

# Chapter 10

## Tribal Consultation



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## Chapter 10 Tribal Consultation

### NEPA ASSIGNMENT – CE Assignment vs. Full Assignment

The Nebraska Department of Transportation (NDOT) entered CE Assignment pursuant to [23 USC 326](#) on September 5, 2018. Under CE Assignment, NDOT assumed FHWA responsibilities for determining whether specific projects are categorically excluded from the requirement to prepare an EA or EIS. NDOT, rather than FHWA, now makes CE determinations for most projects (for exceptions, see [Chapter 1, Overview](#), Section 1.5). All EAs and EISs, as well as CE determinations not assignable to NDOT under [23 USC 326](#), continue to be formally approved by FHWA. Once full NEPA Assignment under [23 USC 327](#) is in place, all types of environmental approvals (CE, EA, and EIS, with limited exceptions; see [Chapter 1, Overview](#), Section 1.5) will be made by NDOT.

Federally recognized Native American tribes have a unique status as domestic dependent (sovereign) nations based on their history and interactions (that is, treaties and agreements) with the U.S. government. This status entitles tribes to a special protocol for conducting consultations with federal entities of the U.S., called government-to-government consultation. Tribal autonomy derives from their original, inherent sovereignty, which is at the core of the federal government trust responsibility. In addition, the federal government has a fiduciary duty and obligation to tribes. Communications and interactions with tribes are conducted on a government-to-government basis in recognition of tribal sovereignty, and consultation is the core component of the federal government-tribe relationship. The term consultation appears in many statutes, regulations, executive orders (EOs), and policies. Consultation is a process; it is meaningful communication that emphasizes trust, respect, and shared responsibilities.

Communications and interactions with tribes are conducted on a government-to-government basis in recognition of tribal sovereignty, and consultation is the core component of the federal government-tribe relationship.

The term federally recognized tribe

refers to the tribal government and tribal members of any tribe, band, pueblo, nation, or other organized group or community including any Alaska Native village or regional or village corporation (as defined in, or established pursuant to the Alaska Native Claims Settlement Act, [43 United States Code \(U.S.C.\) 1601 et seq.](#)), or that is acknowledged by the federal government to constitute a tribe with a government-to-government relationship with the U.S. and eligible for the programs, services, and other relationships established by the U.S. for Indians because of their status as Indians. ([U.S. Department of Transportation Order 5301.1](#))

A list of federally recognized tribes is published nearly annually in the *Federal Register*, and the Bureau of Indian Affairs regularly updates this list in its Tribal Leaders Directory on its website (<https://www.bia.gov/tribal-leaders-directory>).

It is the intent of NDOT to initiate consultation with all known tribes that have ancestral ties to the lands within the state and to honor existing relationships currently in place.

Although the terms Native American, American Indian, Tribes, Nations, and Groups can all be found in the various federal statutes, EOs, and guidelines, for purposes of consistency, the term tribes will be used in this *Environmental Procedures Manual* (Manual) except where specific reference is given and the source document uses a different term. It is the intent of the Nebraska Department of Transportation (NDOT) to initiate consultation with all known tribes that have ancestral ties to

the lands within the state and to honor existing relationships currently in place. When addressing a specific tribe (such as in a letter), then the appropriate title, name, or designation will be used (for example, Community, Nation, Chairman, President).

This chapter provides guidance for NDOT to ensure that Native American tribal perspectives are addressed in planning, designing, constructing, and maintaining transportation infrastructure and to promote efforts to engage in regular and meaningful consultation with tribes. NDOT recognizes the sovereign status of federally recognized Indian tribes and respects each tribe's government, people, history, culture, codes, and laws. NDOT encourages mutual understanding of unique cultural and organizational practices among tribes, and is committed to developing and strengthening tribal relationships.

NDOT will engage in partnering efforts, when appropriate and as resources allow, to encourage and improve understanding and communication with tribes. These efforts may include programmatic agreements with tribes interested in formalizing relations and establishing means of communication and other protocols for consultation.

## 10.1 Government-to-Government Consultation

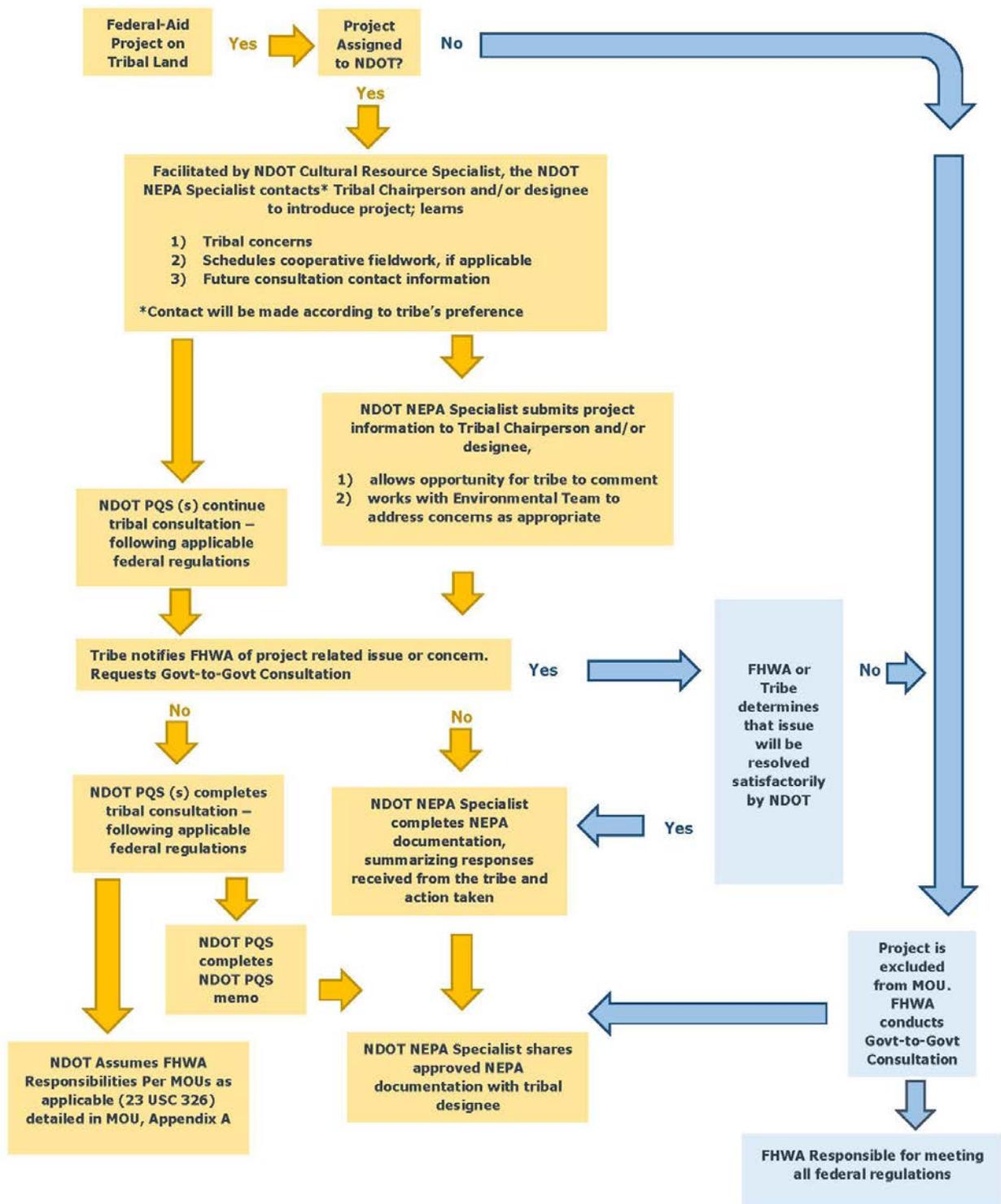
As a federal agency, the Federal Highway Administration (FHWA) is responsible for engaging in government-to-government consultation with tribes, and this responsibility continues under National Environmental Policy Act (NEPA) Assignment. Under NEPA Assignment, NDOT initiates and conducts tribal consultation in accordance with the terms and conditions of the NEPA Assignment Memorandum of Understanding, identified tribal protocols, and [Nebraska Department of Transportation National Historic Preservation Act Section 106 Guidelines](#), Chapters 1 and 2. All consultation materials submitted to tribes will outline the process by which tribes may request government-to-government consultation. Tribes may request formal government-to-government consultation with FHWA via formal written or oral communication, identifying one or more state transportation projects in the request for government-to-government consultation. NDOT will provide supporting documentation to FHWA during government-to-government consultation.

## 10.2 Multidisciplinary Approach to Tribal Consultation

Tribal consultation processes have been developed to meet requirements of different disciplines within NDOT's Environmental Section, as shown in Figure 10-1. NDOT's tribal consultation program will reflect and will adhere to established principles and best practices, and will be established through conversations with individual tribes. With an understanding that historic properties of religious and cultural significance may be located off tribal lands, tribes will be afforded an opportunity to identify areas of interest relative to the Section 106 program. Tribal consultation will be facilitated by NDOT's Cultural Resource Specialist, who will act as a tribal liaison. NDOT Professionally Qualified Staff (PQS) will conduct tribal consultation in their areas of expertise. Regarding NEPA documentation, the NDOT NEPA Specialist will conduct tribal consultation as determined through ongoing discussions with tribes.

NDOT will discuss with tribal representatives the most effective and appropriate way to share technical information and data to facilitate tribal participation, and will consult with tribes as early as possible. Consultation will be conducted in good faith, and honesty and integrity will be maintained by NDOT at all stages of the consultation process. Consultation will occur as part of a meaningful and comprehensive process that promotes effective communication between the tribes and NDOT, and will provide timely opportunities for communication with the tribes about decisions that may affect them.

Figure 10-1. NDOT Tribal Consultation Flowchart



The NDOT Environmental Section will tailor tribal consultation to reflect each tribe’s communication preference. If a tribe has no stated preference, consultation will be initiated by letter, email, telephone call, or personal visit. If there is no response to initial contact by letter or email, NDOT will telephone or will make a personal visit. Project-specific tribal consultation efforts will be documented on the [NDOT Record of Tribal Consultation form](#), shown in Figure 10-2.

**Figure 10-2. NDOT Record of Tribal Consultation Form**



**Record of Tribal Consultation**

Project No: \_\_\_\_\_  
 CN: \_\_\_\_\_  
 Project Name: \_\_\_\_\_

Date	Communication Type (e.g., telephone/email/meeting)	Tribal Representative	NDOT PQS / Representative
<b>Description of Communication</b>			

Date	Communication Type (e.g., telephone/email/meeting)	Tribal Representative	NDOT PQS / Representative
<b>Description of Communication</b>			

The amount of effort to consult should reflect the scope of the project and the degree of cultural sensitivity of resources in the project’s study area and/or area of potential effect. In some cases, a telephone call may be adequate. Other projects may involve more intensive and extensive consultation.

The amount of effort to consult should reflect the scope of the project and the degree of cultural sensitivity of resources in the project’s study area and/or area of potential effect.

**10.2.1 Confidentiality of Resource Information**

In accordance with the [Programmatic Agreement Among the Federal Highway Administration, the Nebraska State Historic Preservation Officer, the Advisory Council on Historic Preservation and the Nebraska Department of Roads to Satisfy the Requirements of Section 106 for the Federal-Aid Highway Program in the State of Nebraska \(Section 106 PA\)](#), Stipulation XIII.F, and consistent with the confidentiality provisions in [36 Code of Federal Regulations \(CFR\) 800.11\(c\)](#), NDOT acknowledges that

information about historic properties, potential historic properties, or properties considered historic for purposes of Section 106 review are, or may be, subject to [Nebraska Revised Statute 84-712.05](#) and the provisions of the National Historic Preservation Act, as amended (NHPA), Section 304 ([54 USC 307103](#)). [Nebraska Revised Statute 84-712.05](#) stipulates that records or portions of records may be withheld from the public if these records would reveal the location, character, or ownership of any known archeological, historical, or paleontological site in Nebraska when necessary to protect the site from a reasonably held fear of theft, vandalism, or trespass. NHPA Section 304 ([54 USC 307103](#)) allows the head of a federal agency or other public official receiving grant assistance, after consultation with the Secretary of the Interior, to withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the federal agency determines that disclosure may (1) cause a significant invasion of privacy, (2) risk harm to the historic resource, or (3) impede the use of a traditional religious site by practitioners.

In consultation with the PQS, the Cultural Resource Specialist will determine what information may be subject to these state and federal confidentiality provisions, and will coordinate with FHWA when tribes make a request to FHWA for government-to-government consultation for specific undertakings.

If NDOT is made aware of confidentiality concerns, the Cultural Resource Specialist and/or the PQS will inform consultants and other project team members on a need-to-know basis. The Cultural Resource Specialist will provide instructions regarding how to proceed in a manner that is sensitive to the situation and is agreed upon by the tribe.

## 10.2.2 Section 106

Tribal consultation will be conducted as required under NHPA Section 106 and in accordance with the process outlined in the [Section 106 PA](#), Stipulations IV, V, X, XI, and XIII.F. Tribal consultation methodologies are further detailed in NDOT's Section 106 guidance document, [Nebraska Department of Transportation National Historic Preservation Act Section 106 Guidelines](#), Chapters 1 and 2.

Tribal consultation under Section 106 is important to any NDOT-administered project in Nebraska located on or near existing tribal lands, as well as within areas identified by tribes as areas of interest or if archeological investigations identify ancestral associations. The PQS will rely on years of research and consultation completed by the Nebraska State Archeology Office and the Nebraska State Historic Preservation Office regarding general areas of tribal activity in Nebraska ([Nebraska State Historic Preservation Office National Historic Preservation Act Archeological Properties Section 106 Guidelines](#)). This information will be used in conjunction with ongoing discussions with Tribal Historic Preservation Officers with ancestral associations in Nebraska.

Tribal consultation under Section 106 is important to any NDOT-administered project in Nebraska located on or near existing tribal lands, as well as within areas identified by tribes as areas of interest or if archeological investigations identify ancestral associations.

### 10.2.2.1 Post-Review Discoveries

When NDOT's identification efforts undertaken in accordance with [36 CFR 800.4](#) indicate that historic properties are likely to be discovered during implementation of an undertaking, NDOT shall prepare an agreement document (for example, a Memorandum of Agreement or Programmatic Agreement) that establishes a process to resolve any adverse effects on such properties in accordance with [36 CFR 800.13](#).

In response to stipulations in the agreement document, a data recovery operation may be implemented and may be ongoing during construction. Construction monitoring in potential archeologically sensitive areas may also be implemented as a construction commitment to ensure

avoidance of an adverse effect. NDOT or the project sponsor is responsible for coordinating field efforts with the PQS, consultant, and contractor to ensure that field investigations are completed in a timely, efficient, and safe manner, and that they are designed to avoid any unnecessary construction delays. NDOT (or other project sponsor) must ensure adherence to the stipulations of the agreement document.

### 10.2.2.2 Discoveries Made Prior to Project Construction

If previously unidentified historic properties or unanticipated effects are discovered after NDOT has completed its Section 106 review under the [Section 106 PA](#), Section 106 consultation will be reinitiated. The [Section 106 PA](#), Stipulation XI, shall then govern how these discoveries will be managed.

### 10.2.2.3 Discoveries Made After Project Construction Begins

If previously unidentified historic properties or unanticipated effects are discovered after project construction begins, that portion of the project will stop immediately, in accordance with NDOT [Standard Specifications for Highway Construction](#) (107.10). The [Section 106 PA](#), Stipulation XI, shall then govern how post-review discoveries will be managed.

## 10.2.3 Treatment of Human Remains and Funerary Objects

The discovery of unmarked human remains requires special care and respect. Two primary laws cover such discoveries: the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA; [25 United States Code \[USC\] 3001 et seq.](#) and its implementing regulations at [43 CFR 10](#)) and the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989 ([Nebraska Revised Statute 12-1203](#)). NAGPRA procedures are followed for remains discovered on federal or tribal land, and the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989 procedures are followed for remains found on all other property. However, if human remains are recovered on land that is not federal or tribal land, and these remains are determined to be Native American, the process for disposition also follows NAGPRA procedures.

The discovery of unmarked human remains requires special care and respect.

### 10.2.3.1 Projects Assigned to NDOT

The Technical Resources Unit Manager and the Cultural Resource Specialist shall be responsible for ensuring that any discovery of unmarked human remains is reported through appropriate channels to History Nebraska (also known as the Nebraska State Historical Society) in accordance with NDOT [Standard Specifications for Highway Construction](#) and the [Section 106 PA](#), Stipulation XII. In Nebraska, History Nebraska is responsible for complying with all applicable provisions of NAGPRA and the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989.

If burials are found during any stage of archeological investigation or during construction, procedures outlined in the [Section 106 PA](#), Stipulation XII, and the [Nebraska Department of Transportation National Historic Preservation Act Section 106 Guidelines](#), Chapter 5, will be followed. If History Nebraska determines that the discovered skeletal remains or burial goods are of American Indian origin, History Nebraska shall proceed as directed by the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989 and NAGPRA. These processes require consultation with Native American tribes. In addition, History Nebraska will contact NDOT, and NDOT shall adhere to the [Section 106 PA](#), Stipulation XII.

All human burials are to be accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations. Visual recording of a burial site containing *in situ* human remains should be limited to the purposes of documentation for cultural affiliation determination. Publication of such visual recordings must be approved by History Nebraska, or approved by NDOT or the federal land manager or tribal official when remains are found on federal or tribal land.

### 10.2.3.2 Projects Not Assigned to NDOT – Human Remains on Federal or Tribal Land

NAGPRA procedures are followed for remains discovered on federal or tribal land, and the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989 procedures are followed for remains found on all other property. The Technical Resources Unit Manager and the Cultural Resource Specialist shall be responsible for ensuring that any discovery of unmarked human remains is reported through appropriate channels to FHWA and History Nebraska in accordance with NDOT [Standard Specifications for Highway Construction](#) (107.10).

The discovery of human remains or associated burial objects on federal or tribal land is governed by NAGPRA and becomes the responsibility of the federal land manager if on federal land, or the tribal official if on tribal land. Tribal land is defined as all land within the external boundary of an Indian reservation ([36 CFR 800.16\(x\)](#)).

If human remains or funerary objects are encountered during construction on federal or tribal land:

1. All construction will cease at the location of the discovery;
2. The location of the discovery will be secured by the NDOT Construction Project Manager;
3. The NDOT Construction Project Manager will immediately notify local law enforcement (county sheriff/county coroner) and the NDOT Technical Resources Unit Manager;
4. Once law enforcement determines that a crime is not involved, History Nebraska staff will be contacted by the appropriate county attorney's office. History Nebraska staff shall promptly assist in examining the discovered material to attempt to determine its origin and identity pursuant to [Nebraska Revised Statute 12-1203](#). History Nebraska staff are required to conduct an onsite investigation within 48 hours to make a preliminary determination of the origin and identity of the remains and promptly relate the findings in writing to the county attorney and interested parties, who may include a descendant Indian Tribe, a descendant family, or the Nebraska Commission on Indian Affairs. This initial contact often outlines the need for further examination of the remains by a qualified physical anthropologist to assist with cultural affiliation determination;
5. The NDOT Technical Resources Unit Manager will notify FHWA within 24 hours of the discovery;
6. FHWA will contact the head of the federal agency responsible for the property if on federal land, or the tribal authority if on tribal land, within 24 hours of the discovery.

If human remains or funerary objects need to be collected from federal or tribal land based on a directive from the federal land manager or tribal authority, it will be done by History Nebraska staff or a professionally qualified consultant in coordination with the federal agency responsible for the property if on federal land, or the appropriate tribal authority if on tribal land.

All human burials are to be accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations. Visual recording

All human burials are to be accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations.

of a burial site containing *in situ* human remains should be limited to the purposes of documentation for cultural affiliation determination. Publication of such visual recordings must be approved by History Nebraska, or approved by NDOT or the federal land manager or tribal official when remains are found on federal or tribal land.

### 10.2.3.3 Projects Not Assigned to NDOT – Human Remains on Non-Federal or Non-Tribal Land

The discovery of human remains or associated burial objects on non-federal or non-tribal land is governed by the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989. However, if human remains are recovered on land that is not federal or tribal land, and these remains are determined to be Native American, the process for disposition also follows NAGPRA procedures.

If human remains or funerary objects are encountered during construction on non-federal or non-tribal land:

1. All construction will cease at the location of the discovery;
2. The location of the discovery will be secured by the NDOT Construction Project Manager;
3. The NDOT Construction Project Manager will immediately notify local law enforcement (county sheriff/county coroner) and the NDOT Technical Resources Unit Manager;
4. Once law enforcement determines that a crime is not involved, History Nebraska staff will be contacted by the appropriate county attorney's office. History Nebraska staff shall promptly assist in examining the discovered material to attempt to determine its origin and identity pursuant to [Nebraska Revised Statute 12-1203](#). History Nebraska staff is required to conduct an onsite investigation within 48 hours to make a preliminary determination of the origin and identity of the remains and promptly relate the findings in writing to the county attorney and interested parties, who may include a descendant Indian Tribe, a descendant family, or the Nebraska Commission on Indian Affairs. This initial contact often outlines the need for further examination of the remains by a qualified physical anthropologist to assist with cultural affiliation determination;
5. Field evaluations may consist of inspection of disinterred or *in situ* remains or artifacts. If possible, remains should be covered and left in place to the maximum extent possible, if construction actions and project specifications will not be adversely impacted. If preservation in place is not possible, and disinterred remains (which include all remains and associated objects of a fully or partially disturbed individual) are non-Native American, the remains may be collected/excavated and turned over to descendent parties or the county attorney for reburial;
6. The NDOT Technical Resources Unit Manager will notify FHWA within 24 hours of the discovery;
7. No further work in the area of the discovery will proceed until FHWA determines that the requirements of [36 CFR 800.13](#) have been satisfied, including consultation with tribes that may attach traditional religious and cultural significance to the discovered property.

All human burials are to be accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations. Visual recording of a burial site containing *in situ* human remains should be limited to the purposes of documentation for cultural affiliation determination. Publication of such visual recordings must be approved by History Nebraska.

## 10.2.4 Threatened and Endangered Species

Tribal consultation methodologies regarding threatened and endangered species will follow the process outlined in the *Programmatic Agreement Among the Federal Highway Administration, U.S. Fish and Wildlife Service, Nebraska Department of Roads, and Nebraska Game and Parks Commission for the Determination of Effects to State and Federally Listed Species from the Federal-Aid Highway Program* and the threatened and endangered species guidance document titled *Nebraska Biological Evaluation Process for the Federal-Aid Transportation Program*.

Tribal consultation methodologies regarding threatened and endangered species will follow the process outlined in the [Programmatic Agreement Among the Federal Highway Administration, U.S. Fish and Wildlife Service, Nebraska Department of Roads, and Nebraska Game and Parks Commission for the Determination of Effects to State and Federally Listed Species from the Federal-Aid Highway Program](#) and the threatened and endangered species guidance document titled [Nebraska Biological Evaluation Process for the Federal-Aid Transportation Program](#).

For those projects not assigned to NDOT, NDOT would follow the process outlined in the [Programmatic Agreement Among the Federal Highway Administration, U.S. Fish and Wildlife Service, Nebraska Department of Roads, and Nebraska Game and Parks Commission for the Determination of](#)

[Effects to State and Federally Listed Species from the Federal-Aid Highway Program](#) and the threatened and endangered species guidance document titled [Nebraska Biological Evaluation Process for the Federal-Aid Transportation Program](#), Stipulation V.E. This process states that “for projects that occur on tribal and/or federal lands, NDOT will submit the [Biological Assessment] documentation, along with a cover letter to FHWA. The cover letter will include a brief description of the scope of work, the project location, a statement of whether or not species-specific surveys were completed, and the [e]ffect determinations. FHWA will send the documentation to the tribal and/or federal agency for a 30-day review. The signatory agencies will be copied on the submittal letter.”

## 10.2.5 NEPA – Categorical Exclusion Projects Assigned to NDOT

When the class of action is a categorical exclusion, tribal consultation under NEPA will be facilitated by the Cultural Resource Specialist. As shown previously in Figure 10-1 and as outlined below, the NDOT NEPA Specialist will use the following process:

1. Identify and confirm that the project location is, in whole or in part, within the boundaries of tribal land on the [Probable Class of NEPA Action Form \(NDOT-53\)](#) by Project Coordination Meeting 20.
2. Work with the Cultural Resource Specialist to determine if a meeting with the tribe to discuss the project is advisable and, if so, to determine the schedule.
3. Contact the Tribal Chair and/or designee by telephone to introduce the project and determine the following:
  - a. How best to direct future correspondence.
  - b. Special consultation conditions, should they exist.
  - c. A schedule for a meeting with the tribe, if advisable.
4. Notify the Tribal Chair and/or designee by letter/email, as follows:
  - a. Describe the project and include a project location map.

- b. Indicate that resource studies are planned and that the results of those resource studies will be reviewed under the appropriate federal regulations and would be shared with the tribe.
  - c. Indicate that the anticipated level of NEPA documentation is a categorical exclusion and that no significant environmental impacts are anticipated.
  - d. Indicate that the tribe may request government-to-government consultation with FHWA via telephone, email, or letter, and should identify the project(s) of interest in the request.
  - e. Request comments or concerns regarding the project from the tribe within 30 days of receipt of the letter.
5. During the 30-day comment period, contact the Tribal Chair or designee by telephone or through an in-person meeting to do the following:
  - a. Discuss the project.
  - b. Identify any tribal concerns.
  - c. Confirm future communication pathways and consultation needs.
6. Record any responses received and what action was taken in the NEPA documentation.
7. Share the approved categorical exclusion with the Tribal Chair and/or their designee for their records.

### 10.2.6 NEPA – Environmental Assessments, Environmental Impact Statements, and Projects Not Assigned to NDOT

When the class of action is determined to be an environmental assessment or an environmental impact statement, or the project is not assigned to NDOT and the undertaking occurs in whole or in part on tribal land, NDOT will notify FHWA Nebraska Division to develop a coordination schedule and a process for consultation.

## 10.3 Local Public Agency Projects

For Local Public Agency projects that receive federal transportation funds, the NDOT Environmental

Section will be responsible for tribal consultation, regardless of whether NDOT serves as the responsible charge for the project. Tribes may request government-to-government consultation with FHWA via formal written or oral communication, identifying one or more LPA projects in the request for government-to-government consultation. NDOT will provide supporting documentation to FHWA during government-to-government consultation.

Section will be responsible for tribal consultation, regardless of whether NDOT serves as the responsible charge for the project. Tribes may request government-to-government consultation with FHWA via formal written or oral communication, identifying one or more LPA projects in the request for government-to-government consultation. NDOT will provide supporting documentation to FHWA during government-to-government consultation.

## 10.4 Laws, Regulations, and Guidance

The various statutes, regulations, EOs, memorandums, orders, and plans that direct FHWA and NDOT to consult with tribes are identified in this section. Protected tribal resources may include archeological sites, landscapes, sacred sites, threatened and endangered species, migratory birds, water, geology, air, and plants of importance, whether they are located on or off tribal land.

Protected tribal resources may include archeological sites, landscapes, sacred sites, threatened and endangered species, migratory birds, water, geology, air, and plants of importance, whether they are located on or off tribal land.

### 10.4.1 National Historic Preservation Act of 1966

The NHPA ([54 USC 300101 et seq.](#)<sup>1</sup>) is the basis for the tribal consultation provisions in the Advisory Council on Historic Preservation's (ACHP) regulations. The NHPA establishes a program under which the federal government provides preservation leadership and encourages historic preservation. The NHPA provides for the expansion of the National Register of Historic Places and created the ACHP.

Section 106<sup>2</sup> of the NHPA and its implementing regulations ([36 CFR Part 800](#)) sets forth the process that federal agencies must follow when planning undertakings that have the potential to affect historic properties. "Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment on such undertakings" ([36 CFR 800.1\(a\)](#)). Undertakings are defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval" ([36 CFR 800.16\(y\)](#)). A historic property is "any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion in, the National Register of Historic Places" ([36 CFR 800.16\(l\)\(1\)](#)).

Two amended sections of the NHPA have direct bearing on tribal consultation and the Section 106 review process. Section 101(d)(6)(A) clarifies that historic properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register of Historic Places, and Section 101(d)(6)(B) requires federal agencies to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by a federal undertaking ([54 USC 302706](#)).

Section 304 of NHPA ([54 USC 307103](#)) provides protection from public disclosure of information about a historic property that might result in harm to the property, a significant invasion of privacy, or impediments to traditional religious practice at a site.

### 10.4.2 Endangered Species Act of 1973

The Endangered Species Act ([16 USC 1531–1544](#)) provides a means of conservation for designated threatened or endangered species and the habitats in which they are found. It requires all federal agencies to use their authorities to promote the purposes of the statute and ensure that any action authorized, funded, or carried out by that agency will not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat of such species. This Endangered Species Act provision also applies to tribes when they act through the tribes'

<sup>1</sup> Effective December 19, 2014, the NHPA was moved in the United States Code from Title 16 to Title 54.

<sup>2</sup> The ACHP intends to keep using the term Section 106 because that refers to the section in the original public law that enacted the NHPA, as opposed to its legal citation in the United States Code, and reference to Section 106 has been in constant use for more than 50 years.

federal liaison, the Bureau of Indian Affairs. While the Endangered Species Act does not specifically mention tribal consultation, the [1997 Joint Secretarial Order 3206](#) is a statement of policy to clarify the Endangered Species Act's role in Indian country and the tribes' relationship with the federal government in enforcing it.

### 10.4.3 Section 4(f) of the U.S. Department of Transportation Act of 1966

Section 4(f) of the U.S. Department of Transportation (U.S. DOT) Act of 1966 ([49 USC 101 et seq.](#)) and the federal regulations that implement Section 4(f), [23 CFR 774](#), apply to public or privately owned historic properties (including archeological sites) that are listed in, or determined eligible for listing in, the National Register of Historic Places, including any properties of traditional religious and cultural importance to an Indian tribe.

### 10.4.4 National Environmental Policy Act of 1969

The statutory language of NEPA ([42 USC 4321 et seq.](#)) does not mention consultation with Native American tribes. However, the Council on Environmental Quality regulations ([40 CFR 1500–1508](#)) and NEPA guidance require consultation with tribes to provide tribes the opportunity to participate at various stages in the preparation of NEPA documentation. The Council on Environmental Quality issued a memorandum to federal agencies titled [Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act \(July 1999\)](#), encouraging federal agencies to invite tribes to participate as cooperating agencies in the NEPA process.

### 10.4.5 Archaeological Resources Protection Act of 1979

The Archaeological Resources Protection Act of 1979 ([16 USC 470aa–mm](#)) protects archeological resources on federal and tribal lands by requiring notification of affected Native American tribes if archeological investigations would result in harm to, or destruction of, any location considered by tribes to have religious or cultural importance.

### 10.4.6 Native American Graves Protection and Repatriation Act of 1990

The discovery of unmarked human remains requires special care and respect for such discoveries. NAGPRA ([25 USC 3001 et seq.](#)) addresses the rights of lineal descendants and Indian tribes to human remains and certain cultural items with which tribes are affiliated. NAGPRA directs federal agencies and museums to identify, in consultation with Native Americans, the cultural affiliation of Native American human remains and associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony, in holdings or collections under their possession or control. Ultimately, the intent is to repatriate the human remains and other cultural items to the appropriate lineal descendants or tribe. NAGPRA regulations are codified at [43 CFR 10](#).

NAGPRA also statutorily establishes Native American right to ownership of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony that are excavated or discovered on federal or tribal lands after November 16, 1990.

NAGPRA applies to federal lands and collections. NAGPRA procedures will be followed for remains discovered on federal or tribal land, and the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989 (see Section 10.4.15) procedures are followed for remains found on all other property. The PQS shall be responsible for ensuring that any discovery of unmarked human remains is reported through appropriate channels to FHWA (if the project is not assigned) and to History Nebraska in accordance with NDOT [Standard Specifications for Highway Construction](#) and the [Section 106 PA](#), Stipulation XII. In Nebraska, History Nebraska is responsible for complying with all

applicable provisions of NAGPRA and the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989 ([Nebraska Revised Statute 12-1203](#)). If human remains or funerary objects need to be collected from federal or tribal land based on a directive from the federal land manager or the appropriate tribal authority, it will be done by History Nebraska or a professionally qualified consultant in coordination with the federal agency or tribal authority responsible for the property.

Because FHWA and NDOT do not control or possess any collections, the repatriation provisions of NAGPRA for collections obtained prior to 1990 are unlikely to apply. For ongoing or future projects, FHWA will reimburse costs associated with inventory, identification, and repatriation as an environmental mitigation expense.

#### 10.4.7 American Indian Religious Freedom Act of 1978

The American Indian Religious Freedom Act of 1978 (Public Law 95-341) and amendments of 1994 (Public Law 103-334) state that “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites” ([42 USC 1996](#)).

#### 10.4.8 Executive Order 12898, Environmental Justice

[EO 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations](#), signed on February 16, 1994, directs federal agencies to identify and address disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. Individuals who are members of American Indian population groups are considered to be minority populations under EO 12898.

#### 10.4.9 Executive Order 13007, Indian Sacred Sites

[EO 13007, Indian Sacred Sites](#), signed on May 24, 1996, orders federal agencies managing federal lands to implement procedures to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, to avoid adversely affecting the physical integrity of such sacred sites, and to ensure that reasonable notice is provided of any proposed action that may restrict future access or use or could adversely affect the sites.

#### 10.4.10 Executive Order 13175, Consultation and Coordination

[EO 13175, Consultation and Coordination with Indian Tribal Governments](#), signed on November 6, 2000, directs federal agencies to establish meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, strengthen the U.S. government-to-government relationships with Indian tribes, and reduce the imposition of unfunded mandates on Indian tribes. EO 13175 supersedes EO 13084 (1998) of the same title.

#### 10.4.11 Presidential Memorandum on Tribal Consultation

A [Presidential Memorandum on Tribal Consultation](#), issued November 5, 2009, tasked executive departments and agencies with creating detailed plans of actions that the executive departments and agencies will take to implement the policies and directives of [EO 13175, Consultation and Coordination with Indian Tribal Governments](#).

#### 10.4.12 U.S. Department of Transportation Order 5301.1

[U.S. DOT Order 5301.1](#), Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes, was signed on November 16, 1999. U.S. DOT Order 5301.1 calls on U.S. DOT agencies to build more effective working relationships with Native American tribal governments and to provide increased opportunities for Native Americans to participate in transportation programs. The stated purpose of U.S. DOT Order 5301.1 is “to ensure that programs, policies, and procedures administered by the Department of Transportation (DOT) are responsive to the needs and concerns of American Indians, Alaska Natives, and tribes.”

#### 10.4.13 U.S. Department of Transportation Tribal Consultation Plan

In response to the [Presidential Memorandum on Tribal Consultation](#) (2009), U.S. DOT established its [Tribal Consultation Plan](#). In the plan, U.S. DOT lists actions it will take to foster meaningful government-to-government relations, improve existing tribal programs, ensure meaningful tribal input into future tribal transportation programs, ensure U.S. DOT’s uniform and effective delivery of tribal programs throughout the country, assist in implementing tribal infrastructure projects, assist tribal members in developing transportation capacities, and assist efforts to coordinate national tribal infrastructure policy and programs within the federal government.

#### 10.4.14 Nebraska Archaeological Resources Preservation Act

The Nebraska Archaeological Resources Preservation Act ([Nebraska Revised Statutes 82-501 to 82-510](#)) applies to all proposed state or state-funded undertakings that have the potential to affect archeological resources or sites that are listed in, or eligible for listing in, the National Register of Historic Places. NDOT is exempt from provisions of this act as long as NDOT has a cooperative agreement with History Nebraska ensuring that all highway construction projects meet federal historic preservation legislation and regulations, and such federal preservation legislation and regulations fulfill or exceed the objectives and standards of the act.

#### 10.4.15 Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989

The Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act of 1989 ([Nebraska Revised Statute 12-1203](#)) protects skeletal remains and unmarked human burial sites in Nebraska. For projects in Nebraska, NDOT follows notification and other procedures pertaining to unplanned discoveries of skeletal remains, and the subsequent handling and disposition of the remains as stipulated by this legislation.