

State-Tribal Consultation Guide: An Introduction for Colorado State Agencies to Conducting Formal Consultations with Federally Recognized American Indian Tribes

Prepared by the Colorado Commission of Indian Affairs

To consult means to ask for advice or to seek an opinion— consultation does not mean obtaining consent.

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July 2014

Cover photo: Inside the Colorado State Capitol Dome

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I. Introduction

About this Guide

The guide is intended to be flexible and dynamic to adapt to the changing partnerships between the State of Colorado and American Indian Tribal governments. The working relationship between the State and Tribes is constantly evolving due to changes in administrations, personnel, and priorities. This guide provides suggestions about how to conduct meaningful State-Tribal Consultations.

Please do not hesitate to contact the Colorado Commission of Indian Affairs with any questions or concerns regarding consultation, or with any corrections to this guide.

About the Colorado Commission of Indian Affairs

In 1976, the Colorado General Assembly created the Colorado Commission of Indian Affairs (CCIA) within the Office of the Lieutenant Governor. The Lieutenant Governor serves in the statutory role as chair of the CCIA. The CCIA was designed to be the official liaison between the two Ute Indian Tribes located in Colorado (the Ute Mountain Ute and Southern Ute Indian Tribes) and the State of Colorado. Since its inception, the CCIA has worked with the two Ute Tribes as well as American Indian individuals who reside in Colorado. The CCIA is fully committed to work on a government-to-government basis with each of the two Tribal governments and to maintain direct contact with the Tribes and urban Indian communities. Specific duties and powers of CCIA are outlined in the CCIA Enabling Statute, C.R.S. 24-44-103. The duties of the CCIA are:

- To investigate the needs of Indians of this state and to facilitate the provision of technical assistance in the preparation of plans for the alleviation of such needs;
- To review all proposed or pending legislation affecting Indians in this state;
- To study the existing status of recognition of all Indian groups, tribes, and communities presently existing in this state;
- To employ and fix the compensation of an executive director of the commission, who shall carry out the responsibilities of the commission;
- To petition the General Assembly for funds to effectively administer the Commission's affairs and to expend funds in compliance with state regulations;
- To accept and expend gifts, funds, grants, donations, bequests, and devises for use in furthering the purposes of the Commission;
- To contract with public or private bodies to provide services and facilities for promoting the welfare of Indian peoples;
- To make legislative recommendations;
- To form committees as needed to respond to and address the needs of Tribal governments and Indian peoples of the state; and
- To make and publish reports of findings and recommendations.

II. Tribal Sovereignty

What is “Tribal Sovereignty”?

The source of tribal sovereignty is American Indian peoples, who mutually consent to self-government by their Tribes since powers of government flow from the consent of the governed; thus, tribal sovereignty refers to the inherent right of tribal peoples to govern themselves. The Institute for the Development of Indian Law defines sovereignty as the supreme power from which all specific political powers are derived. Sovereignty for Native peoples has existed since time immemorial, pre-dating the U.S. Constitution, but has been recognized by Article 1, Section 8 of the U.S. Constitution and confirmed through treaties, statutes, executive orders, and Supreme Court decisions, Tribes have been recognized in federal law as distinct, independent, political communities with the power to govern their own members and territories.

Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. –

Felix S. Cohen

The exercise of governmental powers, also known as “jurisdiction,” is a complex issue in Indian Country. In light of tribal sovereignty and other principles of federal Indian law, states and local governments generally are precluded from exercising jurisdiction over Indians in Indian country. Criminal jurisdiction issues are particularly complex, as jurisdiction may rest with different governments – tribal, federal, or state – often depending on identities of the victim and perpetrator, as well as the severity of offense.

GENERAL RULES OF CRIMINAL JURISDICTION OVER CRIMES COMMITTED IN INDIAN COUNTRY

SUSPECT IDENTITY	VICTIM IDENTITY	TYPE OF OFFENSE	JURISDICTION
Indian	Indian or Non-Indian	Major Crimes	Federal
Indian	Indian or Non-Indian	Non-major Crimes	Tribal
Non-Indian	Indian	Any Offense	Federal
Non-Indian	Non-Indian	Any Offense	State

Source: 18 U.S.C. § 1152 and 18 U.S.C. § 1153

At least as a matter of federal law, Tribes are not foreign nations in the international sense of sovereignty. Rather, federal law characterizes Tribes as having the status of domestic-

dependent nations, which means Tribes are subject to the legislative authority of the United States. Thus, for example, federal law would not allow or recognize a treaty by a Tribe with a foreign nation. In exchange for entering into treaties or agreements with the United States, the United States assumed some legal obligations to Tribes and is sometimes required to take certain actions on behalf of Tribes. The United States has other self-imposed responsibilities to Tribes in the areas of education, public safety, and health.

Tribal sovereignty is the basis of government-to-government relationships between American Indian/Alaska Native Tribes and the United States government.

Brief History of Tribal Sovereignty

The following brief summary provides an overview of the history of various levels of federal support for tribal sovereignty and government-to-government relationships in the United States.

- **Colonial Era (1533–1775):** During this period, European countries entered into treaties with Tribes, who were afforded a similar status as colonial governments. Treaties sought to end hostilities, establish the boundaries of Indian lands, and regulate trade.
- **U.S. Federal Era (1776–1823):** The national government of the new United States continued treaty-making with Tribes in this period. Unilateral laws of the new nation also began to regulate and restrict interactions between Tribes and States, especially concerning trade and land transactions (e.g., Trade and Non-Intercourse Act of 1790). Article I, Section 8 of the U.S. Constitution gave power to the Congress to "regulate Commerce with . . . the Indian Tribes."
- **Removal Era (1823–1871):** The beginning of this period is characterized by U.S. Supreme Chief Justice John Marshall's opinions, which set the precedent that Tribes are "domestic dependent nations." Federal law continued to maintain that only the federal government, not the states, had authority over Tribes. A major federal law was the Indian Removal Act of 1830, which provided for agreed-upon or even forced removal of many Tribes primarily to western lands on which Indian reservations were created. The end of this period is marked by the Appropriations Act of 1871, which ended U.S. treaty-making with Tribes.
- **Assimilation Era (1871–1934):** This period is characterized by federal laws and policies aimed to break up tribes and integrate Indian peoples into mainstream American society. The General Allotment/Dawes Act of 1887, which divided reservation lands into individual parcels, encouraged independent land holding and agriculture. "Surplus" lands were sold to non-Indians. The Indian Citizenship Act of 1924 conferred citizenship on Indian people who had not already gained that status through service in the armed forces, assimilation, or other methods.
- **Reorganization Era (1934–1953):** In 1934, the Wheeler-Howard/Indian Reorganization Act sought to restore some vestiges of tribal sovereignty lost during the Assimilation Era. Tribes were encouraged to establish formal governments and constitutions.

- **Termination Era (1953–1968):** House Concurrent Resolution 108 reversed federal policy reorganizing and recognizing tribal governments and abolished federal relations with more than 50 Tribal governments. This period also is characterized by federally funded programs designed to move Indian individuals from reservations to major cities.
- **Self-Determination Era (1968–Present):** Stirring of Indian consciousness following the Termination Era led to a dramatic increase in advocacy once again for tribal sovereignty. In 1972, President Nixon announced an official policy of Tribal self-determination. In 1975, Congress passed the Indian Self-Determination Act. Today, the United States officially recognizes 566 separate American Indian and Alaska Native tribes.

What is a Government-to-Government Relationship?

The concept of a government-to-government relationship is based on the sovereign status of tribal governments.

The following is from “Government to Government Models of Cooperation Between States and Tribes,” prepared by the National Conference of State Legislators (the full guide can be accessed at <http://www.ncsl.org/documents/statetribe/item019417.pdf>). A successful government-to-government relationship between a State agency and one or more Tribes involves several areas of understanding and cooperation:

- There is a mutual—and ongoing—understanding between both parties that each is an independent government that works for respective constituencies. As such, the State-Tribal relationship is fundamentally an intergovernmental relationship.
- Both States and Tribes understand that the relationship is unique, not only because all Tribal citizens are also State citizens and legislative constituents, but also because of the nature of the Tribal-Federal relationship.
- One or more mechanisms exist that facilitate the intergovernmental relationship between the State legislature and Tribal leaders. Such mechanisms allow the States and Tribes to maintain their respective governmental roles and responsibilities and to collaborate when appropriate.
- Both sides try to reach agreement on common issues, but recognize that there will likely be some areas of conflict. These areas of conflict should not be allowed to influence the entire intergovernmental relationship.

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the [Indians]?...This relation [in a treaty between the United States and an Indian tribe] was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to a master. – Chief Justice John Marshall (1832)

III. Introduction to Consultation

What is a Meaningful Tribal Consultation?

Although there are many different interpretations of “consultation,” one working definition is that consultation is the open and mutual exchange of information integral to effective collaboration, participation, and informed decision making, with the ultimate goal of reaching consensus on issues. Consultation is the development of a relationship based on trust, an effort to understand and consider any effects an undertaking may have on the consulting parties.

Meaningful consultations are typically based on mutually agreed-upon written protocols for timely communication, coordination, cooperation, and collaboration.

Consultation has become major part of the current U.S. federal policy recognizing and respecting tribal sovereignty and government-to-government relations with Tribes. Some specific federal laws require federal departments and agencies to conduct Tribal Consultations on specific matters. More

generally, Executive Order No. 13175, entitled, *Consultation and Coordination with Indian Tribal Governments*, signed by President Clinton on November 6, 2000, and adhered to by all subsequent

Presidents, defines “Consultation” as an accountable process ensuring meaningful and timely input from tribal officials in the development of Department policies that have tribal implications (full text available at <http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html>). This Executive Order outlines that:

- Executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials
- Executive departments and agencies are responsible for strengthening the government-to-government relations between the United States and tribes
- Consultation is a critical ingredient of a sound and productive federal-tribal relationship

Unlike the federal government, individual States and their agencies are not required by federal law to consult with Tribes. However, States and Tribes may choose to work together on a government-to-government basis to effectively reach consensus on matters that affect both governments. State-Tribal Consultation is not only good practice, but also consultation leads to increased mutual respect, and in effect more effective program planning and implementation.

Meaningful consultation is a two way road: it is more than a letter notifying a Tribe about an undertaking, a "legal notice" in a local newspaper, or any other form of unilateral

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

communication. Meaningful consultation requires in-depth and candid dialogue with and by all the consulting parties.

When are State Agencies Supposed to Conduct Tribal Consultations?

While most State agencies are not required to consult with Tribes, doing so may be beneficial to both entities if the subject matter could affect the Tribes in any capacity.

To assess whether an action, policy, or decision may affect Tribal interests, consider the following questions before taking or making any action, policy, or decision:

- Is the action, policy, or decision directly targeted toward the Tribes?
- Is the action, policy, or decision designed to include activities in Indian country?
- Are federal pass-through dollars designated for Tribes attached to the action, policy, or decision?
- Does the action, policy, or decision affect Tribal community interests (i.e. human health, ecological, cultural, economic, and/or social impacts) – or is it close enough to potentially affect such interests?
- Have any of the Tribes expressed interest in and/or concerns with this particular issue?
- Does the action, policy, or decision affect the relationship between the State government and the Tribe?
- Does the action, policy, or decision affect the distribution of power and responsibilities between the State government and Tribal government?
 - Example: Will the action affect the status of Tribes as a co-regulator or the Tribe’s right to self-governance?
- Are there any special legal considerations such as jurisdiction in Indian country?

If the answer is “yes” to any of the questions above, the Colorado Commission of Indian Affairs recommends conducting a tribal consultation.

In addition to asking the above questions, State agencies should also consider conducting consultation if the agency deals with any federal laws that affect tribal nations or peoples. For specific Colorado laws pertaining to American Indians, please see “State Laws Associated with Indian Affairs” at the end of this guide. This list is not exhaustive, so be sure to check the Colorado Revised Statutes for additional laws. The following is a list of the most common federal laws affecting tribes that may fall under the purview of your state agency; of course, there are many other federal laws affecting tribes. If your state agency deals with any of the following state or federal laws, the Colorado Commission of Indian Affairs encourages a State-Tribal consultation.

Common Federal Laws Affecting American Indian Tribes and Peoples

- **Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)** (from www.cr.nps.gov/nagpra/) NAGPRA provides a process for museums and Federal agencies to return certain Native American cultural items -- human remains, funerary objects, sacred objects, or objects of cultural patrimony -- to lineal descendants, and culturally affiliated Indian tribes and Native Hawaiian organizations. NAGPRA includes provisions for unclaimed and culturally unidentifiable Native American cultural items, intentional and inadvertent discovery of Native American cultural items on Federal and tribal lands, and penalties for noncompliance and illegal trafficking. In addition, NAGPRA authorizes Federal grants to Indian tribes, Native Hawaiian organizations, and museums to assist with the documentation and repatriation of Native American cultural items, and establishes the Native American Graves Protection and Repatriation Review Committee to monitor the NAGPRA process and facilitate the resolution of disputes that may arise concerning repatriation under NAGPRA.
- **Indian Child Welfare Act of 1987 (ICWA)** (from www.nicwa.org/) ICWA was passed in response to the alarmingly high number of Indian children being removed from their homes by both public and private agencies. The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902). ICWA sets federal requirements that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.
- **Title VI-E Program** (from www.acf.hhs.gov/) The Federal Foster Care Program helps to provide safe and stable out-of-home care for children until the children are safely returned home, placed permanently with adoptive families or placed in other planned arrangements for permanency. The program is authorized by title IV-E of the Social Security Act, as amended, and implemented under the Code of Federal Regulations (CFR) at 45 CFR parts 1355, 1356, and 1357. It is an annually appropriated program with specific eligibility requirements and fixed allowable uses of funds. Funding is awarded by formula as an open-ended entitlement grant and is contingent upon an approved title IV-E plan to administer or supervise the administration of the program. The title IV-E Agency must submit yearly estimates of program expenditures as well as quarterly reports of estimated and actual program expenditures in support of the awarded funds. Funds are available for monthly maintenance payments for the daily care and supervision of eligible children; administrative costs to manage the program; training of staff and foster care providers; recruitment of foster parents and costs related to the design, implementation and operation of a state-wide data collection system. The fifty (50) States, District of Columbia and Puerto Rico are eligible to participate in the Foster Care Program awards. Beginning in FY 2010, direct funding will be available to Indian Tribes, Indian Tribal organizations and Tribal consortia (hereafter "Tribes"), with approved plans to operate the program. In addition, \$3 million of appropriated funds is reserved for technical assistance and plan development grants to eligible Tribes

beginning in FY 2009. Only the public agency or Tribe designated to provide a program of foster care is eligible to apply for and receive direct title IV-E funding. Individuals and private entities may apply to the title IV-E Agency as sub-grantees or contracted providers.

- **Title VII Indian Education** (from www2.ed.gov/policy/elsec/leg/esea02/pg98.html) "Title VII – Indian, Native Hawaiian, and Alaska Native Education" reads: It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children. The Federal Government will continue to work with local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities toward the goal of ensuring that programs that serve Indian children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but also the unique educational and culturally related academic needs of these children. (a) PURPOSE- It is the purpose of this part to support the efforts of local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities to meet the unique educational and culturally related academic needs of American Indian and Alaska Native students, so that such students can meet the same challenging State student academic achievement standards as all other students are expected to meet. (b) PROGRAMS- This part carries out the purpose described in subsection (a) by authorizing programs of direct assistance for —
 - (1) meeting the unique educational and culturally related academic needs of American Indians and Alaska Natives;
 - (2) the education of Indian children and adults;
 - (3) the training of Indian persons as educators and counselors, and in other professions serving Indian people; and
 - (4) research, evaluation, data collection, and technical assistance.

For more information about Indian Education, check out the Native American Rights Fund's "Indian Education Legal Support Project" at www.narf.org/pubs/edu/turquoise.pdf

- **Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA)** (from portal.hud.gov/) NAHASDA reorganized the system of housing assistance provided to Native Americans through the Department of Housing and Urban Development by eliminating several separate programs of assistance and replacing them with a block grant program. The two programs authorized for Indian tribes under NAHASDA are the Indian Housing Block Grant (IHBG) which is a formula based grant program and Title VI Loan Guarantee which provides financing guarantees to Indian tribes for private market loans to develop affordable housing.
- **Violence Against Women Act (VAWA) Reauthorization 2013** (from www.justice.gov/tribal/vawa-tribal.html) On March 7, 2013, President Obama signed into law the Violence Against Women Reauthorization Act of 2013, or "VAWA 2013." VAWA 2013 recognizes tribes' inherent power to exercise "special domestic violence criminal jurisdiction" (SDVCJ) over certain defendants, regardless of their Indian or non-

Indian status, who commit acts of domestic violence or dating violence or violate certain protection orders in Indian country. This new law generally takes effect on March 7, 2015, but also authorizes a voluntary "Pilot Project" to allow certain tribes to begin exercising SDVCJ sooner. On February 6, 2014 the Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, and the Umatilla Tribes of Oregon Information were selected for this Pilot Project.

In addition to these laws, State agencies should be aware that some federal programs administered by State agencies and boards may provide for specific “pass through” or “set aside” funds for Tribes. One example is the Juvenile Justice and Delinquency Prevention Council (JJJPC).

The JJJPC is comprised of up to 33 citizens, system professionals, and youth members, who are appointed by the governor and charged with the responsibility of administering the Juvenile Justice and Delinquency Prevention Act program. The Council is responsible for: setting funding priorities; approving and denying grant applications under each program (Formula Grants, Title V, and Challenge); developing recommendations to the governor on the state of juvenile justice and suggestions on how to improve the system; monitoring justice trends; approving an annual juvenile justice plan; funding and policy decisions.

IV. Current State-Tribal Consultation Agreements in Colorado

Are any Colorado State Agencies Already Conducting Tribal Consultations?

Yes. Two agencies, Colorado Department of Health Care Policy and Financing (HCPF) and Colorado Department of Public Health and Environment (CDPHE), signed a Tribal Consultation Agreement in 2011 to work on a government-to-government basis with the Ute Mountain Ute and Southern Ute Indian Tribes on health and health care related issues. The Denver Indian Family Resource Center is a consulting party and should be included in communications as needed. This Tribal Consultation Agreement is reprinted in full on pages 14-19.

In 2012, the Colorado Department of Human Services (CDHS) signed on to this Tribal Consultation Agreement. The 2012 Addendum appears on page 20.

In addition to the Tribal Consultation Agreement between HCPF, CDPHE, CDHS, and the Ute Mountain Ute and Southern Ute Indian Tribes, History Colorado, a State agency under the Department of Higher Education, has also been conducting consultations with the 48 Tribes with historic ties to the State of Colorado, mostly in regard to the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). The consultative process between History Colorado and these Tribes is a good example of when State agencies may need to consult with Tribes about federal laws.

What are the Requirements of the Tribal Consultation Agreement?

The two main requirements of the Tribal Consultation Agreement of 2011 are:

1. For the Tribes and selected State agencies to meet at least once each fiscal year
2. For each State agency to provide a Programmatic Action Log Update on a bi-monthly basis

The CCIA urges State agencies to consider the written requirements of any formal agreement to be a minimum guideline for consultations, government-to-government relationships, and other partnerships and communications with Tribes.

Tribal Consultation Agreement (2011)

Tribal Consultation Agreement for the Colorado Department of Public Health and Environment and the Colorado Department of Health Care Policy and Financing

Section I.	Purpose
Section II.	Parties
Section III.	Definitions
Section IV.	Principles and Objectives
Section V.	Consultation Components and Procedures
Section VI.	Additional Provisions
Section VII.	Effective Date and Term
Section VIII.	Signatures

Appendix A. Organizational Charts

1. Colorado Department of Public Health and Environment
2. Colorado Department of Health Care Policy and Financing
3. Southern Ute Indian Tribe
4. Ute Mountain Ute Tribe
5. Denver Indian Health and Family Services

Section I. Purpose

The purpose of this Tribal Consultation Agreement (Agreement) is to formalize the consultation policy through which the Colorado Department of Public Health and Environment and the Colorado Department of Health Care Policy and Financing will seek and maintain regular, consistent communication and partnerships with the federally recognized American Indian Tribes of Colorado and the Urban Indian Health Organization (UIHO) of Colorado on health and health care related issues.

Each Party to this Agreement as further defined in Section II shall respect the sovereignty of the other. The respective sovereignty of the State and of each federally recognized Indian Tribe provides the foundation and authority to enter into this Agreement. The Parties share in their relationship particular respect for the values and culture represented by Tribal governments. Further, the Parties share a desire for a comprehensive, collaborative, government-to-government relationship between the State of Colorado and the federally recognized Indian Tribes in Colorado, as well as a comprehensive and collaborative relationship with the UIHO in Colorado and will take the measures necessary to achieve such relationships.

This Agreement is intended to build confidence and establish a trusting relationship among the Parties as well as to outline the process for implementing and abiding by the Agreement. This Agreement is also intended to formalize and institutionalize this relationship within the organizations represented by the Parties. This Agreement will also serve to comply with federal provisions outlined in Section 5006(e) of the American Recovery and Reinvestment Act of 2009 (ARRA), which establishes consultation requirements for Medicaid and the Children's Health Insurance Program with Indian Health programs.

Tribal Consultation Agreement (2011)

This Agreement also commits the Parties to the initial tasks that will translate the government-to-government relationship into more efficient, improved and beneficial services to Indian and non-Indian people. This Agreement encourages and provides the foundation and framework for specific agreements among the Parties outlining specific tasks to address or resolve specific issues. The Parties recognize that implementation of this Agreement will require comprehensive educational efforts to promote understanding of the government-to-government relationship within their own governmental organizations and with the public.

Section II. Parties

The following entities are parties to this Agreement and are collectively referred to as the Parties:

Lieutenant Governor of Colorado

As member of the Colorado Executive Branch, and the Chair of the Colorado Commission of Indian Affairs, and in recognition of the government-to-government relationship between the State and the Tribes, the Lieutenant Governor is a party to this Agreement.

Tribes

Federally recognized Indian Tribes in Colorado are party to this Agreement. Each Tribe has an independent government-to-government relationship with each other and the State. There are two federally recognized tribes in Colorado:

- Southern Ute Indian Tribe
- Ute Mountain Ute Tribe

Urban Indian Health Organization (UIHO)

Federally recognized UIHOs in Colorado are party to this Agreement. There is one federally recognized UIHO in Colorado:

- Denver Indian Health and Family Services.

State Agencies

There are two state agencies party to this Agreement:

- Colorado Department of Public Health and Environment (CDPHE) – CDPHE is the state agency responsible for protecting and preserving the health and environment of the people of Colorado. For the purpose of this Agreement, the Parties are only referring to the health aspects of CDPHE's responsibilities.
- Colorado Department of Health Care Policy and Financing (HCPF) – HCPF is the state agency responsible for the administration of public health insurance programs in Colorado, such as Medicaid and Child Health Plan *Plus*.

Section III. Definitions

For purposes of this Agreement the following terms shall apply:

Tribal Consultation Agreement (2011)

- A. Actionable Item: Any Programmatic Action with potential Tribal Implications that is in the early stages of development, and therefore has the potential of being significantly impacted by input from the Tribes and the UIHO.
- B. Consultation: An enhanced form of communication among the Parties on Actionable Items that emphasizes trust, respect and shared responsibility. It is an open and free exchange of information and opinion that, in turn, leads to mutual understanding and collaboration. It is a decision-making method for reaching an understanding through a participatory process that (a) involves the State Agencies, Tribes, and the UIHO through their official representatives; (b) actively solicits input and participation by the State Agencies, Tribes, and the UIHO; and (c) encourages cooperation in reaching agreement on the best possible decision for those affected. Consultation with the Tribes is a uniquely government-to-government process with two main goals: (1) to learn, and incorporate whenever possible, all pertinent considerations in decision-making; and (2) to consider each other's perspectives and honor each other's sovereignty.
- C. Indian Health Liaisons: Designated persons from the State Agencies who serve as the primary point of contact for Tribes and the UIHO for health issues relating to American Indians/Alaska Natives living in Colorado. Indian Health Liaisons along with Tribal and UIHO Liaisons share the responsibility of ensuring the implementation of this Agreement and maintaining ongoing communication between the Parties.
- D. Programmatic Action: Action related to the development, implementation, maintenance, or modification of health and health care rules, programs, services, legislation or regulations by the State Agencies that are within the scope of this Agreement.
- E. Tribal and UIHO Liaisons: Designated persons from the Tribes and the UIHO who serve as the primary point of contact for the State Agencies for health issues relating to American Indians/Alaska Natives living in Colorado. Tribal and UIHO Liaisons along with Indian Health Liaisons share the responsibility of ensuring the implementation of this Agreement and maintaining ongoing communication between the Parties.
- F. Tribal Implications: Refers to when a Programmatic Action by one of the State Agencies will have substantial direct effect(s) on the Tribes and/or the UIHO, or on the relationship between the Parties. All Parties to this Agreement share in the responsibility of identifying and determining which Programmatic Actions have Tribal Implications.
- G. Tribes: Federally recognized American Indian/Alaska Native tribes and tribal governments with whom the federal government maintains an official government-to-government relationship. In this Agreement "Tribes" refers to the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe.

Section IV. Principles and Objectives

The Parties intend through the implementation of this Agreement to promote the following principles and objectives:

- A. The recognition and respect for the sovereignty of State and Tribal governments and the fostering of successful government-to-government relations.
- B. The promotion and development of innovative, efficient, and successful methods of involving the Tribes and the UIHO in State Agency policy development, strategic planning, and regulatory processes.

Tribal Consultation Agreement (2011)

- C. The implementation of communication mechanisms and processes to ensure the Tribes and the UIHO are adequately and timely informed of Programmatic Actions, can access pertinent information, and have the opportunity to provide input and voice concerns.
- D. The development of communication mechanisms to identify and share pertinent information among the Parties with the goal of improving the health and wellness of American Indians/Alaska Natives living in Colorado.
- E. The recognition that maintenance of consistency and continuity among Indian Health, Tribal, and UIHO Liaisons will contribute to the effectiveness of consultation and communication among the Parties and should be maintained to the extent possible.
- F. The understanding that good faith, mutual respect, and trust are fundamental to meaningful collaboration and communication.

Section V. Consultation Components and Procedures

A. Procedures

Programmatic Action Log Update:

On a bi-monthly basis (approximately every sixty days) each State Agency shall distribute to the Tribes and the UIHO a Programmatic Action Log Update. The Update shall contain a continuous list/log of Programmatic Actions being developed and/or initiated by each State Agency. The Update shall provide a short description of each Programmatic Action, any clearly foreseeable Tribal Implications, important dates or implementation timeframes, and if the Programmatic Action is considered an Actionable Item. The Update shall indicate a date by which additional consultation could be requested by a Tribe or the UIHO, however, consultation can be requested at any time on any Actionable Item. The Update shall also contain an area to track whether additional consultation was requested and by whom, and to update current status/resolution of Programmatic Actions.

Additional Consultation:

A Tribe or UIHO may request additional consultation on any Actionable Item on the Update or on any question, concern, policy, practice, or issue within the scope of the State Agencies' responsibilities relating to the health of American Indians/Alaska Natives living in Colorado. Actionable Items on the Update shall indicate a date by which a Tribe or the UIHO can request additional consultation, however, consultation can be requested at any time for any Actionable Item. Additional consultation shall be initiated by written notice (may be in the form of an email) from a designated Tribal or UIHO Liaison(s) and directed to a designated Indian Health Liaison(s). Consultation may include but shall not be limited to:

- An initial meeting or teleconference to discuss the intent and scope of the Actionable Item or any other question, concern, policy, practice, or issue within the scope of the State Agencies' responsibilities relating to the health of American Indians/Alaska Natives living in Colorado
- Continued meetings or teleconferences until concerns over the Actionable Item or other question, concern, policy, practice, or issue within the scope of the State

Tribal Consultation Agreement (2011)

Agencies' responsibilities relating to the health of American Indians/Alaska Natives living in Colorado have been fully discussed

- Written correspondence including emails
- Discussions at the Colorado Commission of Indian Affairs' Health and Wellness Committee meetings to more fully understand the specifics and impact of the Actionable Item or other question, concern, policy, practice, or issue within the scope of the State Agencies' responsibilities relating to the health of American Indians/Alaska Natives living in Colorado
- Open meeting for all interested entities to receive information or provide comment
- A presentation by tribal representatives of their concerns and potential Tribal Implications of the Actionable Item or other question, concern, policy, practice, or issue within the scope of the State Agencies' responsibilities relating to the health of American Indians/Alaska Natives living in Colorado

When consultation is completed, a written response from one or both State Agencies to the Party that requested the consultation shall be sent describing the final determination/outcome regarding the topic of consultation. This information shall also be included on the Programmatic Action Log Update.

B. Meetings

Face-to-Face:

The State Agencies, Tribes, and UIHO, all together or individually, shall meet face-to-face no less than once per fiscal year and as resources allow.

Remotely:

As necessary, the State Agencies, Tribes, and UIHO, all together or individually, shall meet remotely via teleconference or videoconference to discuss outstanding issues and/or hold consultations as described above.

Section VI. Additional Provisions

- A. This Agreement shall not diminish any administrative or legal remedies otherwise available by law to the State Agencies, the Tribes, or the UIHO.
- B. This Agreement shall not prevent the State Agencies, the Tribes, or the UIHO from entering into Memoranda of Understanding, Intergovernmental Agreements, Joint Powers Agreements, professional service contracts, or other established administrative procedures and practices allowed or mandated by federal, State, or Tribal laws or regulations.
- C. This Agreement shall not be construed to waive the sovereign immunity of the State of Colorado or any Tribe, or to create a right of action by or against the State of Colorado or a Tribe, or any State or Tribal official for failing to comply with this Agreement. The State Agencies shall have the authority and discretion to designate internal operations and processes that are excluded from this Agreement, and recognizes that Tribes are afforded the same right.

Tribal Consultation Agreement (2011)


D. The State Agencies shall retain the final decision-making authority with respect to actions undertaken by the State Agencies and within the State Agencies' jurisdiction.

Section VII. Effective Date and Term

This Agreement is effective upon full execution and signature by all Parties.

The Parties together shall review and evaluate every two years, or as necessary, the implementation of this Agreement. At such time, a revised consultation policy may be executed, if necessary, replacing this Agreement.

Section VIII. Signatures



Joseph A. Garcia, Lieutenant Governor
State of Colorado

9/12/2011
Date



Pearl E. Casias, Chairwoman
Southern Ute Indian Tribe

9-12-2011
Date




Gary Hayes, Chairman
Ute Mountain Ute Tribe

9/12/11
Date



Del Nutter, Executive Director
Denver Indian Health and Family Services

10/25/11
Date



Christopher E. Urbina, Executive Director
Colorado Department of Public Health and Environment

9/18/11
Date



Susan E. Birch, Executive Director
Colorado Department of Health Care Policy and Financing

10/11/11
Date

END.

Tribal Consultation Agreement (2012 Addendum)

Addendum – State of Colorado Tribal Consultation Agreement

The Colorado Department of Human Services recognizes and supports the sovereignty of the Ute Mountain Ute Tribe and the Southern Ute Indian Tribe.

The Colorado Department of Human Services supports fostering and maintaining a strong relationship with the federally recognized American Indian Tribes of Colorado and the Urban Indian Health Organization of Colorado.

The Colorado Department of Human Services is the state agency responsible for the administration of human services programs in Colorado, administering a wide array of federally funded programs.

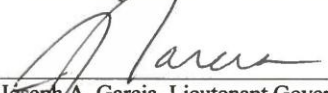
The Colorado Department of Human Services wishes to join as a full and equal party to this Tribal Consultation Agreement.

Signatures:



Reggie Bicha, Executive Director
Colorado Department of Human Services

1-9-2012
Date



Joseph A. Garcia, Lieutenant Governor
State of Colorado

1-9-2012
Date




Gary Hayes, Chairman
Ute Mountain Ute Tribe

1/9/12
Date




Jimmy R. Newton, Jr., Chairman
Southern Ute Indian Tribe

1/9/12
Date




Del Nutter, Executive Director
Denver Indian Health and Family Services

4/13/12
Date



Christopher E. Urbina, Executive Director
Colorado Department of Public Health and Environment

1/9/12
Date



Susan E. Birch, Executive Director
Colorado Department of Health Care Policy and Financing

1/9/12
Date

V. Steps of Consultation

Once your State agency has decided to conduct a Tribal consultation, you may contact the CCIA for advice on how to proceed. Additionally, the steps below will help guide you through the Tribal consultation process.

Remember: the goals with Tribal governments are to include them early, invite them always, follow-up every time, meet with them regularly, and ask them how to best work together.

Step 1: Initiate Consultation

A. Determine Whom to Invite

- Depending on the issue, your agency may decide to consult with multiple tribes at the same time or to consult with each tribe individually. Decide if you want to hold consultations jointly or individually. The CCIA recommends hosting a full day of consultation with each tribe.
- A formal consultation must include the most senior leaders of each party. Ensuring appropriate staff members are present at initial and, if necessary, follow-up meetings with tribal governments, shows a commitment to the government-to-government relationship. Consultations with tribal council officials and tribal program staff should, if possible, be conducted between the same levels of officials.
- Because of frequent elections at the tribal level, it is important to include specific tribal department heads and staff in addition to elected officials, as department personnel tend to be more consistent over time.
- Please contact the CCIA for updated tribal contact information.
 - From the state agency side, invite:
 - The Executive Director, or equivalent highest position
 - Department Directors, or equivalent management
 - Any necessary topic specialists to answer questions during consultation
 - From the tribal side, invite:
 - Tribal Chairperson, Governor, or President, depending on tribal structure. The Ute Mountain Ute and Southern Ute Indian Tribes both have Chairpersons
 - All of Tribal Council, although not all council members may attend (many council members focus on certain issues, and it may be

beneficial to find out which council members are assigned to issues relevant to your state agency)

- Any relevant Tribal Council Committees
- Tribal Program/Department Directors (if you would like to invite departmental staff, you may want to talk with the Directors to be sure their staff are invited)
- You may also want to consider the role of third party participants, particularly urban American Indian organizations involved in similar services or issues as your state agency. Also consider inviting local or state representatives or contractual partners of your agency.

B. Select Options for Dates/Times

- Check with your state agency's calendar to select three to four possible consultation dates.
- Contact the Tribal Councils' Executive Assistants to propose the consultation dates, and limit the possible dates to two options.
- Include your two options in the initial letters to the tribes. The Tribal Council Executive Assistants will most likely know of any conflicting community events and will be able to access Tribal Council's calendar, but may not have access to any specific department calendars.

C. Provide Written Invitation/Notification of the Consultation

- Separate letters need to be addressed and sent to each tribe, even if you plan to hold a joint consultation.
- Letters should be addressed to the Tribal Chairperson/Governor/President and Tribal Council, with the Tribal Program/Department Directors copied on the letter.
- Likewise, the letter should be sent from the state agency's senior level leadership, with other attendees from your state agency copied on the letter.
- Include the language of "State (or Department Specific)/Tribal Consultation" in every written document. Tribes must be able to distinguish a formal consultation from a meeting, so be sure to use the word "consultation," and not "meeting."
- It is best to provide at least a 30 day notice, but the earlier the notification can be sent, the better.
- The letter or notice should include an overview of the issue at hand, the reason for the consultation, and the two options for consultation dates.
- Notice should be sent by both email and snail mail.
- Please feel free to contact CCIA with any questions, or if you would like CCIA to review the letter before you send it.

D. Confirm with the Tribes

- About a week or two after the letter has been sent, consider calling the Tribal Executive Assistant or Tribal leaders directly to determine their desire to consult.

Continue contacting the Tribe until a firm decision about consultation has been determined.

A note on timeframe for communication: communication early and often with Tribes is critical to a successful consultation.

The time frame for developing relationships, conducting consultations, and negotiating protocols with Tribes are frequently time consuming, particularly when relations have not been established or maintained. Plan to spend substantial amounts of time and personal involvement to develop relationships that will lead to productive consultations.

Sometimes, before a Tribe can take an action, approval must be obtained from the Tribal Council/Government. When planning meetings with a tribal government, or placing matters before them for their consideration, attention needs to be given to the Tribal Council's schedule.

Example of Consultation Invitation (page 1)



ADMINISTRATION FOR CHILDREN & FAMILIES

June 7, 2013

Dear Tribal Leader:

This letter is an invitation to Tribal Leaders to attend a consultation session with Shannon Rudisill, Director of the Office of Child Care (OCC) within the Administration for Children and Families, on the OCC's new proposed regulations. On May 20, 2013, OCC published a proposed regulation to strengthen standards to better promote the health, safety, and school readiness of children in federally funded child care. The proposed rule would apply directly to States, Territories, and Tribes who accept Child Care and Development Fund (CCDF) funds. More than 500 federally recognized Tribes receive CCDF, either directly or through consortia agreements, and serve more than 30,000 low-income Tribal children.

Under the proposed rule, Tribes would require that all CCDF-funded child care providers: receive health and safety trainings in specific areas; comply with applicable fire, health, and building codes; receive comprehensive background checks (including fingerprinting); and receive on-site monitoring. Recognizing the critical importance of school readiness, OCC is also proposing that all Tribes set-aside 4% of their grants to improve the quality of child care, which modifies current regulations that only require grantees over \$500,000 to spend money on quality. The proposed rule continues to exempt smaller Tribes from operating a certificate program. It provides notice of our intent to raise the threshold for what is considered an exempt Tribe from \$500,000 to \$700,000 and to increase the base amount of funding that each Tribe receives as part of its Discretionary fund award from \$20,000 to \$30,000. OCC is excited to share these changes, which will better support providers, parents, and Tribes as they work together to make sure that children are safe, healthy, and prepared to succeed. The public is encouraged to submit comments at www.regulations.gov until August 5, 2013. More information is available on the OCC website at: <http://www.acf.hhs.gov/programs/occ/child-care-rule>.

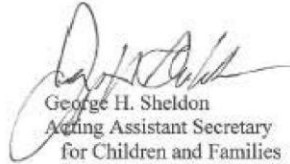
The session will be held from 1:00 to 4:00 PM, Eastern Time, on July 8th at the Aerospace Building, 7th Floor Multipurpose Room, 901 D Street SW, Washington, District of Columbia 20024. You will need to bring a valid picture ID to enter the building. If you are planning to attend, please register or revisit your registration on the ACF Tribal Consultation website at: <http://www.regonline.com/tribalconsult2013>. If you or your designated representative plan to provide testimony at the session, please provide a written copy in advance to Mary Sprague at 370 L'Enfant Promenade, S.W., Washington, DC 20447 or mary.sprague@acf.hhs.gov. OCC will provide distance participation options for this session for those Tribal leaders unable to attend in person.

Example of Consultation Invitation (page 2)

Page 2

I am committed to effective and meaningful consultation with Tribes. If you have any questions or concerns, please feel free to contact Mary Sprague at (202)-401-4831 or mary.sprague@acf.hhs.gov. Thank you for the important work that you do. I look forward to working with you as we move to strengthen child care programs in Tribal communities across the nation.

Sincerely,



George H. Sheldon
Acting Assistant Secretary
for Children and Families

CC: Tribal CCDF Administrators

Attachments:

Draft Agenda

How the New CCDF Proposed Rule Would Impact Tribes

Step 2: Plan the Consultation

A. Create the Agenda and Consultation Materials

- The two Ute Tribes in Colorado are familiar with the following format: welcome, invocation, introductions, updates from State Agents, updates from each Tribe, additional comments, and closing.
 - One of the first items on the agenda always should be introductions. It is important to let everyone in the room have a chance to speak. Tribal leaders may be used to federal consultations, which normally have a formal order of speakers, but this order of speakers for state consultations is not necessary; going around the room in a circle for introductions is fine.
 - It may be appropriate to ask a tribal leader to elder to deliver an invocation. It is common for the invocation to be given in both the speaker's native language and in English. It is recommended to ask someone to give an invocation when preparing the agenda, before consultation day.
- The format for the first consultation (or first few consultations) may conform to tribal procedures, but subsequent consultations should ideally reflect a mutually agreed upon format.
- Other possible consultation formats include: presentation followed by discussion, listening session, small group "breakout" discussions, question and answer session, or a combination of these.
- Communicate with Tribes early on and directly ask about preferred agenda items.
- Consider creating name tags or tents so everyone is easily identifiable.
- Print all necessary consultation materials, including the agenda and handouts.
- Send out the agenda prior to the consultation so everyone has a chance to review the items and make any necessary preparations.
- Have an attendance or sign-in sheet prepared and made available at the consultation. Once the list is complete and everyone has signed in, copies should be made available to the attendees.
- At any point during the consultation, be prepared for tribal leaders to request a tribal caucus, which provides a time for the tribal leadership to privately discuss an issue. The amount of time taken for a tribal caucus can vary, so be patient. If you are planning to conduct a consultation with multiple tribes at the same time, ask tribal leadership prior to the consultation if they would like time for a tribal caucus. Sometimes tribal representatives from different tribes need a little time to get on the same page with each other.
- **Be flexible!** Understand that there are different ways of communication. Seemingly extraneous data may be reviewed and re-reviewed. During negotiations, prepare to discuss all aspects of an issue at hand simultaneously rather than sequentially. Regardless of how carefully planned the agenda is, it is very likely that the conversation will not end up following the agenda precisely.

B. Determine the Location

- If budget and time allow, face-to-face consultations are certainly preferred, particularly for initial consultations. Communication between formal consultations and after the initial consultations does not necessarily need to be in person and can rely on mail and email correspondence, teleconference, video conference, webcasts, and telephone calls.
- Tribal input should be solicited before determining the consultation location.
- Because of the distance between the two American Indian reservations in Colorado and the state Capitol of Denver, selecting the consultation location requires attention to both the state's and tribes' financial and logistic limitations. Typically, the first consultation should be held at tribal headquarters, either in Towaoc (Ute Mountain Ute reservation) or Ignacio (Southern Ute Indian reservation). This also allows for state agents to become familiar with the reservation, culture, and people. CCIA will also help you schedule tours of various places on the reservations, such as the Southern Ute Cultural Center, the Ute Mountain Tribal Park, or tribal health facilities. After the initial consultation, the parties could consider alternating consultation locations between southwest Colorado and the Denver area.
- If consultations do occur outside the Four Corners area, state agencies are expected to incur the partial or whole cost of travel for tribal representatives, when possible.
- CCIA recommends trying to find a date when tribal representatives will already be in the Denver area for other engagements, "piggy-backing" the consultation onto another previously scheduled meeting. This is more convenient for tribal leaders and will help minimize expenses. It is best to simply ask the tribal executive assistant about this possibility.
- When planning travel to consultations, CCIA recommends creating a travel itinerary for all those involved. Please see the following example.

C. Confirm the Consultation

- Confirmation can be sent via email or be done via phone and should include all parties.
- Confirm the consultation date a few weeks and reconfirm a couple of days before the consultation.

Example of a Detailed Agenda

STATE OF COLORADO

Colorado Commission of Indian Affairs
130 State Capitol
Denver, CO 80203
Phone (303) 866-5470
Fax (303) 866-5469
www.colorado.gov/ltgovernor/



Joseph A. Garcia
Lieutenant Governor/Chair

HEALTH & WELLNESS ROUNDTABLE AGENDA August 19-20, 2013

LOCATION:

Sky Ute Casino & Resort
Southern Ute Indian Tribe
14324 Colorado 172
Ignacio, Colorado 81137
Phone: (970) 563-7777

TIME:

10:00 a.m.

Monday, Aug 19, 2013

(Morning Refreshments hosted by Southern Ute Indian Tribe)

- 10:00 a.m. Invocation/Welcoming – Southern Ute Indian Tribe
10:15 a.m. Review of current process for health and public health services
- Federal and State Funds/Programs
 - Colorado Public Health: State and County
 - Colorado Medicaid and CHP+
 - Tribal Health Care System/Tribal Health Priorities and Focus Areas
- 12:00 p.m. Lunch (hosted by CCIA)
1:00 p.m. Review of current state health grants/programs available to Ute Tribes
- Colorado Department of Public Health and Environment
 - Colorado Department of Health Care Policy and Finance (SIM Grant)
 - Colorado Department of Human Services
- 2:30 p.m. Break
2:45 p.m. Update and current status of Colorado Health Benefit Exchange and Next Steps
4:00 p.m. Review of Objectives/Closing Comments

Tuesday, Aug 20, 2013

- 8:30 a.m. Coffee and Pastries
9:00 a.m. Review of previous day objectives/goals
9:30 a.m. “What’s working and what’s not” between the State and the Tribal Programs
10:30 a.m. Break
11:00 a.m. Review, Next Steps, and Closing
12:00 p.m. Lunch
1:00 p.m. Tour of Tribal Health Clinic and Southern Ute Cultural Center

Example of Agenda

**CONSULTATION REGARDING
THE SAND CREEK MASSACRE EXHIBIT
AT 9:00AM AT HISTORY COLORADO
Sept 5, 2013**

- Prayer
- Introductions of Participants
- Overview of last consultation meeting on June 18-19, 2013
- What Kind of Working Relationship do the Participants Want to Build and How?
 - MOU Regarding the Government-to-Government Relationship Between the Northern Cheyenne Tribe, Northern Arapaho Tribe, and Cheyenne and Arapaho Tribes of Oklahoma and History Colorado
- Sand Creek Massacre Exhibit
 - Update on History Colorado's immediate changes to the exhibit
 - Which potential changes to the exhibit should be explored and resolved before the exhibit should be reopened to the public? Which changes should be considered now but implemented later while the exhibit remains open?
 - Define and agree to a process for considering and approving changes to the current exhibit now and in the future.
- Media
- Closing Comments and Adjourn

Example of Travel Itinerary

STATE OF COLORADO

Colorado Commission of Indian Affairs

130 State Capitol
Denver, CO 80203
Phone (303) 866-5470
Fax (303) 866-5469
www.colorado.gov/ltgovernor/



Joseph A. Garcia
Lieutenant Governor/Chair

CCIA 4th Quarterly Commission Meeting/Retreat Agenda June 1st and 2nd, 2012 Ute Mountain Ute Tribe, Towaoc, CO

Friday, June 1, 2012

9:00 am – 11:45 am	CCIA Meeting, Ute Mountain Community Center, Towaoc, CO
11:45 am – 12:00 pm	Travel to Beardance Grounds
12:00 pm – 1:00 pm	Beardance Demonstration with students
1:00 pm – 1:15 pm	Travel to Ute Mountain Community Center, Towaoc, CO
1:15pm – 2:15 pm	Lunch
2:15pm – 5:00 pm	CCIA Retreat Part 1
5:00pm – 5:15 pm	Travel to Ute Mountain Hotel and Resort for Check-in
6:30pm	Group Dinner at Little Buffalo Room, Ute Mountain Hotel/Resort

Saturday, June 2, 2012

7:00 am – 8:00am	Breakfast at hotel restaurant (on your own)
8:00 am – 11:00am	CCIA Retreat Part 2, Hotel Conference Room
11:00am – 12:00pm	Board vans and travel to Ute Mtn Tribal Park
12:00pm – 1:00pm	Lunch
1:00pm – 4:00pm	Tour of the Cliff Dwellings
4:00pm – 5:00pm	Travel back to Ute Mtn Hotel

Step 3: Conduct Consultation

A. Be Clear About Consultation Logistics

- When the consultation is held at an unfamiliar location, initiate the consultation by providing the attendees with building logistical information, including a brief explanation of what to do if an alarm goes off and the smoking, beverage, food, and restroom arrangements.
- Provide a travel schedule, if necessary.

B. Document Everything

- Document your efforts from the planning stages through final consultations, including who attended, what topics were discussed, follow-up items, and any other relevant information.
- During the consultation, the state agency and the Tribe will normally reach agreement about which party will be responsible for preparing and distributing consultation notes or summaries (in most cases, it will be the state agency). Agreement should also be reached about the appropriate state-tribal authority to contact in the follow-up phase. Circulate the consultation notes or summaries for review and comment to all participants before distributing them as a final document. This review will help to ensure that the views and interests of both parties are accurately characterized.
- Make a specific list of follow-up items, and confirm with individuals on any specific items that require follow-up.

C. Offer Refreshments

- If the budget and space allow, consider offering refreshments, including healthy options. This is a cultural characteristic that is still strong in Indian Country.

D. Media are not typically involved in Consultations

- Unless both the Tribe and the state agency agree otherwise, no media should be present at a government-to-government consultation.
- If the media will be present at a non-consultation meeting, or if the state agency and the Tribe expect to be dealing with the media, consider working with the Tribe to prepare a joint media handout or news release prior to the scheduled consultation.
- Be sure to facilitate contact between each party's communications coordinator.

E. Wrap Up the Consultation

- Before leaving the meeting, it is recommended to assess the following:
 - Did everyone have the opportunity to contribute?
 - Did everyone understand the issues?
 - Did everyone understand the process for action?
 - Did everyone understand what will happen next?
 - Did the participants make any commitments about what will happen next (i.e., is another meeting warranted)?

Step 4: Follow-up with the Tribe(s)

A. Send a Response Letter

- After consultation, the State agency should develop a response letter to the tribal leadership involved. The letter should explain how the tribes' input was or will be incorporated into the decision making process and/or how their comments and concerns were or will be addressed.
- If appropriate, be sure to include a method of follow-up for the next consultation.
- The letter should be signed by the highest-level state official involved and sent to the most senior tribal official involved in the consultation, with other participants copied on the letter.

B. Reflect on the Consultation

- **How do I know if we have had a successful consultation?**
 - Success can be measured from several levels or aspects. For example, simply obtaining a consultation with a particular Tribe might be considered a success in one situation. In another, a written agreement might cap a series of negotiations. If there is an opportunity to talk informally with someone from the tribal delegation, ask for his or her assessment of the consultation. Find out what he or she expects will happen next.
- **What if there is a difference of opinion about what happened at the consultation?**
 - Avoid putting off an oral inquiry to reconcile this difference. Since oral communication is the preferred means of information exchange among many tribal cultures, expect most contacts to be face-to-face and, to a lesser degree, by telephone or e-mail.
- **When is consultation complete?**
 - Consultation is an ongoing process; rarely are all concerns and issues addressed in a single, or even a few, consultations.
 - There are no legal requirements regarding the duration of consultations.
 - CCIA encourages state agencies to continually engage Tribes in decision-making processes and other initiatives.

VI. Tips for Successful Consultation

When dealing with Tribes on a government-to-government basis, it may be helpful to:

- Make sure that your consultations offer a value that is worthy of every person's time, effort, and expense and applies to reservations, Tribes and tribal members.
- Be prepared to accommodate the family members of tribal leaders and elders, as tribal representatives often travel with their families. You may need to include the family in the consultation or designate a comfortable waiting area.
- Get informed and stay informed. Brief yourself and your representatives on tribal histories and contemporary issues. Many tribes provide brief histories on their websites. **Please see the appendices with information about the Southern Ute Indian and Ute Mountain Ute Tribes, as well as information about the American Indian population in Colorado.**
- Consider appointing a special liaison or point of contact if you will regularly consult with Indian tribes. This will help streamline the process for all consulting parties.
- Recognize, respect, and encourage cultural differences.
- Be honest and straightforward. Don't make promises that you or your agency/sponsor cannot keep.
- Get involved in the community in as many ways possible. Attend community events and public meetings. The more you and the community are familiar, the more trust builds, contributing to successful consultations.
- Make yourself available – not only as visible in the community, but also be sure to promptly respond to phone calls, emails, etc.
- Allow adequate time for participant groups to consider the project and its implications. Consultation is a process, not a single meeting.
- Share a meal or plan a social outing. Don't restrict your time to just business; engage and learn from native participants to get a better understanding of their perceptions of the matters at hand. Similarly, consider planning tours of community areas before or after the formal consultation.
- Consider bringing gifts. Check with your agency/sponsor and applicable state and federal laws to determine what is appropriate.
- Be aware of tribal political changes. Tribal governments, like national and state government, have periodic leadership changes. The Ute Mountain Ute and Southern Ute Indian Tribal governments hold elections every year. As such, do not pin your idea or

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*

program to one particular tribal leader. Instead, engage multiple tribal council members and be sure to establish sustainable working relationships with departmental directors and staff.

- Keep in mind that you are asking for time from tribal leaders who already juggle many responsibilities. You did not elect the tribal leaders and are not a constituent, so be prepared to be particularly patient and persistent.
- Do not assume one Tribe or one leader speaks for all. Take the time to find the key players.
- Truly address, negotiate, and find ways to accommodate the Tribe's concerns. American Indians object to being 'consulted' or 'studied' by people who have little intention of doing anything in response to their opinions. Be prepared to respond with reasons why the advice may or may not be followed.
- Be mindful that each tribe is a unique and distinct cultural entity, and they should not be treated as though they are alike.
- Attend cross-cultural awareness trainings about American Indian culture.
- Be aware of your own personal biases at all times. Always try to have an open mind.
- Keep in mind that the history of federal-tribal relations has left an undeniable mark on the outlook of American Indian tribal members, often in the form of distrust and apprehension. Be aware of the historical lens from which many tribal representatives view governmental-tribal relations and know that an emotional response about historical events or past government interactions might arise. If negative emotions are escalating, the best thing to do is to display sensitivity by respectfully listening and by not becoming defensive. Do not take it personally, but rather, try to think of the issue from the other person's perspective.
- Consider the cultural differences of time. Typically, American Indian people start meetings when everyone arrives, and the meeting is finished when everyone has had a say. "Indian time," as it is sometimes called, references the cultural differences in priorities; American Indians most likely want to attend the meeting on time, but perhaps a family issue took priority. Consultations may start fifteen minutes to an hour late, but be patient during this time, and use it as an opportunity to interact with tribal representatives.
- **Consider some cross cultural communication tips**
 - When elders speak, give them the courtesy of your patience and respect. Your regard of tribal elders is a reflection on your department and the state.
 - Avoid overly rapid speech, acronyms, and jargon.
 - Pay attention to word choices. For example, the term "prehistoric" may be offensive to native peoples as it implies that tribes had no "history" prior to contact with Europeans.
 - Never check your watch or the clock while someone is speaking.
 - Sometimes American Indians will speak very little during meetings, often because many American Indian cultures value introspective personalities and also because they made need to consult with others before making a statement. Assume your audience is listening, even though they may not be engaging you

verbally. Tribal representatives may be waiting to have a conversation about the issue with other tribal members, elders, or an attorney before making any verbal statements.

- Always use proper title for tribal delegates. Doing so shows respect to the government-to-government relationship.

The National Association of Tribal Historic Preservation Officers' "Tribal Consultation Best Practices In Historic Preservation," published in May 2005, surveyed a large body of Agencies and Tribes regarding their empirical experiences about what constitutes consultation, how it should be conducted, and what constitutes a successful consultation (full study available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf). Below are some of the study's conclusions:

- 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.
- Coming to a final agreement is not as important as building ongoing channels of communication. Reaching a Memorandum of Agreement (MOA) was rarely seen as the indicator of success.
- 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.
- Both sides must plan ahead for consultations and be informed of the project scope and effect prior to attempting consultation.
- Consultation is more likely to be successful when the agency employs a Tribal Liaison.
- Cultural sensitivity training for agency leadership fosters more successful consultations. Similarly, having a third party facilitator who is familiar with the methods of formal consultation contributes to better consultations.

VII. Frequently Asked Questions

What are other ways, besides formal consultations, that state agencies can foster good relationships with Tribes?

- Invite council members to events they may find interesting or relevant.
- Meet with the Tribal Council on a regular basis. Be sure to follow proper procedure to get listed on the council's agenda to present the state agency's information.
- Provide regular written information to the Tribal Council.
- Tour the community with someone who knows the land and some of the history of the tribe.
- Attend a council meeting to learn the method of interaction between the departments and the council.
- Introduce yourself to council members and youth council members, if applicable, when the opportunity presents itself.

What is the preferred term – Native American or American Indian?

"Indian" is a legal term and is often found in federal government legal documentation. Native American is a term that can encompass people born anywhere on U.S. soil, including Native Hawaiians, American Samoans, people from Canada First Nations, and indigenous people in Mexico, Central, and South America, and is not always interpreted as referring to American Indian/Alaska Native people specifically.

The most accurate term to use is American Indian/Alaska Native (or AI/AN). These terms also recognize the cultural and historical distinctions between persons belonging to the indigenous tribes of the continental United States (American Indians) and the indigenous tribes and villages of Alaska (Alaska Natives, i.e., Eskimos, Aleuts, and Indians).

How do you make a presentation to Tribal Council?

First, you will need to arrange a time to present. Contact the tribal executive assistant for council scoping and meeting dates, as well as when to get the materials to him/her for distribution to the council prior to the meeting date. The council may receive a document one week and act on it in the next week or two depending on whether additional information is required. Sometimes action on a request is delayed because the information provided to the council is incomplete.

The council receives mountains of documents and information on a weekly basis, so consider including a one-page summary of the information at the front of the packet. This is most helpful to a council member who would prefer a summary to reading an entire report just to determine what is being requested.

There is formality in addressing the council. Usually the protocol is to greet the council in this manner: “Good evening, (afternoon, morning), President _____, Vice President _____, and members of the council. Thank you for this opportunity to come before you today to present....” Or words to that effect. Introduce yourself and relax! A lot of people get nervous, but there is no need to be concerned that the council is judging you or your presentation. If your information was complete and included all the points that needed to be covered, they most likely will ask questions or may feel comfortable enough to entertain a motion to approve your request.

While it is a great opportunity, it is wise to keep your presentation to a limit and conclude long before the members of the council get that glazed look in their eyes. You want to be remembered for having a great program and not for being that “long-winded” person. If you have to go before council again in the future or on a regular basis, this makes a big difference.

What is the federal Indian trust responsibility? (From the Bureau of Indian Affairs)

The federal Indian trust responsibility is a legal obligation under which the United States “has charged itself with moral obligations of the highest responsibility and trust” toward Indian tribes (*Seminole Nation v. United States*, 1942). This obligation was first discussed by Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831). Over the years, the trust doctrine has been at the center of numerous other Supreme Court cases, thus making it one of the most important principles in federal Indian law.

The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes.

What does it mean for a tribe to be “federally recognized”?

Federal recognition signifies that the U.S. government acknowledges the political sovereignty and Indian identity of a tribe and from that recognition flows the obligation to conduct dealings with that tribe’s leadership on a “government-to-government” basis. As of May 2014, there are 566 federally recognized American Indian Tribes, over half of which are Alaska Native villages. There are approximately 245 non-Federally recognized tribes, many of which are recognized by individual states and are seeking federal recognition.

What is a federal Indian reservation? (From the Bureau of Indian Affairs)

In the United States there are three types of reserved federal lands: military, public, and Indian. A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty

or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe.

Approximately 56.2 million acres are held in trust by the United States for various Indian tribes and individuals. There are approximately 326 Indian land areas in the U.S. administered as federal Indian reservations (i.e., reservations, pueblos, rancherias, missions, villages, communities, etc.). The largest is the 16 million-acre Navajo Nation Reservation located in Arizona, New Mexico, and Utah. The smallest is a 1.32-acre parcel in California where the Pit River Tribe's cemetery is located. Many of the smaller reservations are less than 1,000 acres.

What is Public Law 280 and where does it apply? (From the Bureau of Indian Affairs)

In 1953, Congress enacted Public Law 83-280 (67 Stat. 588) to grant certain states criminal jurisdiction over American Indians on reservations and to allow civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts. However, the law did not grant states regulatory power over tribes or lands held in trust by the United States; federally guaranteed tribal hunting, trapping, and fishing rights; basic tribal governmental functions such as enrollment and domestic relations; nor the power to impose state taxes. These states also may not regulate matters such as environmental control, land use, gambling, and licenses on federal Indian reservations.

The states required by Public Law 280 to assume civil and criminal jurisdiction over federal Indian lands were Alaska (except the Metlakatla Indian Community on the Annette Island Reserve, which maintains criminal jurisdiction), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. In addition, the federal government gave up all special criminal jurisdiction in these states over Indian offenders and victims. The states that elected to assume full or partial jurisdiction were Arizona (1967), Florida (1961), Idaho (1963, subject to tribal consent), Iowa (1967), Montana (1963), Nevada (1955), North Dakota (1963, subject to tribal consent), South Dakota (1957-1961), Utah (1971), and Washington (1957-1963).

Subsequent acts of Congress, court decisions, and state actions to retrocede jurisdiction back to the Federal Government have muted some of the effects of the 1953 law, and strengthened the tribes' jurisdiction over civil and criminal matters on their reservations.

I want to learn more about American Indian Tribes and culture. What should I read?

News sources

- Indian Country Today Media Network:
<http://indiancountrytodaymedianetwork.com>
- Indianz.com

- The Southern Ute Drum: sudrum.com
- Turtle Talk Indigenous Law and Policy Center Blog Michigan State University College of Law: <http://turtletalk.wordpress.com/>
- Native News Online: <http://nativenewsonline.net/>
- Navajo Times: navajotimes.com

General Resources

- National Indian Law Library: <http://www.narf.org/nill/resources/index.html>
- Wilkinson, Charles F. *Blood struggle: The rise of modern Indian nations*. WW Norton & Company, 2005.
- Bureau of Indian Affairs: <http://www.bia.gov>
- *1493: Uncovering the New World Columbus Created* by Charles C. Mann. Knopf 2011.
- *1491: New Revelations of the Americas Before Columbus* by Charles C. Mann. Knopf. 2005.
- *Collected Wisdom: American Indian Education* by Linda Miller Cleary, Thomas D. Peacock. Allyn & Bacon. 1997.
- *Power and Place: Indian Education in America* by Vine Deloria, Daniel R. Wildcat. University Press of Kansas. 2001.
- *Indian Givers: How the Indians of the Americas Transformed the World* by Jack Weatherford. Crown Publishers. 1988.
- *Everything You Wanted to Know About Indians But Were Afraid to Ask*, by Anton Treuer (Borealis Books, 2012).
- David Treuer, *Rez Life: An Indian's Journey Through Reservation Life* (Atlantic Monthly Press, 2012).
- Canby, William C., Jr. *American Indian Law in a Nutshell*, 3d ed. St. Paul, Minnesota: West Group, 1998.
- Cohen, Felix S. *Handbook of Federal Indian Law* (1982 ed.) Charlottesville, Virginia: LEXIS Law Publishing, 1982.
- Wilkinson, Charles F., *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy*. New Haven: Yale University Press, 1988.

Tribal Consultation Resources

- Each Federal Agency's Consultation Materials, prepared by the National Congress of American Indians: <http://www.ncai.org/resources/consultation-support/consultation-letters-and-materials-by-agency>
- List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance, prepared in January 2009 by the White House – Indian Affairs Executive Working Group (WH-IAEWG), Consultation and Coordination Advisory Group (CACAG). The list contains those federal Tribal

consultation statutes, orders, regulations, policies, manuals, and protocols that specify procedures as to how Departments, agencies and bureaus are to carry out consultation:

http://www.achp.gov/docs/fed%20consultation%20authorities%202009%20AHP%20version_6-09.pdf

- State-Tribal Consultation, Collaboration and Communication Policies, prepared by the New Mexico Indian Affairs Department:
http://www.iad.state.nm.us/statetribal_policies.html
- Wisconsin State Tribal Relations Initiative:
<http://witribes.wi.gov/section.asp?linkid=283&locid=57>
- The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion, by Gabriel S. Galanda:
<http://apps.americanbar.org/buslaw/committees/CL121000pub/newsletter/201101/galanda.pdf>
- Best Practices in State-Tribal Consultations, Findings from Minnesota, prepared by the Centers for Medicare & Medicaid Services (CMS):
http://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/State-Consultation-Additional-Resources/CMS-Task-E-Report_MN.pdf