



NORTHWEST FOREST PLAN

THE FIRST 15 YEARS (1994–2008)

Effectiveness of the Federal-Tribal Relationship

Oregon/Washington report prepared by:
The Resource Innovation Group and the Institute for a Sustainable
Environment, University of Oregon

California report prepared by:
Kathy Lynn, Katie MacKendrick, and Hannah Satein

Overall Report Compiled by:
Gary R. Harris, Northwest Forest Plan, Tribal Monitoring Lead



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Preface

This monitoring report documents the effects of implementation of the Northwest Forest Plan (the Plan) on the relationship between Federally-Recognized American Indian Tribes and federal land management agencies within the range of the northern spotted owl. The planning period covered in this report is 2004-2008.

The monitoring protocol for this planning period was developed by the Tribal Monitoring Advisory Group (TMAG) after publication of “Northwest Forest Plan – The First 10 years (1994-2003) Effectiveness of the Federal-Tribal Relationship” (R6-RPM-TP-02-2006) in 2006.

The protocol was implemented and reports were prepared under federal contracts; one for Oregon and Washington (The Resource Innovation Group and the Institute for a Sustainable Environment, University of Oregon) and another for Northern California (the Intertribal Timber Council and the California Indian Forestry and Fire Management Council).

These reports are presented in their entirety as received from the contractors. The Oregon/Washington report is offered first and includes the executive summary, which includes findings and recommendations for OR, WA, and CA monitoring reports.

Strengthening the Federal-Tribal Relationship: A Report on Monitoring Consultation under the Northwest Forest Plan in Oregon and Washington

Prepared for:

Prepared for: Tribal Relations Office of the
USDA Forest Service Region 6
and the
US Department of Interior Bureau of Land Management
Oregon and Washington

Prepared by:

The Resource Innovation Group and the Institute for a Sustainable
Environment, University of Oregon
5247 University of Oregon
Eugene, Oregon 97403
<http://sustainable.uoregon.edu>

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- Gary Harris, USDA Forest Service Region 6 Tribal Relations Office
- Don Motanic, Intertribal Timber Council
- George Smith, Executive Director, Coquille Indian Tribe
- Sonia Tamez, USDA Forest Service Region 5 Tribal Relations Office (retired)
- Merv George, USDA Forest Service Region 5 Tribal Relations Office/
California Indian Fire Forestry Management Council

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I. Executive Summary: Oregon, Washington, and California

Under the 1994 Northwest Forest Plan (the NWFP), agencies that manage federal land within the range of the northern spotted owl are to monitor the effects of implementation of the Northwest Forest Plan's standards and guidelines. One element of monitoring, identified in the Record of Decision (ROD) for the Plan, is "American Indians and Their Culture." Key issues addressed in the initial monitoring effort include conditions and trends of the trust resources¹ identified in treaties with American Indians;

- effectiveness of the coordination or liaison to ensure adequate protection of religious or cultural heritage sites; and
- Adequacy of access by American Indians to forest species, resources, and places important for cultural, subsistence, or economic reasons, particularly those identified in treaties.

Effectiveness monitoring under the Plan is to take place at ten-year intervals. The monitoring for the first ten-year period was completed in 2003, and the results were published in 2006 as "Northwest Forest Plan – The First 10 years (1994-2003) Effectiveness of the Federal-Tribal Relationship" (R6-RPM-TP-02-2006). This initial monitoring report presented the views of fifteen tribes in the area covered by the Northwest Forest Plan. A Tribal Monitoring Advisory Group (TMAG) was subsequently chartered under the proviso of the Interagency Advisory Council to develop recommendations to improve the protocol and techniques used to monitor the federal-tribal relationship and obtain broader tribal participation.

Context for Consultation

In November 2000, then-President Clinton signed Executive Order 13175² to accomplish three objectives:

- Establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

- Strengthen the U.S. government-to-government relationships with Indian tribes.
- Reduce the imposition of unfunded mandates on Indian tribes.

The Executive Order states,

"Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

Numerous agencies and tribes have clearly defined processes for consultation, and yet there is still a lack of knowledge and/or shared understanding about what constitutes *meaningful* consultation. This report examines the state of consultation under the Northwest Forest Plan (NWFP) through twenty-two interviews with tribes and five in-depth case studies focused on consultation experiences within the Northwest Forest Plan area in Oregon and Washington.³ The findings from this study, described in the full report, have resulted in a series of recommendations intended to strengthen the federal-tribal relationship within the context of the Northwest Forest Plan and beyond.

The lessons learned from consultation under the Northwest Forest Plan can build greater understanding of meaningful consultation between tribes and federal agencies in all natural resource management issues. They can also foster consultation in issues such as health and human services, housing, transportation, economic development, and climate change. With a new administration in Washington D.C. every 4 to 8 years, and the potential for significant changes in federal and regional policy, there must be policies in place to ensure the federal-tribal relationship continues to be monitored.

The NWFP's monitoring process has provided a model for examining the challenges and accomplishments of federal-tribal relationships and measuring success in government-to-government consultation. This model could be extended to monitor federal-tribal relationships throughout the country. For this to occur, future legislative and federal programs, should include provisions for tribal

¹See definition of trust resources from the Northwest Forest Plan Record of Decision on page 15 of this report.

²Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments Federal Register: Nov. 9, 2000 (Volume 65, Number 218)]

³A parallel study in region 5, which is scheduled to be completed in December 2009, is currently underway and includes interviews with tribes in California that are within the Northwest Forest Plan area.

monitoring similar to the NWFP monitoring process. New plans, plan revisions, and legislative proposals with potential to replace the NWFP must include a process for tribal monitoring.

It is important to acknowledge that monitoring relationships between tribes and federal agencies yields sensitive information. Yet, for all of the challenges that tribes shared during this study about the current state of consultation, many indicated a strong desire for meaningful consultation and partnerships in the future.

Following the recommendations, the full report presents findings from interviews with twenty-two tribes in Oregon and Washington within the range of the northern spotted owl, and five case studies that feature both challenges and successes in consultation. The report also highlights the outcomes of consultation regarding access to cultural resources and protection of tribal rights and interests under the Northwest Forest Plan

Recommendations

Through the 15 year NWFP tribal monitoring process, a series of recommendations for strengthening the federal-tribal relationship arose. The recommendations apply to federal agency staff at local, district, regional, and national offices that interact with tribes under the Northwest Forest Plan. They also apply to broader natural resource management issues. Federal agencies in this position include the USDA Forest Service, Department of Interior agencies (including the Bureau of Land Management, Bureau of Indian Affairs, and U.S. Fish and Wildlife Service), National Oceanic and Atmospheric Administration Fisheries, the Environmental Protection Agency, US Army Corps of Engineers, and the Department of Justice. The recommendations apply also to tribes and tribal organizations and associations interested in strengthening federal-tribal relationships.

The recommendations are organized into three areas.

1. Define and engage in meaningful consultation.
2. Institute measures for accountability within consultation protocols at tribal, national, and district/local levels.

3. Integrate consultation protocols into federal, state, and regional policies and programs.

1. Define and engage in meaningful consultation

Through the NWFP monitoring process, a set of recommendations was established to strengthen consultation by addressing the timing and substance of consultation and the leadership involved. Federal agencies have a trust responsibility that guides and limits the federal government in dealing with Indian tribes. It requires agencies to consult with tribes on decisions that relate to or affect the sovereignty, rights, resources, or lands of Indian tribes. Because consultation needs may differ significantly between tribes, the most important consideration is to engage tribal leadership in defining a consultation process. Negotiation about the consultation process in deference to tribal sovereignty is critical in meaningful consultation.

1.1 Clarify the purpose of consultation between the tribe and agency.

The federal government has a fiduciary responsibility to engage in consultation with Indian tribes. However, through consultation there is significant opportunity for benefits to come from shared understanding and coordinated management. Therefore, it is important for both parties to identify objectives and goals for consultation and discuss those goals along with proposed plans and actions. Government-to-government consultation is a process separate from general public involvement. Although it does not guarantee that tribal input will change a project, it permits tribes and federal agencies to clarify their expectations jointly about proposed plans, actions, and intended outcomes.

At a minimum, consultation should ensure that the interests of the tribe are heard, articulate how tribal concepts and information generated in consultation are utilized, and provide feedback to the tribe on how tribal input is utilized throughout a project, as decisions are made and actions move forward. At a maximum, consultation can pave the way for mutually beneficial management

strategies that help tribes and agencies meet their objectives for land management and protection of natural and cultural resources.

1.2 Involve all levels of leadership and staff in consultation.

When consultation occurs, tribes expect the highest level of leadership within the agency to engage with the highest level of leadership within the tribe. At the same time, tribal and agency staff with experience and knowledge about the issues and relationships must also be intimately engaged in the consultation process. The expectations of both parties are important. If tribes expect the appropriate decision maker to be involved in consultation, federal agencies must understand that expectation and structure consultation accordingly. If the appropriate decision maker is not among the highest level of leadership, the highest level of leadership should be available and willing to consult with the tribe in case the tribe believes lower levels of leadership are not giving sufficient weight to tribal input. Structuring the consultation process appropriately is vital to ensuring that consultation addresses conflicting viewpoints during the initial phase of project planning and therefore avoids litigation. The exclusion of tribal or agency leadership or staff may jeopardize the consultation process.

1.3 Engage tribes in consultation in all phases of project identification, planning, development, implementation, and monitoring.

When tribes are notified of federal action and given opportunity for input, one level of consultation occurs. However, meaningful consultation occurs only when agencies engage with tribes much earlier in the process, even to the point of giving them an opportunity to guide where and how projects occur. By engaging tribes in all phases of a planning and project development, there is a greater opportunity to meet tribal interests and protect cultural resources.

1.4 Increase capacity of agency staff at the district, regional, and national levels, including technical staff and leadership, to engage in consultation.

For consultation to be effective and meaningful, tribes and federal agency staff at all levels must understand the federal trust responsibility and the consultation process. Training, including joint trainings between tribes and agency staff, provide opportunities to gain this understanding. Training can ensure that federal agencies working with tribes meet their trust responsibility and foster productive and mutually beneficial relationships with tribes. Policy guidance within agencies should also include protocols for when training should occur, particularly as a mechanism for addressing staff turnover. With education about what consultation is and how it should occur, training could include:

why all levels of agency (and tribal) staff and leadership should engage in consultation;

- how general notification is different than consultation;
- why opportunities for intercultural dialogue are important for agencies to understand what they are hearing from tribes; and
- how to create a transition period when there is staff turnover to ensure that new staff members are adequately trained and relationships can be maintained.

1.5 Increase the use of Memorandums of Agreement.

Memorandums of agreement (MOA) help to formalize consultation protocols and provide agencies and tribes an opportunity to build a shared agreement of the needs and objectives of consultation. Whereas a memorandum of understanding (MOU) illustrates shared understanding, a MOA goes further to ensure that action is taken to honor the steps and purpose of consultation, and, in some cases, involves funding. Specifically, MOAs can increase knowledge and awareness among agency staff and tribes about the value of formal protocols and MOUs by providing examples and best practices. Having a formal MOA in place permits the outcomes from the agreement to be monitored.

1.6 Re-establish Provincial Advisory Committees within the Context of the Northwest Forest Plan and Establish Oversight Committees that include Tribal Representation in Future Initiatives.

Within the context of the Northwest Forest Plan, provincial advisory committees (PAC) provided an opportunity for agency executives and tribes to meet frequently and discuss land management plans. As PACs across the NWFP area lost funding, this critical relationship and opportunity for consultation between the highest levels of leadership were lost. Within the NWFP, re-establishment of these PACs would help strengthen consultation between tribes and federal agencies. When state, regional, or national initiatives, such as the NWFP, are put into place, in addition to tribal monitoring provisions, oversight committees with tribal representation should be established to ensure that a high level of consultation continues to occur.

Intended Outcomes

In the context of the Northwest Forest Plan and broader natural resource management policies, meaningful consultation is intended to increase and protect access to cultural and natural resources and forest areas and to improve resource management and decrease negative effects on tribal rights and interests. Other outcomes that could occur with more meaningful consultation under the NWFP include:

- Better representation of tribal interests and use of tribal information (and traditional knowledge) and protection of cultural resources in agency management plans:
 - Consultation resulting in consideration of tribal input and meaningful action
 - Use of tribal traditional knowledge and tribal information in project planning, decision making, and implementation to shape plans, decisions, and actions
 - Monitoring how well agencies' plans and decisions reflect tribal values and needs
- Increased protection of cultural resources

- Opportunities to address land allocations within the NWFP and access to land/resources:
 - Restrictions that limit tribal access to cultural resources; inadequate protection of tribal rights; staff level conflicts; road decommissioning; Endangered Species Act conflicts; and other issues resulting from land management restrictions
 - Land/resource access, including water and timber resources, cultural resources, hunting, and tribal resource management.

Meaningful consultation can also address conflicts over land management and develop a protocol for managing for cultural resources under the Northwest Forest Plan. Conflicts can arise from NWFP land designations, such as Late Successional Reserves and Riparian Reserves. These land designations can exclude tribes from cultural and subsistence resources and alter wildlife habitat, such as grazing areas or plant habitat through fire suppression. In some instances, tribes are left with only one option to ameliorate conflicts: lawsuits. An alternative approach or protocol needs to be developed so that tribes can access resources of interest on tribal-ceded lands currently managed by federal agencies and federal agencies can follow land management plans.

2. Institute measures for accountability

To ensure that consultation occurs, it is important to institute measures for accountability within consultation protocols at tribal, national, and district/local levels.

2.1. Incorporate Tribal Monitoring Protocols into New Management Plans and Plan Revisions.

Tribal monitoring should be incorporated at all levels - from policy to management - to maintain and strengthen government-to-government relations. Tribal monitoring should be incorporated into new management plans and plan revisions. For relationships that have been built through the Northwest Forest Plan, Section 7 – Consultation to continue and grow in the future, tribal monitoring should be incorporated into future policy and management in the

Pacific Northwest and across the nation. In addition, new management plans at district or regional levels, such as the Western Oregon Plan Revisions, should include protocols for tribal monitoring.

2.2. Establish strategies for monitoring and creating accountability for agencies to engage in consultation.

Using the NWFP monitoring process or an improved process, continue monitoring government-to-government relationships. The current time frame for monitoring is ten years. Recalling the frequency and substance of consultation experiences over a ten-year period can be challenging. In the future, the monitoring process should incorporate questions that focus on shorter time periods (e.g., two to three years) to gain a better understanding of how often tribes are consulted, what happens, and when with the information that is generated during consultation.

Beyond the NWFP, monitoring federal tribal relationships should be a part of all agency management strategies. Specific areas of focus for this kind of monitoring could include:

- *Ask tribes how consultation is working.* Develop a framework, such as a formal agreement to meet at least annually, to sit down and talk together.
- *Ask federal agencies how consultation is working.* Consultation is a part of federal agency staff performance plans and thus should be made a priority. Federal agency staff should also have the opportunity to discuss consultation.
- *Develop criteria and performance measures for monitoring agency consultation, project implementation, and effectiveness (based on outcomes from consultation).*
- *Monitoring criteria can create accountability for federal agencies to engage in consultation. Performance measures related to consultation and monitoring can also ensure that agencies can institutionalize mechanisms for accountability.*

3. Integrate consultation protocols into federal, state, and regional policies and programs

3.1 Build capacity for tribal and agency staff to dedicate time to consultation and government-to-government relationships.

One of the greatest needs for tribes and agencies alike is increased capacity to engage in consultation. Tribes and agencies are experiencing budget shortfalls that limit staff availability to participate meaningfully in consultation. However, if agency and tribal leadership recognize the importance of consultation, it may be easier to justify staff resources for consultation.

3.2 In legislative proposals at the national level, consider tribal needs and opportunities for consultations.

Within the new administration and Congress and with the current economic crisis, there are critical windows of opportunity to ensure that new pieces of legislation consider tribal needs, interests, and the role of consultation. Currently, the economic stimulus package and legislation about “green” jobs hold potential and interest for tribes. Climate change legislation will also have an impact on (and provide opportunity for) tribes.

3.3 Consider tribal needs and opportunities for consultation when revising plans and creating new plans within the Northwest Forest Plan area.

Tribal monitoring must be included in legislative actions and federal plans, particularly those that might build on or replace the Northwest Forest Plan (such as the Western Oregon Plan Revisions or new legislative proposals).

3.4 Re-establish funding for the Jobs in the Woods program.

Future federal agency plans and plan revisions must include funding for tribal restoration projects and jobs. The Jobs in the Woods program under the Northwest Forest Plan provided an opportunity for tribes to engage in vital assessment and stream restoration projects, develop

partnerships with private landowners and federal and state agencies, and learn technical restoration skills. To maintain ecosystem health and ecosystem services, funding is needed for programs that will assist tribes and federal agencies in taking action to restore existing ecosystems and manage restoration efforts into the future.

II. Introduction: Oregon and Washington Report

Under the 1994 Northwest Forest Plan (NWFP), agencies managing federal land within the range of the northern spotted owl are to monitor the effects of implementation of the NWFP's Standards and Guidelines. One element of monitoring identified in the Record of Decision (ROD) for the Plan is "American Indians and Their Culture." Key issues addressed in the initial monitoring effort included:

- conditions and trends of the trust resources identified in treaties with American Indians;
- effectiveness of the coordination or liaison to ensure adequate protection of religious or cultural heritage sites; and
- adequacy of access by American Indians of forest species, resources, and places important for cultural, subsistence, or economic reasons, particularly those identified in treaties.

Effectiveness monitoring under the Northwest Forest Plan (the Plan) is stated to take place at ten-year intervals. The monitoring for the first ten-year period was completed in 2003 and the results were published in 2006 as: "Northwest Forest Plan – The First 10 years (1994-2003) Effectiveness of the Federal-Tribal Relationship" (R6-RPM-TP-02-2006). In this initial monitoring report, the views of fifteen tribes in the area covered by the Northwest Forest Plan were presented. A Tribal Monitoring Advisory Group (TMAG) was subsequently chartered under the proviso of the Interagency Advisory Council to develop recommendations to improve the protocol and techniques used to monitor the federal-tribal relationship and obtain broader tribal participation.

For the second round of monitoring, the TMAG devised an approach to provide an opportunity for all seventy-six, federally recognized tribes with interests in the federally managed land within the Plan area to participate in an interview to provide insight and perspectives about consultation under the Northwest Forest Plan. The TMAG worked collectively to develop a survey instrument that reflected lessons learned from the initial monitoring effort and focused on the consultation process, outcomes, and recommendations from the tribes on how to strengthen

government-to-government relationships.⁴ Region 6 of the USDA Forest Service contracted with Resource Innovations at the University of Oregon to conduct interviews with all tribes within the Northwest Forest Plan area in Oregon and Washington. Region 5 of the USDA Forest Service contracted with the Intertribal Timber Council and the California Indian Forestry and Fire Management Council to coordinate interviews with tribes in the Northwest Forest Plan area in California.

Findings from this monitoring effort will be used to report key aspects of federal-tribal relationships within the Northwest Forest Plan. However, findings, lessons learned, and recommendations can be shared much more broadly in a policy context to strengthen government-to-government relationships that extend well beyond the Northwest Forest Plan.

Key Findings from the Initial Monitoring Report

In 2006, the USDA Forest Service published a report on the Effectiveness of the Federal-Tribal Relationship as part of a series of reports on the Northwest Forest Plan.⁵ The original monitoring effort that studied the effectiveness of federal-tribal relationships was conducted for the period from 1994 to 2003. The report summarizes the results of a monitoring program designed to evaluate the effects on federal-tribal relationships of the implementation of the Northwest Forest Plan. The report includes perspectives from fifteen of the seventy-six, federally recognized tribes within the Northwest Forest Plan area that agreed to participate in interviews for the monitoring project. The report also includes key findings and recommendations from a forum of tribal leaders that was held in April 2005.

The initial set of interviews consisted of fourteen questions used in formal, face-to-face consultations between tribal government representatives and federal agency officials to collect monitoring information. Key topics addressed in the questions included the conditions

⁴See Appendix A for a full list of survey questions and the letter sent by the Forest Supervisor and District Manager to all tribal chairpersons within the Northwest Forest Plan area in Regions 5 and 6.

⁵Technical Paper R6-RPM-TP-02-2006

and trends of resources protected by treaty or of interest to American Indian tribes and access to those resources; the condition of and access to sites of religious and cultural heritage; and the quality of the government-to-government relationship.

Key findings from the interviews included:

- Some tribes felt that the condition of aquatic and riparian habitats, fisheries, and forest health had improved under the Plan.
- Cooperative relationships between federal and tribal leaders are more productive under the Plan, partnerships have been formed to implement projects on the ground, and some tribal resource needs have been accommodated.
- Tribes prefer “layered” consultations that combine informal staff contact with formal government-to-government consultation. The tribes felt that the planning process sometimes slows management of trust resources and resources of interest on the ground.

Key findings and recommendations from the 2005 forum of tribal leaders included:

- Tribal leaders recommended that the federal agencies should not confuse the popular word “collaboration” with consultation.
- Although tribes and tribal representatives provided information through the consultation process, tribal leaders believed that the advice and recommendations gathered by the federal agencies had, at times, disappeared without a response.
- The continual federal and tribal leader turnover within the NWFP area creates a difficult consultation and relationship-building environment. The representatives at this meeting felt there should be an ongoing orientation process for both federal and tribal leaders.

It is important to reflect on these key findings and others in the 2006 report as the changes in the federal-tribal relationship during the last five years since the initial

monitoring took place are examined. Findings between the two periods of monitoring will be compared in the conclusion and recommendations section of this report.

Oregon & Washington Methods

In both Regions, the Forest Service and Bureau of Land Management (BLM) sent a joint letter to the chairpersons of all tribes within the Northwest Forest Plan area to invite them to participate in the interviews and introduce the respective contractors. In Region 6, Resource Innovations followed up with phone calls to each tribe that wanted to participate. In most cases, these calls were made to the natural resource director or coordinator for the tribe. Sources used to identify the appropriate contact included recommendations by the TMAG and Intertribal Timber Council, as well as listings in the *2008 Washington State Tribal Directory and the 2007 Indian Forestry & Natural Resources National Directory* (published by the Bureau of Indian Affairs and the Intertribal Timber Council).

Interview questions

After the initial monitoring had been conducted, the Tribal Monitoring Group refined and developed eleven questions to focus on the following areas:

- consultation process, outcome, and tracking
- access and protection
- affect on tribal values of interest (cultural, social, and economic)
- strengthening federal-tribal relations

A list of the questions used in the monitoring can be found in Appendix B.

Confidentiality and Informed Consent

Each tribe participating in the monitoring effort was notified of confidentiality issues. The information collected during the interviews has been synthesized into the published report. In the report, no information is attributed to a specific person or tribe. However, because the interview notes and key code are part of the record of the monitoring process and will be considered property of the federal government, all interview participants were informed that confidentiality cannot be fully protected under the law.

Tribal Interviews

There are thirty-four, federally recognized tribes in Region 6 (Oregon and Washington) within the Northwest Forest Plan area. Twenty-seven of these tribes are in Washington, and seven are in Oregon. Of these thirty-four tribes, Resource Innovations interviewed twenty-one individuals representing twenty-two tribes.⁶

Oregon and Washington Case Studies

As part of the effort to monitor government-to-government relationships under the Northwest Forest Plan, Resource Innovations conducted five case studies that expand on the information and findings from the tribal monitoring interviews. There is a need to hear from tribes about their experiences and perspectives on how their rights and interests have been affected during plan implementation. The case studies explore in more detail the types of consultation processes that have occurred under the Northwest Forest Plan, barriers and limitations to consultation, successes, and lessons learned to inform policy development and implementation.

Case studies can assist tribes and agencies in understanding local conditions and the outcomes from a given process, such as NWFP implementation. They also provide best practices from which others may learn or replicate in their own communities or among their own agencies. The five case studies featured in this report are:

1. Coquille Indian Tribe: consultation process (communication, relationships, and trust)
2. Quileute Indian Tribe: consultation challenges (supporting staff transitions and developing common understanding of treaty reserved rights)
3. Quinault Indian Nation: consultation and Northwest Forest Plan outcomes (effects on natural resource management, revenue, and access to cultural resources)
4. Upper Skagit Indian Tribe: consultation outcomes (developing consultation beyond

project notifications to find balance between resource protection, forest management, and tribal access)

5. Formalizing Consultation Protocols: providing the foundation for consultation and long-term, cooperative government-to-government relationships.

Definitions

Consultation

Consultation is an accountable process to ensure meaningful and timely input by tribal officials into the development of regulatory policies that have tribal implications. Consultation is the active, affirmative process of (1) identifying and seeking input from appropriate tribal governing bodies, community groups, and individuals; (2) considering their interests as a necessary and integral part of the decision-making process; and (3) providing a feedback mechanism to share with tribes how tribal input has been used in the decision-making process. (EO 13175, 11/6/2000; HUD Consultation Policy)

Collaboration

Collaboration is a mutually beneficial and well-defined relationship entered into by two or more organizations to achieve common goals. The relationship includes a commitment to mutual relationships and goals; a jointly developed structure and shared responsibility; mutual authority and accountability for success; and sharing of resources and rewards. Communication channels are well defined and operate on many levels. Authority is determined by the collaborative structure. (Massetich, Murray-Close and Monsey 2001)

Coordination

Coordination involves somewhat formal relationships, with some planning, division of roles, and understanding of compatible missions. Formal channels of communication are established. Individual organizations retain authority but share, to an extent, risk, resources, and rewards. (Massetich, Murray-Close and Monsey 2001)

⁶One interviewee is the natural resource staff person for two separate tribes; he was directed by both tribes to participate in the interview on behalf of both tribes.

Cooperation

Cooperation is an informal relationship without a commonly defined mission, structure, or planning effort. Information is shared as needed, and authority is retained by each organization. Risks, resources, and rewards are not shared. (Massetich, Murray-Close and Monsey 2001)

Consultation at the Federal Level

President Clinton's Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," requires each federal agency to have an accountable process to ensure meaningful and timely input by tribal officials into the development of regulatory policies that have tribal implications.

Federal agency action shall be guided by the principles of respect for Indian self-government and sovereignty, tribal treaties and other rights and responsibilities that arise from the special trust relationship between the federal government and Indian tribes. Federal action shall also favor maximum tribal participation and defer to the laws and policies established by Indian tribes to the extent permitted by law. Each federal agency has established a government-to-government consultation policy (see Forest Service policy below). Key aspects of federal consultation policy should include:

- notifying Indian tribes as soon as possible regarding formulated or proposed federal actions;
- informing Indian tribes of the potential impact of formulated or proposed federal actions;
- informing Indian tribes of those federal officials charged with making the final decisions with respect to the federal action;
- ensuring those federal officials are engaged and available for consultation directly with tribes;
- ensuring the input and recommendations of Indian tribes are fully considered by those officials responsible for the final decision; and
- providing Indian tribes with feedback regarding the adoption or rejection of tribal recommendations by those federal official involved in the decision-making process.

Forest Service Protocol for Consultation with Tribes – FSH 1509.13 (excerpt)

The following steps should be taken when coordinating consultation with tribes:

- The agency contacts the Tribal Government, preferably prior to scoping and public involvement, to advise the Tribe of a proposed policy, plan, or project that may affect tribal rights or interests;
- The Tribe may respond back that this is not an issue or that this proposal is important and would like to initiate consultation;
- The Tribe may request that Federal agency technical experts meet with the Tribe's technical representatives (or the Tribe may request an official level meeting);
- Issues are discussed in order for the agency to understand why the proposal is of concern to the Tribe. This allows the respective staff to brief respective parties and to provide informed opinions and recommendations;
- Consultation steps are defined and an agreement may be reached between the Tribe and the Forest Service on the process for consultation;
- The agency makes a decision in consultation with the Tribe.

Treaty Rights and Trust Resources (as described in the NWFP Record of Decision)⁷

This [record of] decision provides a higher level of protection for American Indian trust resources on public lands than the plans that it amends and does not impair or restrict the treaties or rights of tribes. However, subsequent implementation of standards and guidelines could directly affect American Indian practices and activities, e.g., a prohibition against the collection of certain plant material or trees in late successional reserves that are subject to tribal treaty off-reservation gathering rights. Under such circumstances, the exercise of these tribal treaty rights will not be restricted unless the Regional Interagency Ecosystem

⁷ Northwest Forest Plan Record of Decision. (April 1994). www.reo.gov/library/reports/newroda.pdf

Office determines that the restriction is (1) reasonable and necessary for preservation of the species at issue, (2) the conservation purpose of the restriction cannot be achieved solely by regulation of non-Indian activities, (3) the restriction is the least restrictive alternative available to achieve the required conservation purpose, (4) the restriction does not discriminate against Indian activities either as stated or as applied, and (5) voluntary tribal conservation measures are not adequate to achieve the necessary conservation purpose.

Future analysis and planning efforts to implement this decision on lands administered by the BLM and Forest Service will identify Indian trust resources that would be affected, and identify potential conflicts between proposed federal actions and treaty rights or tribal trust resources. Consultation with the recognized tribal government with jurisdiction over the trust property that the proposal may affect, the Bureau of Indian Affairs, and the Office of the Solicitor will be conducted early in the planning process. The consultation with affected tribes will occur on a government-to-government basis. Conflicts will be resolved collaboratively, and affected tribes will be involved in the planning process, consistent with the federal government's trust responsibilities.

III. Key Findings from the Tribal Interviews

There are thirty-four, federally recognized tribes in Region 6 (Oregon and Washington) within the Northwest Forest Plan area. Twenty-seven of these tribes are in Washington and seven are in Oregon. From these thirty-four tribes, Resource Innovations interviewed twenty-one individuals representing twenty-two tribes.⁸

During the introduction to the interview process, numerous tribes had comments or questions before beginning the interview. Four interviewees specifically stated that their tribe had had little or no experience with the Northwest Forest Plan (NWFP) and, as such, had concerns about participating in the interview. Several of those who indicated a lack of experience or knowledge of the NWFP suggested that they could talk about consultation with public agencies more broadly (outside of the NWFP). Throughout this report, comments about consultation that is outside of the Northwest Forest Plan are clearly pointed out.

Q.1. Adequacy of Consultation Protocols

Interview Question	Yes	No	Don't Know
1.a Have written consultation protocols been developed?	32%	50%	18%
1.b Are they adequate for government-to-government consultation?	32%	45%	23%

Of the twenty-two tribes interviewed, 50% indicated that written protocols had not been developed under the Northwest Forest Plan, and 18% were not sure if there were written protocols in place. Of the 32% of those interviewed who said there were protocols in place, all indicated that they were adequate for government-to-government consultation.

Successful approaches to consultation

Fourteen of twenty-two tribes interviewed had comments about the adequacy of consultation and the Northwest Forest Plan to identify potential effects on tribal rights, interests, and effects on tribal lands. Numerous tribes

interviewed provided examples of how consultation under the NWFP had been adequate and resulted in the protection and integration of tribal rights and interests and effects on tribal land from the NWFP. In describing the consultation process, one respondent said,

“If the federal government wants to consult with the tribe, they send a letter and then the tribe decides if they want to participate in a consultation. And then the tribe gauges if they have interest and then at what level those meetings should be at.”

- The value of formal protocols and MOUs

Common themes emerged in the interviews to illustrate what might make a stronger government-to-government relationship between a federal agency and a tribe. In general, tribes with consultation protocols in place indicated that the protocol had created a stronger government-to-government relationship. Four tribes specifically mentioned that existing memorandums of understanding with the federal agencies were critical to foster a strong government-to-government relationship.

“The government-to-government consultation process [outlined in an MOU that includes the NWFP] allows for collaboration between tribal staff and local agency staff. They try to keep it flexible and as little burden as possible.”

“The tribe has an MOU with the agency that talks about relationships between the governments and directs how the tribe coordinates with the agency on ceded lands. The tribe does make requests to have government-government consultation with the agency and tribal and agency biologists meet on a regular basis. There are also a lot of staff interactions and tribal council consultations, which often includes agency leadership.”

Another tribe specifically mentioned that its MOU helped the tribe to retain access to federal rights.

⁸One interviewee is the natural resource staff person for two separate tribes; he was directed by both tribes to participate in the interview on behalf of both tribes.

“The agency has continued the commitment to have quarterly meetings every year. The tribe has an MOU with the agency that helps with their communications and results in greater government-government relations. This is [important to the tribe because] they have an interest in retaining to access to agency lands.”

- **Increased involvement in consultation by agency leadership**

Several respondents cited strong leadership within the agency or an individual agency staff person committed to consultation as a reason for stronger government-to-government relationships. Other examples included funding within the agency that allowed for more frequent consultation and funding within the tribe that provided an opportunity for tribal staff to engage in meetings with the agency.

- **Increased engagement and participation by agency staff**

Respondents generally felt that consultation improved as the level of engagement among agency staff with the tribe increased. For example, respondents who had experienced consultations involving a district manager or forest supervisor indicated stronger levels of consultation. Several respondents mentioned that increased engagement and participation by agency staff generally had resulted in stronger consultation.

“Consultations have gone beyond formal protocol. Agency staff is actively participating in regional planning... [tribal staff] are members of a steering committee, which provides decision recommendations to the state director. On the ground, they have almost weekly interaction with the district manager and field staff... The MOU between the agency and the tribe describes a relationship of sharing information. For the most part, that works pretty well with the agency.”

Another respondent suggested that when tribal staff and agency staff interact frequently, consultation becomes

an effective ongoing process. Staff interaction can become an effective means of ongoing consultation with managers up to the state and regional levels.

In general, interviewees who stated that federal policies on consultation are adequate described strong relationships with the agencies, good communication processes, and established protocols. Specifically, these respondents indicated that notification or communication early in the project design phase that continued throughout planning and implementation is clearly different from general notification after project design has been completed and the agency is only seeking comments on proposed activities.

“They are adequate because of the relationships that exist between the tribal and federal governments. When the agency consults with the tribe, the agency provides the tribe with advance information about projects and activities.”

Barriers to successful consultation

Several of the tribes interviewed offered comments about how consultation under the Northwest Forest Plan has been inadequate. In general, respondents who indicated that consultation has been inadequate claimed that, although federal agencies often provided general notifications, they did not contact the tribe for formal consultation and did not have policies in place to ensure that formal consultation would take place.

- **Staff Turnover**

Numerous respondents described staff turnover as one of the biggest contributors to inadequate consultation.

“They run into trouble when there is agency staff turnover and someone new comes who is not familiar with the MOU or the existing relationship with tribe and agency. Sometimes it is a challenge to bring them up to speed.”

One tribe noted that, over time, relationships can improve, but only if there is a long-term commitment and transitions during staff turnover.

“Because the agency doesn’t do anything on reservation lands, and since the tribe has [treaty] rights, they are involved with more co-management activities. The relationship hasn’t always worked well but it has improved. They are constantly doing education work with the agency and that has gone a long ways in helping the relationships. However, not everyone is trained. This is problematic when people leave and there is staff turnover. It is always a struggle to educate people about the tribe.”

- **Notification vs. Consultation**

Some respondents stated that the only form of communication they had had with the federal agencies was general notification about proposed actions rather than formal consultation.

“The tribe is aware that theoretical consultation protocols are in place, but the tribe does not have formal consultation... The tribe receives notices in the mail – not sure if that counts as consultation.”

Several tribes suggested that perhaps the agency did not have a full understanding of consultation and how it differs from communication with nontribal governments, including states, counties, and municipalities.

- **Consulting with all relevant tribal leadership and staff**

One tribe stated that because agencies met only with tribal technical staff, formal consultation with the tribe did not occur.

“[Consultation is] totally inadequate. The agency is only meeting with technical staff, and that does not meet the requirement of consultation.”

Another respondent suggested that the opposite was also a problem.

“...because if the agencies are addressing issues and only notifying the tribal administrator, it’s not adequate. It needs to go to natural resources staff to engage those that will be working on the issue.”

- **Lack of Policies and Formal Protocols**

A number of respondents attributed weaker government-to-government relationships to a lack of formal protocols or policies.

“[There are] no tribal policies in place for consultation; they basically rely on case law.”

- **Lack of Funding**

Several respondents mentioned funding as a barrier. This included limited agency funding to support internal staff time or support for the tribes. It also included limited funding within the tribes to be responsive when asked for input by the agencies.

“The weakness in the consultation process is funding. The government gives little funding to support staff to meet obligations of consultation. Federal funding has been cut drastically...”

- **Lack of relevant issues to work on**

Two of tribes stated that they have consultation protocols in place but are not consulted about the NWFP because they do not have fishing or hunting rights or ceded land within the Northwest Forest Plan area.

“There is a general agreement to have an annual meeting between the agency and the tribe, which is designed to discuss joint issues, but there has not been one in two years. There is not a lot of consulting going on about the NWFP or other issues.”

Q.2. Use and Adequacy of Federal Policy Guidance

Interview Question	Yes	No	Some-times	Don't Know
2.a Is the tribe aware that federal policy guidance is available for tribal consultation when agency plans, projects, programs or activities have the potential to affect resources, uses, or areas of interest to tribes, including tribal lands?	64%	32%	4%	0%
2.b Are federal procedures adequate to identify direct and indirect effects to activities on tribal lands?	54%	23%	-	23%

Sixty-four percent of interview respondents stated that they are aware of federal policy guidance for consultation at the federal level, and 54% indicated they felt those procedures are adequate to identify direct and indirect effects on tribal rights, interests, and to activities on tribal lands. In general, those interviewed stated that they were aware of executive orders on consultation at a federal level, and some indicated they have agreements with agencies that reflect those federal policies for consultation.

“This is part of the MOU – it says that anytime activities occur in ceded territory or lands that are regularly used, there should be a formal consultation.”

When asked to elaborate on the adequacy of the federal policy guidance, six respondents indicated concern about the federal procedures in place and the depth of understanding that agencies have about the federal responsibility for consultation.

“The tribe is not totally comfortable with the process, and the process differs with the different forests.”

Of those who said federal policy guidance is not adequate, several indicated that the agencies are apt to follow the legal “letter of the law” by providing written notice about federal actions, but not to engage in a formal consultation or

ensure that tribes have meaningful involvement in planning, implementation, or monitoring of that action.

“There is a government-to-government requirement and the [tribe] receives written notice... In a perfect world, there would be better coordination.” And “The agency doesn’t have enough detail to identify direct and indirect effects. The agency does not consider the effects of their actions on adjacent properties. The tribe sometimes gets pulled in by individual staff members at the agencies, but it is not universal and it is not adequate for consultation.”

Q.3. Frequency of Consultation

Interview Question	Yes	No
3.a. Over the past ten years, has the tribe been consulted on federal agency plans, projects, programs, or activities that might affect tribal rights or interests?	73%	27%

Seventy-three percent of those interviewed stated that they had been consulted in the last ten years. However, many of those who said they had been consulted indicated that the level of consultation had not necessarily been adequate and may have been only a notification of agency actions. To provide context, several tribes described the kinds of proposed actions about which they had been notified or consulted by federal agencies related to the Northwest Forest Plan. Agency proposed actions have included thinning, road decommissioning and road building, invasive species control, watershed analyses, endangered species protection, forest products, and a proposed mine in a ceded area.

- **Frequent consultation**

Among the respondents who indicated they had been consulted with in the past ten years, there was a wide range in terms of the frequency and adequacy of the consultation that had occurred within that time period. Many of those interviewed indicated that they had been consulted on a regular basis and that consultation had improved over time.

“[The tribe is] consulted regularly – almost daily. The consultation process has increased in frequency and has been improved over the years. Consultation may be high because the tribe has lands in three counties.”

One tribe mentioned that consultation occurs on a project-by-project basis, and several tribes noted that consultations may occur more frequently with a particular agency than with others.

“While the tribes have been recognized as a significant stakeholder by one agency, in the case of the other, more often than not, it’s as a ‘dear stakeholder’. Consultation is more than just a letter that goes out to a concerned citizen.”

- **Use of formal protocols and MOUs**

One tribe attributed more frequent consultation to the establishment of a memorandum of agreement.

“Consultation is an ongoing process and has been under the MOA since its inception. The tribe and the agency are always talking.”

Other tribes noted that the frequency of consultation is based on the number of environmental or cultural issues at stake.

- **Leadership and champions within the agency**

A number of those interviewed mentioned that it is often because of an individual within the agency that there is regular and meaningful consultation.

“There is one person dedicated on tribal staff to monitor agency activities that affect ceded lands and tribal lands. They always comment, especially on things that have to do with water and fisheries. Interactions happen weekly or monthly.”

Another respondent stated:

“It depends. Had a great relationship with the agency leadership and local staff - but many folks have been replaced and that has created a

need to start the relationship over. But they try and have quarterly or more regular meetings.”

- **Infrequent consultation.**

For others, consultation was too infrequent or unpredictable to ensure that tribal rights and interests would be upheld.

“Formal consultation on projects (different from notification) is infrequent. The tribes get written notification and a call for comments on things that tend to be quite small.”

- **Consequences of infrequent consultation: Notification instead of Consultation**

In numerous cases, interviewees indicated that the consultation that had occurred over the last ten years occurred only in the form of an opportunity to comment on agency action or notifications by letter from the agency about a specific agency action.

“We are notified just like the general public. There is no special notification to the tribe. The tribe has not necessarily had any formal policy interaction or consultation, only consultation at the technical level.”

“The tribe heard that the agency’s form of communication is to include the tribe on a mailing list to present the agency’s periodic schedule of proposed work... The tribe is notified as part of a general notification system produced for the general public.”

Several respondents did note that, although the agency often sent letters to notify the tribe of actions, the tribe is not always able to respond because of limited funding and staff time. Another tribe noted that when agency staff is familiar with the tribe, there may be greater communication, but if staff turnover occurs, it may turn back to notification.

“They tend to get a few notifications a year. When [agency staff] is stable they have good stretches of communication. It has been two years since the last notification.”

• Agency understanding of consultation

Throughout the survey, respondents commented that agency staff may sometimes lack an understanding of what consultation is.

“The agency conceives consultation differently than the tribe does. The tribe often feels they are consulted the same as the public – maybe that accomplishes what the agencies have to do. They are notified more than consulted. However if there is an issue they are able to work it out when they bring their concerns forward. But initial consultation is lacking.”

“Consultation is not when the agency sits down and lays out the issues – that’s just sharing information but it wasn’t true consultation.”

Q.3. Provincial Advisory Committees (PAC)

Provincial Advisory Committees	Yes	No	Don’t Know	N/A
3.c. Are there PACs or other intergovernmental forums in the area?	59%	14%	23%	4%
3.d. Do tribes participate in these forums?	59%	32%		9%

More than half of those interviewed indicated that there are or have been provincial advisory committees (PAC) or other intergovernmental forums in the area and tribes have participated in these forums.

Although more than half of those interviewed stated they had participated in or were aware of a PAC or intergovernmental forum in their area, many indicated that the PACs or forums had not met frequently, or it had been several years since the last meeting. Several indicated they weren’t sure if the PACs still existed, and one specifically stated that the PAC in his area had dissolved.

“The PAC dissolved because there was a lack of participation by community stakeholders. It was difficult to recruit community stakeholders (other than tribes) and there was a feeling that the PAC had lost some of its relevancy.”

Another tribe stated that, *“The tribe knew about PAC in the first and second year of NWFP implementation, but it was at that time that tribes decided not to fill three places on the PAC that would have represented twelve (or so) tribes. At that point, it went to government-to-government consultation. Other tribes weren’t pushing for participation in the advisory committee.”*

Of the tribes that indicated that they have or still do participate in the PACs or other forums, at least five indicated that funding and available staff time limit their ability to engage in intergovernmental forums.

“They participate at the level they are able given time and funding limitations. Tribal staff needs to wear a lot of hats and funding has decreased. Even though consultation obligations are technically met, there isn’t enough capacity to make change.”

Another tribe stated that they send a delegate as time and staffing allow. One tribe indicated that a lack of tribal resources affected their ability to participate fully.

“This [lack of participation] is an example of where the tribe is not taking advantage of the forum to the extent that they could.”

Q.4. Use of Tribal Information

Tribal Information	Yes	No	Some-times	Don't Know	N/A
4.a Has tribal information been incorporated into federal planning documents (including watershed analysis and decision-making processes) in a manner such that tribes can recognize their contributions?	59%	10*	14%	9%	
4.b. Did tribal contributions result in any changes to federal actions or considerations for resources of interest?	32%	36%	9%	14%	9%

Almost 75% of those interviewed indicated that tribal information that has resulted from consultation efforts has, to some extent, been incorporated into planning documents. However, only 40% of those interviewed indicated that they felt their contributions had resulted in changes to federal actions or considerations for tribal resources of interest.

- **Consultation that results in consideration of tribal input and meaningful action**

When asked how tribal contributions resulted in changes to federal actions, several respondents provided examples of consultation processes that had resulted in meaningful incorporation of tribal issues and ideas.

“While the tribes’ input may not have “changed” the results, the tribe does feel their input led to further investigation and caused the federal government to look at resources differently (i.e. taking into account their cultural significance).”

One respondent noted that the extent to which tribal contributions are considered has improved over time.

“Tribal contributions are now being considered, but they were not initially. When the NWFP was first developed, the tribe presented a list of

issues that were not incorporated into NWFP at all. But relations have greatly improved.”

- **Failure to include tribal input - examples and consequences**

There were, however, examples in which tribal information had not been gleaned or incorporated through the consultation process. Furthermore, some of these examples had resulted in weaker government-to-government relationships.

“The tribe feels like they are going through the motions. The agency listens to concerns but doesn’t consider them in implementation.”

“The tribe had a lengthy and frustrating process trying to get reconsideration on the sale of a property with a registered cultural site on it. Throughout this process, it has been difficult finding what person to deal with in this process.”

One tribe provided an example of how a lack of consideration for tribal input had resulted in a lawsuit from the tribe against the federal agency.

“[Tribal information was incorporated] when we sued them. The tribe pleaded with the agency to help come up with way to deal with problem, but the agency ignored the tribe, which led to a lawsuit. The agency settled out of court with the tribe. This was followed by a period of the agency paying attention to the tribe. Now the agency is understaffed and challenged by budget cuts. Tribal input has not been sought after in terms of NWFP and the tribe has not provided input.”

Two respondents specifically stated that, although their tribal input is considered, it is to a limited extent.

“The tribe has not been as successful as they would like because they haven’t gotten everything they want incorporated in the federal management plan.”

“Tribal input is considered to a limited extent. The tribes are frequently unsatisfied with the amount of weight given to their input.”

Of those interviewed, only four specifically stated that the tribe has been provided with the end result document and shown how tribal input has been incorporated.

“The tribe was a part of the entire process and was given access to final documents and findings.”

One tribe reflected that, *“When the agencies make a real effort they usually incorporate feedback. Information can help inform an acceptable project, but not change it. They have an MOU about consultation that involved the NWFP. In this case they had a stronger impact on end product.”*

Others interviewed indicated that they are often provided with the end result, but it is not clear how tribal input has been addressed. Some tribes did not know whether their input had been incorporated and had not been provided an end product.

“We have made comments about road decommissioning, but don’t really get follow-up activities, maybe a phone call. No trouble getting documents, but the tribe doesn’t see where their specific comments fit in.”

Another tribe suggested that, *“There is a feeling that obligations are met because they have listened to the tribe. But follow-through often doesn’t happen.”*

Q.5. Use of tribal information in future efforts

Interview Question	Yes	No	Don’t Know
5) Have agencies consulted or collaborated with tribal governments to develop plans for future monitoring, restoration, or assessment projects, or for other planning efforts?	64%	32%	4%

Sixty-four percent of those interviewed stated that agencies have consulted with the tribes to develop plans for future monitoring, restoration, or assessment projects, or other planning efforts. In general, comments about the level of consultation that have occurred about future projects mirror findings about consultation above. Some tribes felt that the MOUs and protocols that were in place have led to good consultation about future projects.

“Most everything the tribe is consulted on is about plans for the future. There isn’t anything in particular that they hope to be consulted on that the agency hasn’t consulted with them on.”

“The MOU [the tribe and agency] is working on is about plans for future. The tribe wants to include the tribal public in prioritization process. The agency is supportive of finding out the priorities of the public and getting input from whole tribe.”

• **Desire for increased consultation**

The frequency of consultation about future projects often depends on agency staff or leadership who have an interest in and commitment to working closely with the tribes. Numerous respondents indicated a strong desire for increased consultation on future projects and consultation that occurs at all levels of project identification, design, planning, implementation, and monitoring.

“We want to be consulted on anything that affects ceded lands – both cultural and natural resources.”

“Broad scale conversations are needed for land management and watershed goals. ...there is no conversation about what lands the tribe considers to be important.”

• **Areas of interest for consultation**

Several tribes described the kind of projects they hope to be consulted on in the future. These included projects with

cultural and geographic importance to the tribe, as well as economic and natural resource issues the tribes hope to explore.

“As a rule of thumb the tribe likes to be consulted on areas of high importance and where there has been historical occupation by the tribe.”

Specific areas of interest mentioned by respondents included forest and watershed restoration projects, stewardship contracting, biomass utilization projects, climate change, and road management plans.

Summary of Key Findings: Consultation Process and Protocols

Other Barriers to Consultation

- The capacity and knowledge for agency staff to consult with tribes is critical to successful consultation. Consultation cannot rely on an individual agency staff person who has an interest in working with the tribe. Frequent turnover of agency staff can affect relationships and stable, long-term consultation with the tribes.
- When a request for consultation from the agency to the tribe does not come from agency leadership, it may not reach the decision makers within the tribe.

Consulting with tribes in future efforts

- Tribes want to be consulted by the agencies in all aspects of future agency actions, including the identification of actual projects, planning, implementation, and monitoring.
- MOUs/MOAs can provide a venue for identifying types of projects on which to consult with tribes.

Access to and Protection of Tribal Resources and Interests

Part of the monitoring effort is intended to evaluate whether access to and protection of tribal resources and interests on federal land have increased for tribes under the Northwest Forest Plan. The following section examines these issues.

Q.6. Exercise of tribal rights and access to resources

Interview Question	Yes	No	Some-times	N/A	Don't Know
6) Have the exercise of tribal rights or access to resources and/or areas of tribal interest on federal lands changed?	45%	36%	5%	5%	9%

More than 45% of tribes interviewed suggested that the exercise of tribal rights or access to resources and/or areas of tribal interest on federal lands had changed under the Northwest Forest Plan.

- **Increased access to traditional resources, forest areas, and improved resource management**

Thirty-six percent of respondents indicated that their tribe had not experienced changes in rights or access to resources since the establishment of the Northwest Forest Plan. Of the 45% of respondents who have seen changes, only two respondents suggested that the change had been for the better. One tribe indicated that within the context of the NWFP, access to cedar had increased. The other tribe stated that the:

“NWFP laid groundwork for change. ...better access, direct participation in the decision making and things that benefit resources such as improvements to wildlife habitat, better access to hunting areas.”

- **Decreased access and effects on tribal rights and interests**

Those interviewed provided numerous examples of how tribal rights had been negatively affected, or how access to resources had decreased under the Northwest Forest Plan. One respondent noted that environmental restrictions had resulted in an absence of land management in some instances, increasing the risk of wildfire in some areas of interest to the tribes.

“Treaty resources are being placed at risk because the lands are not being managed and make them susceptible to fire.”

The economic impacts of the Northwest Forest Plan resonated with several of the tribes interviewed. The limitations on timber harvests under the NWFP affected some tribes. A related impact, noted by several respondents, has been the increased demand on tribal staff to gain access to cultural resources because of the permitting processes.

“The tribe has to get permits, vehicle tags for road access -- these changes have hindered the tribe’s ability to pursue tribal interests on trust lands... [Permits] hinder tribal access.”

Three tribes specifically mentioned that access to cedar logs had become more difficult due to restrictions in the NWFP.

“Access to cedar bark has become more difficult because of the limitation and abundance of required consultation for any federal action.”

One tribe noted that it had taken time and legal fees to address the limitations on access to cultural resources.

“The tribe is now familiar enough with the NWFP – so they don’t often try to push limits on resources. They learned a lesson and now avoid and circumvent the issues. Those less familiar could be running into more trouble [trying to access resources.]”

Other limits on access and tribal interests identified during the interviews included the following:

- reduced access to huckleberry fields; berry picking
- reduced access to brush gathering, bark stripping, nontimber forest products, and other cultural resources
- fewer hunting and fishing rights
- closing of roads and trails; road abandonment
- less access for elders at the level they have experienced in the past

One respondent described the impact of broad-based national policy on local issues. He claimed that national policies may not reflect the difference between treaty tribes and nontreaty tribes, thereby affecting tribal rights.

Q.7. Protection and use of tribal information and cultural resources in management plans

Protection and use of tribal information and cultural resources in management planning	Yes	No	Don’t Know
7.a Is the tribe aware of procedures that have been put into place to protect sensitive tribal information from unauthorized access or release?	68%	27%	5%
7.b Is the tribe aware of procedures that have been put in place to provide incorporation of tribal traditional knowledge into the development of management actions?	55%	41%	4%
7.c Is the tribe aware of procedures that have been put in place to provide protection of cultural sites on federal land?	59%	23%	18%

Almost two-thirds of respondents felt that procedures have been put into place to protect sensitive tribal information from unauthorized access or release. Fifty-five percent indicated that tribal knowledge had been incorporated into management plans, and 59% were aware of procedures in place to protect cultural sites on federal land. These findings suggest that the agencies are at least somewhat active in protecting sensitive information and cultural resources on federal land and utilizing tribal knowledge in management planning. At least four of those interviewed stated that the cultural resources personnel for the tribe would be better equipped to respond to these three questions.

“This [protection of rights and access to resources] has improved greatly over time.”

- **Lack of acknowledgment and demonstration of incorporating traditional knowledge**

In response to questions about the use of traditional knowledge in developing management actions, several respondents suggested that although the tribe has provided information related to management actions, it is not clear

how the information is utilized. One respondent stated that it would be more effective if the tribe could be involved at the “front-end.”

Several respondents mentioned the challenges within the federal agencies that affected fully utilizing tribal information and protecting tribal rights, interests, and access.

“...sometimes traditional knowledge is still not always incorporated or considered as fully as it could be. They don’t have funding for a cultural resource expert – so it falls on natural resource staff [within the agency] to understand the protection of cultural sites.”

Others recognized that there are often champions with the agencies working to protect tribal rights and interests, but staff turnover can affect the long-term protection of those rights.

“Local agencies are becoming more aware of the needs for protection. [The tribe] is getting better protection than they have had in the past. We have long term relationships that result in protection, but if there is staff turnover, there is no policy in place to ensure that the protection would be maintained.”

One tribe stated that protection of rights and resources and use of information was less than adequate.

“There is no established relationship, nobody from the [agency] doing government to government consultation.”

• **Uncertainty about the protection of cultural resources**

There was a level of uncertainty about the protocols used (or even whether protocols exist) to ensure that tribal information and cultural resources will be protected or that tribal knowledge would be utilized in management plans.

“The tribe is not familiar with formal procedures – but we know they do protect things.”

Another tribe stated, *“The agency has been good about protecting sensitive information. Not totally sure about policies to incorporate tribal knowledge into projects, but the agency tries. There are a number of laws about protecting cultural sites on federal lands. But there are discrepancies about what is considered federal. The tribe has a broader definition of culturally important sites.”*

Another tribe mentioned the concerns the tribe continues to have about the protection of sensitive sites after the sale of federal lands; what protocols are in place to ensure tribal rights and access to resources on federal land if it is sold?

Q.8. Conflicts over the use or management of resources

Interview Questions	Yes	No	Don’t Know
8) Are there conflicts over the use or management of resources or areas of tribal interest?	36%	55%	9%

More than half of the respondents suggested that they do not have conflicts with federal agencies over the use or management of resources or areas of tribal interest.

• **Management practices restricted by NWFP land designations**

A common source of conflict, cited by at least six tribes interviewed, was the conflict that arises due to the restrictive nature of land allocations and limited access to resources under the NWFP. Tribes may want to see one kind of management practice (such as prescribed burning to promote bear grass) but restrictions (such as a late successional reserve designation) may limit their access or ability to implement such an action.

“The imposition of the Northwest Forest Plan is thought about in the context of the tribal land, being able to access its own resources. More than half of the tribal forest is locked up in riparian reserves. Cultural resources

folks have tried to encourage certain types of management that is limited by the land use allocation that culturally important plants exist in –they may be a riparian associated species, making them off-limits due to the aquatic conservation strategy.”

- **Administrative barriers**

“When the tribe wants to gather roots or barks or berries, the federal land owners want to develop agreements before the gathering takes place. However, the agency doesn’t do a good job deciphering between the general public and the tribe. Drafts going back and forth. Nothing moves forward. The agency doesn’t want certain plants removed, so there is a conflict.”

- **Persisting conflict due to federal land management practices**

Persisting conflict due to federal land management practices such as historic watershed management practices (legacy of roads and harvesting practices in the 1970s and 1980s) and continued timber harvest.

- **Increased stress on tribal land and tribal resources on public land**

A common concern mentioned in the interviews was the stress on tribal land due to increased access by nontribal hunters, gathers (seeking access to huckleberries or other nontraditional forest products) and recreationalists, as well as trespassers (such as mushroom pickers).

“Huckleberry fields are a primary source of conflict. The federal government is actually on [the tribe’s] side, but there are so many people harvesting the berries. This [issue in part] led to the Non-Timber Forest Products Act. One source of conflict is that commercial pickers often pick before the berries are ripe, but the tribe can’t pick until the berries are ripe, so there are often not many left for the tribe.”

- **Decreased conflict due to NWFP resource management practices**

Three respondents stated that although there is not conflict over resource management practices under the NWFP, there is conflict over other management and resource issues, including water rights and exercising traditional practices on federal land.

One respondent suggested that, given the significant conflict in the 1970s and 1980s related to logging practices, current management practices focused on restoration and thinning have resulted in less conflict and improved habitat for wildlife. Several others agreed that the decline in conflict can be attributed to a decrease in timber harvest and federal action.

- **Lack of process or protocol for conflict resolution and staff turnover**

One tribe mentioned that conflict can arise from lack of formal consultation and transparency in how tribal information is utilized in decision making.

“[Tribal information was not incorporated] at policy level; sometimes at staff level. ...there have been disagreements, it has been difficult to see eye-to-eye, and [tribal] comments are often not addressed. The disconcerting thing is that [the tribe] never received a response [from the agency]. There isn’t a formal process at the policy level for dealing with disagreements.”

From a process perspective, those interviewed suggested that the sources of conflict include poor consultation and a lack of written procedures as well as inadequate protection of tribal rights. An additional source of conflict mentioned was change in agency leadership and a lack of understanding and ideas by agency leadership.

- **Decreased conflict due to consultation and conflict resolution protocols, relationships**

Two tribes suggested that although there is still conflict, it has diminished over time, and better processes are in place to address conflict and deal with the staff turnover.

One tribe noted that given the reduced conflict since the establishment of the NWFP, the tribe is now interested in trying to do more projects without conflict.

“There is good rapport with FS regarding how to address the issues.”

When asked if conflict resolution processes are adequate, several respondents suggested that strategies and relationships were in place with the federal agencies to ensure that conflicts could be resolved.

“[Inadequate conflict resolution] goes to the fact that there is a lack of formal consultation and relationship.”

Three tribes specifically mentioned having a formal protocol, such as an MOU, in place to resolve conflicts. One tribe also mentioned having a strong, collaborative, working relationship.

“[The tribe and agency] have an MOU in place to help resolve conflict if problems arise. There haven’t been any major disagreements and one of the reasons is due to working together on a watershed analyses – this has helped the relationship tremendously.”

Two tribes mentioned National Environmental Policy Act (NEPA) and appeals as mechanisms for resolving conflict. However, as part of their statements, they both indicated that NEPA and appeals are not necessarily desirable forms of conflict resolution, and suggested that alternatives, such as formal consultations and MOUs, would be better. One tribe specifically suggested that if consultation happened earlier in the process, there might be fewer conflicts. Another mentioned that having a facilitator or an objective third party would help to resolve future conflicts.

Q.9. Treaty Rights

Respondents were asked if their tribe exercised treaty rights, other rights, or pursued tribal interests associated with national forests and BLM public lands and resources. Two tribes specifically stated that they are not treaty tribes and therefore have no treaty rights or recognized treaty

rights. In describing the treaty rights most relevant to the NWFP, the majority of responses were related to access to cultural and traditional resources – especially minor forest products and medicinal plants. Six tribes indicated that hunting, fishing, wildlife, and gathering (including berries and other food sources, whole trees, medicinal plants, and other vegetative materials, and firewood) were among the most important treaty rights in relationship to the NWFP.

- **Limited ability to access resources protected by treaty rights**

When asked how treaty rights have been affected by the NWFP, three tribes specifically stated that access to resources protected by treaty rights had been limited under the NWFP.

“Road closures diminish treaty rights by limiting abilities to conduct activities.”

Another tribe commented, *“There have been significant losses of the land base for decades and now there is a pretty meager land base that the tribe has for exercising treaty rights.”*

One tribe commented that illegal harvesting that has occurred since the establishment of the NWFP has depleted resources used for traditional uses and a lack of enforcement has led to severe consequences in the depletion of these tribal resources. One respondent focused on the steps his tribe has taken under the NWFP to assert tribal rights and interests.

“[The tribe] has a deep interest in management – they push themselves into decision making processes and practice all treaty rights on agency lands. They do have members that exercise their rights on ceded lands.”

“The tribe is recognized as a co-manager [of resources] and the [agency] knows that they have that status. But the [tribe] is having difficulty in other areas – such as accessing forest products on federal lands or exercising gathering rights.”

Q.10. Federal Forest Management Compatibility with Tribal Values

Almost half of the tribes interviewed suggested that federal forest management practices are compatible with tribal values. Examples given included the following:

- current practices of thinning, watershed restoration, and road decommissioning
- management practices for multiple uses and values
- very low-impact logging regime
- values and priorities within the Northwest Forest Plan (e.g., protection of ponderosa pine)
- shift to ecosystem management and less extractive-based practices
- recovering endangered fish species
- managing for forest health and species diversity
- fostering healthy forests and healthy aquatic systems (and fish stocks)

When asked for examples of forest management activities within the context of the NWFP that align with tribal values, one tribe described management practices in a particular national forest that includes tribal ancestral lands.

“There is a road use plan and closures in certain areas with late successional reserves. The [agency] has instituted the practice of having some forest set aside and dedicated to growing older forest, water quality and stream quality reserves. These practices are all in line with tribal values.”

Consultation regarding land management improves opportunities for cooperation, partnerships, and accessing resources

One respondent suggested that as compatibility between tribal and federal agency management practices grows, there will be increased opportunities for partnerships. Another noted that as compatibility in management practices increased, there was more opportunity for the tribe to access cultural resources.

“It is important to keep forestlands healthy and provide resources for hunting and gathering.”

The [agency] has slowed down [on timber harvests] and the lands are much healthier now. In the past, the majority of cedar was harvested. The tribe wants more cedar available for totem poles, carving canoes, long house, etc. Most of those trees are gone – but now the [tribe and agency] are planning for future resources.”

Several tribes suggested that although the tribes and agencies may have common values, the agency still needs to consult with the tribe and make a clear distinction between the tribe and the general public.

“[Agency] forest management fits in within [tribal] requirements, but the tribe finds themselves lumped in with public. But tribes aren’t the same as the public; there is a greater chance for conflict. If activities are compatible with public activities, the federal government cooperates.”

One tribe suggested that there are significant benefits of federal-tribal partnerships for resource stewardship. The person interviewed maintained that strong partnerships can result in a cultural shift at the agency level. To avoid actions, including land sales and mineral leases that make documented cultural sites vulnerable and discount decades of environmental restoration efforts by tribes and others, federal agencies and tribes need to establish meaningful communication and trust. Both are integral components of consultation and functional working relationships. Specific recommendations included:

- Avoid land sales or leases that compromise the agency’s mission and in so doing reduce habitat protection, support for communities, and public benefit of land once stewarded.
- Avoid land losses that impact entire basins. Forest habitat loss at the headwaters, for example, may impact land hundreds of miles away; and a mining site could taint drinking water for major cities downstream.
- Develop more fiscally sustainable approaches to agency administration and land management. Partnering can help forward land stewardship and

bring in funding streams to allow the agency to continue working to fulfill its mission as opposed to actions that compromise its mission.

- Partnering tribes can bring needed expertise the agency may have lost in past funding cuts. In Washington State, for example, the tribes now employ more than thirty percent of scientists in the field.
- Partnering tribes can bring needed funds to management activities.

- **Need for intercultural dialogue**

One tribe noted that although there may be some broad compatibility in management practices, tribes still carry their own distinct values that should be respected in management planning. One agency may manage in ways that are consistent with a tribe's values that people are part of creation and natural resources are used for survival and prosperity.

“:[The tribe] has their own intrinsic [principles] worthy of conservation by their own rights and their own inherent values.”

One example given that relates to how agency management practices do not align with tribal values includes traditional, heavy timber harvests, although the respondent noted that this happens much less now. When asked for examples of forest management practices that have not reflected tribal values, one tribe suggested that the agency focus on commercial harvest is not conducive to maintaining tribal resources.

“The NWFP has increased awareness of treaty resources and the need to consider them. The [agency] has made an effort to meet tribal needs and consider tribal rights. This has gotten easier as the old guard retires and new staff comes in and are more conservation minded. Forest management can be good for treaty resources too. Road management, conservation-minded timber harvests and protecting riparian areas are all in line with tribal value.”

“The NWFP has included other interests such as the needs of wildlife. Previously the agencies were focused on timber harvest. The new approach is to have sections that deal with water and fish and wildlife. Because of that, the [agency] plans include more tribal values in their management activities.”

- **Administrative barriers**

Another respondent noted that the agency may hold values that are similar to those of the tribe, but can't carry out compatible management practices because of budget cuts or requirements under the NWFP. Furthermore, external organizations may limit the opportunity for a certain practice to be implemented (e.g., an environmental organization may stop an action through an appeal.)

“Society and environmental groups may just want to let things go and let Mother Nature manage them. But that hinders the tribes' ability to exercise their rights. Catastrophic fire or disease means we can't manage the lands the way we want to.”

Key Findings: Access to Resources and Tribal Rights and Interests

Access to cultural resources and tribal rights and interests

- The restrictions within the NWFP have resulted in inadequate access to cultural resources and tribal rights and interests for many of the tribes interviewed in this study.

Land allocations within the NWFP and access to land/resources

- Restrictions/Limitations
 - Inadequate protection of tribal rights
 - Staff level conflicts
 - Road decommissioning
 - Endangered Species Act (ESA) protection

- Land management restrictions (e.g., prescribed burning in Late Successional Reserve (LSR))
- Land/resource access (what’s working and what’s not working)
 - Water and timber resources
 - Cultural resources
 - Hunting

Protection of tribal resources and information and use of tribal knowledge

- Incorporation of tribal information and traditional knowledge into existing and future plans
 - Tribal information incorporated in and shaping plans, decisions, and actions
 - How well do agencies’ plans and decisions reflect tribal values and needs?
 - Traditional knowledge incorporated into project plans
- Protection of sensitive tribal information
- Protection of cultural sites and tribal resources and interests

Federal agency forest management compatibility with tribal values

- Compatibility
 - Examples/Values:
 - Common interests = partnership opportunities
 - Improved management of natural and cultural resources
 - Access to treaty resources
- Incompatibility
 - Examples: Road decommissioning (diminishes treaty rights by limiting ability to conduct cultural activities and gather foods, fibers, and medicines)

Q.11. How can federal-tribal relationships be strengthened?

The survey asked respondents to provide suggestions to strengthen the federal-tribal relationship.

- **Utilize MOUs and more formal protocols to strengthen consultation.**

In their recommendations to strengthen the tribal-federal relationship, four respondents specifically mentioned the need to develop MOUs, MOAs, or formal protocols between the tribes and federal agencies.

“Creating or revitalizing instruments like an MOA will memorialize the relationship and be of great value to tribes and land management agencies.”

One tribe specifically suggested that formal protocols should include strategies for dealing with staff turnover, one of the primary reasons given for weaker government-to-government relationships.

“Write formal protocols for consultation [that address staff turnover] and get the training to make it work.”

Another tribe mentioned that MOUs would help ensure that federal agencies would meet their responsibility to identify and protect cultural resources

- **Qualities of a successful government-to-government relationship**

A number of respondents also described the tribal perspective on the qualities of and strategies for a successful government-to-government relationship. Other strategies included ongoing opportunities for collaboration and transparent communication, including regular meetings to talk about relevant issues and to check-in more broadly about consultation. Tribes also described the need for forward thinking and proactive agency staff with an interest in tribal views.

“...open and straight forward communication has created a lot of trust. That has been the greatest asset in being able to offer input into

the federal agencies' planning process. The development of trust and friendship has been paramount in their ability to do that."

"Keep encouraging the agency to have meetings and consultations. Consultations need to be more interactive. The tribal staff needs to brief the tribal council so communication with staff is necessary. The Forest Service needs to go through channels or talk staff-to-staff. And there has been greater recognition of this. There had traditionally been less collaboration around the NWFP – so continue to increase collaboration and cooperation. These relationships need to be nurtured."

- **Funding**

In various parts of the interviews, several respondents noted that funding limits the ability of the tribes to fully engage in consultation with the agency. One tribe even noted that the agency requested consultation with the tribe more frequently than the tribe was able to engage.

"The lack money and resources hinder the relationships. There is a need for more continuity. There are staffing issues with high turnover that affect communication. It comes down to people and understanding each other's unique positions and a need for more cooperation."

Respondents also noted that diminished funding for agency staff limits their ability to consult with tribes.

"The government needs to provide more funding and staffing abilities. That is the biggest hindrance. It is tough to get a good end-result because they are coming in with diminished capabilities."

- **Staff Turnover**

As in the initial monitoring that took place for the period between 1994 and 2003, numerous tribes interviewed stated that staff turnover is one of the biggest barriers to a federal tribal relationship. They suggested that memorandum of understandings or formal protocols could include mechanisms for training new staff and ensuring a smooth transition. One tribe suggested that training on tribal issues should be a requirement in job descriptions.

"Due to the constant turnover of personnel, an ongoing training program would be really helpful and would strengthen the trust."

Another tribe suggested that stronger relationships with agency tribal liaisons might result in more continuity with all levels of government.

"We need better function from tribal liaisons. They need to facilitate access to the correct staff. The liaisons need to engage the Tribe in outreach, they have never called us. The liaison must help with process building for the agency and the tribe, this has not happened."

- **Levels of consultation and contact with tribal leadership and technical staff**

Several tribes mentioned the need for federal agency staff to consult with all levels of tribal government to strengthen the federal-tribal relationship. One respondent suggested that a way to accomplish this would be to strike the right balance when it comes to meeting with tribal council and policymakers, as well as tribal technical staff. This would ensure that the "letter-of-the-law" was being met through consultation with the highest level of tribal leadership, while still taking advantage of the knowledge among tribal technical staff.

"A key theme that has come up numerous times is the need for the federal land management agencies to consult at the highest levels with the tribes. This means the forest supervisor, district manager and tribal liaisons engage in consultation, not just line officers or technicians."

- **Levels of consultation with agency leadership**

“Having access to the top is important to the tribal federal relationship.”

Several respondents noted that when agency representatives consult with the tribe, the tribe expects the highest level of agency leadership, including the district manager or forest supervisor to engage in consultation.

“Get the agency to understand who a tribe is and how they should interact with them. We are a federally recognized tribe with a treaty. Come in the door at the very highest level before they get started – not after or when they are done.”

“I think that by the tribal it would behoove the FS and BLM at the district manager or forest supervisory level to the resource area manger or forest range, become more familiar with the government to government relationship. Tribes are not just other stakeholders. There is a higher level of consultation required by the federal government.”

- **Regular communication and personal contact.**

More than half of the tribes interviewed described a strong federal-tribal relationship as one that recognized and followed formal protocols, but also included informal communication, personal contact, and sustained interest in working with the tribe by the federal agency. One tribe suggested that the most effective way to strengthen the government-to-government relationship would be for the federal agencies to simply engage and ask the tribe how well tribal interests and rights were being met.

“Let’s just embrace it. Embrace us and ask the tribe what should be happening within the federal properties to fulfill reserved treaty rights – is the agency fulfilling tribal needs for huckleberries, animals, etc.?”

Another stated, *“Address issues at the start, consultations have been a work in progress, and although they have improved over time there is stillroom for improvement. Asking for input earlier would be helpful and would improve communication.”*

- **PACs**

Throughout the interviews, those tribes that had experience with PACs continued to state their value and reflect on the important purpose they served in strengthening federal-tribal relationships.

“PACs have been beneficial because they create better communication opportunities with agencies. PACs also create cooperation opportunities.”

“The PACs really provide an excellent forum for folks to be aware of issues and concerns, and there is a requirement for consultations. And it provided a forum to get message across. But PACs are being dissolved, and re-establishing forums would be great.”

- **Develop clear monitoring strategies to ensure follow-through with consultation**

Although monitoring was a specific element of the interview guide, very few tribes interviewed were able to provide examples of any mechanisms in place to monitor how well the agencies are consulting with tribes or the results of consultation.

“We need a mechanism to follow through with consultation.”

Several tribes stated that mechanisms must be in place to ensure that agencies follow through with consultation. These mechanisms could be established through MOUs and formal protocols.

IV. Case Studies

As part of the effort to monitor government-to-government relationships under the Northwest Forest Plan, this report includes five case studies that expand on the information and findings from the tribal-monitoring interviews. There is a need to hear from tribes about their experience and perspectives on how their rights and interests have been affected during plan implementation. The case studies explore in more detail the types of consultation processes that have occurred under the Northwest Forest Plan, the barriers and limitations to consultation, the successes and lessons learned to inform policy development and implementation.

Case studies can assist tribes and agencies in understanding local conditions and the outcomes from a given process, such as NWFP implementation. They can also provide best practices from which others may learn or replicate in their communities or among their agencies. The five case studies featured in this report are:

1. **Coquille Indian Tribe.** Consultation process: communication, relationships, and trust
2. **Quileute Indian Tribe.** Consultation challenges: supporting staff transitions and developing common understanding of treaty reserved rights
3. **Quinault Indian Nation.** Consultation and Northwest Forest Plan outcomes: effects on natural resource management, revenue, and access to cultural resources
4. **Upper Skagit Indian Tribe.** Consultation outcomes: developing consultation beyond project notifications to find balance between resource protection, forest management, and tribal access
5. **Formalizing Consultation Protocols.** Providing the foundation for consultation and long-term, cooperative government-to-government relationships

Case Study #1: Coquille Indian Tribe

Consultation process: communication, relationships and trust

Introduction

The Oregon Resource Conservation Act of 1996 created the Coquille Forest (Section 501, Title V), an area of roughly 5,000 acres within the historic territory of the Coquille Indian Tribe (the Tribe). It also initiated a relationship between the Coquille Tribe and the U.S. Bureau of Land Management (BLM) Coos Bay District, which manages the lands adjacent to the Coquille Forest. The legislation instructs that the tribe manages the Coquille Forest “... under applicable forestry laws and in a manner consistent with the standards and guidelines of federal forest plans on adjacent lands.”⁹ Out of necessity, to be able to go about conducting tribal business, the Coquille Tribe initiated conversations with the BLM Coos Bay District. “*This [statute] places a unique trust responsibility on the BLM that doesn’t exist anywhere else in the country. When the BLM chooses a management direction, it affects Tribal management.*”¹⁰ Since 1996, the Tribe and the BLM have worked together and developed a productive relationship. Moving from formal, structured consultation to an informal, free-flowing dialogue, they have built trust and now support each other in seeking win-win situations.

Purpose of the case study

The Tribe’s historical experience, its assertiveness and interest in working collaboratively with public agencies, and particularly with the BLM Coos Bay District after passage of the Coquille Forest legislation, illustrate best practices for consultation. The Coquille Tribe’s experiences with consultation related to the land management guidelines of the Northwest Forest Plan offer insights from which other tribes may learn and draw to strengthen their own consultation processes. The following sections focus on:

- consultation between the BLM Coos Bay District and the Coquille Indian Tribe;

- the Tribe’s experience with the Northwest Forest Plan and other land management activities; and
- relevant tribal policy, local conditions, existing relationships, procedures, and unique approaches to consultation.

Background

Pre- Northwest Forest Plan

Prior to the Northwest Forest Plan (NWFP) and before the creation of the Coquille Forest, personal relationships and compelling need drove consultation. This occurred through one-on-one interactions and depended on existing relationships among tribal and agency staff, which in some instances had been adversarial.

Northwest Forest Plan 1994-2003

The Northwest Forest Plan brought more opportunities for the tribe to ask questions through public involvement and to speak up and demand to be a part of the conversation. It also imposed management guidelines on the Tribe via the Coquille Forest legislation. The Coquille Forest is the only Indian forest managed under the Northwest Forest Plan.¹¹

In the beginning, tribal staff sat in on watershed analysis meetings to ask questions and provide information.¹² The Tribe also participated in meetings of the Southwest Oregon Provincial Advisory Committee, or PAC.¹³ The Coquille Tribe had an interest in participating in the local PAC because of its statutory requirement to manage the Coquille Forest in lockstep with the BLM. The Tribe found participation in the PAC beneficial. Frequent meetings provided opportunity to key into management directions, discuss impacts of the Northwest Forest Plan, and provide feedback to federal agencies. PAC meetings

¹¹Younker, Jason T. 2003. “Coquille/K’o’kwell, A Southern Oregon Coast Indian Tribe: Revisiting History, Ingenuity, and Identity,” diss. (Eugene, OR: University of Oregon, Department of Anthropology, 2003), 61-63 <http://proquest.umi.com/pqdweb?did=764820931&Fmt=6&clientId=11238&ROT=309&VName=POD>

¹²Federal agencies were required to develop watershed analyses of implementing projects under the NWFP.

¹³As part of an interagency requirement to engage community stakeholders, the NWFP also established regional Provincial Advisory Committees (PACs)

⁹ The Library of Congress, Senate Report 104-314 – Oregon Resource Conservation Act of 1996

¹⁰Coquille Indian Tribe

Tribal and Federal Policy

- Coquille Restoration Act of 1989: restored Coquille Indian Tribe as a federally recognized tribe.
- Oregon Resources Conservation Act of 1996–Title V--Coquille Tribal Forest: designated approximately 5,000 acres of forestlands in Coos County, Oregon as the Coquille Forest.
- Tribal Forest Protection Act of 2004: established a process for tribes to work with federal agencies to reduce wildfire risk and improve forest health across jurisdictional boundaries.

also provided a forum for the Tribe to develop relationships with the Coos Bay BLM district manager and other federal land management line officers.

Northwest Forest Plan 2004-present

In 2004, technical, political, and legal factors converged with strained relationships and led to a shift in Northwest Forest Plan implementation. Agencies began looking for opportunities to move forward and implement projects.

Budget cuts and declining participation from Provincial Advisory Committee (PAC) members led Bureau of Land Management and US Forest Service (USFS) managers within southwest Oregon to determine that the PAC had served its purpose and it would be best to let the Charter expire. At that point, only the Coquille Tribe, federal agencies, and a few recreational groups participated in the local PAC. With the southwest Oregon PAC, the decision was made to dissolve a number of PACs in other provinces. At the same time, the Intergovernmental Advisory Committee (IAC), the regional counterpart to the PACs, was also dissolved. For several years, the Coquille tribal forest manager had provided representation for the Intertribal Timber Council on the IAC.

Changes to Consultation under the NWFP

The dissolution of the Plan's formal interagency communication structure and changes in Plan implementation affected communication between the Coquille Tribe and federal land managers, including the BLM Coos Bay District. Instead of meeting on a regular basis with agency supervisors and others in the forums provided by the PAC and IAC, the Tribe began to engage on an issue-by-issue basis, reviewing projects individually and providing input. Tribal staff began to participate on Level One and Level Two teams with agency biologists from the BLM, Forest Service, NOAA Fisheries, and U.S. Fish and Wildlife Service to review project plans on an individual basis and assess potential effects to fish, wildlife, and endangered species.¹⁴ These changes in communication - from a regular interagency discussion to individual project review - could have negatively affected collaboration and

The Coquille Tribe has worked to develop relationships and agreements with several federal agencies in Southwestern Oregon.

- MOU with BLM Coos Bay District to coordinate management of public lands (1997).
- Cooperative Right-of-Way and Land-use Agreement with BLM and BIA (1999).
- MOA with U.S. Forest Service Powers Ranger District for notices on projects of interest; and generalized agreements about access to traditional resources.
- MOA with Federal Highways that recognizes the Tribe's interest in federal highways projects and, with other interested parties, will be notified on all instances that may affect the Tribe.

Each agreement functions differently, depending on the level of business the two entities are conducting with each other, and the relations created through working together.

¹⁴Streamlining guidance under the Northwest Forest Plan, Section 7— Consultation, led to the creation of Level One and Level Two assessment teams.

consultation. With a focus on fish and wildlife habitat and endangered species and no regular discussion about ongoing and future projects, tribal interests could have been left out of project plans.

However, at this point, the Tribe and BLM had a consultation protocol in place and a concrete relationship. The Tribe also recognized the importance of maintaining an involvement during project design, when they could determine if consultation was necessary. Through consultation, the Tribe can learn about, review, and provide input on BLM projects. Therefore, the Coquille Tribe has made it a priority to communicate with the BLM Coos Bay District from project design through implementation and monitoring, and the BLM district manager has reciprocated.

During the past three years, consultation has moved from a more structured, formal process to an informal, ongoing dialogue. *“Relations have built enough so that it’s much easier to discuss issues, and it doesn’t even seem like consultation.”*¹⁵ The BLM district manager views consultation as a dialogue between parties in which information is shared and discussed for the mutual benefit of all parties; he recognizes the importance of personality styles. Openness, honesty, and sincerity are important in developing and sustaining consultation. Tribal staff notes that the BLM district manager is interested in communicating and finding win-win situations; and the BLM district manager notes, *“Tribal staff has a style about them that is easy to engage.”* The BLM sees value in working with the Tribe and will continue to consult with the Tribe even without the NWFP.

Accomplishments

Recently, the Tribe participated on a steering committee for the Western Oregon Plan Revision (WOPR). The committee consisted of six district managers and a representative for the Tribe. It made recommendations to the BLM State Director. The Tribe was the only nonfederal party with an official place at the decision table during the WOPR development process. As a result of this involvement, the final WOPR Record of Decision contained provisions that

represent the Tribe’s interests. The process and opportunity to be involved with the steering committee made it possible for the Tribe to know what is at stake and changes that may occur. *“It was better to be there, and provide input and express concerns and needs rather than to be sitting on the sidelines and not be aware of the plan.”*¹⁶

As a result of building relationships and trust over the years, the Tribe is now experiencing better consultation from the BLM, which is actively inviting the Tribe into the planning process. *“It’s not because of the NWFP, it’s because of the people implementing the projects and their willingness to sit down at a table with us and talk about it.”*¹⁷ For the first time, the BLM invited the Tribe to work on a plan revision at the beginning of the design phase, which makes it possible for the Tribe to advocate for protection of trust resources.

The Coquille Tribe now engages in co-management with the BLM. The Tribe has a say on actions that occur on federal lands that affect tribal lands. *“We are leveraging our values, our trust interests, and putting them into the BLM management plan.”* The Coquille Indian Tribe is not a treaty tribe and depends on relationships and trust (relational) to advance its influence over managing the resources that are important to the Tribe: clear air, clean water, values, and traditional and cultural properties.

Through the Coquille Tribe’s efforts to provide education on trust responsibilities and communicate with the BLM, agency staff now has an understanding and an appreciation of cultural values. For example, the BLM staff is aware of where important resources exist in the forest and takes the time to talk about them with Tribal staff. Now, the BLM looks to the Tribe to provide important information on cultural resources to be incorporated into management decisions. *“It’s within the scope of the work [BLM staff] do to acknowledge resources important to the Tribe, incorporate them, and talk about them. Because those are resources the agency holds in trust. That the BLM looks to the tribe as a resource is a remarkable difference between the Coquille Tribe and other tribes.”*

¹⁵BLM Coos Bay District Manager

¹⁶Coquille Indian Tribe

¹⁷Coquille Indian Tribe

A planned BLM timber sale on a parcel with land adjacent to the Coquille Forest illustrates improvements in consultation. Through planning with the Tribe, the BLM became aware of the Tribe's strong interest and traditional use concerns in an area of meadow being encroached by trees because of fire suppression, and in another area on BLM land associated with the timber sale. The Tribe shared with the BLM information about traditional bear grass uses in the two areas. As a result, the BLM was able to protect and enhance the traditional meadow area and enter into a small agreement regarding the other area on BLM land so that the Tribe could manage and enhance the area for the BLM. In discussions of one timber sale with the tribe, the BLM became aware of two traditional use areas and learned about what is important to the Tribe in those areas. The BLM notes, *"If we went in on our own, we would have done our own thing and impacted both areas in a negative way."*

Challenges

Trust Responsibilities

For a nontreaty tribe, federal agency trust responsibility can be elusive because it is based on quantifiable land and resources. For the Coquille Tribe, the Northwest Forest Plan did not contribute to protecting trust resources. It was the Coquille Forest Legislation that brought recognition of trust responsibilities. Trust responsibilities were acknowledged and grew out of the relationships the Tribe developed with federal agencies once the Coquille Forest Legislation designated forestlands for the Tribe. Only in the last six years was the trust responsibility refined. Both parties are now able to take advantage of the relationship that has grown out of the recognition of trust responsibility to forward individual and mutual interests.

Land Management

The approach of the Northwest Forest Plan can conflict with a traditional ecological approach. The Coquille Tribe notes that the NWFP initially identified one species of importance and then added a few more; however, the approach to protection was to draw lines or boundaries and create reserves.

"The traditional ecological knowledge approach would dictate more involvement with those (important) resources in managing for those resources as opposed to drawing lines. We're going to be involved with those resources and have a place in managing them."

The Northwest Forest Plan reserve system limits managing for important resources, and the Northwest Forest Plan doesn't really allow for managing for cultural resources.

"We got lucky on a bear grass area in traditional matrix lands, but if it had been in riparian reserve or LSR we wouldn't have been so lucky."

Tribal Monitoring

Through its staff's participation on the Western Oregon Plan Revision (WOPR), however, the Tribe noticed that the plan revision failed to incorporate tribal monitoring as it exists under the Northwest Forest Plan. Without tribal monitoring, actions under the WOPR on 2.8 million acres of BLM lands could impact tribal relations and resources of interest. Although local relationships are now strong, unless tribal monitoring is incorporated into the plan revision there is no guarantee for the future that government-to-government consultation and protection of tribal interests will continue. Although the WOPR did not address tribal monitoring at the state level, it is the intent of the Coquille Tribe to address tribal monitoring at the local level through its cooperative relationship with the Coos Bay District.

Lessons Learned

Assertiveness and a Willingness to Engage Help Move Consultation Forward

As a restored tribe, the Coquille Tribe approaches land management planning with federal agencies and other situations with a fresh outlook. The Coquille Tribe doesn't have the more adversarial history with federal agencies that some other tribes have.

“Those factors have allowed us to be more inquisitive and have given us more time to deliberate, think about our options and take more time before acting. They have given us the opportunity to build more relationships.”

Although the Coquille Tribe is ready to stand up for itself, it recognizes the need for a less adversarial approach.

“However, therein lies our ability to be assertive, we want to figure out what’s going on. We’ve been compelled to organize ourselves, and that’s given us advantage.”

In addition, as part of its historical experience as a tribe, the Coquille Tribe is known for its hospitality and for being accommodating.

How to sustain relationships between federal agencies and tribes is incumbent upon the leadership in the agency and the Tribe.

“You can have all the paper and agreements, but really it boils down to the relationship.”
*“The other part is entirely incumbent on tribes – if we are not willing as tribal folks or tribal government to tell people why it’s important and project ourselves as a resource – if we’re not willing to assist federal officials in understanding the broader aspects of the federal trust responsibility and the value of the Tribe as a resource, things then rest on individual people relationships and may not be sustained when changes occur in leadership and staff positions.”*¹⁸

Building Relationships is Integral to Consultation

In addition to developing formal agreements, building relationships and communicating on a regular basis are integral to consultation.

“I am aware of the MOU and commitment the BLM made to consulting with the tribe, but I haven’t looked at it in several years and it

doesn’t influence my day-to-day interactions with the tribe.” Agreements are one way to assist consultation.

However, as one tribal staff member noted,
*“It’s more about the personal commitment, philosophy and understanding of government responsibility to tribes. An agreement in and of itself is not going to make any difference.”*¹⁹

The BLM notes it is important to engage in meaningful discussions with tribes, and it falls on the BLM to have an open and transparent style. However, the same is true for tribes. Closed-mindedness, bitterness, and lack of trust only hinder consultation. If these issues exist, both parties must commit to working through them together.

Federal Agency Staff Must Understand the Federal Tribal Trust Responsibility

It is critical for federal agencies to understand the trust responsibility. Agency understanding of the trust responsibility can result in successful consultation and co-management opportunities.

Tribes Offer Valuable Knowledge and Resources to Federal Land Planning

Tribes have traditional and historical knowledge and experience that reflect why the environment and natural and cultural resources are important. They offer insight on the significance of discussing resources the value of the work to protect them.

“Without the willingness we have to introduce those values, we would miss opportunities to perpetuate those values and miss opportunities to pause and appreciate those values of being human.”

By strengthening their relationships, agencies and tribes can find opportunities to collaborate. Currently, the Coquille Tribe is working on an experimental biomass project. The Tribe needed a place to store the biomass material before it could be transported for processing.

¹⁸Coquille Indian Tribe

¹⁹BLM Coos Bay District Manager

Because of ongoing communications, the BLM was able to create an agreement that involved permitting the Tribe to share the space in a road maintenance area that the BLM owns. In turn, the Tribe will do some needed repairs and site improvements and save the BLM money.

Address the Impact of Staff Turnover on Consultation

Staff turnover in federal agencies can disrupt relationships, understanding, and trust that have developed over years of working together. Staff turnover can affect consultation considerably. Developing approaches to sustain continuity in relationships can help maintain consultation between tribes and federal agencies. Some approaches suggested by the Tribe, based on its experience with the BLM Coos Bay District are:

- creation of an agency staff mentorship program;
- fostering smooth transitions of leadership in the agency when there is staff turnover; and
- inclusion in line officers job descriptions, a requirement for knowledge of tribal relations.

Formal agreements are important. For example, the MOU with the Coquille Tribe provides new agency and tribal staff with background information on consultation with the Tribe and a good starting point. However, the BLM must educate its own managers and staff about the government’s obligations. Staff must understand it is a part of how the agency does business. The BLM also notes that it might be useful when a new manager comes in if the previous manager accompanies that person and introduces him to the tribal council. This would help the previous manager to bridge the relationship and introduce past and ongoing commitments.

Case Study #2: Quileute Indian Tribe

Consultation challenges: supporting staff transitions and developing common understanding of treaty reserved rights

Introduction

The Quileute Tribe, located on the Olympic Peninsula in Washington State, has a population of about 800 people and a total land area of approximately 1,000 acres.²⁰ In addition to its current land base, the Tribe retains rights to natural resources on lands and in waters ceded to the U.S. government.²¹ Like other tribes in Washington State, who signed treaties in 1855 and 1856 with Isaac Stevens, the Quileute has the reserved right to natural resources on surrounding lands now managed by the federal government, and from usual and accustomed places, including those now in private ownership. In other terms, the Tribe has continuing property rights and continuing jurisdiction, also known as overlapping jurisdictional rule.

Over the years since the treaties were enacted, the interpretation of reserved rights to natural resources has changed, and continues to change. The Quileute staff recalls in 1974 the interpretation recognized only salmon and steelhead fishing. It wasn't until the mid-1980s and '90s that the interpretation expanded to include other resources. A U.S. 9th Circuit Court decision in 1998 (157 F.3d 630) regarding shellfish, known as the Rafeedie decision (after Judge Edward Rafeedie), helped expand the interpretation and clarify that tribes are entitled to all marine fishery resources regardless of whether they are actively harvesting them, and extend treaty rights beyond salmonids.²² This case illustrates that the courts will interpret treaties broadly to recognize that tribes do not use only a few specific resources from land or water and should be entitled to broad access to the resources today.

²⁰Quileute Tribe staff

²¹Treaty of Olympia of 1855, http://www.quileutenation.org/index.cfm?page=treaty_of_olympia.html.

²²US v Washington, 157 F.3d 630 (9th Cir. – 1998), culminating a series of district court cases and appeals.



Quileute Indian Reservation Boundary, Olympic Peninsula, Washington State. Image: Quileute Indian Tribe.

The changing interpretation of the law regarding treaty-reserved rights has impacted land management plans and policies and relationships among tribes in Washington State and federal land management agencies. When the law is interpreted narrowly, focusing only on specific species, or when public land is converted to private, the tribe's continuing property rights are compromised and its interests are vulnerable. Consultation can play a role in building common understanding among federal agencies and tribes regarding rights and interests. However, open communication, education, and long-term relationships that go beyond formal consultation are critical.

The following case describes the Quileute Tribe's experience with consultation under the Northwest Forest Plan and more generally with other federal agencies. The Tribe's experience provides insight on challenges to consultation that can arise during staff transitions and barriers to accessing cultural resources that arose under the NWFP land designations. The case concludes with suggestions, based on conversations with tribal and federal agency staff, for sustaining relationships through staff transitions and improving consultation through thoughtful and transparent processes.

Consultation under the NWFP

In 2000, the Quileute Tribe developed a formal consultation memo of understanding (MOU) with the Olympic National Forest (ONF). The MOU, currently in its second term

(2005-2009), acknowledges the Tribe’s right to hunt, fish, and gather within the ceded lands outlined in the Treaty of Olympia of 1855. The MOU’s purpose is to provide:

“A. a mutually beneficial process for the ONF and the Tribe to jointly identify, communicate, and coordinate actions of common concern relating to the management of natural resources and tribal culture (including but not limited to lands, waters, fish, wildlife, vegetation and firewood) tribal practices, and archaeological or anthropological remains; and

B. a mechanism for continuing involvement in the development and revision of land and water management plans.”²³

The MOU describes procedures for project coordination, including notification and review procedures; and cooperative opportunities, including cultural resource management and information development. It states that environmental planning will involve the Tribe at the earliest point practicable and “before [plans] have reached the stage of a published proposed rule in the Federal Register,”²⁴ and it states the Tribe and ONF will meet annually to discuss the MOU terms and other matters of mutual interest. ONF staff note also that the MOU is an important resource for staff transitions.

In accordance with Executive Order 13175,²⁵ before public scoping and any internal process, the Forest Service sends the Tribe a letter for comments regarding proposed plans and a time frame. Also, in accordance with EO 13175, the Forest Service district ranger meets with the Tribe’s director of natural resources quarterly. Additional Forest Service and Tribal staff also attend these meetings. Quileute Tribe staff members describe the quarterly meetings as an opportunity to learn about ONF activities and new Federal

Register regulations to develop meaningful comments. Olympic National Forest staff members describe the meetings as an opportunity to discuss upcoming projects and accomplish some of the objectives of government-to-government consultation. The meetings may also serve as a venue to introduce new district rangers.

The Olympic National Forest has experienced a large turnover in district rangers in the recent past, some lasting just a few months and others lasting several years. During times of staff transition within the agency, the Quileute Tribe has experienced lulls in communication, quarterly meetings, and varying levels and understandings of consultation. Sometimes, transition has led to a need to redevelop relationships and common understanding of treaty reserved rights. As a result, staff transitions have hindered progress in building relationships, addressing conflicts, and improving protection for resources of interest.

The Olympic National Forest works with at least thirteen Indian tribes; the Quileute Tribe works with at least ten federal agencies and ten state agencies regarding project planning and policy implementation. For new staff, developing and managing relationships with sovereign nations and public and private stakeholders during planning, project implementation, and monitoring pose significant learning curves.

To assist staff transitions, the Quileute Tribe has developed presentations to educate new district rangers and other federal and state agency staff about treaty rights, intercultural dialogue, and the subtleties of government-to-government relationships. To better assist staff transitions, the Tribe wonders how it may work with federal agencies to prepare for staff transitions and what federal agencies can do to plan for and support staff transitions to maintain relationships and progress between the Tribe and agencies.

Northwest Forest Plan

Staff transition within the Olympic National Forest has affected communication regarding the Northwest Forest Plan status, including which elements are still operative and which are inoperative. The Plan has recently undergone numerous changes that have directly impacted the Quileute Tribe. The Tribe’s experience with the NWFP includes

²³Memorandum of Understanding (MOU) between the Quileute Indian Tribe and USDA Forest Service Olympic National Forest for Coordination on Resource Management Issues. 2004.

²⁴MOU between Quileute Indian Tribe and USDA Forest Service Olympic National Forest – see 3

²⁵Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments. November 6, 2000.

working on a watershed analysis with the Forest Service, developing restoration projects through the Jobs in the Woods program, participating as a tribal representative on the Interagency Advisory Council (IAC) in the 1990s, and attending meetings of the Olympic Provincial Advisory Committee (OPAC).

Several years ago, funding for the Jobs in the Woods program ended; recently, the OPAC dissolved; before that, the IAC - the regional counterpart to the PACs - also dissolved. These changes weakened communication among stakeholders and governments and management of resources of concern within the forest.

Jobs in the Woods

Through the Jobs in the Woods program, established in 1994 under the Northwest Economic Adjustment Initiative,²⁶ the Quileute Tribe had the opportunity to compete with other tribes for funding to support restoration projects. The Bureau of Indian Affairs (BIA) received funding through the program to distribute to tribes after ranking proposed projects, based on criteria established through watershed analyses. The Quileute Tribe received funding every year (~1997-2005) for at least two projects. The funding provided through Jobs in the Woods enabled the Tribe to accomplish vital assessment and stream restoration projects, including culvert repairs, and develop



Treating invasive knotweed along Calawah River. Image: Quileute Indian Tribe.

partnerships with local land owners. It also helped to train Tribal staff in technical stream restoration tasks. Quileute staff described the program's end as

“a huge loss that no other program has replaced. All animals’ and plants’ habitats in the forest will degrade again without programs to maintain habitat.”²⁷

In addition to support for restoration projects, Quileute Tribe staff members noted that the NWFP incorporated important support for rural communities, ecosystems, and treaty rights. The Northwest Forest Plan recognized the need for local assistance and provided funding mechanisms for local-level entities to deal with the economic displacement that followed timber harvest reductions. Compared to management goals during the 1980s, the Northwest Forest Plan also encompassed a wider range of values, and, as a result, people are now acknowledging the value of an intact, functioning, forest ecosystem.

Tribal Monitoring

The inclusion of a section on treaty rights in the NWFP Record of Decision provided opportunity for tribes and federal agencies to have dialogue and strengthen understanding and protection of treaty rights. Quileute Tribe and Olympic National Forest staff members did begin a dialogue; however, it has yet to fully come to fruition. Staff members’ transitions within the ONF and within local law enforcement have affected the dialogue and progress in achieving common understanding regarding treaty-reserved rights. In addition, reduced funding to support dialogues between agency and Tribal staff members limited its success. Quileute staff members noted the decline in funding resources available to the ONF following the decline in timber harvests after NWFP implementation had impacted the Forest Service’s capacity to build relationships with the Tribe.

²⁶<https://scholarsbank.uoregon.edu/xmlui/handle/1794/3283>

²⁷Currently, the Jobs in the Woods program is an unfunded mandate of the NWFP.

Interagency Advisory Council

During the 1990s, Quileute staff participated on the Interagency Advisory Council (IAC) for the NWFP. Tribal staff served on the IAC for a number of years, attending quarterly meetings and representing the issues NW tribes faced under the NWFP. The IAC was active in making NWFP policy recommendations regionally and nationally. The recommendations reflected an interpretation of treaty-reserved rights based on discussions of the IAC and its members. However, at this regional level, interpretations of treaty-reserved rights differed from local interpretations; a lack of communication between the regional office and local federal agency offices made it difficult for policy recommendations made at the regional level to be implemented at the local level.²⁸ Quileute staff suggested that increased participation or opportunity for input by local federal agency staff at the regional level, or increased dialogue between regional staff and local staff could improve future policy recommendations and the resulting implementation.

Provincial Advisory Council

Quileute staff related that the Olympic Provincial Advisory Council (OPAC), which dissolved about a year ago, had originally been set up for stakeholders with an interest in the Olympic National Forest to learn about proposed policies and projects. Tribal staff maintained that they felt like token participants in the process. Now, without the OPAC meetings, Tribal staff members say they are losing their stakeholder foot in the door. In addition to lulls in communication that result from staff turnovers, the loss of OPAC meetings has further reduced opportunities for the Tribe to learn about agency-proposed policies and projects and provide input and comments. Sometimes OPAC brought to the attention of its members issues that the tribes did not know about. OPAC meetings were the Tribe's only access to actions of which the Tribe should have been aware and the option for consultation. Without venues for dialogue, such as the OPAC meetings, the Tribe was not able to provide feedback on how proposed regulations might affect their

work or their ability to access resources of interest in the forest. The Tribe loses understanding of how the Forest Service comes to project decisions.

Access to Resources

The Quileute Tribe and the Olympic National Forest have been able to work together and reach agreement regarding access to some resources, such as various traditional plants and firewood. However, agreement has not been reached about other resources such as cedar logs. ONF staff members noted that the Forest Service would like to provide the Tribe and other tribes in the area with cedar logs. However, several factors have limited the Forest Service's ability.

- NWFP land designation - Late Successional Reserve (LSR) designation makes it more challenging to consider using standing trees.
- Limited staff capacity makes it difficult to locate potential trees in the forest.
- Habitat – Cedar trees provide habitat for threatened and endangered species.
- Cedar declines and theft – Some areas of the forest, including easy access areas along the road system, have had large losses of old-growth cedar. Much cedar theft has occurred along the road system.
- Conservative interpretation of the treaty language – The interpretation of reserved rights as access to specific resources from land and water instead of broad access, as acknowledged in the Refeedie decision described above has limited the ability of the Forest Service to provide cedar logs.

The Northwest Forest Plan land designations have also limited available habitat for elk and overall forest access. The LSR designation has decreased grazing habitat for elk; road decommissioning and gating for prophylactic reasons (vandals, garbage dumping, and theft) within LSR have decreased access to the forest. The Quileute Tribe and the Forest Service have had some success in addressing these two issues. The ONF worked with the Tribe to develop its

²⁸Quileute Nation staff



Hyas Creek stream restoration. Image: Olympic National Forest.



Stream restoration on Hyas Creek, tributary to the Sitkum River in the Quileute's ceded area. The Forest Service and Quileute Tribe cooperated on this project, which involved placing trees, large woody debris, in Hyas Creek to improve fish habitat. Image: Olympic National Forest.

plan for road decommissioning, incorporating comments from the Tribe on specific roads the Tribe needed to access certain streams. In approximately 2007, the ONF worked with the Tribe to develop its strategic plan, incorporating feedback on the need for ungulate habitat. Since then it has worked with the Tribe on projects to develop elk habitat in the forest.

At the technical staff level, ONF and Tribal staff members noted that they have been able to work well together. However, at the policy level, relationships and communication have at times fallen short of what is needed to build trust and maintain relationships to fulfill the federal trust obligation and accomplish government-to-government consultation. Recommendations based on conversations with Tribal and federal agency staff for improving and sustaining consultation and relationships between Tribes and federal agencies follow.

Lessons Learned

Educational opportunities are needed for federal agency staff members to learn about the federal-tribal relationship.

Over the course of agency staff transitions, pre- and post-NWFP, the Quileute Tribe has experienced varying levels of open communication. At times Tribal staff members say they have been left with the impression that consultation is driven by individuals who understand the federal trust responsibility and work to build relationships. Consultation has been hindered by individuals who do not understand the relationship between federal agencies and tribes or who actively resist the relationship. ONF staff members maintain that opportunities to learn about the federal-tribal relationship and government-to-government consultation are lacking. New district rangers receive training on government-to-government consultation. However, line officers and acting rangers – individuals who fill in during staff transitions – receive no training.²⁹

²⁹This is not to imply that agency staff members have no experiential or learned knowledge regarding government-to-government relations.

ONF staff and Tribal staff agree that there is a need for more education. Without education, ONF staff members note a real missing link for understanding cultural concerns, issues, and values. Staff members try hard to stay connected, but training is needed to fully understand some cultural norms.

Opportunity exists for the Tribe and ONF to develop joint training and educational opportunities. The Tribe has developed several presentations to educate federal and state agency staff; and Tribal staff members say they are prepared to engage in interagency training that has been built into a new MOU between the National Park Service, the Quileute Tribe, and seven other Olympic Peninsula tribes. Joint training opportunities also offer a chance to improve communication among agency and tribal staff.

Additional educational opportunities can assist tribes to educate new agency staff about treaty- reserved rights and help new agency staff understand the language in an MOU about the federal-tribal relationship and the process required to fulfill government-to-government consultation. They can buffer staff transitions within the agency.

Understanding and interpreting treaty-reserved rights have varied over time and among federal and state agencies. Although the law protects all resources, the Tribe has experienced difficulty accessing all resources. Tribal staff members suggest that a lack of understanding of federal Indian laws causes some of the problems. More frequent dialogue at the local, regional, and national level could clarify misunderstandings. Further court decisions could also help.

A lack of training and misunderstanding of consultation lead to conflicts in developing and implementing projects.

Tribal staff members maintain that they have experienced problems in implementing fisheries management activities within the ONF. They have been stopped, questioned and even blocked by new rangers and law enforcement officials from accessing streams in the forest. Consultation provides an opportunity to talk about such issues, learn from them, and discuss ways to avoid them in the future.

Maps of usual and accustomed places and ceded lands would help federal agencies determine when proposed projects are in a tribe's scope of interest.

ONF staff members noted that there are no good maps of tribes' usual and accustomed places or ceded lands. Maps that show these areas would help agency staff determine when a particular project is within the scope of interest for a particular tribe. In the development of project plans, ONF staff members want to contact tribes about issues of importance to them and include all tribes with an interest in a particular project. However, agency staff members were unsure of the total scope of tribes' interests in terms of locations and issues.

Quarterly meetings may not be sufficient, particularly during staff transitions.

At times, regularly scheduled meetings have faltered during staff turnovers. More frequent meetings might maintain relationships and strengthen communication, particularly during personnel transitions. More frequent meetings might maintain an ongoing dialogue about plans, and address issues before full consultation is needed. ONF staff members recommended including in meetings an individual who could bridge staff transition. This would be someone from the agency or Tribe who had been involved in the past, was remaining in the area physically, and able to act as a bridge between new and old staff and maintain a link between the agency and the Tribe. During transitions, new staff members should meet with neighboring forest supervisors, district rangers, and the regional tribal liaison to learn about consultation and local issues.

Consultation must be monitored and federal agencies and tribes must be held accountable.

“Tribes can develop MOUs but they're only as good as the people who are going to enforce them.”³⁰

³⁰Quileute Nation staff

Staff transitions have had an impact on consultation between the Quileute Tribe and the ONF. To assist future transitions, mechanisms to monitor consultation and ensure accountability could help. Additional strategies include:

- When consultation happens, document the process through detailed note-taking.
- Organize forums for agencies and tribes to jointly design the consultation process.
- Provide resources to ensure staff capacity for regular contact between tribes and federal agencies
- In accordance with EO 13175, ensure timely notice whenever tribes are impacted by agency action.
- Organize a process for the Forest Service and tribes to develop a set of policy recommendations for the new administration; an opportunity for a fresh start with doors open for tribes and willingness among agency staff to receive the recommendations once outlined.

Federal agencies and tribes need to develop and maintain a mutually agreed upon system for project planning.

Quileute staff members noted the importance of agencies contacting the Tribe about project plans. The Tribe has developed an MOU with the ONF to help in project planning. Yet, inconsistencies in process have occurred between federal agencies and the Tribe. At times, the Tribe has learned about proposed plans or regulations through the Federal Register instead of from the acting agency. Tribal staff members related that once plans have been published in the Federal Register, influencing change is like moving a mountain and requires a lot of political clout – understandable because of the effort put forth by an agency to reach that stage. Yet, it illustrates that tribal input before the Register stage is critical. Without consistent contact from federal agencies, it is difficult for the Tribe to keep track of all the agencies and their proposed projects.

Consultation must happen before federal agencies take action – during the planning stage. Currently, organizations, including the Columbia River Intertribal

Fish Commission and the Northwest Indian Fisheries Commission, work to scan the Federal Register for projects, actions, and plans that may impact tribes because communication between federal agencies and tribes fails to cover all projects of interest to tribes. However, it is incumbent on the agency to notice the affected tribe(s) and establish pre-Register consultation for tribal input.

Improved consultation could alleviate the need for these agencies to monitor the Federal Register. However, for this to occur, consultation must be thorough, transparent, and mutually agreed upon. Even more critical, the agency must follow up on issues raised by the Tribe in the consultation, so that the consultation process is not reduced to lip service.

EPA Region 10: Consultation Framework and Guiding Principles

Region 10 of the Environmental Protection Agency (EPA) has spent considerable time and effort to develop a consultation framework and guiding principles for government-to-government consultation.³¹ In addition to the recommendations described above, these principles offer considerations for other federal agencies that wish to improve their consultation processes. Below are highlights of EPA Region 10’s consultation framework and additional consultation challenges the EPA Region 10 has identified in its current effort to revise its consultation framework.

EPA Region 10 staff emphasizes the importance of commitment to consultation. Staff suggests its approach can be successful because of the care put into setting up consultation, the respect during consultation, the process to address concerns and incorporate a tribe’s comments into project plans, and the deference given to tribal sovereignty.

“When we do consult we’re very much consulting with tribes as governments.”³²

EPA Region 10’s consultation framework includes procedures for thorough, inclusive, and transparent consultation, moving forward with regional issues (involving more than one tribe), and protecting tribal

31EPA Region 10 – Consultation Framework – <http://yosemite.epa.gov/r10/tribal.NSF/34090d07b77d50bd88256b79006529e8/4e239b01fbabd5198825694b00041cc5!OpenDocument>

information. It describes processes for consultation that tribes request and consultation the EPA initiates.

Negotiating Consultation

EPA Region 10 staff describes the importance of negotiation before beginning consultation. For each consultation, the agency goal is to work with the tribe (or tribes) to determine where consultation will occur, who will be there, the expected outcomes, what the tribe hopes to achieve, and any other details that will ensure a transparent and mutually agreed upon process. EPA staff members note that tribes usually prefer face-to-face consultation involving the highest level agency staff person. Negotiation helps tribes to be supportive of the process because they can see how they will be involved in every step.

Identifying Consultation Priorities

The EPA Region 10 has begun a process to revise its consultation framework to improve consultation. EPA staff members note challenges in identifying tribes'

priorities for consultation, including and in addition to: village lands, reservations, Usual & Accustomed Areas and watersheds of interest. The EPA is working to find a better way to make sure tribes are receiving all of the information about their consulting interests. EPA Region 10 staff notes the Forest Service is currently developing a database that offers potential for this purpose.

When Consultation is Meaningful

EPA Region 10 staff describes another challenge in defining when consultation is meaningful.

“Sometimes even though we may all try our best, we’re constrained by statutes and regulations.”

Sometimes, the EPA is constrained in its ability to alter proposed project plans because of existing rules and regulations. When this is the case, consultation can help to mitigate concerns. However, in the end, a tribe can be left feeling that consultation was not meaningful because the tribe’s concerns were not fully addressed. The challenge is to be creative and address tribal concerns within the constraints of law and regulation.

Case Study #3: Quinault Indian Nation

Consultation and Northwest Forest Plan outcomes: effects on natural resource management, revenue, and access to cultural resources

Introduction

The Quinault Indian Nation (QIN) consists of the Quinault and Queets tribes and descendants of five other coastal tribes - Quileute, Hoh, Chehalis, Chinook, and Cowlitz - and is located on the southwestern corner of the Olympic Peninsula in Washington State. The Quinault Indian Reservation (QIR) includes twenty-three miles of Pacific coastline, and its boundaries enclose more than 208,150 acres of conifer forest. These forests are composed of western red cedar, western hemlock, Sitka spruce, Douglas-fir, Pacific silver fir and lodgepole pine-dominated upland sites, whereas extensive stands of hardwoods, such as red alder and Pacific cottonwood, can be found in the river valleys.³² In 2000, the tribal population was 1,370³³, and in 2001, tribal enrollment was 2,454³⁴. Today, the QIN and its enterprises employ nearly 700 people, making it one of the largest employers in Grays Harbor County.³⁵

This case study describes the Quinault Indian Nation's experience with consultation with the USDA Forest Service and the effects of the Northwest Forest Plan on QIN natural resource management, revenue, and access to cultural resources.

Consultation under the NWFP

Members of the QIN and the Forest Service staff interviewed for this case study indicated that consultation under the Northwest Forest Plan has increased, as has agency awareness of cultural and trust resources. Whereas the QIN and agency staff indicated that both sides are working on the consultation process and the consultation

³²Quinault Indian Nation. <http://209.206.175.157/>. January 26, 2009

³³2000 Census

³⁴2001 BIA labor report

³⁵Quinault Indian Nation. <http://209.206.175.157/>. January 26, 2009

Quinault Indian Reservation Act (P.L. 100-638)

From the Interior Board of Indian Appeals, Dahlstrom Lumber Co. v. Portland Area Director, Bureau of Indian Affairs, 20 IBIA 143 (07/17/1991)

The Quinault Indian Reservation was established on the Olympic Peninsula in western Washington by an Executive Order in November 1873. Parts of the area encompassed within the reservation were not surveyed until 1892. Because of an inaccuracy in the survey, approximately 15,000 acres along the northern boundary were improperly excluded from the reservation.

In 1897, President Grover T. Cleveland set aside a large tract of forest land adjacent to the reservation. This tract later became the Olympic National Forest. Part of the boundary for the forest tract was stated to be the "North boundary of the Quinault Reservation." Lands that should have been included within the reservation thus became part of the Olympic National Forest.

The Olympic National Park was established by the Act of June 29, 1938. Part of the land for the park was taken from the Olympic National Forest and included acreage that should have been included in the reservation as established by the 1873 Executive Order.

Public Law 100-638, 102 Stat. 3327 (P.L. 100-638), was enacted on November 8, 1988. P.L. 100-638 was intended primarily to provide a means through which the Quinault Indian Nation could begin to remedy some of the problems on the reservation that resulted from allotment and earlier surveying errors.

Section 1 of P.L. 100-638 expanded the reservation by transferring approximately 11,905 acres of land from United States ownership with administration by USFS to United States ownership in trust for the Tribe with administration by the Department of the Interior. In addition, section 2 of the act (referred to as the Quinault Special Management Area) required USFS to continue to administer an additional 5,460 acres of land, but to transfer 45 percent of the income generated from those lands to the Secretary of the Interior to be transferred to the QIN.

relationship has improved significantly. Members of the QIN suggested that the executive orders now in place for consultation have resulted in more QIN and agency staff engaging in consultation. Specifically, members of the Nation suggested that the 1988 Quinault Indian Restoration Act (P.L. 100-638) has initiated more meaningful consultation.

“Prior to the North Boundary Restoration in 1988, there was no consultation. Afterwards, we began to have monthly or quarterly meetings.”
QIN staff

The QIN stated that the Forest Service does provide letters and notification for any action. However, the Nation often receives notifications at the same time as the general public. The Nation expressed concern that the Forest Service is still working internally to make decisions and put forward actions and not working directly with the Nation to develop plans and strategies.

“The Nation—submitted our input for the Humptulips project, but never received any information on how it was received or used by the agency” QIN staff

Level of leadership

One of the biggest concerns among QIN natural resource staff interviewed for the case study was that, although local Forest Service staff members regularly consult and coordinate with the QIN, there is very little interaction with the Forest Supervisor. The Nation believes that formal consultation should begin with the Forest Supervisor - the highest level of leadership.

“Tribes need to be engaged in the initial scoping process – not just when decisions have been made. When timber sales have already been designed, it’s too late. Can’t get any meaningful input at that level.” QIN staff

Tribal capacity and communication

One QIN member did indicate a recent instance when the Nation was able to provide input into a Forest Service

action before the decision was made and the final product completed. However, there was a miscommunication with the Nation on when the request for input occurred. The Forest Service staff interviewed for this case study recognized that tribal workload might affect the Nation’s ability to respond to all agency notices.

“If we write a letter describing the project and a time period for response, we don’t always receive a response from the tribe. If we make a phone call, we’re more likely to receive a response, but we really aim for a formal written response that the Forest Service can include in a project file. A formal response represents the interest of the entire tribe or nation instead of an individual. [I] Blame it on workload.”
Olympic National Forest, USDA Forest Service staff

Turnover

The Nation did recognize that the local district has gone through downsizing, which led to more transition and lack of knowledge about consultation with the Nation. However, QIN members recognized that the local staff members who have been there for many years help ensure a better transition and more consistency with the consultation relationship.

“Just when you get a good relationship with the district ranger, he tends to leave. But the core staff has been there for decades and they have institutional knowledge that has kept the relationship going and brought the new district ranger up to speed.” QIN staff

Impacts and Access to Resources under the Northwest Forest Plan

Access to Cultural Resources

According to the QIN, the Northwest Forest Plan has not had an impact on cultural use, and the consultation relationship has strengthened access to some resources.

Consultation with the Olympic National Forest (ONF) under the Northwest Forest Plan has resulted in some access to cedar.

“[When] the Forest Service finds cedar blow down, they contact the tribe and give the tribe first right to take the cedar. The tribe has gone in to get as much as possible. The tribe has to be fairly aggressive because there is a high theft of cedar – if the tribe doesn’t act quickly the cedar thieves find it quickly.” QIN staff

The QIN attributes the ability to access cedar to a strong relationship with the local Forest Service staff. Cultural resources that QIN members use are still available on the reservation, and the Nation has experienced no significant issues under the NWFP regarding access to hunting and gathering. Individual tribal members may collect cultural resources on national forest system(NFS) lands without knowledge of the tribe or the USFS. They may have their own special spots they go to as a family. They understand balance and don’t take too much from a single area and spread their collecting around to it isn’t even noticed. Most of these resources are renewable each year and grow back when collected correctly. Most people interacting with such resources do such a good job that resource managers don’t see their impact or notice their presence. They don’t make a mess or leave any trace of their visit.

NWFP impacts to the Quinault Indian Nation timber economy

Reductions in timber harvests under the Northwest Forest Plan have directly affected access to opportunities for the QIN timber and individual jobs for tribal members.

“Because the NWFP has reduced wood, it’s changed the local economy of how wood is moved and purchased. It has shifted it to the private sector. We’ve lost mills and communities have changed because the huge volume of resources has changed. The overall impact of the NWFP is that it has so dramatically reduced the annual harvest level.” QIN staff

One QIN staff member stated that it is critical for federal agencies to understand the impact and begin to use consultation to increase opportunities for restoration, jobs, and economic development.

Quinault Special Management Area

The Quinault Special Management Area (QSMA) was intended to provide the Quinault Indian Nation with forty-five percent of the income generated from management activities implemented by the Olympic National Forest in the QSMA.³⁶ According to the QIN and ONF staff, the Northwest Forest Plan has had a direct impact on management of commercial timber and other resources in the QSMA and affected both the amount of revenue and timing of the dispersal of that revenue to the QIN.

“The commercial thinning sales [in the QSMA] were directly impacted by the Survey and Manage direction in the NWFP. We were initially required to conduct field surveys for Survey and Manage species, and the QSMA turned out to be a hot bed for several Survey and Manage slugs, primarily the warty jumping slug. So many were found that it took several years to reach the point where we could proceed with the timber sales. ...I can say for sure that the timing of the sales was slowed.” Olympic National Forest, USDA Forest Service staff

Reductions in commercial timber harvests within the QSMA reduced the amount of revenue that reached the Nation.

“What revenues do we really get? Maybe a few thousand when it was anticipated to be hundreds of thousands.” QIN staff

Quinault River Restoration Project

The Quinault Indian Nation initiated the Quinault River Restoration Project in 2007. The Quinault River Restoration Project aims to restore a regime of natural processes on the upper river through the use of engineered logjams

³⁶Public Law 100-638, 100th Congress

and floodplain reforestation to protect and restore critical spawning habitat for sockeye salmon. In one month following completion of the pilot project in October 2008, 200 spawners were counted among the logjams.³⁷

This Quinault River Restoration Project is among the most important habitat restoration projects to the Nation, according to those interviewed for this case study. The QIN is proposing a twenty-five-year habitat restoration project, which will include twenty years of initial construction (of the engineered logjams) and tree planting and another thirty years of adaptive management. To accomplish this effort, however, the Nation needs a long-term relationship with the Forest Service to access the material for the engineered logjams. For perspective, the initial pilot project, which resulted in thirteen engineered logjams, utilized 2,500 logs. The Nation is now estimating the number of logs needed for the twenty-year construction phase and projects that an additional 400 logjams could be needed, potentially well more than 75,000 logs.

The Nation feels that the Forest Service is unengaged and unsupportive of the project, primarily because the project is not on National Forest System land. However, the goal of the restoration effort is to re-establish stability to the meandering channels of the Upper Quinault River, which will accrue benefits to all stakeholders in the Quinault Valley, including the Forest Service. Effects of land use and development during the last century have reduced sockeye-spawning habitat from an estimated nineteen miles to fewer than four miles. Once the floodplain has been stabilized and the channels re-established, prime habitat for salmon spawning will be restored. Although the project was done adjacent to USFS property, which had been lost to the river, it is now starting to be reclaimed as the river channel is being pushed back from national forest system lands and redepositing land once eroded away. Land survey laws along a river channel can take and then restore ownership, based on how the river moves. In this instance, the USFS appears to be in a position to regain many acres once lost to the river. As it relates to the Forest Service, the channels

could once again find themselves meandering through Forest Service boundaries.

“The Forest Service is a major player in the Quinault Valley – they have been for decades and they are still are a major entity in the Quinault Valley. From that perspective, we believe they ought to be engaged in this habitat restoration project. It is a significant issue for the Quinault Indian Nation – we are trying to save and protect a critical fish species to the Nation. We feel the Forest Service ought to be interested in what we are planning on doing. When you overlay that with their trust responsibility to be mindful of the interests of the QIN in the area, it is another reason they need to be involved.” QIN staff

According to those interviewed for the case study, the Nation tried to engage the Forest Supervisor and the Forest Service Leadership team, but was unable to schedule a meeting over a six-month period to present on the project.

“The Nation engaged really well with the local district ranger and staff, but every time the ranger went to Olympia to meet with the Forest Service Supervisor, the leadership didn’t give it the attention that the QIN had expected.”

The Nation feels that Forest Service engagement in the restoration initiative is critical. The Forest Service has the potential to lend significant credibility and press to this effort if they were to engage as a full partner.

“I would like to see the Forest Service engage as a partner in this. Even if they have a legitimate argument that the majority of the property is outside of FS boundaries, and they can’t do work on these lands because of legislative restrictions, that doesn’t mean that they can’t be a partner with us on the rest of the initiative. Send the message up their bureaucratic ladders that this is important to QIN and help us with public relations.”

³⁷Wild Salmon Center (accessed February 2, 2009) http://www.wildsalmoncenter.org/press/wsc_news_nov_08.php#logjam

Free Use Permits

One of the most significant reasons that the QIN needs Forest Service partnership on the project is to access material for the engineered logjams. The Forest Service is the only landowner remotely close to the Nation that can provide the amount of material needed for the restoration over the twenty-year time frame.

The Nation can apply for a “Free Use Permit” as a cultural tribe and access \$5,000 to \$10,000 in material each year. In 2007 and 2008, the QIN applied for a \$10,000 permit and received only \$5,000 permits each year. In December 2007, a big storm event resulted in a significant amount of blow down, which could have made it possible for the agency to provide a larger amount of material (and potentially a \$10,000 free use permit.) However, the Nation was awarded only the \$5000 permit. The road right of way material through the blow down was put up for sale and didn’t sell. This was given to the QIN for the value of the free use permit. The wood above and beyond the \$5,000 value was then sold to the QIN for the stumpage rate established for the timber sale. All of the material was then used for the pilot project. According to conversations between QIN staff and the QIN attorney, the Forest Service has latitude to be flexible with the Free Use Permits and spend them out fully, depending on the scale of the cultural activity. If the Forest Service were a partner in the Quinault River Restoration Project, the Nation feels it might be more forthcoming with material under the Free Use Permit.

Furthermore, the Nation is concerned that its only access to material is through the Free Use Permits, which are also available to local and county entities and other tribes. If the agency treated the QIN as a federal entity, it could provide the material directly, without going through a Free Use Permit.

“If the Forest Service saw the Nation as a federal entity, then the Forest Service is authorized to make that wood available directly, not as a handout.”

An additional challenge that has resulted from a lack of consultation is related to Japanese knotweed, an invasive species in the area. More consultation between the QIN

and the Forest Service is critical. The Forest Service land is upstream from the QIN reservation, including areas that the QIN has already treated. Plant foliage from untreated areas floats downriver and leads to knotweed re-establishment in areas that have already been treated. The Forest Service had recently completed an environment impact assessment within the NWFP to address Japanese knotweed, but lost funding because of the national fire-spending transfer that occurred during the 2008 fire season.

The QIN did suggest that it was exploring use of the Tribal Forest Protection Act as a way to implement treatments on adjacent federal land.

Use of MOU’s in consultation

The Quinault Indian Nation does not have a formal MOU with the Forest Service. The QIN indicated that its long-term relationship with the Forest Service has led to regular consultation on projects in relations to Executive Order 13175 and the Quinault Special Management Area (P.L. 100-638). The QIN recently developed a MOU with the National Park Service and seven other Olympic Peninsula tribes, which has established a consultation relationship and built an understanding of needs for the Nation and the agency. The MOU is only the first step in developing an accountable process so that staff understand and accomplish consultation in a meaningful way.

Lessons Learned

Engage tribes in consultation at all levels of planning, scoping, and implementation. Currently, the QIN is notified of projects as they are developed, but those interviewed want to be involved at a much more significant level and on more than timber sales.

“The Forest Service plans like no one you’ve ever seen. While we are asked to provide input on individual timber sales, there is a whole lot of other planning that goes on that we could be engaged in. Ten- and twenty-year plans, forest plans, etc. – but the Tribe is not interacting with the agency as those longer-term plans are being developed.” QIN staff

Level of leadership. Consultation must occur with all levels of federal agency leadership and staff – from line officers and technical staff to district rangers and forest supervisors.

“To see the Forest Supervisor come down and to see the impacts of agency action and policy on the tribe would be immensely helpful. Not necessarily for individual timber sales, but to come down to discuss the agency’s entire impact and meet with the Nation for discussions about opportunities. This would be a start to recognizing meaningful consultation.” QIN staff

Use federal programs to increase partnership opportunities. Use of federal authorities and programs, such as the Tribal Forest Protection Act, could lead to more collaboration in managing cultural and natural resources.

Case Study #4: Upper Skagit Indian Tribe

Consultation challenges and resulting outcomes: developing consultation beyond project notifications to find balance between resource protection, forest management and tribal access

Introduction

The Upper Skagit Indian Tribe (USIT) is located in the North Cascades region of Washington State and owns a small amount of forest land, approximately 250 acres. The Upper Skagit Indian Tribe's guiding philosophy includes a belief in a landowner's entitlement to active forest management as long as resource protection is adequate. This philosophy extends to areas within the Tribe's usual and accustomed land, areas now managed by the Mt. Baker-Snoqualmie National Forest. The Tribe's treaty-reserved rights protect access to these areas. However, land designations under the Northwest Forest Plan have limited the Tribe's ability to access the forest and fulfill its treaty-reserved rights.

Within the Tribe's usual and accustomed land, Late Successional Reserve (LSR) lands, designated to protect old growth forest, have reduced the Tribe's ability to access the forest. Matrix lands, designated for timber harvest, have affected resources of concern. The limited availability of matrix lands has constrained timber harvesting in the Skagit Basin and in turn reduced revenue for road maintenance and abandonment, which has directly increased the likelihood of sediment delivery to fish-bearing streams. USIT staff members acknowledge that the NWFP land designations are a result of listing the northern spotted owl and marbled murrelet under the federal Endangered Species Act (ESA). Therefore, the ESA is the actual root cause of reduced access.

Through consultation, the Tribe seeks to address these issues and find balance between resource protection, forest management, and tribal access to usual and accustomed land now managed by the Mt. Baker-Snoqualmie National Forest. The USIT seeks also to be included in decision making from the point of planning and project conception through to monitoring. USIT staff members assert that ongoing meetings and project updates and protection of tribal rights are integral components of meaningful consultation.

Under the NWFP, the Upper Skagit Indian Tribe's experience with consultation highlights a common shortfall of consultation processes between federal agencies and tribes in Region 6: project notifications in place of formal government-to-government consultation. The following case describes the outcomes of inadequate consultation and offers lessons learned in considering how to enhance consultation processes so that they are meaningful for tribes and federal agencies and result in balanced outcomes. The case also offers insight from the Tribe's experience with adaptive management and collaborative land management, including the NWFP-designated Finney Adaptive Management Area and the Washington State-initiated Timber-Fish-Wildlife forest management system.

Background

Under the Northwest Forest Plan, the Upper Skagit Indian Tribe has cooperated successfully with the Forest Service on a variety of projects. The Tribe has assisted in distributing salmon carcasses in the Skagit Basin and in planning an elk habitat area. The USIT staff notes also that the Tribe is just now engaging in the Forest Service review process for timber harvest proposals within the Skagit Basin. Recently, the Tribe has found a channel of information within the Forest Service, an agency staff member, who has shared maps and proposals for very light thinning projects on the Mt. Baker-Snoqualmie National Forest. Through this connection, the USIT staff has begun to understand the Forest Service's process for identifying places for harvest.

Consultation vs. Project Notification

In 2004, the Upper Skagit Indian Tribe began formally consulting with the Forest Service. Prior to 2004, a cooperative of three tribes represented the USIT in consultation. The Tribe has no formal, written consultation protocol in place. The USIT staff describes the Tribe's formal consultation process with the Mt. Baker-Snoqualmie National Forest as an annual meeting with several agency representatives, who inform the Tribe of the forest service's planned activities for the coming year with minimal follow-up.



Photo courtesy of the Upper Skagit Indian Tribe



Photo courtesy of the Upper Skagit Indian Tribe

“We need an additional meeting(s) to hear about the implementation of these plans, were they effective, were there problems in the proposed implementation plans or were the projects successful? It is important to the Tribe that federal agencies understand that we are not interest groups or members of the public in this consultation process.”³⁸

³⁸Upper Skagit Indian Tribe staff

During the planning process, the forest service and other federal agencies managing lands near the Upper Skagit Indian Tribe send the Tribe project notifications by mail or email. However, limited tribal funding currently requires tribal staff to address a multitude of tasks that, under different circumstances, would be divided among more individuals. Because of this limited staff capacity, the Tribe’s ability to respond to all project notifications received by the tribe is directly inhibited. More important, the Tribe is often unable to screen all of the project notifications to determine whether they are of specific interest and whether they require consultation.

The Tribe’s ongoing relationships with individual employees within the federal agencies do help in identifying projects of specific interest, but do not fully ensure the Tribe’s interests are considered and protected. The Tribe has developed a good rapport with federal agency staff through a long-standing relationship. As a result, some individual federal agency employees take the time to review projects with the Tribe’s interests in mind and contact the Tribe to call attention to particular projects. However, because of limited staff capacity, some projects of interest to the Tribe do slip through with no consultation.

The current consultation process also offers limited opportunities to address project concerns. In effect, sending a letter or an email does not meet federal and legal requirements for consultation. This narrow scope of action impedes meaningful consultation between federal agencies and tribes. It limits communication and opportunity for the Tribe to provide comments and to know how and if those comments are considered in project planning. As a result, outstanding issues persist between the Tribe and federal agencies.

Consultation Outcomes

The USIT staff acknowledges that outstanding issues limit the effectiveness of consultation, and inadequate consultation limits opportunity to address the issues.

“Even if we believe in consultation, we don’t seem to get results.”³⁹

³⁹Upper Skagit Indian Tribe staff



Photo courtesy of the Upper Skagit Indian Tribe

Recently, the Tribe has met with federal agency staff members to discuss accessing an important gathering area for huckleberries so that tribal members can exercise treaty hunting and gathering rights. However, the agency has been working to designate the area as a grizzly bear recovery area, reducing access in the process. Thus, even though grizzly bears have been absent from the area for fifty years, and even though the Tribe's treaty-reserved rights predate any habitat designations, the agency and the Tribe have not been able to address access to the area. As a result they cannot ensure that the Tribe's interests are protected and needs met.

In addition, USIT members are required to obtain permits from the forest service for gathering activities. Many of the Tribe's members are active in basketry and the collection and preparation of native basketry materials. USIT staff members noted that the permits the tribal members must obtain are the same permits members of the general public must obtain for gathering activities. The

permitting process in itself is not cumbersome. However, the permits limit the quantities tribal members are allowed to harvest. They also encroach on the Tribe's ability to govern its members.

"In our minds, the [federal government's] trust responsibility extends beyond the general public...We have made it clear to the USFS that access to all areas within our Usual and Accustomed land is our treaty right and we have not resolved this issue."⁴⁰

To better understand access, maintenance, and resource protection needs, the Tribe has completed a geographic information system (GIS) project to locate all Forest Service road gates and the dates of seasonal closure, and is in the planning stages of creating a GIS layer showing the locations and current status of all Forest Service roads in the Skagit Basin. However, to address these issues, the Tribe and the Forest Service need to consult on a government-to-government level and develop a plan that can balance the Tribe's needs, habitat conservation, and resource management.

Competing interests make project planning difficult. However, the decision-making process regarding projects also makes it difficult for tribe's rights and interests to be protected. Although federal agencies are making final project decisions, it is common for their interests to take precedence over the interests of tribes. The Upper Skagit Tribe has experienced this regarding the NWFP land designations and the Endangered Species Act. To address endangered species concerns, the Tribe's treaty-reserved rights are being compromised.

Collaborative Land Management Systems

Finney Adaptive Management Area

In addition to LSR, Matrix, and Riparian Reserve land designations, the NWFP created Adaptive Management Areas (AMA) in each physiographic province within the Plan area. The AMAs encouraged federal land managers to test flexible and creative management approaches to balance

⁴⁰USIT Staff



Photo courtesy of the Upper Skagit Indian Tribe

multiple interests. Each AMA had a particular management emphasis. In the North Cascades physiographic province, the 98,400-acre Finney AMA on the Mt. Baker-Snoqualmie National Forest emphasized late-successional forest restoration and riparian habitat.⁴¹ The Finney AMA offered land managers an opportunity to address significant damages to fish and water quality that resulted from extensive clear-cutting and road building.⁴² The Finney AMA also offered an opportunity to balance tribal forest access with management and resource protection.

To date, USIT staff noted that the AMA planning process has been incredibly slow and constrained by limited funding resources. Research questions to address fisheries resources and water quality were only recently (2008) formulated. During AMA meetings, the Tribe has provided comments to guide planning direction and decisions. However, those comments have not impacted planning. In this process, USIT staff claimed that the Tribe has been treated like a member of the general public.

⁴¹Northern Coast Range Adaptive Management Area Guide: <http://www.fsl.orst.edu/ncama/guidint.htm>

⁴²Adaptive Management Area Network Archive – Finney: <http://www.reo.gov/ama/locations/finney.htm>

Timber-Fish-Wildlife Forest Management System

In 1987, the Timber-Fish-Wildlife Agreement (TFW) was developed as a result of the adoption of Washington State’s first forest practice rules (1974) and litigation over a variety of potential harvest impacts to aquatic species. The TFW process has evolved over the years, but it is based on a management approach that is open to a variety of disciplines and personnel, in addition to foresters from the Department of Natural Resources. It emphasizes resource protection coupled with the viability of the forest products industry. USIT staff describes the Tribe’s experience in TFW as varied.

“Very tenuous in the early years, as landowners proposing timber harvest were not used to, nor willing to allow, especially tribal, input on issues they felt were their domain. However, acceptance came with consistent, credible, and practical suggestions and solutions to conflicts and problems within the interdisciplinary process. Tribal review of harvest applications has come to be trusted and relied upon in the Skagit basin.”⁴³

The USIT staff stated that the Tribe can engage with federal agencies in the TFW system in a meaningful way.

“The openness of the TFW process is its strength coupled with continuous contact among all participants in the form of monthly gatherings, ID Team field reviews, and quarterly updates on rule changes that facilitate at least understanding if not agreement.”⁴⁴

However, USIT staff stress the difference in the requirements of participants in the TFW process to listen to the Tribe and the requirements of federal agencies to engage the Tribe. The TFW process has built trust, balanced interests, allowed for joint decision making, and sustained dialogue among participants. It may offer insight for formal

⁴³USIT Staff

⁴⁴USIT Staff

consultation. However, it is important to acknowledge that the requirements of formal consultation differ.

Lessons Learned

Address tribal values during all decision-making processes.

The USIT staff related that all tribal values, for the most part, are centered on reserved rights. Therefore, these rights must be addressed initially during any decision-making process. Addressing a tribe's rights reactively or after decisions and actions have occurred, leads to conflicts and inadequate protection of tribal rights. More weight should be given to the Tribe's interests in comparison to weight now given to general interest groups.

Demonstrate action on tribal issues or concerns. Balance the protection for management and tribal use of the land.

USIT staff stated that relationships with the federal agencies could be strengthened by the agencies demonstrating action on issues or concerns raised by the Tribe. Agencies could demonstrate action through periodic updates and additional information about projects that were discussed, on-going communication with the Tribe, additional meetings with the Tribe, and addressing and working with the Tribe to recover access to usual and accustomed land.

USIT staff members claimed that enough weight has not been given to the Tribe's interests. To address this,



Photo courtesy of the Upper Skagit Indian Tribe

they suggest coordinating additional meetings between the Tribe and Forest Service so that they Tribe can learn how project plans are developed and implemented and see how its interests and concerns are incorporated into decision making and project planning.

Develop additional educational opportunities for federal agency staff.

Currently, USIT staff members were unaware of forums or trainings in the North Cascades for agency staff to learn about consultation or treaty-reserved rights. Education and more communication could help federal agency staff understand the Tribe's rights.

Increase federal agency and tribal staff capacity for consultation

Increased tribal funding would help to address staff limitations. A formal, written agreement for government-to-government consultation may also help to identify projects of specific interest and begin to address outstanding issues, including competing interests. However, to be effective, consultation and project planning for federal lands require an inclusive decision-making process that acknowledges tribal rights and interests.

Develop a scope of interest to identify consultation priorities

The Upper Skagit Tribe has recently developed a scope of interest for the Federal Communications Commission



Photo courtesy of the Upper Skagit Indian Tribe

(FCC), which contacts the Tribe regarding cell phone tower sitings. The FCC used to notify the Tribe regarding numerous sitings, even those occurring on the other side of the country. The scope of interest at least limits notifications to the geographic area of interest to the Tribe. It sorts the projects initially so that the Tribe is not so overwhelmed with notifications. Upper Skagit Tribal staff said it could be worthwhile to develop a similar scope of interest with federal agencies to prioritize projects for consultation and ensure that projects of interest would not slip through the cracks.

Case Study #5: Considerations for Consultation Protocols

Developing a Memo of Understanding: Providing the foundation for consultation and long-term, cooperative, government-to-government relationships

Introduction

Tribal monitoring conducted during the first ten years of the Northwest Forest Plan (1994-2003) revealed that all of the tribes with consultation protocols in place (11) described them as adequate for government-to-government consultation.⁴⁵ The initial interviews conducted for this project, the second round of tribal monitoring under the Northwest Forest Plan, also revealed that of the tribes interviewed that had written consultation protocols in place (32 percent; 7) in Region 6, all indicated that their protocols are adequate for government-to-government consultation. This link between protocol development and consultation adequacy highlights the important role written consultation protocols can play in initiating cooperative government-to-government relationships.

Tribes maintained that consultation protocols strengthened government-to-government relationships in several ways. They defined the interests and responsibilities for each party; increased engagement among federal agency staff; strengthened communication, relationships and trust; improved information sharing between tribes and federal agencies; promoted tribal involvement in federal agency planning from the initial planning stages; and incorporated information about and protection of tribal rights and interests in federal agency land management plans.

“The Parties wish to cooperate and harmonize the application of their respective authorities to advance their common interests in protecting and conserving the resources and environment of the ONP and to ensure that the Tribes’ treaty rights to natural and cultural resources are respected.”

NPS-eight Olympic Peninsula Tribes MOU (July 2008)

⁴⁵Claudia Stuart, and Kristen Martine, eds. 2006. “Northwest Forest Plan – the First 10 Years (1994-2003): Effectiveness of the Federal-Tribal Relationship.” Technical Paper R6-RPM-TP-02-2006.

However, the initial interviews for this project also revealed that 50 percent (11) of the tribes interviewed in Region 6 have no consultation protocol in place, and 18 percent (4) are not sure if a protocol exists. A formal protocol allows tribes and federal agencies to mutually develop a framework for consultation. It provides a mechanism to ensure that consultation occurs. Without this mechanism in place, federal agencies may not be aware of when it is necessary to consult with tribes or the land management activities that may impact tribal rights and interests. As a result, the federal agencies may not follow-through with consultation.

Purpose of the case study

For tribes and federal agencies without formal, written protocols in place, this case study offers considerations to consider during a dialogue about developing a formal consultation protocol. This case offers examples of consultation protocols from the National Park Service–Eight Olympic Peninsula Tribes and the Siuslaw National Forest–Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI).⁴⁶ However, it is important to acknowledge the importance of the process and the communication and relationships built between tribes and federal agencies in developing a formal consultation protocol. It is important also for tribes and federal agencies to first identify the outcomes they want to achieve from having a formal consultation protocol in place and to determine methods for how to get there. The protocols described in this case study and the consultation references cited provide insight into a protocol’s contents. Yet, it is a tribe’s right to define the protocol and, with federal agencies, decide its contents.

Background

This section provides an overview of the context and purpose of memorandums of understanding developed by the National Park Service and eight Olympic Peninsula

⁴⁶Although the National Park Service (NPS) does not allow many of the same land uses permitted by the Forest Service and Bureau of Land Management, the NPS is profiled in this case study, based on its work to develop an MOU that meets the needs of the agency and eight Olympic Peninsula tribes.

Tribes, as well as the Siuslaw National Forest and Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.

National Park Service and Eight Olympic Peninsula Tribes

In July 2008, the National Park Service – Olympic National Park (ONP) and eight Olympic Peninsula Tribes signed a memorandum of understanding (MOU) that establishes a framework for government-to-government consultation. During a number of general management planning meetings, the Tribes first stressed to the National Park Service their desire to hold annual meetings regardless of specific plans or projects. During a National Park Service training session on Native American law in 2007 in Port Angeles, Washington, the idea to develop a general consultation MOU originated. The Northwest Indian Fisheries Commission organized a meeting, moderated by Charles Wilkinson, to prioritize the Tribes' interests. An additional training session was held in early 2008 in Ocean Shores, Washington to discuss working successfully with tribal governments. It was hosted by a consortium comprised of the Quinault Indian Nation, several National Forests, including regions on the West Coast, Rocky Mountain, and the Southwest and the NPS Intermountain Region. This session supported the process of developing the MOU.

The training sessions brought tribal and park staff together, which helped to strengthen understanding, interest, and commitment to foster stronger government-to-government relationships and facilitate the creation of the MOU. The ONP superintendent and anthropologist, the Department of Interior solicitor, Northwest Indian Fisheries Commission, and eight Olympic Peninsula Tribes worked together to draft the language for the MOU. Within one year they approved and signed it. The quick time frame in which the MOU was developed and approved, with participation by the eight tribes and the National Park Service, clearly demonstrated interest and commitment.

The Hoh Indian Tribe, Lower Elwha Klallam Tribe, Quileute Nation, Port Gamble S'Klallam Tribe, Jamestown S'Klallam Tribe, Makah Indian Tribe, Quinault Indian

Nation, and Skokomish Indian Tribe all have ties to lands within the Olympic National Park and all participated in developing this MOU. The MOU acknowledges that the Tribes have a stake and a shared interest in the land and natural and cultural resources that are managed by Olympic National Park.

The MOU defines the trust responsibilities of the federal government and clarifies the responsibilities and expectations of both parties - the National Park Service and the eight Tribes. It sets guidelines, schedules, and contacts involved in general consultation. Its goal is to ensure that the Tribes and NPS meet before specific issues arise. The MOU captures the core values of the Tribes and serves as a foundation for building a sustainable relationship between the National Park Service and the Tribes.

In an interview for this case study, ONP staff members clarified that although the MOU does not create new policy, it clearly identifies and captures in writing the objectives, expectations, and interests of all parties and serves as an important tool for orienting new staff. Quinault Indian Nation staff members added that the MOU establishes procedures for implementing consultation.

Siuslaw National Forest and Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians

The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians have an interest in the lands once held by their ancestors - land encompassing 1.6 million acres on the Central Oregon coast and adjacent coast range, including part of the Siuslaw National Forest (SNF). Since 1997, with support from legislators, local government, conservation organizations, and the timber industry, the CTCLUSI has been working to move forward a request to the U.S. Congress to restore ceded lands. The CTCLUSI is the only federally recognized Oregon tribe that has not received restored lands or compensation by the U.S. Congress for taken lands.⁴⁷ At the recommendation of former Oregon senator, Gordon Smith, as part of the land restoration proposal, the Confederated Tribes approached the

⁴⁷Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians. Congressional Request to Restore Tribal Land. 2007.

Siuslaw National Forest and, in 2003, developed a formal consultation memo of understanding.

The original expectation for the MOU was to formalize consultation in preparation for when the U.S. Congress restores land to the CTCLUSI. Regardless of the restoration, however, the Confederated Tribes have interests in the lands that are now part of the Siuslaw National Forest. For this reason, the MOU also formalizes information sharing on heritage resources, permits, road construction, and restoration, and develops a foundation for communication about the lands in which the CTCLUSI and Siuslaw National Forest share an interest. Although the Confederated Tribes have no treaty rights (because an 1855 treaty between Coos, Lower Umpqua, and Siuslaw Indians and the federal government was never ratified), the CTCLUSI is federally recognized.

*“It is the policy of the United States Government and the Forest Service to coordinate activities and consult with federally recognized Indian Tribal Governments with respect to resource management ...”*⁴⁸

The Confederated Tribes see the SNF as a partner in land management. In an interview for this case study, CTCLUSI staff shared their feelings that the Siuslaw National Forest has done well at sharing information early in the planning process, and the CTCLUSI has tried to respond by providing the SNF updates on its legislative efforts. The MOU has facilitated positive relationships between the parties, which the Confederated Tribes acknowledge will be an asset when a land transfer occurs. Under different circumstances, a land transfer could be adversarial. The communication pathways and mutual trust built through the MOU will aid future opportunities to work together.⁴⁹

Yet, CTCLUSI staff members say that until the federal government approves a land transfer - a matter of social

justice - there will always be a barrier to working together. After lands are restored, the Confederated Tribes can say,

“Okay. We’ve reached a level of reconciliation and can move forward working together.”

MOU: Mechanism to Ensure Consultation Occurs

The following sections highlight essential parts of the two MOUs. See Appendix C to read in full the MOUs between the National Park Service and eight Olympic Peninsula Tribes and between the Siuslaw National Forest and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.

The National Park Service and eight Olympic Peninsula Tribes signed their MOU in July 2008 and continue to work on details regarding the consultation process and the types of projects for communication and consideration for consultation.⁵⁰ The Siuslaw National Forest and CTCLUSI have completed a five-year period with their MOU. As of December 2008, they are in the process of updating it.⁵¹

An MOU serves as a starting point and is not an end in itself. These MOUs offer examples for tribes and federal land management agencies interested in developing agreements and protocols for government-to-government consultation.⁵²

Purpose, goals, and objectives

The purpose section of the MOU defines the interests of each party in the consultation process.

*“The Tribes, and the NPS, each sharing an interest in regulation of activities and management of the resources within and around the boundaries of ONP, enter into this MOU to clarify responsibilities and expectations.”*⁵³

⁵⁰Quinalt Nation Staff

⁵¹Siuslaw National Forest staff, CTCLUSI staff

⁴⁸Memo of Understanding between The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians and the USDA Forest Service, Siuslaw National Forest. 2003.

⁴⁹CTCLUSI staff

⁵²Another resource for developing a consultation protocol: Forest Service Manual (FSM) 1500, section 1563.11 “General Consultation Requirements” http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?1500

⁵³Purpose, Memo of Understanding between National Park Service and

The MOU between the NPS and eight Olympic Peninsula Tribes applies not just to consultation, but also to communication, coordination, information sharing, and collaboration to pool knowledge and resources and work to protect and restore natural and cultural resources. The MOU between the Siuslaw National Forest and CTCLUSI also pertains to consultation and to land and resource information and data sharing for the Siuslaw National Forest lands within the ancestral territory of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.

Goals and objectives further describe the purpose of the MOU and strategies for implementation. The MOU between the NPS and eight Olympic Peninsula Tribes acknowledges integrating traditional knowledge into NPS research and resource management, at the Tribes' discretion, along with NPS knowledge. It also describes a joint process to work toward the shared goal of conserving common resources.

Definitions

The definitions section of the MOU includes shared understanding for the terms that underlie the MOU. The NPS and Eight Olympic Peninsula Tribes MOU includes the following terms in a section on definitions:

- affect tribal rights or interests
- cultural resources
- natural resources
- government-to-government consultation
- policies or actions that may affect Tribal interests or reserved treaty rights
- tribal officials

The NPS MOU defines government-to-government consultation as,

“an accountable process that ensures substantive, meaningful, and timely input by Tribal officials on NPS policies or actions that may affect the Tribe’s rights or interests prior to a decision; and substantive, meaningful, and timely consideration by ONP of Tribal input prior to decision making, and to be informed on

how their input was considered and addressed in the decision.”

This definition is important because it stresses the need for both tribal input *and* feedback from ONP staff on the input *prior* to any decision making.

In the initial interviews for this project, several Tribes noted that they receive notifications regarding federal agency land management plans and decisions but do not receive offers to communicate and provide input early in project design or planning. There is a significant difference between notification, which members of the general public may also receive to provide comments on project plans, and consultation, which is a policy of the federal government to engage Tribes in project design and planning and providing comments. Clarifying these terms in an MOU creates awareness among federal agency staff and opportunities for Tribes to provide input at all stages of project development and implementation. It also allows federal agencies to provide input on tribal projects. For all parties involved, an MOU provides an opportunity to develop a framework for improving communication and coordination.

Authorities

The authorities section of the MOU provides the basis for consultation rooted in tribal constitutions, the U.S. Constitution, and federal legislation and includes federal trust and consultation responsibilities. This section differs for each Tribe, depending on its history and relationships with federal agencies and other entities. However, the two MOUs described herein offer initial lists. In addition, USDA Forest Service Manual (FSM) 1500, section 1563.11-Exhibit 01 provides a table that describes key laws and executive orders about consultation and coordination requirements for each.⁵⁴ See Appendix C and D for the complete lists of authorities included in the MOUs.

Obligations

The obligations section of the MOU can include a description of mutual obligations held by each party and

Hoh Indian Tribe, Lower Elwha Klallam Tribe, Quileute Nation, Port Gamble S’Klallam Tribe, Jamestown S’Klallam Tribe, Makah Indian Tribe, Quinault Indian Nation, and Skokomish Indian Tribe. 2008.

⁵⁴Forest Service Manual (FSM) 1500, section 1563.11-Exhibit 01 http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?1500

obligations specific to each party. The obligations cover project planning, scheduling, and implementation. They cover procedures that range from identifying a contact person who is responsible for facilitating and maintaining government-to-government communication, to pursuing opportunities for collaboration among the parties and other federal agencies. As part of planning and scheduling, the MOU between SNF and CTCLUSI states that the SNF will involve the Tribes “*at the earliest point practicable in the planning process before written public notification.*” It also accounts for the timeframe during which communication and project review and consideration will occur; and lists opportunities for field visits during project implementation and monitoring.

The CTCLUSI tribal staff members noted that the call for consultation early in the planning process is a key part of the consultation process, and it is important for the MOU to recognize the government-to-government relationship. The topics and projects on which the Confederated Tribes and Siuslaw National Forest consult are almost secondary to the significance of the relationship stated in the MOU.⁵⁵

The MOU between the NPS and eight Olympic Peninsula Tribes specifies the types of projects on which the parties will seek to collaborate and the types of data and information they plan to share. The MOU describes a framework to begin sharing information and working together on projects and acknowledges that the process will be monitored, tracked, and refined over time. It states that the Tribes and NPS will meet regularly to review processes and outcomes and work together to develop training opportunities to maintain a shared understanding and provide new staff members with knowledge and resources to continue the processes into the future.

Based on the MOU, the eight Olympic Peninsula Tribes and NPS plan to have annual face-to-face meetings. As of March 2009, the annual meeting has been scheduled to be held after the intertribal canoe journey in summer 2009. In an interview for this case study, parties involved in developing the MOU shared concerns about whether annual meetings will be enough to address outstanding issues and

⁵⁵Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians staff

strengthen communication. Agreeing in writing to hold at least one annual meeting for all parties may suffice for this MOU. There is an option for additional meetings to occur, in this case, with individual Tribes or through workgroups created to address specific issues. The NPS is considering creating individual agreements with each Tribe.

It is likely that the language in a written MOU will not capture all of the issues that exist between parties. However, it is important for the MOU to articulate a process for identifying, addressing, and having a dialogue about outstanding issues. The MOU for the eight Olympic Peninsula Tribes and NPS states that during the annual meeting, the parties plan to develop a work plan to address outstanding issues, form workgroups to discuss specific issues, and create a calendar for future meetings. Figure 1 describes the outstanding issues that the parties included as an appendix to their MOU.

The obligations in the MOU between the NPS and eight Olympic Peninsula Tribes also cover the accommodation and protection of the Tribes to exercise certain rights and fulfill interests with respect to natural and cultural resources. The section also includes NPS staff in the development of tribal plans and actions regarding natural and cultural resources that transcend the bounds of the Olympic National Park, such as salmon and riparian habitat.

When Consultation Occurs

The USDA Forest Service Manual (FSM) 1500 outlines the general requirements and steps for government-to-government consultation (section 1563.11).⁵⁶ Region 5 of the USDA Forest Service provides insight on the key principles for effective consultation based on the steps outlined in FSM 1500:⁵⁷

- Tribes should be consulted as early as possible in the development of policies, plans, and actions that may have tribal implications. The

⁵⁶Forest Service Manual (FSM) 1500 http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?1500

⁵⁷USDA Forest Service Pacific Southwest Region, Policies: Consultation, Steps to Effective Consultation <http://www.fs.fed.us/r5/tribalrelations/consultation.php?more=page4>

Figure 1 Initial Issues for Workgroups: NPS—Eight Olympic Peninsula Tribes MOU

APPENDIX OF INITIAL ISSUES FOR WORKGROUPS	
1.	Identification of areas of importance for the ability of Tribes to exercise spiritual and cultural activities and the measures to be taken to ensure their integrity and preservation.
2.	Development of an inventory of cultural and natural resources utilized by the Tribes for cultural purposes.
3.	Identification of areas where cultural and natural resources are to be preserved, measures to ensure their conservation (e.g., regulating or prohibiting commercial harvest or competition for use, limitation of total harvest, application of herbicides/pesticides), and opportunities to provide or enhance Tribal access and use.
4.	Identification of areas of importance for the exercise of Tribally reserved rights; measures to protect, restore, and conserve wildlife and fish habitat and population productivity; and elimination of obstacles to the exercise of those rights.
5.	Restoration of landscapes and ecological functions that have historically supported cultural resources.
6.	Development of mechanisms to identify places of importance to sustain cultural, natural, and archeological resources.
7.	For resources within ONP that are utilized or affected by Tribal activities, development of mechanisms to assist NPS with information to report on status and condition of these resources as required by NPS policies.
8.	Provision of access by all Parties to appropriate policy, technical, and legal resources and of information when seeking to collaboratively resolve issues to their mutual satisfaction.
9.	Development of specific guidelines for consultation on a government-to-government basis.

FS should contact elected officials or designated representatives of the tribal government to discuss a particular issue or opportunity. This should be done prior to “scoping” and general public involvement. Tribes may request that FS technical specialists meet with tribal technical experts, or the tribal leadership may request a meeting with FS line officers.

- Preliminary discussion of why the proposed policy or action is of concern to the Tribe and why the FS is pursuing the proposal can be helpful and enable participants to prepare informed responses and recommendations.
- After consultation, the FS should give full consideration to tribal concerns and recommendations on a particular issue or opportunity. Tribes should then be informed on how their input was considered in the final decision.
- The decision should be documented, including the results of the consultation, and the final decision communicated to the Tribe. The consultation efforts of a FS unit should be

evaluated periodically for their effectiveness, and this information should be included in appropriate program management reviews.

Dispute Resolution and Disclaimers

If any party has issue with an aspect of the MOU or the processes described therein, a section on dispute resolution provides information on how to ameliorate conflict. Dispute resolution can involve a neutral, third-party facilitator. However, involving a third party does not replace the right to appeal a federal agency decision. A section on disclaimers includes information specifying the MOU’s jurisdiction and identifies areas of overlap and nonoverlap with other agreements, protocols, policies, and laws.

Provisions for MOU amendment, review, and termination

The inclusion of provisions for MOU review, modification, and termination allows the consultation process and the government-to-government relationship to evolve and grow. The CTCLUSI staff related that it is important to note room for improvement on both sides. In the past, the Confederated Tribes have had to cancel quarterly meetings

at the last minute, thus creating an inconvenience for the SNF and delaying opportunities to exchange information. The SNF hasn't always provided information requested by the CTCLUSI. However, the CTCLUSI has been able to express this feedback, and the SNF has accepted it as information that will help strengthen communication and relationships.

Both MOUs include provisions for annual face-to-face meetings to review the MOU. These meetings require tribal and agency staff members to have a dialogue about the MOU and matters of mutual interest. They also permit tribal and agency staff members to build relationships and learn to collaborate toward shared interests. Nevertheless, it is worthwhile to consider whether annual meetings are sufficient to improve communication and address and clarify mutual understanding about issues that exist among parties.

Lessons Learned

Developing a written MOU provides a foundation for building cooperative relationships and identifying a formal process for consultation. It offers tribes and federal agencies

an opportunity to think through and clarify their interests. Three integral components to consider for a written consultation MOU include:

- the government-to-government relationship and the importance of initiating formal consultation at the earliest point possible in the planning process;
- a schedule or structure for regular interactions, such as face-to-face meetings; and
- a framework for identifying, documenting, and addressing outstanding issues.

A written MOU may not contain all of the details of the consultation relationship or process, or address all outstanding issues between parties. Yet, it does need to document the duty, desire, and need for parties to communicate and engage in consultation about shared interests and outline a process for maintaining and strengthening communication and trust. The strength grows during the process of developing an MOU. It is sustained by individuals who acknowledge the importance and need to work together and take and maintain the initiative to do so, even through staff turnover.

V. Recommendations

Through the NWFP monitoring process, a series of recommendations for strengthening the federal-tribal relationship arose. The recommendations apply to federal agency staff members at local, district, regional, and national offices who interact with tribes under the Northwest Forest Plan and to broader natural resource management issues. Federal agencies in this position include the USDA Forest Service, Department of Interior agencies (including the Bureau of Land Management, Bureau of Indian Affairs, and U.S. Fish and Wildlife Service), NOAA Fisheries, the Environmental Protection Agency, US Army Corps of Engineers, and the Department of Justice. The recommendations also apply to tribes and tribal organizations and associations with an interest in strengthening federal-tribal relationships.

The recommendations are organized into three areas:

1. define and engage in meaningful consultation;
2. institute measures for accountability within consultation protocols at tribal, national, and district/local levels;
3. integrate consultation protocols within federal, state and regional policy and programs.

1. Define and engage in meaningful consultation

Through the NWFP monitoring process, a set of recommendations was established to strengthen consultation by addressing the timing and substance of consultation and the leadership involved. Federal agencies have a trust responsibility that guides and limits the federal government in dealing with Indian tribes. It requires agencies to consult with tribes on decisions that relate to or affect the sovereignty, rights, resources, or lands of Indian tribes. Because consultation needs may differ significantly between tribes, the most important consideration is to engage tribal leadership in defining a consultation process. Negotiation about the consultation process in deference to tribal sovereignty is critical in meaningful consultation.

1.1 Clarify the purpose of consultation between the tribe and agency.

The federal government has a fiduciary responsibility to engage in consultation with Indian tribes. However, through consultation there is significant opportunity for benefits to come from shared understanding and coordinated management. Therefore, it is important for both parties to identify objectives and goals for consultation and discuss those goals along with proposed plans and actions. Government-to-government consultation is a process separate from general public involvement. Although it does not guarantee that tribal input will change a project, it permits tribes and federal agencies to clarify their expectations jointly about proposed plans, actions, and intended outcomes.

At a minimum, consultation should ensure that the interests of the tribe are heard, articulate how tribal concepts and information generated in consultation are utilized, and provide feedback to the tribe on how tribal input is utilized throughout a project, as decisions are made and actions move forward. At a maximum, consultation can pave the way for mutually beneficial management strategies that help tribes and agencies meet their objectives for land management and protection of natural and cultural resources.

1.2 Involve all levels of leadership and staff in consultation.

When consultation occurs, tribes expect the highest level of leadership within the agency to engage with the highest level of leadership within the tribe. At the same time, tribal and agency staff with experience and knowledge about the issues and relationships must also be intimately engaged in the consultation process. The expectations of both parties are important. If tribes expect the appropriate decision maker to be involved in consultation, federal agencies must understand that expectation and structure consultation accordingly. If the appropriate decision maker is not among the highest level of leadership, the highest level of leadership should be available and willing to consult with the tribe in case the tribe believes lower levels of leadership

are not giving sufficient weight to tribal input. Structuring the consultation process appropriately is vital to ensuring that consultation addresses conflicting viewpoints during the initial phase of project planning and therefore avoids litigation. The exclusion of tribal or agency leadership or staff may jeopardize the consultation process.

1.3 Engage tribes in consultation in all phases of project identification, planning, development, implementation, and monitoring.

When tribes are notified of federal action and given opportunity for input, one level of consultation occurs. However, meaningful consultation occurs only when agencies engage with tribes much earlier in the process, even to the point of giving them an opportunity to guide where and how projects occur. By engaging tribes in all phases of a planning and project development, there is a greater opportunity to meet tribal interests and protect cultural resources.

1.4 Increase capacity of agency staff at the district, regional, and national levels, including technical staff and leadership, to engage in consultation.

For consultation to be effective and meaningful, tribes and federal agency staff at all levels must understand the federal trust responsibility and the consultation process. Training opportunities, including joint trainings between tribes and agency staff, provide opportunities to gain this understanding. Training can ensure that federal agencies working with tribes meet their trust responsibility and foster productive and mutually beneficial relationships with tribes. Policy guidance within agencies should also include protocols for when training should occur, particularly as a mechanism for addressing staff turnover. With education about what consultation is and how it should occur, training could include:

- why all levels of agency (and tribal) staff and leadership should engage in consultation;
- how general notification is different than consultation;

- why opportunities for intercultural dialogue are important for agencies to understand what they are hearing from tribes; and
- how to create a transition period when there is staff turnover to ensure that new staff members are adequately trained and relationships can be maintained.

1.5 Increase the use of Memorandums of Agreement.

Memorandums of agreement (MOA) help to formalize consultation protocols and provide agencies and tribes an opportunity to build a shared agreement of the needs and objectives of consultation. Whereas a memorandum of understanding (MOU) illustrates shared understanding, a MOA goes further to ensure that action is taken to honor the steps and purpose of consultation, and, in some cases, involves funding. Specifically, MOAs can increase knowledge and awareness among agency staff and tribes about the value of formal protocols and MOUs by providing examples and best practices. Having a formal MOA in place permits the outcomes from the agreement to be monitored.

1.6 Re-establish Provincial Advisory Committees within the Context of the Northwest Forest Plan and Establish Oversight Committees that include Tribal Representation in Future Initiatives.

Within the context of the Northwest Forest Plan, provincial advisory committees (PAC) provided an opportunity for agency executives and tribes to meet frequently and discuss land management plans. As PACs across the NWFP area lost funding, this critical relationship and opportunity for consultation between the highest levels of leadership were lost. Within the NWFP, re-establishment of these PACs would help strengthen consultation between tribes and federal agencies. When state, regional, or national initiatives, such as the NWFP, are put into place, in addition to tribal monitoring provisions, oversight committees with tribal representation should be established to ensure that a high level of consultation continues to occur.

Intended Outcomes

In the context of the Northwest Forest Plan and broader natural resource management policies, meaningful consultation is intended to increase and protect access to cultural and natural resources and forest areas and to improve resource management and decrease negative effects on tribal rights and interests. Other outcomes that could occur with more meaningful consultation under the NWFP include:

- Better representation of tribal interests and use of tribal information (and traditional knowledge) and protection of cultural resources in agency management plans:
 - Consultation resulting in consideration of tribal input and meaningful action
 - Use of tribal traditional knowledge and tribal information in project planning, decision making, and implementation to shape plans, decisions, and actions
 - Monitoring how well agencies' plans and decisions reflect tribal values and needs
- Increased protection of cultural resources
- Opportunities to address land allocations within the NWFP and access to land/resources:
 - Restrictions that limit tribal access to cultural resources; inadequate protection of tribal rights; staff level conflicts; road decommissioning; Endangered Species Act conflicts; and other issues resulting from land management restrictions
 - Land/resource access, including water and timber resources, cultural resources, hunting, and tribal resource management.

Meaningful consultation can also address conflicts over land management and develop a protocol for managing for cultural resources under the Northwest Forest Plan. Conflicts can arise from NWFP land designations, such as Late Successional Reserves and Riparian Reserves. These land designations can exclude tribes from cultural and subsistence resources and alter wildlife habitat, such as grazing areas or plant habitat through fire suppression.

In some instances, tribes are left with only one option to ameliorate conflicts: lawsuits. An alternative approach or protocol needs to be developed so that tribes can access resources of interest on tribal-ceded lands currently managed by federal agencies and federal agencies can follow land management plans.

2. Institute measures for accountability

To ensure that consultation occurs, it is important to institute measures for accountability within consultation protocols at tribal, national, and district/local levels.

2.1. Incorporate Tribal Monitoring Protocols into New Management Plans and Plan Revisions.

Tribal monitoring should be incorporated at all levels - from policy to management - to maintain and strengthen government-to-government relations. Tribal monitoring should be incorporated into new management plans and plan revisions. For relationships that have been built through the Northwest Forest Plan, Section 7 – Consultation to continue and grow in the future, tribal monitoring should be incorporated into future policy and management in the Pacific Northwest and across the nation. In addition, new management plans at district or regional levels should include protocols for tribal monitoring.

2.2. Establish strategies for monitoring and creating accountability for agencies to engage in consultation.

Using the NWFP monitoring process or an improved process, continue monitoring government-to-government relationships. The current time frame for monitoring is ten years. Recalling the frequency and substance of consultation experiences over a ten-year period can be challenging. In the future, the monitoring process should incorporate questions that focus on shorter time periods (e.g., two to three years) to gain a better understanding of how often tribes are consulted, what happens, and when with the information that is generated during consultation.

Beyond the NWFP, monitoring federal tribal relationships should be a part of all agency management strategies. Specific areas of focus for this kind of monitoring could include:

- *Ask tribes how consultation is working.* Develop a framework, such as a formal agreement to meet at least annually, to sit down and talk together.
- *Ask federal agencies how consultation is working.* Consultation is a part of federal agency staff performance plans and thus should be made a priority. Federal agency staff should also have the opportunity to discuss consultation.
- *Develop criteria and performance measures for monitoring agency consultation, project implementation, and effectiveness (based on outcomes from consultation).*
Monitoring criteria can create accountability for federal agencies to engage in consultation. Performance measures related to consultation and monitoring can also ensure that agencies can institutionalize mechanisms for accountability.

3. Integrate consultation protocols into federal, state, and regional policies and programs

3.1 Build capacity for tribal and agency staff to dedicate time to consultation and government-to-government relationships.

One of the greatest needs for tribes and agencies alike is increased capacity to engage in consultation. Tribes and agencies are experiencing budget shortfalls that limit staff availability to participate meaningfully in consultation. However, if agency and tribal leadership recognize the importance of consultation, it may be easier to justify staff resources for consultation.

3.2 In legislative proposals at the national level consider tribal needs and opportunities for consultations.

Within the new administration and Congress and with the current economic crisis, there are critical windows of opportunity to ensure that new pieces of legislation consider tribal needs, interests, and the role of consultation. Currently, the economic stimulus package and legislation about “green” jobs hold potential and interest for Tribes. Climate change legislation will also have an impact on (and provide opportunity for) tribes.

3.3 Consider tribal needs and opportunities for consultation when revising plans and creating new plans within the Northwest Forest Plan area.

Tribal monitoring must be included in legislative actions and federal plans, particularly those that might build on or replace the Northwest Forest Plan (such as new legislative proposals).

3.4 Re-establish funding for the Jobs in the Woods program.

Future federal agency plans and plan revisions must include funding for tribal restoration projects and jobs. The Jobs in the Woods program under the Northwest Forest Plan provided an opportunity for tribes to engage in vital assessment and stream restoration projects, develop partnerships with private landowners and federal and state agencies, and learn technical restoration skills. To maintain ecosystem health and ecosystem services, funding is needed for programs that will assist tribes and federal agencies in taking action to restore existing ecosystems and manage restoration efforts into the future.

VI. References

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Appendix A. Letter sent to Tribes

Dear Tribal Leader:

We are writing to request your assistance in participating in a study to evaluate the impacts of the Northwest Forest Plan on resources of concern and working relationships between your tribe and Federal agencies. The study will rely upon results of a telephone survey and selected case studies to develop a monitoring report that will be presented to the regional executives of Federal agencies involved in the implementation of the Northwest Forest Plan.

The insight and perspectives provided from tribal leadership will hopefully result in actionable recommendations that will strengthen working relationships between your tribe and federal land managers and improve resource management to address tribal concerns. If you are willing to participate in this process, please identify the names and phone numbers for the individuals who should be contacted to provide the insights and perspectives on behalf of your tribe.

Resource Innovations, of the University of Oregon's *Institute for a Sustainable Environment*, will be responsible for conducting the study in Oregon and Washington. The Intertribal Timber Council and the California Indian Forestry Fire Management Council will perform the study in California. A description of the process we will use to develop the monitoring report and accompanying case studies, along with a discussion of potential confidentiality issues that may arise, is attached.

If you have questions or comments regarding this process, please contact Gary Harris, Forest Service and Bureau of Land Management, Tribal Relations Staff Assistant at (503) 888-2603 or by e-mail at grharris@fs.fed.us.

LINDA GOODMAN
Regional Forester
Region 6
Forest Service

ED SHEPHARD
State Director
Oregon State Office
Bureau of Land Management

Enclosure(s)

Enclosure 1: Northwest Forest Plan Tribal Monitoring Project

Purpose

Under the 1994 Northwest Forest Plan (the Plan), agencies managing federal land within the range of the Northern Spotted Owl are to conduct monitoring of the effects of implementation of the Plan's Standards and Guidelines.

One element of monitoring identified in the Record of Decision (ROD) for the Plan is "American Indians and Their Culture". Key issues addressed in the initial monitoring effort included:

- Conditions and trends of the trust resources identified in treaties with American Indians.
- Effectiveness of the coordination or liaison to assure adequate protection of religious or cultural heritage sites, and
- Adequacy of access by American Indians to use of forest species, resources, and places important for cultural, subsistence, or economic reasons, particularly those identified in treaties.

Background

Effectiveness monitoring under the Plan is to take place at 10-year intervals. The results of monitoring for the first 10-year period was completed in 2003 and published in 2006 as: "Northwest Forest Plan – The First 10 years (1994-2003) Effectiveness of the Federal-Tribal Relationship" (R6-RPM-TP-02-2006). In this document, the views of 15 Tribes in the area covered by the Northwest Forest Plan were presented. A Tribal Monitoring Advisory Group (TMAG) – see attached list of members, was chartered under the proviso of the Interagency Advisory Council to develop recommendations to improve the protocol and techniques used to monitor the Federal-Tribal relationship and obtain broader Tribal participation.

2008 Monitoring Changes

The TMAG has devised an approach that provides an opportunity for all 76 federally recognized tribes with interests in the federally managed land within the Plan area to participate in an interview to provide their insight and perspectives regarding the Northwest Forest Plan.

Some tribes will be selected for in-depth case studies. The protocol is described as follows:

1. Unless otherwise requested, telephone interviews will be used to obtain responses to a standard set of questions;
2. The questions focus on four areas:
 - a. Consultation Process, outcome and tracking,
 - b. Access and protection,
 - c. Affect on tribal values of interest (cultural, social and economic), and
 - d. Strengthening of federal-tribal relations;
3. In-depth case studies will be conducted and reported in situations where information can offer lessons learned; and
4. Interviews and report writing will be conducted by a third-party, independent, non-government organization or party.

Confidentiality and Informed Consent

The information collected during the interviews will be synthesized into a published report. In the report, no information will be attributed to a specific person or tribe. The interviewers will create a key code, which will allow the raw interview notes to be tied to an individual who was interviewed throughout the process. Because the interview notes and the key code are part of the record of the monitoring process and will be considered property of the federal government, confidentiality may not be fully protected under the law.

Process for Conducting Interviews

Resource Innovations, a program within the University of Oregon's *Institute for a Sustainable Environment*, will be conducting the interviews, writing the reports, and preparing the case studies in Oregon and Washington. Many of you will know of *Resource Innovations* from their work with the Intertribal Timber Council on the June 2006 "Tribal Wildfire Resource Guide". Over the next few months, staff from *Resource Innovations* will be in contact with you, or your professional staff, to identify who you would like them to interact with while conducting the interview. Interviews to complete the questionnaire are anticipated take approximately an hour.

Appendix B. Interview Questions

Tribal consultation process, outcome, and tracking

- 1) Have written consultation protocols been developed?
 - 1a. Are they adequate for government-to-government consultation?
 - 1b. Are they adequate for potential effects on tribal rights, interests, and effects on tribal lands?
- 2) Is the tribe aware of federal policy guidance that is available for tribal consultation when agency plans, projects, programs or activities have the potential to affect resources, uses, or areas of interest to tribes, including tribal lands? Are federal procedures adequate to identify direct and indirect effects to activities on tribal lands?
 - 2a. Is notification specific to the tribe?
- 3) Over the past ten years, has the tribe been consulted on federal agency plans, projects, programs, or activities that might affect tribal rights or interests?
 - 3a. *How frequently and over what time period?*
 - 3b. *Are there PACs or other intergovernmental forums in the area?*
 - 3c. *Do Tribes participate in these forums?*
- 4) Has tribal information been incorporated into federal planning documents (including watershed analysis and decision-making processes, in a manner such that tribes can recognize their contributions?
 - 4a. *Can you provide any examples of when the tribes were dissatisfied?*
 - 4b. *Did tribal contributions result in any changes to federal actions or considerations for resources of interest? If so, please explain.*
- 5) Have agencies consulted or collaborated with tribal governments to develop plans for future monitoring, restoration, or assessment projects, or for other planning efforts?

Access and Protection

- 6) Have the exercise of tribal rights or access to resources and/or areas of tribal interest on federal lands been changed? If so, how?
- 7) Is the tribe aware of procedures that have been put in place to provide for
 - 7a. *protecting sensitive tribal information from unauthorized access or release?*
 - 7b. *incorporating tribal traditional knowledge in the development of management actions?*
 - 7c. *protecting cultural sites on federal land?*
- 8) Are there conflicts over the use or management of resources or areas of tribal interest? What are the sources of the conflict?
 - 8a. *Are conflict resolution processes adequate?*

Affect On Tribal Values of Interest

- 9) Has the tribe exercised treaty rights, other rights, or pursued tribal interests associated with national forests and BLM public lands and resources? Please provide examples, if you wish.
 - 9a. *Any barriers to exercising rights?*
- 10) How is federal (FS/BLM) forest management compatible with what the tribe values about those lands?

Strengthening Tribal-Federal Relationship

- 11) How can the tribal-federal relationship be strengthened? (consultation process?)

Appendix C. Examples: Memorandum of Understanding

The example Memos of Understandings described in case study #5 Considerations for Consultations are available via the Intertribal Timber Council website: <http://www.itcnet.org/>.

- MOU between the Siuslaw National Forest and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians
- MOU between Eight Olympic Peninsula Tribes and the National Park Service

Appendix D. Summary of Comments from Review of the Draft Tribal Monitoring Report

Final Report Draft Comments:

Resource Innovations sent a request to all tribal and agency representatives that had participated in interviews and case studies for the report requesting formal review of the report. The letter was sent on March 2 and participants were given two weeks to conduct the review. Text of the email request follows:

Dear Tribal leaders, staff, and agency partners:

We are writing to request your assistance in reviewing a draft of the attached report, **Strengthening the Federal-Tribal Relationship: A Report on Monitoring Consultation under the Northwest Forest Plan**. You participated in this study during 2009 by responding to questions about the consultation process between tribes and federal land management agencies, outcomes from consultation related to access to natural and cultural resources and protection of tribal rights and interests, consultation monitoring and tracking, and how to improve the federal-tribal relationship.

The attached draft report contains recommendations for strengthening the federal-tribal relationship and compiled findings from the 22 total interviews we conducted with tribes in Oregon and Washington within the Northwest Forest Plan area. It also contains five case studies, which look more in-depth at the consultation experiences of specific tribes within the Northwest Forest Plan area.

We are hoping you will have time to review the draft report for accuracy and clarity. With your help, our goal is to develop a report that is useful in providing insight into the challenges and strengths of government-to-government consultation, and in offering a succinct list of recommendations that may be shared more broadly with federal agencies, tribes and policymakers so that the responses and experiences captured in this report can be used to strengthen the federal-tribal relationship in the future.

We hope to receive all comments by Monday, March 16, 2009. We welcome comments by email, fax, mail or by phone. We are sending the draft report for review to all of the tribes that participated in interviews and case studies, and the federal agencies who also provided input for the case studies.

You are welcome to share the report among other staff within your tribe or agency. However, this is a draft and is not yet available for public review.

Please do not hesitate to contact me if you have any trouble opening the document, or if you have any questions about this process. We look forward to hearing from you and receiving your feedback.

Sincerely,
Kathy Lynn, Resource Innovations

Additional questions about this project may be directed to:

Gary Harris, Forest Service and Bureau of Land Management, Tribal Relations Staff Assistant

Phone: (503) 888-2603

Email: grharris@fs.fed.us

Comments were submitted by the following tribes:

Full report draft comments submitted by:

Name	Organization	Email	Notes
Phyllis Steeves	Siuslaw National Forest	psteeves@fs.fed.us	Email comments
Mike Iyall	Cowlitz Tribe	mikenjoan@comcast.net	Email comments
Doug Couvelier	Upper Skagit Indian Tribe	DougC@UPPERSKAGIT.com	Email comments
Jacilee Wray	Anthropologist – Olympic National Park	Jacilee_wray@nps.gov	Attached word document
Lee Carlson	Yakama Nation	lcarlson@yakama.com	Track changes in report
Mike Stamon	Quinalt Indian Nation	MSTAMON@quinault.org	Track changes in report
Libby Halpin Nelson	Tulalip Tribes	Libbynel@comcast.net	Email Comments

The comments tribes and federal agencies submitted regarding the full report draft are included below. Where relevant, we also offer a description of how we integrated their comments into the final report.

Comments from Respondent 1:

- We have reviewed the document and have no concerns regarding our interview - good job!

Comments from Respondent 2:

- **Executive Summary: Context:** I think the key to the Executive Order is the “accountable process” Like we said even about the ONP agreement is that is a starting point to making it accountable to the staff that would actually carry out the consultation process. Consultations are doing better at the gov’t to gov’t level but tend to fail at the staff levels. Too often the consultation process seems to not be as strong below the initial contact at the top end and loses its energy to be meaningful and accountable as it gets down to the staff level. Mostly because of unclear and accountable direction from above.
- **Recommendations:** 1.2 Involve all levels of leadership and staff in consultation: You nailed this on the head!!!! Fixed what I was saying above about “an accountable process” defined so it doesn’t fail at the staff level.
- **3.4 Re-establish funding for the Jobs in the Woods program:** Timing might be good to re-enact this one before the stimulus money starts flowing. My impression is the money is coming down EXISTING pipelines with controls already in place. Would be good to see this be reinstated. It was a great program that put some great work into the landscape.
- **Case Study Pg. 52: Impacts and Access to Resources under the Northwest Forest Plan:** Individual tribal members may on their own be collecting cultural resources on USFS lands unknown to the tribe or the USFS. They may have their own special spots they go to as a family. They understand balance and don’t take too much from a single area and spread their collecting around to it isn’t even noticed. Most of these resources are renewable each year and grow back when collected correctly. I like to think most people interacting with these sorts of resources do such a good job we as resource managers don’t see their impacts or ever notice they were there. They don’t make a mess or leave any trace to their visit.

- **Use of MOU's in consultation:** The MOU is only the first step in really developing an accountable process so staff involved in the consultation really understand and accomplish the consultation in a meaningful way
- In regards to the comment about the \$200,000 road we will spend \$80,000 to decommission: It is kind of out of context and just hanging out there by itself. Also kind of a stretch for the NWFP. I'm thinking it may be better with out it.

Integrated into the final report:

We addressed all of the specific suggestions and removed the final statement regarding the road decommissioning. We did not add to or change the areas where the comments are in support of the existing recommendations or statements.

Comments from Respondent 3:

I reviewed the document and used track changes to insert some comments. I agree with your conclusions and recommendations for the most part. Some could use a little clarification or emphasis and those are the areas I tried to attach my comments to. Would have been nice to have had one of the Columbia River Tribes included in your case studies so it didn't just reflect coastal tribes.

- **Recommendation 1.1 Clarify the purpose of consultation between the tribe and agency:** Emphasize that consultation is not just checking a box for public involvement nor is it a guarantee that tribal input will be able to change a project.
- **Recommendation 1.2 Involve all levels of leadership and staff in consultation:** Most tribes generally want to speak directly with the appropriate decision maker.
- **Recommendation 1.6 – Intended outcome:** This is a point of view issue that frequently pops up: the tribes see these lands as tribal ceded lands currently managed by federal agencies, not as federally owned lands.
- **Pg. 10. Key findings from the interviews included: Tribes felt that the condition of aquatic and riparian habitats, fisheries, and forest health had improved under the Plan. *This is not universal improvement. In some areas, there has been some improvement in conditions.***
- **Pg.13 Consultation at the Federal Level: Informing Indian tribes of those federal officials charged with making the final decisions with respect to the federal action. *And that those officials are available for consultation.***
- **Pg. 23 Key findings from consultation: Adequacy of Consultation**
 - When there are formal protocols in place there is generally a stronger level of consultation, specifically when those protocols are outlined in MOAs or MOUs. *Those protocols need to be described by the tribe and the process should come from the tribe to the federal agency*
 - The agencies do not necessarily perceive consultation in the same way that the tribe does. The agency personnel frequently do not understand the distinction between tribal treaty rights and public privilege. Nor is the concept of ceded lands well understood by the agency staff.
 - For a successful consultation, several tribes suggested that there is a need for formal consultation and engagement with tribal administrators and council members, as well as technical tribal staff – not just one or the other. *In particular, tribes want to have their discussions with the person that will be making the decision.*
- **Pg. 29. Q9. Treaty Rights:** In general, local agency staff don't seem to fully understand the distinction between a tribe's treaty right and the general public's privilege of access.
- **Pg. 68. Recommendation 1.2 Involve all levels of leadership and staff in consultation:** I'm not sure this is entirely accurate. The tribes generally expect the appropriate decision maker to be involved in the consultation. However,

higher levels of agency leadership should be willing to consult with the tribe if the tribe feels that the decision maker is not giving the tribal input sufficient weight. I think the tribes would rather work out their difference on the front side of the project rather than sue or appeal a decision afterwards.

Integrated into final report document

Recommendation 1.1 updated to include – “Government-to-government consultation is a process separate from general public involvement. Although it will not guarantee that tribal input will change a project, it will offer tribes and federal agencies to clarify their expectations jointly regarding proposed plans, actions and intended outcomes.”

Recommendation 1.2 updated to include – “The expectations of both parties are important. If tribes expect the appropriate decision-maker to be involved in consultation, federal agencies need to understand that expectation and structure consultation accordingly. If the appropriate decision-maker happens not to be the highest level of leadership, that individual should also be available and willing to consult with the tribe in case the tribe believes lower levels of leadership are not giving sufficient weight to tribal input. Structuring the consultation process appropriately is vital to ensuring that consultation addresses conflicting viewpoints during the initial phase of project planning and therefore avoiding litigation.”

Recommendation 1.6, Intended Outcomes – changed ‘federal land’ to ‘tribal ceded land currently managed by federal agencies’

In addition, in **Key Findings** – changed finding to reflect only in some areas tribes felt improvements in natural resources had occurred under the Plan. Added bullet to **Consultation at the Federal Level** definition to reflect comment. Incorporated comments into three bullets under **Summary of Key Findings: Consultation Process and Protocols, Adequacy of Consultation.**

Comments from Respondent 4:

- Pg. 3 - Your key issues include “trust resources.” I believe I commented on this way back in 1997. The term is being misused. Trust resources are managed solely for Indians, and the BIA manages those resources. Treaty rights are not necessarily trust resources. I would speak to you solicitor about using this term as it creates a type of resource that does not exist on some federal lands.
- I think you should have an editor go through it carefully. Many words are connected or two sentences were combined, leaving an awkward sentence, or other typos exist. I just did not have the time to edit all of these.
- Many of the tribal comments center around new staff and making sure that consultation is done uniformly. This should go in the executive summary.
- P 6 - I believe an MOA involves funding whereas an MOU does not.
- P 10 - I agree that the tribes like layers of consultation - from agency leads to informal staff - but later there are contradictions to this where tribes state that only leadership should consult. There needs to be some follow-up on such discrepancies and maybe you will find that the tribes actually agree on these points. Along the same lines, there are conflicting opinions about road closure.
- p. 61 - Having NPS MOU in this document is a bit confusing because the NPS is not mentioned previously and we do not allow many of the same uses as the USFS or BLM, so I would suggest stating why you are using it as an example and describing the difference in our land management practices from USFS and BLM.
- P 61, Paragraph 1 - The training at Ocean Shores was hosted by a consortium comprised of the Quinault Indian Nation, several National Forests, including regions on the West Coast, Rocky Mountain, and the Southwest and the NPS Intermountain Region.
- Paragraph 2, line 2 - relationships, add “and” helped

- Paragraph 4, line 5 - add “sustainable” relationships
- P 65, Paragraph 2, line 2 - next annual meeting will be held after the intertribal canoe journey this summer.
- P 65, Line 5 - I don’t think we want to update this MOU. I would delete sentence “Updating the language . . . may better fulfill the original intention of the MOU.”
- Move to improve communication after the sentence on the annual meeting. What we will be doing is creating separate agreements with individual tribes. I think the MOU as written covers all basis and will not need to be rewritten, just facilitate individual agreements.
- p.66, paragraph 1, line 2 - instead of “their” rights replace with “certain” rights. Not all treaty rights can be carried out in the park, for example we do not allow hunting.

Integrated into final report document

Addressed concerns regarding use of terms trust resources and treaty rights by pulling language taken directly from ROD into a sidebar. We acknowledge the confusion that exists regarding these terms. However, for the purposes of this report, we are following the definitions outlined by the IAC and ROD.

In addition, addressed comments regarding MOAs involving funding in **Recommendation 1.5**. Addressed similar comments regarding layers of consultation through other comments provided. Added a footnote to Consultation Protocols case study to address comment regarding differences in allowed land uses between NPS and FS/BLM. Added suggested edits into Consultation Protocols case study also.

Comments from Respondent 5:

Case Study #5: Considerations for Consultation Protocols: Provisions for MOU amendment, review and termination. Including provisions for MOU review, modification and termination allows for the consultation process and the government-to-government relationship to evolve and grow over time. CTCLUSI staff relates that it is important to note there’s room for improvement on both ends. In the past, the Confederated Tribes has at the last minute needed to cancel quarterly meetings, creating an inconvenience for the SNF and delaying opportunities to exchange information; and the SNF hasn’t always followed through in providing information *[to the CTCLUSI directly following a request. Yet, the SNF and CTCLUSI have the opportunity to share feedback with each other, and re-request information during their quarterly meetings, which help strengthen communication and relationships. The meetings are ongoing and provide an important venue to address continuous issues and tend to work in progress. SNF staff describes the atmosphere of the quarterly meetings as courteous, open and relaxed, a sign of the trust built between the two parties.]*

Integrated into final report document

Integrated updated text into case study.

Comments from Respondent 6:

The USFS and the Tribes needs to move past compulsory and token efforts to communicate. We have attempted for many years to work with the agency, when we are able to work with them, we have both benefited. There must be a cultural shift at the agency level. We see property sold with documented cultural sites on them, over tribal objections. We see mining leases sales proposed that could eliminate decades of environmental restoration efforts by tribes and others. This kind of action is wrong at so many levels, let me attempt to list some of these.

- #1 When government assets (the people’s property) (are sold) the selling agency has less justification for it’s existence; that is shouldn’t we hire realtors instead? Realtors would get more money than agencies with a much

- lower overhead. Realtors are better at selling land, much better, but they don't do habitat.
- #2 The agencies should consider partnering with others, preferably tribes, before selling their reason for existing. Once lands are sold it is unlikely the agency mission for those properties will continue. Speculators and developers don't do habitat, nor do they stay and support communities.
 - #3 Once land is sold or leased the public loses benefit of what was once stewardship of that land. Forest habitat loss will impact an entire drainage, so actions at the headwaters have impacts, perhaps hundreds of miles away. A proposed coppermine could have tainted drinking water for several major cities far downstream.
 - #4 Once lands are sold, the agency will spend the funds and then will have to sell more lands to continue. How will they continue when they have sold it all?
 - #5 Partnering can help keep lands in stewardship and bring in funding to allow the agency to get back to what was once its mission. Partners can bring needed expertise lost in past funding cuts. In Washington State the tribes now employ over 30% of the scientists in the field, state and federal agencies are in another round of cuts. The result will be even fewer scientists in the field.
 - #6 Partnering can bring profitability back to management activities. This will allow the agency to resume its role as a steward of the lands. The needs that generated these agencies still exist, even as the agency dies. Partnering is perhaps, the last chance for the agencies to continue.
 - Unfortunately, we have never got to share these thoughts before with agency leadership that could act on them. When we do share them with agency staff we get only a sad look. They can't even help themselves.
 - Yes, I would like to see the tribes have a better voice in this process.

Text Integrated into final report document

Benefits of federal-tribal partnerships for resource stewardship

Strong partnerships can result in a cultural shift at the agency level. In order to avoid actions, including land sales and mineral leases, which make documented cultural sites vulnerable and discount decades of environmental restoration efforts by tribes and others, federal agencies and tribes need to establish meaningful communication and trust, both integral components of consultation and of functional working relationships.

- Avoid land sales or leases that compromise the agency's mission and in so doing reduce habitat protection, support for communities, and public benefit of land once stewarded.
- Avoid land losses that impact entire basins. Forest habitat loss at the headwaters, for example, may impact land hundreds of miles away; and a mining site could taint drinking water for major cities downstream.
- Develop more fiscally sustainable approaches to agency administration and land management. Partnering can help forward land stewardship and bring in funding streams to allow the agency to continue working to fulfill its mission as opposed to actions that compromise its mission.
- Partnering tribes can bring needed expertise the agency may have lost in past funding cuts. In Washington State, for example, the tribes employ over 30 percent of scientists in the field.
- Partnering tribes can bring needed funds to management activities.

Comments from Respondent 7:

I will outline some brief comments I have at this point, that mostly underscore your existing recommendations. Note that I am speaking primarily from my experience with the Forest Service, as a tribal administrative lead for the Forest Service-Tulalip Tribes MOA, signed November of 2007.

- Consultation process can be effectively laid out in an MOA, or sub agreement to the MOA as is our intention. This will give both the Tribes and the Forest Service an opportunity to work together on arriving at such a process that is understandable, workable to both parties, and is capable of achieving some collective input and consistency in approach from multiple staff and departments within both tribes and federal agencies.
- While training opportunities for federal agency staff are very important, especially including topics of cross cultural communication, tribal history on what are now federal lands and treaty rights specific to the Tribes they are consulting with, and, training for all federal agency staff and tribal staff too on the consultation mechanism(s) agreed upon.
- Strongly agree that PACs should be re-established, and provide ongoing regional guidance on issues that profoundly impact tribes—an example is the new Special Forest Product Policy (in review by Obama administration now) which will need very direct involvement of area tribes whose treaty rights are directly impacted and even with commenting opportunity, could have contributed earlier in this process to yield a more thoughtful draft policy—better policy, greater federal efficiency.

A few of the challenges to effective consultation I have noticed so far:

- Budget and staff limitations, particularly a concern with the Forest Service – this is always given to us as a reason why certain types of consultation or follow up has not occurred- their staff is reduced from prior levels and asked to cover too many fronts; consultation may take a back seat due to a variety of what are seen as more pressing issues.
- Tribal continual follow up and effort needed to ensure consultation- when Tribal staff also limited, this becomes difficult
- Consultation happening within different departments, among different staff- not well coordinated and as a result, not as well informed. A more coordinated approach to consultation from both federal and tribal perspectives, would fortify this process.
- While some agency heads or staff may be committed and knowledgeable, other staff may have very little understanding or knowledge about tribes and tribal consultation requirements—agencies need to better convey these responsibilities as well as allocate appropriate levels of their time to consultation if it is really to occur meaningfully.
- All good relationships require time and personal connections help. Staff turnover in either parties can slow this process.
- Despite having an MOA, and regular monthly meetings now with some staff from the Forest Service, there are still several important projects that went forward with no mention to Tulalip, and that we didn't find out about until late in the process. Knowing what Tribes are interested in and using staff interactions to convey informally as well as formally, these projects of potential tribal concern, is a slow process and one that will time and tribal vigilance to foster.

Use of Comments in Final Report:

Comments will be posted to a discussion website about the report to help stimulate dialogue on the role of and process for consultation.

Case study comments:

Tribes and federal agencies participating in the five case studies included in the report each had opportunities to comment on case study drafts before the full report draft went out to all participating tribes for review. Their comments were integrated into the case studies before those case studies were integrated into the full report draft.

Scott Schuyler, Doug Couvelier	Upper Skagit Indian Tribe	sschuyler@upperskagit.com ; Dougc@upperskagit.com	Email comments regarding USIT case study
Howard Crombie	Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians	hcrombie@ctclusi.org	Email comments regarding Consultation Protocols case study
Sue McGill, Jacilee Wray	Olympic National Park - Past Acting Superintendent	Jacilee_wray@nps.gov	Email comments regarding Consultation Protocols case study
Mel Moon, Katie Krueger, Frank Geyer	Quileute Indian Tribe	mel.moon@quileutenation.org ; frank.geyer@quileutenationa.org ; katie.krueger@quileutenation.org	Email comments regarding Quileute Indian Tribe case study
Wenona Wilson	EPA Region 10 – Tribal Consultation Specialist	Wilson.wenona@epamail.epa.gov	Email comments regarding Quileute Indian Tribe case study
Martha Krueger	USDA Forest Service, Olympic National Forest	mfkrueger@fs.fed.us	Email comments regarding Quileute Indian Tribe case study
George Smith, Jason Robison, Tim Vredenburg,	Coquille Indian Tribe	georgesmith@coquilletribe.org ; jasonrobison@coquilletribe.org ; timvredenburg@coquilletribe.org	Email comments regarding CIT case study
Mark Johnson	BLM Coos Bay District – District Manager	Mark_e_Johnson@or.blm.gov	Email comments regarding CIT case study
Mike Stamon, Dave Bingaman, Larry Gilbertson, Jim Plampin, Wayne Moulder	Quinalt Indian Nation	mstamon@quinault.org , dbingaman@quinault.org	Email comments regarding QIN case study

Strengthening the Federal-Tribal Relationship: A Report on Monitoring Consultation under the Northwest Forest Plan in Northern California

Prepared for

Tribal Relations Office of the
USDA Forest Service Region 5
and Bureau of Land Management, California

Authors:

Kathy Lynn
Katie MacKendrick
Hannah Satein

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Acknowledgements

The USDA Forest Service in Region 5 contracted with the Intertribal Timber Council and the California Indian Fire and Forestry Management Council (CIFFCM) to conduct interviews with tribes in California within the Northwest Forest Plan area. Merv George, with CIFFCM at the time of the interviews, conducted all interviews for the report. Kathy Lynn contracted with the Intertribal Timber Council to analyze the interview data; Kathy, Katie MacKendrick and Hannah Satein are the primary authors of this report.

A tribal monitoring advisory group (TMAG) provided guidance throughout the development of the Northwest Forest Plan tribal monitoring report for both Regions 5 and 6 of the Forest Service. Members of the TMAG include:

- Gary Harris, USDA Forest Service Region 6 Tribal Relations Office
- Don Motanic, Intertribal Timber Council
- George Smith, Executive Director, Coquille Indian Tribe
- Sonia Tamez, USDA Forest Service Region 5 Tribal Relations Office (retired)
- Merv George, USDA Forest Service Region 5 Tribal Relations Office/ California Indian Fire Forestry Management Council

The authors thank the tribal leaders, tribal staff, and agency representatives who spent significant time sharing thoughts and perspectives for the interviews, case studies, and review of the full report.

I. Introduction

Under the 1994 Northwest Forest Plan (the Plan), agencies that manage federal land within the range of the northern spotted owl are to monitor the effects of implementation of the Northwest Forest Plan's Standards and Guidelines. One element of monitoring identified in the Record of Decision (ROD) for the Plan is "American Indians and Their Culture." Key issues addressed in the initial monitoring effort included:

- conditions and trends of the trust resources identified in treaties with American Indians;
- effectiveness of the coordination or liaison to ensure adequate protection of religious or cultural heritage sites; and
- adequacy of access by American Indians of forest species, resources, and places important for cultural, subsistence, or economic reasons, particularly those identified in treaties.

Effectiveness monitoring under the Northwest Forest Plan is to take place at ten-year intervals. The monitoring for the first ten-year period was completed in 2003, and the results were published in 2006 as: "Northwest Forest Plan – The First 10 years (1994-2003) Effectiveness of the Federal-Tribal Relationship" (R6-RPM-TP-02-2006). In this initial monitoring report, the views of fifteen tribes in the area covered by the Northwest Forest Plan were presented. A Tribal Monitoring Advisory Group (TMAG) was subsequently chartered under the proviso of the Interagency Advisory Council to develop recommendations to improve the protocol and techniques used to monitor the federal-tribal relationship and obtain broader tribal participation.

For the second round of monitoring, the TMAG devised an approach to provide an opportunity for all seventy-six, federally recognized tribes with interests in the federally managed land within the Plan area to participate in an interview to provide insight and perspectives about consultation under the Northwest Forest Plan. The TMAG worked collectively to develop a survey instrument that reflected lessons learned from the initial monitoring effort and focused on the consultation process, outcomes, and recommendations from the tribes on how to strengthen

government-to-government relationships.¹ Region 6 of the USDA Forest Service contracted with Resource Innovations at the University of Oregon to conduct interviews with all tribes within the Northwest Forest Plan area in Oregon and Washington. Region 5 of the USDA Forest Service contracted with the Intertribal Timber Council and the California Indian Forestry and Fire Management Council (CIFPMC) to coordinate interviews with tribes in the Northwest Forest Plan area in California.

Findings from this second monitoring effort will be used to report key aspects of federal-tribal relationships within the Northwest Forest Plan. However, findings, lessons learned, and recommendations can be shared much more broadly in a policy context to strengthen government-to-government relationships that extend well beyond the Northwest Forest Plan.

Key Findings from the Initial Monitoring Report

In 2006, the USDA Forest Service published a report on the effectiveness of the federal-tribal relationship as part of a series of reports on the Northwest Forest Plan.² The original monitoring effort that studied the effectiveness of federal-tribal relationships was conducted for the period from 1994 to 2003. The report summarizes the results of a monitoring program designed to evaluate the effects on federal-tribal relationships of the implementation of the Northwest Forest Plan. The report includes perspectives from fifteen of the seventy-six, federally recognized tribes within the Northwest Forest Plan area that agreed to participate in interviews for the monitoring project. The report also includes key findings and recommendations from a forum of tribal leaders that was held in April 2005.

The initial set of interviews consisted of fourteen questions used in formal, face-to-face consultations between tribal government representatives and federal agency officials to collect monitoring information. Key topics addressed in the questions included the conditions

¹See Appendix A for a full list of survey questions and the letter sent by the Forest Supervisor and District Manager to all tribal chairpersons within the Northwest Forest Plan area in Regions 5 and 6.

²Technical Paper R6-RPM-TP-02-2006

and trends of resources protected by treaty or of interest to American Indian tribes and access to those resources; the condition of and access to sites of religious and cultural heritage; and the quality of the government-to-government relationship.

Key findings from the interviews:

- Some tribes felt that the condition of aquatic and riparian habitats, fisheries, and forest health had improved under the Plan.
- Cooperative relationships between federal and tribal leaders are more productive under the Plan. Partnerships have been formed to implement projects on the ground, and some tribal resource needs have been accommodated.
- Tribes prefer “layered” consultations that combine informal staff contact with formal government-to-government consultation. The tribes felt that the planning process sometimes slows the management of trust resources and resources of interest on the ground.

Key findings and recommendations from the 2005 forum of tribal leaders:

- Tribal leaders recommended that the federal agencies should not confuse the popular word “collaboration” with consultation.
- Although tribes and tribal representatives provided information through the consultation process, tribal leaders believed that the advice and recommendations gathered by the federal agencies had, at times, disappeared without a response.
- The continual federal and tribal leader turnover within the NWFP area created a difficult consultation and relationship-building environment. The representatives at this meeting felt there should be an ongoing orientation process for both federal and tribal leaders.

It is important to reflect on these key findings and others in the 2006 report as the changes in the federal-tribal relationship during the last five years since the initial monitoring took place are examined.

California Methods

In both regions, the Forest Service and Bureau of Land Management (BLM) sent a joint letter to the chairpersons of all tribes within the Northwest Forest Plan area to invite them to participate in the interviews and introduce the respective contractors. In Region 5, the California Indian Forestry and Fire Management Council followed up with phone calls to each tribe requesting participation.

Interview Questions

After the initial monitoring had been conducted, the tribal monitoring group refined and developed eleven questions to focus on the following areas:

- consultation process, outcome, and tracking
- access and protection
- affect on tribal values of interest (cultural, social, and economic)
- strengthening federal-tribal relations

A list of the questions used in the monitoring is in Appendix B.

Confidentiality and Informed Consent

Each tribe participating in the monitoring effort was notified of confidentiality issues. The information collected during the interviews has been synthesized into the published report. In the report, no information is attributed to a specific person or tribe. However, because the interview notes and key code are part of the record of the monitoring process and will be considered property of the federal government, all interview participants were informed that confidentiality cannot be fully protected under the law.

Tribal Interviews in California

There are forty-two, federally recognized tribes in California within the Northwest Forest Plan area. Of these forty-two tribes, the California Indian Forestry and Fire Management Council interviewed seventeen individuals representing fifteen tribes.

California Case Studies

As part of the effort to monitor government-to-government relationships under the Northwest Forest Plan, the California Indian Forestry and Fire Management Council conducted two case studies that expand on the information and findings from the tribal monitoring interviews. There is a need to hear from tribes about their experiences and perspectives on how their rights and interests have been affected during plan implementation. The case studies explore in more detail the types of consultation processes that have occurred under the Northwest Forest Plan, barriers and limitations to consultation, successes, and lessons learned to inform policy development and implementation. Case studies can assist tribes and agencies in understanding local conditions and the outcomes from a given process, such as NWFP implementation. They also provide best practices from which others may learn or replicate in their own communities or among their own agencies. The two case studies featured in this report are:

1. Hoopa Valley Indian Tribe: Consistency in consultation and its role in aligning land management across jurisdictions
2. Elk Valley Rancheria: Communication, funding, education, and co-management to address factors affecting consultation

Definitions

Consultation

Consultation is an accountable process to ensure meaningful and timely input by tribal officials into the development of regulatory policies that have tribal implications. Consultation is the active, affirmative process of (1) identifying and seeking input from appropriate tribal governing bodies, community groups, and individuals; (2) considering their interests as a necessary and integral part of the decision-making process; and (3) providing a feedback mechanism to share with tribes how tribal input has been used in the decision-making process. (EO 13175, 11/6/2000; HUD Consultation Policy)

Collaboration

Collaboration is a mutually beneficial and well-defined relationship entered into by two or more organizations to achieve common goals. The relationship includes a commitment to mutual relationships and goals; a jointly developed structure and shared responsibility; mutual authority and accountability for success; and sharing of resources and rewards. Communication channels are well defined and operate on many levels. Authority is determined by the collaborative structure. (Massetich, Murray-Close and Monsey 2001)

Coordination

Coordination involves somewhat formal relationships, with some planning, division of roles, and understanding of compatible missions. Formal channels of communication are established. Individual organizations retain authority but share, to an extent, risk, resources, and rewards. (Massetich, Murray-Close and Monsey 2001)

Cooperation

Cooperation is an informal relationship without a commonly defined mission, structure, or planning effort. Information is shared as needed, and authority is retained by each organization. Risks, resources, and rewards are not shared. (Massetich, Murray-Close and Monsey 2001)

Consultation at the Federal Level

President Clinton's Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," requires each federal agency to have an accountable process to ensure meaningful and timely input by tribal officials into the development of regulatory policies that have tribal implications.

Federal agency action shall be guided by the principles of respect for Indian self-government and sovereignty, tribal treaties, and other rights and responsibilities that arise from the special trust relationship between the federal government and Indian tribes. Federal action shall also favor maximum tribal participation and defer to the laws and policies established by Indian tribes to the extent

permitted by law. Each federal agency has established a government-to-government consultation policy (see Forest Service policy below). Key aspects of federal consultation policy should include:

- notifying Indian tribes as soon as possible regarding formulated or proposed federal actions;
- informing Indian tribes of the potential impact of formulated or proposed federal actions;
- informing Indian tribes of those federal officials charged with making the final decisions with respect to the federal action;
- ensuring those federal officials are engaged and available for consultation directly with tribes;
- ensuring the input and recommendations of Indian tribes are fully considered by those officials responsible for the final decision; and
- providing Indian tribes with feedback about the adoption or rejection of tribal recommendations by those federal officials involved in the decision-making process.

Forest Service Protocol for Consultation with Tribes – FSH 1509.13 (excerpt)

The following steps should be taken when coordinating consultation with tribes:

- the agency contacts the tribal government, preferably prior to scoping and public involvement, to advise the tribe of a proposed policy, plan, or project that may affect tribal rights or interests;
- the tribe may respond back that this is not an issue or that this proposal is important and the tribe would like to initiate consultation;
- the tribe may request that federal agency technical experts meet with the tribe’s technical representatives (or the tribe may request an official level meeting);
- issues are discussed in order for the agency to understand why the proposal is of concern to

the tribe. This allows the respective staff to brief respective parties and provide informed opinions and recommendations;

- consultation steps are defined and an agreement may be reached between the tribe and the Forest Service on the process for consultation;
- the agency makes a decision in consultation with the tribe.

Treaty Rights and Trust Resources (as described in the NWFP Record of Decision)³

This [record of] decision provides a higher level of protection for American Indian trust resources on public lands than the plans that it amends and does not impair or restrict the treaties or rights of tribes. However, subsequent implementation of standards and guidelines could directly affect American Indian practices and activities, e.g., a prohibition against the collection of certain plant material or trees in late successional reserves that are subject to tribal treaty off-reservation gathering rights. Under such circumstances, the exercise of these tribal treaty rights will not be restricted unless the Regional Interagency Ecosystem Office determines that the restriction is (1) reasonable and necessary for preservation of the species at issue, (2) the conservation purpose of the restriction cannot be achieved solely by regulation of non-Indian activities, (3) the restriction is the least restrictive alternative available to achieve the required conservation purpose, (4) the restriction does not discriminate against Indian activities either as stated or as applied, and (5) voluntary tribal conservation measures are not adequate to achieve the necessary conservation purpose.

Future analysis and planning efforts to implement this decision on lands administered by the BLM and Forest Service will identify Indian trust resources that would be affected and identify potential conflicts between proposed federal actions and treaty rights or tribal trust resources. Consultation with the recognized tribal government with jurisdiction over the trust property that the proposal may

³Northwest Forest Plan Record of Decision. (April 1994). www.reo.gov/library/reports/newroda.pdf

affect, the Bureau of Indian Affairs, and the Office of the Solicitor will be conducted early in the planning process. The consultation with affected tribes will occur on a

government-to-government basis. Conflicts will be resolved collaboratively, and affected tribes will be involved in the planning process, consistent with the federal government's trust responsibilities.

II. Key Findings from the California Tribal Interviews

A number of tribes contacted for interviews indicated that because of their limited (or complete lack of) tribal land base, they were not aware of the Northwest Forest Plan and declined to participate in an interview.⁴ Some tribes did share experiences with consultation in general, even when it was not directly related to the Northwest Forest Plan. Throughout this report, comments about consultation not related to the Northwest Forest Plan are clearly pointed out.

Consultation Process and Protocols

Q.1. Adequacy of Consultation Protocols

Interview Question	Yes	No	Some-times	N/A
1a. Have written consultation protocols been developed?	53%	47%	0	0
1b. Are they adequate for government-to-government consultation?	20%	60%	13%	7%

Of the fifteen tribes interviewed, 47 percent indicated that written protocols for consultation had not been developed under the Northwest Forest Plan. Of the 53 percent who said they had protocols in place, just three tribes indicated they were adequate for government-to-government consultation.

Use of Memos of Understanding and Memos of Agreement

Of the eight tribes (53 percent) with written consultation protocols in place, five stated that they had a memorandum of understanding (MOU) or a memorandum of agreement (MOA) that helped facilitate consultation.

Have Written Protocols and Process, but Room for Improvement

Several of the tribes interviewed noted that their written protocol could be improved. The presence of a written protocol did not ensure adequate consultation. One tribe suggested it was too early to tell if its MOU was adequate. Other tribes

⁴Tribes with limited or no tribal land may, however, rely on federally managed lands for subsistence and culturally important resources and sites.

described interaction with federal agencies as more informal than consultation and desired more co-management rather than merely being told what was happening.

Staff Turnover

Two tribes stated that staff turnover impaired consultation and federal-tribal relationships. One tribe described how the transition of federal agency staff reduced the quality of its consultation process. The person who had been consulting with the tribe had retired, and the new person was ill-prepared, unhelpful, or culturally insensitive.

Limited Staff Capacity and Access to the Highest Level

Two tribes cited staff capacity and a lack of interaction with higher level federal staff as problems that impaired consultation. One tribe maintained that fire issues were not being addressed because of limited federal agency staff and that assistance was needed. The other tribe stated that consultation was inadequate because they do

“not have enough access to regional managers. [The] field office has limited authority to make any major decisions.”

Written Protocols Have Not Been Developed

Seven tribes interviewed stated they did not have written protocols in place. One tribe noted it formerly had one with the Bureau of Land Management (BLM), but no longer did. Another tribe stated that there were few Forest Service lands near their reservation.

Q.2. Use and Adequacy of Federal Policy Guidance

Interview Question	Yes	No	Some-times	Don't Know
2a. Is the tribe aware that federal policy guidance is available for tribal consultation when agency plans, projects, programs, or activities have the potential to affect resources, uses, or areas of interest to tribes, including tribal lands?	47%	47%	0%	7%
				total is greater than 100%
2b. Are federal procedures adequate to identify direct and indirect effects to activities on tribal lands?	13%	80%	7%	0%

Whereas 47 percent of respondents stated that they are aware of federal policy guidance for consultation at the federal level, 80 percent of all tribes interviewed indicated that federal procedures are inadequate to identify direct and indirect effects to activities on tribal lands.

Guidance from Specific Agencies, Programs, or Legislation

Several tribes provided examples of guidance from a specific agency or piece of legislation, including the Environmental Protection Agency and Section 106 of the National Historic Preservation Act.

General Guidance

One tribe stated that a “*blanket report*” is provided, but no individual guidance.

Adequate Notice Given regarding Effects to Tribal Lands

Only one tribe maintained that federal procedures are adequate to identify effects to activities on tribal lands:

“Always notified if impacts are there...get maps and letters.”

Inadequacy of Federal Procedures regarding Effects to Tribal Lands

A number of tribes responded that federal procedures were inadequate to identify direct and indirect effects to activities on tribal lands. Tribes described federal agencies that provided too little time for tribes to respond. One tribe suggested,

“*Ten-day notices are not adequate.*”

Other tribes noted adequate procedures existed for certain issues only; two tribes described inadequate procedures for protecting cultural resources and tribal resources from the impacts of multiple use policies.

Q.3. Frequency of Consultation

Interview Question	Yes	No
3a. Over the past ten years, has the tribe been consulted on federal agency plans, projects, programs, or activities that might affect tribal rights or interests?	80%	20%

Eighty percent of the tribes interviewed stated they had been consulted in the last ten years. Yet, the issues addressed, agencies and staff engaged, and frequency of consultation varied.

Consultation Varies by Issue, Agency, and Frequency

Tribes provided examples of the issues addressed in consultation, such as wind generation, impacts on cultural sites, fire concerns, and environmental assessments and the National Environmental Policy Act. Tribes described how the frequency of consultation varied, depending on the issue or staff involved. One tribe noted timber harvest plans motivated consultation.

Tribes also provided examples of the federal agencies and private organizations that consulted with them, such as the Bureau of Land Management, USDA Forest Service, California Department of Transportation, and logging companies. The frequency of consultation varied among agencies. One tribe noted that consultants for the California Department of Forestry send notifications; another tribe state,

“*Pacific Gas and Electric all the time, depends on the projects and contact people involved, Forest Service sometimes.*”

The frequency of consultation varied from a dozen notifications a year to two times in the last five years. One tribe suggested it received notifications every time activities occurred in its area. Another tribe noted that during the last fifteen years the tribe has had frequent consultations, the requirements for which are spelled out in its MOU.

Although some tribes suggested that they received frequent consultation, others described the opposite. One tribe suggested that it was rarely consulted because local federal agency staff had limited understanding of the tribe’s

standing because it was a smaller band related to a larger tribe. Although both are federally recognized, the larger tribe receives regular consultation, whereas the smaller, separate-but-related band, rarely receives consultation.

Q.3. Provincial Advisory Committees (PACs)

Interview Question	Yes	No	Non-Response	N/A
3c. Are there PACs or other intergovernmental forums in the area?	20%	73%	7%	0%
3d. Do tribes participate in these forums?	13%	80%	0%	7%

Twenty percent of those interviewed indicated that there are or have been Provincial Advisory Committees (PAC) or other intergovernmental forums in the area; 13 percent of the fifteen tribes interviewed have participated in these forums.

Imbalance of Power and a Lack of Relevance and Support in PACs

Two tribes stated that they had previously participated in the PACs, but no longer did. One tribe stated that

“they didn’t listen”

and another said they are a

“waste of time - used to [participate] but [they] do not recognize the tribe’s role...[in] decision making.”

These tribes chose to stop participating in the PACs after their unsatisfactory experiences.

Unaware of PACs (Lack of Tribal Participation and Representation in PACs)

One tribe stated they were unaware of any PACs. This suggests that PACs may exist, but that tribal representation in PACs could be limited.

Q.4. Use of Tribal Information

Interview Question	Yes	No	Some-times	Don’t Know	Non-Response
4a. Has tribal information been incorporated into federal planning documents (including watershed analysis and decision-making processes) in a manner such that tribes can recognize their contributions?	40%	60%	0%	0%	0%
4b. Did tribal contributions result in any changes to federal actions or considerations for resources of interest?	7%	33%	13%	7%	40%

Six tribes indicated that tribal information that has resulted from consultation efforts has, to some extent, been incorporated into planning documents. However, only one tribe interviewed indicated that it felt its contributions had resulted in changes to federal actions or considerations for tribal resources of interest.

Many tribes gave examples of the types of projects that they have worked on with federal agencies. Several tribes stated that they assisted in watershed analyses and assessments. One tribe noted that it had worked on an inventory of federal lands in 2001.

Two tribes suggested their contributions were sometimes incorporated; one noted that change is slow, but the Forest Service is starting to become more culturally sensitive. Another tribe stated that information is incorporated and changes are made

“on a local level - small items work well when within the local level discussion. Big ticket items (wilderness) don’t work as well- [due to] limitations on authority.”⁵

⁵Congress designates Wilderness Areas, yet these designations also impact the rights of tribes and therefore are important to acknowledge in considering strengthening consultation at the highest level of decision making.

Nine tribes replied that they had not had their information incorporated into federal planning documents and decision-making processes. Five tribes replied that the information they had given had not resulted in any changes in federal actions, and two responded that sometimes changes are made. One tribe stated that

“no...input is ever solicited.”

Another stated that it is *“hard to say”*

if its contributions resulted in any changes to federal actions or consideration of resources of interest.

Q.5. Use of Tribal Information in Future Efforts

Interview Question	Yes	No	Sometimes
5. Have agencies consulted or collaborated with tribal governments to develop plans for future monitoring, restoration, or assessment projects, or for other planning efforts?	47%	47%	6%

Almost half of those interviewed stated that agencies have consulted with the tribes to develop plans for future monitoring, restoration, or assessment projects, or other planning efforts.

Consultation on Specific Projects

Three tribes stated that they had been consulted on issues regarding fisheries and fishing rights; one tribe cited the Marine Life Protection Act. Other issues tribes were consulted on included water rights, restoration, mushroom and basket gathering, and watershed assessments.

Use of Memos of Understanding

One tribe stated that its

“MOU partially covered this [process].”

This highlights the potential of MOUs to facilitate adequate consultation processes.

Notification vs. Consultation

Several tribes described consultation as receiving notifications from federal agencies about planned actions. One tribe stated that it was

“asked for assistance after the fact”

but would

“prefer to be involved in the future.”

This suggests that, for a number of tribes, the consultation process is more akin to a notification process about ongoing federal planning efforts.

Access to and Protection of Tribal Resources and Interests

Part of the monitoring effort is intended to evaluate whether access to and protection of tribal resources and interests on federal land have increased for tribes under the Northwest Forest Plan. The following section examines these issues.

Q.6. Exercise of Tribal Rights and Access to Resources

Interview Question	Yes	No	Some- times	N/A	Don't Know
6. Have the exercise of tribal rights or access to resources and/or areas of tribal interest on federal lands changed?	20%	60%	13%	0%	7%

Twenty percent of tribes interviewed suggested that the exercise of tribal rights or access to resources and/or areas of tribal interest on federal lands had changed under the Northwest Forest Plan. Sixty percent of respondents indicated that they had not experienced changes in rights or access to resources since the establishment of the Northwest Forest Plan.

Access to Cultural Sites has been Affected or Limited

One tribe stated that its access to cultural sites has been limited by gates that demarcated *“special management zones.”* Another tribe stated that its access to a specific cultural site had been affected.

Impacts to Hunting and Gathering

Two tribes stated that their hunting and gathering areas had been affected. One tribe described that fishing and its right to snowy plover had been affected. Another tribe suggested that

“special gathering status should be granted to tribes over other groups.”

Land Designations Affect Rights and Access

One tribe replied that it had not experienced any changes *“aside from more lands being put into wilderness.”* Although wilderness designations occur at the Congressional level and not under the Northwest Forest Plan, it is important to note that these designations also affect the ability of tribes to exercise their rights and access important resources and sites.

Lack of Knowledge about the Northwest Forest Plan

Two tribes stated that they were not sure how their tribal rights had been affected due to a lack of knowledge about the Northwest Forest Plan. They maintained that they had never heard of the NWFP or knew very little about it. These experiences suggest that other tribes may not have the information they need to properly determine how the NWFP impacts tribal rights or access to resources and areas of interest.

Q.7. Protection and Use of Tribal Information and Cultural Resources in Management Plans

Interview Question	Yes	No
7a. Is the tribe aware of procedures that have been put into place to protect sensitive tribal information from unauthorized access or release?	60%	40%
7b. Is the tribe aware of procedures that have been put in place to provide incorporation of tribal traditional knowledge into the development of management actions?	47%	53%
7c. Is the tribe aware of procedures that have been put in place to provide protection of cultural sites on federal land?	67%	33%

Sixty percent of respondents noted that procedures had been put into place to protect sensitive tribal information from unauthorized access or release. Forty-seven percent indicated that tribal knowledge had been incorporated into management plans, and 67 percent noted they were aware of procedures in place to protect cultural sites on federal land.

Procedures and Staff are Ineffective

One tribe stated that the *“Forest Service is uneducated,”* and another said that occasionally sensitive tribal information is protected: *“It depends on who is working with the tribes.”* One tribe stated that the procedures in place are ineffective,

“Archeological sites are being documented when they were asked not to. Sometimes tribes don’t want archeological sites documented because of a fear of what will happen with the information...Freedom of Information Act is always an issue to worry about.”

Incorporation of Knowledge for Specific Projects

Tribes cited specific projects they had worked on with the Forest Service and BLM to incorporate tribal information into management practices, including land use practices and tribal knowledge. One tribe said it had worked with federal agencies on

“bear grass or thinning fuels reduction projects.”

No Procedures in Place to Incorporate Tribal Information

One tribe replied that although

“some discussion...[has] been happening...no procedures [have been] put in place”

to incorporate tribal knowledge about traditional burning and other management issues into federal management plans.

Protection of Information and Cultural Sites Only Partially Adequate

One tribe said it was aware of procedures to protect information about sacred sites; another said that it was aware of procedures to protect information about several of their tribal sites. One tribe credited the Forest Service with the protection of a specific cultural site. Another tribe said that its weaving and gathering areas were being adequately protected.

One tribe said that it worked with federal agencies to co-enforce and monitor tribal cultural sites. Another tribe stated that more work is needed in this area. One tribe described working on an MOU to deal with issues surrounding the protection of tribal information and cultural sites and the incorporation of tribal knowledge.

Protection of Cultural Sites Depends on Staff

Three tribes stated that the protection of cultural sites depends on the federal agency staff. One tribe stated that it

“depends on [the] Forest Service representatives”

and another stated that most of the time protection is adequate but

“during fires it depends on the IC or [who the] Ranger is.”

Q.8. Conflicts over the Use or Management of Resources

Interview Question	Yes	No	Sometimes
8) Are there conflicts over the use or management of resources or areas of tribal interest?	73%	20%	7%

Twenty percent of the respondents suggested that they do not have conflicts with federal agencies over the use or management of resources or areas of tribal interest. However, the majority of the tribes responded that they had conflicts and that conflicts were increasing.

Cultural Sites Not Protected

One source of conflict cited by tribes was a lack of protection for cultural sites. One tribe stated that it wanted a specific group of sites protected, but the

“BLM does not seem to care.”

Others described how looting is occurring on cultural sites;

“Medicine people using areas are not formally protected from the general public. As a result of trees tipping over it is uncovering ancient village sites, and the public is allowed to visit the lands because it is not in trust.”

Negative Impact on Tribal Resources and Areas from Public Use

Five tribes stated that the presence of the general public on federal lands was having a negative impact on the lands and causing conflict. They described garbage, pollution, and inappropriate hunting and gathering. One tribe stated that conflicts are increasing;

“Access to gathering sites is getting tough. Many non-natives over pick and over harvest valuable areas. Not much left for Indians.”

Conflict over Fire Use and Management

Four tribes described conflicts over the way federal agencies manage and use fires. One tribe replied:

“Wilderness does not allow for stewardship-[it] will burn up eventually (wilderness equals abandonment).”

Similarly, one tribe replied that it faces

“land management issues during fires. Intentional fires as fuel breaks hurt tribal areas. [There are] fuels management...conflicts [because the] Forest Service only wants to protect conifers.”

Another tribe stated that it is

“not allowed to remove fire hazard (trees) because of coastal zone permit processes. Too bureaucratic of a process because of strained relationships.”

Still another tribe said it faced conflicts over building fires for ceremonies.

Two tribes stated that conflicts over fires are increasing.

One replied

“[conflicts are] increasing-[the] forests are becoming more unhealthy.” Another stated, *“[Conflicts] increase with Forest Service activities. Fires increase disputes.”*

One tribe stated that the presence of fires is leading to decreased conflict because

“fires bring out bad policies.”

Land Use, Land Designations, and Management Conflicts

The tribes interviewed provided a range of land management and land use conflicts they face. One tribe described a specific land use conflict over the placement of a proposed energy plant. Another cited a

“lack of stewardship- [federal agencies] not taking care of the land”

as causing conflict. Still another tribe said it faced conflict over

“land management issues- [putting] land into trust. Zoning issues are a really major

source of conflict [that] may or may not be from [the] Forest Service and Bureau of Land Management.”

One tribe stated it faced conflicts over mushrooms.

Another stated it was having

“permit problems with bear dance access... [and] perhaps the Forest Service needs cultural training on tribal ceremonies.”

Another tribe replied it was having conflicts about the Native American Graves Protection and Repatriation Act (NAGPRA).

Adequacy of Conflict Resolution Processes

Six tribes replied that they had adequate conflict resolution processes. One stated that the processes in place were adequate: they have

“two summit meetings each year.”

Out of the six tribes that stated they had adequate conflict resolution processes, three replied this was because of their MOU or MOA.

Six tribes replied that conflict resolution processes are not adequate. One tribe stated that it has

“made complaints but nothing helps.”

Another tribe replied that although it

“always gets a return phone call from Forest Service representatives,”

the processes are not adequate and

“always can be improved.”

One tribe stated that no conflict resolution processes exist. Another tribe said they were

“Unsure; few conflicts worked themselves out.”

Effect on Tribal Values of Interest (Cultural, Social, and Economic)

Q.9. Treaty Rights

Respondents were asked if their tribe exercised treaty rights, other rights, or pursued tribal interests associated with national forests and BLM public lands and resources. Many tribes responded that they had exercised their hunting and gathering rights, and some tribes cited conflicts that had arisen around these rights. A few tribes replied that they had not exercised their rights.

Exercising Hunting and Gathering Rights

Ten of the fifteen tribes responded that they had exercised their hunting and gathering rights, activities such as fishing and collecting mushrooms, nuts, basket materials, firewood, and medicinal plants. One tribe stated that it exercised its rights

“not as a government action, but individual members still gather basket materials,...wildlife, regalia items (sea lion tusks), [and] abalone.”

Another tribe stated that its gathering rights are

“spelled out in [its] MOA.”

Similarly another tribe stated that it had

“mushroom agreements [for] off reservation [collection].”

Not Exercising Rights

Three tribes responded that they had not exercised any of their tribal rights. One tribe stated that the

“Forest Service does not recognize any tribal rights off tribal lands.”

Conflicts in Exercising Rights

Four tribes stated that they faced conflicts exercising their rights. One tribe replied it does exercise its rights but

“access is severely hampered by gates. Hunting, gathering, [and] ceremonial preparation [are] negatively impacted.”

Another tribe stated that *“exploratory digging hurts tribal land use”* and another stated its *“fishing rights [are a] big issue”*

and that there had been conflict over them.

Q.10. Federal Forest Management Compatibility with Tribal Values

The tribes interviewed provided many examples to illustrate the ways in which federal forest management is compatible and incompatible with tribal values.

Overall Compatible Management

Three tribes replied that overall federal forest management aligns with tribal values. One tribe stated that habitat protection for fish and endangered species is nearly compatible with tribal management. One tribe described,

“[The] Northwest Forest Plan is similar to... [the tribal] forest management plan: adapted management areas...,riparian protection zones are similar, silvicultural prescriptions [and] fuel transport are very similar.”

Another tribe noted, *“Manage the same. Tree poachers and grave diggers have been prosecuted in the past. Tribe would do the same.”*

Compatibility is Situational

Two tribes replied that federal-tribal management compatibility depended on each situation. One tribe stated,

“When both sides agree, cultural and environmental issues work well. Management style is where problems arise.”

Fire Management Not Compatible

Three tribes stated that federal fire management is incompatible with tribal management. The tribes described that there is too much fuel piling up in the forests and more, low-intensity, prescribed burns are needed. One tribe noted,

“Federal management lets too much duff (forest slash a.k.a. fire fuel) exist. Lands are

not kept up. Tribe would have been using more prescribed fire. [This management] results in bad wildlife habitat and gathering areas.”

Overall Incompatible Management

Beyond incompatible fire management, five tribes said that overall federal forest management is incompatible with tribal values. They provided varying reasons why this is the case, including conflicts over village and burial sites, exclusion of other tribal species and resources from federal management, differences regarding the concept of late successional reserves, and differences in priorities, e.g., economics vs. culture.

Strengthening Federal-Tribal Relations

Q.11. How Can Federal-Tribal Relationships be Strengthened?

The survey asked respondents to provide suggestions to strengthen the federal-tribal relationship. Five tribes stated that improving communication between tribes and federal agencies would help improve the federal-tribal relationship. Tribes suggested that there needs to be more communication and it needs to occur earlier. Tribes emphasized the importance of having meaningful and honest communication. One tribe recommended opening up dialog and allocating more funding for communication.

Increase Educational Opportunities for Federal Agencies

Five of the fifteen tribes replied that the federal-tribal relationship could be improved if federal agency staff had more education about tribal policy, culture, and concerns. One tribe noted,

“Federal agencies have to be culturally sensitive and understand native culture. [They need to] work with natives and not against their interests. There are no checks and balances in the forest.”

Another tribe described,

“[There needs to be] better understanding by upper management in the Forest Service and Bureau of Land Management of how tribes value land and resources. Most don’t understand tribal management methods/resources.”

Resolve Existing Conflicts Regarding Level of Consultation and Relationships

Four tribes maintained that resolving issues between tribes and federal agency staff would improve the federal-tribal relationship. The conflicts cited by the tribes arose because of staff turnover, personality conflicts between federal and tribal staff, and the level of staff consulting. One tribe suggested,

“Federal agencies should contact...[the] chairman [and] set up...a person to person meeting. Letters don’t cut it. Because of limited tribal staff, it is very important to keep the chairman in the loop.”

Another recommended more regional meetings with the highest level of the Forest Service and BLM.

Engage in Collaborative Consultation and Co-management

Three tribes recommended that true consultation and management rather than having federal agencies simply notify tribes of their actions could strengthen federal-tribal relationships. The tribes need to be seen and treated as equals, distinct from the general public. One tribe suggested,

“Those tribes that have technical, professional capacity [should be] invite[d] to a process/forum where they can be joint decision makers. [There are] ways to do it without jeopardizing federal responsibilities. The goal is collaborative management.”

Another tribe insisted,

“Consultation needs to be meaningful and upfront. Not [just a] token. [It needs to occur] right at the beginning of the process [as] government to government true equals.”

Return Land to Tribes

Two tribes stated that returning land to tribes would improve federal-tribal relationships. One of the tribes said it is

“hard for [the tribe]...small land base now... no longer have fishing rights or access to tribal lands. Culturally [we] still care, but politically and legally [we are] unable to get too involved.”

Adequate Consultation for Tribes of All Sizes

The experiences of tribes in California, ranging from small Rancherias with minimal or no land bases to large tribes with intact tracts of their ancestral territory, suggest the importance of consistency in consultation regardless of size of the tribe or land base. Some of the smaller tribes interviewed for this project described experiencing inadequate consultation and suggested lack of recognition as one of the causes. Smaller tribes may rely more heavily on federally managed lands for access to resources and culturally important sites because they may own smaller amounts of land. Smaller tribes may lack human resources to engage in consultation and follow-up with federal agencies. The same may be true for larger tribes. To ensure adequate consultation for all tribes, it is important to consider these factors among tribes.

III. Case Studies

As part of the effort to monitor government-to-government relationships under the Northwest Forest Plan, two case studies were conducted to expand on the information and findings from the tribal-monitoring interviews. There is a need to hear from tribes about their experience and perspectives on how their rights and interests have been affected during plan implementation. The case studies explore in more detail the types of consultation processes that have occurred under the Northwest Forest Plan, the barriers and limitations to consultation, and the successes and lessons learned to inform policy development and implementation.

Case studies can assist tribes and agencies in understanding local conditions and the outcomes from a given process, such as NWFP implementation. They can also provide best practices from which others may learn or replicate in their communities or among their agencies. The two case studies featured in this report are:

1. **Hoopa Valley Indian Tribe:** Consistency in consultation and its role in aligning land management across jurisdictions
2. **Elk River Rancheria:** Communication, funding, education, and co-management to address factors affecting consultation

Case Study #1: Hoopa Valley Indian Tribe

Consistency in Consultation and its Role in Aligning Land Management across Jurisdictions

Introduction

For centuries, the Hoopa people have lived in the area now known as the Hoopa Valley along the Trinity River in Humboldt County, California. The Hoopa Valley Reservation today comprises around 92,000 acres of the valley and surrounding mountain slopes; about one-quarter of the tribe's historic territory (around 400,000 acres). Of the 92,000 acres, roughly 2,250 acres are allotted lands, 1,300 are individually owned, and the rest are tribally owned (Tiller 2005). The tribe currently has approximately 2,700 members.

The Hoopa Valley Tribe has long had an established governance system. Under the amended 1988 Indian Self-Determination Act (PL 100-580), the Hoopa Valley Tribe was one of the first tribes (one of twenty in the nation) to take on self-governance as a demonstration tribe. Self-governance became solidified in the early 1990s and has allowed the tribe to define how it uses federal funds and develop its own programs to apply those funds.

The tribe relies on the Trinity River, tributary streams, and prairie, oak woodland, and mixed hardwood and conifer forests for subsistence, well-being, and livelihood. In addition, the tribe's historic territory, continued interests, and connection to the land today extend beyond the reservation boundaries across surrounding private and public lands, including adjacent lands managed by the Bureau of Land Management and USDA Forest Service. Sacred to the tribe, and conservatively protected, are its fishing rights which are federally reserved and confirmed in *Parvanno v. Babbitt*, 1994.

Purpose of the Case Study

The Hoopa Valley Tribe case study offers insight into the impacts of staff transition on consultation and communication between the tribe and federal agencies. It highlights how a lack of access to the highest decision-making level within federal agencies affects tribal

rights, resources, and interests; and how a lack of land management actions under the Northwest Forest Plan affects federal-tribal relations and resources of concern. The case study considers the barriers to, opportunities for, and benefits of aligning forest management on the reservation and on surrounding Forest Service and BLM managed lands to improve forest health, reduce fire risk, and work towards fulfilling goals for the tribe and the agencies. It also presents recommendations described by individuals interviewed for this case for strengthening consultation and federal-tribal relationships.

Background

Trinity River

The Trinity River flows through the Hoopa Valley Reservation, but originates in the Scott Mountains to the northeast. After traveling approximately 130 miles, it enters the Lower Klamath River just north of the reservation near Weitchpec, California. Before traveling through the reservation, the Trinity and Lewiston dams divert Trinity River flows to California's Central Valley via the Trinity River Division (TRD) of the Central Valley Project. The Bureau of Reclamation's decisions regarding flow allocations for the Trinity River affect the tribe's drinking water supply, cultural and social practices, and subsistence and cultural resources, including salmon and other aquatic species, which also cross the reservation boundaries traveling to the ocean via the Lower Klamath River. Presently, the Trinity River Record of Decision (ROD) signed by the Department of Interior and HVT allows for approximately 27 % of the annual inflow above the TRD to be released for restoration of Trinity River fisheries (See PL 102-575).

Forest Management

During the 1940s through the 1980s, the Bureau of Indian Affairs (BIA) was in charge of forest management planning for the tribe. Hoopa tribal staff suggested that the BIA was planning with the economic interests of the tribe in mind, but the tribe never approved any of the BIA's forest management plans. They described that past BIA and

surrounding Forest Service and BLM forest management practices conflicted with tribal forest management practices. One tribal staff member described how the tribal members used to collect different tree sizes and species for different uses, which helped in maintaining forest health.

“One thing we know is when people used to harvest wood from the forest, they used different species for different purposes – one species and size for cooking, another for starting a fire, etc., which helped in keeping the forest clean and free of underbrush accumulating. Federal agencies stopped those practices, and now everything is accumulating on the forest floor.”

In 1988, the tribe took over forest management planning and implementing for its 88,000-acre forest, yet the BIA retains signatory authority on the tribe’s forest management plan. Hoopa tribal staff described how the tribe switched from economic-driven management to management that incorporated a mix of forest values – economic, ecologic, and cultural. The tribe now manages its forest to maintain culturally important species, in addition to managing for economic species. However, Endangered Species Act requirements shift the tribe’s monitoring and management focus to listed species in the area, including the Northern Spotted Owl, and away from culturally important tribal government and tribal members. The tribe’s timber is Smart Wood Certified by the Forest Stewardship Council (FSC).

Past forest management practices and policies on and surrounding the reservation influence the tribe’s lands and interests today. Hoopa tribal staff described how federal forest management policies, including banning the use of fire, have led to significant changes in the landscape, including changes in species composition and impaired forest health, conditions cited by numerous tribes in California who participated in this study.

“Over the last 80 years, the landscape has evolved, along with the climate getting drier, along with subtle changes and the lack of the use of fire. The landscape has evolved to the

point where plants are unhealthy, shaded by Doug firs that have encroached.”⁶

Past forest management practices affect the tribe’s ability to manage its forestlands for economic values and increase the tribe’s vulnerability to catastrophic fire. Hoopa tribal staff described how past management could be one of the reasons the forest is experiencing more blowdown – hundreds of acres are being wiped out on and adjacent to the reservation. They described how surrounding land management practices increase the potential for catastrophic fire to spread onto the reservation, and catastrophic fire could decimate the tribe’s timber economy and harm culturally important species, sites, and human health.

Northwest Forest Plan Implementation

USDA Forest Service

The USDA Forest Service manages lands adjacent to the Hoopa Valley Reservation to the north, east, and south in the Six Rivers National Forest. The Lower Trinity Ranger District office is located in Willow Creek, CA, just south of the Hoopa Valley Reservation. The Six Rivers National Forest Supervisor’s office is located in Eureka, CA.

Hoopa tribal staff described how the Forest Service and BLM have done very little in the area under the Northwest Forest Plan. Tribal staff noted that protection for the Northern Spotted Owl halted timber sales and logging in the area. One staff member maintained that few Forest Service staff are working in the area as a result.

“Because the Forest Service is not doing much, the Willow Creek office, the Lower Trinity Ranger District, has been gutted. So little is being done, it’s like a ghost town. I don’t even know who’s working there now.”

Tribal staff noted that the lack of activity is worrisome because a lot of land could use work. One staff member suggested, as an example, how the Forest Service quit logging to protect the northern spotted owl population in the Willow Creek study area, an Adaptive Management Area in the Six Rivers National Forest. However the area doesn’t

⁶Hoopa Tribal Forestry staff

have good prey habitat, which could be contributing to the population's decline.

Bureau of Land Management

The Arcata Field Office of the Bureau of Land Management works adjacent to the Hoopa Valley Reservation. The BLM is responsible for the Lacks Creek Management Area on the west side of the reservation and lands just north of the reservation boundary.

Hoopa tribal staff suggested the BLM, compared to the Forest Service, does not manage much land in the area. However, they suggested that since Northwest Forest Plan implementation, projects are more readily available to the tribe on land that the BLM does manage. The tribe started working on a project on BLM land in 1995 and currently has crews working in the Lacks Creek Area, which is within the Redwoods National and State Parks Protection Zone.

Consultation Process

Notification

Although there hasn't been much activity under the NWFP in the area, Hoopa tribal staff maintained that federal agencies do try to consult with the tribe, but in the form of notification. The Forest Service sends out a list of potential projects to the tribe, but the projects on the list aren't located close to the reservation and therefore aren't a priority for the tribe. As a result, the tribe doesn't bother to comment. One tribal staff member noted that a former tribal relations staff member at the regional Forest Service office in Eureka did a great job notifying the tribe of any actions that could impact the tribe's interests, but that individual has now retired. Staff members suggested that the consultation process for NEPA is inadequate. Other staff members were unaware of any systems to communicate information about projects from federal agencies to the tribe.

Authority

Staff members suggested that the tribe lacks access to federal agency staff at the highest level, which raises questions of authority and inhibits consultation. Tribal

leadership is hesitant to participate without federal agency leadership also participating. The Hoopa Valley Tribe's experience in this case aligns with comments shared by other tribes who participated in interviews for the northern California report. Other tribes noted conflicts over informing and accessing federal and tribal leaders, suggesting the importance of increasing access to federal staff at the highest level and keeping tribal chairpersons informed.

Tribal-Federal Relationships

Staff turnover members suggested the tribe works well with line officers and individual federal agency staff. However, tribal staff described that federal agency staff turnover and a lack of understanding about tribal sovereignty directly influence relationships between the tribe and federal agencies. Other California tribes stated that staff turnover and a lack of understanding among federal agency staff affected consultation. Hoopa tribal staff members suggested that it is not a matter of federal agency staff not being able to comprehend tribal standing, but rather a matter of experience, education, and knowledge transfer. Staff members described how these issues vary between Forest Service and BLM staff.

Tribal staff maintained that Forest Service employees - line officers in particular - move so frequently that it limits the extent of the relationships the tribe is able to develop with them. Tribal staff members described experiences in which projects initiated with one staff member stopped with that person's departure. They related occasions on which the tribe had to start from scratch educating a new staff member about tribal standing because the new staff member had transferred with no experience working with tribes. Of a policy between the tribe and Forest Service about burning and collecting wood, one tribal staff member described how the federal staff member left in the middle of it; the tribe had to introduce the new staff person to the project because the information had not been shared with that person. Hoopa Tribal staff insisted that the Forest Service staff has changed significantly in the past year. They noted there

are no mechanisms in place to transfer work in progress or relationships between transitioning staff. One tribal staff member stated,

“Forest Service staff changes constantly. Since the 1980s we’ve gone through five different forest supervisors and four district rangers. It is frustrating to have to familiarize new rangers, and the Forest Service doesn’t have someone at the line officer, ranger, or supervisor level that is helping to familiarize people with the Tribe’s standing.”

Tribal staff members suggested that the BLM has a good understanding of the tribe’s standing because individuals remain in one location as line officers for longer periods of time. Tribal staff members also noted that, as a result, the tribe has been working with the BLM since NWFP implementation and has agreements in place regarding the work. Staff members noted that the relationships between the tribe and BLM have progressed significantly since the early 1990s; before the early 1990s, the tribe and BLM acted independently and kept to themselves. Now, they work together on a government-to-government basis. One staff member for the tribe said that the BLM now offers projects to the tribe before others because of the tribe’s proximity to BLM managed land and because the BLM knows the tribe has quality, capable, and reliable, natural resources staff members.

Mechanisms for Collaboration

Hoopla tribal staff described a number of projects and topics through which the tribe and federal agencies have shared knowledge and resources, including assisting the Forest Service with surveys of the North Fork of the Trinity River and the Fish and Game on South Fork surveys and communicating with BLM staff to share ideas on surveying for fishers. In addition to staff-level cooperation, tribal staff members mentioned several mechanisms that have allowed federal-tribal collaboration. These mechanisms vary in relation to the Northwest Forest Plan but are important in their ability to bring tribes and federal agencies together to jointly manage lands and pool resources and knowledge.

Tribal Forest Protection Act

Tribal staff noted that the Tribal Forest Protection Act allowed the tribe to develop and implement a stewardship contracting project on federal lands adjacent to the reservation in areas burned during the 2005 Megram fire. Currently, the tribe is pursuing additional work on adjacent federal lands through the Act.

Jobs in the Woods

Staff members for the Hoopa Tribe described that the funding for watershed restoration and restoration jobs was one of the biggest selling points of the Northwest Forest Plan. They said that discontinuing that funding was detrimental to the Plan and to tribes.

Trinity River Restoration

Hoopla Tribal staff described how restoration work on the Trinity River has brought the tribe and federal agencies together through funding allocated for restoration.

Role of Consultation in Ensuring Tribal Access to Resources and Sites

Hoopla Tribal staff members said that the tribe doesn’t rely heavily on federally managed lands for subsistence and natural and cultural resources. However, natural and cultural resources and sites important to the tribe are located on adjacent federally managed lands. Staff members described concerns about the impacts of federal land management practices on tribal interests, including sites and resources. Tribal staff noted the lack of Forest Service action to protect the integrity of a spiritual area on Forest Service managed land, suggesting the site is destined for catastrophic fire.

Yet, staff members noted that the tribe is working to formulate agreements with federal agencies to address issues regarding access to important resources and sites. Staff described how the tribe and the Forest Service have formulated a mushroom-gathering policy to protect the species from commercial harvesting and careless harvesting practices on National Forest system lands. The policy makes some concessions, but not all that the tribe wanted. Staff members also described a forest species policy and a

firewood policy for tribal membership. But, as mentioned above, the firewood policy stopped in mid-development as a result of turnovers in the federal agency staff.

Recommendations to Improve Federal-tribal Consultation and Communication

Develop mechanisms to maintain relationships through staff transitions

Hoopa tribal staff emphasized the great turnover in federal agencies in the area, particularly in the Forest Service and the impacts of the turnovers on federal-tribal relationships and projects. Hoopa tribal staff suggested that to address issues such as knowledge transfer, there is a need for a process for an outgoing staff person to introduce the incoming staff person to current ongoing projects and contacts.

Address land management concerns on adjacent federal lands

As a result of the fluidity of ecosystems and watersheds across jurisdictional boundaries and the imposition of jurisdictional boundaries through tribal ancestral territories, federal land management adjacent to the Hoopa Valley Reservation affects the tribe's lands and interests, and vice versa. Tribal staff described how land management under the NWFP has been scaled back. Yet, there is a need for management action on federal lands to protect resources and sites of concern and to reduce the risk of catastrophic fire spreading from adjacent lands onto the reservation. Federal agencies need to consider how to address land management so that the tribe's interests are protected.

Incorporate tribal knowledge, insight, and resources into project planning and implementation

Hoopa tribal staff described the capacity of the tribe's natural resource staff members to assist in planning and management on federal lands adjacent to the reservation. Staff members described collaborative projects through which the tribe has been able to use consistent management techniques on tribal and federal lands, including a

prescription for brush cutting along a road bordering the reservation and federal lands. Incorporating tribal knowledge and resources offers an opportunity to meet the tribe's and federal agencies' land management needs and the potential to build federal-tribal relationships.

Increase federal-tribal communication and collaboration

Hoopa tribal staff suggested the need for better collaboration and coordination between the tribe and federal agencies to treat forestlands and streams within the area. Staff members insisted that collaboration among entities working in different parts of the watersheds or forest currently would allow all stakeholders to hear about the total watershed and landscape. They suggested that the Trinity River restoration program could offer one avenue for building communication and collaboration regarding watershed management. However, they noted past avenues for communication, including the Klamath Restoration Act (PL 98-552), which ceased in 2006, and the Provincial Advisory Committee (PAC) in Redding, in which the tribe never participated. Communication and collaboration could help develop and maintain federal-tribal relationships and land management. However, it is important to consider maintaining venues for communication and collaboration once initiated, either through collaborative processes or written protocols.

Need for consultation at the highest decision-making level

Hoopa tribal staff described concern for policies and land management decisions made at the highest level of decision-making within federal agencies. They shared concerns about NEPA consultation, Endangered Species Act requirements, Wilderness designations, and policies applied to federal lands, and suggested that tribal insight was not adequately incorporated or considered. As a result, the policies now affect the tribe's interests and contribute to the tribe's vulnerability and resource degradation. One tribal staff member described how the tribe was treated during the development of a non-timber forest products policy.

"We've been able to do some good with the National Forest. Tribal members are able to gather certain forest products, though a very limited list of forest resources, and don't need

an additional permit. The list was developed by the timber sale shop out of the Forest Service in D.C. The list was based on need from communities requesting to use the forest including the public. The tribe was considered the same as the public, or as a minority group.”

Other tribal staff members described how the tribe could be affected if a new federal forest management plan includes new monitoring and management requirements for northern spotted owls. The concerns expressed suggest that policies crafted at the federal level require greater insight and involvement from tribes so that those policies will translate well at the local level. Although these federal policies relate loosely to the Northwest Forest Plan, the tribe’s experience with them demonstrates the need to strengthen consultation processes between tribes and federal agencies from the highest decision-making level down to the lowest one.

Conclusion

In summary, the lack of Northwest Forest Plan implementation in the area could have affected the Hoopa Valley Tribe’s consultation experience and the development of consultation processes between the tribe and federal agencies under the Plan. However, that surrounding federally managed lands affect the tribe’s interests on and off the reservation suggests a need for consultation – starting with the highest level of federal agency leadership down to the level of line officers. The lack of understanding of tribal sovereignty by incoming federal agency staff members suggests a need for education of federal agency staff at all levels to improve relations and opportunities for collaboration between the tribe and federal agencies. Finally, to address issues arising during times of staff transition, there is a need to develop processes for transferring knowledge and contacts between outgoing and incoming staff. These processes could be an important part of consultation protocols developed between the tribe and federal agencies.

Case Study #2: Elk Valley Rancheria

Communication, Funding, Education, and Co-management to Address Factors Affecting Consultation

Introduction

The people of Elk Valley, part of the Tolowa Tribe, historically lived along the coast and rivers in the redwood forests of northern California and southern Oregon. Today, the Elk Valley Rancheria is located in Del Norte County near Crescent City, California. In 1960, the federal government terminated the Rancheria. In 1983, the Rancheria was reestablished with sixteen other Rancherias in California as a result of Tillie Hardwick et al. v. United States, Civil No. C-79-1910-SW (N.D. Cal. 1983). The Elk Valley Rancheria has ninety-four, enrolled members and owns 600 acres; the Bureau of Indian Affairs holds 400 acres in trust for the tribe.

The Pacific Ocean lies to the west, and the Klamath and Smith rivers travel south and north (respectively) of the Rancheria on their way to the ocean. Lake Earl State Wildlife Area, Jedediah Smith Redwoods State Park, Redwoods National Park, and Six Rivers National Forest all lie within twenty-five miles of the Rancheria. In 2003, primarily through its casino and tribal government and additional business enterprises, including an RV resort inside Redwoods National Park, Elk Valley Rancheria provided 250 jobs to the local economy, making it the largest employer in Del Norte County. The timber industry has played a large role in the region's economy and well-being and continues to some degree today. (Tiller 2005)

Purpose of the Case Study

The Elk Valley Rancheria's experience with consultation under the Northwest Forest Plan highlights the conflict that can arise and persist through inadequate consultation that results from staff transitions, lack of understanding about tribal sovereignty and consultation, and lack of funding to support consultation within federal

agencies and tribes. The case study describes the tribe's experience and summarizes recommendations offered by individuals interviewed for this case to address the factors that affect consultation.

Consultation Process

Staff Transitions, Lack of Understanding and Follow Through

Elk Valley Rancheria staff members suggested the tribe had an MOU in place when working with a former district ranger for the Gasquet Ranger District of the Six Rivers National Forest. One staff member for the tribe noted,

“Elk Valley and Smith River Rancheria started to develop a good relationship with the Forest Service under the past district ranger. With an MOU in place, the tribe thought relations would continue to be good, but I guess it depends on who is in the office.”

Elk Valley staff members described that when the last ranger was in office, the Forest Service started to use fire to manage an old oak grove. As a result, the grove was starting to come back with less competition from other species. Tribal staff suggested the cultural burn worked as a fire break and showed that cultural burns do work. Yet, the use of fire also stopped following a transition of staff.

Tribal staff members insisted that with federal agency staff transitions, the tribe has lost ground. They noted that new federal agency staff lack understanding of past work and relationships with the tribe and lack cultural sensitivity.

Elk Valley Rancheria staff described that federal agencies have, to some extent, consulted with the tribe on agency plans, projects, and programs that could affect tribal rights or interests. In the last five years, one staff member for the tribe said the tribe has been consulted three times. Specifically, tribal staff pointed out consulting with federal agencies regarding fire and concerns for cultural areas, but not about future planning efforts. However, they noted input provided through consultation hasn't been incorporated into federal agency planning in a way that the tribe can recognize its contributions.

Notification vs. Consultation

In addition to some consultation, tribal staff members suggested they do receive notifications from federal agencies, but the system is inadequate because the agencies don't follow through with the tribe. Tribal staff stressed that notification does not mean consultation has been met.

Tribal-Federal Relationships

For the Elk Valley Rancheria, federal agency staff transitions have led to an increase in conflict because federal staff members have been unresponsive to tribal concerns over the use and management of resources of interest to the tribe. Tribal staff members suggested conflicts are a result of personnel issues rather than policy; the tribe has made complaints, but they haven't helped.

Role of Consultation in Ensuring Access to Resources and Sites

Under the Northwest Forest Plan, Elk Valley Rancheria staff suggested that the exercise of tribal rights and access to resources and areas of interest has not improved. The tribe has exercised hunting and gathering rights on federally managed lands. However, tribal staff members maintained that gates severely hamper hunting, gathering, and ceremonial preparation. Three new wilderness designations, actions to reduce the spread of Port Orford Cedar root disease, and road decommissioning and closures within the area also limit tribal access, including the ability of tribal elders to reach gathering and hunting spots. In addition, tribal staff noted that other people picking bear grass and other basket materials on federal lands affects resources and sites that are important to the tribe.

Elk Valley Rancheria staff members said that tribal access to culturally important species and sites is limited on federally managed lands as a result of different management practices. One staff member noted,

“The lack of burning affects acorns and hazel sticks important to the tribe. There's a lot of disease out there and the Forest Service needs to burn the forest to clean them up; they have to burn before the disease gets down to the cedar.”

Tribal staff members suggested that procedures to protect sensitive tribal information are inadequate. They noted experiences in which Forest Service staff gave out information to the media regarding sacred sites and in which people removed tribal artifacts as a result of inadequate protection. One staff member for the tribe described a conflict over an access road on Forest Service managed land and a gate on property the tribe purchased to protect a cultural site on the Smith River. The Forest Service removed the gate, flattened the area, and planted trees so that it is no longer visible where the gate was. The conflict has led to increased foot traffic within the site where the tribe has a cultural camp. Tribal staff members insisted that the Forest Service, Gasquet Ranger District, said they can't restrict access because of fishers wanting access to the other side of Forest Service land. The conflict remains unresolved.

Recommendations to Improve Federal-Tribal Consultation and Communication

Aligning tribal and federal forest management

Elk Valley Rancheria staff suggested that federal forest management would be more compatible with tribal values if federal staff used more sustainable resource extraction methods, had more timber sales, and increased the use of fire and prescribed burns. Tribal staff members maintained that federal forest management practices lead to too much duff and forest slash accumulation, which results in poor wildlife habitat and gathering areas.

Meaningful and genuine consultation

To strengthen the federal-tribal relationship, Elk Valley Rancheria staff described the need for the Forest Service's attitude to change. Currently, tribal staff members said the Forest Service feels compelled to work with the tribe; yet, the tribe doesn't want to feel like it is in the way. The tribe is interested in being acknowledged and in collaborating and meaningful consultation. They expressed a desire for federal agencies to work with the tribe and not against its interests.

Building federal agency cultural understanding

As part of strengthening federal-tribal relations, Elk Valley Rancheria staff stressed the need for cultural sensitivity and an understanding among federal agency staff of tribal standing.

Appropriating adequate funds for consultation

Elk Valley Rancheria staff suggested inadequate funds are appropriated for consultation, and federal agencies and tribes are not willing or able to pay out of pocket to support it. Neither the agencies nor the tribes have funds to support consultation. Therefore, to strengthen consultation and maintain it through staff transitions, it is important to appropriate adequate funds at the federal level.

Developing cooperative agreements to develop and implement forest management policy

Tribal staff for the Elk Valley Rancheria described a successful past experience working with federal agency staff members to re-introduce cultural burns and the use of fire as a management tool on the landscape. However, they said that the practices put in place stopped with the transition of federal agency staff. Tribal staff members suggested developing cooperative agreements to address changes in land management that could arise during staff transitions and land management practices that affect tribal rights and interests. They suggested agreements to co-manage the land to ensure that the tribe not only has opportunity to provide input on management decisions but to participate in land management. One staff member stated,

“Beyond consultation, I would like to see the tribe (and any tribes) guide and inform forest management policy and/or enter into a cooperative agreement for joint management. I think consultation isn’t strong enough without an ability to compel action; and I think tribes can only do that through a cooperative management arrangement that both develops and implements forest management policy.”

Conclusion

In common with the experiences of other tribes in California within the Northwest Forest Plan area, the Elk Valley Rancheria’s experience highlights the importance of building understanding of tribal sovereignty and culture among federal agency staff at all levels. The tribe’s experience points out the importance of maintaining relationships through staff transitions. It suggests a need for checks and balances and accountability for federal agencies and tribes regarding consultation. Improving consultation could provide opportunity for aligning federal and tribal visions for and interests in forest management and for upholding tribal rights. It could provide a starting point for cooperative land management.

IV. Appendices

Appendix A: Letter Sent to Tribes

Dear Tribal Leader,

We are writing to request your assistance in participating in a study to evaluate the impacts of the Northwest Forest Plan on resources of concern and working relationships between your tribe and federal agencies. The study will rely on results of a telephone survey and selected case studies to develop a monitoring report that will be presented to the regional executives of federal agencies involved in the implementation of the Northwest Forest Plan.

The insight and perspectives provided from tribal leadership will hopefully result in actionable recommendations that will strengthen working relationships between your tribe and federal land managers and improve resource management to address tribal concerns. If you are willing to participate in this process, please identify the names and telephone numbers of the individuals who should be contacted to provide the insights and perspectives on behalf of your tribe.

Resource Innovations of the University of Oregon's *Institute for a Sustainable Environment* will be responsible for conducting the study in Oregon and Washington. The Intertribal Timber Council and the California Indian Forestry Fire Management Council will perform the study in California. A description of the process to be used to develop the monitoring report and accompanying case studies and a discussion of potential confidentiality issues that may arise are attached.

If you have questions or comments regarding this process, please contact Gary Harris, Forest Service and Bureau of Land Management, Tribal Relations Staff Assistant at (503) 888-2603 or by e-mail at grharris@fs.fed.us.

LINDA GOODMAN
Regional Forester
Region 6
Forest Service

ED SHEPHARD
State Director
Oregon State Office
Bureau of Land Management

Enclosure(s)

Enclosure 1: Northwest Forest Plan Tribal Monitoring Project

Purpose

Under the 1994 Northwest Forest Plan (the Plan), agencies managing federal land within the range of the Northern Spotted Owl are to conduct monitoring of the effects of implementation of the Plan's Standards and Guidelines.

One element of monitoring identified in the Record of Decision (ROD) for the Plan is "American Indians and Their Culture." Key issues addressed in the initial monitoring effort included:

- conditions and trends of the trust resources identified in treaties with American Indians;
- effectiveness of the coordination or liaison to assure adequate protection of religious or cultural heritage sites, and
- adequacy of access by American Indians to use of forest species, resources, and places important for cultural, subsistence, or economic reasons, particularly those identified in treaties.

Background

Effectiveness monitoring under the Plan is to take place at ten-year intervals. The results of monitoring for the first ten-year period was completed in 2003 and published in 2006 as "Northwest Forest Plan – The First 10 years (1994-2003) Effectiveness of the Federal-Tribal Relationship" (R6-RPM-TP-02-2006). In this document, the views of fifteen tribes in the area covered by the Northwest Forest Plan were presented. A Tribal Monitoring Advisory Group (TMAG) (see attached list of members) was chartered under the proviso of the Interagency Advisory Council to develop recommendations to improve the protocol and techniques used to monitor the federal-tribal relationship and obtain broader tribal participation.

2008 Monitoring Changes

The TMAG has devised an approach that provides an opportunity for all seventy-six, federally recognized tribes with interests in the federally managed land within the Plan area to participate in an interview to provide their insight and perspectives regarding the Northwest Forest Plan. Some tribes will be selected for in-depth case studies. The protocol is described as follows:

1. Unless otherwise requested, telephone interviews will be used to obtain responses to a standard set of questions.
2. The questions focus on four areas:
 - c. consultation process, outcome and tracking;
 - d. access and protection;
 - e. affect on tribal values of interest (cultural, social, and economic); and
 - f. strengthening of federal-tribal relations.
7. In-depth case studies will be conducted and reported in situations where information can offer lessons learned.
8. Interviews and report writing will be conducted by a third-party, independent, non-government organization or party.

Confidentiality and Informed Consent

The information collected during the interviews will be synthesized into a published report. In the report, no information will be attributed to a specific person or tribe. The interviewers will create a key code, which will allow the raw interview notes to be tied to an individual who was interviewed throughout the process. Because the interview notes and the key code are part of the record of the monitoring process and will be considered property of the federal government, confidentiality may not be fully protected under the law.

Appendix B. Interview Questions

Tribal consultation process, outcome, and tracking

- 1) Have written consultation protocols been developed?
 - 1a. Are they adequate for government-to-government consultation?*
 - 1b. Are they adequate for potential effects on tribal rights, interests, and effects on tribal lands?*
- 2) Is the tribe aware of federal policy guidance that is available for tribal consultation when agency plans, projects, programs or activities have the potential to affect resources, uses, or areas of interest to tribes, including tribal lands? Are federal procedures adequate to identify direct and indirect effects to activities on tribal lands?
 - 2a. Is notification specific to the tribe?*
- 3) Over the past ten years, has the tribe been consulted on federal agency plans, projects, programs, or activities that might affect tribal rights or interests?
 - 3a. How frequently and over what time period?*
 - 3b. Are there PACs or other intergovernmental forums in the area?*
 - 3c. Do tribes participate in these forums?*
- 4) Has tribal information been incorporated into federal planning documents (including watershed analysis and decision-making processes, in a manner so that tribes can recognize their contributions?
 - 4a. Can you provide any examples of when the tribes were dissatisfied?*
 - 4b. Did tribal contributions result in any changes to federal actions or considerations for resources of interest? If so, please explain.*
- 5) Have agencies consulted or collaborated with tribal governments to develop plans for future monitoring, restoration, or assessment projects, or for other planning efforts?

Access and Protection

- 6) Have the exercise of tribal rights or access to resources and/or areas of tribal interest on federal lands been changed? If so, how?
- 7) Is the tribe aware of procedures that have been put in place to provide for
 - 7a. protecting sensitive tribal information from unauthorized access or release?*
 - 7b. incorporating tribal traditional knowledge into the development of management actions?*
 - 7c. protecting cultural sites on federal land?*
- 8) Are there conflicts over the use or management of resources or areas of tribal interest? What are the sources of the conflict?
 - 8a. Are conflict resolution processes adequate?*

Affect on Tribal values of interest

- 9) Has the tribe exercised treaty rights, other rights, or pursued tribal interests associated with national forests and BLM public lands and resources? Please provide examples, if you wish.
 - 9a. Any barriers to exercising rights?*
- 10) How is federal (FS/BLM) forest management compatible with what the tribe values about those lands?

Strengthening Tribal-Federal Relationship

- 11) How can the tribal-federal relationship be strengthened? (The consultation process?)

Appendix C. Summary of Comments from Review of the Draft Tribal Monitoring Report

Final Report Draft Comments:

A request was sent to all tribal and agency representatives that had participated in interviews and case studies for the report requesting formal review of the report. The letter was sent on October 20 and participants were given ten days, plus additional time if requested to conduct the review. Each Tribe was contacted by phone as well. Text of the email letter request follows:

Dear Tribal Leaders and Staff,

We are writing to request your assistance in reviewing a draft of the attached report, **Strengthening the Federal-Tribal Relationship: A Report on Monitoring Consultation under the Northwest Forest Plan**. You participated in this study during 2009, which focuses on Region 5 (California) of the USDA Forest Service, by responding to questions about the consultation process between tribes and federal land management agencies, outcomes from consultation related to access to natural and cultural resources and protection of tribal rights and interests, consultation monitoring and tracking, and how to improve the federal-tribal relationship.

The attached draft report contains compiled findings from the 15 total interviews the California Indian Forestry and Fire Management Council (CIFFMC) conducted with tribes in California within the Northwest Forest Plan area. It also contains two case studies, which look more in-depth at the consultation experiences of specific tribes within the Northwest Forest Plan area in California. Finally, the attached draft executive summary from the report that focuses on Region 6 (Oregon and Washington) of the USDA Forest Service contains recommendations for strengthening the federal-tribal relationship. We are hoping you will have time to review the draft report and draft executive summary for accuracy and clarity. With your help, our goal is to develop a report that is useful in providing insight into the challenges and strengths of government-to-government consultation, and in offering a succinct list of recommendations that may be shared more broadly with federal agencies, tribes and policymakers so that the responses and experiences captured in this report can be used to strengthen the federal-tribal relationship in the future. Once California tribes have opportunity to review the Region 5 draft report, our goal is to integrate the Region 5 and Region 6 reports.

We hope to receive all comments by **Friday, October 30, 2009**. We welcome comments by email, mail or by phone. If you need more time or have questions on how to submit your comments, please contact Kathy Lynn at 541-346-5777. We are sending the draft report for review to all of the tribes that participated in interviews and case studies. You are welcome to share the report among other staff within your tribe or agency. However, this is a draft and is not yet available for public review.

Please do not hesitate to contact us if you have any trouble opening the document, or if you have any questions about this process. We look forward to hearing from you and receiving your feedback.

Sincerely,
Kathy Lynn

Katie MacKendrick

Additional questions about this project may be directed to:

Don Motanic
 Intertribal Timber Council
 Office: 503-282-4296
 Email: donmo@itcnet.org

Comments were submitted by the following tribes:

Full report draft (including case studies) comments submitted by:

Name	Organization	Email	Notes
Reweti Wiki	Elk Valley Rancheria	rwiki@elk-valley.com	Email comments
Mike Orcutt	Hoopla Valley Indian Tribe	director@hoopa-nsn.gov	Track changes in report document

The comments tribes and federal agencies submitted regarding the full report draft, including case studies, are included below. Where relevant, we also offer a description of how we integrated their comments into the final report.

Comments from Respondent 1:

Full report: I don't have anything specific that you wouldn't be able to cull from somewhere else.

Case study: One comment I would like to add is that beyond consultation, I would like to see the Tribe (and any Tribes) guide and inform forest management policy and/or enter into a cooperative agreement for joint management. I think consultation isn't strong enough without an ability to compel action; and I think Tribe's can only do that through a cooperative management arrangement that both develops and implements forest management policy. One technical point is that the Elk Valley Rancheria consists of predominantly Tolowa, Yurok cultural members rather than just Tolowa members.

Integrated into the Final Report as follows:

Case study:

The people of Elk Valley are predominately cultural members of the Tolowa and Yurok tribes. Historically, they lived along the coast and rivers in the redwood forests of Northern California and Southern Oregon. ...

Creating cooperative agreements to develop and implement forest management policy

Tribal staff for the Elk Valley Rancheria described a successful past experience working with federal agency staff to re-introduce cultural burns and the use of fire as a management tool on the landscape. However, they described that the practices put in place stopped with federal agency staff transition. Tribal staff suggested developing cooperative agreements to address changes in land management that could arise during staff transitions and land management practices that affect tribal rights and interests; they suggested agreements to co-manage the land to ensure that the Tribe not only has opportunity to provide input on management decisions but to participate in land management. One staff member stated,

Beyond consultation, I would like to see the Tribe (and any Tribes) guide and inform forest management policy and/or enter into a cooperative agreement for joint management. I think consultation isn't strong enough without an ability to compel action; and I think Tribe's can only do that through a cooperative management arrangement that both develops and implements forest management policy.

Comments from Respondent 2:

Case study: Respondent 2 offered clarifications regarding number of acres the reservation comprises, number of Tribal members, Tribal rights, federal policies, and court decisions mentioned in the case study. All were integrated into the final draft of the full report (including the case studies).

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