

Tribal Consultation Primer for Land Trusts

- Note: these notes are excerpted from a longer presentation. In general, this handout assumes you're building something that has potential to destroy cultural properties; you can use some of the concepts in this to help with other situations. This document or excerpts from it may be shared (but not publicly posted on the internet) with attribution given to the author and with the following caveat: "This is not a legal document. Always check this information with your lawyer before using it for a decision." Corrections are welcome. This is a work in progress.-

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Why Consult and What is it?

-Environmental and social advocacy go together because people are a part of nature, and on a practical level protecting material culture also protects the environment around it.

- Tribal consultation is a process whereby you invite the tribes into a project that then becomes a joint project. It involves talking, listening, and acting on tribal input. Above all, it's a partnership where you and the tribes work together. It's optional for the Tribes at all times; although there are times when you must invite them, required consultations, which will be explained below.

- The point of consulting the tribes is social justice: to at minimum invite the Tribes to have the opportunity to identify and to negotiate for the protection of their Traditional Cultural Properties (TCP) which take many forms including both traditional archaeology-type things you might expect (e.g. arrowheads, hearths, fishing weirs) which archaeologists can help identify and Indigenous ceremonial stone structures and landscape which only a tribal representative can identify. Tribes may or may not respond to your invitation---this may have to do with their workload or an assessment of your project or other inputs unknown to us; nonetheless, the invitation is important (and sometimes required).

-Tribal consultations are built on mutual respect.

Two types of consultation and Some Information about Tribes:

- 1) Situations in which tribes should be consulted but there is no obligation to invite them: "courtesy"; a voluntary consultation
- 2) A situation in which tribes must be invited to consult: "required" consultation under section 106 of the National Historic Preservation Act occurs if there's federal money, permitting or federal involvement of any kind in the project.

In both of these, you, being the ones with a project, are the "project proponent."

1) Courtesy Consultation=Voluntary Partnership

-In a courtesy situation:

- a) no federal involvement, therefore no legal requirement to consult
- b) project control remains with you the proponent
- c) tribes are equal to each other and to all other stakeholders unless you decide otherwise
- d) this is a mutually-beneficial, invited partnership

The Consultation Process:

- When to bring in the Tribes---early! They will be with you throughout the process as your partners in planning
- Beginning: consultation and then negotiation
- During: monitoring
- After: check compliance, celebration

Federally-recognized and State-recognized Tribes:

- There are 2 types of tribes:
- Federally-recognized
- State-recognized

The differences will become important in a required consultation, but for a courtesy one you can treat them the same----although you should be aware there are lots of internal politics. Key: be up front with all parties as to who is involved; make your process transparent to all partners.

- Who's going to represent the tribes at the table?

Tribes designate their own representatives called (in the case of federal tribes) the Tribal Historic Preservation Officer (THPO), or (in the case of state tribes) the Cultural Preservation Officer (CPO). If a tribe has neither of these, they may still designate a knowledgeable person to work with you who has all the rights of this official position.

Skills, knowledge, and goals of Tribal representatives vary from tribe to tribe and from individual representative to representative. This will affect your project. The important thing to remember is that the THPO(s) or CPO(s) has the final word on TCP.

- Side note: Non-official representation (tribally-affiliated)

State and Federal Tribes decide who represents them. A self-described tribally-affiliated person is not the same as a Tribal consultant---Individuals claiming tribal heritage cannot represent or replace tribes unless the Tribes say so; they can be involved at the stakeholder level as interested parties, not tribal reps. Groups claiming to be "tribal" but that have no state or federal recognition may act at the stakeholder level if desired by both parties, but again, they cannot act for the tribes unless the tribes sanction it.

~Legitimate groups/people will not want to usurp the place of Tribes.~

- outcome of a courtesy consultation is to identify and then protect TCP. Both these steps should be done with the Tribes. If graves or grave goods are found: Bones: call the coroner, the SHPO (state historic preservation officer), and the Tribes. Grave goods: call the Tribes and the SHPO. (see Native American Graves Repatriation Act---NAGPRA)

2) Required consult (sometimes called 106 because it is required under section 106 of the National Historic Preservation Act as amended, a federal law. Note that it has since moved to a different section of the law but it's still called by it's old position, 106).

-It is triggered if there is any federal involvement---financing, grants, permits.

-The requirement is that the federal Tribes are invited to consult (they may turn you down or they may accept).

-Because the Federal Tribes are Nations, they deal on a government-to-government basis with the US federal government in the form of whatever agency is involved (via funding or permit).

While a 106 consult is more involved if the Tribes accept your invitation to consult, the goal of the consultation is the same: to identify and then protect TCP.

-who consults? A 106 consultation:

a) must invite federal tribes to participate. Only a federal tribe fulfills the 106 obligation. They may or may not decide to be involved, but you must ask them to be.

b) must include any federal tribe that wishes to participate (currently "local" or not).

c) must include anyone else who wants to participate, including state tribes, but they have fewer rights to consultation as "stakeholders".

- In a 106 consult, the responsibility and to some degree control over the process of Tribal Consultation moves from you (the project proponent) to the Federal government. This is because federal tribes have a government-to-government relationship with the USA. This is a hard-won status, and so they will sometimes refuse to talk to anyone below that level including you. So while you remain the project proponents, the requirement to invite and fulfill tribal consultation on your project falls to the federal agency involved.

The federal agency responsible for the consult is whichever one is involved; they all have problems fulfilling this role and they may try, but they can't, delegate this responsibility to you. The federal agency is required to invite tribal participation and to manage the consultation. You may contact the tribes, but as sovereign nations, they are not required to respond to anyone but the feds in their privileged government-to-government status.

The exception to this is if the tribes allow you to help, and on small projects, they may very well prefer to deal with you directly. This is likely to be the best route if the tribes allow it. So, you can help if the tribes let you help, and in reality, you will most likely be managing the consult for the feds.

- What does a 106 consult look like? Usually, it looks like official federal agencies used to dealing with energy project proponents, scrambling to cover their butts and catch up

because they didn't realize or didn't want to realize what they're required to do by law. Land trusts can do better if we start by realizing our relationship is built on respect.

The official work is called a TCP study, which outlines exactly how you'll be looking for TCP, and what will happen with it once you find it. A good TCP study:

- is based on historic research
- identifies traditional cultural properties
- is allowed to expand the area being studied beyond its boundaries if necessary
- includes Native Americans negotiating for the protection of and access to their TCP, and they should be able to charge for their services.

- Despite their differences, the outcomes of a 106 consult should be the same as a courtesy consultation: to invite the Tribes to have an opportunity to identify and protect the TCP. But there's another step in a 106---if the project proponents and Tribes disagree about what is TCP, they then refer to a separate body, known as the National Register Advisory Council, to determine if it's on or eligible for the national register. The National Register is a list of properties at the federal level that have been determined to be of historic/cultural value. It's not a complete list, so there's a neat quirk about it---if something is determined to be "eligible for" the register, even if it's not on it, it gets the same status as something on it. The bad news is that that status does not protect it. TCP determined to be on or eligible to be on may still be destroyed, but only after meaningful consultation with the Tribes and all stakeholders, and justification.

So, this whole process does not protect TCP. What protects TCP is what you all agree to in the end. Your consensus plan for how to go forward is the only thing that can protect TCP. This is a very great responsibility that I know you take seriously.

- Main points of a 106 required consultation.
 - 1 fed involvement is what triggers a 106 instead of a courtesy consult
 - 2 some feds agencies are OK at this (none are good at it) and most are clueless
 - 3 only federal tribes participate in 106 consultations as government to government
 - 4 state tribes are considered stakeholders and separately participate
 - 5 outcomes include identifying and protecting TCP, and sometimes involve National Register determination

- keep in mind the purpose: you're working together to protect something that matters
- Tribal involvement means partnership
- timing is important---work with Tribes from the beginning
- budget for Tribal involvement

Questions to contemplate:

What could working with the Tribes bring to the work we/I do?

What could I offer the Tribes?

How can I invite the Tribes into our work and make that work a true partnership?
(individual and organization-wide levels)

Selected Glossary

106: Refers to Section 106 of the National Historic Preservation Act; the section that requires consultation with federally-recognized Tribes if there is any federal involvement in a project. I use "106" and "required" to mean the same thing when referring to a Tribal consultation. Note: the act has been renumbered, but we still use this old term. For more see "Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties" of the National Register by Patricia L. Parker and Thomas F. King

Courtesy Consultation: A voluntary Tribal consultation; meaning, you are inviting Tribal participation even though you are not compelled to do so under federal law. Much more relaxed than a 106 consult.

CPO: (pronounced "sip-oh"): Cultural Preservation Officer; official representative of a state-recognized Tribe who has responsibility for identifying TCP. Any Tribally-determined representative can fill this role.

Federal: The national-level government of the United States of America. Tribal governments are also Federal, but in this handout The Feds refers to the USA. In terms of Tribal recognition, federal recognition means they have agreed to, and fulfill, the terms the federal government has determined make up a Tribe.

National Register: A list of historic properties that have been determined by an advisory council to be of importance. Being on or eligible for the NR gives a property the same status. This status does not protect the property but forces a project proponent to explain why it is less important than their project if it must be destroyed, and allows the tribes a chance to meaningfully negotiate for its protection.

Required Consultation: (see 106 above)

Stakeholder: Someone or some group effected by your project---someone with a stake in its outcome. In terms of the Tribes, a Federally-recognized Tribe has a government-to-government relationship with the US federal government that puts them on a level above stakeholder on required consultations, with everyone else (including state-recognized Tribes) being on the stakeholder level. In a required consultation you must include all stakeholders in your discussions, while federally-recognized Tribes get even more consultation rights. On courtesy consultations everyone (federal and state Tribes included) is on the same "stakeholder" level, and there is no requirement for you to invite any of them.

State: The state level of government of the USA. In terms of Tribal recognition, state-level recognition is an official status, but does not extend beyond the boundaries of the USA state, even if the traditional boundaries or current activities of the Tribe do extend beyond it. State tribes, like federal tribes, should be allowed to consult wherever they acknowledge as an area of interest to their culture regardless of current state lines.

SHPO: (pronounced "ship-oh"): State Historic Preservation Officer. Represents the state-level Historical Commission. Cannot replace tribal consultation.

THPO: (pronounced "tip-oh"): Tribal Historic Preservation Officer; official representative of a federally-recognized Tribe who has responsibility for identifying TCP. Usually this is an official position; however, any Tribally-determined representative can fill this role.

TCP: Traditional Cultural Property; something of significance to a culture

TCP Study: an official study of the TCP affected by a project, and a plan for how/if to protect it at the time of construction and going forward

Voluntary Consultation: (see Courtesy consultation above)

Resources:

Required consultation information:

Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties" of the National Register by Patricia L. Parker and Thomas F. King
<https://www.nps.gov/nr/publications/bulletins/nrb38/>

<https://www.achp.gov/digital-library-section-106-landing/section-106-archaeology-guidance>

How to find a federal Tribe:

https://grantsdev.cr.nps.gov/THPO_Review/index.cfm

<https://www.bia.gov/tribal-leaders-directory>

<http://www.usetinc.org/about-uset/member-tribes/>

How to find a state Tribe:

<http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx>

Massachusetts: Nipmuc Nation (note this is 1 of 2 Nipmuc bands; only 1 band has state recognition)

Vermont: Abenaki (various bands all with state recognition)

Information, case studies, deep thinking on land trusts and Indigenous People working together:

So many great essays by Peter Forbes:

<https://peterforbes.org/writing>

Grossman, Z. 2017. Unlikely Alliances University of Washington Press (especially the last chapter)

Related Info:

Energy Sprawl:

<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0162269>

Need to preserve data and where it goes:

https://theconversation.com/americas-archaeology-data-keeps-disappearing-even-though-the-law-says-the-government-is-supposed-to-preserve-it-104674?utm_source=facebook&utm_medium=facebookbutton

Tribal Contact Information
Massachusetts Land Trust Conference 2019

See resources in lecture notes for websites to search for more general Tribal contact information. Compiled (with permission of people listed) by Lisa McLoughlin Lisa@hemlockhouse.net. Do not post this information publicly.

State-recognized Tribe:

Abenaki (Elnu band), state-recognized in VT, but they have a present and historical interest in what is now known as Massachusetts, and have already begun thinking outside the box on land issues. Contact: Rich Holschuh, rich.holschuh@gmail.com, 1-802-258-8925

Federally-recognized Tribes:

Doug Harris, Preservationist for Ceremonial Landscapes, contact person for the United South and Eastern Tribes and for the Tribal Historic Preservation Offices of the Narragansett, Western Pequot, Mohegan, and Wampanoag of Gayhead-Aquinnah. dhnithpo@gmail.com, 1-413-325-7691

2019 Presentations: Indigenous Ceremonial Stone Landscape Protection (with municipal Historical Commissions)
 Doug Harris, Deputy Tribal Historic Preservation Officer, Narragansett Indian Tribal Historic Preservation Office
 It is OK to post this page (only) publicly; for more information: Emily Volz; egvolz@gmail.com

TOWN	DATE	TIME	VENUE
Woodstock, NY	March 16th	5:00-7:00pm	Woodstock Community Center 56 Rock City Rd., Woodstock, NY
Littleton / Acton, MA	May 9th	6:30pm refreshments 7:00-9:00pm	Discovery Museum 117 Main St., Acton, MA
Hopkinton, MA	May 11th	1:00-3:00pm	Hopkinton Public Library 13 Main St., Hopkinton, MA
Berlin, MA	May 17th	7:00-9:00pm	19 Carter 19 Carter St., Berlin, MA
Upton, MA	May 19th	2:00-3:00pm	Nipmuc Regional High School 90 Pleasant St., Upton, MA
Northfield, MA	June 9th	2:00-4:00pm	Dickinson Memorial Library 115 Main St., Northfield, MA
Harvard, MA	June 18th	6:30-8:30pm	Harvard Public Library 4 Pond Rd., Harvard, MA
Chicopee, MA	TBD		