

## **Consulting with Indian Tribes: 10 Questions & Answers**

### **1. We seem to be giving Indian tribes special treatment with all the consultation that is required. Why do we treat them differently from other public groups?**

The United States Government has a unique legal relationship with Indian tribal governments. Federally recognized tribes are, from a legal standpoint, sovereign nations and should be treated as other government entities, not as user groups. This long-standing position was most recently reaffirmed by President Clinton in an April 24, 1994, memorandum to federal executive departments and agencies. Citing the historic and recognized rights of sovereign tribal governments, and the U.S. Government's unique relationship with tribes, the memorandum directs agencies to operate within a government-to-government relationship with tribes, consult with tribal governments before taking actions that affect tribal rights and interests, and assess federal activities to ensure sure that impacts on tribal trust resources are considered before taking action.

### **2. Must we make an effort to consult with Indian tribes on all of our actions?**

No. We should consult with them on all land use plans, but not on all land use actions. Consultation on land use actions is necessary whenever the BLM Field Manager determines that the nature and/or location of a proposed land use could affect tribal interests or concerns. This will always be a judgment call. As our working relationship with each tribe becomes stronger, we will become more aware of the kinds of actions and places the tribe is concerned about, and tribal representatives will likely be more willing to tell us, at the land use planning level, the kinds of things about which they are concerned.

### **3. With whom should we consult—with elected tribal officials, or with traditional leaders and religious practitioners?**

Ideally, both, but always with the elected officials and/or their designated representatives. Our government-to-government relationship with tribes dictates that we consult with elected tribal officials. But the American Indian Religious Freedom Act specifically requires us to consult with traditional religious practitioners, not tribal government officials. That is why we should begin by consulting tribal officials, and ask them if there are any traditional leaders or religious practitioners we should also consult. If we are already familiar with such traditional leaders and practitioners, and we think our proposed action may affect religious practices, we should consult those people after letting the tribal officials know that we intend to do so.

### **4. How far must we go in seeking input from tribes to comply with the National Environmental Policy Act (NEPA), American Indian Religious Freedom Act (AIRFA), and National Historic Preservation Act (NHPA)?**

**a. If they don't respond to our letters?**

Follow up our letters with telephone calls.

**b. If they don't respond to our telephone calls?**

Document our efforts and proceed with the action.

**c. If they don't attend the public meetings we arrange?**

Arrange meetings at locations convenient to them and offer to give them tours of the project area. If they still do not participate, document our efforts and proceed with the action.

**d. If they insist on payment before they respond?**

Document our efforts and proceed with the action.

**5. To what extent can we use contracting firms to meet our tribal consultation responsibilities?**

Contractors can gather information on areas of traditional religious or cultural importance (sometimes called traditional cultural properties, or TCPs), they can assess potential socioeconomic effects of the proposed action on a tribe, and they can elicit concerns tribal members might have with the proposed action. However, contractors cannot negotiate, make commitments, or otherwise take on the role of BLM's responsibility to conduct a dialogue – a give-and-take discussion to resolve potential conflicts – and address tribal concerns in decision making. Ultimately, the responsibility for tribal consultation is ours, and contractors can never be used as our agents in consulting with tribes on a government-to-government basis.

**6. Why shouldn't cultural resource specialists do all the consultation with tribes?**

(1) Many of the issues tribes are concerned about are not related to cultural resources, so the archaeologist is often not the best person to send.

(2) The government-to-government relationship is the responsibility of the decision-maker. This is a formal relationship the line manager, representing the United States, has with the Executive Officer of the Indian tribe. This is not the same as the relationship a geologist has to the tribal economist, or an archaeologist has to the tribal historian. We would not use a staff specialist as BLM's sole representative in discussing land use issues with the governor of a state, nor should we do so with the leader of a tribal government. The government-to-government relationship means BLM's executives talk to the tribe's executives before BLM's technical staff talk to the tribe's technical staff.

(3) Field Offices need to build working relationships with tribes based on mutual trust and respect. Sending only archaeologists to consult with a tribe sends a message that we don't understand the diversity and complexity of the tribe's interests regarding the public lands. It also does not show much respect, in the eyes of the elected head of a sovereign nation, when our line officers cannot find the time to meet with the tribe.

(4) State Directors generally want Field Office Managers to be the primary contact in consultations with tribes. This responsibility should not be delegated solely to staff. BLM staff can arrange consultation meetings, and they can get together with tribal staff to discuss issues once BLM managers and tribal officials decide it is time for them to do so. But BLM staff should not be sent to talk with tribal government leaders unless they are invited by the tribe to do so.

## **7. How much consultation is enough?**

There is no simple “cookbook” measure of sufficiency. This will always be a case-by-case determination based on the following:

(1) What potential does the proposed action have to harm or disrupt places or practices important to tribes?

(2) What alternatives are there to reduce or eliminate potential harm or disruption?

(3) How complete and appropriate is the list of tribes, groups and individuals consulted?

(4) What kinds of issues have been raised? Are they the kinds of things tribes have been concerned about in the past? Are they simple enough to be resolvable with brief consultation, or are they complex and require more extended discussions?

(5) How intense are the concerns expressed by tribes about the proposed action?

(6) How productive has the consultation been, and how productive is further consultation likely to be?

## **8. If tribes say we cannot identify places of traditional cultural importance to them without their input and/or their participation in field survey, and they won't provide this input or participation without payment, can we comply with NEPA, NHPA, and AIRFA if we refuse to pay?**

Yes. We must make a good faith effort to elicit tribal views and provide opportunities for tribes to participate in consultation to identify and address impacts of concern to them,

but their participation is not mandatory. If tribes choose not to participate, we can proceed without their input and still be in compliance, as long as we have made a reasonable and good faith effort to consult.

**9. Are there certain geographic locations or features that are "red flags" indicating the need for consultation?**

Yes. Cultural resource specialists can be helpful here because they are most familiar with tribal traditions. Mountains, prominent rock outcroppings, caves, rockshelters and springs are considered sacred by many Indian tribes. Rock art sites and sites likely to contain human burials should also trigger consultation. But many places of importance to Indians would not be obvious to non-Indians, including places where plants used for traditional or religious purposes grow, and the locations of ancient travel routes connecting sacred places. Little by little, as our relations with tribes mature, we should learn more about the kinds of places they are concerned about.

**10. Is there some way to take care of our consultation responsibilities more efficiently?**

You may be able to reduce the need for case-by-case consultation by holding an annual meeting with the tribes with which you work. At such a meeting:

- (1) You can identify and briefly explain actions planned for the coming year, as well as any additional land use proposals that you can foresee on public lands or lands that may be affected by your decisions.
- (2) The tribe can identify proposed actions it is concerned about and would like to consult with you about at a later time. The tribe can also identify actions on which it feels no need to be consulted.
- (3) For some proposed actions, you and the tribe can agree to follow expedited or tailored consultation procedures that are different from what you would normally do. These can help resolve scheduling conflicts and project timeframes, or accommodate the special needs of tribal members or your own staffs.
- (4) The tribe can use this meeting as an opportunity to identify people it recognizes as traditional leaders or religious practitioners. The tribe can also identify specific proposed actions, or kinds of actions, on which these individuals should be consulted.