



**PILOT TRIBAL CONSULTATION EFFORTS  
BY THE STATE OF NEW MEXICO:  
*STUDY OF THE IMPLEMENTATION  
OF EXECUTIVE ORDER 2005-004***

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Children, Youth and Families Department	Department of Cultural Affairs
Economic Development Department	Energy, Minerals and Natural Resources Department
Environment Department	Department of Health
Human Services Department	Department of Homeland Security and Emergency Management
Department of Indian Affairs	Department of Workforce Solutions
Public Education Department	Office of the State Engineer/Interstate Stream Commission
Taxation and Revenue Department	Tourism Department
Department of Transportation	Department of Veteran Services

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## **REPORT OF NEW MEXICO STATE -TRIBAL CONSULTATION PLANNING AND IMPLEMENTATION**

### **Background**

Over the past few decades, across the nation, as American Indian tribes have expanded their capacities to exercise self-governance and their visibility has increased, there has been a movement to develop dialogue between American Indian nations and state governments. Multi-jurisdictional issues, concerns and conflicts, as well as the shared responsibility to use public resources effectively and efficiently have engendered this.<sup>1</sup> Also, as noted by the former Director of the NM Office of Indian Affairs (the predecessor to the NM Indian Affairs Department) in his comprehensive and detailed history of state and tribal relations in New Mexico, this movement dates back to the 1980s with the federal policy shift known as devolution, which resulted in fewer federal resources for tribes and their redirection from direct tribal funding to funding through the states.<sup>2</sup>

New Mexico has been at the forefront of the movement to expand communications and cooperation between American Indian nations and state governments. In 2003, Governor Bill Richardson signed an historic Statement of Policy and Process with twenty-one of the Indian tribes, nations and pueblos in New Mexico. Among several provisions of that document, it was noted that:

. . . the State and the Tribes, Nations and Pueblos recognize the importance of full and open communications and cooperation on issues of shared interest or concern, such as taxation, water rights, education, health care, economic development, law enforcement, and the provision of State services to tribal members, so as to avoid misunderstandings, disagreements and disputes and to facilitate coordinated and cooperative policy formulation and implementation.

Moreover, on February 1, 2005, Governor Richardson issued Executive Order (“EO”) 2005-004, Statewide Adoption of Pilot Tribal Consultation Plans. This EO directed seventeen executive agencies to each select one specific area of operation that involves “interaction with tribal

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<sup>1</sup> “Tribal-State Relations,” National Congress of American Indians and National Conference of State Legislators.

<sup>2</sup> “A Conversation with Regis Pecos: The Emergence of Federal Self-Determination Policy and its Impact in Defining State-Tribal Relations,” New Mexico Indian Affairs Department, I-News, March 2009.

governments, communities, and/or tribal members within New Mexico” and to adopt a pilot tribal consultation plan.<sup>3</sup> As an example of the types of collaboration that could result from tribal consultation, on that same day in 2005, the State and the Navajo Nation signed a Memorandum of Understanding (“MOU”) to establish a partnership between the NM State Parks Division<sup>4</sup> and the Navajo Nation Parks and Recreation Department to collaborate on planning and design of parks and recreation projects, marketing and tourism, public education and other areas of park management. In remarks delivered with the issuance of the EO, Governor Richardson noted that the goal of the EO “is to explore various models together to see what works.”

The EO directed all of the named agencies to submit pilot tribal consultation plans to the Office of the Governor by July 1, 2005. Among the conditions set for the development of the pilot plans was that it “shall focus on only one program, project, or topic area within the agency’s jurisdiction.” The responses varied due to another key stipulation in the EO, which allowed for a variety of documents to be submitted:

The plan may take various forms, including but not limited to a policy statement, a memorandum of agreement, a guidance document, the establishment of a task force or other institutional forum, or by the adoption of a protocol.

The EO also called for each of the agencies to submit a status report on the progress of such plans to the Office of the Governor by October 1, 2005. It is the understanding of the research team that there was no monitoring of whether such reports were submitted.

Subsequently, in August 2008, the NM Indian Affairs Department (“IAD”) issued a Request for Proposals (“RFP”) to conduct a study of New Mexico’s tribal consultation practices and procedures. This report is the result of the study. Representatives of seventeen agencies were interviewed; in all but two instances, the Tribal Liaison was interviewed. Furthermore, representatives of fourteen tribes participated in the study. Four tribes were interviewed and ten tribes submitted responses to a survey questionnaire. It should be noted that the 2009 State-Tribal Collaboration Act<sup>5</sup> was developed and enacted during the time of this study.

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<sup>3</sup> The NM Indian Affairs Department was not one of the seventeen agencies specified in the EO.

<sup>4</sup> The Division is part of the NM Energy, Minerals and Natural Resources Department (“EMNRD”), which was one of the seventeen agencies noted in the EO.

## Summary Findings and Assumptions

Each of the seventeen agencies submitted responses to the EO by the July 1, 2005 deadline. These departmental responses are summarized in Table 1 below.

**Table 1. NM Executive Agency Responses to EO and Implementation Outcomes**

Agency	Tribal Consultation Plan Description	Main Implementation Outcomes
<b>ALTSD</b>	The Aging and Long-Term Services Department (“ALTSD”) is one of four agencies comprising the NM Health and Human Services Departments that submitted a joint letter of intent to hold a Tribal Consultation Meeting in November 2005 which led to the development of the State-Tribal HHSD Work Plan that was sent to the Tribes in June 2006.	The 2006 Work Plan resulted in a March 2008 <i>State-Tribal Consultation Protocol</i> ; annual HHSD-Tribal Summits have been held but with limited tribal participation.
<b>NMDA</b>	The NM Department of Agriculture (“NMDA”) submitted a two-page Tribal Consultation Plan which identified two ongoing planning efforts as responding to the tribal consultation plan requirement: 1) the <i>Interim Final New Mexico Statewide Policy and Strategic Plan for Non-Native Phreatophyte [Salt Cedar] /Watershed Management</i> ; this included continued collaboration with tribes to include providing input on the interim final plan; and 2) the <i>New Mexico Department of Agriculture 2004-2008 Strategic Plan</i> ; this included refining the current strategic plan in FY 05-06 through a series of meetings and discussions with tribal administrators to be more inclusive of Native needs.	The NMDA website indicated that at least one meeting was held with tribal administrators to define goals and objectives to be incorporated into the 2004-08 strategic plan.
<b>CYFD</b>	The NM Children, Youth and Families Department (“CYFD”) submitted a letter that identified the renegotiation of the CYFD and Navajo Nation Indian Child Welfare Act (ICWA) Intergovernmental Agreement (IGA) as the project it would focus on, citing that an initial meeting on the IGA had already occurred. The final agreement was to be used as a model for the review and consideration by the other 21 New Mexico tribes.  Also, CYFD was one of four agencies comprising the NM Health and Human Services Departments that submitted a joint letter of intent to hold a Tribal Consultation Meeting in November 2005 which led to the development of the State-Tribal HHSD Work Plan that was sent to the Tribes in June 2006.	The IGA was finalized by CYFD and the Navajo Nation in January 2008.  The 2006 Work Plan resulted in a March 2008 <i>State-Tribal Consultation Protocol</i> ; annual HHSD-Tribal Summits have been held but with limited tribal participation. Although the protocol lacked the signatures of

		11 tribes late in 2008, it was used by CYFD, NMDH and NMHS as the basis for policy consultations in 2007 and 2008.
<b>DCA</b>	<p>The NM Department of Cultural Affairs (“DCA”) submitted a six-page statement of <i>Policy Regarding Tribal Consultation</i> regarding when decisions or actions of DCA divisions might have potential effects on Native American human remains, cultural objects, cultural properties or sensitive knowledge. This policy statement identifies three divisions for pilot policy implementation:</p> <ol style="list-style-type: none"> <li>1) New Mexico State Library Tribal Libraries Program, a program in existence since 1994;</li> <li>2) Museum of Indian Arts and Culture Indian Advisory Panel, continuation of this panel in existence since 1987;</li> <li>3) Office of Archaeological Studies State of New Mexico Burial Disposition Consultations to guide the actions of the OAS which provides archaeological consulting services to state, federal, municipal and private clients including both planned excavations and emergency discoveries of archaeological remains found on State of NM land or private land within the State.</li> </ol>	The Tribal Libraries program continues but the consultant for that program is no longer there and there have been no consultations. The MIAC panel continues to meet. There have been no consultations necessitated with OAS.
<b>NMEDD</b>	<p>The NM Economic Development Department (“NMEDD”) submitted an eight-page Tribal Consultation Plan with objectives which came from the Economic Summit of 2003:</p> <ol style="list-style-type: none"> <li>1) comprehensive assessment of tribal development (identifying the assets of each tribe);</li> <li>2) provide access for tribes to the Community Development Revolving Loan Fund (including amending the authorizing legislation in 2006 to allow for this);</li> <li>3) producing a Native American Resource Guide by December 1, 2005;</li> <li>4) assisting tribes to receive certification as Certified Communities, and;</li> <li>5) providing a system of information sharing that connects resources to tribes and updates on the progress tribal communities are making in economic development endeavors.</li> </ol>	The assessment survey was sent to all NM tribes, however, only three persons responded. The Native American Resource Guide was developed and distributed to tribes. Two Tribal Economic Development Summits were held in 06 and 07, but were poorly attended and have been discontinued.
<b>EMNRD</b>	<p>In addition to the MOU with the Navajo Nation, EMNRD’s State Parks Division submitted a General Tribal Government Consultation and Communication Policy which includes sections devoted to:</p> <ol style="list-style-type: none"> <li>1) lands and related resources,</li> <li>2) interpretive program,</li> <li>3) state park management plans,</li> <li>4) staff training,</li> <li>5) employment and participation,</li> <li>6) economic partnerships, and</li> <li>7) access.</li> </ol>	In addition to ongoing work with the Navajo Nation, State Parks conducted consultations with the Mescalero and Jicarilla Apache Tribes and with Taos Pueblo.
<b>NMED</b>	<p>The NM Environmental Department (“NMED”) submitted a two page Pilot Tribal Consultation Plan aimed at tribal consultation regarding policy development and program activities; it also provided contact information for the 22 tribes, all governors, etc. and environmental contacts and extensive notes from the April 2005 Tribal Environmental summit.</p>	Subsequent tribal summits were held in 2007, 2008 and 2009, which resulted in a draft Tribal Consultation Plan to be finalized in 2009.

<p><b>NMDH</b></p>	<p>The NM Department of Health (“NMDH”) was one of four agencies comprising the NM Health and Human Services Departments that submitted a joint letter of intent to hold a Tribal Consultation Meeting in November 2005 which led to the development of the State-Tribal HHSD Work Plan that was sent to the Tribes in June 2006.</p>	<p>The 2006 Work Plan resulted in a March 2008 <i>State-Tribal Consultation Protocol</i>; annual HHSD-Tribal Summits have been held but with limited tribal participation. Although the protocol lacked the signatures of 11 tribes late in 2008, it was used by CYFD, NMDH and NMHS as the basis for policy consultations in 2007 and 2008.</p>
<p><b>DHSEM</b></p>	<p>The NM Department of Homeland Security and Emergency Management (“DHSEM”) submitted a letter of intent to create a classified term position within the Division of Public Safety to coordinate requests for technical assistance from the tribes, as well as process all homeland security awards.</p>	<p>The position of Tribal Liaison was created; however, it has undergone at least three turnovers and remains vacant.</p>
<p><b>NMHS</b></p>	<p>The NM Human Services Department (“NMHS”) was one of four agencies comprising the NM Health and Human Services Departments that submitted a joint letter of intent to hold a Tribal Consultation Meeting in November 2005 which led to the development of the State-Tribal HHSD Work Plan that was sent to the Tribes in June 2006.</p>	<p>The 2006 Work Plan resulted in a March 2008 <i>State-Tribal Consultation Protocol</i>; annual HHSD-Tribal Summits have been held but with limited tribal participation. Although the protocol lacked the signatures of 11 tribes late in 2008, it was used by CYFD, NMDH and NMHS as the basis for policy consultations in 2007 and 2008.</p>
<p><b>DWS</b></p>	<p>The NM Department of Workforce Solutions (“DWS”) submitted a two-page statement indicating that it receives 97% of its revenue from the U.S. Dept of Labor, most of which goes toward payment of unemployment compensation. As it serves individual clients rather than tribes, the statement lists the interactions and partnerships with the various pueblos and tribes primarily in two areas:</p> <ol style="list-style-type: none"> <li>1) counseling, job fairs, and workshops to assist tribal members to find a job; and</li> <li>2) job order postings and technical assistance (developing job descriptions, job screening, application and resume writing classes, and interviewing techniques, as well as navigating through computer screens) for tribal casinos and other Native American businesses.</li> </ol>	<p>Ongoing assistance is provided to Native American individuals in NM; however, consultations with tribes are not considered part of its purview.</p>

<b>PED</b>	<p>The NM Public Education Department (“PED”) submitted a letter indicating that the 2003 <i>Indian Education Act (IEA)</i> formalized its consultation process with the 22 NM tribes by establishing the <i>New Mexico Indian Education Advisory Council (NMIEAC)</i> charged with developing an <i>Action Plan</i> in collaboration with the Indian Education Division regarding appropriate expenditures to be allocated for implementing the IEA provisions. The IEA requires consultation in the areas of:</p> <ol style="list-style-type: none"> <li>1) tribal involvement in programs and services for students,</li> <li>2) participation in initiatives and decisions to improve educational opportunities,</li> <li>3) approval of curricula to assist students, and</li> <li>4) verification of school districts’ Indian Policies and Procedures.</li> </ol>	<p>Two of the annual quarterly meetings of the NMIEAC are considered as government-to-government meetings where tribal officials may have input.</p>
<b>OSE/ISC</b>	<p>The NM Office of the State Engineer/Interstate Stream Commission (“OSE/ISC”) submitted a three-page Pilot Tribal Consultation Plan indicating that the adoption in 2003 of the <i>State Water Plan</i>, which calls for a review every five years under the auspices of the Office of the State Engineer, would serve as its consultation process. The statute authorizing the <i>State Water Plan</i> required consultation with tribal governments regarding the coordination of the water plans of Indian Nations, Tribes and Pueblos with the State Water Plan. The plan also notes that OSE/ISC would hold a Water Institute in 2005 to obtain input from Tribes and Pueblos regarding the State Water Plan.</p>	<p>Six Water Institutes have been held since 2005; the five-year update of the State Water Plan was conducted in 2008. The Tribal Liaison indicated that most activity has been spent on negotiations of the Aamodt, Abouseman, Navajo and Taos water settlements.</p>
<b>TRD</b>	<p>The NM Taxation and Revenue Department (“TRD”) submitted a two-page resolution entitled <i>Protocol for Consultation Between the Department and Tribes, Pueblos and Nations in the State of New Mexico Regarding the Treatment of Native American Artifacts in the State’s Custody</i>. In its role as unclaimed property administrator, TRD is required to take into custody abandoned safety deposit boxes, which may include Native American artifacts and objects of cultural patrimony.</p>	<p>The TRD Tribal Liaison was unaware of the protocol but will ensure that there will be follow up to it in the future.</p>
<b>NMTD</b>	<p>NM Tourism Department (“NMTD”) submitted a six-page <i>General Tribal Government Consultation and Communication Policy</i> which proposed NMTD Programmatic Actions shall be sought by the NMTD Indian Tourism Program Director focuses on three program areas:</p> <ol style="list-style-type: none"> <li>1) product development, including providing assistance in establishing partnerships with educational institutions and other organizations for Indian tourism training and product development assistance, as well as assistance with the NM capital outlay process for tourism initiative;</li> <li>2) promotion and outreach, to include the annual Native NM brochure/guide and the Native American section in the annual NM Vacation Guide; and</li> <li>3) collaboration and partnerships to increase economic and community benefits from Indian Tourism.</li> </ol>	<p>In December of each calendar year, the NMTD Indian Tourism Program conducts an annual survey of each of the 22 Tribes, including the Tribal tourism representatives. This was to update information contained in the Native NM guide, and to inform tribes of other planned activities.</p>
<b>DOT</b>	<p>The NM Department of Transportation (“DOT”) submitted a letter indicating that its plan was to enter into Memoranda of Understanding (MOU) with all 22 NM tribes and attached the November 2004 MOU between the Pueblo of Jemez and DOT as a sample. This MOU was one of ten formalized communications protocols signed with Tribes as of June 30, 2005. It specified the establishment of workgroups with each tribe and a process for identifying objectives for projects on which to</p>	<p>The Tribal Liaison indicated that Joint Powers Agreements had been formalized with all NM Tribes and a brief annual report was submitted each year.</p>

	collaborate. It was anticipated that once an objective is identified, the Tribe and the DOT would enter into a project-specific Joint Powers Agreement for that particular project. For accountability purposes, the parties were to agree to an annual review and evaluation of the ability of the Working Group to implement the government-to-government relationship formalized in the MOU and to prepare an annual report summarizing this evaluation.	The most recent project was the inclusion of BIA roads data in the DOT roads database.
<b>DVS</b>	The NM Department of Veteran Services (“DVS”) submitted a letter indicating that it would use the \$47,000 in 2005 NM Legislative funds for a Tribal Veterans Outreach Program. This program focused on the appointment and training of a Tribal Veteran representative to assist the Department in assuring that Native American Veterans are better served. This plan deals with identifying individual veteran volunteers rather than direct consultation with tribes.	DVS has identified and trained Tribal Veteran volunteers from all twenty-two tribes.

**Summary Findings.** As shown in the Table 1 above, there was a huge disparity in what each agency saw as constituting a tribal consultation plan. They ranged from a simple commitment to hire a Tribal Liaison, as was the case with the Department of Homeland Security and Emergency Management, to a specific call for holding a tribal summit in November 2005, which eventually resulted over an 18-month period in the formalization of a comprehensive State-Tribal Consultation Protocol as was the case with the four departments constituting the Health and Human Services Departments (“HHSD”).

Ten of the seventeen<sup>5</sup> NM state agencies cited in the EO developed formal pilot tribal consultation plans. By the fall of 2008, eight of the ten had successfully implemented some or all of the objectives, projects or activities specified in the plans. The findings in this report regarding successful implementation or “best practices” are taken from the experiences of these eight agencies.

Some of the responses identified ongoing services that the agency had been providing to Native American clients rather than specific consultations with tribes. Seven departments responded to the EO with other documents, which may not be objectively defined as “plans,” but met the EO’s mandate. For example, the responses submitted by two departments (DVS and DWS) were focused on providing outreach to Native American *individuals* as clients, rather than ongoing

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<sup>5</sup> It should be noted that the Department of Game and Fish (“DGF”), while not specified in Executive Order 2005-004, also responded to Governor Richardson’s order with a tribal consultation plan apparently developed for EO 2005-003, Adoption of Statewide Tribal Consultation Policy on the Protection of Sacred Sites and Repatriation.

government-to-government consultation with tribes. In response to the EO, DVS Secretary Garcia submitted a letter to NM Indian Affairs Department noting the DVS “has been actively engaged in implementing a tribal veteran service officer outreach program for Native American Veterans” to ensure that, as with all NM veterans, the 15,000 Native American Veterans in the state receive all benefits and services to which they are entitled. The letter also noted that the department was working with the leadership of the nineteen Pueblos, the two Apache Tribes and the Navajo Nation to “appoint a Tribal Veteran representative whom DVS could train as a veteran services officer.” However, this initial plan did not come to fruition due to limited funding, and it was replaced with a program to train and mentor veteran volunteers. The DWS (in 2005, the Department of Labor) responded to EO 2005-004 with a two-page “policy statement” describing ongoing services that the department provided to individual Native Americans through “interactions and partnerships” with the various NM tribes.

In other cases, specific projects were identified as the basis for the plan, such as in the State Parks Division’s MOU with the Navajo Nation. Similarly, the Children, Youth and Families Department identified as its specific project the work it had started with the Navajo Nation on an interagency agreement on the Indian Child Welfare Act provisions, which was completed mid-year 2008. Prior to the issuance of the EO, CYFD and the Navajo Nation had been involved in this process, which eventually became the basis for its participation in the development of the comprehensive *State-Tribal Consultation Protocol* developed jointly by the four HHS agencies.

In the case of the Economic Development Department, according to the Tribal Liaison, its Tribal Economic Development Summits went largely unattended by tribes and have been discontinued. Furthermore, the departmental representative discovered that tribes were not necessarily interested in the Certified Communities program or in the Revolving Loan Fund, two of the five areas of focus specified in its consultation plan. The representative noted that tribes were more interested in what EDD grants might potentially be available to them, a focus area not in the pilot consultation plan.

These examples reflect the vastly differing priorities and functions, as well as the range of programming, among the missions of the agencies. They also reflect the fact that the Tribal Liaison role is different among the different agencies. For example, a priority for the Office of

the State Engineer has been the water settlement lawsuits being negotiated by the State with a number of specific tribes. Thus, the OSE Tribal Liaison has spent the majority of his time involved with that continuing concern, rather than consulting with all NM tribes. In the case of the Department of Cultural Affairs, the Tribal Liaison is located in one of the DCA divisions that is not one of those identified in that department's pilot consultation plan, and, thus, that individual is not directly involved in the formal consultation efforts.

**Assumptions.** The parameters of the RFP for the study assumed that comparisons could be made across these vastly different initiatives in the seventeen agencies as to “what works or doesn't work.” This has proven to be a challenge since the definition of a tribal “consultation” varied from department to department. Some have protocols/plans that were developed over time to be very specific and applicable to many tribes; others have ongoing “contacts” with individual tribes over mutual concerns. Some agencies missions — as with DVS and DWS — are focused on individual clients, not necessarily dealing with tribes as a constituency.

The most formal of the consultation plans — the HHSD *State-Tribal Consultation Protocol* — while proven useful to the three respective agencies that have used it, the process may not necessarily be applicable to other agencies' missions or be consistent with their internal procedures. Nevertheless, because of its specificity and its history of being proven successful, it is highlighted in this report as one example of “successful practice.” It should be noted that not all tribes had signed on to the HHSD protocol as of Fall 2008. Similarly, the NM Environment Department's Plan is just as formal, however, as of June 2009, it had not been finalized or utilized.

Due to these factors, the discussion of agency responses to the EO in this report somewhat blurs the line between activities that are a result of the tribal consultation “plan” and ones that are a function of the ongoing work that the department, usually with the assistance of the Tribal Liaison, provides to tribes.

This latter point is particularly relevant in regard to the fact that the parameters of the study also imply that some forms of consultation may be more effective or have been more effective than others. This implies a formal process or mechanism of consultation that has proven consistently

effective with most if not all tribes. This is not necessarily apparent. What works with one tribe might not work with another. Moreover, what may be defined by tribes as effective or successful consultations, i.e., negotiations in which they get favorable resolution to an issue or problem — might not necessarily be seen as effective from the agency’s perspective or in the best interest of the agency, as one Tribal Liaison noted.

Lastly, it should be noted that the institutional memory within agencies varied. At several agencies, the persons interviewed were unfamiliar with their departmental response to the EO. In some agencies, the Tribal Liaison had changed and the new employee had a new perspective on how to interpret the tribal consultation responsibility. Both factors affected the ability of the research team to collect consistent data across agencies.

When interviewed, contact persons at seven departments indicated that there had been little follow-up activity on their response to the EO, or as was the case with NMEDD, that consultation activities had been largely unsuccessful. Contact persons from six departments<sup>6</sup> were unable to locate a copy of their department’s pilot plan in response to the EO; these individuals were given an opportunity to copy the plan supplied to the research consultant team by the Indian Affairs Department. Among those agencies, the study team came to the conclusion that tribal consultation did not occur.

The research team was unable to meet or speak with the departmental contact for the NM Department of Agriculture until this report was almost completed.<sup>7</sup> However, in a recent telephone call, the NMAD Tribal Liaison noted that the agency is (a) presently reviewing its tribal consultation plan; (b) establishing contacts with tribes, such as the Jicarilla Apache Tribe, on a regional basis, e.g., through the Southwest Indian Agriculture Association; and (c) planning to work with tribes through the National Indian Agricultural Council.

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<sup>6</sup> These agencies were the Department of Homeland Security and Emergency Management, GFD, DWS, Taxation and Revenue Department, Department of Cultural Affairs, and ALTSD.

<sup>7</sup> A letter from the IAD Secretary was sent in mid-September 2008 to the 17 agencies informing them of the study and introducing the research firm/team; follow-up telephone calls were made by the research team in September and October 2008 to each agency; and in early November, follow-up emails were sent to each agency that had not responded. The first agency interview was conducted on October 20, 2008 and the last was conducted on December 2, 2008.

## **I. WHAT IS TRIBAL CONSULTATION**

The concept of “tribal consultation” had a range of connotations depending on the agency. Furthermore, the concept of tribal consultation is different from the perspective of tribal respondents. It is significant that none of the tribal representatives responding to the study questionnaire or interviewed knew of any specific tribal consultation plans of the seventeen agencies reviewed except for the HHSD *State-Tribal Consultation Protocol*.

**Departmental Perspectives.** Eight of the seventeen departments specified in EO 2005-004 had a firm definition of what constituted “tribal consultation.” These eight departments had definitions that were similar and it is assumed based on a “consultation plan” template provided by IAD acting in a technical assistance capacity. This template was organized into several “sections” including (a) definitions, (b) guiding principles, (c) procedures, (d) program areas of consultation, and (e) limitations. The definition of tribal consultation in the template was then adapted by each department or delegated agency:

Consultation - A process of government-to-government dialogue between the Division and Tribal Governments regarding the Division’s Programmatic Actions and proposed Programmatic Actions that affect or may affect the Tribal Governments’ interests, in an effort to mutually resolve concerns. (NMTD, DCA, the State Parks Division in EMNRD, and DGF)

Consultation: is an enhanced form of communication that emphasizes trust and respect. It is a shared responsibility that allows parties to exchange, in an open and free manner, timely and accurate information and opinions for the purpose of fostering mutual understanding and comprehension. Consultation is mutually satisfying deliberation that results in collaboration and joint decision-making. Consultation with New Mexico’s Tribal governments is uniquely a government-to-government process that has two main goals: (a) to reach a consensus during decision-making; and (b) whether or not consensus is reached, at the end of the process the parties have honored each other’s sovereignty. (NMDH, NMHS, CYFD, and ALTSD)

Consultation - an enhanced form of communication that emphasizes trust and respect. A shared responsibility that allows an open and free exchange of information and opinion among parties that leads to mutual understanding, respect and comprehension. Consultation is integral to a process of mutually satisfying deliberations to result in collaboration and joint decision-making. (NMED)

The seven departments, which submitted documents other than formal pilot consultation plans did not contain specific definitions of “tribal consultation” and, in many cases, described ongoing activities addressing Native American clients or other efforts at gaining tribal input for coordination with departmental activities.

**Tribal Perspectives.**<sup>8</sup> Tribal definitions of Tribal Consultation ranged along a continuum. At one end, were statements regarding:

- the need for technical assistance from state agencies — “providing expertise advise to tribes . . . the focus should be on providing tribes assist[ance] in how best to accomplish goal[s];” and
- giving more input in order to improve state agency services — “discussion of accomplishments, needs and future plans with the State/Federal government to improve services.”

In defining tribal consultation, some tribal representatives made vague reference to bringing together tribes or persons: “bring together leaders of different tribes to address common concerns and issues,” “discussions among a group of people for a single purpose,” and a “time when tribes would meet with State or Federal officials to discuss impacts based on new regulations or laws being considered . . . [and] take this into consideration when finalizing the regs or law.” Interestingly, these were the only instances when inter-tribal meetings, such as the tribal summits, were specifically cited as a form of tribal consultation.

Many of the representatives emphasized the ideas of mutual respect and acknowledging each other’s opinions, for example:

- “Open communications, collaborative efforts, mutual respect, willingness to listen, exchange of information, all parties involved acknowledge each other’s opinions, beliefs, and concerns with collaboration and coordination the desired outcome.”

Tribal representatives also noted the government-to-government aspect of “meaningful” tribal consultation:

- “Meaningful government-to-government discussion [needs to occur] before State agencies implement programs.”

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<sup>8</sup> The tribes participating in the study were the Mescalero Apache Tribe, the Navajo Nation, Ohkay Owingeh, Cochiti Pueblo, Isleta Pueblo, Jemez Pueblo, Laguna Pueblo, Pojoaque Pueblo, Sandia Pueblo, Santa Ana Pueblo, Santa Clara Pueblo, Taos Pueblo, Zia Pueblo and Zuni Pueblo.

- “Engaging in State-Tribal open dialog/discussion on an equal basis resulting in proactive action to meet mutually beneficial outcomes for communities and people.”
- “Timely and meaningful sovereign to sovereign deliberations regarding issues impacting one or both sovereign entities; diplomatic and full consideration of either sovereign in the decision making process. [This] extends to follow-up matters resulting from a decision.”
- “Tribal consultation is the foundation of any state-tribal relationship and the acknowledgement of tribal self-determination . . . Simply increasing consultation requirements will not provide for adequate consultation, unless there is increase in commitment from both entities (state, tribe) to engage in meaningful dialog, consultation and provide some mechanism to hold the other accountable if the consultation process is not followed.”
- “Having government to government discussions/meetings on issues affecting the tribal/state governments as they pertain to Native American issues. (Meetings such as the recent Tribal Leadership Summit where it involves Tribal Governors and the State Governor. Not the prior practice of Tribal Governor and State Department Staff.)”
- “Holding meetings for discussion of various subject matters on a government to government level.”
- “It needs to be a genuine government to government conversation versus just having an audience, and it is important that the meeting be one-on-one because each Pueblo is unique, while we share some common things, each Pueblo’s situation, circumstances or issues may vary.”
- “A meeting regarding a specific topic between a Tribal government leader (and appropriate staff) and a Federal/State government leader (and appropriate staff).”

Another feature of the tribal definitions of tribal consultation was the need for it to occur prior to any new programs, policies, regulations, laws or other actions being implemented:

- “Meaningful government-to-government discussion [needs to occur] before State agencies implement programs.”
- “When [the] tribe is given an opportunity to question and provide inputs in regard to issues, rules, regulations, policies or legislation. When the tribe is provided information on issue or rule making affecting their members of [armed] services.”
- “. . . [A] time when tribes would meet with State or Federal officials to discuss impacts based on new regulations or laws being considered. The official would take this into consideration when finalizing the regs or law.”
- “. . . for decades, consultation policies and procedures have been developed and never followed, while state agencies make and take important action[s] affecting Pueblo interest

without consultation. . . . Tribal consultation must be embraced by state agencies and tribal leadership to make it an integral part of intergovernmental policy discussions to make it more effective and efficient in making equitable decisions affecting the State and Pueblos of New Mexico.”

- “Ensuring that the rights of sovereign tribal governments are fully respected, all such consultations are to be open and candid so that tribal governments may evaluate for themselves the potential impact of relevant proposals, to move on the administration of a state funded program.”
- “We view it as a process — not a one time event — in which tribal input is taken on policy decisions, based on knowledge gained about the perspectives, concerns, policies, priorities, laws and expectations of a tribe. . . . the better way to begin the process is with leadership, then to follow up on technical issues with assigned tribal staff who work in the areas concerned.”

Other aspects of tribal consultation definitions from the tribes’ perspective focused on the need for tribal consultation to be results oriented — e.g., centered on problem solving or decision-making between the Tribe and the State — and/or also be part of a defined process:

- “Engaging in State-Tribal open dialog/discussion on an equal basis resulting in proactive action to meet mutually beneficial outcomes for communities and people.”
- “Face-to-face meetings which should be issue-oriented and aimed at problem solving; not NM agency presentations at meetings such as AIPC which are informative but are not face-to-face problem solving. A successful tribal consultation results in workable solutions to a problem. Operating in a respectful atmosphere is assumed as an obvious requirement to reach a workable solution. True consultation should be preceded by program managers from both the state and pueblo meeting to discuss the issues at hand and their possible solution.”
- “Timely and meaningful sovereign to sovereign deliberations regarding issues impacting one or both sovereign entities; diplomatic and full consideration of either sovereign in the decision making process. Extends to follow-up matters resulting from a decision.”
- “ . . . to engage in meaningful dialog, consultation and provide some mechanism to hold the other accountable in the consultation process is not followed.”
- “When our tribe can sit down with the state, face-to-face, and discuss issues. Not where you have many tribes and state entities together to discuss issues. We all don’t have the same issues to discuss.”
- “An interactive/advocacy process of communication toward the goal of understanding, interpreting and representing the “consultee” position/conceptualization/priorities, etc., revolving around specific issues, programs, legal issues, etc.”

In summary, the tribal perspective on what constitutes effective Tribal Consultation is that it involves both the tribe and the state agency in sitting together on an equal footing as mutual sovereigns in a respectful and meaningful way that results in mutually satisfactory actions whether they be new policies, projects, services, programs or new legislation. There is a strong undercurrent of feeling that the state should not take future actions without considering how they impact each specific tribe, pueblo or nation. There is also the expectation that the state agencies will commit the necessary resources, energy and creativity to make tribal consultation work. Some issues, such as changes in HHSD programs or implementation of new initiatives, lend themselves to statewide meetings with representatives of all 22 New Mexico tribes. Other issues, such as water rights negotiations, lend themselves to a state agency meeting either with an individual tribe or a specific group of tribes that are party to the negotiations.

**Initiation of the Tribal Consultation Process.** In most instances cited by the NM state agency representatives, the consultation was initiated by the state (e.g., the NMDH, NMHS, TRD and PED consultations), was initiated mutually by the state and tribe (e.g., EMNRD's and CFYD's consultations with the Navajo Nation), or was initiated by the tribe (e.g., CFYD's consultation with the Mescalero Apache Tribe regarding youth in the criminal justice system). In the twenty-nine examples cited by the tribal representatives, the tribe initiated seventeen of the consultations and five were "mutually" initiated in that an issue arose that involved both entities. All of the tribally initiated consultations dealt with an issue with which the tribe was seeking state assistance or resolution. Most of these were successfully resolved; in only four instances was there no resolution. In those four cases, the specific reasons cited were, in two cases, the agency representative did not follow-up, and in the other two, a mutual resolution could not be reached.

The timeframe for the consultations varied depending on the specific factors surrounding the consultation. In some cases such as the CFYD's consultation with the Navajo Nation regarding the development of a new ICWA Interagency Agreement, the consultation took 22 months. In other cases, such as Zuni Pueblo's consultation with the OSE, the consultation took six months because of the time it took to schedule the meeting. In one instance, the tribal representative noted that he was able to "secure funds via telephone calls and a business lunch" which took about a month to set up. Tribes initiated consultations under a wide range of circumstances. Zuni Pueblo initiated the consultation with OSE after experiencing a negative review on its

documentation submitted as part of a preliminary plat review. Taos Pueblo initiated a meeting with DOT to draw up a MOU between the agency and the Pueblo. The Navajo Nation initiated a consultation on expanding US Highway 491 from a two-lane to a four-lane highway. Navajo DOT initiated a consultation with the NM State Land Office regarding the Nation's leasing of state land for a proposed Navajo Transportation Center. The Navajo-Hopi Land Commission initiated a consultation with PED to develop a language and culture curriculum. In many cases, the tribes sought state agency expertise to initiate the projects or to protect resources that the tribes highly valued. Tribes also noted that many of their consultations with NM state agencies were ongoing, such as the Santa Clara Pueblo Social Services Department's ongoing relationship with CYFD in reference to ICWA policies regarding clients referred to the tribal department or who were in state custody. Other tribally cited ongoing consultations related to grant funding to the tribe from the state agency, e.g., IAD's Tribal Infrastructure Fund grants and Capital Outlay grants, PED grants for Native Language programs, ALTSD's grants to tribes.

**Awareness of Agencies' Tribal Consultation Plans.** Seven tribes cited agencies that they thought had tribal consultation plans. These agencies were DOT, NMHSD, PRC, NMTRD, CYFD, IAD and the four agencies in NMHSD protocol. The police chief from one tribe also cited the NM Traffic Safety Bureau. The tribal planner at one tribe specifically mentioned the North West Council of Governments and the Middle Region Council of Governments as having tribal consultation plans.

## **II. TRAINING ON TRIBAL CONSULTATION**

Training of other departmental staff in Tribal Consultation was mentioned by a majority of the Tribal Liaisons and other departmental representatives interviewed as a continuing and generally unmet need. In several cases, departmental representatives were expecting some state-government-wide tribal consultation training to be developed by the IAD. Only two of the Pilot Tribal Consultation Plans — the plans for NM State Parks Division (a division of EMNRD) and the Environment Department — had provisions that are detailed and explicit with regard to staff training. The New Mexico State Parks Division *General Tribal Government Consultation and Communication Policy* has the following provision:

**Staff Training** Division training shall, subject to budgetary limitations, be augmented to provide consultation expertise to park staff and include an educational training component for this in the Division's training program. Tribal Governments may provide Division staff with information on tribal histories, policies, issues and concerns relating to the Division. This information may be used to educate Division employees with the goal of increasing knowledge and respect for tribal issues and concerns. Training, training materials and guidelines may be provided by Tribal Governments and may be developed by the Division in collaboration with Tribal Governments.

The Environment Department's Pilot Tribal Consultation Plan contains a similar provision with one modest modification — it provides for training NMED divisions and bureaus, as well as staff. The NMED Tribal Consultation Plan also has a provision for widely disseminating copies of the consultation plan to all NMED staff, a provision identical to that in the Health and Human Services Departments' *State-Tribal Consultation Protocol*.

New Mexico State Parks holds an annual fall conference which incorporates staff training as a major component. For example, the 2005 annual conference included a panel discussion on the elements of successful consultation that included the War Chief from the Pueblo of Taos, a Native American member of the State Parks Advisory Board, and the Regional Consultation Manager for the National Park Service. In 2007, there was a presentation on the cultural resource protection process and, in 2008, there was a field trip to Shiprock in response to the recently published Shiprock State Park Feasibility Study. In addition, the Program Manager for Education and Resource Protection, NM State Parks Division, prepared a presentation on *Tribal Consultation and NM State Parks* for a meeting of the NM Heritage Preservation Alliance in the fall of 2006.

Of particular note also is the fact that, this fall, the Tribal Liaison for the Department of Health developed a comprehensive training module for the HHSD *State-Tribal Consultation Protocol*, which will be shared with the other three HHS agencies in December 2008 when it is finalized.

Other Tribal Liaisons also indicated that they either have provided training to other departmental employees or intended to do so soon. When interviewed, the Tribal Liaison for the Environment Department indicated that he intended to do training in the department on the new Tribal Consultation Plan and tribal protocols in late November. The Tribal Liaison for the Office of

State Engineer indicated that he did training for other staff in 2004 on tribal protocols; he indicated that other OSE staff members know to come to him first before initiating consultation or any other contact with tribes. The Tribal Liaison for the Taxation and Revenue Department (“TRD”) suggested that some Tribal Liaisons might actually benefit from training in how tribal leadership is structured and how and when it might change; she went on to suggest that departmental staff training beyond the scope of the Pilot Tribal Consultation Plans — such as TRD staff being educated on Indian transactions issues — might also be beneficial. Lastly, in the Human Services Department, training on the tribal consultation protocol is incorporated into the orientation for new employees.

In summary, training of other departmental employees on Tribal Consultation has received relatively little attention in the eighteen agencies implementing the various Pilot Tribal Consultation Plans, with the exception of six state agencies – State Parks Division, Environment Department, and the four Health and Human Services Agencies.

### **III. THE ROLE OF TRIBAL LIAISON**

Of the eighteen state agencies reviewed, ten<sup>9</sup> had Tribal Liaisons who are Native Americans. Of these ten Tribal Liaison positions, six were considered by the individuals in the positions to be full-time Tribal Liaisons. The three other Tribal Liaisons considered themselves as part-time Tribal Liaisons as they had other responsibilities — one was a Deputy Division Director of Historic Preservation, one was the Assistant Secretary for Indian Education, and another was the Protest Manager for the Legal Services Bureau (TRD). All ten Tribal Liaison positions were either in the Office of the Secretary (or its equivalent) or were in a division or bureau directly under the Secretary. It should be noted that the Human Services Department has three Tribal Liaison positions, one of which is currently vacant.

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<sup>9</sup> Children, Youth and Families Department; Department of Cultural Affairs; Environment Department; Department of Health; Human Services Department; Public Education Department; Office of State Engineer; Taxation and Revenue Department; Tourism Department and Department of Transportation.

Two agencies — the EMNRD and the NMEDD — had Tribal Liaisons who were not Native American. These agencies considered their Tribal Liaison functions to be only part of their other responsibilities. For example, in NMEDD, five of the Community Development Representatives for the regions in which tribes were located also serve as Tribal Liaisons; in the State Parks Division of EMNRD, the de facto Tribal Liaison is the Manager for the Education and Resource Protection Program.

At the time of the interviews in the Fall of 2008, there were three agencies where the Tribal Liaison position (or equivalent) was vacant: (1) Director of the Office of Indian Elder Affairs, ALTSD; (2) Department of Homeland Security and Emergency Management; and (3) Indian Tourism Program Manager, Tourism Department. The position in ALTSD was only recently created at the time of the interview (the research team spoke with the person who had previously served as the Tribal Liaison for the department). The DHSEM had hired two Native American individuals to fill the position; however, they were in the position for very short periods of time (two weeks for one person, and two months for the other person) and the agency lost them because one individual was elected to tribal office and the other found a job with a higher paying salary. The NMTD Tribal Liaison had changed departments and served as the Deputy Secretary of the IAD until February, 2009 when he returned to his position as the NMTD Tribal Liaison.

At the time of the interviews in the Fall of 2008, there were two agencies where the Tribal Liaison position (or equivalent) was vacant: (1) Director of the Office of Indian Elder Affairs, ALTSD; and (2) Department of Homeland Security and Emergency Management. The position in ALTSD was only recently created at the time of the interview (the research team spoke with the person who had previously served as the Tribal Liaison for the department). The DHSEM had hired two Native American individuals to fill the position; however, they were in the position for very short periods of time (two weeks for one person, and two months for the other person) and the agency lost them because one individual was appointed to state office and the other found a job with a higher paying salary.

Four agencies do not have a formal Tribal Liaison position. That function is served by the Deputy Secretary of the department in three cases and by the Planning Director in the other case. These four agencies are NMAD, DVS, DWS, and DGF, respectively.

In response to a survey item asking them to rank which factors should be considered as most important when a state agency is considering establishing a Tribal Liaison position, tribal representatives ranked “Experience working with Tribal programs” the highest in terms of importance. “Native American background” was ranked second highest; and “Professional background and training” was ranked third highest. “Experience as a Tribal leader” was ranked least important. Table 2 on the next page provides an overview of how 12 tribes participating in the study regarded the relative importance of these criteria for the Tribal Liaison positions. Note that two tribes did not specifically address the issue and are not included in Table 2. Also, two tribes gave even weight to at least three of the criteria. Rankings went from 1 as most important to 4 as least important.

**Table 2. Tribal Rankings of Relative Importance of Tribal Liaison Criteria**

Tribe	Tribal Liaison Criteria			
	Professional Background	Experience as Tribal Leader	Tribal Work Experience	Native American Background
Cochiti Pueblo		1	1	1
Isleta Pueblo	1	3	4	2
Jemez Pueblo	3	4	1	2
Laguna Pueblo*	1		1	1
Mescalero Apache Tribe	2	4	3	1
Navajo Nation*	2	4	1	3
Pojoaque Pueblo	3	4	1	2
Sandia Pueblo	3	4	1	2
Santa Ana Pueblo*	3	2	1	3
Santa Clara Pueblo*	4	2	1	2
Taos Pueblo	2	4	1	3
Zuni Pueblo	2	3	4	1
Average for All Tribes	2.36	2.92	1.67	1.92

\* Where there were multiple respondents, an average rating was calculated across all respondents.

In interviews with the research team, the Tribal Liaisons and other departmental contact persons cited several factors as determining what made for being a successful Tribal Liaison or determining their effectiveness in working with tribal governments. These are discussed below, as well as those qualities mentioned by tribal representatives who were interviewed or who

responded to the survey. The following factors were identified as being the most important in facilitating the Tribal Liaison functions:

- Knowledge of how tribal governments and communities work: Persons interviewed in nine agencies cited this as an important factor in making their work more effective. Several of the Tribal Liaisons had either worked in positions of tribal leadership (two had been governors of their pueblos) and/or in tribal government programs. Two had been directors of their tribal development corporations. Others noted their long work experience in Indian Country either at the tribal level or with Indian organizations. Tribal representatives also cited this as the most important characteristic for anyone in the Tribal Liaison position.
- Their relatively high position within their department's organizational structure: Nine Tribal Liaisons noted that because their positions were either in the Office of the Secretary or in strategically advantageous subdivisions, their ability to advocate for tribes was enhanced. Tribal representatives also cited that it was essential that the Tribal Liaison be in a position to be able to make a decision when approached regarding a particular issue of concern to a tribe.
- Cultural competency: Tribal Liaisons in seven agencies noted that it was important to have knowledge of the cultural protocols, values, and norms of the twenty-two New Mexico tribes, as well as the interpersonal and cultural skills to navigate their role as mediator between tribes and the state agencies.
- Knowledge of both State government bureaucracy and tribal government hierarchies: Six Tribal Liaisons cited that it was important to know how both the department and the tribal governments function in order to negotiate realistically with tribal contacts when working together.
- Professional training and/or technical expertise: Tribal Liaisons from four agencies cited their professional training as being helpful to fulfilling their responsibilities.
- Personal attributes: Three Tribal Liaisons cited personal skills and attitudes — such as “being able to calm waters when problems arise,” “ability to bring people together,” “positive attitude . . . need to be creative – when there is a controversy, don't get stuck, look for a new way” — as helping them do their work.

In summary, the most important factors that can make the position of Tribal Liaison function more effectively are:

- (a) Experience working in Tribal leadership or with Tribal government, prior experience working in Native American communities and/or with Indian organizations. This experience gives insight for Tribal Liaisons in how they can adapt agency rules and regulations to better-fit tribal needs. This experience also gives the Tribal Liaison more credibility with tribal leaders and tribal program workers.
- (b) That the Tribal Liaison position be relatively high in the organizational structure of the state agency. Being in the Office of the Secretary or in a strategically advantageous division — e.g., Strategic Planning, Policy and Performance, etc. — will assist the implementation of tribal interests while protecting the state’s trust. It should be noted that those agencies<sup>10</sup> most successful in developing and implementing tribal consultation plans or protocols all had the Tribal Liaison position (or its equivalent) relatively high in the organizational structure and the position was filled with a Native American.
- (c) The relative importance of the position within the agency also assures that compensation for the work is sufficient to maintain longevity. The lack of adequate salary was acknowledged as a problem within two departments.<sup>11</sup>
- (d) Cultural competency — e.g., knowledge of cultural values, norms and protocols — is an important element of being successful in negotiating between the agency and the tribes. This would indicate that filling the position with a Native American who has experience working within Native communities would enhance the performance of being a Tribal Liaison. Four Native American Tribal Liaisons interviewed explicitly mentioned this as a requirement for the position; it was also mentioned specifically by a Deputy Secretary in one department where the position was at the time of the interview vacant.
- (e) The position being full-time for Tribal Liaison work: Conversely, it should be noted that those agencies that were not able to develop and/or implement comprehensive tribal consultation plans were agencies where the Tribal Liaison function was the responsibility of someone with a majority of his/her responsibilities directed elsewhere.

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<sup>10</sup> The Department of Health; the Human Services Department; Children, Youth and Families Department; Environment Department; Public Education; Department of Transportation; Office of State Engineer; State Parks Division (EMNRD); and Tourism Department.

<sup>11</sup> For purposes of confidentiality, those two agencies are not identified.

Although ten of the fourteen tribes indicated that they were familiar with the Tribal Liaisons at various agencies, the majority of the 41 tribal respondents were largely unfamiliar with who served as a Tribal Liaison at the various agencies. Two respondents were able to cite the names of seven and twelve Tribal Liaisons, respectively. With the exception of the CYFD, DCA, NMED, OSE, PRC and DOT, tribal program personnel mention going directly to the relevant program office on the project rather than the Tribal Liaison. In the case of Zuni Pueblo and its consultation with the OSE, the Tribe noted that:

Through the tribal liaison . . . we made several requests to engage in tribal consultation, but we had to make several requests before it was granted. It took about six months to schedule a meeting. The actual meeting with the State Engineer took about 5-6 hours at their offices, and the Zuni Tribe continues to have dialog with the agency as the final plat approval process for the subdivision project is being considered. . . .Continual informal dialog with the tribal liaison laid the foundation for a positive outcome, but added to the length of the consultation process. The length of time before the actual consultation process was engaged allow[ed] the Zuni Tribe to gather necessary information to present to the State Engineer and prioritize the consultation process in order that immediate issues were addressed over future issues/concerns.

In the case of Taos Pueblo initiating a 2004-05 consultation with the DOT, it was the feeling of the Taos Tribal Administrator that, although the DOT Tribal Liaison was part of the consultation, “Taos initiated the meeting, it would have occurred and would have been successful without him.”

Indeed, the most cited example of the value of the Tribal Liaison position was the ongoing communications provided by the person rather than anything specifically related to a specific tribal concern or issue. The Santa Clara Pueblo Community Library noted that they look to the State Library Tribal Liaison (called the State Tribal Library Consultant) as an expert on library matters, as well as an advocate for their concerns within the State Library system. Unfortunately, this Tribal Liaison position has been vacant for many months. However, interviews and survey data indicate an interest among tribes in knowing who the specific Tribal Liaisons are for each NM state agency. Furthermore, it was mentioned that a frequently updated list of Tribal Liaisons on the Indian Affairs Department’s website would be a good resource.

These findings indicate that a Tribal Liaison is most critical to the consultation process when agency-wide decisions regarding changes to practice, policy or new programs are being considered as in the case of the Health and Human Services Departments' consultations. From the tribal perspective, Tribal Liaisons were viewed as a first contact only when other departmental personnel or functions were unknown; tribal leadership or personnel went to specific divisions or offices related to the project or issue they needed to get agency assistance.

#### **IV. A MODEL TRIBAL CONSULTATION PRACTICE**

The best example of a formal government-to-government consultation process is the one outlined in the HHSD *State - Tribal Consultation Protocol* (hereafter referred to as the "Protocol"). As noted elsewhere, development of this document involved the four health and human services-related departments, namely, Department of Health; Human Services Department; Children, Youth and Families Department; and Aging and Long-Term Services Department. Although, as of Fall 2008, the protocol had yet to be signed by all twenty-two New Mexico tribes, it had however been used effectively by the first three of those agencies.

DOH used the Protocol in two instances: in 2007, to gain tribal input regarding the agency's Health Solutions legislative proposal, and, in 2008, in developing a new RFP for a new behavioral health contractor. Similarly, CYFD used the Protocol twice in 2007: in consultations involving (a) the Navajo Nation Department of Social Services to negotiate a new *Indian Child Welfare Act* Intergovernmental Agreement, and (b) the Mescalero Apache Tribe's Tribal Courts to develop a Juvenile Justice Intergovernmental Agreement. In 2008, CYFD began using the Protocol again to seek tribal input into revisions being made to its Domestic Violence Service Delivery Manual. In 2008, HSD used the protocol to gain Tribal input regarding coordinated long-term services for Medicaid funding using a "four-phased" regional meetings approach to working with Tribal and local governments and communities. The ALTSD has yet to use the Protocol.

The HHSD *State-Tribal Consultation Protocol* is one of three developed in response to the EO and is, by far, the most comprehensive. This protocol was developed subsequent to the four Health and Human Services Departments and the twenty-two New Mexico tribes and pueblos

completing a tribal consultation meeting on November 17<sup>th</sup> and 18<sup>th</sup>, 2005. This meeting was held by the four departments in response to the EO mandate to develop a pilot tribal consultation plan. A state-tribal work group developed the Protocol over the eighteen-month period from the November tribal consultation meeting to the signing of the protocol on June 7, 2007.

The Protocol has eleven sections: (1) Background, (2) Purpose, (3) Principles, (4) Definitions, (5) General Provisions, (6) Intergovernmental Coordination and Collaboration, (7) Annual HHS - Tribal Summits, (8) Dissemination of Protocol to HHS Employees, (9) Amendments to the Protocol, (10) Effective Date, and (11) Sovereign Immunity.

The purpose of the Protocol is to use the agreed-upon consultation process when any one of the four departments develops or changes policies, programs or activities that have tribal implications. While it is our understanding that the Protocol still lacks signatures of some tribal leaders, it has been used by three of the NMHHS departments to guide tribal consultation (see description on previous page).

The Principles Section explains seven principles that the Protocol is based on:

- (1) Recognize and Respect Tribal Sovereignty,
- (2) Government-to-Government Relationship,
- (3) Health Care Delivery and Access,
- (4) Distinctive Needs of Native Americans,
- (5) Establishing Partnerships,
- (6) Individual and Collective Responsibility, and
- (7) Future Partnership.

Under Future Partnership, it is noted that “a tribal advisory board may be established to help accomplish the goals and actions identified as a result of this Tribal Consultation meeting.”

The Definitions Section provides in-depth definitions for consultation (“enhanced form of communication that emphasizes trust and respect ... that allows the parties to exchange, in an open and free manner, timely and accurate information and opinions for the purpose of fostering mutual understanding and comprehension”) and consensus (“collective agreement ... within this process it is understood that the Tribal and HHS agencies may disagree on consultation outcomes.”). This section also makes it explicit that each HHS Department and tribal

government has the “authority and discretion to determine what internal processes are exempt from the consultation processes contained in this Protocol.”

The General Provisions Section of the Protocol lays out the process for undertaking tribal consultation. Consultation is required in four cases: (1) when the Governor of the State of New Mexico or a Pueblo Governor or Tribal President initiates a request for consultation, (2) when an HHS Secretary, the HHS Secretaries as a whole, or delegated Tribal Officials request consultation, (3) when federal law or regulation requires consultation, and (4) when state law or regulation mandates consultation. Of note is the provision that the consultation process may – as defined in the Protocol – not be applicable when a mandated and approved process exists such as the State or Tribal process for negotiating and approving Professional Services Contracts, Joint Powers Agreements, Intergovernmental Agreements, Memoranda of Understanding or other established administrative procedures and practices mandated by State or Tribal law. The consultation process may not be required but may be nonetheless useful when the federal government mandates changes to federal-state programs. It is important to note that the HHS Secretaries may designate consultation compliance to an HHS Deputy Secretary and/or the HHS Native American Liaison who will be responsible for ensuring the Protocol’s implementation. Similarly, a Tribal Governor or President may delegate consultation to a Tribal Official who will be responsible for ensuring the Protocol’s implementation. The appropriate HHS agency will notify the Indian Affairs Department if a single HHS department or the HHS departments as a whole requires consultation with Tribes or a single tribal entity.

Subsection E (Protocol for Government-to-Government Consultation) of the General Provisions Section lays out in detail the process for Government-to-Government Consultation. In the Protocol, the initiation of the Government-to-Government Consultation process begins with the respective HHS department’s review of proposed policies or programs; however, Tribal Governments are certainly free to initiate their own review of proposed policies or programs without waiting for official notification from the respective department. The provision in the Protocol is as follows: “HHS may review proposed policy or a program’s impact, scope and overall agency goals and determine whether tribal consultation or cooperation will assist in the program’s implementation. If the purpose of the program or project includes services or impacts on the Tribal communities, HHS may notify the Tribes and inquire as to whether tribal

consultation should occur and assess the willingness of the Tribes or Tribe to engage in the process. The Tribe has discretion to decide whether to engage in the consultation process.” Once it has been decided that Government-to-Government consultation would be useful, HHS and Tribes may engage in direct consultation and/or establish a *work group*.

The purpose of HHS and Tribes establishing a work group is to develop recommendations for the consideration of the Tribal Leaders and HHS Secretaries. To facilitate its effectiveness, the work group shall, to the extent possible, consist of members from the HHS department, the IAD and the Tribes. The Protocol then outlines specific steps for establishment and implementation of the work group:

- The department shall widely publicize the solicitation for tribal membership on the work groups. Membership shall be based on written appointment by Tribes and the HHS department; as State and Tribal leadership changes, work group membership shall be designated as appropriate.
- “Written notices announcing meetings shall identify the purpose, work group, task force preliminary responsibility, time frame and other specific tasks. All meetings shall be open and widely publicized through each of the Native American [i.e., Tribal] Liaison offices, HHS departments, and Tribal offices.”
- The work group may establish procedures to govern the meetings to include, but not limited to, (a) selection of Tribal and State co-chairs to represent the group, serve as coordinators, and ensure that the tribal consultation protocol is adhered to; (b) definition of roles and responsibilities of individual work group members; (c) definition of a process for decision-making to arrive at a final product; (d) determination of the process for drafting and dissemination of all final work group products; (e) definition of an appropriate timeline; and (f) the stipulation that work group members shall make a good faith effort to make all meetings.
- In addition to the work group procedures enumerated above, the Protocol calls for the work group to specify parameters with regard to the lines of authority, responsibility and boundaries, as well as the definition of issues and the delineation of negotiable and non-negotiable points.
- Once the work group has created a final draft recommendation or policy, it will distribute

the draft recommendation or policy to the Tribal Governor(s) and/or President(s), the HHS and IAD Secretaries and the Native American Liaisons for review and comment.

- The Tribes and HHS will return comments to the work group, which will determine its next course of action as follows: (1) if the work group considers the policy to be substantially complete as written, the work group will forward the proposed policy to the HHS and Tribes for finalization; (2) the work group will record any contrary comments, disagreements and/or dissent in the final report; (3) if, based on the comments, the work group determines that the policy should be rewritten, it will reinitiate the consultation process to redraft the policy; (4) if HHS and the Tribes accept the policy as is, the work group will accomplish the final processing of the policy.
- Once the consultation process is complete, the HHS and Tribal work group co-chairs shall be responsible for broadly distributing the final recommendations to HHS departments, Tribal leaders, and IAD.
- At the conclusion of the Consultation process, work group participants will participate in an evaluation of the process. The evaluation will measure outcomes and make recommendations for improving the process. It should be noted that none of the HHS Native American Liaisons reported that they were aware of any evaluations having been undertaken.

The HHS General Communication and Coordination Section provides guidance to HHS agencies on communication and coordination. The Protocol emphasizes the importance of agencies employing full-time Native Americans as Tribal Liaisons to work with tribal leaders, staff and their programs in developing policies or implementing program changes. The importance of informal communications is recognized. HHS and Tribes recognize that consultation meetings may not be required for all situations or interactions involving state-tribal relations. In fact, Tribal members may communicate with HHS employees outside the consultation process, including the Tribal Liaisons and Program Managers, to ensure programs and services are delivered to their constituents. While the State-Tribal relationship is based on a government-to-government relationship, other Indian organizations, such as those representing or providing services to urban Indians or off-reservation Indians might be adversely affected if excluded from HHS departments' communications. Nothing in this Protocol prevents HHS departments from

soliciting recommendations or otherwise communicating with these groups.

The Role of Tribal Advisory Bodies Section explains that it may be necessary that the HHS departments solicit advice and recommendations from Tribal advisory organizations or committees to involve Tribes in policy development prior to the more formal consultation contained in the Protocol. Input derived from such activities will not be defined as Tribal consultation.

In the Intergovernmental Coordination and Collaboration Section, it is noted that under certain federal Tribal self-governance and self-determination laws, Tribal governments are authorized to administer their own HHS programs and services that were previously administered by a State agency. Although a state agency or a Tribal program may have its own federally approved plan to adhere to, HHS and their Tribal counterparts are encouraged to always work in cooperation and to have open communications that provides a two-way dialogue in these program areas.

The last five sections of the Protocol provide (1) that the respective HHS department and the Tribes shall meet annually to consult on HHS issues that are identified as important for discussion; (2) that the HHS departments shall inform its employees of this Protocol and disseminate a copy appropriately to all staff members; (3) that the Protocol shall be reviewed annually and revised as needed upon written mutual agreement of the parties; (4) that the Protocol shall become effective upon the date all necessary signatures and/or approvals to this Protocol are obtained; and (5) that nothing in the Protocol shall be construed to waive the sovereign immunity of the Tribes or the State of New Mexico or to create a right of action by or against either party or its officials for failure to comply with the Protocol.

## **V. OTHER SUCCESSFUL TRIBAL CONSULTATION PRACTICES**

Although the seventeen NM state agencies' interpretations of Tribal consultation varied, every agency noted the need for gaining tribal government input, especially when considering changes to departmental policies, procedures and programs. As noted earlier, these agencies were involved in a variety of "consultation" practices. These practices range along a continuum and are discussed below.

- The four-phased “roll-out” (i.e., conducting a series of regional meetings) approach used by HSD to elicit tribal responses regarding changes to Medicaid would seem to be a useful adaptation of the *State-Tribal Consultation Protocol* format given the concerns of Tribes about accessibility to meetings held in Santa Fe, as well as to concerns about the lack of resources to conduct ongoing one-on-one meetings with State agencies regarding particular issues.
- Departmental “Tribal Summits” which are held annually by at least seven (see attachment A) of the 17 departments reviewed. Some departments were more successful than others in terms of getting many tribes to attend. Several departmental contacts indicated that tribal leadership often did not attend unless the Governor was also present. Most tribal representatives did not view this method as particularly effective.
- Focus groups — which include both departmental staff and tribal leaders and/or tribal programs staff — that are centered around specific programmatic issues are seen by departmental contacts as effective mechanisms for gaining tribal input.
- Working groups — which are similar to focus group — but are more ongoing and have a more consistent make-up in representation.
- Indian advisory committees were noted by four (see attachment A) of the seventeen departments as being an effective method of gaining tribal or individual Native American input.
- Training and technical assistance forums were used by at least two departments as effective methods of communicating with tribes around particular issues. The Environment Department holds quarterly Technical Forums on various environmental issues or topics; all tribes are invited to attend. The Office of the State Engineer has held at least six Water Institutes since 2005; these are to inform tribes about various functions of the OSE. All tribes are invited to these, and some 10 to 15 tribes usually attend according to the OSE Tribal Liaison.
- State advisory boards and commissions with at least one Native American representative — such as the Interstate Stream Commission, the Water Trust Board, and the Workforce Development Board — were also cited as effective ways of eliciting the views of Native Americans and tribes.

The interviews with departmental contact persons and Tribal Liaisons indicated that no measures of success/effectiveness of tribal consultations were currently collected by the State agencies. Most persons interviewed indicated that the most important indicator of success/effectiveness

was the satisfaction of the Tribe and State agency in coming to successful agreement, such as in the case of MOUs between them, or in resolving the pertinent issue or concern. Several Tribal Liaisons acknowledged the need to collect some type of evaluation data for consultation “events” such as Tribal Summits and the OES/ISC Water Institutes.

## **VI. TRIBAL EXAMPLES OF SUCCESSFUL CONSULTATION**

Several tribes provided detailed descriptions of specific projects involving consultation with state agencies. These examples of successful Tribal Consultations are summarized below.

The Zuni Tribe initiated consultation with the Office of the State Engineer after experiencing a negative review on the Tribe’s documentation submitted as part of a preliminary plat review for a proposed subdivision project within five miles of its reservation’s northern boundary. Initially, the Tribe had been unable to convince the local county commissioners to consider the Tribe’s water model — during the preliminary plat review process — as part of the potential water impacts the subdivision project would pose to senior water users. The Tribe requested the OSE to review its water model as part of the final plat approval in order to establish the Tribe’s senior rights to the limited amount of water available in the area. Although the preliminary plat had been approved, the State was willing to consider the Zuni water model as part of the permanent plat approval process. Secondly, the State was willing to accept any documentation showing the water and residual impacts (e.g., drainage, erosion, waste water storage and seepage, etc.) from development for the State to consider when reviewing future developments near the tribal boundaries. Furthermore, the Tribe was given an opportunity to review the State’s current documentation of water and other impacts of development within the region as submitted by other interested non-Zuni, or other Native, parties. This review allowed the Tribe an opportunity to provide supplemental documentation, which the State lacked, in order that it have ample information when considering how future development affects Zuni Pueblo’s interests on or near its reservation boundaries.

The Navajo Nation Department of Transportation cited a consultation involving the NM State Land Office (“NMSLO”) and the state DOT regarding leasing of state land for the proposed Navajo Transportation Center in McKinley County. The NMSLO provided the tribe with

information and assistance on the land leasing procedures and processes leading to an application. The Navajo Nation DOT representative noted that NMSLO “provided very useful insights into leasing processes and [successful] collaboration/cooperation between State and Tribal entities successfully. The idea is fairly new and in many respects [represents] new grounds and means for cooperation were established. It looks also at past and present land status and its evolution into the present relations and ownership. Cooperation and collaboration went real well; the biggest lesson is that such cooperation is possible in situations where open dialog is the basis for a desire to accomplish; not all situations are the same with other [State] offices.”

In an interview with the Tribal leadership<sup>12</sup> of Cochiti Pueblo, several examples of positive interactions with state agencies were cited. The Cochiti Transportation Director noted that the Tribal Liaison for the state DOT keeps him informed of ongoing issues and events by e-mails and periodic visits to the pueblo. A representative of the DOT recently came to the pueblo to discuss the construction of a commercial driveway in the Tent Rocks area. Also, there have been long-term discussions with DOT officials over the improvement and better maintenance (particularly in the winter) of State Route 22, which cuts across the reservation. The Cochiti Transportation Planner noted that the DOT Tribal Liaison is particularly effective because of his experience as a former tribal leader. Leaders at Cochiti have also met with the OSE several times recently through meetings of the Six Middle Rio Grande Pueblos concerning water transfers between the pueblos. Also, ALTSD holds quarterly meetings on the Title 6 Program, which representatives from Cochiti frequently attend. In a water pump replacement project (funded 50% by US Department of Agriculture and 50% by the NMED), the Cochiti officials noted that they deal directly with the contractor and the NMED project manager, rather than involving the NMED Tribal Liaison. In general, the Cochiti group expressed the opinion that state agencies were more responsive than federal agencies when problems arose.

The Governor of Zia Pueblo also noted that the OSE Tribal Liaison was proactive in contacting the Pueblo, as well as the other pueblos involved in the Abouseman water rights settlement negotiations. He also cited the OSE invitations to its Water Institutes.

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<sup>12</sup> The Pueblo Governor, the Tribal Administrator, the Tribal Planner and the Accountant.

The Navajo Nation Division of Natural Resources (“NNDNR”) specifically cited consultations with the State DOT regarding construction of US 491 expanding it from two lanes to four lanes. Noting that the Tribe initiated the consultation, NNDNR indicated that an agreement was developed over meetings that occurred in both Santa Fe and Window Rock over three years and that included compromises made by both parties. NNDNR specifically noted that the NM-DOT Tribal Liaison assisted in keeping lines of communication open and providing access to key DOT personnel at one point when talks began to break down.

The Navajo Nation Environmental Protection Agency (“NNEPA”) cited a consultation involving the NMED which concerned water quality permitting issues raised by a discharge permit sought by a mining company. In a face-to-face meeting with NMED permitting personnel in Shiprock, NM — apparently not including the Tribal Liaison — discussions occurred over the issuance of a draft permit in order to identify any potential impacts to waters on the Navajo reservation. NNEPA and NN Department of Justice representatives were given an opportunity to proffer their concerns and the meeting resulted in assurances that there would be no impact to reservation waters. This has resulted in an ongoing process of periodic meetings between NMED Water Quality and National Pollutant Discharge Elimination System (“NPDES”) Permit programs and NNEPA.

Santa Clara Pueblo, Pojoaque Pueblo, Zuni Pueblo, and the Navajo Nation Department of Social Services also cited the tribal consultation meeting that resulted in the development of the NM Health and Human Services Departments’ *State-Tribal Consultation Protocol*; however, no specific details were mentioned by any of the tribal respondents.

The NM Public Education Department’s twice yearly Indian Education Advisory Committee “government-to-government meetings” were also noted by the Cochiti Pueblo leadership group; however, the group did not consider those meetings as “real” tribal consultation as they did not necessarily result in any formal resolution or problem solving which they viewed as essential to the nature of tribal consultation. The Navajo Nation respondent stated that the NMPED is “unlike other state government [agencies and] was very easy to work with and their personnel were very welcoming” when responding to a request by the Tribe to meet with NMPED regarding accreditation issues; not much more detailed information was provided.

The Ohkay Owingeh representative cited his good working relationship with the NMDOT Tribal Liaison and also noted that several tribal departments had similar working relationships with various personnel in their pertinent state agencies. He especially liked the fact that IAD was promoting closer consultation between NM tribes and state agencies and appreciated IAD's listing of Tribal Liaisons.

The Santa Clara Pueblo Tax Commission cited the work of the New Mexico Public Regulatory Commission ("PRC") to exempt Tribal members living on Tribal lands from utility fees as a successful example of tribal consultation. The Tribal Liaison for the PRC has led a working group, also consisting of the Tribal Liaison for the NM Taxation and Revenue Department, the tribes, and the utilities, to develop a standard form for tribal members to claim exemption from utility fees. The working group has successfully devised the form and is now concentrating on how to successfully implement the program. The Governor of Zia Pueblo also cited the PRC as an example of successful consultation, especially in regard to legislation pertaining to tax issues such as those related to gas and electrical utilities.

Jemez Pueblo cited the work of the North West Council of Governments (NWCOG), coordinated by DOT, as an example of successful consultation. Characterizing the COG relationships as "an advocacy process," the tribal representative noted the COG's work over a ten year period "on a myriad of issues, laws, programs and community concerns that fairly and accurately interpret and portray local interests, concerns and perspectives." Specific positive outcomes cited were "strong and respectful listening, an obvious striving to understand, clarify and honestly represent the perspectives, priorities and values of [Jemez Pueblo], follow through, and continued involvement and proactive measures to keep [the pueblo] part of the process."

The Governor of Isleta Pueblo similarly noted its hosting of the Mid-Region COG (MRCOG) meetings as a forum for mayors of neighboring towns (Bosque, Peralta, Los Lunas and Belen), state agencies such as DOT, state representatives and senators, as well as city planners and engineers. He noted that these meetings have been successful and positive: all participants agree that "the dialogue and relationship find continued support." These meetings, which initially focused on highway safety, have expanded to include wastewater issues and development

impacts. The Governor also noted that “anytime government agencies come together for consultation, it is successful; we may not agree on all issues, however, we become aware that there is an issue on either side.”

In their responses to the survey questionnaire, the tribal representatives from Santa Ana Pueblo and the Mescalero Apache Tribe cited the NM Indian Affairs Department’s work as examples of successful tribal consultation. Santa Ana Pueblo noted the assistance provided by IAD when contacted by the Pueblo regarding Capital Outlay funding: “when issues arise . . . they are immediately resolved either by phone or meetings at the Pueblo or IAD office; with the positive working relationship, issues are resolved within a reasonable time. The Mescalero Apache Tribe specifically noted IAD’s assistance with the Tribal Infrastructure Fund (TIF) for capital outlay, which resulted in the tribe being awarded several grants. The Tribe also noted that the IAD staff had initiated the assistance.

In summary, the tribes’ perspective on what constitutes successful consultation is based on achieving results, most examples emphasizing successful completion of a project between the tribe and a particular state agency. Other than the few tribal representatives that mentioned the HHSD *State-Tribal Consultation Protocol*, most tribal respondents or interviewees were unfamiliar with specific Tribal Consultation plans of the other agencies in the EO. One Navajo Nation respondent noted that the Arizona Department of Environmental Quality (“ADEQ”) has had a tribal consultation plan since 1992 and that “every ADEQ Director has reaffirmed it since 1992,” as well as the fact that it is available on the ADEQ website.

From tribal comments, it appears that agency consultation sessions involving all or many tribes are not always the most effective form of consultation; the majority of tribal respondents felt that one-on-one Tribe/Agency consultations on a specific issue are more successful. However, it is important for state agencies to have ways to keep tribes informed of changes in programs and services, including using mechanisms such as government-to-government meetings, annual summits, or e-mail newsletters.

There were only six examples of unsuccessful tribal consultation mentioned in the survey questionnaire responses and in tribal interviews. Three examples of unsuccessful tribal

consultation were cited by Santa Clara Pueblo staff in the areas of funding for Indian reservation roads under Governor Richardson’s Investment Partnerships initiative, questions about the state water plan, and documentation of DOH funding to Santa Clara Pueblo for Pandemic flu response. The Jemez Pueblo representative cited NMEDD trivializing and/or being non-responsive to requests for assistance and information. In the other instances where tribal representatives indicated that there had been an unsuccessful consultation, no specifics were given as to what agency or issue.

### **Tribal Examples of Best Practices in State-Tribal Consultation**

Below are summarized several “best practices” for State-Tribal consultation drawn from the lessons learned item in the study questionnaire or additional comments as provided by tribal representatives responding to the survey or interviews with the study team. These represent either (a) direct quotes from tribal leaders and/or program directors, or (b) insights gained by the study team from comments made on the survey or in interviews.

- “We view it [Tribal Consultation] as a process — not a one time event — in which tribal input is taken on policy decisions, based on knowledge gained about the perspective, concerns, policies, priorities, laws and expectations of a tribe. In our case we recognized that the better way to begin the process is with leadership, then to follow up on technical issues with assigned tribal staff who work in the areas concerned.”
- The consultation with NMED was successful because “we were involved in setting the agenda and setting forth expectations. We saw it as step one to further consultations and used it as opportunity to educate one another about how decisions are made.”
- The consultation with OSE was successful because “once [we] learned who was who we were able to make a plan for follow-up and even spent some time on substantive issues we need to address.”
- The Tribal Liaisons were particularly helpful in two cases: “NMED — explanation of permitting process for mining, and related information; SHPO — explanation of process and relative functions of staff in the Department, as well as information on technical assistance we could get.”
- The lesson learned in the two cases cited above is that “in some cases, sharing information beforehand could be helpful. Having leadership and staff who work on the issues involved helps to make the consultation more effective.” “If a decision is the

desired outcome of the meeting then the meeting needs to have decision makers from both sides present to create the framework for the staff to work under to achieve the desired end result.”

- The Tribal Liaisons in the two cases cited above helped in leading to success by “scheduling all the individuals we had to collect in one room, as well as helping with the agenda.”
- The following statement notes frustration with continuing state agency lack of knowledge about the pueblo’s sovereign immunity. “In several cases, we had to negotiate memoranda of agreement or other agreements. It seems that we have to educate state departments on our pueblo and its laws. Time and time again we have to educate them on the fact that the Pueblo will not waive its sovereign immunity and subject itself to state court for resolution of disputes on these agreements. This has been a sticking point for some agencies, and it has been frustrating to revisit this issue with another state department from time to time.”
- The following statement is in regard to the current unsatisfactory method that NMDOT initiates section 106 (Historic Preservation) tribal consultations with the pueblo. “NMDOT does what it calls tribal consultation every time they send out a letter asking for a checkbox on ‘yes, this will have impacts on cultural resources,’ or ‘no, it won’t’ and a responses within 30 days or less. This is a wholly inappropriate way of conducting business that does not respect the tribe’s knowledge or procedures. A better approach would be for the NMDOT to inform tribes of upcoming projects well in advance, and discuss potential impacts with the tribes.”
- “Periodically, a representative from the IAD comes to the Pueblo to perform a consultation session to review current project reviews and evaluations to keep the projects moving towards completion. Much of the information provides guidance to assure compliances and reporting summaries.” “The scope of the work and law that applied to the allocation are compared and provided a means of planning the project within the decision of the Legislature. This is a positive outcome of the consultation process.”
- “Transportation projects that have been developed within the exterior boundaries of the [Pueblo of Laguna, i.e., POL] have allowed the participation in the design, development and construction phases of the improvements. Consultation usually occurs at the project site or in the administrative offices [of NMDOT] and follows a developed agenda that covers the pending need or determination by the POL.” “The efforts of the project planning NMDOT team and the POL have shown some successes and in one respect was recognized as an outstanding project by a National Organization. With other projects, the success is measured in the public safety and awareness of the final product.”
- The following are examples of successful techniques observed while participating in consultation over ten years with the NWCOG: “strong and respectful listening; obvious striving to ‘understand,’ clarify and honestly represent the perspectives, priorities and values of the consultee; follow through; continued involvement and proactive measures

to keep consultee part of the process.”

- The lesson learned while participating in consultation over ten years with the NWCOG is that “it is a time consuming process. The entity/individual engaged in ‘consultation’ needs to craft the sessions, schedule and demands around the time constraints and other demands of the consultee. It must be communicated to the consultee that their input is valued and used. The critical mistake that government offices and consultants have consistently made using the consultation process as a club to dictate to the consultee is counter productive and wasteful as well as simply unethical . . . .”
- “When issues arise on Capital Outlay funding the issues are immediately resolved either by phone or meetings at the Pueblo or IAD office. With the positive working relationship issues are resolved within a reasonable time.”
- The pueblo defines success when dealing with a state agency when there are “direct one-on-one conversations and contacts which provide open lines of communication. It is important that the department not only point us in the direction of who to contact, but actually assist in coming to some solution. Getting support for our issue, especially technical assistance and dollars, is important. Accomplishing the resolution of problems and the elimination of being given the run around are also important.”
- The following is a cautionary statement about the need for effective tribal consultation. “For the Zuni Tribe, tribal consultation is the foundation of any state-tribal relationship and the acknowledgment of tribal self-determination, as granted by the federal government to the Pueblos of New Mexico. New Mexico Pueblos have and have interest in vast land masses which contain natural resources and other cultural properties which are impacted by the state agencies’ actions. Tribal consultation has been occurring sporadically, some effective other not. However, for decades consultation policies and procedures have been developed and never followed, while state agencies make and take important action affecting Pueblo interests without consultation. Simply increasing consultation requirements will not provide for adequate consultation, unless there is an increase in commitment from both entities (state, tribe) to engage in meaningful dialogue, consultation, and provide some mechanism to hold the other accountable if the consultation process is not followed. Tribal consultation must be embraced by state agencies and tribal leadership to make it an integral part of intergovernmental policy discussions to make it more effective and efficient in making equitable decisions affecting the State and Pueblos of New Mexico.”
- The following information was provided with regard to why the Zuni Tribe’s interaction with the OSE was successful. “Our meeting with the State Engineer was successful because the State was willing to review and consider the tribe’s water model, which was disregarded as part of the preliminary plat for a subdivision project near our northern reservation boundary. The State encouraged the tribe to submit the water model although the preliminary plat was approved and they would consider Zuni’s water model as part of the permanent plat approval process. Secondly, the State was willing to accept any documentation showing the impact of water and residual impacts of development

(drainage, erosion, waste water storage or seepage, etc.) for the State to consider as part of future developments near our boundaries. Lastly, the tribe was given an opportunity to review the State's current documentation of water and other impacts of development within our region, as submitted by other interested non-Zuni, or Native parties. This review allowed the tribe an opportunity to provide supplemental documentation lacking within the State's resources for them to have ample information when considering how future development affects our interest in our lands and near our boundaries."

- The following explains how the Tribal Liaison's participation was critical to the success of the tribal consultation. "Continual informal dialogue occurred between the Governor of Zuni and the tribal liaison for the State Engineer, as they attended various meetings throughout the state. During these informal meetings, the Zuni Governor kept highlighting the concerns of the Zuni Tribe and the impacts water, waste water, drainage/seepage, and erosion anticipated with a new subdivision less than five (5) miles from the northern boundary. The concerns of the Governor lead the tribal liaison to consider having the State Engineer meet directly with the Zuni Tribe to hear our concerns. Without the tribal liaison, our issues would not have been given much consideration if we followed the normal process of submitting our complaints to the Office of State Engineer."

## **VII. CONCLUSION**

The passage of SB 196, the State-Tribal Collaboration Act, in the 2009 NM Legislative Session has created a series of statutory provisions that will build on EO 2005-04. First, the State-Tribal Collaboration Act, because it is a law rather than an executive order, will be binding on future Governors and their Administrations unless it is rescinded by a future act of the New Mexico State Legislature. Second, the act requires every cabinet-level state agency, by December 31, 2009, to develop and implement a policy that promotes effective communication and collaboration and positive government-to-government relations between state agencies and Indian nations, tribes or pueblos. This policy is clearly meant to apply broadly to all programs and services provided by cabinet-level agencies, departments or offices to or directly affecting American Indians or Alaska Natives in contrast to the executive order, which was directed only at pilot tribal consultation plans, which were quite varied in their focus. Importantly, the act calls for state agencies, when developing this policy, to consult with representatives designated by the Indian nations, tribes or pueblos.

Additionally, the act formalizes the requirement that every cabinet-level state agency shall

designate a tribal liaison who must report directly to the office of the head of the state agency. This key staff member has three responsibilities: (1) assisting the head of the state agency with developing and ensuring the implementation of the state-tribal collaboration policy; (2) serving as a contact person who maintains ongoing communications between the state agency and affected Indian nations, tribes or pueblos; and (3) ensuring that training is provided to the staff of the state agency.

In addition, the act has requirements for an annual summit, training of state employees, and annual reports. At least once a year, during the third quarter of the state's fiscal year (between January 1 and March 31), the Governor shall meet with the leaders of Indian nations, tribes and pueblos in a state-tribal summit to address issues of mutual concern. The annual summits will also provide an opportunity to help build a written record of ongoing progress in implementing the act and setting priorities for the coming year.

These annual agency reports (due to the Indian Affairs Department no later than July 31<sup>st</sup> of each year) must include: (1) the policy that the agency adopted pursuant to the State-Tribal Collaboration Act; (2) the names of and contact information for the individuals in the agency who are responsible for developing and implementing programs of the agency that directly affect American Indians or Alaska Natives; (3) the current and planned efforts of the agency to implement the policy; (4) a certification by the state personnel office of the number of managers and employees of each state agency who have completed the required training; (5) a description of current and planned programs and services provided to or directly affecting American Indians or Alaska Natives and the amount of funding for each program; and (6) the method the agency established for notifying employees of the agency of the provisions of the State-Tribal Collaboration Act.

In 2001, the Oregon Legislature adopted Senate Bill 770, which directs state agencies to develop and implement a policy that promotes communication and positive government-to-government relations between the state and the tribes. Since this legislation is similar to New Mexico's recently enacted State-Tribal Collaboration Act and has been in force for eight years, some lessons may be learned from the implementation of the Oregon legislation. First, the agencies'

tribal relations policies and the annual government-to-government agency reports are on the web site of the Legislative Commission on Indian Services for public review. In conjunction with the planning for the annual government-to-government summits, an online survey is created each year to capture summit participants' opinions on the summits. To explore issues of common concern, state agencies and the nine Oregon tribes have organized themselves into government-to-government clusters focused on such topics as Indian education, health services, public safety, economic development and community services, natural resources, and cultural resources. These government-to-government clusters meet on a quarterly basis and provide an opportunity for state agency employees to build relationships with tribal representatives and employees of other related state agencies. The minutes of these quarterly meetings are typically posted on the web site of the state agency that co-chairs the cluster group. The annual government-to-government summits provide the various cluster groups an opportunity to present their issues to the Tribal Chairs and the Governor. Additionally, tribes are given an opportunity at the summit to share their achievements and concerns with state agencies. Lastly, the Department of Administrative Services, in conjunction with the Legislative Commission on Indian Services, is responsible for hosting an annual training on tribal issues for all state agencies. These training sessions are videotaped in order to make them available to all state agencies.

The National Association of Tribal Historic Preservation Officers (NATHPO) published "Tribal Consultation: Best Practices in Historic Preservation" in 2005 (available on their web site) to identify the attributes of a successful consultation between tribes and federal agencies in the execution of their historic preservation activities. While this study was focused on projects that were required to undergo historic preservation reviews under the National Historic Preservation Act and other related federal laws, the best practices and conclusion sections of the study make some important points for New Mexico agencies to consider when drafting their State-Tribal Collaboration Act policies. Flexibility and honesty are important to ensuring successful consultations. Best practices in successful consultation include: (1) multiple contacts that begin early in the planning process and continue throughout the project; (2) multiple venues for consultation, such as the Agency office and locations close to the tribe(s) and the area of the undertaking; (3) formal and informal meetings, (4) an early effort to identify areas of concern to the tribe(s); (5) provision to tribe(s) of full and candid information prior to the first meeting; (6) an open-ended and flexible agenda (no hidden agendas) and ; (7) facilitators (if needed) for the

sessions alternate between agency and tribal leaders. In short, these best practices are designed to create a level playing field in consultations between an agency and a tribe. It is important to remember that consultation is the most formal example of the spectrum of methods for successful communication and collaboration between state agencies and Indian nations, tribes or pueblos.

#### **VIII. RECOMMENDATIONS FOR NON-STATUTORY POLICIES TO IMPROVE TRIBAL CONSULTATION**

At the inception of this study, according to the NM Indian Affairs Department's *Strategic Plan Overview*, it was a goal of IAD to standardize best practices in collaboration and consultation with tribal governments. As noted earlier, the passage of SB 196 during the 2009 legislative session provides a statutory framework for ensuring this goal. While agency functions and priorities differ, it is an important aspect to make collaboration and consultation with tribes an integral and ongoing part of each executive agency's annual work plan, as was the intent in issuing a call for "pilot" plans in the EO which were intended as a mechanism to test various departmentally appropriate approaches to tribal consultation which might be extended to other departmental divisions or offices. A number of recommendations have been mentioned in this report that would improve tribal consultations or the functions of Tribal Liaisons. These are summarized and presented again below.

Recommendation 1 – Training on Tribal Consultation: It was recommended by several departmental representatives that it would be helpful for IAD to develop a training package which other agencies could use for training their employees. One or more of IAD's meetings of the Tribal Liaisons Group could focus specifically on this issue since many of the concerns regarding training of other employees on tribal consultation and communication are shared by the various departments. Such training could be the subject of the annual Tribal Summits that many tribal leaders feel, according to the Tribal Liaisons, need strengthening with the preparation of new/updated training materials.

IAD staff's review of the Department of Health's training module and/or the State Parks

Division's Tribal Consultation PowerPoint presentation could be the beginning step in preparing such a training package.

Recommendation 2 – Desired Attributes for Tribal Liaison Positions: Several factors were identified by Tribal Liaisons as making their job performance more effective. IAD can encourage other agencies to consider adding these factors to the Tribal Liaison job descriptions. These factors included (a) prior experience working with tribal government programs or Indian organizations, (b) ensuring that the position is high enough – preferably within the Office of the Secretary – in the organizational structure to be an effective advocate on behalf of tribes, (c) making certain that the compensation for the position is adequate so as to prevent turnover in the position, and (d) demonstration of cultural knowledge and competency in working with NM tribes.

Recommendation 3 – Updated Listings of Tribal Liaisons: Several tribes indicated that it would be helpful if IAD were to post an updated listing of Tribal Liaisons and other pertinent agency contacts on the IAD website. It is not enough to have the list included in the monthly IAD newsletter, which not all tribal personnel may receive.

Recommendation 4 – Access to Tribal Consultations: The issue was brought up that Zuni Pueblo, Navajo Nation and the two NM Apache Tribes are far removed from Santa Fe. The HSD's four-phased regional meeting approach to conducting tribal consultations regarding Medicaid regionally can serve as a model for other agencies.

Recommendation 5 – IAD's Role as Tribal Consultation Facilitator: The IAD can help provide more visibility to tribal consultation by making it a formal program of the department. As such, a staff member could be designated as the Tribal Consultation Coordinator and a portion of the IAD website could be specifically set aside for tribal consultation. The agency reports required annually by SB 196 should highlight agencies' benchmarks in their tribal consultation efforts and plans for tribal consultation.

Recommendation 6 – Tribal Consultation as an Element of Departmental Planning: Similar to the objectives specific to the functions of the Tribal/Environmental Justice Liaison's position in

the NMED Strategic Plan, other State agencies should be encouraged to include tribal consultation as integral to their Strategic Plans. In light of passage of SB 196, it should be made explicit that tribal consultation be an element of departmental planning and noted in all agency communications and collaboration policies developed in response to that law.

Recommendation 7 – Annual Report on State-Tribal Collaboration: SB 196 requires every cabinet-level state agency to submit to IAD an annual report on state-tribal communications and collaboration. It requires that the annual report include current and planned efforts of the agency to implement the policy. These reports need to include useful statistical information to put their current and planned efforts to implement the policy in perspective, e.g., number of tribal libraries and their funds relative to other public libraries, number of miles of State Roads through Indian reservations and the conditions of the roads, numbers of American Indian clients served through DWS, claims filed by American Indian veterans with the assistance of DVS, etc. IAD could use this statistical information along with information on state-tribal collaborations to produce an overall annual report.

Recommendation 7 – Full-Time Tribal Liaison Position: SB 196 requires that each Tribal Liaison report directly to the head of the state agency. To further strengthen the Tribal Liaison positions, it is recommended that they be full-time positions and that funding be provided for this to ensure that tribal consultation is an important departmental concern.

## **Attachment A**

### **Tribal Summits**

Environment Department - most recent one was held June 19, 2009.

Economic Development Department - 2006 and 2007: The departmental Tribal Liaison indicated these were poorly attended and have been replaced by the Annual New Mexico Infrastructure Finance Conference, October 28-30, 2008, which has a broader target population than just tribes but which does have a strand of sessions directed at tribal issues and audiences.

State Tribal Water Institute - most recent one held October 24, 2008; a total of six held since 2005.

Public Education Department - NM Indian Education Advisory Council (government-to-government meetings held twice a year; most recent one held January 16, 2009).

Human Services Department - most recent one held in January 2008; annual Joint Meeting sponsored by Medicaid Division and Indian Health Service.

Children, Youth and Families Department - annual summits usually held in January.

Health Department - held a summit in 2007.

### **Indian Advisory Committees Associated with the 17 Agencies Named in E.O. 2005-004**

Health Department: Fifteen member American Indian Health Advisory Committee whose members are appointed by the tribes and includes tribal representatives, health professional representatives, off-reservation appointments, etc.

Public Education Department: Sixteen member (formerly fourteen) NM Indian Education Advisory Council consisting of proportionate tribal representation including Navajo Nation representatives, Jicarilla and Mescalero Apache tribal representatives, Northern Pueblos representatives, Southern Pueblos representatives and urban Indian representation.

Environment Department: Intertribal Resources Advisory Committee consisting of the Environmental Directors of all twenty-two NM tribes and which meets with the NMED Tribal/Environmental Justice Liaison and the federal EPA Region 6 Tribal Ombudsmen.

Cultural Affairs Department: The Museum of Indian Arts and Culture's Indian Advisory Panel - a fifteen member group currently consisting of individuals from 12 NM Pueblos, one Dine representative and two American Indian representatives from Arizona tribes (one Tohono O'odham and one Hopi).