

## The Confederated Tribes of the Umatilla Indian Reservation

### Consultation: Government to Government (or otherwise)

#### *WHAT IS CONSULTATION?*

CONSULTATION. Deliberation of persons on some subject. State District Court of Third Judicial Dist. in and for Powell County, 85 Mont. 215, 278 P. 122, 125. A conference between the counsel engaged in a case to discuss its questions or arrange the method of conducting it. In French Law. The opinion of counsel upon a point of law submitted to them. Black's Law Dictionary, DeLuxe Fourth Edition. West Publishing Co., (1951).

CONSULTATION \,kan(t)-sel-'ta-shen\ n **1:** COUNCIL, CONFERENCE; *specif:* a deliberation between physicians on a case or its treatment **2:** the act of consulting or conferring. Webster's New Collegiate Dictionary, G & C MERRIAM COMPANY, (1979).

Consultation is the formal process of negotiation, cooperation and policy-level decision-making between the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) and the United States federal government. As such, consultation is the bilateral decision-making process of two sovereigns: the Confederated Tribes of the Umatilla Indian Reservation and the United States Government.

It is critical to understand that consultation is not just a process or a means to an end. Rather, consultation is the process that ultimately leads up to and includes a **decision**. ***The most important component of consultation is the ultimate decision.*** Consultation then is the formal effort between two sovereigns of making policy level decisions.

It is equally important to understand what consultation is not. Consultation is not notifying a Tribal government that an action will occur, requesting written comments on that prospective action, and then proceeding with the action. In this scenario the decision is not affected. This is not consultation.

#### *WHAT ARE THE OBJECTIVES OF CONSULTATION?*

- a. Assure that CTUIR Board of Trustees understands the technical and legal issues necessary to make an informed policy decision.
- b. Improved policy-level decision making of both CTUIR and federal government.
- c. Bi-lateral decision making among sovereigns (co-management).

- d. Protection of CTUIR lifestyle, culture, religion, economy.
- e. Compliance with Tribal laws.
- f. Compliance with federal Indian law; federal statutes; federal policy.
- g. Develop and achieve mutual decisions.
- h. Improve the integrity and longevity of decisions.

### ***HOW DOES CONSULTATION WORK?***

Consultation works through the same procedures and steps that are common-place for most federal agencies: technical meetings and policy meetings. From a practical standpoint, consultation requires an ability to differentiate between technical and policy issues; this allows for proper technical level staff consultation and then policy-level consultation for those issues that remain unresolved or for those issues that are clearly only resolvable at the policy level. Consultation is the process of coming to common understanding of the technical and legal issues that affect or are affected by a decision. Consultation is using this common understanding to make a decision.

Consultation does not portend to mandate a certain decision; most Tribal governments are much more willing to address cooperatively a decision that on the surface is distasteful than if they had not been thoroughly consulted with prior to facing that distasteful decision.

Meaningful consultation requires that federal agencies and Tribes understand respective roles and have a basic understanding of the legal underpinnings of the government-to-government relationship, including the responsibility of the federal government under the Trust doctrine. In addition, federal agencies will benefit from some understanding of tribal culture, perspectives, world view, and aboriginal rights. Tribal governments must understand the policy decision-making authority of the federal agency. Tribal governments must understand the non-tribal politics of the federal agency decision that consultation will affect.

Tribal governments must also understand the federal and state laws within which the agency must operate. In these examples, it is critical to note that a Tribal government cannot understand the politics of the federal agency decision without personal communications. Similarly, the federal agency cannot understand the Tribe's world view unless agency staff meet with the Tribe to discuss that world view. The lesson here is that consultation has a foundation of communication. Without communication, consultation is thwarted and a mutual decision is impossible.

Thus in a hypothetical example, consultation works like this:

1. Federal agency contacts Tribal government to advise of an impending project proposal or to conduct an activity that may or may not impact a tribal resource or issue.<sup>1</sup>
2. CTUIR responds back that this issue is important and that it would like to initiate consultation. CTUIR requests federal agency technical experts meet with CTUIR technical representatives (or CTUIR requests a policy level meeting).
3. Consultation has been initiated. Technical staffs meet. Technical and legal issues are discussed; the result is that CTUIR staff understand the proposal and federal agency staff understand at technical level why this proposed activity is of concern. This allows respective technical staff to brief respective policy entities and to provide informed opinions and recommendations.
4. CTUIR staff brief the proper Tribal policy entity. Consultation steps are defined, written down and then transmitted to federal agency.<sup>2</sup> Agreement is reached upon this consultation process.
5. Additional meetings are held, if necessary, leading up to the decision.
6. Federal agency and CTUIR formulate a decision. Ultimately and optimistically this decision is consistent with federal laws and tribal laws and policies. This means the decision is consistent with applicable natural and cultural resource laws and policies, with the Doctrine of Trust Responsibility and with federal Indian law. For the CTUIR specifically, it means the decision protects the resources to which the CTUIR has specific aboriginal and treaty reserved rights, protects the unique culture and world view and enables continued practice of the Tribal religion.

Most important is that leading up to the decision, the Tribal Government and the federal government have communicated. Mutual understanding and trust have been developed. Without mutual understanding and mutual trust a mutual decision is nearly unthinkable. History is replete with examples of such failures. In any event, the CTUIR perspective regarding the decision to formally consult or not to consult is that those entities required by law or policy to consult with Tribes is obviously to consult, or at the minimum, ask the CTUIR. The consequences of consulting when not required is preferred to the consequences of misjudging and not consulting when required.

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<sup>1</sup> It is crucial to note here that the federal agency contacted the CTUIR because of an impending *decision* that the federal agency will have to make in the near future. Remember, it is that *decision* that consultation is focused upon. Also note that, depending upon the issue, the CTUIR could have contacted the federal agency to initiate consultation.

<sup>2</sup> These steps are usually no more complicated than additional technical level meetings, later policy level meetings, potential mutual measures to obtain additional information, and finally a policy level meeting to make the ultimate decision.