

Transportation Planning Capacity Building (TPCB) Peer Program

State DOT Tribal Liaison Roundtable

A TPCB Peer Exchange

Location:	Anaheim, California	
Date:	October 3, 2016	
Host Agency:	Alaska Tribal Technical Assistance Program (TTAP) Center	
Peer Agencies:	Alaska Department of Transportation and Public Facilities (ADOT & PF) California Department of Transportation (Caltrans) Florida Department of Transportation (FDOT) Oklahoma Department of Transportation (ODOT) Washington State Department of Transportation (WSDOT)	
Federal Agencies:	Federal Highway Administration (FHWA) Office of Federal Lands Highway Solicitor's Office, Division of Indian Affairs, Department of the Interior (SOL-DIA) U.S. Department of Transportation (USDOT) Office of Tribal Affairs USDOT Volpe National Transportation Systems Center	



U.S. Department of Transportation Federal Transit Administration

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Contents

Introduction 2
Background 3
Peer Exchange Overview
Purpose 4
Participants
Format4
Key Recommendations and Lessons Learned6
Planning Consultation with Tribes
Communication6
Consulting and Coordinating with Tribes in Planning and Project Development
FHWA State of the Practice Review on Tribal Consultation in the Planning Process
Funding and Joint Projects11
Planning and Project Development11
Conclusion and Next Steps13
Appendices
Appendix A: Event Participants14
Appendix B: Peer Exchange Agenda15
Appendix C: Acronyms17

Introduction

This report summarizes the discussions held during a one-day peer exchange roundtable sponsored by the Transportation Professional Capacity Building (TPCB) program, which is jointly funded by the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA).

This roundtable did not include any formal presentations. Instead, it proceeded as a series of discussions, organized around the topics of communication and consultation with Tribes. Jared Fijalkowski of the Volpe Center facilitated the roundtable.

Background

Tribal sovereignty is the basis and reason for tribal consultation. It is the right of tribal governments to self-governance, self-determination and economic self-sufficiency. <u>USDOT Order 5301.1</u> defines tribal sovereignty as:

"...the unique legal status of federally recognized Indian tribes as set forth in the U. S. Constitution, treaties and Federal statutes, executive orders and court decisions, which establish...tribes, as domestic dependent nations..."¹

Each federally recognized tribe is respected as a sovereign nation. Therefore, activity between a tribe and the Federal government is defined as a 'government-to-government' activity that fosters 'government-to-government' relations.

23 CFR 450.104 states that:

"Consultation means that one or more parties confer with other identified parties in accordance with an established process and, prior to taking action(s), considers the views of the other parties and periodically informs them about action(s) taken."²

Federal laws and regulations require States to consult with federally recognized tribes in the development of the Statewide Long-Range Transportation Plan (LRTP) and Statewide Transportation Improvement Program (STIP).

State DOTs may consult with tribes in a variety of ways, but they should work with each individual tribe's governing body to identify the tribe's preferences for being consulted. For example, some tribes may choose to allow the State DOT to work directly with tribal planning staffs, who share pertinent information with their governing tribal leadership. Other tribes may prefer that the State DOT share information formally and in-person at the meetings of the tribe's governing body. It is best to agree to the parameters of the consultation between a State DOT and a tribe and document those parameters in a memorandum of agreement.

Many State DOTs have Tribal Liaisons who manage the process of communicating, coordinating, and consulting with Native American tribes who either reside in the State or who have ancestral ties to land in the State.

 ¹ DOT Order 5301.1 – Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes.
 ² 23 CFR 450.104.

Peer Exchange Overview

Purpose

The Alaska Tribal Technical Assistance Program (TTAP) Center requested a TPCB peer exchange in order to gain an understanding of the roles and responsibilities of Tribal Liaisons for tribal consultation in the planning process at State DOTs. In addition, this event provided a forum for peer agencies to discuss challenges and best practices in tribal consultation in the transportation planning process.

Participants

Tribal Liaisons from five State DOTs participated in the peer exchange:

- Alaska Department of Transportation and Public Facilities (ADOT & PF): Anna Bosin
- California Department of Transportation (Caltrans): Ngozi Ezekwo, Bennie Lee, Chad Riding, and Lonora Graves
- Florida Department of Transportation (FDOT): Roy Jackson
- Oklahoma Department of Transportation (ODOT): Rhonda Fair
- Washington State Department of Transportation (WSDOT): Megan Cotton

Format

The Alaska TTAP Center hosted the one-day peer exchange as a pre-conference session at the 19th Annual National Tribal Transportation Conference at the Anaheim Marriott in Anaheim, California on October 3, 2016. Tribal Liaisons from five State DOTs and staff from the Alaska TTAP Center, FHWA, USDOT Office of the Secretary – Tribal Government Affairs, and the Department of the Interior (DOI) attended the peer exchange. Appendix A provides a full list of attendees. The agenda for the peer exchange is provided in Appendix B.

The peer exchange began with an introduction of the peers, facilitator, and participants. Next, FHWA and the USDOT Office of Tribal Government Affairs provided information about the TPCB Peer Program goals and background. In addition, FHWA and the USDOT Office of Tribal Government Affairs provided an overview of the history of tribal consultation at FHWA and USDOT and USDOT tribal policies.

Following the overview, participants engaged in facilitated roundtable discussions on various topics relating to tribal consultation in the transportation planning process. These topics included:

- Planning Consultation with Tribes;
- Funding and Joint Programs;
- FHWA State of the Practice Review on Tribal Consultation in the Planning Process; and

• Planning and Project Development.

At the conclusion of the event, participants discussed tribal consultation topics that were not covered in the roundtable discussions. In addition, this time was used as an opportunity for participants to highlight what they learned in regards to tribal consultation processes and what they would like to take back to their respective States.

Planning Consultation with Tribes

Communication

Each State DOT provided an overview of their communication with tribes in the transportation planning process, including the tribal context in their States, their successes in communicating with tribes, and the challenges they've faced.

Alaska DOT & PF

Context: As of 2016, Alaska has 229 federally recognized tribes; some have small populations and are located in remote areas, and others have large populations and are located near metropolitan areas. Due to the size of Alaska and the number of tribes within it, the State DOT Tribal Liaison has limited staff and financial resources to travel to or communicate with each tribe on a regular basis. Due to limited resources, the State DOT uses post-award conferences in Anchorage to connect with most tribes.

Successes: The State DOT has been successful at communicating with tribes about applying for various types of funding (e.g., the <u>Federal Lands Access Program</u>). The State DOT has also found post-award conferences to be an effective communication venue. The post-award conferences have encouraged tribal members to apply for construction jobs and provide opportunities for increased communication.

Challenges: The combination of a part-time Tribal Liaison position and hundreds of geographically remote tribes is a challenge. In addition, there is currently no established formal process for communicating with tribes. The State DOT struggles to identify points of contact for each tribe, resulting in email being an ineffective medium. The peers suggested Alaska try conference calls or video meetings to communicate with tribes that are difficult to access for in-person meetings.

Caltrans

Context: As of 2016, California has 109 federally recognized tribes. Caltrans proactively invites tribes to be involved in a variety of planning initiatives (e.g., transportation plans and programs) within the transportation planning process. Caltrans' culture is to think outside the box, "not do box-checking." Each Caltrans District has a Tribal Liaison that communicates directly with tribes about funding opportunities and tribal concerns.

Successes: Caltrans' <u>Native American Advisory Committee</u> (NAAC) consists of tribal representatives that meet quarterly to advise Caltrans management on transportation issues in California. Through the NAAC, Caltrans invites early input from tribes on transportation plans, programs, or laws in development.

Challenges: Communicating with remote rural tribes is challenging. Often, postal mail is not a good form of communication, so Tribal Liaisons must call or email them to communicate effectively.

Florida DOT

Context: As of 2016, Florida has two federally recognized tribes. The State DOT primarily communicates with its two federally recognized tribes through its Office of Environmental Management. The State DOT Tribal Liaison does all the work related to Section 4(f) and cultural resources. One District has an archaeologist, the others have cultural resource coordinators who communicate with tribes.

Successes: The tribes have generally taken advantage of the State DOT's <u>Environmental Screening Tool</u>, which allows anyone to comment, rank, and highlight concerns with plans and projects. FDOT has found this helpful in understanding tribes' concerns about plans and projects.

Challenges: The challenge is institutional within FDOT, which involves increasing tribal coordination among office units other than the environmental office. Florida has a Governor's Council on Indian Affairs, but it rarely discusses transportation issues. Tribes attend the Council's meetings but they prefer to work with Florida DOT's Office of Environmental Management or FHWA.

Oklahoma DOT

Context: As of 2016, Oklahoma has 38 federally recognized tribes. Most of Oklahoma's tribes were relocated from their ancestral lands in other States; therefore, most do not have reservations in Oklahoma. Each tribe has a patchwork of land held in trust, land owned outright, and land held in trust for individual members. Oklahoma has a State-level council of Tribal Liaisons from all State agencies, including the DOT.

Successes: Oklahoma DOT's Tribal Advisory Board consist of nine members from various Tribal Governments that meet quarterly to advise ODOT on transportation policy. ODOT has documented procedures for communicating with the tribes, which are supplemented by the State DOT's Tribal Liaison's effective coordination with the tribes.

Challenges: ODOT's Tribal Liaison is responsible for communicating, consulting, and coordinating with tribes in transportation planning and for the Section 106 process. As a staff of one, it is difficult to communicate with all tribes.

Washington State DOT

Context: As of 2016, Washington has 29 federally recognized tribes that range from small memberships with reservations of a few acres to 10,000 members and reservations of over a million acres. In general, tribes in Washington State are active in transportation. The tribes retain 75 percent of the gas tax on fuel sold on their reservations, giving them additional funding for transportation. Each of the

Washington State DOT's regions has a tribal coordinator. In addition, Washington State DOT has three full-time Tribal Liaisons.

Successes: The Washington Indian Transportation Policy Advisory Committee (WITPAC) has delegates that are authorized by their Tribes to consult with Washington State on transportation policy issues. WITPAC developed a <u>Tribal Consultation Best Practices Guide for Metropolitan and Regional</u> <u>Transportation Planning Organizations in Washington State</u> to help tribes, Metropolitan Planning Organizations (MPOs), and Regional Transportation Planning Organizations (RTPOs) to work together more effectively.

Challenges: Consultation with tribes on local agency projects that receive pass-through Federal funding through WSDOT is a challenge. Some of these projects receive Federal funds late in project development. Difficulties tend to arise when environmental review requirements are triggered at different points in the project development.

Consulting and Coordinating with Tribes in Planning and Project Development

The State DOT Tribal Liaisons discussed their successes and challenges in consulting and coordinating with Tribes in planning and project development.

Consultation vs. Public Outreach

A common theme was that "consultation" is not the same thing as "public outreach," but the terms are somewhat intermixed, in practice. It was noted that, for FHWA, "consultation"³ is a very specific term when used in writing, but Tribes are frequently less interested in documenting consultation and more interested in forming relationships with the State DOT.

Some specific points were:

- The group generally agreed that "consultation" is inherently a Federal process, due to its association with Section 106 and the National Environmental Policy Act. FHWA can delegate consultation responsibilities to a State DOT, but the actual consultation is between the Federal government and the Tribe.
- Federal law indicates that State DOTs must consult with Tribes on the development of the LRTP and STIP. Federal law also says Tribes must consult with an MPO if they are working on a regionally significant project. Tribes want to be the ones defining "regionally significant," but MPOs have their own definition.

³ <u>23 CFR 450.104</u> states that "Consultation means that one or more parties confer with other identified parties in accordance with an established process and, prior to taking action(s), considers the views of the other parties and periodically informs them about action(s) taken."

• The liaisons expressed concerns about how some MPOs and RTPOs consult and coordinate with tribes. Washington State DOT shared that WITPAC created a Consultation Best Practices Guide, co-written by Tribes, MPOs, and Washington State DOT, which could be helpful.

Tribal Consultation Documentation

The liaisons discussed the documentation they have for tribal consultation in the transportation planning process and how they use it.

ADOT & PF has <u>documentation</u> for tribal consultation but it no longer reflects how tribal consultation is conducted in the State.

Caltrans has a written <u>Tribal Consultation Policy</u>, which provides guidelines for consulting with tribes, but it does not outline the detailed process to be followed.

FDOT has a written protocol, but its covers Section 106 and not the planning process.

ODOT has no written protocols for tribal consultation in the planning process. The liaison believes that documenting the process would be valuable. However, it would be difficult to document the unique ways that she consults with each individual tribe. Furthermore, limited staff devoted to tribal consultation makes it difficult to spend time documenting the process.

WSDOT has <u>Tribal Communication and Consultation Protocols for Statewide Policy Issues</u> as well as the aforementioned <u>Best Practices Guide</u>. In addition, WSDOT and WITPAC have set up consultation protocols that have been signed by most of Washington's tribes. The protocols document mutual agreements about how to work on issues and highlights a collaborative consultation process.

Several participants were interested in better documenting their existing tribal consultation processes and requested guidance and the opportunity to coordinate with and learn from other States.

Consultation on the Statewide LRTP and STIP

Several States find that the data requirements of statewide plans interfere with successfully getting Tribes to the table.

ODOT has a committee of tribal representatives, including Tribal Advisory Board members and other tribal stakeholders, which works on certain sections of the LRTP. The section then goes out for public and tribal comment.

Caltrans worked on its last statewide plan update with the NAAC and also promoted it via listening sessions throughout the State. From there, Caltrans formed a steering committee to help draft sections of the plan. Caltrans wrote the plan, and the steering committee reviewed and commented on it. After the listening sessions, Caltrans sent consultation letters to the Tribes asking if they wanted individual

consultations. Of the 109 tribes, two responded; however, many had participated in the Tribal-specific listening sessions.

WSDOT has found that, because there are several ways tribal projects can be included in the STIP, tribes are not generally interested in reviewing and commenting on the final STIP. With a move towards performance-based planning, some tribes are finding that they are not able to supply the necessary data to justify their projects. They often only have sparse or anecdotal data regarding their transportation problems. WSDOT is working with the tribes to close data gaps.

For **ADOT & PF**, the challenge is obtaining any rural data. Alaska is looking at creative substitute data (e.g., data from local health clinics or emergency medical services data) to quantify safety issues. In small communities, tribes are reluctant to provide crash data because it's easy to tell who was involved in a given incident. Alaska would like FHWA to allow anecdotes as replacements for data in these kinds of situations. They also suggested that it would be helpful for FHWA Division Office staff to attend tribal safety audits to learn more about the tribes' needs.

FDOT noted that tribes do not typically review and comment on the STIP, and as a result, they do not often request that projects be added to the STIP. The tribes have successfully worked with their congressional representatives to have some projects earmarked.

FHWA State of the Practice Review on Tribal Consultation in the Planning Process

Jared Fijalkowski presented the attendees with the recommendations in FHWA's Tribal Consultation in the Planning Process State-of-the-Practice Review Report, an internal document from 2015. By conducting the review, FHWA aimed to learn about FHWA Division Offices' oversight processes for tribal consultation in the planning process. The report documents the findings of the review, which included the Maine, Oklahoma, and Washington Divisions, and made recommendations for FHWA's Office of Planning, Resource Center, and all Division Offices to consider implementing to improve the tribal consultation process for transportation planning.

Peer exchange participants reviewed the recommendations and agreed with most of them. In particular, the Tribal Liaisons wanted clear guidance on what needs to be done for State DOTs to document their tribal consultation procedures to meet FHWA's requirements. They noted several challenges in documenting consultation procedures:

- Each tribe has its own preferences for consultation, so State DOTs adapt their consultation procedures accordingly, making them difficult to document.
- Some tribes wish to not have written consultation protocols and instead rely on relationships for consultation.

• As sovereign nations, some tribes only consider consultation as between the tribe and the Federal government.

Funding and Joint Projects

The Federal government allocates transportation funding to tribes using a statutory formula based on tribal population, road mileage and average tribal shares of the former Tribal Transportation Allocation Methodology (TTAM) formula. They request the funding from BIA or USDOT and are required to develop a Tribal LRTP and a Tribal Transportation Improvement Program (TTIP). Formula funds may only be spent on projects that are in the TTIP. The majority of tribes administer the projects in their TTIP, not the State DOT. This includes planning, environmental review, preliminary engineering, final design, right of way acquisition, and construction. Tribes must provide assurance to FHWA or BIA that they have fulfilled all requirements in 25 CFR 170. BIA and DOT oversee these processes for funded tribes.

Some State DOTs are frustrated that some tribes do not include them in public engagement for their TTIPs, leaving the State DOT uninformed about planned projects. This may be partly due to tribes' sensitivity and urgency about maintaining their sovereignty. TTIPs are public documents, and FHWA plans to post them online, which will make them available to State DOTs.

Planning and Project Development

The group briefly discussed a number of topics relating to planning and project development with tribes:

Hiring Preference: Several State DOTs have or are seeking initiatives to encourage hiring locally (including tribal members) for constructing transportation projects and maintaining transportation facilities.

Tolling in Trust Lands: There are discussions about exempting tribal members and/or their casino customers from tolling or, conversely, reimbursing them for tolls paid. Another option is to provide special transponders that charge lower or no rates for certain populations.

Bilingual Signage: Some tribes are requesting that roadway signs be made in native languages in addition to English. Adam Larsen stated that FHWA is working on a policy to address this issue. The draft policy appears to indicate that directional signs (i.e., blue, brown, and green highway signs) can be made bilingual, while warning and regulatory signs (i.e., yellow, black, white, or red signs) may not be bilingual. This guidance is not yet official.

Road Maintenance: Reservations have both tribal and State roads; several State DOTs are working with tribes to set up regular maintenance agreements. In some States, counties are subcontracting to tribes to maintain State roads through tribal lands. In Washington, some tribes want State routes to be

included on their inventories; this federalizes the roads and would allow the tribes to use federal funds for road repairs.

Data Collection: The liaisons agreed that tribes face challenges in collecting and reporting transportation data that is used to evaluate and program projects. Gathering data is a challenge for cultural as well as technical/financial reasons. Some tribes are ineligible for funding to address safety issues because they are unable to collect adequate data. The group discussed the availability of smartphone apps that allow users to take photos and record corresponding location data. In some cases, this would be considered worthy for data-reporting purposes. Adam Larsen noted that FHWA is working on addressing data gaps among tribes and recommended that tribes and States consider using the Traffic Records Assessment methods described in NCHRP 788, Guide for Effective Tribal Crash Reporting.

Tribal Priorities: The liaisons noted that it is important to be sensitive to the fact that Tribes are busy during the summer (intensive subsistence activity), holidays, funerals, and other cultural events. It's important to build these activities into the planning schedule as much as possible. The key is to be aware of it: engineers don't like surprises, so if they are made aware of a factor, they can plan around it.

Conclusion and Next Steps

All participants liked the roundtable format, which allowed them to share their experiences without having to make formal presentations. Everyone learned something they wanted to take back to their home agency, whether it was awareness of the effective practices of a more experienced State or information about new resources.

The group discussed the following recommended next steps to help improve the state of tribal consultation in the transportation planning process.

Form a Community of Practice: The group would like to work with FHWA and FTA to improve tribal consultation by building a State DOT Tribal Liaison community of practice that enables them to turn to each other for insights. They asked for a contact list of State Tribal Liaisons that identifies each person's area or specialty. For example, some have Section 106 expertise, and others are engineers.

Guidance on Tribal Consultation: The group would like guidance on how to conduct more meaningful consultations, including guidance on clear minimums for consultation and on how to document the consultation process. In particular, States would like information on consulting with remote tribes or with tribes without land or reservations.

Documenting Consultation Procedures: The participants agreed that it will be important to document their own guidance, procedures, and policies at all levels for consultations. Andy Caulum recommended the Department of the Interior's <u>website for consultation policy</u>. Ada Valaitis provided attendees with links to other Federal agencies' consultation policies.

Direct Federal Involvement: The participants would like to see FHWA and FTA participate in tribal safety audits and in statewide tribal organizations. They would also like guidance on how tribes can get involved in the MPO process.

Appendix A: Event Participants

Name	Organization	Email
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Appendix B: Peer Exchange Agenda



TRANSPORTATION PLANNING CAPACITY BUILDING PROGRAM (TPCB)

State Department of Transportation Tribal Liaison Roundtable and Panel Discussion Anaheim Marriott Hotel, Anaheim, California October 3, 2016

Time	Agenda Item	Description
8:00 am	 Welcome and Introductions TPCB Peer Program Goals Background and History USDOT Tribal Policies – Kenneth Martin 	
8:30 am	 Planning Consultation with Tribes Roundtable Communication Coordination Cooperation Questions to answer: How were the tribes involved in developing the State DOT's communication, coordination, and cooperation processes? How often do they participate in the 3Cs? How does it vary tribe to tribe? How do you know that your communication, coordination, and cooperation are effective? How can the 3Cs be more effective? 	Moderator will facilitate a conversation on each of the three topics, for 30 minutes each. Liaisons will be asked to comment on: - Description of Process/Effort - Challenges - Successes - Lessons Learned - Available Resources
10:00 am	Break	
10:15 am	 Funding and Joint Projects Roundtable TIGER projects MAP-21 and FAST Act Provisions: How do new rules impact how State DOTs work with tribes? – Brian Allen 23 U.S.C. 202 Section A9 – Brian Allen Questions to answer: How do States involve tribes in identifying projects? How do tribes compete for project funding? How do performance management requirements affect tribes? What traffic and signage issues are you working on with tribes (e.g., bi-lingual signage) 	FHWA will briefly present on the topics and the moderator will facilitate discussion between FHWA and the liaisons.
11:45 am	Lunch	

Time	Agenda Item	Description
1:15 pm	 FHWA State of the Practice Review on Tribal Consultation in the Planning Process Purpose Methodology Findings and Recommendations Questions to answer: How can FHWA help State liaisons conduct effective consultation in planning? What successes should FHWA make standard operating procedure? 	FHWA and the moderator will discuss the recent State of the Practice Review of FHWA Division Offices regarding tribal consultation in Planning. The discussion with liaisons will focus on the recommendations from that report.
2:00 pm	 Planning and Project Development Roundtable Overview: Tribal Involvement in Federal-Aid Project Selection Process Spotlights TBD At what point do you consult with tribes about the STIP? What does that consultation look like? How are your states coordinating with MPOs and tribes during project selection? 	Moderator will facilitate a conversation on each topic. Liaisons will be asked to comment on: - Description of Process/Effort - Challenges - Successes - Lessons Learned - Available Resources
3:30 pm	Break	
3:45 pm	 State DOT Liaisons Action Plan Identify Statewide and National Goals Questions to answer: What will you take back to your State? What do you need to make change in your State? How can FHWA and FTA help you improve your consultation processes? 	Discussion of where States see themselves. Setting goals based on this meeting.
4:45 pm	TPCB Peer Program Evaluations	Participants fill out TPCB peer program evaluation forms
5:00 pm	Adjourn	

Appendix C: Acronyms

Acronym	Definition
ADOT & PF	Alaska Department of Transportation and Public Facilities
Caltrans	California Department of Transportation
DOI	Department of the Interior
DOT	Department of Transportation
FDOT	Florida Department of Transportation
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
LRTP	Long-Range Transportation Plan
MPO	Metropolitan Planning Organization
NAAC	Native American Advisory Committee
ODOT	Oklahoma Department of Transportation
RTPO	Regional Transportation Planning Organization
STIP	Statewide Transportation Improvement Program
ТРСВ	Transportation Planning Capacity Building
ТТАР	Tribal Technical Assistance Program
TTIP	Tribal Transportation Improvement Program
WITPAC	Washington Indian Transportation Policy Advisory Committee
WSDOT	Washington State Department of Transportation