

# Memorandum

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Subject: **INFORMATION:** Consultation with Indian Tribal  
Governments on Federal-aid Projects

Date: October 24, 2001

*Original signed by:*

From: Cynthia J. Burbank, Program Manager  
Planning and Environment

In Reply Refer To:  
HEPH

To: Bill Jones  
Division Administrator  
Colorado Division

We have received your October 2, 2001, memorandum regarding consultation with Indian tribal governments. Colorado Department of Transportation's (CDOT) involvement and consultation with tribes is consistent with the FHWA Interim Guidance issued on November 9, 2000.

While the Interim Guidance states that the responsibility to initiate and carry out consultation cannot be delegated, it also states that FHWA may rely on the State DOTs to carry out day-to-day and project specific consultation, with the agreement of affected Indian tribes.

The provision in 36 CFR 800.2(c)(4) which allows FHWA to authorize CDOT to initiate consultation is one instance where FHWA would rely on the State DOT to carry out project specific consultation.

The FHWA cannot delegate its government-to-government responsibility and overall consultation and coordination responsibilities duties. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution, treaties, statutes, Executive Order and court decisions – a relationship that States do not have with tribal governments. However, the arrangement that you have entered is not a delegation of Federal responsibilities.

The division office as part of FHWA's government-to-government relationship, and consultation and coordination, should discuss the Federal-aid program, the division office role, and the State role with interested tribal governments to ensure tribe's needs are appropriately considered. This is particularly important in statewide planning as required under 23 USC 135(d) and (f).

We concur in this procedure that ensures tribes have opportunity to provide input on projects that affect them. Your memo indicates that the division office continues to provide program oversight and monitoring and would take the lead responsibility back should any tribal representative not accept the current arrangement. With these oversight mechanisms in place, we think this is an acceptable and appropriate arrangement.



U.S. Department  
Of Transportation  
Federal Highway  
Administration

Colorado Federal Aid Division  
555 Zang Street, Room 250  
Lakewood, CO 80228-1040

February 12, 2001

Mr. Thomas E. Norton  
Executive Director  
Colorado Department of Transportation  
4201 E. Arkansas Avenue  
Denver, CO 80222

File: 740.2

Ms. Georgianna Contiguglia  
State Historic Preservation Officer  
Colorado Historical Society  
1300 Broadway  
Denver, CO 80203

Dear Mr. Norton and Ms. Contiguglia:

Subject: Delegation of Native American Cultural Resources Consultation Responsibilities to the Colorado Department of Transportation

Under terms set forth in the revised Advisory Council on Historic Preservation regulations (36 CFR 800, Protection of Historic Properties), the Federal Highway Administration (FHWA), Colorado Division, is obligated to initiate government-to-government cultural resource consultations with Native American tribes on federally funded transportation projects. In an effort to streamline administration of the consultation process, FHWA has issued a blanket authorization to the Colorado Department of Transportation (CDOT) to undertake, on its behalf, all phases of the consultation process on FHWA-sponsored projects in Colorado. CDOT will henceforth coordinate consultation with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officers (THPOs) and Indian tribal governments, as appropriate.

By transferring project level consultation duties to CDOT, FHWA is in no way abrogating its responsibilities as outlined under Section 106 of the National Historic Preservation Act (as amended) and the revised Advisory Council regulations. According to 36 CFR 800.2(c)(4), "the agency official may authorize an applicant...to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official." FHWA will continue to function in an oversight capacity for Native American consultation and will maintain ultimate authority over all agreements, regulations and guidelines that may result from the consultation process. The approach to government-to-government coordination, however, will be greatly enhanced and facilitated by this arrangement.

CDOT has identified Staff Archaeologist Dan Jepson as the cultural resources consultation administrator for all federal-aid transportation projects undertaken by that agency. The FHWA Colorado Division Environment & Right-of-Way Programs Manager, Edrie Vinson, will provide program oversight. Any questions, comments, or concerns regarding this issue should be directed to Mr. Jepson at (303) 757-9631, or Ms. Vinson at (303) 969-6730, Ext. 378.

Sincerely yours,



William C. Jones  
Division Administrator

EVinson:jc

- c: Forty-Four Federally Recognized Native American Tribes
- Mr. George Gerstle, DTD, CDOT
- Ms. Rebecca Vickers, EP, CDOT
- Mr. Timothy Penny, HEPH-1
- Ms. MaryAnn Nabor, NEPH-10
- Reader File
- File 740.2

Evinson.44 Tribes

# MEMORANDUM

DEPARTMENT OF TRANSPORTATION

4201 East Arkansas Avenue  
Denver, Colorado 80222  
(303) 757-9011



**DATE:** February 14, 2001

**TO:** Cecelia Joy, Dick Annand, Tammie Smith, John Crier,  
Carl Watson, Brad Beckham

**FROM:** Becky Vickers, Environmental Programs Office

*Becky Vickers*

**SUBJECT:** Native American Cultural Resources Consultation

Recently FHWA was allowed to delegate to the state DOTs the responsibility for consultation with Native American tribes on cultural resource issues. The FHWA Colorado Division has taken advantage of this streamlining opportunity and formalized the process with CDOT. Dan Jepson will remain the CDOT lead in this effort. As you may recall, several years ago CDOT identified Dan as the primary point of contact for consultation with tribal governments. This simply formalizes the arrangement and makes his coordination with FHWA more streamlined. Please continue to coordinate through Dan as usual for any projects with tribal issues related to cultural resources.

This agreement, which is attached, should be placed in your notebook of Memorandums of Agreement and Understanding under tab 27. A revised Table of Contents for the MOU/MOA notebook is also enclosed.

## Attachments

cc: Ron Speral/Edrie Vinson  
Dean VanDeWege  
Dan Jepson  
Marie Venner  
Robin Geddy  
Andy Flurkey  
Kim Gambrell  
*George Gerstle*