



Tribal Engagement and Technical Assistance



Tribal Training for Caltrans Regional Planners

1

2020

PRESENTED BY:
NIJC, CALTRANS, AND FHWA



Agenda

Time	Topic
8:30 a.m.-9:00 a.m.	I. Registration ²
9:00 a.m.-9:30 a.m.	II. Introductions and Understanding the Interaction of Tribal, State and Federal Laws
9:30 a.m.-10:30 a.m.	III. California Tribal Cultures - Understanding Historic and Modern Contexts
10:30 a.m.-10:40 a.m.	BREAK (10 minutes)
10:40 a.m.-11:55 a.m.	IV. Developing and Building Relationships
11:55 a.m.-1:05 p.m.	LUNCH (1 hour and 10 minutes)
1:05 p.m.-1:30 p.m.	V. Strategies for Resolving Intergovernmental Conflicts
1:30 p.m.-2:05 p.m.	VI. Model Consultation Policy and Protocols
2:05 p.m.-2:15 p.m.	BREAK (10 minutes)
2:15 p.m.-2:40 p.m.	VI. Model Consultation Policy and Protocols
2:40 p.m.-3:15 p.m.	VII. Case Study
3:15 p.m.-3:45 p.m.	VIII. Debrief
3:45 p.m.-4:00 p.m.	IX. Questions and Answers, Evaluation

I. Introductions

3

↓ PLEASE SHARE

- Name
- Community
- Position
- Grant Writing Experience
- What you hope to get out of the class



Training Objectives

4



- Create a process to define and track consultation activities,
- Be able to help MPOs and RTPAs develop consultation policy and protocols, and
- Better manage Tribal grantees as they work to achieve the desired planning outcomes from the monies awarded through the Caltrans Sustainable Transportation Planning Grant Program.

Tribal Government Consultation and Coordination

5

- WITH METROPOLITAN PLANNING ORGANIZATIONS (MPO)
- &
- REGIONAL TRANSPORTATION PLANNING AUTHORITIES (RTPA)



Developing Partnerships in Transportation (The California Model)

6

California Department of Transportation

Director's Policy

Number: DP – 19
Effective Date: 08-29-01
Supersedes:
Title: **Working with Native American
Communities**

POLICY

7

- When working with Native American communities, the Department of Transportation (Department) acts consistently, respectfully and sensitively.
- When there are regulatory, statutory and/or procedural impediments limiting the Department's ability to work effectively and consistently with Native American communities, the Department seeks to resolve such impediments.

POLICY (Continued)

8

- The Department establishes and adheres to Government-to-Government relationships when interacting with federally recognized California Native American Tribes (Tribal Governments).

The Department:

- Acknowledges these tribes as unique and separate governments within the United States.
- Ensures that its programs and activities avoid or minimize adverse impacts to cultural and other resources.
- Recognizes and respects important California Native American rights, sites, traditions and practices.
- Consults with Tribal Governments prior to making decisions, taking actions or implementing programs that may impact their communities.

INTENDED RESULTS

9

- When engaging in activities or developing policies that affect Native American tribal rights or trust resources, the Department acts in a knowledge-able, sensitive and respectful manner.
- Native American communities include lands held in trust by Tribal Governments, communities of non-federally recognized tribes, tribal reservation or Rancheria, Native Americans that are not part of a California tribe living in California.

II. Understanding the Interaction of Tribal, State and Federal Laws

10

AFTER THIS PRESENTATION, PARTICIPANTS SHOULD BE ABLE TO:

- **Recognize why this training is taking place (because of the need for cooperation between State, Regional, and Tribal transportation professionals as outlined in law and policy).**
- **Define tribal sovereignty and jurisdiction and explain how these concepts relate to regional planning**

Key Definitions & Concepts of Tribal Sovereignty and Governance Authority

11

- American Indian is an ethnic descriptor used to identify the legal and political status of American Indians in this country accordingly written in the U.S. Constitution and treaties.
 - It is common for American Indians to identify first with tribal affiliation and as American Indian or Native American second.
 - Native American, American Indian, and Indigenous are arguably used based on preference and often used interchangeably.

Sovereignty - Defined

12

- Sovereignty is the **Right of Self-Governance**.
 - It is the right of an entity to make its own laws and to be governed by them.
- Tribal Sovereignty was initially recognized by the U.S. as a result of having entered into treaties with Tribes.
 - The U.S. only negotiates treaties with sovereign entities.
 - The U.S. may expand or contracts its recognition of tribal sovereign authority.

Sovereign Immunity

The right to be free from suit; the right not be sued in court.

"Sovereign"

Cannot be sued because the Sovereign's assets are the assets of the community as a whole.

Note: It's important to know the difference between Sovereignty and Sovereign Immunity.

Tribes as Quasi-Sovereign Nations

• Inherent Tribal Sovereign Authority

- Possess Inherent Sovereignty by virtue of being.
- Subject to Tribal Powers only.

13

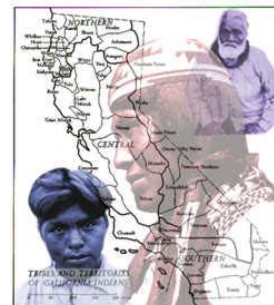
• Legal Sovereign Status of Tribes

- Possess legal sovereign status because of treaty making between tribes and U.S./foreign powers.
- Subject to Plenary Power of Congress, Interpretation of law by Federal Courts and some State Powers.

California Indian History 101

14

- U.S. Federal Government negotiated 18 Treaties with California Indians setting aside 7.5 million acres of land negotiated from 1850-51
 - California Land Claims Act of 1851
 - ✧ Resulting in loss of tribal villages and scattered landless Indians in California
- There are 109 federally recognized tribes in California, more than 30 (possibly as many as 80) that are not federally recognized and very large urban Indian population comprised of non-California Indians.



Indian Country Defined

15

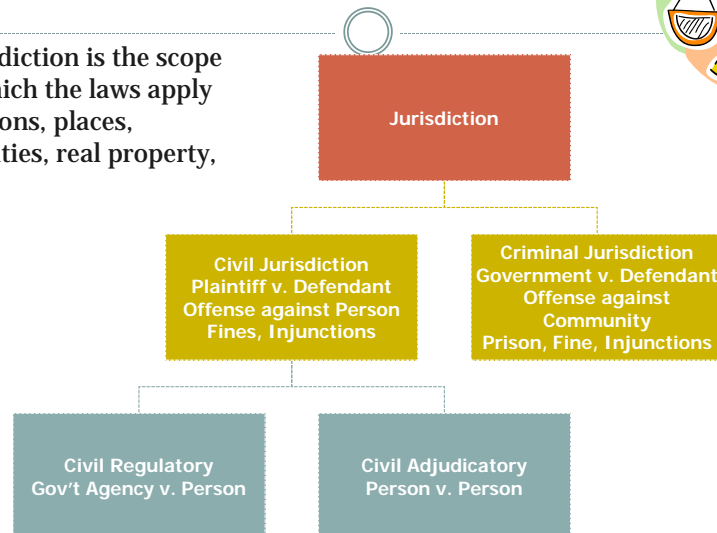
The term “**Indian country**,” as used in this chapter, means:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. section 1151

Types of Jurisdiction

Jurisdiction is the scope to which the laws apply (persons, places, activities, real property, etc.).



Types of Tribal Jurisdiction

17

Exclusive

- an area in which only the tribe may legislate and act.

Concurrent

- an area in which tribe shares legislative, judicial and other authority with another government.

Referral

- established by Indian Child Welfare Act, jurisdiction is concurrent, but presumptively tribal.

Partial

- an area where federal action is required to complete tribal action.

Proprietary Interest

- Property ownership.

A Note on Jurisdiction

18

Civil Jurisdiction

- People v. People
- Plaintiff v. Defendant
- Kramer v. Kramer
- Estate of Nicole B. Simpson v. O.J. Simpson
- Person commits crime against another person
- Fine, Injunctions

Criminal Jurisdiction

- Government v. Perpetrator
- State (U.S.) v. Defendant
- U.S. v. Kagama
- The People v. O.J. Simpson
- Person commits crime against the community
- Prison, Fine, Injunctions

18

Federal Tribal Trust Relationship: The Marshall Trilogy

19

- Three foundational decisions authored by Chief Justice John Marshall in the early 1800's. [Johnson v. Macintosh (1823); Cherokee Nation v. Georgia (1831); Worcester v. Georgia (1832)]
 - The cases reaffirmed the sovereignty of Indian tribes and acknowledged this as predating European arrival.
 - Marshall used the phrase "domestic dependent nations" to describe the political status of tribes.
 - These words expressed the fact that tribes, after conquest and through treaty, had agreed to be under the protection of the United States.
 - The cornerstone of U.S./tribal relationship is mutual consent.

Johnson v. McIntosh (1829)

20

- This case applied and adopted the Discovery Doctrine into U.S. case law.
- Discovery Doctrine gave the U.S. the exclusive right to extinguish the original tribal right of *possession* by purchase or conquest.
- Discovery Doctrine only left Tribes with the Right to Use and Occupy the Land.
- This theory gave the U.S. Government title to all land as a result of having arrived onto the continent.
- U.S. Supreme Court held that Indians did not have the power to give (nor could a non-Indian receive from an Indian) title to land upon which Indians lived.
- This case served **to protect federal land grants** (federal land patents) which the federal government used to settle the territories.

Cherokee Nation v. Georgia (1831)

21

- State of Georgia attempted to apply state law over Cherokee Nation in an effort to “annihilate the Cherokees as a political society.”
- Cherokee Nation filed suit as a foreign nation directly in U.S. Supreme Court.
- U.S. Supreme Court held that Cherokee Nation was not a foreign nation but a Domestic Dependent Nation.

Worcester v. Georgia (1832)

22

- They found that case when four missionaries were arrested for being in Cherokee territory without a permit from the governor of Georgia.
- All four were convicted and sentenced to hard labor for four years.
- The governor extended them all pardons, but two of the four, Samuel Worcester and Elizur Butler, refused to accept them so that the constitutionality of the Georgia law could be tested. Worcester challenged the jurisdiction of Georgia Courts. President Jackson denied the missionaries federal agent status.
- The Cherokees responded to Georgia's actions by adopting a written constitution. They proclaimed themselves an independent state outside of the jurisdiction of either the federal government or the several states.
- The Cherokee constitution was largely patterned after that of the United States, creating a republican government with the Cherokee Nation divided into several districts.

Trust Relationship

23

- The federal government owes a responsibility to the tribes.
- Initially, this responsibility was described as the relationship of a “guardian to its ward.”
 - Now it is called the Trust Relationship.
- Pursuant to the Trust Relationship, the federal government owes a fiduciary duty to the tribes to protect their interests in the lands and resources held for their benefit.

Trust Relationship

24

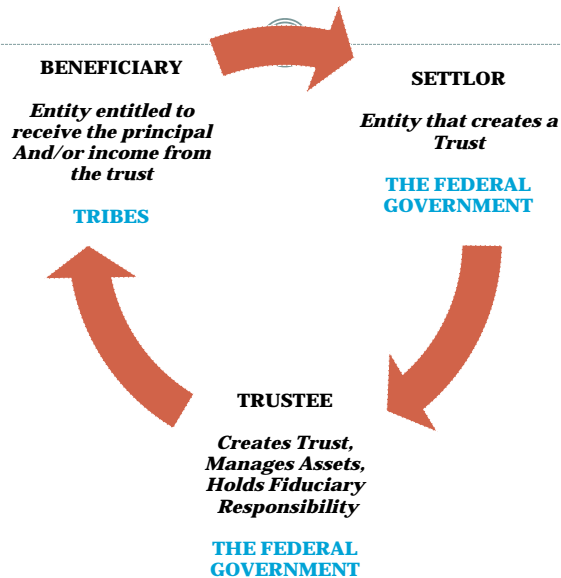
- A legal trust comes to an end only when the tribes cease to exist (legally or otherwise).

Trustee = all federal branches of government



Beneficiary = Tribes and their Members

Federal Tribal Trust Relationship



*Common law prohibits the settlor and trustee from being the same entity to protect against mismanagement of assets.

Rights of Way

26

- The presence of a Right of Way does not mean that the state has exclusive jurisdiction over the Right of Way.
- Rights of Way may be presumed by the state. If the state claims a Right of Way exists, it should produce the documentation showing BIA approval.
- The ruling in Hardwick v. U.S. was that the Termination Plans were void.
 - **Rights of Way dating from the Termination Era may be void and/or should be renegotiated.**

Relationship between Tribes and States

27

- States have no authority over tribal governments unless expressly authorized by Congress.
- In California, Public Law 280 grants California criminal and some civil jurisdiction in Indian Country.
- Federally recognized tribes possess both the right and the authority to regulate activities on their lands (territory) independently from state government control.
- While federally recognized tribes generally are not subordinate to states, they can have a government-to-government or contractual relationship with states.

III. California Tribal Cultures - Understanding Historic and Modern Contexts

28

**AFTER THIS PRESENTATION, PARTICIPANTS
SHOULD BE ABLE TO:**

- **Recognize the historical and legal foundations that shaped tribal governments in California**
- **Identify historical and modern contexts that shape/influence CA tribal cultures**
- **Recognize how tribal culture may impact the way business is conducted, and identify ways in which this may impact regional planners working in native American communities**

Essential Knowledge of California Indians

29

- January 2018, there are 573 federally-recognized American Indian and Alaska Native tribes and villages.
 - Seven Virginia tribes were added in 2018.
- There are **109** federally recognized tribes in California.
- California has 20% of all tribes in the nation.
 - 104 tribes are based in California and an additional five tribes are within lands (Indian Country) extending into California.

CA
2010
U.S.
Census

362,801 AI/AN alone

723,225 AI/AN in combination with another race

Essential Knowledge of California Indians

30

- There are 308.7 million people in the United States.
 - Majority members of tribes located outside of CA are Cherokee 18%; Apache 6%; Navajo 5%; and Choctaw 5%.
- Los Angeles has the highest population of AI/AN
- As of 2005, only 3% of AI/AN population lived on a reservation or rancheria.
 - This population includes American Indians that are from California tribes as well as those from tribes from other states.

Country
2010
U.S.
Census

2,932,248 are American Indian and Alaska Native (AI/AN) alone

5,220,579 AI/AN in combination with another race

Essential Knowledge of California Indians

31

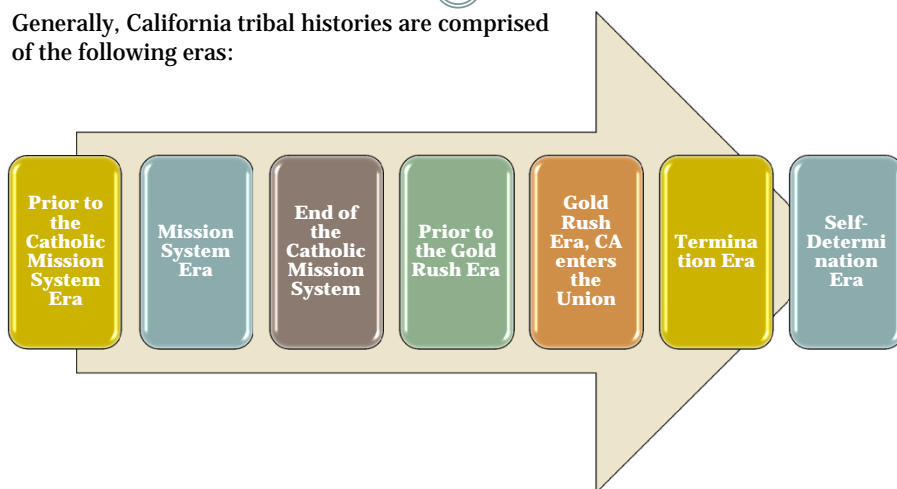
- California Indians were subjected to religious, federal, state and local policies that sought to eliminate tribal peoples, culture, and communities.
- From the conversion practices of the Catholic missionaries to the militias reimbursed for killing Indians, tribal communities in California have survived horrific histories.
- Federal policies such as the Indian Relocation Act of 1956 targeted Indians residing on reservation lands for relocation for job training programs in large U.S. cities.
- California Research Bureau Report CRB-02-014, Early California Laws and Policies Related California Indians, September 2002.

California Research Bureau Report CRB-02-014, Early California Laws and Policies Related California Indians, September 2002.

Essential Knowledge about California Indians

32

Generally, California tribal histories are comprised of the following eras:



Prior to the Catholic Mission System

33

- California was populated by American Indians for at least 19,000 years. Humans in this area dated back to 50,000 years. Tribal origin (creation) stories cite tribal presence since time immemorial.
- Before European settlement, California had more than 500 “tribelets” speaking about 300 dialects of at least 100 languages. The diversity of dialects required knowledge of multiple languages to engage in social interaction and trade.
- Tribal food staples included acorn “mush,” salmon, deer, elk, and rabbit. Much of the traditional foods of California Indians are scarcely available in the modern era. Plant materials for cultural arts such as basket weaving are heavily damaged by pesticides and are unsafe, inaccessible due to private property rights.



Mission System Era

34

- In 1769, there were 310,000 Natives prior to the Spanish Missions
 - Around 1900 — 20,000 Indians left in California
 - High death rate, low birth rate attributed to forced labor, diet, disease, living conditions and inadequate sanitation systems.
- Missions were intended to operate for a limited number of years bringing civilization to the native people. At the end of the mission program, the mission property and operations were to be turned over to the Indian people.
 - Indian people worked 30-40 hours/week within the missions.
 - Products from the Missions included grains, vegetables, dairy products, fruit, wine, beeswax products (i.e., candles), leather tooling (saddles, bridles). The income generated from trade supported the operation of the mission.



End of the Mission Era

35

- The Mission Period lasted until 1832, when Mexico, having taken over California from Spain 10 years earlier, secularized the missions, and began doling out the vast mission holdings to political favorites, wealthy people, and cronies of the governors of California.
- These "land grants" were called ranchos, and many of the Indian people living in the missions had little choice but to stay on and work for the new landowners.



The Years In Between

36

- The years preceding the gold rush and the Mexican American war were a violent period for California Indians.
- American settlers entered the territory in search of economic opportunities, often at the expense of tribal communities.



Bloody Island Massacre

37

- In 1847, Andrew Kelsey & Charles Stone bought a herd of longhorns from Salvador Vallejo with grazing rights in what is now Lake County. They used Pomo people to tend to cattle and other needs.
- Stone and Kelsey took Indians to work in the mines. On the 2nd mining expedition, 100 Indians were taken to the mines and only 3 survived and came home due to malaria and a lack of food.
- Stone & Kelsey bought an additional 1000 cattle (now herd of 2,000) with the gold mining profits. They began planning the next mining expedition with Indian labor. Herd impacted local ecosystem and Indian food.

Bloody Island Massacre

38

- Accounts of rape of Indian women and a plan to stop any mining expeditions. Indians killed the two men.
- They packed up and went around Lake — hiding on Bloody Island. The Army came to meet, Pomos came out of hiding but were slaughtered.
- 100+ Indians were killed to avenge the death of Stone and Kelsey.



Prior to the Gold Rush

Pre-Gold Rush

- **Economic Structure**
 - A few Spanish landholders controlled Indian workers who tended to mines, animals and fields.
 - Indians gained basic necessities and wealth through trading, raiding or working.
- **Political Structure**
- **Social Structure**
 - Indians outnumbered non-Indians 10 to 1. Consequently, some villages remained intact in the Sierra foothills and NW (the richest gold bearing areas in the state). By 1850, whites outnumbered Indians 2 to 1.

Gold Rush

- **Economic Structure**
 - Unlike the Spanish landholders, white gold miners were not solely dependent on Indian labor in the mines.
 - Native subsistence lifestyles were ending due to the impact upon the environment.
 - Indians paying for trade goods with an equal weight in gold. Traders created the Digger Ounce using a lead slug that outweighed the standard weights.
- **Political Structure**
- **Social Structure**
 - Indians part of the consumer market, traditions changed from survival arts to commercial crafts.

Treaty of Guadalupe Hidalgo

40

• **The Mexican American War 1846-1848**

- Manifest Destiny
- Dispute over control of Northern Territories and Border at the Rio Grande

• **February 2, 1848 — Treaty of Guadalupe Hidalgo**

- 9 Days Before — Gold discovery at Sutter's Mill
- Indian citizenship
- Indian Rights to Land
- Homestead Act
- Half of Mexico's Territory ceded to the U.S.
- Influx of money and land hungry non-Indians.

Discovery of Gold in California

41



- In January of 1848, Indian and white workers discovered gold while building Sutter's sawmill in Koloma Nisenan country.
- Sutter was the federal Indian subagent.
- He indentured the Yalisumni Nisenan Indians and signed a 20-year lease to the Nisenan property with the exclusive right to cultivate the land, cut timber, and build a sawmill and other necessary machinery for the purpose.

The Gold Rush

42

- From 1848 – 1857, it is estimated that 23.3 million ounces of gold was dug up in California.
- The value of the gold at 1998 prices would have been \$6.9 billion or \$285/ounce.
- More than 100 tons of mercury was dug up for use in the gold rush
- 7,000+ tons of mercury was lost in local rivers during this time. (One *gram* of mercury in a lake violates modern federal health standards.)
- 250 million cubic meters of mercury laden sediment from the Gold Rush have filled the San Francisco Bay.

The Gold Rush and Indian People

43

- **Forced or Manipulated Mining Employment**
Working to pay off food, gear paying for trade goods with an equal weight in gold. Earning wages in liquor.
- **From 1848 – 1870s, 10,000+ Indians were indentured, 4000 were children. Boys sold for \$60, girls sold for \$200.**
- **Indian miners were resented by white miners because they were a cheap labor force resulting in blatant hostilities.**
 - Indians constituted more than half of the miners in some mines of more than 4000 miners.
 - Indian women worked in the mines as well.
- **Prostitution by Indian women increased as Indian mining earning power decreased. Forced prostitution was rampant.**

Termination and Relocation

44

- **The U.S. Government sought to move Indians off of the Reservation into the Urban Center**
- **Through P.L. 280, the U.S. Government sought to end the Federal/Tribal trust relationship.**
- **Resulted in loss of land and homelessness.**



House Concurrent Resolution 108

(Introduced by Rep. Harrison on June 9, 1953)

45

- In 1953, the House Concurrent Resolution 108 proposed ending Indians status as wards of the United States.
- A total of 109 Indian Tribes and Bands were terminated within the United States, primarily in Oregon and California, affecting a total of 13,263 individuals or 3% of the total Indian population, with approximately 1,365,801 acres of land was removed from trust status during this period.
- “In view of the historic policy of Congress favoring freedom for the Indians, we may well expect future Congresses to continue to endorse the principle that ‘as rapidly as possible’ we should end the status of Indians as wards of the Government and grant them all the rights and prerogatives pertaining to American citizenship.

House Concurrent Resolution 108

(Introduced by Rep. Harrison on June 9, 1953)

46

- Whereas it is the policy of Congress, as rapidly as possible to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship; and

House Concurrent Resolution 108

(Introduced by Rep. Harrison on June 9, 1953)

47

- Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens:



House Concurrent Resolution 108

(Introduced by Rep. Harrison on June 9, 1953)

48

Now, therefore be it

- Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the **States of California, Florida, New York, and Texas**, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians.

California Rancheria Act

49

- By 1958, through the California Rancheria Act, Public Law 85-671, 44 California tribes were identified for termination, with Congress promising tribes improved roads, water systems, sanitation facilities, and vocational schools before the termination would become effective.
- On July 19, 1983 a U.S. District Court in *Tillie Hardwick, et al. v. United States of America, et al.* Case #C-79-1710-SW ordered federal recognition of 17 of California's Rancherias. The Hardwick decision restored more terminated tribes than any other single case in California and prompted the majority of the terminated Rancherias to pursue federal restoration.
- Of the 46 terminated Rancherias more than 30 have been restored, Coyote Valley didn't need restoration because it is currently recognized, and at least five Rancherias are still trying to restore their federal status.

Indian Relocation Act

50

- In 1956, the Indian Relocation Act (also termed as Public Law 959 or the Adult Vocational Training Program), encouraged Indians to leave the reservations to obtain work in urban areas with no training, no services offered for those living off-reservations (i.e. health), and no support groups (e.g. extended families and relatives) in urban areas. Relocation further broke Indian families apart.
- Poverty was a reason used for removing Indian children from their homes and placing them with more affluent white families.

Self-Determination Era

51

- After the late 1960s, the Self-Determination Era gave Indian tribes opportunities to manage their own local government and issues.
- The Self-Determination and Education Act of 1975 (PL-93-638) required federal agencies to permit qualifying tribes and Indian organizations to administer the federal government's Indian programs on the reservations (i.e., education, social services, health clinics, etc.).
- Despite these opportunities to strengthen tribes, the contract process was controlled by the BIA's rules and regulations, which challenged tribal sovereignty.
- Nonetheless, this was the time of great Indian activism and advancements in education, economic, and religious freedom rights for Indians.

Why is CA Indian History important?

52

- Understanding the history and diversity among California Indians helps to create a better working relationship with Tribes. Every tribe is different and unique.
- Therefore, working with a Tribe will depend on a meaningful consultation and addressing the needs of each tribe.
- Reference Handout in Handbook:
 - *Source: The 7 Essential Understandings for California Indian History and Culture, Prepared by the California Indian Museum and Cultural Center. Based on those Developed under Montana Office of Public Instruction.*
 - ✕ <https://cimcc.org/wp-content/uploads/2018/07/7-Essential-Support-Booklet-Final.pdf>

BREAK (10 minutes)

53



IV. Developing and Building Relationships

54

**AFTER THIS PRESENTATION,
PARTICIPANTS SHOULD BE ABLE
TO:**

- **Describe the relationship building essentials (as outlined in the curriculum)**
- **Explain how these essentials connect to regional planning**

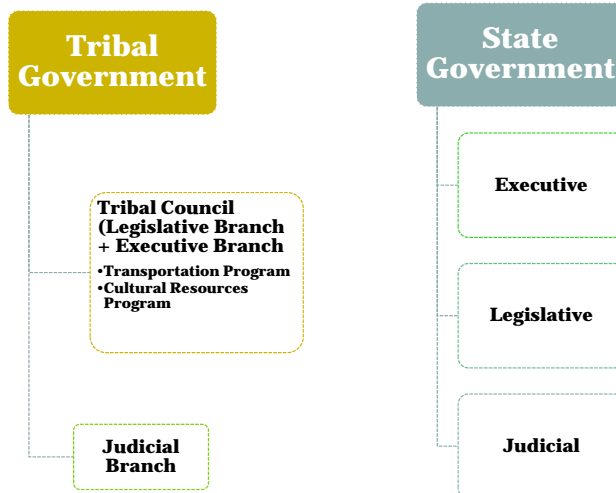
Guiding Principles

55

- Tribal governments should be involved in the planning and the decision-making process at the beginning of the project not at the end or when a burial or sacred site is uncovered.
- Agencies should write and publish consultation procedures for working with tribal governments.
- **Honor and integrity** should be regarded as vital to the tribal consultation process.
- Agencies should train staff on the fundamentals of consulting with tribal governments.

Consultation Engages the Government-to-Government Relationship

56



Best Practices for Consultation with California Indian Tribes

57

Guiding Principles

1)

- Honest, Open, and Meaningful Conversation

2)

- Involvement and Support of Tribal and State Leadership

3)

- Relationship Marked by Mutual Respect and Trust

4)

- Collaborate on Planning the Consultation Meeting

5)

- Multiple Contacts that Begin Early in the Process and Continue Throughout

1 Honest, Open, and Meaningful Conversation

58

- Includes providing tribes/agencies with necessary information and the time to review it and active listening.
- Disagreements or limitations do not derail consultation efforts, so both good and bad news can be openly shared and discussed.

② Involvement and Support of Tribal and State Leadership

59

- The active presence of tribal and state leaders contributes to meaningful, informed discussion during consultations and further strengthens the government-to-government relationship by demonstrating the involvement of members with policy-making authority from both the state and tribes.
- Make sure that the person you are consulting with is designated by the tribal government to speak on behalf of the tribe.

③ Relationship Marked by Mutual Respect and Trust

60

- Characterized by transparent, accurate, and open communication and a high degree of accountability.
- Respecting tribal confidentiality when handling sensitive information (consider including a provision about respecting tribal confidentiality in agreements with consultants and contractors).
- Understand that the discussion of confidential sacred site locations, burial locations, and tribal practices touches on spiritual matters and would not occur but for the possibility of protecting the tribe's cultural resources; think of how you would want your spiritual beliefs and practices respected and act accordingly.
- Existence of an agency tribal liaison
- Adopting a culturally appropriate perspective, underscored by familiarity with a tribe's culture and history.

4 Collaborate on Planning the Consultation Meeting

61

- Agree on a venue that maximizes participation and minimizes travel expenses for all parties.
- Develop an agenda with the tribe in advance, agenda is straightforward
- To the extent possible, research any issues raised by either side before the meeting
- Share materials before the meeting

5 Multiple Contacts that Begin Early in the Process and Continue Throughout

62



IV. Developing and Building Relationships

63

AFTER THIS PRESENTATION, PARTICIPANTS SHOULD BE ABLE TO:

- **Recognize federal and state laws/policies for tribal engagement/consultation in regional transportation planning and programming. This section includes discussion of:**
 - **RTP/RTP guidelines**
 - **OWPs**
 - **What regional planners are looking for (requirements)**
- **Recognize some tools available to identify tribes/areas for potential coordination**
- **MPO tribal consultation template**
- **Tribal outreach spreadsheet (tool)**

Regional Transportation Planning Requirements & Processes

[Chapter 7, from the 2017 Regional Planning Handbook]

64

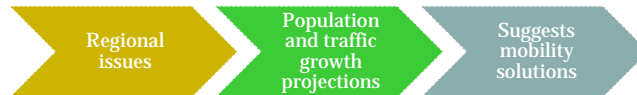
- **Metropolitan Planning Organizations (MPOs) and Regional Transportation Planning Agencies (RTPAs) are required by federal law (Title 23 CFR Part 450, Subpart B for RTPAs and Subpart C for MPOs) and by state law (Government Code section 65080 et seq.) to develop Regional Transportation Plans (RTPs) in order to qualify for and receive federal transportation funding.**

Regional Transportation Planning Requirements & Processes

[Chapter 7, from the 2017 Regional Planning Handbook]

65

- The RTP is a comprehensive, 20+ year vision of a balanced, multimodal transportation system.

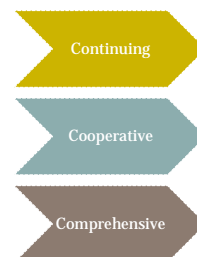


- The RTP includes a list of proposed projects that lead to development of the Regional Transportation Improvement Program (RTIP).

Regional Transportation Planning, State Planning Priorities and “3C” Planning: *Continuing, Cooperative and Comprehensive*

66

- It involves the entire community: individuals, federal, state, tribal governments, regional and local agencies, and public, private, environmental justice, disadvantaged communities and community based organizations .
- Comprehensive regional transportation planning can be understood from several perspectives, among which are mode, participation and setting.
- All modes shall be considered.
- Decisions shall be made through formal **government-to-government consultation with Native American Tribal Governments**, and with the full participation of the community served.
- Consistent with a collaboratively crafted vision, the region will work together to determine how best to provide a full range of transportation options for all system users.



“Working together to identify how future regional transportation needs will be met.”

Overall Work Programs (OWPs)

[Chapter 2, from the 2017 Regional Planning Handbook]

67

- Annually, each MPO/RTPA is required to develop and submit an Overall Work Program (OWP) that its Governing Board adopts per the MFTA, Section 1(A).

- The OWP provides:



Overview of the region



Transportation Goals and Objectives



Actions to achieve those goals and objectives

Overall Work Programs (OWPs) Scope of Work

68

- The OWP is a scope of work for transportation planning activities, including estimated costs, funding sources, and completion schedules funded with CPG and/or RPA funds.

Estimated
Costs

Funding
Sources

Completion
Schedules

Overall Work Programs (OWPs) Tribal Involvement

69

- The OWP is the yearly work program to implement the goals of the long range plan (RTP).
- Tribes need to be involved in the RTP development process but it would be good for Tribes to be involved in the OWP process, as well.
- Please make sure you make a request to consult/coordinate with tribal governments

Regional Transportation Plan

70

- To provide a clear vision of the regional transportation goals, policies, objectives, and strategies.
- Must be realistic and be with fiscal constraints;
- Provide an assessment of the current modes of transportation and the potential of new travel options within the region;
- Predict the future needs for travel and goods movement;
- Identify and document specific actions necessary to address the region's mobility and accessibility needs;

Caltrans Consultation Requirements

71

- AB 52 added Tribal Cultural Resources as an impact under CEQA and required consultation to mitigate those impacts with the California Native American tribes as defined in California Public Resources Code Section 21073.
- Because RTPs are subject to CEQA and a program EIR is prepared to analyze the impacts of implementing an RTP, AB 52 means that MPOs must consult with tribes with regards to Tribal Cultural Resources as part of the CEQA process.

Review of the Draft RTP

72

- The District review ensures that the RTP is a complete and accurate document reflecting the MPO/RTPAs stated goals.
- The main tool that the Districts uses in their review and comment of the draft RTP is the RTP Checklist.
- This is the same checklist that the MPO/RTPA completes and submits along with the RTP. **Appendix will have a sample of the RTP Checklist**
- Document on how tribal concerns have been addressed.

Caltrans Consultation Requirements

73

- **Federal:** Title 23 CFR part 450.316(c) requires MPOs to involve the federally recognized Native American Tribal Government in the development of the RTP and FTIP. Title 23 CFR part 450.316 (a) (1), the participation plan shall be developed by the MPO in consultation with all interested parties and shall, at a minimum, describe explicit procedures, strategies and desired outcomes. The requirement of including interested parties in the development of the participation plan and the RTP would include federally recognized and non-federally recognized tribes.
- **State: Public Resources Code Section 5097.94, and Sections 21073 through 21084.3.**

Consultation – defined

74

DOT 5301.1, U.S. Department of Transportation (1999)

- “Consultation” refers to a **meaningful and timely discussion** in an understandable language with tribal governments during the development of:
 - **regulations,**
 - **policies,**
 - **programs,**
 - **plans, or**
 - **matters**that **significantly or uniquely affect** federally recognized American Indian and Alaska Native tribes and their governments.”

Consultation Statutes and Regulations

75

- There are many various federal and state statutes that require an agency to engage in consultation and/or coordination with federally recognized tribes that may be impacted by a project funded by those federal or state funds:
 - **Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)**
 - **SAFETEA-LU**
 - **National Environmental Policy Act (NEPA)**
 - **Native American Graves Protection and Repatriation Act (NAGPRA)**
 - **National Historic Preservation Act (NHPA)**
 - **American Indian Religious Freedom Act (AIRFA)**

Federal Mandates for Tribal Consultation

76

1996 – Presidential Executive Order

No. 13007:

Indian Sacred Sites

- This action directs Federal agencies to protect tribal sacred sites and accommodate tribal access to them.

Federal Mandates for Tribal Consultation

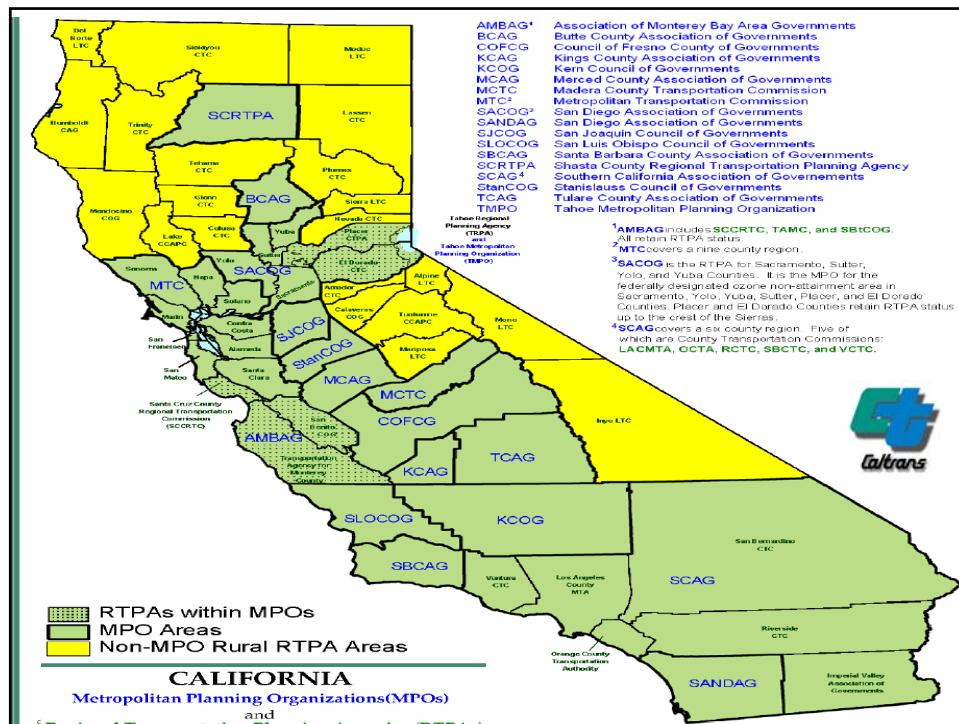
77

- **Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, November 6, 2000**
 - Establishes regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies with tribal implications. The goals of this order are to strengthen government to government relationships with Indian tribes and to reduce the imposition of unfunded mandates upon local tribes.
- **Executive Order B-10-11 (2009)**
 - President Obama, in his November 5, 2009 Memorandum on Tribal Consultation (Federal Register, Vol. 74, No. 215, November 9, 2009), reiterated the directive for public agencies to incorporate tribal consultation into their plans and programs in a timely and meaningful manner.
- **Executive Order B-10-112 (2010)**
 - At the state level, Governor Edmund G. Brown Jr.'s administration emphasized the importance of tribal-state relations through the creation of the Office of the Tribal Advisor (Executive Order B-10-112) in 2010.

Regional Transportation Agencies (RTPA) & Metropolitan Planning Organizations(MPO)

78

- **RTPAs & MPOs in cooperation with Caltrans, and Tribal Governments are required to develop a Transportation Plan (RTP) & Regional Transportation Improvement Programs (RTIP)**
- **Required laws, statutes & Guidelines:**
 - Federal legislation, U.S. Code, Title 23, Section 134, and 135
 - State Legislation, Government Code Section 6580et seq., of Chapter 2.5
 - California Transportation Commission (CTC) Guidelines



Consultation with Native American Tribal Governments and Communities

80

- It is recommended that federally and non-federally recognized Tribal Governments be consulted when historic, sacred sites, subsistence resources or traditional collecting properties are present in the MPOs jurisdiction.
- The MPO should include a discussion of consultation, coordination and communication with federally recognized Tribal Governments when the tribes are located within the boundary of an MPO/RTPA.
- The MPO should establish a government-to-government relationship with each tribe in the region.

Consultation with Native American Tribal Governments and Communities

81

- 23 CFR 450.316, *Interested parties, participation, and consultation*, outlines that the MPO shall develop a documented process that outlines the following:
 - Roles,
 - Responsibilities, and
 - Key decision points for consulting with Indian Tribal Governments.

Consultation with Native American Tribal Governments and Communities

82

- This refers to the protocol for communicating between the MPOs and the Tribal Governments as sovereign nations.
 - This consultation process should be documented in the RTP.
 - The initial point of contact for Tribal Governments should be the Chairperson for the tribe.
 - The MPO should develop protocol and communication methods for outreach and consultation with the Tribal Governments.
- However these protocol and communication methods should be re-evaluated if the agencies are un-successful in obtaining a response during the development of the RTP.

Consultation with Native American Tribal Governments and Communities

83

- It is important to ensure that efforts in establishing channels of communication are documented in the RTP.
- California is home to many non-federally recognized tribes as well as Native Americans living in urban areas.
- MPOs should involve the Native American communities in the public participation processes.

Who should agencies consult with?

84

- The MPO can do this by sharing information and conducting meetings with leaders of the federally recognized Tribal Governments during the preparation of the RTP prior to taking action(s) on the plan and by making sure to consider input from the tribe as decisions are made.
- Consultation should be conducted in a way that is mutually respectful of each party's sovereignty. Tribal Government coordination is the comparison of the MPOs transportation plans, programs, projects and schedules with similar documents prepared by the tribe.
- The MPO needs to ensure consistency with tribal plans and the RTP.
- Agencies should not only coordinate their plans with those of Tribal Governments within their boundaries, but also consider Tribal Governments' concerns about projects outside Tribal jurisdiction that have the potential to impact Native American cultural resources or communities, as well as the needs of individuals within those communities.

Who should agencies consult with?

85

- Unless otherwise directed by the Tribe, correspondence should be addressed to the Tribal Chairperson. Because each Tribe has its own form of government and protocol for how business is to be conducted, there is no singular approach. Tribes differ in their ability to finance leaders, spokespersons or administrative support. For example:
 - Tribal leaders frequently participate on their own time and money.
 - Agencies need to be cognizant of this and act accordingly, e.g., be flexible when and where meetings are scheduled.
- A meeting with the Tribal Government (most often referred to as the Tribal Council) or its designated representative is usually the most effective way to communicate.
- Be sure to provide enough time for the Tribal Government to respond, since most Tribal Governments meet once a month, and it may be difficult to put additional items on the agenda if not given enough time.

Public Participation

86

- Public participation provides for public involvement of all citizens (including Native Americans), affected public agencies, representatives of transportation agency employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transit, and other interested parties of the community affected by transportation plans, programs and projects.
- All Native Americans as individual citizens---regardless of whether they are members of Federally-recognized Tribes---can contribute to the public participation process.
- They belong to a minority, they may be low income, are traditionally underserved, and they may be associated with a community-based organization or be among the groups shown above.
- Within public participation forums, as individuals, they are not representing Tribal Governments.

The Role of the District Regional Planning Staff in Reviewing Regional Planning Documents

87

- The primary role of the District is to act as the communication link between the MPO/RTPA and the Department. The District staff represents the interests and priorities of the Department in the RTP process through its work on MPO/RTPA advisory committees. The District prepares the Department's comments on the draft RTP and Environmental Document.

Reviewing Planning Documents

88

- Regional agencies and Caltrans staff are responsible for ensuring that individual Regional Transportation Plans (RTPs) and Overall Work Plans (OWPs) are in compliance with federal and state law.
- Tribal consultation and coordination requirements deserve particular attention when reviewing planning documents.
- Tribal Governments are separate entities from State and Federal government, yet they occupy adjacent land, and Native American cultural resources often overlap with lands under MPO/RTPA jurisdiction.
- Any time an OWP work element may affect a Tribal Government, it is important that there is a statement regarding the inclusion of an area's Tribal Governments in the planning process.

Reviewing Planning Documents

89

- In turn, any time that an OWP work element identifies a degree of public participation, inclusion of Native American individuals, environmental justice and other disadvantaged groups must be documented.
- Stating in a planning document that consultation and coordination are occurring is an important first step, but it is integral that this reflects an actual effort to consult with Native American tribes and individuals in the planning process.
 - Caltrans developed a template for MPO consultation with Indian Tribal Governments (to view template, see *Appendix A*)
 - Outcome of consultation/coordination efforts

The Tribal Consultation Protocol Template

90

This document was developed using the Karuk Tribe Consultation Policy and Rincon Tribal Consultation Ordinance. Go to Page # of your Manual.



**Tribal Consultation
Tool Kit**

<https://nijc.org/tct-toolkit.html>

The Tribal Consultation Protocol Template

91

- Includes example text and instructions for tailoring the steps to the user's needs.
- Main sections include:
 - 1) Authority and Purpose
 - 2) Definitions
 - 3) Guiding Principles
 - 4) Objectives of Consultation
 - 5) Establishment of Point of Contact
 - 6) Consultation Procedure
 - 7) Consultation Record
 - 8) No Waiver of Sovereign Immunity
 - 9) Severability
- Link to [Template](#).

1. Authority and Purpose

92

- The authority and purpose section is the place where the author points to the article in the tribe's constitution that gives the tribe's governing body the authority to develop and adopt this article.
- Provides the authority to the Tribal Council or Governing Body to develop and adopt this protocol, ordinance, or policy.

1. Authority and Purpose

93

- The purpose section is where the author states that the purpose of the protocol is to establish guidance for federal and state agencies that request consultation with the Tribe.

2. Definitions

94

- The definitions section includes common terms and definitions related to the consultation process.

3. Guiding Principles

95

- The guiding principles section outlines the roles of the tribe and state/federal agencies and guidelines for communication between the them.

4. Objectives

96

- The objectives of consultation section outlines the legal and decision-making objectives for the tribe and an Agency and includes best practices for consulting with the tribe.

5. Establishment of Point of Contact

97

- The establishment of point of contact section lists the point of contact and gives instructions for choosing an alternate point of contact.
 - Insert POC Information:
 - ✦ Name
 - ✦ Position
 - ✦ Employer
 - ✦ Address
 - ✦ City, State Zip
 - ✦ Phone
 - ✦ Fax
 - ✦ Email

6. Consultation Procedure

98

- The establishment of point of contact section lists the point of contact and gives instructions for choosing an alternate point of contact.

7. Consultation Record

99

- The consultation record section defines which types of notes and other media will serve as the consultation record, who may possess the consultation record, and how the tribe's sensitive information will be handled.

8. No Waiver of Sovereign Immunity

100

- The no waiver of sovereign immunity section expressly states that the tribe does not waive sovereign immunity for this ordinance or protocol.

9. Severability

101

- The severability section establishes that if a provision is held to be unconstitutional, then that provision may be severed from the rest of the ordinance/protocol.

Why consultation with tribes is important?

102

- 1) Consultation with tribes is *required by law*.
 - 2) And, out of *respect* for the status Indian tribes occupy in our federal system of government, as well the unique tribal interests potentially affected.
- **Legal Status and Rights of Tribes**
 - Tribal Sovereignty
 - The Federal Trust Responsibility
 - Treaty Rights
 - Government-to-Government Relations
 - Non-Federally Recognized Tribes
 - Indigenous Groups and Individual Tribal Members

© NJC 2015

Other Categories

103

Tribal governments and tribal communities can also be categorized as:

Environmental Justice

- According to Executive Order No. 12898, "environmental justice" matter is any civil or criminal matter where the conduct or action at issue may involve a disproportionate and adverse environmental or human health effect on an identifiable disabled, low-income, minority, tribal, or indigenous population or community in the United States.

Priority Populations and Disadvantaged Communities

- Areas disproportionately affected by environmental pollution and other hazards that can lead to negative public health effects, exposure or environmental degradation.
- Areas with concentrations of people that are of low income, high unemployment, low levels of home ownership, high rent burden, sensitive populations, or low levels of educational attainment.

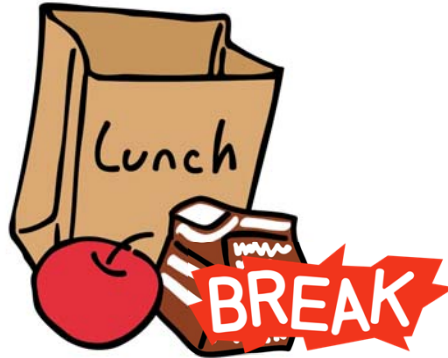
Conclusion

104

- **Effective and Efficient Consultation = saving time and money.**
- **Early Tribal involvement = positive relationships and smooth and orderly development of projects.**
- **Positive Consultations experiences= future effective consultation.**
- **Good Process will last beyond individuals.**
- **Mutual respect and understanding concerns.**

Lunch (1 hour and 10 minutes)

105



V. Strategies for Resolving Intergovernmental Conflicts

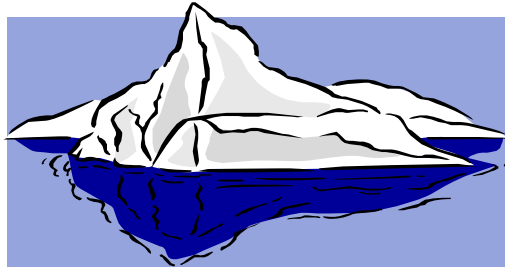
106

AFTER THIS PRESENTATION, PARTICIPANTS SHOULD BE ABLE TO:

- **Effectively utilize mediation and conflict resolution strategies that would be helpful in resolving intergovernmental conflicts.**
- **Effectively utilize tools available to identify tribes for potential consultation and coordination.**

Active conflict is just the tip of the iceberg

107



**anger, fear, distrust, frustration, fear of change,
fear of rejection, humiliation, embarrassment,
loss of authority**

Resource: Original content contributed by the Olds College OER Development Team, of Olds College to Professional Communications Open Curriculum under a CC-BY 4.0 license:
<https://ecampusontario.pressbooks.pub/profcommsontario/chapter/conflict-resolution/>

Conflict Styles

108

- **Competitive:** The competitive style involves a person who tends to be very assertive and more interested in getting their own way than the possible outcome. This style is used when:
 - the issue is very important to the person, and the person has a big stake in getting his way.
 - the person has the authority to make the decision, and it seems clear that this is the one best way.
 - decisions have to be made fast and the person has power to make it.
 - the person feels he has nothing to lose.
 - he is in an emergency situation where immediate action/decision is needed, or
 - the person can't get a group to agree.

Conflict Styles

109

- **Avoidant:** The Avoidant style is used by a person who does not assert himself, don't cooperate or avoids the conflict entirely.
 - This can be a good approach to use if one is dealing with a difficult person or when there is no urgency to make a decision.
 - Avoidance can appear to others as 'running away' from the issue but sometimes evasion /delay can be appropriate and constructive.

Conflict Styles

110

- **Accommodative:** This approach happens when one works cooperatively with the other person, without trying to assert their own concerns.
 - This may be used when the outcome of the situation is very important to the other person but of less importance to you.
 - In accommodation, you cooperate: you face the situation and agree to do what the other person wants.

Conflict Styles

111

- **Compromise:** In the compromise approach, the parties negotiate with an understanding that the parties may have to give a little, to get a little.
 - This is done by making exchanges, concessions and bargaining to come up with a solution both parties can agree to.
- **Collaborative:** In the collaborative style, one gets actively into the conflict, asserting what he wants while still trying to cooperate with the other person.
 - If one has the time and the issue is important enough this is a good way to find a win-win situation.
 - The key to collaboration is taking the time to look at underlying interests and needs of both parties

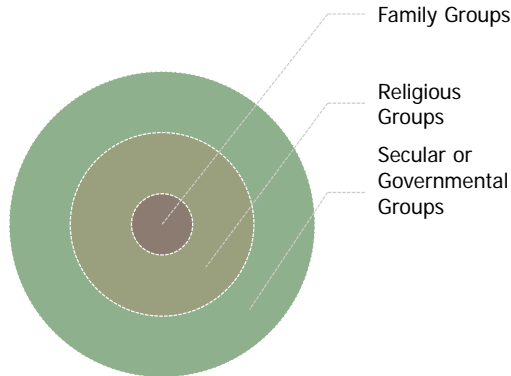
Steps for Conflict Resolution

112

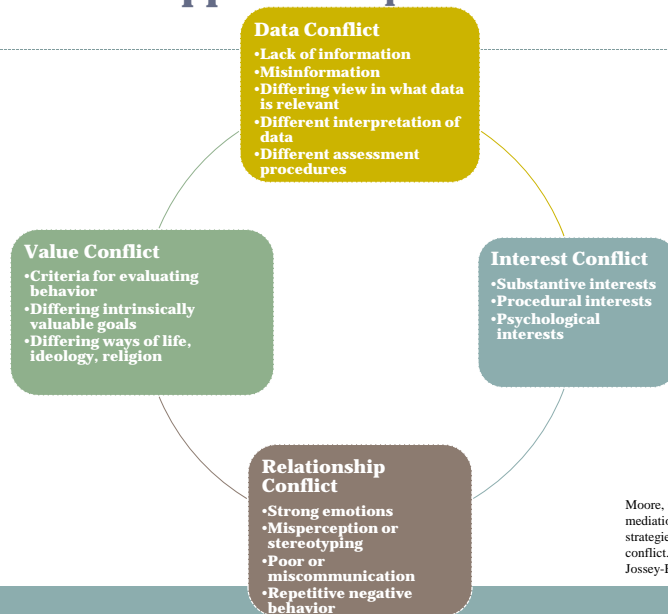
- Identify positions (“what are they saying”) of each side in conflict.
- Learn more about the true needs and desires behind each side.
- Ask clarifying questions for more information.
- Brainstorm possible solutions.
- Discuss how each solution would affect each side and figure out possible compromises.
- Agree upon a solution.
- Implement solutions.
- Re-evaluate solutions, if necessary.

Aboriginal Systems

Generally, existed within a unique cultural and natural environment in which individuals relied upon the group for subsistence.

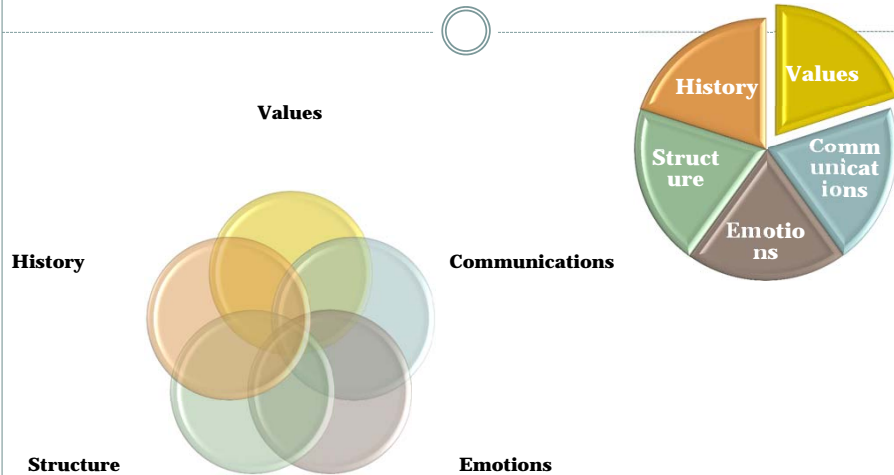


Agency for Dispute Resolution (ADR) Approach: Sphere of Conflict*



Moore, C. W. (2006). The mediation process: practical strategies for resolving conflict. San Francisco, CA: Jossey-Bass.

Wheel of Conflict*



115

Strategies for Resolving Intergovernmental Conflicts

[the following from A Local Official's Guide to Intergovernmental Conflict Resolution]

116

When should public officials turn to a conflict resolution professional?

When state law or some other regulation requires two (or more) local agencies to work together and disagreements are beginning to emerge.

When one or more of the agencies says "We've been here before and we didn't work it out very well then, so let's try something different."

When agencies disagree on public policy, and one or more are considering using "legal technicalities" to settle a public policy dispute.

When you find yourself saying, "They just don't understand what I've said." Or, "I wish they would tell us what they really mean."

When differences are threatening to cause gridlock.

Improving Working Relationships with Tribal Governments Requires AN Understanding of the History of the Conflict

[the following from A Local Official's Guide to Intergovernmental Conflict Resolution]

117

• **Approaches to Resolving Inter-Agency Conflict**



Finding and Selecting the Impartial Person

[the following from A Local Official's Guide to Intergovernmental Conflict Resolution]

118

- **Interest-based negotiation and collaborative problem-solving among agencies and tribes.**
 - Included were facilitated discussions on issues or problems of significance to the specific region that had been identified from the pre-workshop interviews.
 - The design team determined that a two-and-a-half day format provided the best balance between accommodating critical information and activities, and not unduly intruding upon the participants' busy schedules.

VI. Model Consultation Policy and Protocols

119

AFTER THIS PRESENTATION, PARTICIPANTS SHOULD BE ABLE TO:

- Understand federal requirements for tribal consultation, and define effective consultation outcomes (e.g., Documentation, project revisions, funding, and follow-up on tribal concerns)
- Explain the need for a public participation plan and describe the difference between a PPP and tribal engagement
- Determine when a tribal consultation process is effective (as opposed to just there in name)



Tribal Consultation

Tashia J. Clemons
FHWA California Division

Federal Requirements

121

- Section 106 Compliance
- CEQ regulations
 - Sections 1501.2
 - Section 1501.7

Effective Consultation

122

- Takes commitment
- No fail-safe approach
- Establish and maintain long-term relationships

Effective Outcomes

123

- It “depends” on the context and nature of the projects, areas of concern or controversy etc.
- Early engagement can serve as a “reality check”
- Document consultation efforts
- Follow through with commitments

Public Participation Plans

124

- https://www.fhwa.dot.gov/planning/public_involvement/publications/pi_techniques/fhwahep15044.pdf
- Tribes/Tribal Governments are not “the Public”
- Public Involvement Opportunities

For More Information

125

- **FHWA Successes in Stewardship Newsletter:**
- *Tribal Case Studies Highlight Effective Intergovernmental Partnerships*
https://www.environment.fhwa.dot.gov/Pubs_resources_tools/publications/newsletters/sept13nl.aspx
- **Section 106 Tribal Agreements:**
- *Strengthening Government-to-Government Partnerships and Accelerating Project Delivery*
https://www.environment.fhwa.dot.gov/Pubs_resources_tools/publications/newsletters/jun19nl.aspx
- **FHWA Resource Center**
- *In Their Own Light: A Case Study in Effective Consultation*
https://www.fhwa.dot.gov/resourcecenter/teams/environment/tribal_consult.pdf

VI. Model Consultation Policy and Protocols

126

AFTER THIS PRESENTATION, PARTICIPANTS SHOULD BE ABLE TO:

- **Explain the link between cultural resources and regional transportation planning**
- **Recognize the importance of early consultation as it relates to section 106 consultation**



CULTURAL RESOURCES

127

Tribal Historic Preservation Considerations during Regional Land Use and Transportation Planning

- Streamlining and Improving Project Delivery Processes;
- Promoting historic preservation and avoidance of important tribal heritage sites and resources;
- Fostering better tribal relations and more meaningful historic preservation outcomes through early tribal engagement and consultation.

Introduction

128

↓ SARAH ALLRED

- Division of Environmental Analysis (DEA)
- Cultural Studies Office (CSO)
- Native American Cultural Studies Branch

Anthropology, Archaeology, Cultural Resources Management, Historic Preservation, Environmental Compliance, Transportation Project Delivery

Introduction

129

↓ JODY BROWN

- Division of Environmental Analysis (DEA)
- Cultural Studies Office (CSO)
- Native American Cultural Studies Branch

Anthropology, Archaeology, Cultural Resources Management, Historic Preservation, Environmental Compliance, Transportation Project Delivery

Caltrans Tribal Relations

130

DIVISION OF TRANSPORTATION PLANNING	DIVISION OF ENVIRONMENTAL ANALYSIS & PROJECT DELIVERY
HQ Native American Liaison Branch (NALB) – Lonora Graves	HQ Native American Cultural Studies (NACS) Branch – Sarah Allred
District Native American Liaisons (DNALs)	District Native American Coordinators (DNACs)
Works with tribes in the context of transportation planning and programming process to address tribal transportation needs and funding sources. Manages TERO matters. Administers the Caltrans <i>Native American Advisory Committee</i> (NAAC) Meetings. Primary government to government contact.	Works with tribes in context of the cultural resources investigations conducted as part of the environmental review/compliance process to identify, evaluate, and treat significant cultural resources that may be affected by transportation projects.
Focus: tribal transportation planning, mobility needs, and funding sources.	Focus: protection/treatment of tribal heritage resources during project delivery

Key Definitions

131

- **CULTURAL RESOURCES**
Not defined in any federal law; Basically refers any prehistoric or historic district, site, building, structure, or object made by people regardless of significance; Can include landscapes, traditional cultural properties, or natural features of importance to a group of people.
- **HISTORIC PROPERTIES**
Term used to describe cultural resources that have been evaluated as significant and eligible for listing in the *National Register of Historic Properties*.
- **HISTORICAL RESOURCES**
Term used to describe cultural resources that have been evaluated as significant and eligible for listing in the *California Register of Historical Resources*.
- **TRIBAL CULTURAL RESOURCES**
A class of resources under 2015 CEQA amendment (aka AB52) to describe cultural resources that are of cultural value to a tribe; requires consultation and emphasizes the importance of tribal knowledge in identifying significant cultural resources.
- **AREAS OF CULTURAL CONCERN**
For planning purposes, an alternative vocabulary is recommended, given the legal meaning of the above terms in the cultural resources compliance process. This term is intended to be a broad definition for areas of prehistoric or historic sensitivity.

Key Environmental and Historic Preservation Laws

132

- **NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)**
- **NATIONAL HISTORIC PRESERVATION ACT**
- **CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)/AB52**
- **CA PUBLIC RESOURCES CODE 5097.98**
- **CA PUBLIC RESOURCES CODE 5024**
- **NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA)**

NEPA ASSIGNMENT AND THE SECTION 106 PROGRAMMATIC AGREEMENT

133

NEPA Assignment: Streamlines the federal environmental review and approval process by eliminating FHWA's project-specific review and approval. Under NEPA assignment, Caltrans serves as the lead federal agency and is responsible for complying with all applicable federal environmental laws, regulations, policies, and guidance, and is legally responsible and liable for the environmental decisions made on projects under NEPA Assignment.

Section 106 Programmatic Agreement (PA):

Streamlines the Section 106 review process for our program and serves as the framework for how Caltrans complies with the National Historic Preservation Act for all applicable federal undertakings. Caltrans serves as the federal agency official for purposes of Section 106 review. Rigorous, well-monitored program; Professional qualifications standards; Quality control and peer review; State and federal agency oversight; Auditing and annual reporting requirements.

Environmental Review & Project Delivery: The Cultural Resources Investigation Process

134

- **BEGIN ENVIRONMENTAL**
- **IDENTIFICATION**
- **EVALUATION**
- **AVOIDANCE/MINIMIZATION**
- **MITIGATION (RESOLUTION OF ADVERSE EFFECTS)**

The Cost of Conflict During Project Delivery

135

- Strained tribal government relations
- Project delays
- Increased project costs
- Legal Challenges
- Unfavorable media attention
- Less optimal historic preservation outcomes

Tribal Concerns and Complications During Project Delivery

136

- Historical circumstances
- Disappearing and non-renewable nature of tribal heritage resources
- Importance of 'Sense of Place'
- Different Perspectives: Traditional tribal knowledge and scientific archaeological inquiry
- Time and funding pressures of project delivery; no time for meaningful discussion
- Misunderstandings/confusion about the process

How can we improve? Earlier coordination is key.

To be continued...

137



Planning-Environmental Linkages (PEL) Initiative

138

Planning and Environment Linkages represents a collaborative and integrated approach to transportation decision-making that:

- ❖ Considers environmental, community, and economic goals early in the transportation planning process, and
- ❖ Uses the information, analyses, and products developed during planning to inform the environmental review process.

***State and local agencies can achieve significant benefits by incorporating environmental and community values into transportation decisions early in planning and carrying these considerations through project development and delivery.**

Planning – Environmental Linkages at Caltrans

139

- PEL initiated in 2005 with enactment of SAFETEA-LU.
- Optional, but increasingly encouraged by FHWA.
- Flexible and can be implemented in a variety of ways to meet individual needs.
- HQ Division of Environmental Analysis' SP&R Grant opens up opportunities for communication
- No formal process at Caltrans yet; FHWA's PEL webpage is a wealth of information.
- Caltrans PEL implementation to date is largely focused on natural resources, but research suggest real opportunities for historic preservation planning.
- **Potential Benefits of Historic Preservation Planning:**
 - ✦ Improve historic preservation outcomes that benefit communities,
 - ✦ Strengthen tribal relations,
 - ✦ Economic benefits/Heritage Tourism,
 - ✦ Improve project delivery.

Applying PEL to Tribal Historic Preservation: Guidance and Best Practices

140

- **Existing Research/Guidance on PEL:**
 - Since the passage of SAFETEA-LU in 2005, a number of reports, studies, and best practices have been developed for the consideration of environmental factors during planning and early project development, some specifically focused on Historic Preservation (see annotated references).
- **A continuum of levels of effort can be applied at various stages of the planning and project development process**
(Can be used by external partners, as well as internally):
 - Early Tribal Engagement; Regular joint (Planning-Environmental) meetings with tribes (web-based or face to face);
 - Computerized Inventories of Resources/Studies (e.g., CCRD/CHRIS);
 - Predictive Modeling for Archaeology;
 - Development and Use of Regional Historic Contexts;
 - Historic Bridge Inventories;
 - Development of Detailed Interagency Procedures;
 - Development of Consultation Protocol Agreements with Tribes;
 - Advance Mitigation Planning (see 23 CFR 450 Appendix A).

Key Cultural and Environmental Staff

141

- **District Native American Coordinators (DNACs)**
- **District Archaeologists, Architectural Historians**
- **District Environmental Branch Chiefs**
- **District Environmental Coordinators/Generalists**
- **District Native American Liaisons (DNALs)**
- **Native American Cultural Studies Branch (NACS)**
- **Native American Liaison Branch (NALB)**

Tribal Outreach and Messaging for Historic Preservation Planning

142

- Acknowledging the diversity of tribes in California; Not a one-size-fits-all approach. Recognition of varying tribal interests and capacity to engage.
- Important to identify points of contact; determining interests/concerns prior to going into tribal meetings/consultations.
- Conveying Caltrans' mission, vision, goals, and values.
- Conveying the prominence of transportation on the landscape and importance of tribal input during planning decisions.
- Emphasis on Avoidance; acknowledging potential effects/discussing mitigation options.
- Awareness of **confidentiality** concerns and how it may affect tribes' willingness to share information.

CONFIDENTIALITY

143

Section 304 of National Historic Preservation Act

Requires that information be withheld about location, character or ownership . . . if the disclosure may:

- ☐ Cause a significant invasion of privacy
- ☐ Risk harm to the historic property
- ☐ Impede the use of a traditional religious site by practitioners.

CA Public Records Act (Gov. Code 6254, subd. (r))

Exempts sensitive information from disclosure (i.e., Native American graves, cemeteries, and sacred places and records of Native places, features, and objects, as described in Pub Resources Code 5097.9 and 5097.933).

Guiding Principles on Historic Preservation and Tribal Engagement

144

National Historic Preservation Act (1966) PREAMBLE:

- The spirit and direction of the Nation are founded upon and reflected in its historic heritage.
- The historical and cultural foundations of the Nation should be preserved as a living part of our community.
- The preservation of heritage is in the public interest.
- It is the policy of the federal government to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony to fulfill the social, economic, and other requirements of present and future generations.
 - ❖ The NHPA regulations place a heavy emphasis on the engagement and participation of Native American tribes.
 - ❖ Ensuring the public is able to access and benefit from the preservation of heritage is a fundamental to the Act.

Guiding Principles on Historic Preservation and Tribal Engagement

145

- **Governors' Executive Orders B-10-11 and N-15-19**
 - Strong directive from highest levels of state government regarding State-Tribal relations
- **California State Transportation Agency (CalSTA)**
 - Tribal Consultation Policy: Collaboration; Communication; Education; Process; Timely Notice.
- **Caltrans Vision/Goals and Director Omishakin's Focus**
 - Enhancing California's economy & livability; Values people, resources, and partners; Seeks to make long-lasting, smart mobility decisions that improve the environment, support vibrant economy, and build communities, not sprawl.
 - Director's emphasis on Active Transportation, as well as general trends in Planning (e.g., smart growth, context sensitive solutions, sustainability practices/environmental stewardship) are complimentary to tribal historic preservation planning.
- **23 CFR Part 450 (Planning Assistance Standards) – Appendix A: Linking Transportation Planning and NEPA Processes**
 - Indicates that environmental analyses have been disconnected from the analyses used to develop long range transportation plans. The purpose of Appendix A is to support the congressional intent that statewide and metropolitan transportation planning should be the foundation for highway and transit project decisions.

Additional Resources/Guidance for Preservation Planning

146

- Advisory Council on Historic Preservation (ACHP): ***Early Coordination with Indian Tribes during Pre-application process: A Handbook*** (October 2019)
- ACHP ***Preserve America Program***
- National Park Service, ***Secretary of the Interior's Standards and Guidelines for Preservation Planning*** (June 2001)
- CA Office of Historic Preservation (OHP), Technical Assistance Series No. 14: ***Drafting Effective Historic Preservation Ordinances*** (Rev. 2005)
- OHP ***CA Cultural Resources Climate Change Task Force and Strategic Plan***.
- ACHP Policy Statement: ***Archaeology, Heritage Tourism, and Education*** (August 2008)
- ACHP ***Measuring Economic Impacts of Historic Preservation***

Summary/Closing Thoughts

147

- Historic preservation can enrich communities and provide a sense of pride, but can have tangible economic benefits.
- Tribal values are highly compatible with sustainability and environmental stewardship initiatives.
- There are many opportunities for Planning-Environmental collaboration within Caltrans, as well as with external partners and tribes.

VII. Case Study

148

PARTICIPANTS SHOULD BE ABLE TO:

- **Identify steps to solve problems and improve consultation practices**
- **Case Scenarios on page of the handbook**

Case Study Scenario #1: ABC MPO

149

- You're a Caltrans planner, and ABC MPO tells you they are proud of the close relationship they have with the federally recognized tribe in their region. Often the tribe will call Executive Management directly to discuss issues. Despite having a great relationship (as described by ABC MPO) sometimes planning results in outcomes that displease the tribal government. After the completion of a particularly contentious project you discovered that the tribal chairperson was not aware of the planning of this project and that the MPO doesn't have a formal plan for consultation and coordination. What steps would you take to ensure that this doesn't happen again?

Case Study Scenario #2: ABC RTPA

150

- ABC RTPA has a formal plan to engage all three federally recognized tribes in the region. The formal plan was put into practice 20 years ago and has not changed since. However, leadership at the RTPA and the tribes has changed several times throughout the years. The RTPA believes they go above and beyond what's required by having a formal plan for engaging federally recognized tribes, but there are consistent bad outcomes when plans are implemented, especially for two of the tribes. Two of the three tribal governments feel the RTPA is simply checking the box for consultation and not meaningfully considering input. What steps would you take to ensure that meaningful input is received and considered?

Tribal Transportation Tool

151

- This inventory tool will serve as a central location for gathering and organizing Tribal Transportation Plans for your district.
- In an effort to supplement the “Native American Tribal Consultation and Coordination” section found in Regional Planning’s guidelines for MPOs we have included all Californian tribes district by district.

Tribal Transportation Tool

152

- Through the gathering of Tribal Plans and documents in one central location, the identification of collaboration opportunities can be improved and can help facilitate conversations between MPOs and RTPAs and tribal governments.
- The District Native American Liaison can be a source of assistance to complete the inventory tool and to update any contact / tribal transportation information within the tool.
- To view the spreadsheet, [click here](#).

VIII. Debrief Activity

153

PARTICIPANTS SHOULD BE ABLE TO:

- **Explain how they (each participant) might use the “MPO Consultation with Indian Governments Template” and “Tribal Outreach Spreadsheets” as a tool for reviewing regional planning documents.**
- **Assess the completeness of a tribal consultation plan (is it effectively meeting the intent of the policies/laws)**

IX. Questions & Answers

154



X. Evaluation

155

**THANK YOU FOR VIEWING THE
PRESENTATION.**

ANY QUESTIONS?

**PLEASE COMPLETE THE EVALUATION
FEEDBACK SURVEY:**

**[HTTPS://WWW.SURVEYMONKEY.COM/R/CAL
TRANS_TRAININGSESSIONEVALUATION](https://www.surveymonkey.com/r/caltrans_training_session_evaluation)**



Thank you

156

Address:

**National Indian Justice
Center
5250 Aero Drive
Santa Rosa, CA 95403
Phone: (707) 579-5507
Fax: (707) 579-9019**

**For further information and
assistance in the consultation
process, contact the Caltrans Native
American Liaison Branch (NALB)
at:**
**[http://dot.ca.gov/hq/tpp/offices/nc
p/nalb](http://dot.ca.gov/hq/tpp/offices/nc/p/nalb)**

**The NALB webpage also provides
contact information for the Caltrans
Districts' Native American Liaisons.**



**Tribal Engagement and
Technical Assistance**

