

CONSULTATION ON FEDERAL DECISIONMAKING ON INFRASTRUCTURE
TALKING POINTS - YANKTON SIOUX TRIBE
Rapid City, South Dakota
November 17, 2016

- **Key Problems with the Existing Framework**

- **Failure to define when consultation should begin.**
- Consultation does not begin early enough in the federal decision-making process because consultation policies do not adequately define when consultation should begin.
- Phrases like “as early as possible” are too vague. Policies must identify when consultation must start with specificity.
- By the time an agency engages with tribes, it is too late for consultation to be meaningful. The agency has already determined the decision it will reach, and consultation is merely conducted as a matter of course.
- Agencies view consultation as merely a box that they need to check off before the action that they are going to take is formally approved. This defeats the purpose of consultation and violates the federal trust responsibility.
- Tribes have unique knowledge which is necessary inform federal decisions that impact tribal interests.
- Government-to-government consultation cannot be a rote exercise; it must be substantive and meaningful out of respect for the tribal sovereign.
- **Failure to comply with consultation policies and lack of accountability.**
- Federal agencies habitually violate their own consultation policies. While it is good to have consultation policies, those policies are meaningless if they are not enforced.
- There is currently no accountability for agency violations of consultation policies.
- Most agency policies expressly state that they are not judicially enforceable, and they do not provide consequences for the agencies if they violate the policies.
- Tribes must be able to enforce their consultation rights without having to resort to litigation.
- Consultation policies must, at a minimum, include financial repercussions for an agency’s failure to comply with consultation requirements and prohibit an agency from proceeding with an action when consultation policies have been violated.
- The ACHP needs to have increased authority. It is often the only seemingly neutral party when there is a dispute regarding consultation. The ACHP must be able to not only make recommendations, but also enforce its decisions.

- **Failure to identify when a project will or may impact tribal sovereign interests.**
- Agencies frequently fail to recognize when their action will or may impact tribal interests.
- For example, with respect to the Dakota Access Pipeline, the St. Louis District of the Army Corps of Engineers failed to consult with the Yankton Sioux Tribe entirely. No attempt was made at all. Presumably, this is because the Corps was unaware of the Tribe's extensive history in Iowa. As a result, the Tribe's unique knowledge of its culture and history in this region, including burials, was not taken into account by the Corps.
- Federal agencies must adopt a clear and unambiguous policy for identifying which tribes it needs to consult on a particular project, and agencies must err on the side of caution by including a tribe when in doubt.
- This policy must take into account cultural practices, ancestral lands, treaty rights, and traditional areas of cultural or spiritual importance.
- The Yankton Sioux Tribe will provide specific recommendations for identification criteria in its written comments.
- **Specific Solutions**

Many steps can be taken at the regulatory or administrative level to help ameliorate the problems with the existing consultation framework and make consultation more meaningful. Some of these steps are:

- Agency policies must be made consistent with one another across the board.
- Consultation policies must be drafted with specific, unambiguous language that leaves no room for discretion.
- Appendix C must be absolved, as it is illegal. It has never been approved by the ACHP and it does not meet the requirements of the NHPA.
- Nationwide Permit 12 must not be renewed. It enables companies to circumvent necessary environmental and cultural resource reviews, precluding necessary consultation on these issues.
- Any and all cultural resource surveys must include tribal member participants who are members of the affective tribes, and surveys must comply with tribal standards, to ensure that consultation regarding cultural resources is meaningful.
- All federal actions which will or may affect tribal interests and which would require an environmental assessment under NEPA should be automatically taken to the next level and require an environmental impact statement.
- A federal permit encompassing the entire project should be required prior to construction of any major infrastructure project, ensuring that tribes can consult on the impacts of the project as a whole.

- Agencies must initiate consultation within a specific timeframe, such as ten days, upon receipt of a request, application, or other notification that triggers a consultation requirement.
- Consultation must occur face-to-face unless otherwise agreed by both the tribe and the agency.
- Consultation must occur with the governing body of each tribe. This means an agency must be careful to identify the governing body of each tribe, as the government structure varies from tribe to tribe. For example, the governing body of the Yankton Sioux Tribe is its General Council, rather than a body of elected officials.
- Treaty councils must also be permitted to participate in consultation.
- All correspondence must be addressed to both the governing body of a tribe and the tribe's tribal historic preservation officer.
- An agency should determine each tribe's preferred method of communication and correspond with each tribe accordingly.
- If a tribe has adopted its own consultation protocols, as the Yankton Sioux Tribe has, the federal agency must adhere to those protocols.
- If a consultation meeting requires a tribe to travel, funding should be provided by the agency or by the entity requesting that the agency take a particular action so that the tribe does not have to bear the expense of participating in a consultation made necessary by no fault or action of its own.
- Following each consultation meeting, the agency should provide the tribe with a written transcript.
- An agency must allow for adequate time during the consultation process for a tribe to conduct its own studies and assessments. This is particularly important for projects that have the potential to impact water.
- Upon request, an agency should work with a tribe to bring in a mutually agreed-upon mediator to facilitate consultation meetings and ensure that agency responses to the tribe's questions are actually responsive to those questions.
- Upon request, an interpreter should be provided to facilitate consultation meetings as necessary.
- Penalties must be imposed on an agency if it fails to comply with its consultation requirements.
- As required by international law, following consultation each potentially affected tribe must give its free, prior and informed consent prior to an agency making a decision to approve an infrastructure project.



Ihanktonwan Consultation Wo'ope

Protocols for Consultation with the Yankton Sioux Tribe

I. Purpose

The purpose of these protocols is to provide federal agencies with standards with which they must comply when engaging in consultation with the Yankton Sioux Tribe in order to ensure that consultation is meaningful and will fulfill the purpose and intent of Executive Order 13175 as well as applicable federal statutes, regulations, and agency policies, manuals, and Secretarial Orders. Consultation shall create understanding, commitment, and trust between the parties, and should be used to identify opportunities and solve problems.

II. Scope

These consultation protocols apply to any effort by a federal agency to consult with the Yankton Sioux Tribe pursuant to federal law(s), including but not limited to the National Environmental Policy Act implementing regulations (40 C.F.R. Part 1500), the National Historic Preservation Act (16 U.S.C. § 470 et seq.) and implementing regulations (36 C.F.R. Part 800), the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 et seq.) and implementing regulations (43 C.F.R. Part 10), the American Indian Religious Freedom Act (42 U.S.C. §§ 1996 & 1996a), the Archeological Resources Protection Act of 1979 (16 U.S.C. §§ 470aa-mm), Executive Order 13175, and Executive Order 12989.

III. Protocols

A. Cultural Protocols

1. Relationship-building should be at the center of any consultation, as this is a primary cultural protocol for the Ihanktonwan. Relationship building cannot occur through just one meeting, or by telephone or email. It requires time, trust, and respect for the relationship.
2. Agencies must recognize that water is viewed as the first medicine, and it must be honored and protected. Water is vital to the spiritual practices, culture, and health of the Ihanktonwan.
3. Agencies shall respect the fact that Yankton Sioux Tribal members have experience and knowledge that makes them uniquely qualified to identify Ihanktonwan cultural resources, and shall weigh their views accordingly.



4. Agencies must recognize that certain members of the Tribe possess inherent abilities and historical knowledge passed down through generations that make those tribal members uniquely equipped and able to identify sites of spiritual, cultural, and historical interest. These skills and knowledge should be utilized through tribal surveys of areas that may be impacted by a proposed action.
5. Agencies must recognize and respect the cultural practice of speaking in a “circular” manner, which may mean that it takes time for a speaker to arrive at the ultimate point but which conveys relevant information necessary to a proper understanding of that point.
6. Elders must be respected.
7. Agencies must recognize the Ihanktonwan practice reciprocity, which means that if remains are unearthed, something must be given back in return to restore balance. There are consequences dictated by the universe for disturbing graves and remains, and this should be avoided.
8. Agencies must respect the practice of making offerings.
9. Sharing a meal at the conclusion of a meeting is customary and expected.

B. Behavioral Protocols

1. Parties shall respect each participant and respect each other’s diversity.
2. Parties shall speak with respect, courtesy, dignity, care, and moderation to maintain an amicable atmosphere.
3. Parties shall avoid the use of language of dominance and/or oppression.
4. Parties shall refrain from disruptive gestures or actions.
5. Parties shall avoid tactics to induce intimidation. This includes manner of dress. Parties should dress in traditional or civilian clothing.
6. Parties shall treat everyone involved in a consultation meeting, particularly elders, with respect.
7. When an individual is speaking, all parties must refrain from interrupting that individual.
8. Parties shall not be dismissive of any statement made, but rather, shall acknowledge and value all contributions and bring them into consideration in any decision.
9. Parties shall refrain from reaching any decision until consultation has concluded and sufficient information has been exchanged.



10. Parties shall contribute and express opinions with complete freedom.
11. Parties shall carefully examine the views of others and accept valid points when made by others.
12. Parties shall focus on the subject of the consultation and avoid extraneous conversation.

C. Procedural Protocols

1. Consultation shall only include government-to-government, in-person meetings with the Tribe's General Council. Consultation shall not be conducted via telephone or written correspondence unless expressly agreed to by the Chairman of the Yankton Sioux Tribe ("Tribe") in writing.
2. A meeting shall not be considered consultation unless the relevant federal agency is represented at the meeting by an individual with decision-making authority over the proposed federal action at issue.
3. Multi-tribal or public meetings shall not be considered consultation unless expressly agreed to by the Chairman of the Tribe in writing unless the meeting is comprised exclusively of the federal agency and the Oceti Sakowin.
4. The consultation process shall commence as early as possible. Initial notification by a federal agency to the Tribe of a proposed action shall occur within two weeks of the federal agency becoming aware of the proposed action.
5. A federal agency shall contact the Chairman of the Tribe and the Ihanktonwan Treaty Steering Committee for the Tribe to notify the Tribe of a proposed federal action and initiate the consultation process. If the proposed federal action is expected to impact tribal cultural, spiritual, or historical resources, the federal agency shall also contact the Tribal Historic Preservation Officer. Notification pursuant to this protocol does not constitute consultation, but merely initiates the consultation process.
6. The consultation process shall include a pre-consultation meeting at which preliminary information shall be exchanged and an overview of the proposed federal action shall be provided, to be scheduled by the Chairman of the Tribe and/or his staff.
7. During or prior to the pre-consultation meeting, the relevant federal agency shall inform the Tribe of the potential impacts on the Tribe of the proposed federal action.
8. During or prior to the pre-consultation meeting, the relevant federal agency shall inform the Tribe of which federal officials will make the final decision with respect to the proposed federal action.



9. Each consultation meeting shall be scheduled by the Chairman of the Tribe and his staff.
10. The pre-consultation meeting and consultation meetings shall be held at a time and location convenient for the Tribe.
11. Consultation meetings shall be scheduled a least thirty-five (35) days in advance to allow for adequate notice to the General Council, which is comprised of tribal members age 18 years and older and which is the governing body of the Tribe.
12. All meetings shall be opened with a prayer.
13. All meetings shall be closed with a prayer.
14. All meetings shall be followed by a meal or include a meal as part of the necessary relationship-building.
15. Consultation meetings shall not designate an end time, but shall continue until all have had an opportunity to speak.
16. The federal agency shall provide the services of a court reporter to record each consultation meeting. A transcription of each meeting shall be provided to the Tribe within ten (10) days following said consultation meeting.
17. Prior to the final consultation meeting, the parties shall mutually agree that the following consultation shall be the final consultation meeting. If agreement cannot be reached to terminate consultation after the subsequent meeting, the subsequent meeting shall not be deemed the final meeting. No party shall unreasonably withhold consent to terminate consultation, but consultation shall continue until each party is satisfied that meaningful consultation has been achieved.
18. While there is no set number of meetings required for consultation to be deemed sufficient, consultation shall consist of no less than two meetings and shall not be considered complete until the parties are satisfied that all necessary information has been adequately exchanged.



Summary of Consultation Steps:

1. Federal agency learns of proposed federal action that may affect the Yankton Sioux Tribe.
2. Federal agency promptly (within two weeks) notifies the Chairman of the Tribe and the Ihanntonwan Treaty Steering Committee (and the Tribal Historic Preservation Officer for the Tribe if the proposed action is expected to impact tribal cultural, spiritual, or historic resources) of the proposed action. The consultation process is thus initiated.
3. The Chairman and/or his staff schedules a pre-consultation meeting.
4. A pre-consultation meeting is held.
 - a. Opening Prayer
 - b. Meeting
 - c. Closing Prayer
 - d. Meal (may also occur during the midpoint of the meeting)
5. The Chairman or his staff schedules a consultation meeting.
6. A consultation meeting is held.
 - a. Opening Prayer
 - b. Meeting
 - c. Closing Prayer
 - d. Meal (may also occur during the midpoint of the meeting)
7. Federal agency provides the Chairman of the Tribe with a transcript of the consultation meeting within 10 days.
8. Repeat steps 5-7 until meaningful consultation has been fully achieved, mutually agreeing prior to the final meeting that it will be the final consultation meeting.

D. Governmental Protocols

1. Federal agencies shall respect the unique legal and political relationship between the United States and the Yankton Sioux Tribe.
2. Consultation shall be conducted in accordance with Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which requires the "free, prior and informed consent" of an Indian tribe prior to adopting and implementing legislative or administrative measures that may affect it.
3. Consultation shall be meaningful and shall include collaboration with tribal officials.



4. The Yankton Sioux Tribe's views shall be incorporated into a federal agency's decision-making process.
5. Consultation shall be conducted and resulting agency decisions shall be made in such a way that the government-to-government relationship between the Tribe and the United States is strengthened. The Yankton Sioux Tribe shall be considered as a collaborative partner with the federal agency.
6. Federal agencies shall recognize the Yankton Sioux Tribe's right to self-government and its inherent sovereign powers. Federal agencies shall be respectful of the Tribe's sovereignty.
7. Federal agencies shall acknowledge and abide by the treaties between the United States and the Yankton Sioux Tribe.
8. Federal agency actions during and after consultation shall reflect the trust responsibility of the United States to the Yankton Sioux Tribe.

IV. Compliance

All parties shall comply with the protocols contained herein when engaging in the consultation process. Should a party fail to comply with one or more protocols, the other party shall notify the non-compliant party of the violation and the parties shall mutually agree upon a time and location for a meeting between the parties to resolve the matter. The goal of this meeting shall be to restore balance and reduce or eliminate discord by talking through the violation and reaching a mutual understanding to move forward in compliance with the protocols. Should the non-compliant party fail to participate in this meeting or fail to correct its non-compliant behavior in subsequent meetings, the other party may pursue legal remedies through enforcement of these protocols in Yankton Sioux Tribal Court.