the Interior's Standards and Guidelines are direct interaction and an exchange of views. That an agreement is reached may be the desired result, but the essential attributes of consultation are found in respectful, direct communication. Pueblo of Sandia affirms the opinion of many respondents to this study, that a letter inviting consultation followed by a briefing given to Tribes by the Agency does not constitute consultation.

The Consultation Process

At a minimum, consultation begins with the Agency official reviewing all known information about sites within the area of potential effect of the project. That review must also identify Native American groups with a potential interest in the area, whether or not they are physically present in the area.

The Agency official has the obligation to make a "good faith effort" to identify the consulting parties early in the planning process and give them a "reasonable opportunity" to identify concerns about effects on historic properties, advise on identification and evaluation of such properties, including traditional cultural properties and "participate in the resolution of adverse effects."[16]

The NHPA regulations include as consulting parties:

1. The State Historic Preservation Officer (SHPO), and on Tribal land by request or agreement or when the Tribe does not have a 101(d)(2) Tribal Historic Preservation Officer (THPO).[17]
2. The THPO in lieu of the SHPO for those Tribes having THPOs, or if none, then the Tribal representative in addition to the SHPO, on Tribal lands.[18]
3. Any Indian Tribes or Native Hawaiian organizations that attach "religious and cultural significance to historic properties that may be affected by an undertaking," "regardless of the location of the historic property."[19]
4. Representatives of local governments where local governments have jurisdiction on the land and in place of the Agency official by agreement.[20]
5. The Agency official on federal land and where a permit, license, federal assistance or other approvals are authorized by the federal Agency.[21]

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[16] 36 C.F.R. § 800.2(c)(2)(ii)(A).
[17] 36 C.F.R. § 800.2(c)(1).
[18] 36 C.F.R. § 800.2(c)(2).
[19] 36 C.F.R. § 800.2(c)(2)(ii).
[20] 36 C.F.R. § 800.2(c)(3).
[21] 36 C.F.R. § 800.2(c)(4).

6. The public and others with a demonstrated interest in the project or their concern with the effects on historic properties.[22]

Consultation between the Agency and Tribe lasts until the parties resolve the adverse effects[23] of an undertaking or until an impasse is reached and the Advisory Council is to comment upon termination of consultation.[24] Consequently, consultation plays a role in the planning of the undertaking, determinations that are made regarding the nature of the undertaking and its potential effects,[25] identification of properties of religious and cultural significance,[26] decisions on whether additional consulting parties should be added,[27] and decisions on mitigating adverse effects.[28]

Agency Protocols

Many Federal Agencies have a Native American policy that includes acknowledgement of the need to consult with Tribes, but not all of them have translated this policy into action. Also, sometimes they confuse consultation policy, as directed by Executive Order 13175, and consultation protocols. The ACHP has noted that, "For many agencies, there remains a significant problem with implementation."[29] The following Agency protocols for consultation with Tribes have either been finalized or are in the draft stage:

- USDA Forest Service has a draft for FSM 1500 – External Relations, which is a comprehensive blueprint for interaction with American Indian and Alaska Native Tribal Governments, developed by the USDA National Tribal Relations Program Implementation Team. The handbook covers consultation on regulations and policies, as well as, specific activities and sets forth requirements for consultation and an evaluation process.
- The FWHA Pennsylvania Division held an Intertribal Summit in September 2003, out of which came recommended protocols. These protocols acknowledge the cultural aspects of consultation and that understanding the communication practices of a consulting partner is simply a matter of respectful behavior.
- ACHP Consultation Protocols are embodied in the Action Plan on ACHP Native American Initiatives, October 2003. The ACHP has assumed that among its tasks is a responsibility to assist all participants in understanding Native American consultation requirements in the Section 106 process.

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[22] 36 C.F.R. § 800.2(c)((5) & (d).
[23] 36 C.F.R. § 800.6(a).
[24] 36 C.F.R. § 800.7.
[25] 36 C.F.R. § 800.3(c)(1)(3).
[26] 36 C.F.R. § 800.4((b).
[27] 36 C.F.R. § 800.3(f).
[28] 36 C.F.R. § 800.5(a).
[29] ACHP Action Plan, October 2003, p. 5.

- ACHP's "Policy Statement Regarding the Council's Relationships with Indian Tribes (November 2000).
- FCC has a Memorandum of Understanding (MOU) with the United South and Eastern Tribes (USET), which adopts voluntary "Best Practices" concerning protection of historic properties of religious and cultural significance to Tribes in the tower siting process, and has a draft Programmatic Agreement designed to streamline the NHPA review process for communication facilities.
- HUD has an Office of Native American Programs (ONAP) that provides training and is undertaking to consult with Tribes and their housing entities, according to their Tribal consultation policy.
- DoD has developed training materials and has been active in training personnel on consultation techniques. These trainings include American Indian trainers, Tribal historians and Tribal elders in presentations given to the attendees. DoD has also produced a monograph on consultation with Tribes on Sacred Sites.
- Department of the Army has developed Army Alternate Procedures (AAP) for consultation with Indian Tribes and Native Hawaiian organizations. True to the purpose of consultation, Native Americans were included in many of the AAP formative meetings to ensure that their perspectives were effectively incorporated into the AAP.

> Consult, Consult, Consult does not mean Agree, Agree, Agree.
> We began a dialogue that opened doors for future meetings.
>
> *Major Samuel House, Environmental Programs Director, Wyoming National Guard*
> *ICRMP with Wyoming National Guard*

> Consultation was successful because an effort was made by all parties to be considered <u>before</u> anything took place. We worked from point "A" through the whole process "together" as a group.
>
> *Ms. giiwegiizhigookway Martin, THPO, Lac Vieux Desert Band of Lake Superior Chippewa*
> *L'Anse Trail Project*

V. METHODOLOGY: STUDY DESIGN AND IMPLEMENTATION

This study was conducted in five (5) stages: (1) hypotheses development; (2) survey distribution; (3) survey solicitation; (4) posting and analyzing of the data; and (5) Boolean assessment. Hypotheses are the pre-study set of assumptions about consultation subject to question. The survey was the main investigative tool and was used to determine the attributes of a successful consultation between Tribes and Federal Agencies, as self-reported by Tribes and Agencies. The survey form reflected interviews with members of the Project Advisory Committee, staff of the ACHP and others involved in historic preservation, and sought to obtain information capable of identifying best practices in tribal consultation for Section 106 undertakings (as opposed to policy). Where the survey instrument was insufficient, or the responses did not provide sufficient information, a follow-up interview was conducted. The interview notes were then attached to the survey response form to maintain a record that reflects the notes as taken, and separate from the self-reported comments (the survey form is found in Appendix 3, Survey Form). The responses and data tables created are maintained by NATHPO.

The surveys were distributed in two phases. Phase One was the initial mailing to all Tribes and Federal Preservation Officers. Phase Two involved a request for response to a specific project presentation made to a consulting partner identified in the first mailing. All of the responses were charted and analyzed by posing hypothesis to the data. Finally, Boolean analysis was used to devise a formula for successful consultation.

Stage One: Hypotheses Development

The first step was to establish a preliminary set of questions, or "hypotheses," to be used later in the project. Hypotheses were developed by Dr. Hutt after interviewing the project advisors, ACHP staff, and others involved in historic preservation.

Stage Two: Survey Distribution

In January 2004, a Project Advisory Committee was formed, and in April the survey instrument was sent by NATHPO to all Tribes and Federal Preservation Officers (FPOs). In addition, requests were made to personal contacts in Tribes and Agencies to support the official request from NATHPO. President Kraus made requests for survey responses at seminars, consultations and other events she attended during this time period, and Dr. Hutt did the same at trainings and

conferences she attended, including: U.S. Department of Agriculture-Farm Services (USDAFS), Bureau of Land Management and Tribal training in Grand Junction, Colorado, and USDAFS and Tribal training on Indian Law in Grand Teton, both in May; Texas National Guard and Army training on the Native American Graves Protection and Repatriation Act and Indian Law in Austin, Texas, in June; and the American Culture Association, in a panel on the use of NHPA, ARPA and NAGPRA to assert Tribal cultural sovereignty, in San Antonio, Texas, in April. Information on the study and a survey form were posted on the NATHPO website in early April.

Sixty-six (66) phase one survey responses were received (Appendix 2, Survey Inventory) concerning sixty-one (61) projects. Thirteen (13) Tribes and twenty-four (24) Agencies submitted projects, twice the same project was submitted by two different entities (Tribe-Agency and Agency-Agency). The Army had four different divisions submit a project at this stage, and each is counted as an Agency response for this study. Supplemental information was solicited from parties submitting phase one surveys where the survey instrument or responses were deemed to be insufficient, or to obtain missing contact names and information on the consulting parties, for phase two of the study. Interview notes were attached to the survey response form so that the record would include both the notes as taken and the self-reported comments. Phase one closed on November 5, 2004.

Stage Three: Survey Solicitation

In an effort to learn the views of Tribes and Agencies on consultation, and determine the indicia of successful consultation, getting survey responses from different consulting partners for the same undertaking was critical. Tribes and Agencies supported the study with survey responses, but they did not always report similar consultation experiences when on the same undertaking. By directly soliciting responses from consulting partners of phase one survey respondents, the number of Tribes and Agencies providing input to this study during phase two was doubled.

Phase two survey solicitations commenced on September 1, 2004. Phase two consisted of obtaining survey responses from consulting partners that were listed in the stage one surveys. To obtain sets of survey responses the inventory was compiled for distribution to the Project Advisory Committee and others who could prompt Tribes and Agencies to submit responses. Direct solicitations were made by mail, telephone, email and personal contact to elicit responses. In addition, direct interviews were conducted over the telephone with the consulting partner when time permitted.

For phase two, consulting parties from thirty-three (33) Tribes and thirty-two (32) Agencies[30] responded with information on the project they reported in phase one[31]. Of the original sixty-one (61) projects submitted in phase one, there were forty-four (44) projects where at least one consulting partner responded in phase two and seventeen (17) projects where no consulting partners responded. Phase two of the study closed on November 24, 2004.

Stage Four: Posting and Analyzing the Data

The data received from the survey responses were recorded as three data sets: (1) Tribal responses; (2) Agency responses: and (3) Joined Sets of consulting partners compared from Tables 1 and 2.

For Tribal Responses and Agency Responses: Columns were arranged to record the presence or absence of a THPO, Tribal Liaison, Tribal Chair and Agency official. The number of sessions held was recorded and the nature of the session was noted as a formal planned consultation or informal contacts. The indicia of success and lessons learned were as reported by the respondent. Each entry had an additional section of notes, which included the methods used to determine the consulting partners.

THPO	Tribal Liaison	Tribal Leader	Agency Official/ Contractor	Number of Sessions	Nature of Session (in/formal)	Indicia of success	Format	Lessons learned
Yes/No	Yes/No	Yes/No						

Table 3 follows the same data-recording format as used for Tables 1 and 2, but the responses were paired for Tribe and Agency responses to a single project on which consultation occurred.

Several hypotheses about consultation developed prior to the survey were tested against the data. In addition, the tables were also used to identify the factors for the Stage Five Boolean assessment.

Stage Five: Boolean Assessment ("Truth Table")

Boolean analysis is a management tool that seeks to identify the critical attributes of decision-making, and the presence or absence of those attributes in case studies. A Boolean analysis identifies factors, isolates those factors in case

[30] Although the same situation occurred here as it did in stage one with multiple divisions or regions of the same Agency submitting.
[31] Phase one surveys provide one or more phase two consulting partners. One survey listed thirty (30) consulting partners. Many of the phase one surveys had the same consulting partner listed, and at times, when a Tribe responded, it responded to more than one project.

studies, enters their presence or absence on a Boolean "data table," and, distills the results in order to test whether a particular factor should appear on a Boolean "truth table," of factors that taken together likely will yield a successful result. As attributes for each reported consultation experience are reduced to simple algebra (i.e., formulas), the various ways to achieve successful consultation emerge in the Boolean "Simplification Table." In other words, Boolean analysis allows for various events to be compared and the essential common aspects of consultation to be identified. The data table lists all formulas by response. The "truth table" allows for a weighted analysis, as recurring formulas can be segregated from single, outlier responses. Ultimately, a single formula emerges to predict success. Where a number of outliers exist, they may be analyzed separately to determine how success was achieved absent the predominant success formula.

Boolean analysis complements the Stage Four analysis explained above, by providing another means to test hypotheses against the survey data. Not only does it seek to answer frequently asked questions about consultation as gathered by the researchers, it looks for attributes of consultation free of preexisting assumptions. Since the use of hypotheses for questions reflects the present culture's understanding and presumptions, hypothesis testing only proves or disproves each assumption. It does not openly ask, "What else is there?" Boolean analysis, on the other hand, does not begin with any assumptions. It is predicated on the attributes of consultation frequently appearing in the data. Therefore, Boolean analysis allows researchers to extract guidance from the data about factors that may not have been initially contemplated and to more accurately predict actions that will lead to success in consultation.

Essentially, the purpose of a Boolean assessment is to isolate a formula that leads to a positive result, which in this case is a successful consultation. This project is ideal for such analysis as the survey only requested examples of positive results. To be able to give guidance to others who wish to replicate success, knowing the critical elements of success beforehand promotes efficiency and effectiveness. Boolean analysis exposes those critical elements.

In each consultation described by respondents to the study several attributes may be isolated and recorded on the Boolean data table. The critical nature of these factors to success may be tested by the presence or absence of the factors in the consultation experiences reported in the survey as being successful. More than one combination of factors may lead to success, however, and indispensable factors and inconsequential factors will be revealed. This is of importance in planning consultation events and prioritizing expenses.

Boolean analysis begins by distilling from the data factors whose presence is a reliable predictor successful consultation. Review of the surveys reporting successful consultation revealed repeated references to factors that can serve as

criteria for Boolean testing purposes. Once identified, each criterion is listed and assigned a letter. A letter is capitalized when the criteria is present or positive in a survey response, and is in lowercase when it is not present. In this study, the criteria and their assigned letters are:

A	=	Presence of a THPO and/or an Agency Tribal Liaison
a	=	absence of either or both
B	=	Government-to-government level of consulting participants (presence of Tribal and Agency officials)
b	=	absence of either or both
C	=	Early consultation in the project planning stage
c	=	contacts occur late in the process
D	=	Information exchange prior to the consultation event(s)
d	=	no or minimal information exchange prior to contacts/meetings
E	=	Funds available for travel and to host meetings, or meeting sites on Tribal land
e	=	funding needed, but not a critical factor, events occur on tribal sites
F	=	Ability to come to consensus or final resolution in an agreement
f	=	final agreement is not an immediate product

Below is an example of a Boolean "truth table," and an explanation of how it would work in the study. The three examples are based on actual survey responses.

Example 1: The Tribe reports a successful consultation where the Tribe had a THPO (= A) and the Tribal chair, as well as the area head of the Agency participated in meetings (= B). The consultation took place in the early planning stages of the Agency proposed action (= C) and was proceeded by a document sent to the Tribe that explained the project, the reasons therefore, scope, effect on the resources and projected calendar (= D). The Agency funded five Tribal representatives for three days to a meeting near the project site (= E). No final agreement was reached (= f), although the concerns of the Tribe were voiced and additional meetings were planned. Absent Boolean criteria: Final resolution (= f)

Boolean equation: ABCDEf

Example 2: The Agency reports a successful consultation when the THPO (= A) and the Agency contractor (= b) meet early in the planning process(= C), at a site convenient to the Agency, but where travel for the Tribal delegation is paid for by the Agency (= E). Information about the project is sent to the Tribe a month in advance of the meeting (= D) and an agreement is reached (= F) on mitigation of impacts to Tribal traditional cultural properties. Absent Boolean criteria: Government-to-government level of consulting participants (= b)

Boolean equation: AbCDEF

Example 3: The Tribe reports a successful consultation when the Tribal chair and the Agency head talk over the telephone (= B), early in the planning of the project undertaking (= C), an event preceded by an exchange of several letters in which the viewpoints of each is discussed and the issues of concern are narrowed (= D). They arrive at a Memorandum of Agreement (= F). Absent Boolean criteria: THPO or Tribal Liaison present (= a); funds for travel (= e)

Boolean equation: aBCDeF

The three example results are posted on a table of Boolean equations as follows:

1. ABCDEf
2. AbCDEF
3. aBCDeF

The equations resulting from each of the case examples indicate that successful consultation most likely occurs when all six (6) factors are present (ABCDEF). Absent the presence of the six factors, consultation can still be successful when a THPO or Tribal leader is involved. Also, while travel funds and consensus are important factors, consultation can still be successful even if one of these factors is absent. In the end, the factors C and D are indispensable attributes to a successful consultation. In other words, consultation can not be successful unless it occurs early in the planning process (C) and there is an exchange of information prior to the consultation event (D).

The Boolean tables compiled in this study were distilled from the factors indicated by survey respondents. Additional factors may have been present, but were not reported. The inability to capture additional and unreported factors would create a "false negative," however, there is little likelihood of this happening given that responses were open-ended questions and a provided list of factors. Recurrent factors are those reasonable predictors of success, based on a survey of real-life situations. The survey could have controlled for a "false negative" on the importance of any discrete factor by supplying the factors and asking for a "yes" or "no" for each, but the purpose of leaving the field open for self-reporting and unbiased results would have been defeated. Consequently, this study does not test the worth of a single factor or criterion, but rather provides a formula for optimum likelihood of success in consultation with the best practices model emerging through the combination of factors.

VI. THE RESULTS OF THIS STUDY: WHAT MAKES CONSULTATION WITH TRIBES SUCCESSFUL

Broadly speaking, this survey addresses four aspects of consultation: (A) Preparing for Consultation; (B) The Process of Consultation; (C) Defining Success; and (D) The Formula for Successful Consultation. Each topic is set forth below with it own set of hypotheses, which are tested and analyzed.

Hypotheses To Be Tested

The data collected in the surveys are grouped to address seventeen (17) hypotheses raised in the pre-survey interviews as follows:

A. Preparing for Consultation

1. *The consultation is more likely to be successful when the Agency employs a Tribal liaison.*
2. *There is a higher incidence of successful consultation when the Tribe has a THPO.*
3. *Successful consultation is predicated on a first person familiarity between the Tribe and Agency representatives to the consultation.*
4. *Successful consultation is dependent upon the presence of the Tribal chair and the Agency official.*
5. *Agencies have the ability to determine the appropriate consulting partner Tribes.*
6. *Tribes and Agencies feel a need for training on successful consultation practices.*

B. The Process of Consultation

1. *The timing of consultation events is critical to success.*
2. *The place of consultation is a factor in success.*
3. *The adequacy of information provided to Tribes prior to consultation is critical to success.*
4. *Successful consultation is dependent upon funding for travel and face-to-face meetings.*
5. *Consultation is defined as an interaction between informed participants.*
6. *Decentralization of decision-making has an effect on the process.*

C. Defining Success

1. *Agencies are concerned about immediacy of result and Tribes are concerned about the long-range impact to the resource and this difference*

impacts the consultation process and prognosis for a successful consultation.

2. *Agencies are more concerned with completing the process and outputs, and Tribes are more concerned with outcomes.*
3. *Successful consultations engender future successful consultation between consulting partners.*
4. *Consensus is not a reliable indicator of success.*
5. *Consultation is a path to resolution of issues or the avoidance of conflict.*

D. The Formula for Successful Consultation

The formula for successful consultation exists in the survey data and can be revealed by Boolean analysis.

Results

The results of the study were used to verify or nullify each of the seventeen (17) hypotheses. Following each hypothesis is a summary of the survey responses. This summary allows an analysis of the pre-survey assumption.

A. Preparing for Consultation

Hypothesis 1. The consultation is more likely to be successful when the Agency employs a Tribal Liaison.

Results:

- Twenty-seven (27) projects reported the presence of an Agency Tribal Liaison, although there were an additional six (6) projects from Agencies that also have a Tribal Liaison. In one instance, the Tribal Liaison was expressly credited with the success of the consultation.
- Approximately half of the successful consultations included a Tribal Liaison.
- Three (3) consultations noted the Agency did not have a Tribal Liaison, the respondents expressed a need to have one (one Tribe, two Agencies).
- Tribal Liaisons were specifically credited in some instances with determining the consulting partners. In other responses the responsibility for the determination was unspecified.
- Two (2) responding Agencies specifically mentioned that the Tribal Liaison was a Native American.

Analysis: True. Having a Tribal Liaison is a positive factor in an efficient and successful consultation. Agencies that employ a Tribal Liaison are likely to engage in successful consultation. While the study did not request information on consultations that were not successful, the Tribal Liaison was prominently and consistently referenced in this study. Further study of Tribal Liaisons in

consultations, both successful and unsuccessful, would verify the importance of this position.

Hypothesis 2. There is a higher incidence of successful consultation when the Tribe has a THPO.

Results:

- Of the thirteen (13) Tribes that initially reported a successful consultation, seven (7) had THPOs and three (3) were interested in or were establishing a THPO.
- Thirty-three (33) Tribes responded in phase two as a consulting partner, and of these, eleven (11) had THPOs (three of which initially reported) and eight (8) were considering THPO status.
- Of the total sixty-one (61) consultations that were reported, thirty-eight (38), or 62%, had at least one THPO as a consulting partner.
- Of these thirty-eight (38) reported consultations, there were twelve (12) that had two (2) or more THPOs listed and twelve (12) projects where THPO status was unavailable (non-recognized group, inter-tribal organization, or Alaska Native).
- Forty-one (41) of forty-six (46) THPOs existing at the time of this study either reported a successful consultation or were named in at least one as a consulting partner.

Analysis: True. Over half (62%) of the successful consultations included a THPO, and respondents repeatedly said that the involvement of THPOs was necessary for a successful consultation experience. Agencies are beginning to recognize the value of involving the THPO early in the planning process. More than 90% of the 66 responses indicated that a THPO and/or an Agency Tribal Liaison was a factor in successful consultation.

Hypothesis 3. Successful consultation is predicated on a first person familiarity among the Tribe and Agency representatives to the consultation.

Results:

- Six (6) Agency responses and six (6) Tribal responses reported relying on first person familiarity. There were nine (9) separate consultations that relied on the presence of a specific person. In eight (8) of these consultations, it was the impetus of specific individuals that established the process of successful consultation, which resulted in ongoing communication thereafter.
- Eight (8) Tribal responses and twelve (12) Agency responses reported relying on face-to-face meetings.
- Three (3) Tribal responses and one (1) Agency reported consistency in representatives as necessary throughout consultation and from one to the next.

- Two (2) Agencies reported keeping a current contact list, and one (1) reported the need to update it often.
- Twenty-four (24) Tribal responses and twenty-five (25) Agency responses reported that an atmosphere of respect, building trust and mutual understanding of priorities were necessary.

Analysis: Not necessarily true. Meeting face-to-face is helpful in establishing communication links for successful and on-going consultation. Having continuity in the participants to consultation was preferred, but the critical factor was meeting in an atmosphere of mutual understanding, respect and trust. While a single person can be the catalyst for a successful consultation, the process can be sustained where an ongoing atmosphere of respect and trust prevails.

Hypothesis 4. Successful consultation is dependent upon the presence of the Tribal chair and the Agency manager.

Results:
- The presence of the Tribal chair was noted thirty-two (32) times by Tribes and thirty-three (33) times by Agencies.
- Agency officials are noted as present by Tribes four (4) times and by Agencies five (5) times.

Analysis: False, although without an Agency head present, the respondents acknowledged that the process was not a true government-to-government event. Consultation is a government-to-government process which Tribes take seriously as demonstrated by the commitment of the Tribal chair to be present, but most often Agencies assign the role of the government to a contractor, the applicant for a license, or the Tribal Liaison. Nevertheless, Tribal officials are committed to the consultation process and voice gratitude for being afforded consideration. Since this study requested only input on successful consultations, the absence of the government official apparently was not fatal to success. On the other hand, the number of unsuccessful consultations attributed to the non-participation of the Agency official is unknown. Of the paired responses only two (2) Tribes considered the consultation not a success or not a consultation absent the Agency official's presence.

Hypothesis 5. Agencies have the ability to determine the appropriate consulting partner Tribes.

Results: Agencies reported using the following means to determine appropriate Tribes to include in consultation:
- Ten (10) sent letters to all Tribes that may have an interest in the area, using ancestral homeland maps, other maps, or the history of Tribes in the area.
- Six (6) relied on research by consultants.

- Four (4) made calls and sent letters to known Tribes to ask whether they knew of other Tribes that should be included.
- Two (2) relied on the National NAGPRA website consultation database of Tribes.
- Seven (7) requested assistance from the SHPO.
- Three (3) used the BIA list.
- Six (6) requested assistance from intertribal organizations such as the Native American Heritage Commission in California.
- Three (3) used prior contacts as a model.
- One (1) relied upon knowledge within the Agency.

Analysis: True. Abundant and accessible means are available to Agencies to determine which Tribe(s) to consult. None of the Agencies expressed difficulty determining which Tribes to consult and were not concerned with broadly reaching out to Tribes. Of those Tribes consulted there were varying degrees of concern with a given project, but none voiced concern that they had been contacted unnecessarily. Once contacted, a Tribe can determine if they have an interest that will be impacted and a desire to participate, assuming they also are sufficiently knowledgeable about the project (see Process below). Perhaps most instructive is the procedure employed by two (2) respondents, who consulted with Tribes to identify the actual consulting parties on the project.

Hypothesis 6. Tribes and Agencies feel a need for training on successful consultation practices.

Results:

- Two (2) Tribes reported desiring training in consultation (dispute resolution). One (1) of these Tribes also reported desiring training on consensus building, diplomacy and grief counseling.
- Four (4) Tribes wanted Section 106 training, and one wanted NHPA training.
- One (1) Tribe wanted cultural sensitivity training for Agencies.
- In one instance, cultural and sensitivity training was provided by the Tribes to the Agency. This Agency reported one of their lessons learned as needing/requiring cultural training for senior leadership before they meet Tribes for the first time.
- Seven (7) Tribes reported they needed expertise, knowledge, understanding and/or experience with consultation and laws.
- One (1) Agency reported it wanted to receive “Consultation Coordination” training similar to what another Agency (BLM) receives.
- In one instance, a video documentary was created from a successful consultation and has been used by the Agency as a teaching tool during Environmental Conflict Resolution and Section 106 training.

Analysis: True. Cultural sensitivity together with consulting and dispute resolution skills foster successful consultation. Consequently, training on the process and methods of consultation is needed. While a Cultural Resource Management contractor often facilitated consultation, Tribes and Agencies voiced a desire for more skillful consultants. Compliance with and knowledge of the law were mentioned as necessary aspects of consultation, but none of the respondents expressed a desire to have counsel present during consultation.

B. The Process of Consultation

Hypothesis 1. The Timing of consultation events is critical to success.

Results:
- Fifteen (15) Tribes mentioned the importance of consultation occurring early in the project planning process.
- Sixteen (16) Agencies indicated that they consulted early in the project planning process or wished that they had done so.

Analysis: True. In addition to the results, Tribes and Agencies that did not explicitly use the terms, "early" or "timely" nonetheless spoke of working through consultation in the beginning of the project or prior to decision making. Pre-survey interviews spoke of an ongoing perception that Tribes delay projects, and a Tribal perception that Agencies wait until they have made decisions and progressed on a project before they notify Tribes. Neither situation is conducive to successful consultation. Clearly this study validates the hypothesis that timing of consultation is critical to success, and the earlier the better. Other responses spoke of ongoing consultation and meetings on general concerns prior to specific projects, which are other means of entering the consultation process early, when input can be the most meaningful and impending project deadlines are not yet a factor.

Hypothesis 2. The Place of consultation is a factor in success.

Results: Most of the consultation responses described more than one consultation event, which used a variety of approaches. Each point of contact listed in survey responses is tallied here from the field of sixty-six (66) responses
- Face-to-face meetings at Tribal and Agency offices were indicated eleven (11) times by Tribes and five (5) times by Agencies.
- The Tribe as a sole host was indicated six (6) times by Tribes and eight (8) times by Agencies.
- Tribes noted the Agency as sole host seven (7) times and the Agency six (6) times.
- A neutral or conference site was indicated by Tribes three (3) times and by Agencies nine (9) times.

- Locations that varied by topic were indicated fourteen (14) times by Tribes and four (4) by Agencies.
- Site visits as the place of consultation were indicated fourteen (14) times by Tribes and sixteen (16) times by Agencies.
- The telephone as a medium of consultation was indicated fourteen (14) times by Tribes and eighteen (18) times by Agencies.
- The mail, including email, was the modality of consultation noted eighteen (18) times by Tribes and twenty-three (23) times by Agencies.

Analysis: True. Conducting consultation at both Agency and Tribal sites or mutually convenient locations shows respect and consideration, and looms large in the attitudes of survey respondents across the board. Site visits were noted thirty (30) times, and indicates the importance attributed to walking the area together for fostering a mutual understanding of the circumstances and concerns facing the consulting partners. Surprisingly, other means beside face-to-face consultation often figured into a reported successful process, although the survey respondents noted a preference for face-to-face meetings. Telephone and mail contacts were employed most often as a follow-up to in-person meetings, or were utilized for efficiency after communication channels and trust already had been established in prior consultations. Agencies noted the use of newsletters to keep consulting partners informed as the project progressed, which indicates their realization that consultation is an ongoing process. The term "ongoing" frequently appeared in survey comments.

Hypothesis 3. The adequacy of information provided to Tribes prior to consultation is critical to success.

Results:

- Five (5) Tribe and four (4) Agency responses said that the Tribes should be involved in planning for the consultation meetings and in preparing the information exchanged prior to the meetings.
- Only one (1) response, by a Tribe, mentioned a desire to know their role at the outset.
- Ten (10) Tribes and two (2) Agencies felt that having information exchanged prior to the meeting was critical to success.
- Two (2) Tribes mentioned a need to know the needs of each party as a necessary predicate to successful consultation. There were no Agency responses that expressed the same need.
- Two (2) Tribes felt inundated by information and one (1) Agency felt that they had provided an overly abundant amount of information prior to consultation.

Analysis: True. The majority of Tribal respondents desired to be informed about the project prior to attending a consultation. Most of those Tribes viewed

preparation as a critical element of successful consultation. Some responses did not explicitly mention the receipt of information prior to consultation, but as they considered a successful consultation to be an exchange of views and concerns distinguishing an exchange of views from an informed basis for conversation would appear to be splitting hairs. Tribes mentioned a desire to receive information more often than Agencies noted a concern to provide it, so a gap in perception might exist as to the needs of the parties as they approach consultation. At the same time, inundating Tribes with documents could be counterproductive.

Hypothesis 4. Successful consultation is dependent upon funding for travel and face-to-face meetings.

Results:

- Sixteen (16) Agencies and eight (8) Tribes reported that success was attributed in part to a willingness of the Agency to travel to Tribal sites or at least rotate the location of the meetings.
- Twenty-two (22) Agencies and (18) Tribes reported that time and financial commitment to consultation was critical to success.

Analysis: As phrased, the hypothesis can be true and false. Recognizing that there is a cost to consultation, in both time committed by the participants and the preparation and travel required for the process, Tribes acknowledged and appreciated funding for consultation provided by the Agency. Nevertheless, consultation is an obligation of the Agency as a matter of law, and therefore some level of funding is mandated. The optimum point for funding is that point necessary for success. As apparent from the survey responses, successful consultation creates certain efficiencies. For example, where consultations subsequently build on prior relationships, less research may be needed to discover Tribes affected by and interested in a project, and the need for face-to-face meetings might be less. As this study requested only satisfactory experiences, the number of court actions, project delays and redesigned projects averted because of time and funds spent on productive consultation, remains unknown.

Hypothesis 5. Consultation is defined as an interaction between informed participants.

Results:

- Ten (10) Tribes and eight (8) Agencies include in a definition of consultation the component of communication. It is a time when the views of all parties are heard.
- Sixteen (16) Tribes and three (3) Agencies include the defining component of mutual understanding. Consultation is thus an exchange of information on the needs and desires of the others, where the objective is mutual understanding.

- Nine (9) Tribes and three (3) Agencies specifically noted that consultation provides an opportunity to give meaningful input into plans and have impact on the decision making process.
- Six (6) Tribes indicated that sending a letter alone is not consultation.

Analysis: True. Understanding the defining attributes of consultation is an area where Tribal and Agency responses were the most dissimilar. For Tribes, consultation involves listening, exchanging views, and having meaningful input into the final decisions and planning documents. By contrast, the majority of Agencies perceived consultation as a time to meet with Tribes and indicated to them that the Agency has listened when the planning document was written. The distinction may be subtle but profound. When asked to describe consultation the Agency responses tended to focus on technique -- invitees, place, method, friendliness, and caring, whereas the Tribal responses focused on dynamics – understandings and exchanges of ideas. This difference may go to the core of success and failure, if not of any one consultation event, then of the totality of the consultation enterprise.

The six (6) Tribes who indicated that, for them, a letter is not consultation understood that a letter from an Agency was an effort by the Agency to consult. The Tribes warned that, since they may not see a letter sent to the Tribal office, they may not respond, but the failure to respond should not be understood as acquiescence. In fact, several Agencies responded that they sent a letter to the Tribe, received no response, deemed the lack of a response to be an absence of adverse opinion on the Agency action and deemed the event a successful consultation. Clearly, in these instances a failure to communicate on the needs of the parties in a consultation experience has occurred.

Hypothesis 6. ***Decentralization of Agency decision-making has had a negative or positive effect on the consultation process.***

Results:
- Agency decisions were made by the Washington Headquarters Office for ten (10) projects, a regional or district office for thirty-five (35) projects, and five (5) from a local level (city, county, park).
- In addition, there were also ten (10) regional/district projects and two (2) local projects where the Agency had a Contractor.
- In one instance, it was reported that the regional commitments did not translate to the local level since the local office did not fulfill the agreements made at the regional level.

Analysis: Positive effect. Decentralization of decision-making is consistently noted as a positive factor. The correlation between proximity and success were

closely related, and evidences the level within the Agency at which commitments made to Tribe(s) were implemented.

C. Defining Success

Hypothesis 1. Agencies are concerned about immediacy of result and Tribes are concerned about the long-range impact to the resource and this difference impacts the consultation process and prognosis for a successful consultation.

Results:

"Success is" (more than one indicia may have been given)	**Tribes**	**Agencies**
All opinions heard (open communication, listen)	10	12
Tribe was invited to the table and involved in the Agency decision (collaborative, joint, cooperative)	13	14
Achieve respect and mutual understanding	24	25
Mutual understanding of laws and responsibilities (knowledge, expertise, experience)	7	13
Protect sites/culture/recover remains/items/minimize/mitigate	12	8
Satisfied parties	2	11
MOU/MOA/Agreement/Solution	16	16

In addition, the following responses are notable:

- Eight (8) Tribes and five (5) Agencies reported wanting a signed document.
- One (1) Tribe viewed the consultation as unsuccessful because they did not sign a document.
- In one instance, an Agency reported that consultation should occur with all Tribes whether or not they sign agreements.
- Eight (8) Tribes and ten (10) Agencies reported that establishing ongoing communication was a goal in itself, and viewed concrete results as incremental long-range goals.

Analysis: False. This study negates the hypothesis that success is measured differently by Tribes and Agencies. While taking a long-range view of consultation as an ongoing process, both parties appreciate a discrete resolution at some point. Agencies and Tribes reported a desire for mutual satisfaction, and that the concerns of each party be addressed. Successful consultation, as reflected by an agreement, was equally regarded by both Tribes and Agencies. Tribes

reported concern for site protection more often than Agencies by a margin of three to two (3:2).

Open communication conducted against a backdrop of mutual respect and understanding, and honesty defines success. Coming to consensus is not critical to respondents' perceptions of success. Tribes and Agencies had an equal number of responses that equated to an MOA or similar solution (16), but the majority of Tribes and Agencies agreed that fundamental success lay in incrementally building open communication, and mutual respect and understanding.

In response to the question, "What does success look like," it is an open channel for respectful and ongoing communication. Tribes are invited to the table early in the planning process and are provided by the Agency with project specifics prior to any meetings. All Tribes having an interest in the outcome participate.

Hypothesis 2. Agencies are more concerned with completing the process and outputs, and Tribes are more concerned with outcomes.

Results:

- In one instance, an Agency characterized an agreement as a result of effective consultation, but not the primary objective.
- An almost equal number of Tribes (13) and Agencies (14) reported that Tribal involvement in the decision-making was a factor in defining consultation a success. (Note: This study did not test for site impact or outcomes of site management. Further study might look at these factors.)
- Twenty-four (24) Tribes and twenty-five (25) Agencies reported that creating an atmosphere of respect, building trust and mutual understanding of priorities, was a goal in and of itself.

Analysis: False. Agencies and Tribes reported a desire to follow an established process. Tribes and Agencies are more often in agreement than not, that consultation is an on-going process rather than a technical exercise with an immediate result.

The idea that Tribes and Agencies approach consultation with differing expectations or require different criteria for success is a presumption proved invalid by this study. Both parties value open communication, mutual respect and understanding, and a recognition that consultation must start as early in the process as possible. Also, both Tribes and Agencies expect to begin consultation early and with information on the project, generally, and its implications for them explained. Consultation does not begin until after the mutual exchange of information, including known information about the physical effect of the project and the priorities of the consulting partners.

Hypothesis 3. Successful consultations engender future successful consultation between consulting parties.

Results:

- An equal number of Tribes and Agencies (6) reported previous relationships as a factor for success.
- Eight (8) Tribal responses and ten (10) Agency responses reported ongoing relations as important in successful consultation.
- Three (3) Tribal responses and one (1) Agency response reported desiring consistency of representatives.
- In one instance, litigation on one project has stopped all consultations by the Tribe with that Agency on any project.
- In another instance, the Tribe continues to consult with the Agency, although past consultation was not always successful.

Analysis: True. Both Tribes and Agencies agree that a positive relationship between the parties is an important factor in successful consultation. The hypothesis that success breeds success is a point proven in this study and further substantiates the efficiencies to be gained by an initial investment in meaningful consultation.

Hypothesis 4. Consensus is not a reliable indicator of success.

Results:

- Tribes and Agencies indicated that consultation was a success even when one or more parties were not pleased with the result.
- Tribes and Agencies indicated that the consultation was successful even when no consensus was reached.

Analysis: True. Both Tribes and Agencies report consensus as one of the products of successful consultations, but parties should beware of "false consensus." Whereas an Agency feels they have completed consultation by obtaining an agreement, the acquiescence by a tribe(s) that felt that they had no other option, is not an expression of successful consultation. Two Agencies reported that reaching an agreement did factor in their characterization of the consultation as successful. Therefore, while consensus is a likely by-product of consultation it is not a necessary attribute of consultation or an indicator of success.

Hypothesis 5. Consultation is a path to the reduction and resolution, or the avoidance, of conflict.

Results:

- In one instance a Tribe reported that once a conflict has occurred, it is hard to get back into consultations. In another instance a Tribe reported that when they do have a conflict with local staff, they then go back to the table with Agency officials for further consultation. No other Tribes reported 'conflict'.
- Two (2) Agency responses reported that consultation reduces conflict.
- In one instance, litigation on one project has stopped all consultations by the Tribe with that Agency on any project.
- Seven (7) Tribal responses and eleven (11) Agency responses characterized addressing 'concerns' as important.
- One (1) Tribe reported that they were able to bring attention to Agency officials the possible negative effects that might have occurred through consultation.
- Sixteen (16) consultations were started when an 'issue' arose; nine (9) of these consultations were initiated by Tribes. An additional four (4) consultations were started by an Agency to avoid possible negative effects.

Analysis: True. Respondents did not characterize conflict avoidance, resolution or reduction as 'consultation' even though consultation does reduce and resolve or avoid conflict. Instead, they reported 'addressing concerns,' receiving 'input,' resolving 'possible negative effects' or as an 'issue to be discussed' as the agenda of consultation. Consultation reduces conflict, but the objective of the consulting parties goes much deeper and dispute resolution was not the objective.

D. Summary of All Hypothesis Testing

The responses indicate that complex issues may require multiple meetings for resolution, but that failure to reach a global agreement is not necessarily viewed as an indicator of failure of consultation when the parties leave the meeting with a feeling of fair treatment and openness. Success was often gauged not by the completion of a final agreement, but by the progress made in exploring ideas and areas of commonality, and building communication links. No project type or size was regarded as problematic, as long as the Agency brought the Tribe to the table.

The Formula for Success: Boolean Analysis

Each Tribal response and each Agency response was listed on the Boolean data table which recorded the presence (= capital letter) or absence (= lower case letter) for each consultation recorded. The Boolean "truth table" listed the formulas for success, compiled from the data table, and indicated the number of times the formula was seen. One column listed Tribal formulas and one listed

Agency responses. The "truth table" allows outliers to be observed and points of strong agreement between Tribes and Agencies to be seen. The simplification table is the algebraic reduction of the formulas into the simplified expression.

Tribal Responses
The simplification of results from the Tribal responses yields the formula:

CDef (AB + Ab) = ACDef (B +b)
that is: ABCDef or AbCDef

According to Tribes the formula for success in consultation always requires early action (= C) and the provision of information (= D). Funding for Tribes to participate in consultation (= e) was mentioned as a factor, but not so often that it could be deemed critical to success. Reaching a final agreement (= f) was not the goal of consultation, rather the goals were gaining a seat at the table, being involved in the decision-making process and developing channels of communication for ongoing interaction. Tribal respondents mentioned these goals more frequently than protecting sites, which would be consistent with an overriding desire for input into the final agency decision. The presence of a Tribal Liaison and/or a THPO (= A) was also mentioned in an overwhelming number of responses. The ways in which this factor contributes to successful consultation may merit further study, and could be useful in training new Tribal Liaisons and THPOs. Certainly, consultation must occur on a government-to-government basis, but the presence at the consultation of the Tribal chair was not a deciding factor in success (= B + b). The presence of the Tribal chair was mentioned in about half of the successful consultations reported. The presence of the Tribal chair and the absence of the corresponding Agency official as impacting the success of consultation is a matter that may be reserved for future study. In reducing the formulas AB (presence of a Tribal Liaison/THPO and Tribal/Agency officials (= AB), was evenly weighted with presence of Tribal Liaison/THPO and absence of Tribal/Agency official for success (=Ab).

Agency Responses
The simplification of results from the Agency responses was more involved as the combinations factors were more diverse than for Tribes. Formulas reported in one or two instances were deleted as outliers and those reported in three or more responses were entered onto the simplification table, which, when reduced, revealed the following:

ADef (BC + Bc + bC + bc)

Where ADef, the presence of a THPO and/or an Agency liaison (= A), with an information exchange prior to the consultation event (= D), but in the absence of funds for travel (= e) and without reaching a final agreement (= f).

The weight of the results for government-to-government consultation (= Bb) and consultation early in the process (= Cc) was almost identical:

BC(16) Bc(13) bC(13) bc(17)

Where: BC = Presence of Tribal and Agency officials, early in the Section 106 process,
Bc = Presence of Tribal and Agency officials, timing not a factor,
bC = Tribal and Agency officials not a factor, consultation early in the process,
bc = Neither Tribal and Agency officials nor timing a factor in consultation.

Therefore the formula for successful consultation derived from Agencies is in agreement with that gleaned from the Tribal responses for all factors, with one notable exception. The one factor on which the two groups diverge is timeliness of the consultation (= C). For Tribes early consultation was a critical factor for success (= C), while Agencies were evenly split on whether it was or was not a factor (= C or = c).

On the matter of timeliness, responses from Tribes found early consultation to be critical, as they were given input into decision making at a time when it could have meaningful impact. Being asked to the table early in the planning process was taken by Tribes as a sign that the Agency was seeking input from Tribes in order to incorporate their concerns into the execution of the undertaking. Early action on consultation resulted in efficiencies in the planning process. By contrast, there was a correlation in Agency responses between a lack of regard for early action (= c) on consultation and the need for a final result (= F) in 12 responses. Apparently in those instances where the Agency had not included Tribes in planning, they were faced with an immediate, critical issue needing prompt resolution. **Consequently, where consultation was remedial, the process tended to be final result driven.** When contacted by this study to submit a response on projects where early contact was not made, in order to match Tribal and Agency views on individual projects, Tribes responded either that they would not consider such interaction to be consultation, or that it was not a successful method of consultation.

Formula of Successful Consultation

Combining the Tribal and Agency formulas for successful consultation results in the following:

Tribe: A CDef (B + b)
Agency: A Def (BC + Bc + bC + bc)
ACDef (B + b)

The hypothesis that Tribes and Agencies do not think similarly about the necessary attributes of successful consultation is proven false by this study, for there is consensus on the formula for success. Accordingly, ACDef (B + b) = in the presence of a THPO and an Agency Tribal liaison (= A), consultation occurs early in the project planning process (= C), there is an exchange of information as a predicate to the consultation event (= D), the lack of funding for travel does not prevent success in consultation (= e), reaching a final result is not the gauge by which success will be measured (= f), and the presence of a Tribal chair and an Agency official is a neutral factor (B + b).

VII. STUDY REVELATIONS: *BEST PRACTICES* THAT EMERGE

The survey responses highlight an emerging understanding of the characteristics of successful consultation. Some of these Best Practices are:

- True government-to-government contact between the Agency and Tribe, where high level Agency representatives meet with Tribal leaders;
- Multiple contacts that begin early in the planning process and continue throughout the project;
- Multiple venues for consultation, such as the Agency office and locations close to Tribes and the area of the undertaking;
- Formal and informal meetings;
- The existence of an Agency Tribal Liaison;
- The Agency's fostering of a relationship with the THPO;
- An inclusive approach to contacting Tribes having an interest;
- Consultation with unrecognized Tribes, separate from recognized Tribes, unless the unrecognized Tribe has an on-going relationship with the recognized Tribe;
- An early effort to identify the areas of concern to the Tribes;
- Provision to Tribes of full and candid information prior to the first meeting;
- An open-ended and flexible agenda (no hidden agendas);
- Facilitators for the sessions alternate between Agency and Tribal leaders;
- A concerted effort by the Agency to have all Tribes with an interest be present for all sessions;
- A successful result is viewed as partners arriving at an agreement, but reaching an agreement is not an end in itself; (Note: Framing the issues and understanding impacts early in site management decisions renders the process meaningful, but this study did not test for outcomes of site management.)
- Tribes participate in consultation on the invitee list as a preliminary consultation and participate on the agenda setting and planning of the consultation.

These best practices were observed in the survey responses, supported by the Boolean Analysis, and are incorporated into the Model Protocol Steps below. These Model Protocol Steps are general; certain Agencies will have more specific ones. Nevertheless, these steps are actions that need to take place for consultation to succeed. The following protocol embodies the principles and suggestions derived from the surveys.

VIII. MODEL PROTOCOL STEPS

Step One: Planning Document

The Agency early in the planning stage compiles a draft of the scope of project, including area of potential effect.

Step Two: Determining Consulting Partners

The Agency creates a Tribal Contact List of Tribes potentially having an interest in the project area by:

1. Contacting the THPO of the Tribes or Tribal Leader of the Tribes not having a THPO, in the geographic area:
   a. To determine if they have an interest
   b. To determine if they know of other Tribes that may have an interest.
   AND
2. Determining from state or regional intertribal organizations Tribes having an interest, but not necessarily presently residing in the state of the project area.
   AND
3. Consulting with identified Tribes on what other Tribes may be included.

Step Three: Initial Contact with Consulting Partners

The Agency mails a copy of the Agency project plan, relevant information and a request for a consultation meeting to the THPO (for Tribes having a THPO) or Tribal Leader (for Tribes not having a THPO).

Step Four: Arranging for Consultation Meetings

The agency arranges with the Tribal contacts, a time, place, agenda, and travel funds for the meeting by:

1. Letters to Tribes; and
2. Follow-up by telephone to confirm receipt of documents.
3. At this point, the Agency needs to determine if there are barriers to Tribal participation in consultation, such as timing, financing, and/or location.
4. There is a discussion on whether there will be sensitivities regarding Sacred Sites and the need to include a religious leader.
5. Establish meeting format.
6. Establish goals:
7. For example, goals could include Agency officials and Tribal representatives sharing concerns and desires about the project, and the mitigation of impacts to Tribal cultural sites.

Step Five: Consultation Meeting

1. At start of meeting: Confirm meeting format, facilitator, and issues to be addressed.
2. Discussion time.
3. Throughout the meeting: Provide time for meeting participants to get to know each other.
4. Conclude with plan for next meeting: Agenda/goal for next meeting, drafts of areas of agreement, and matters to be resolved.

Step Six

Repeat step 5, as necessary.

Step Seven

Memorandum of Agreement (MOA) or resolution or agreement on mitigation of impacts to Tribal cultural site reached.

IX. CONCLUSION

There are a number of conclusions that can be drawn from this study which are instructive for the development of a protocol for successful consultation between Tribes and Federal Agencies in Section 106 compliance. Some of them are:

- There are efficiencies in project development and execution to be gained from the employment of an Agency Tribal Liaison who works with a THPO.
- Involvement of Tribes by Agencies early in the planning process is critical for smooth and orderly development of the project and timely execution of the project.
- Successful consultation begets future successful consultation. There is a benefit from the efforts that result in successful consultation, as open channels of communication are not likely to be disrupted when Agency personnel transfer to other positions or Tribal responsibilities change.
- Good process lasts beyond individual personal relationships, even though the latter may have initially opened the door to communication.
- Mutual respect and understanding of concerns is of prime importance to Tribes and Agencies when engaging in consultation.
- Neither Tribes nor Agencies have time and money to spare. Both look for efficiencies in working relationships. Effective consultation is seen by both as a positive factor in project efficiency. Neither Tribes nor Agencies desire to remediate a situation that has gone bad due to lack of open communication or a failure to build ongoing working relationships.
- A meeting without a previously disclosed agenda is not a consultation.
- A meeting where a participant is not informed prior to the meeting of the project specifics, including the project scope and areas of potential impact, is not a consultation.
- Meaningful consultation is predicated on informed participants.
- Successful consultation is not measured in the immediate attainment of an agreement. Consensus can build over time.
- Agreements reached as the product of consultation, even though time consuming are well regarded, understood and lasting.
- Consultation is an interaction and exchange of ideas that seeks to develop a mutually agreeable plan.
- That Tribes may be motivated by a desire to protect cultural sites and Tribal interests and Agencies may be motivated by a desire to meet the Agency mission and move a project forward, does not mean that the two groups do not agree on what is successful consultation.

It is apparent that what began in 1992 as amendments to the National Historic Preservation Act and was reiterated in several Executive Orders regarding consultation with Tribes, has begun to filter into the rubric of daily practice for

Federal Agencies and other government entities whose undertakings impact Tribal sites and concerns. Government Agencies understand that there is a requirement to consult with Tribes, and some have done an admirable job of instigating effective consultations. Others require some guidance, and have not yet reached a comfort level in working with Tribes. All are hesitant to spend government resources in ways that cannot be shown to lead to efficient project completion.

The results of this study should help Tribes and Agencies in two ways: (1) by showing that there are efficiencies to be gained in consultation with Tribes, and that consultation is a desirable practice even without the constraint of legal mandates; and (2) by providing discrete factors to be included in Agency consultation protocols, with assurances that there is a high probability of success in those consultations that employ these suggestions.

Additional Research and Information

As the survey solicitation was ongoing, information was compiled on Agency and Tribal consultation policies, Agency and Tribal protocols, other studies on consultation, and scholarship on consultation from reports, model protocols, books and articles and websites. This information was used as background for the analysis in this study and has been submitted with the final report as a compendium on consultation with Tribes in historic preservation (see Appendix 1, Online Resources). This bibliography is by no means exhaustive, additional research to create a definitive compilation of consultation materials would be very useful. The Historic Preservation Portal of the Federal Preservation Institute in the National Park Service has been compiling information specifically on consultation with tribes and Section 106 of the NHPA (www.codetalk.fed.us/fpi.html).

APPENDIX 1

"Online Resources"

The following websites contain information on Federal Agency, Tribal, and State policies and other information to assist in conducting tribal consultation.

1. Agency Regulations, Codes, and Orders on Tribal Consultation

Advisory Council on Historic Preservation (ACHP)

Regulations Governing the NHPA Section 106 Review Process, Part 800 Protection of Historic Properties (36 C.F.R. 800)
http://www.access.gpo.gov/nara/C.F.R./waisidx_01/36C.F.R.800_01.html

Department of the Army

Army Regulation (AR) 200-4, "Cultural Resources Management"
https://www.denix.osd.mil/denix/Public/Policy/Army/r200_4.pdf

Fort Bragg, North Carolina, Standing Operating Procedures (SOP) #16 Native American Consultation:
http://www.bragg.army.mil/culturalresources/Docs/icrmp/SOPs/SOP16--Native%20Am%20Consulting.pdf

Department of the Interior

National Park Service, Native American Graves Protection and Repatriation Act Regulations (43 C.F.R. 10)
http://www.cr.nps.gov/nagpra/MANDATES/43C.F.R.10_10-1-03.htm

Executive Memorandum

Memorandum on Government-to-Government Relations with Native American Tribal Governments, April 29, 1994 (superceded)
http://www.cr.nps.gov/nagpra/AGENCIES/Clinton_Memorandum.htm
Memorandum on *Government-to-Government Relationship with Tribal Governments*, September 23, 2004
http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html

Executive Orders

Executive Order 12898 (February 11, 1994) Environmental Justice
http://www.archives.gov/federal_register/executive_orders/pdf/12898.pdf

Executive Order 13007 (May 24, 1996) Sacred Sites
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1996_register&docid=fr29my96-149.pdf

Executive Order 13084 (1998) Consultation and Coordination with Indian Tribal Governments
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1998_register&docid=fr19my98-162.pdf

Executive Order 13175 (November 6, 2000) Consultation with Indian Tribal Governments
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=fr09no00-167.pdf

2. Federal Agency Online Resources - Consulting with Native Americans

Advisory Council on Historic Preservation (ACHP)

Policy Statement Regarding ACHP's Relationships with Indian Tribes
http://www.achp.gov/policystatement-tribes.html

Department of Agriculture

Forest Service
National Resource Guide to American Indian and Alaska Native Relations (see FSM 1563 in Appendix A)
http://www.fs.fed.us/people/tribal/

Natural Resources Conservation Service (NRCS)
Cultural Resources and Consultation Policy: NRCS Nationwide Programmatic Agreement with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers
http://www.nrcs.usda.gov/technical/ECS/culture/Pa_31.pdf
NRCS National Cultural Resources Procedures Handbook
http://policy.nrcs.usda.gov/scripts/lpsiis.dll/H/H_190_601_Content.htm
NRCS Tribal Program Delivery Policy, chapters of the agency's General Manual. Title 410-Rural Development, Part 405 "American Indians and Alaska Natives" A-D
http://policy.nrcs.usda.gov/scripts/lpsiis.dll/GM/GM_410.htm

Courses:
"Cultural Resources Web-Based Training," designed for awareness, not technical, training for USDA personnel, partners, contractors and the public
http://www.nedc.nrcs.usda.gov/catalog/cultres.html
"Working Effectively with Alaskan Natives," designed to sensitize, inform and experience facets of Indian culture, history and protocols

http://www.nedc.nrcs.usda.gov/catalog/workwithalanat.html
"Working Effectively with American Indian Tribes," designed for awareness and basic understanding of American Indians and Indian Country
http://www.nedc.nrcs.usda.gov/catalog/workwithamerind.html
"Planning and Contracting in Indian Country," advanced training for field that spells out what tools and background are needed to promote successful delivery of NRCS technical services and programs
http://www.nedc.nrcs.usda.gov/catalog/plnandcontinind.html
"Consultation with American Indian Governments," examines the unique historical, legal and political relationship between the US and Indian nations
http://www.nedc.nrcs.usda.gov/catalog/consultwithind.html

Department of the Army

SOP#16 Native American Consultation:
http://www.bragg.army.mil/culturalresources/Docs/icrmp/SOPs/SOP16--Native%20Am%20Consulting.pdf

Department of Commerce and General Services Administration (GSA)

General Services Administration
Policy on Consultation
http://www.gsa.gov/gsa/cm_attachments/GSA_BASIC/ADM%201072.1_R2HC2-b_0Z5RDZ-i34K-pR.doc

National Oceanic and Atmospheric Administration (NOAA)
Cultural Resources and Consultations with Native American Indian Tribes
http://boulder.noaa.gov/updates/tribes.html

Department of Defense (DoD)

American Indian and Alaska Native Policy, 1998
https://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html

Native American Traditions and Cultures: Implementing DOD Native American Policy
https://www.cecos.navy.mil/coursedetail.cfm?CourseID=66

Department of Energy (DOE)

DOE bibliography on consultation
http://www.trex-center.org/naibib.asp
American Indian Perspectives on the Yucca Mountain Site Characterization Project and the Repository Environmental Impact Statement: American Indian Resource Document (1998)
http://www.ymp.gov/deisref/collection/disk1/042.pdf

Environmental Policy & Guidance, American Indian Religious Freedom and Native American Graves Protection and Repatriation Acts
http://tis.eh.doe.gov/oepa/laws/airfa.html
Native American and Alaska Native, Tribal Government Policy
http://www.ci.doe.gov/indianbk.pdf

Department of Health and Human Services

Agency for Healthcare Research and Quality
American Indian/Alaska Native Consultation Plan
http://www.ahrq.gov/about/tribalplan.htm

Centers for Medicare and Medicaid Services (CMS)
American Indian and Alaskan Native Consultation Strategy
http://www.cms.hhs.gov/aian/consultation.asp

Indian Health Services (IHS)
http://www.ihs.gov/AdminMngrResources/Regulations/deptpolicy.asp

Department of Housing and Urban Development (HUD)

American Indian and Alaskan Native 1994 Policy Statement
http://www.hud.gov/offices/pih/ih/regs/1994_policystmt.cfm
Government-to-Government Tribal Consultation Policy
http://www.hud.gov/offices/pih/ih/regs/govtogov_tcp.cfm

Department of Homeland Security

Federal Emergency Management Agency (FEMA)
Final Agency Policy for Government-to-Government Relations with American Indian and Alaska Native Tribal Governments
http://www.fema.gov/tribal/natamerpolcy.shtm

Department of the Interior

Bureau of Indian Affairs (BIA)
Guidelines for Integrated Resource Management Planning in Indian Country
http://www.doi.gov/bureau-indian-affairs.html, (not accessible at this time)

Bureau of Land Management (BLM)
BLM Handbook, H-8610-1 General Procedural Guidance for Native American Consultation
http://www.blm.gov/nhp/efoia/wo/handbook/h8160-1.html

Bureau of Reclamation
Consultation and Coordination

http://www.usbr.gov/pn/programs/lcao_misc/pdf/westland/Chapter4.pdf

Fish and Wildlife Service
Annual Report of the Native American Liaison 1998-1999
http://nativeamerican.fws.gov/fy99anrep.html

National Park Service
National NAGPRA. Native American Consultation Database, to assist in identifying consulting parties
http://www.cast.uark.edu/other/nps/nacd/
Map Index of Indian Reservations in the Continental United States
http://www.cr.nps.gov/nagpra/DOCUMENTS/ResMAP.HTM

Federal Preservation Institute (National Park Service)
General information website with links and training materials
http://www.codetalk.fed.us/fpi.html

Office of Collaborative Action and Dispute Resolution
Compilation of Agency Consultation Policies, see:
http://mits.doi.gov/cadr/main/G2GAgencyPolicies.cfm

Department of Justice
Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes, 1999
http://www.usdoj.gov/otj/sovtrb.htm

Department of the Navy
Policy for Consultation with Federally-recognized Indian Tribes
http://neds.daps.dla.mil/directives/11010%5F14.pdf

Department of Transportation (DOT)
Federal Highway Administration (FHWA)
Historic Preservation, Tribal Issues
http://environment.fhwa.dot.gov/histpres/tribal.htm
Section 106 Tribal Consultation Q & A's
http://www.fhwa.dot.gov/hep/tribaltrans/tcqa.htm
Native American Consultation Programmatic Agreement on Section 106 Tribal Consultation Process for the Interstate 25 Corridor Environmental Assessment between FHWA Colorado and Colorado DOT, Colorado SHPO, Cheyenne and Arapaho Tribes of Oklahoma, Kiowa Tribe of Oklahoma, Northern Cheyenne, Pawnee Tribe of Oklahoma, and Southern Ute Indian Tribe
http://www.i25environment.com/eafinal/ea9natamer.pdf
Wisconsin, DOT

Transportation Synthesis Report, State DOTs and Native American Nations, 2004
http://www.dot.wisconsin.gov/library/research/docs/tsrs/tsrnativeamerican.pdf

Environmental Protection Agency (EPA)

Policy, Administration of Environmental Programs on Indian Reservations, 1984
http://www.epa.gov/indian/1984.htm
Memorandum of Actions for Strengthening EPA's Tribal Operations, 1994
http://www.epa.gov/indian/tribe.htm
Interagency Working Group on Environmental Justice, Native American Task Force
http://www.epa.gov/compliance/environmentaljustice/interagency/

Federal Communications Commission (FCC)

Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, June 2000
http://www.fcc.gov/Bureaus/OGC/Orders/2000/fcc00207.doc

3. State Consultation Policies and Protocols

Alaska

Office of the Governor, Administrative Order No. 186
http://www.gov.state.ak.us/admin-orders/186.html

Arizona

Arizona Commission of Indian Affairs, Enhancing Tribal-State Partnerships Through the Town Hall Process
http://www.indianaffairs.state.az.us/pubs/NCAI-NCSL%20Paper.pdf

California

Governor's Office of Planning and Research, "Tribal Consultation Guidelines," April 15, 2005
http://www.opr.ca.gov/SB182004.html

Idaho

Idaho Transportation Department, Section 1800 Historical, Archaeological and Cultural Resources
http://www.itd.idaho.gov/manuals/Online_Manuals/Environmental/HTML%20Files/1800.htm

Iowa

Department of Transportation/FHWA – Iowa Division, Iowa Tribal Consultation Process: Initiatives and Recommendations
www.ctre.iastate.edu/reports/tribal.pdf

Maine

Resolve, to Foster the Self-governing Powers of Maine's Indian Tribes in a Manner Consistent with Protection of Rights and Resources of the General Public, Chapter 45 H.P. 926-L.D. 1269
http://janus.state.me.us/legis/ros/lom/LOM118th/RESLV12to85-33.htm

Michigan

Governor, Executive Directive 2001-2
Policy Statement on State-Tribal Affairs, May 2001
http://www.michigan.gov/formergovernors/0,1607,7-212-31303_31306-1831--M_2001_5,00.html#ExecutiveDirective20012

Minnesota

Department of Transportation, Government-to-Government Transp. Accord
http://www.dot.state.mn.us/mntribes/accord02.doc
Minnesota Tribes and Transportation E-Handbook
http://www.dot.state.mn.us/mntribes/handbook/
Executive Department, Executive Order 03-05
Affirming the Government-to-Government Relationship between the State of Minnesota and Indian Tribal Governments Located within the State of Minnesota, April 2003
http://www.dot.state.mn.us/mntribes/execorder2003.pdf

Mississippi

Accord Between the Executive Branches of the Mississippi Band of Choctaw and The State of Mississippi, 1997
http://www.choctaw.org/government/executive_accord.htm

Montana

http://data.opi.state.mt.us/bills/mca/90/11/90-11-101.htm
http://data.opi.state.mt.us/bills/2003/billhtml/HB0608.htm

New Hampshire

Historic Preservation – s. 227 C: 8d,
Consultation with Native American Community
http://www.gencourt.state.nh.us/rsa/html/XIX/227-C/227-C-8-d.htm

New Mexico

Historic Preservation Division, Department of Cultural Affairs

Native American Consultation and Section 106 Outreach
http://nmhistoricpreservation.org/OUTREACH/outreach_section106.html
Governor's Office, Government-to-Government Policy Agreement, 1996
http://www.state.nm.us/oia/pdf/PolicyProcedures.pdf
New Mexico and Navajo Nation Statement of Policy and Process, 2003
http://www.state.nm.us/oia/pdf/Navajo.pdf
NM and All Indian Pueblo Council Statement of Policy and Process, 2003
http://www.state.nm.us/oia/pdf/Pueblo.pdf

North Dakota

North Dakota Indian Affairs Commission, Protocol When Working with Tribes
http://www.health.state.nd.us/ndiac/protocols.htm

Oregon

Office of the Governor, Executive Order No. EO-96-30, State/Tribal Government-to-Government Relations
http://www.leg.state.or.us/cis/execord96-30.pdf

Tennessee

Tennessee Valley Authority
http://www.tva.gov/river/landandshore/culturalresources/native.htm

Washington

Department of Transportation, Centennial Accord Plan
http://www.wsdot.wa.gov/NR/rdonlyres/AF62EB38-2F31-4452-8127-323BAA632CCA/0/AccordPlan.pdf
Executive Order Number: E 1025.00 "Tribal Consultation Policy"
http://www.wsdot.wa.gov/NR/rdonlyres/847C3EC9-3373-41A7-ADBE-AC4D8E3F6ED6/0/ConsultationPolicy.pdf
General Websites on State Laws for Archeological/Cultural Resources:
Indian Burial and Sacred Grounds Watch
http://www.ibsgwatch.imagedjinn.com/learn/lawsstate.htm

4. <u>How to Locate Tribes (in addition to searching for Tribal websites)</u>

Department of the Army Maps

http://www.wes.army.mil/el/ccspt/dodmap/us_akhi.html
http://www.wes.army.mil/el/ccspt/natamap/usa_pg.html

Department of the Interior (Bureau of Indian Affairs)

Tribal Leaders Directory
http://www.doi.gov/leaders.pdf

National Park Service--National NAGPRA
Native American Consultation Database to assist in identifying consulting parties
http://www.cast.uark.edu/other/nps/nacd/
Map Index of Indian Reservations in the Continental United States
http://www.cr.nps.gov/nagpra/DOCUMENTS/ResMAP.HTM

Department of Transportation

American Association of State Highway and Transportation Officials
Identifying Tribes for Consultation
http://environment.transportation.org/environmental_issues/tribal_consultation/identifying.htm
FHWA -- Local Technical Assistance - research site
http://www.ltapt2.org/resources/ttaplinks.htm

States:

For a listing of state commissions see:
Tribal Court Clearing House
http://www.tribal-institute.org/lists/state_relations.htm
National Conference of State Legislatures
http://www.ncsl.org/programs/statetribe/stlegcom.htm

California

Alliance of California Tribes
www.allianceofcatribes.org
California Indian Legal Services
www.calindian.org
California Tribal Nations Emergency Management Council (Southern Region)
cwalters@sanmaunel-nsn.gov
Native American Environmental Protection Coalition
tribalenvironment@yahoo.com
Native American Heritage Commission, California
nahc@pacbell.net

Idaho

http://www.itd.idaho.gov/civil/tribal-links.htm

Tennessee

Tennessee Commission of Indian Affairs
http://www.state.tn.us/environment/boards/tcia.php
Advisory Council on Tennessee Indian Affairs
http://www.actia.org/

APPENDIX 2

"Survey Responses"

Original Survey Responses: 13 Tribes = 18 projects; 24 Agencies = 43 projects;

Total: 61 projects

Consulting Partner Responses: 33 Tribes; 32 Agencies; Tribal Organizations: 2; Non-Recognized Tribes: 4; Agency Other: 4.

Total – 44 projects

(17 projects with no Consulting Partner responses)

O=Other
NR=Non-Recognized

Tribe/Agency	Project
Tribes:	
Alabama–Coushatta Tribes of Texas	NAHI w/Camp Beauregard
Alabama–Coushatta Tribes of Texas	ICRMP with NAS-Pensacola/ NAV FAC
Alabama-Quassarte Tribal Town	ICRMP with NAS-Pensacola/ NAV FAC
Benton Paiute	106 Protocols, Data Sharing, Coso Hot Springs Access, Elder Field visits to base, Petroglyph tourism training
Blue Lake Rancheria	Centerville Road Re-Align
Blue Lake Rancheria	Little River State Beach
Bridgeport Indian Colony	106 Protocols, Data Sharing, Coso Hot Springs Access, Elder Field visits to base, Petroglyph tourism training
Caddo Nation	NAHI w/Camp Beauregard
Caddo Nation	Hwy 71 Relocation
Cherokee Nation	General section 106
Cherokee Nation	Study of New Echota

Tribe/Agency	Project
Cheyenne River Sioux Tribe	Animal Waste Facility
CRST	ICRMP with WY National Guard
Chickasaw Nation	State Route 73
Chippewa Cree Tribe of the Rocky Boy's Reservation	ICRMP with WY National Guard
Confederated Tribes of the Umatilla Indian Reservation	General with Forest Service
CTUIR	General with USACE
Fort Peck	Animal Waste Facility
Fort Peck	ICRMP with WY National Guard
Gila River	Army Alternate Procedure
Gila River	Roosevelt Estates, Gila Cty
Havasupai	Flight Rules Grand Canyon
Houlton Band of Maliseet Indians	Programmatic Agreements with FEMA 1
Hualapai Tribe	Flight Rules Grand Canyon
Hualapai Tribe	Hualapai Tribe Ethno Study
Keweenaw Bay Indian Community Of Michigan	L'Anse Trail Project
Lac Vieux Desert Band of Lake Superior Chippewa Indians	L'Anse Trail Project
Lummi Nation	Water System Project
Lummi Nation	Orcas Island Beach
Lummi Nation	Terminate Lease Bellingham Airport
Lummi Nation	Wetland Restoration
Lovelock Paiute Tribe	B-20 Reauthorization
Morongo Band of Mission Indians	Land transfer to Ft. Irwin
Navajo Nation	Flight Rules Grand Canyon
Navajo Nation	Nationwide Agreement with FCC

Tribe/Agency	Project
Northwestern Band of Shoshoni	Hill AFB Project
Passamaquoddy Tribe	Indian Township, BIA Fed Rd Project
Passamaquoddy Tribe	Programmatic Agreement with FEMA 1
Pawnee Nation	General 106 multi state
Quapaw Tribe	NAHI with Camp Beauregard
Rosebud Sioux Tribe	ICRMP with WY National Guard
St. Regis Mohawk	US 15 Upgrade G20/22
Sealaska Corp	Indian Point
Seminole Nation of Oklahoma	ICRMP with NAS-Pensacola/ NAV FAC
Seneca-Cayuga T	US 15 Upgrade
Seneca-Cayuga T	Intertribal Summit
Sitka Tribe of Alaska	Sitka Rocky Gutierrez
Skull Valley Band of Goshute Indians	Hill AFB Project
Skull Valley Band	GB National Park
Snoqualmie Tribe	Waste Systems Install
Snoqualmie Tribe	City of Carnation Pipeline
Stockbridge Munsee Community	Glusha Mine
Thlopthlocco Tribal Town	ICRMP with (NAS-Pensacola/NAV FAC)
Timbisha Shoshone	Land transfer to Ft. Irwin
Timbisha Shoshone	106 Protocols, Data Sharing, Coso Hot Springs Access, Elder Field visits to base, Petroglyph tourism training
Tuscarora Nation	Intertribal Summit with FHWA Penn. DOT
United Keetoowah	Study of New Echota
United Keetoowah	ICRMP with NAS –

Tribe/Agency	Project
	Pensacola/NAVFAC)
White Earth Band	MOU with USDA NRCS
White Mountain Apache Tribe	Roosevelt Estates, Gila City
WMAT	American Tower
WMAT	AAP
Yurok Tribe	Little River State Beach
Other:	
Great Lakes Indian Fish and Wildlife Commission	L'Anse Trail
NATHPO	Tower Construction Notification
Chumash	Foster Park Bank Repair
Craig Torres, Cult. Rep.	Aliso Beach Park
Gabrielino Tongva of	Santa Monica
Aliso Beach Park	
Ti'At Society	Aliso Beach Park
Agencies:	
Army	Army Alternate Procedures
Amy Corps	Moorefield Local Flood Project
Army, Fort Irwin	Land transfer to Ft. Irwin
USAG-AK	Army Alternate Protocol
USACE	Jointa Glusha Mine
USACE Seattle	Orcas Island Beach
USACE Walla	General s.106 with CTUIR
BIA Southern Plains Region	General s.106 multi state w/ Pawnee Nation
DOE/SWPA	General s.106 multi state w/ Pawnee

Tribe/Agency	Project
	Nation
DOT AK	Sitka Rocky Gutierrez Airport
DOT AR	US 71 Relocation
DOT GA	Study of New Echota
DOT Iowa	General s.106 multi state w/ Pawnee Nation
DOT NC	General w/ EBCI
DOT PA	Intertribal Summit with FHWA Penn. DOT
DOT PA	Tribal Consultation Handbook/ Interim Consultation Guidance
FAA	Flight Rules Grand Canyon
FAA	Hualapai Tribe Ethno Study
FAA - Alaska	Sitka Rocky Gutierrez Airport
FCC	American Tower Construction
FCC	SE towers & s.106 process
FCC	Tower Ventures
FCC	Tower Construction Notification System
FCC	Nationwide Agreement
FCC	Tower Siting Process
FEMA 1	Programmatic Agreements
FEMA 9	Old Hernandez Road
FEMA 9	City of Chowchilla
FEMA 9	Roosevelt Estates, Gila City
FEMA 9	Foster Park Bank Repair
FEMA 9	Centerville Road Re-Align
FEMA 9	Olivehurst Interceptor

Tribe/Agency	Project
FEMA 9	Rancho Drive Slipout Repair
FEMA 9	Aliso Beach Park
FEMA 9	South California Firestorms
FHWA AR	US 71 Relocation
FHWA GA	Study of New Echota
FHWA ME	Indian Township, BIA Fed. Rd Project
FHWA NC	General w/ EBCI
FHWA Penn DOT	US 15 G20/22
FHWA Penn DOT	Intertribal Summit
FHWA NY	US 15 G/20/22
FHWA TN	State Route 73
MEMA (MA)	Programmatic Agreement with FEMA 1
Naval Air Station- Pensacola	ICRMP with NAS – Pensacola/NAV FAC
NAV FAC	ICRMP with NAS – Pensacola/NAV FAC
Naval Air Station – Fallon	Fallon Range Complex
NAS-Fallon	Training range/tactical
NAS-Fallon	B-20 Lone Rock-TCP
Naval Air Weapons – China Lake	106 Protocols, Data Sharing, Coso Hot Springs Access, Elder Field visits to base, Petroglyph tourism training
NOAA	Indian Point
NPS Carlsbad	General s.106 multi state w/ Pawnee Nation
NPS GB	GB National Park
NPS Midwest	Animal Waste Facility
SHPO AZ	Roosevelt Estates, Gila City

Tribe/Agency	Project
SHPO AZ	American Tower Construction
SHPO AZ	Flight Rules Grand Canyon
SHPO LA	NAHI w/ Camp Beauregard
SHPO MN	MOU w/ White Earth/USDA NRCS
SHPO NC	General w/ EBCI
SHPO PA/ PHMC	Intertribal Summit with FHWA Penn.DOT
SHPO RI	Tower Ventures
SHPO SD	Spring Development
SHPO TN/ TDOA	State Route 73
SHPO WA	Wetland Restoration
Texas Mil	Construction of Maintenance Shop
USDA FS - Ottawa NF	L'Anse Trail
USDA FS - Umpqua NF	Umpqua General Plan
USDA FS - Umatilla NF	General w/ CTUIR
USDA NRCS – AL	NAHI w/Camp Beauregard
USDA NRCS– AL	Alabama Bridge Realign
USDA NRCS– AL	Excavate Hickory Ground
USDA NRCS– MN	MOU w/ White Earth Band
USDA NRCS – NC	Consultation Protocol s.106
USDA NRCS – SD	Animal Waste Facility
USDA NRCS - SD	Spring Development
USDA NRCS - WA	Wetland Restoration
USDA RD WA	Water System Project
WA Air National Guard	Terminate Lease Bellingham Airport
WY National Guard	ICRMP with WY National Guard

Tribe/Agency	Project
Other:	
Calif. Parks	Little River State Park
City of Carnation	City of Carnation Pipeline
King County	Waste Systems Install
New Echota State Park	Study of New Echota

Respondents That Have Nothing To Report – First Stage	
Tribe	
U tu Utu Gwaita Paiute Tribe/Benton Paiute	Native Village of Bill Moore's Slough
Agency	
SHPO, State of Maryland	

Respondents That Have Nothing To Report – Second Stage	
Tribe	
Absentee-Shawnee	US 15 Upgrade G20/22
Absentee-Shawnee	Intertribal Summit with FHWA Penn. DOT
Absentee-Shawnee	ICRMP with NAS-Pensacola/NAV FAC
Cow Creek	Umpqua General Plan
Delaware Nation	US 15 Upgrade G20/22
Delaware Nation	Intertribal Summit with FHWA Penn. DOT
Douglas Indian. Association	Indian Point
Mesa Grande Band of Mission Indians	Southern Calif. Firestorms
Mescalero Apache Tribe	Construction of Maintenance Shop

APPENDIX 3

"Survey Form"

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS
P.O. Box 19189 ● Washington, D.C. 20036-9189
Phone: (202) 454-5664 ● Fax: (202) 466-7706 ● www.nathpo.org

"Tribal Consultation: Best Practices in Historic Preservation"
National Historic Preservation Act, Section 106 Process

SURVEY FORM

This form has been developed for your ease of use. Please complete one form for each project. Attach additional sheets, if you need additional space. Related, written information (reports, for example) may also be attached, if you feel that it is helpful. If you would rather respond in a letter that contains the information requested, please send to Dr. Sherry Hutt at contact information listed below.

Tribe or Agency:_____
Name and Title of Respondent:_____
Telephone: (____) _____ E-mail:_____
Identify Project: _____
_____
Project Dates (exact if know, estimates okay): _____
Dates & Locations of Consultation(s): _____
_____
Consultation Parties (Tribe or Agency and which party on which date):
_____
_____
_____
_____
Titles of participants:_____
Briefly describe the project:
_____
_____
_____
_____

Describe the consultation (where did it occur and how did it operate?)
_____
_____
_____

In your estimation, how would you measure a successful consultation?
_____
_____
_____
_____
_____

(continued)

Was this consultation successful, and if yes, what made it so?

_____
_____
_____
_____
_____

Does your Tribe have a THPO?: __ Yes __ No ___ We are interested and/or establishing.
Does your Federal Agency have a Tribal Liaison?: __ Yes __ No
How did your Federal Agency determine which Tribe(s) to consult?

_____
_____

Was the SHPO involved, and if yes, how?

_____
_____

Did the Tribal Liaison take part in the process? __ Yes __ No Other:

_____
_____
_____

Lessons learned (How might the process been improved?):

_____
_____
_____
_____
_____
_____

May we contact you for follow-up questions? __ Yes __ No
What is the best way to contact you (see page 1)? __ Telephone __ Email

Deadline for returning this form: Friday, May 14, 2004
(If extension needed, please contact Dr. Hutt.)

Return to: Dr. Sherry Hutt, Principal Investigator
Best Practices in Tribal Consultation Project
2745 - 29th Street, NW #208
Washington, DC 20008
Fax: (202) 466-7706
Email: sherryhutt@aol.com

Questions? Please contact Dr. Sherry Hutt at (602) 751-3683

Thank you for your participation in this project.

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Information supplied remains the property of the NATHPO and ACHP "Best Practices in Tribal Consultation" project and will be summarized into a final report.
No specific information will be included without prior approval

ABOUT NATHPO

The National Association of Tribal Historic Preservation Officers (NATHPO) is a Washington, D.C. based national, non-profit membership association representing the collective and shared interests of the Tribal Historic Preservation Officers and all Tribal governments. NATHPO monitors the U.S. Congress, Administration, and state activities on issues that affect Tribes. NATHPO also provides technical assistance, training, and operates a website www.nathpo.org and free electronic news service "eNews from NATHPO."

ABOUT THE AUTHORS

Sherry Hutt, J.D., Ph.D. is the program manager for the National NAGPRA Program. She retired from the Arizona State Superior Court bench after 17 years as a Judge, to form Cultural Property Consulting, Inc., to provide training, writing and dispute resolution to tribes, museums and government agencies. Dr. Hutt taught cultural property law at the George Washington University, George Mason University and University of Arizona, Rogers College of Law. She has published journal articles on cultural property and coauthored three books: *Archeological Resource Protection*, NPS (1992); *Heritage Resources Law*, Wiley and Sons (1999); and, *Cultural Property Law*, American Bar Assoc. (2004). She prosecuted archeological resource criminal violation cases as an Assistant U.S. Attorney and continued to do training on resource protection for the Departments of Justice, Interior, Agriculture, Defense and Energy, as well as through the University of Nevada, Reno, and the National Preservation Institute. In 2002/03 she held a fellowship at the Smithsonian Institution in museum studies. She was a trustee of the Heard Museum in Phoenix, and is a founder of the Lawyer's Committee for Cultural Heritage Preservation in Washington, DC. She has also served as a Tribal appellate judge. Dr. Hutt is a recipient of the Department of the Interior Conservation Service Award and a Special Achievement Award from the Society of Professional Archaeologists. She earned a J.D. from Arizona State University College of Law in 1975 and a Ph.D. in forestry/economics from Northern Arizona University School of Forestry.

Jaime Lavallee, J.D., LL.M. is from the Muskeg Lake Cree Nation in Saskatchewan, Canada. Ms. Lavallee received her Juris Doctorate from the University of Toronto Faculty of Law and was an International Indigenous Rights Intern in the Osgoode Hall Lands, Resources and First Nations Governments Intensive Programme and the International Human Rights Programme. She has worked for First Peoples Worldwide, the international program of First Nations Development Institute, to further international Indigenous rights by providing basic legal education to the San peoples in Namibia. In 2003, she received her Masters of Law (LL.M.) from the University of Arizona James E. Rogers College of Law in Indigenous Peoples Law and Policy, and was awarded a fellowship assisting the Director and teaching as adjunct faculty, and serving as the first ever Tribal Appellate Clerk for the Yavapai-Prescott Tribe.