

The Navajo Nation Model

Tribal Consultation Under the National Historic Preservation Act

The National Historic Preservation Act (NHPA) requires federal agencies to ensure that tribal values are taken into account as part of the nation's preservation program. Both the Act and the implementing regulations for Section 106 of the Act (36 CFR Part 800) require federal officials to consult with tribal governments about federal undertakings that may affect places of concern to a tribe both on and beyond tribal lands. Some federal officials profess concern about the difficulty of identifying and consulting with the appropriate tribal governments in this context. For more than a decade, the Navajo Nation has been consulting with other tribal governments on the potential effects of federal undertakings on Navajo Nation lands. Our experience demonstrates that tribal consultation can be both manageable and meaningful.

Why is the Navajo Nation consulting with other tribes? The Navajo Nation Historic Preservation Department (HPD) assumed Bureau of Indian Affairs' (BIA) staff responsibilities for the management of cultural resources on Navajo lands (years before formal recognition as a Tribal Historic Preservation Office [THPO] under section 101(d)(2) of the Act), under an Indian Self-determination and Education Act contract. Thus, for federal undertakings on Navajo Nation lands for which the BIA is the lead agency, HPD conducts the work previously carried out by BIA staff. In this capacity, HPD staff prepare all of the documents and make recommendations to the Navajo Regional Director on all decisions for which she is responsible pursuant to 36 CFR Part 800. (For the purposes of Section 106, the Regional Director makes the decisions for the federal agency based on HPD's recommendations.)

Consultation: Meaning and Operation.

From our perspective, which is shared with every tribal official I have ever met, a consultation does

not mean notification. Consultation is conferring between two or more parties to identify issues and make a good faith attempt to find a mutually acceptable resolution of any differences identified. It is an interactive process of seeking advice or information, and exchanging views.

In a Section 106 context, federal agencies must address two essential questions:

Which tribes have concerns about a particular undertaking or area?

What are the individual tribe's concerns?

There are two ways to seek answers to these questions. It can be done on an individual project-by-project basis, or it can be accomplished programmatically. Each agency must decide which is the best route to take given their circumstances, but in either case, consultation is not—and should not be—trivial.

Our experience suggests that many consultation efforts are seriously hampered by at least two problems. First, agencies and tribes do not know and understand—and perhaps do not care—what the others' concerns are. Furthermore, neither have staff, or enough staff, devoted to consultation efforts. The latter is particularly problematic for many tribal governments. Each tribe has to deal with multiple agencies, each of which may be seeking an immediate response to a letter notifying them about an undertaking. Agencies often ask tribal governments to provide expert-level opinions, and information about the identification of specific places of concern and the effects the undertaking may have on those places. And agencies typically expect a response before the tribe has set foot in the project area to check things out. Every federal agency claims to be operating on fewer resources than it needs to get the job done. But virtually all tribes are operating on staffing and funding levels that are stretched thinner than any federal official can even imagine.

Agency notification letters are routinely routed to tribal bureaucrats sitting in offices

behind computers. The administrator must seek answers to the questions posed by experts who are usually not employed by the tribal government. For example, the critical Navajo experts are practicing chanters or elders who are conducting their life in a traditional fashion. Other experts may be the elected politicians serving the Navajo people at the community or central government level. We must also consider the views of individuals living in the chapters nearest a proposed project area.

No tribal expert would claim to be expert about everything of concern to the tribe. They often do not have telephones—or necessarily even ready access to them. The tribal administrator must nevertheless identify appropriate experts, seek their opinions, evaluate the responses, and convey the approved tribal response back to the agency.

Similarly, while agencies are generally better funded than tribes, agencies are often faced with contacting and initiating meaningful dialogue with several tribes that may have different concerns, or concerns that directly conflict with one another or other interested parties.

Sometimes tribes do not consider these factors. At other times, tribes are reluctant or unable to take the initiative to become an active player in consultation. Agency staff frequently question whether their letters or telephone messages were received, and why the tribe has not responded. In any case, agencies have to learn that consultation takes time, expertise, and, often, money.

How the Navajo Nation Consults with Interested Parties. After several years of dealing with consultation on a case-by-case, project-by-project basis, HPD decided to develop a programmatic approach to consultation. In 1993, the Navajo Nation compiled a list of tribes with known historic ties to a general area that is now the Navajo Nation, as well as tribes within the region that might have any interest in undertakings on Navajo lands. We were deliberately inclusive, and attempted to cast as wide a net as we reasonably could. The result was that HPD initially contacted 34 neighboring tribes and two inter-tribal organizations. We explained that we anticipated that there would be extensive construction and improvement to new and existing roads throughout the Navajo Nation. HPD's initial contact was by letter. For many tribes, we made repeated attempts to get an initial response by mail. We also followed up with telephone calls and faxes.

All of our communications asked the tribes if they had historic, cultural, traditional, or sacred properties or other interests that lie within the exterior boundaries of the Navajo Nation, and if they would like to be considered an interested party to this huge undertaking. The effort to elicit expressions of interest from other tribes was extensive—probably more extensive than was strictly required by either law or regulation—but this was a prototype effort, and greater rather than lesser effort was warranted. Furthermore, it is the Navajo Nation's view that inclusion and consideration of as many identifiable interests as is reasonable in the consultation process is sound in both principle and practice. Early identification of interests is more likely to lead to a result that takes all of those interests into account and leads to a broadly acceptable resolution.

As project planning proceeds, design alternatives are eliminated, and each advance in planning reduces the amount of flexibility in consideration of alternatives, which increases the likelihood that interests cannot be accommodated later in the development process.

Our efforts to identify and communicate with concerned tribes involved repeatedly posting letters, and following up repeatedly with faxes and phone calls. After about 18 months of effort, we concluded that we had gotten the responses we were going to get—at the time. Five tribes told us that they considered themselves descendants of the Anasazi (the archeologists' name referring to the pre-Columbian people living in the Four Corners region of the United States), and that they were therefore concerned about all Anasazi sites. These tribes asked to be consulted about each undertaking on a project-by-project basis; they would afterward decide how much effort they wanted to expend on an individual project basis. Four tribes informed us that they had concerns about particular areas and asked to be consulted about undertakings occurring within them. All these tribes provided some level of tribal history in support of their desire to be involved, including the fact that they had historically resided in or used areas now within the exterior boundaries of the Navajo Nation, and the fact that they have traditional cultural properties here. The Navajo Nation does not dispute these claims in any way. In fact, Navajo Nation policy is committed to protecting traditional cultural properties of other Native American groups on lands under its jurisdiction.

The history of the project-by-project consultation effort is mixed. Only nine of the 34 tribes initially contacted expressed a desire for any real involvement in Section 106 consultations. Of these nine, only three tribes routinely tell us that they are interested in the cultural resources work related to the undertaking, but they do not want to take an active part. Instead, their main concern relates to NAGPRA issues—the respectful treatment of human remains, and associated funerary objects. Three tribes have been more involved on a variety of projects, including conducting their own assessments of the area of potential effect of certain undertakings and preparing reports of their findings. One of these tribes has occasionally been directly involved in the reinterment of human remains. The other tribes are rarely involved, because, so far at least, few undertakings have occurred in the area with which they are concerned.

While the efforts taken up front were considerable, the net result is a process that works fairly smoothly today. The tribes with the greatest concerns are involved as they deem appropriate. The process provides for consideration of their interests in project design and development, and accommodates those concerns. It is important to note that the Hopi Tribe is perhaps the most actively involved tribe in this process. The fact that if we are able to accommodate the concerns of the Hopi Tribe—even given the state of high tension the exists between the Navajo Nation and the Hopi Tribes—this demonstrates that consultation is not to be feared. It is also important to note that the Navajo Nation does not view

consultation as in any way a derogation of Navajo tribal sovereignty. Although extensive efforts are made to identify and resolve any concerns other tribes may have, ultimately the Navajo Nation makes the decision on how to proceed. All of the tribes involved in this process understand and acknowledge this reality.

Conclusion

The Navajo Nation's experience demonstrates that consultation can be made to work if the agency seeking to consult is committed to the process; if the process will be, especially during start up, time consuming and require intensive efforts; if it provides a workable basis for identifying and resolving conflicts and cultural heritage issues with project development needs; and if it can promote functional, working relationships on heritage issues, even among parties engaged in significant disputes on other fronts or areas.

In addition, our experience clearly demonstrates that not all tribes are interested in everything in their general vicinity. Tribes will exclude themselves unless they have real, substantive interests or concerns. Casting a wide net in attempts to identify interested tribes does not result in tribes seeking to consult when they have no reasonable basis for interest; and if there are reasonable ways to identify tribes with real concerns, they will be identified and can be consulted to meet both the letter and the spirit of the law.

Alan Downer is the Director of the Historic Preservation Department, Navajo Nation, P.O. Box 4950, Window Rock, Arizona 86515.



Printed on recycled paper

CRM

U.S. Department of the Interior
National Park Service
Cultural Resources (Suite 350NC)
1849 C Street, NW
Washington, DC 20240

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

FIRST CLASS MAIL
Postage & Fees Paid
U. S. Department of the Interior
G-83

VOLUME 23 • NO. 9
Cultural Resources
Washington, DC