Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions

January 2017

U.S. Department of the Interior
U.S. Department of the Army
U.S. Department of Justice

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I. Executive Summary

Over the past eight years, the Obama Administration has made historic progress to strengthen the government-to-government relationship between the United States (United States or U.S.) and Federally-recognized Indian Tribes (Tribes or Indian Tribes) and to better fulfill the United States' trust responsibility to Tribes. In addition to creation of the White House Council on Native American Affairs, restoring Tribal homelands, and settling historic disputes, this Administration has prioritized Tribal consultation as a method for considering how Federal policies and decision-making processes affect the interests of Tribes and their members. With regard to infrastructure projects, historically Federal agencies have not, as a matter of policy, sought out Tribal input or consistently worked to integrate Tribal concerns into the project approval processes; Tribal consultation is a way to rectify this by recognizing the government-to-government relationship and taking Tribal interests into account from the start.

Investment in our Nation's infrastructure has also been a priority of the Obama Administration. The lack of 21st century infrastructure is particularly apparent in Indian country. Whether it is running water, roads, housing, or broadband, Tribal communities are often the most in need. National proposals included calling for investments in a cleaner, more reliable transportation system that reduces our reliance on fossil fuels, cuts carbon pollution, and helps mitigate impacts of climate change; expanding collaboration across the public and private sectors; and calling for establishment of a National Infrastructure Bank.[1] Since 2011, the Administration has undertaken an ambitious effort to modernize the Federal Government's role in infrastructure permitting processes. Through a variety of actions, the Administration has sought to expedite the review and permitting of major infrastructure projects that will strengthen our Nation's economy, create jobs, and improve our competitiveness in the international market.

Recognizing these priorities are interlinked, on September 23, 2016, the Department of the Interior, Department of Justice, and the Department of the Army issued a joint letter to Tribal Leaders committing to a broad review and consultation with Tribes on how Federal decision-making on infrastructure and related projects can better allow for timely and meaningful Tribal input. This Report, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions,* is the product of this government-to-government consultation and comments received from fifty-nine Tribes (and eight organizations representing Tribal interests) in October and November 2016. It reflects the start of a continuing nation-to-nation consultation that is needed to ensure that infrastructure projects are sited in a manner that lives up to the United States' obligations to Tribes.

While each Tribe's comments were unique to their respective experiences, Tribes spoke with one voice as to the need for improvement in how and when Federal agencies engage Tribes prior to authorizing or otherwise initiating Federal infrastructure decisions. Specifically, Tribes stated that Federal agencies are inconsistent in the degree to which each agency is aware of, and implements, its responsibilities to engage with Tribes as sovereigns in accordance with the

[1] As proposed, the National Infrastructure Bank would leverage public and private funds to invest in infrastructure nationwide.

government-to-government framework, the Federal relationship, and Tribal reserved rights through treaties and other legal authorities. Even where such rights and responsibilities are explicit in law, regulation, or policy, Tribes asserted that Federal agencies often fail to fully implement them.

Along these lines, Tribes further remarked that even the best-written agency Tribal consultation policies are often poorly implemented. Tribes noted that often agencies neither treat Tribes as sovereigns nor afford Tribes the respect they would any other governmental entity—let alone treat Tribes as those to whom the United States maintains a trust responsibility or as those who hold reserved rights through treaties that granted the United States vast amounts of territory. Tribes emphasized that the spirit with which consultation is conducted is essential, Tribes need to be consulted sooner, Federal staff need better training prior to working with Tribes, and that consultation should be more consistent across agencies.

In addition to these more general comments, Tribes also identified obstacles to their meaningful participation in Federal decision-making under specific statutes, and suggested changes in the language and/or implementation of these statutes. However, in doing so, Tribes also noted that they are not universally opposed to infrastructure investments. To the contrary, roads, broadband, transmission and energy resources are important to Tribal economies and economic development. Tribes emphatically said that they want to be part of the process from the start, rather than being included only after relevant determinations have already been made or projects have already commenced. Tribes also objected to having to use the legal system as a way of making their voices heard. They noted that when infrastructure investments affect Tribal interests, these investments should also benefit Tribes so that Tribes have better access to broadband, better transportation, and cleaner, safer energy options, just like the rest of our Nation.

Based on Tribes' input, this Report articulates a set of principles that should inform agency practices in the realm of infrastructure. Among other things, this includes appropriate staffing, training, and resource allocations, as well as guidance as to how Tribal interests should be incorporated into agency decision-making processes in both formal and informal ways. These recommendations should help agencies fulfill their dual responsibilities of complying with applicable treaty and trust responsibilities and ensuring a smooth runway for infrastructure investments.

This Report does not set forth a detailed discussion of each individual agency's consultation policies and practices or make comprehensive recommendations for policy, management, or legislative action. Additional Tribal consultations must be held to fully shape such comprehensive recommendations. However, included in this Report are a handful of specific recommendations for agencies and agency actions underway. In addition, this Report recommends that each agency undertake a detailed analysis of its own Tribal consultation policies and practices, as well as relevant statutory authorities, in order to ensure that each agency's decision-making processes honor the government-to-government relationship with Tribes and continue to fulfill the Federal trust responsibility to Tribes.

In analyzing their Tribal consultation policies and practices, agencies should examine whether the policies and practices are consistent with the recommendations of this Report. Agencies should provide a written account of their findings to the White House Council on Native American Affairs (WHCNAA)[2] and also make these findings available online no later than April 1, 2017. The WHCNAA and Federal agencies that have a role in improving the Federal infrastructure permitting processes may then review agency submissions and discuss Tribal consultation as a topic at its 2017 first quarter meeting. These agency submissions will also provide stakeholders and Congressional leaders with a sense of what statutory, regulatory, and funding barriers hinder agencies from improving Federal decision-making on infrastructure and related projects, identify next steps in improving and fully implementing robust Tribal consultation policies and practices, and inform efforts to advance infrastructure investments and agency Tribal consultation practices moving forward.

II. Purpose of Report

While the Federal Government has made great strides towards making Tribal consultation a standard part of the Federal review and decision-making process, Tribes have expressed frustration with inconsistent authorities, implementation, policies, and practices across the Federal Government and across the country with regard to consultation. In the September 23, 2016 letter to Tribal Leaders, the Departments of Interior, Justice, and the Army committed to a broad review and consultation with Tribes on how Federal decision-making on infrastructure and related projects can better allow for timely and meaningful input from Tribes (Appendix 1). A subsequent Framing Paper discussed in greater detail the type of information the Departments sought from Tribes during the consultations (Appendix 2). Specifically, Federal agencies sought feedback concerning best practices for Tribal consultation and asked for Tribal input on questions in two broad categories:

1) *Promoting Meaningful Government-to-Government Engagement within the Existing Framework.* How can Federal agencies better ensure meaningful Tribal input into infrastructure-related reviews and decisions to protect Tribal lands, resources, and treaty rights within the existing framework?

2) *Identifying Any Necessary Change to the Existing Framework.* Where and when does the current framework present barriers to meaningful consultation? What changes to the current framework would promote these goals?

In October and November 2016, Federal agencies convened a series of seven government-to-government consultation sessions and one listening session with Tribal leaders in locations around the country (Appendix 3). Concurrently, a written comment period provided an avenue for Tribes to submit written comments in addition to or in place of participating in the in-person sessions. In sum, eighty-seven written comment submissions were received and fifty-nine Tribes and eight organizations representing Tribal interests provided input on the questions

[2] The WHCNAA is tasked with improving coordination of Federal programs affecting Tribes and the use of resources available to Tribal communities.

posed. 175 Federal staff representing sixteen Federal agencies participated in one or more of the sessions.

This Report serves several functions. First, it provides information about the existing Federal statutory, regulatory, and policy framework governing both Tribal consultation and Federal decision-making on infrastructure and related projects. Second, it serves as a record of Tribal input on this topic, summarizing both written and oral comments received during the consultations, listening session, and written comment period. Third, in order to improve both consultation and infrastructure permitting processes, this Report recommends that agencies undertake a thorough review of their consultation policies and practices, and that consultation policies be provided to the WHCNAA and made publicly available (if they are not already). The Report provides an initial Federal response to Tribal comments and recommendations along with a set of principles that should inform Tribal consultation. Finally, the Report highlights best practices gleaned from what Tribes identified as successful Tribal consultations and makes recommendations for further research, administrative, regulatory, or legislative action.

III. Overview of Key Concepts and Legal Framework

Recognizing the complexity of the historical, legal, and policy framework that informs both Tribal affairs and infrastructure issues, this section of the Report serves as a primer on key concepts and statutes relevant to both Federal Indian law and environmental and related issues governing Federal infrastructure review and permitting. This is not a comprehensive summary of all issues, but rather a starting point to ensure all readers have a foundation in some of the key legal principles in these fields.

A. Key Concepts in Federal Indian Law and Policy

Treaty Rights and Trust Responsibilities

From this Nation's founding until Congress's 1871 decision to end treaty making with Indian Tribes, the United States entered into many treaties with Tribes under the authority granted by the Treaty Clause and Indian Commerce Clause[3] in the United States Constitution. Treaties are agreements between two sovereign nations and are, along with the Constitution and Federal laws, the supreme law of the United States. These treaties not only recognize Tribal sovereign authority, but also reserve all rights not expressly granted to the United States and often include express reservations of certain rights, such as hunting and fishing, and the guarantee of goods and services such as food, education, and healthcare. Treaties were also a means by which Tribes granted to the Federal Government vast tracts of Indian land, which was used for homesteading and rights-of-way, while reserving lands for Tribes.

[3] Article I, Section 8, Clause 3 of the Constitution grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This latter clause is referred to as the "Indian Commerce Clause" and has been interpreted by courts as granting Congress plenary authority over Indian affairs.

The Constitution provides the legal basis for the nation-to-nation relationship between the United States and all Tribes. One of the basic principles of Indian law is that the United States has a special trust relationship with all Indian Tribes. Congress has defined the trust relationship in statutes, and in some cases, has imposed fiduciary obligations on Executive branch agencies. Congress has repeatedly reaffirmed the trust relationship. *See, e.g., Indian Trust Asset Reform Act*, Sec. 101-102. Pub. L. 114-178 (June 22, 2016). This trust relationship serves as an underlying basis for Tribal consultation practices discussed throughout this Report.

Tribal Consultation

Tribal consultation is a process that aims to create effective collaboration with Tribes and inform Federal decision-makers.[4] Consultation is built upon a government-to-government exchange of information defined, in part, by meaningful dialogue based upon trust, respect, and shared responsibility.[5] In addition, this kind of consultation has a defined, agreed-upon purpose, subject, and objective. By proactively involving Tribes in the Federal decision-making process whenever Tribal interests are affected, Federal agencies will often improve the quality of their decision-making, improve outcomes for affected communities, protect Tribal interests, and reduce litigation risk.

President Obama reaffirmed the Federal commitment to Tribal consultation in his November 9, 2009 Presidential Memorandum on Tribal Consultation (Presidential Memorandum),[6] which directed agencies to fully implement the policies and directives of Executive Order 13175 (E.O. 13175),[7] Consultation and Coordination with Indian Tribal Governments, issued by President William J. Clinton on November 6, 2000. E.O. 13175 establishes policymaking criteria that promote respect for Tribal self-government and directs agencies to have an accountable process to ensure meaningful and timely input by Tribal officials in the development of regulations and policies that have Tribal implications.

For instance, E.O. 13175 and the Presidential Memorandum direct agencies to engage in Tribal consultation regarding policy decisions "that have substantial direct effects on one or more Indian [T]ribes, on the relationship between the Federal Government and Indian [T]ribes, or on the distribution of power and responsibilities between the Federal Government and Indian [T]ribes." Some agencies have issued consultation policies that require consultation regarding agency actions and decisions not specifically addressed in E.O. 13175, such as by requiring consultation for other types of agency actions, or when the effects on Tribes are more indirect or speculative. Thus, the specific circumstances under which a given agency will initiate Tribal consultation accordingly may vary on an agency-by-agency or statute-by-statute basis. However, throughout the course of the Obama Administration, at least eight Federal agencies have

[4] Secretarial Order 3317 §4(b), U.S. Department of the Interior, December 1, 2011.
[5] *Id.*
[6] https://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president
[7] https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments

renewed, updated, or created Tribal consultation policies in accordance with the Presidential Memorandum and E.O. 13175 (Appendix 4).

B. Current Legal Framework for Federal Infrastructure Decisions

In addition to the authorities generally governing Federal relations with Indian Tribes discussed above, there are a variety of statutes, regulations, and executive orders that govern Federal involvement in infrastructure, extractive, and other projects that may affect Tribal lands or resources. Many types of infrastructure projects require Federal funding, permits, or other authorization. For example, infrastructure projects may trigger requirements under the Clean Water Act, the Endangered Species Act, the Natural Gas Act, or other Federal statutes. Projects that are located on or cross Federal or Indian (trust or restricted) land generally require approval from the relevant land management agency, such as the U.S. Forest Service, the Bureau of Land Management, or the Bureau of Indian Affairs.

Statutes, regulations, and judicial decisions constrain the scope of an agency's review or permitting authority, including what factors and evidence the agency may consider in its review. The applicability of any particular legal authority depends on factors such as the type of the project, where it is located, its source of funding, and/or particular site-specific issues. Agencies also undertake more comprehensive planning processes that can affect infrastructure permitting processes and decisions, such as the Bureau of Land Management's Resource Management Plans or the U.S. Forest Service's Planning Rule. Conversely, some infrastructure projects, such as a privately funded project on private or state land, may not require any Federal permits or reviews. Other projects may have only limited Federal involvement focused on a specific element of the project, such as the discharge of dredged or fill material into waters of the United States, including wetlands.

When a project does require a Federal permit or authorization, the Federal agency involved may have a duty to consult with Tribal governments, depending on requirements under applicable statutes. Generally, a Federal agency will only consult with Tribes regarding the portion of an infrastructure project over which that agency has jurisdiction. For some projects, multiple Federal agencies have jurisdiction over a project, but typically each agency conducts its own consultation process. The legal framework also influences the timing of Federal review. If there is limited Federal involvement with a project, the Federal agency may not learn of a project until late in the planning and development process. All of these limitations present challenges for integrating Tribal input into project outcomes.

The following discussion provides an overview of some of the most common statutes that apply during a major infrastructure project. These topics were selected for inclusion based on the issues Tribes raised in the listening session, consultations, and written comments.

The National Environmental Policy Act and Environmental Reviews

The National Environmental Policy Act (NEPA) requires Federal agencies to incorporate environmental considerations into their decision-making processes. NEPA requires that prior to funding, authorizing, or implementing a given project or course of action, Federal agencies must

assess the action's direct, indirect, and cumulative impacts on the environment. Implementing regulations direct Federal agencies to encourage and facilitate public involvement to the fullest extent possible in decisions that affect the quality of the environment. Tribes may be involved in a NEPA review through the general public participation process or, more formally, as a cooperating agency. NEPA also requires agencies to evaluate a range of reasonable alternatives when deciding whether to approve a project. Depending on the type of Federal action and its likely impacts, agencies comply with NEPA by: 1) demonstrating the reason the project fits within a categorical exclusion from review; or 2) completing either an environmental assessment or an environmental impact statement.

The National Historic Preservation Act and Historic Preservation Reviews

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to consider the effects of proposed Federal projects or actions on historic properties, prior to the expenditure of funds or issuance or approvals for permits or licenses, and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. Section 106 seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the Federal agency official and consulting parties in the early stages of project planning. The goal is to identify historic properties potentially affected by the proposed Federal projects or actions, assess potential effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. Consulting parties must include State Historic Preservation Officers and Tribal Historic Preservation Officers, Indian Tribes, Native Hawaiian Organizations, local governments, and applicants, as appropriate. Specifically, Federal agencies are required to consult with any Indian Tribe that attaches religious and cultural significance to historic properties that may be affected by proposed Federal projects or actions. The agency is required to involve the public at certain points within the review process and may include consulting parties and individuals and organizations with a demonstrated interest in the project or action as additional consulting parties.

The ACHP has issued government-wide regulations as well as specific guidance regarding tribal consultation.[8] The U.S. Army Corps of Engineers (Corps) promulgated its own regulation for the protection of historic properties under NHPA, commonly known as Appendix C.[9] The Corps published Appendix C in 1980, before the ACHP promulgated its revised regulations implementing the 1992 amendments to the NHPA which include, among other things, the need to consult with Tribes when historic properties of religious or cultural importance could be affected. In order to ensure consistency with the NHPA amendments and ACHP regulations, the Corps issued an agency-wide Tribal consultation policy in 2012 and several Interim Guidance documents specific to the Corps' regulatory program that outline requirements for consulting with Tribes on Section 106 matters. These guidance documents include references to ACHP's regulations for various aspects of the consultation process. In addition, the Corps issued an agency-wide Tribal consultation policy in 2012 and a regulatory-specific Tribal consultation memorandum in 2016.

[8] 36 C.F.R. part 800
[9] 33 C.F.R. part 325

Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (NAGPRA) was passed into law in 1990. Along with its implementing regulations, NAGPRA protects Indian Tribes', Native Alaskan entities', and Native Hawaiian organizations' rights to custody of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony with which they have a relationship of cultural affiliation that are discovered on Tribal or Federal lands. NAGPRA would apply in the event that an infrastructure project being built on Federal or Tribal land encountered human remains or other cultural items that are identified as Native American.

Clean Water Act

The Clean Water Act (CWA) and its implementing regulations establish the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. One CWA provision that comes into play as part of Federal review of infrastructure projects is Section 404.

Section 404 regulates the discharge of dredged or fill material into the waters of the United States, including wetlands. It requires a Corps permit prior to entities making such a discharge unless the activity is exempted from Section 404 regulation (e.g., certain farming and forestry activities). This includes discharges of dredged or fill material into waters that may be associated with a variety of project types, including infrastructure such as energy generation and transmission, roads, rail, dams, airports, ports, or navigation. In general, no discharge of dredged or fill material may be permitted if (1) a practicable alternative exists that is less damaging to the aquatic environment or (2) the Nation's waters would be significantly degraded. EPA and the Corps have issued regulations and guidelines interpreting various aspects of the CWA.

General Mining Act of 1872 and Federal Land Policy Management Act

The General Mining Act of 1872 (Mining Act) authorizes and regulates the mining of mineral deposits on most Federal public lands.[10] The Mining Act opened "all valuable mineral deposits," such as gold, silver, copper, and uranium, in unreserved lands belonging to the United States to exploration and purchase. The 1976 Federal Land Policy and Management Act (FLPMA) and various agency regulations protect the surface resources of Federal lands during exploration and mining activities, and generally prohibit unnecessary or undue degradation of public lands. The Mining Act itself contains no environmental protection measures, but mining activities on Federal lands are subject to NEPA and other Federal, state, and local regulations for air and water quality and solid waste management.

[10] Some lands are withdrawn from mineral entry and claims, including Indian reservations, National Parks, National Monuments, and most reclamation projects and wildlife protection areas.

The Natural Gas Act and Energy Policy Act of 2005

The Federal Energy Regulatory Commission (FERC) reviews and permits natural gas pipelines pursuant to the Natural Gas Act and the Energy Policy Act of 2005. This permitting process generally involves three stages—pre-filing, application, and post-authorization. The pre-filing process provides opportunities for stakeholders, including Tribes, to get involved early and provide relevant views and information, promoting coordination and a shorter overall timeframe. In deciding whether to grant or deny an application, FERC considers multiple factors, including a project's potential impacts on pipeline competition, the possibility of overbuilding, potential environmental impacts, and other considerations.

Laws Applicable to Interstate Oil Pipelines

Interstate oil pipelines are reviewed and permitted primarily at the state level. The construction of an oil pipeline requires Federal authorization only if it crosses Federal land or Federally-regulated waters. If a pipeline crosses Federal land, the Federal agency responsible for managing that land (e.g., BLM) is responsible for issuing a right-of-way permit or easement. A pipeline that requires construction in Federally-regulated waters will also require permits or other approvals from the Corps.

Once a pipeline is constructed, FERC is the Federal agency responsible for regulating rates and conditions of service. FERC regulates rates and the terms and conditions of service offered by oil pipelines engaged in interstate commerce. The Pipeline and Hazardous Materials Safety Administration (PHMSA) is responsible for monitoring oil pipeline safety.

C. Federal Efforts to Improve Infrastructure Permitting

Since 2011, the Administration has undertaken an ambitious effort to modernize the Federal Government's role in the environmental review and permitting process. Through a variety of actions, the Administration has sought to expedite the review and permitting of major infrastructure projects that will strengthen our Nation's economy, create jobs, and improve U.S. competitiveness. At the same time, these review processes must improve environmental and community outcomes. Two examples of these efforts are detailed below: (1) the Fixing America's Surface Transportation (FAST) Act and the Federal Permitting Improvement Steering Council (FPISC); and (2) infrastructure permitting processes for development on Tribal lands.

FAST Act & the Federal Infrastructure Permitting Improvement Steering Council

The FAST Act was enacted on December 4, 2015. Title 41 of the FAST Act (FAST-41) created a new governance structure, set of procedures, and funding authorities designed to improve the timeliness, predictability, and transparency of the Federal environmental review and authorization process for certain infrastructure projects. FAST-41 created the FPISC, which is composed of thirteen agency Deputy Secretary-level members and chaired by an Executive Director appointed by the President.

FAST-41 applies to two different categories of infrastructure projects: 1) projects that are subject to NEPA, likely to require a total investment of more than $200 million, and not already subject to abbreviated review procedures; and 2) projects subject to NEPA that, in the opinion of FPISC, are likely to benefit from enhanced Federal oversight and coordination. Subject to limited exceptions, infrastructure projects that fall into either of these two categories are required to develop multi-agency coordinated project plans that set out timetables for applicable environmental reviews and authorizations, and must include schedules for public and Tribal outreach and coordination. FAST-41 covered projects are not expedited; under FAST-41, agencies are expected to follow the schedules they agree to in the coordinated project plans for covered projects.

Improving Processes for Permitting and Infrastructure Development on Tribal Lands

There have also been recent efforts to improve Federal review processes for a variety of infrastructure and related activities on Tribal lands. For example, the Department of the Interior issued new regulations in 2012 that clarify the procedures for obtaining Bureau of Indian Affairs (BIA) approval of residential, business, and wind and solar lease documents, and establish deadlines for BIA to issue decisions on complete lease applications. Importantly, these regulations provide greater deference to Tribes for Tribal land leasing decisions. The Department of the Interior similarly revised its regulations for granting rights-of-way across Indian land in 2015. Another example is efforts led by the Department of Housing and Urban Development (HUD) to simplify Tribal housing development and its related infrastructure needs. After a series of Tribal information sessions, listening sessions, and formal consultation, as well as coordination among Federal agencies, a report was provided to Congress containing recommendations that HUD and its interagency partners are in the process of implementing as of the time of this Report's publication.[11]

IV. Nationwide Consultations – What Was Said

Tribal input received during this Tribal consultation has described some systemic issues with the way Federal agencies solicit and account for Tribes' input into infrastructure decisions. Additionally, some Tribes voiced concern on the effectiveness of the current framework itself. This section provides an overview of Tribes' comments and recommendations. For more detail, please see the summary of Tribal comments and recommendations at Appendix 5. [12]

A. Summary of Tribal Comments

Tribal Perspectives on Consultation

Overall, Tribes provided their views that meaningful government-to-government consultation occurs when Federal agencies and Tribes, as sovereigns, have an open dialogue to

[11] http://portal.hud.gov/hudportal/documents/huddoc?id=CoorEnvirReview.pdf
[12] Note: The views expressed in Section IV are summaries of comments received during this Tribal consultation process. These views do not necessarily represent the view of the Federal Government.

share information early on in the process and sincerely work in partnership toward consensus on a path forward. Tribes expressed their experiences with Federal agencies treating government-to-government consultation as a "box-checking" procedural exercise, rather than an opportunity to substantively address Tribal concerns and obtain Tribal consent. Tribes repeatedly cited to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as authority for requiring Tribes' free, prior, and informed consent for any infrastructure-related project that may affect Tribes or treaty rights. Also, a few Tribes provided positive examples of when government-to-government consultation relating to infrastructure projects has worked well. See Appendix 6 for more details on these positive models for Tribal engagement.

Tribal Perspectives on Federal Infrastructure Projects

In the listening session, consultation sessions, and written comments, Tribes acknowledged the importance of infrastructure to Tribal economies and economic development. Conversely, many Tribes shared turning points in their histories where a specific Federally-approved infrastructure project, on which the Tribe was not adequately consulted, had devastating effects on the Tribe's community, resources, ability to engage in ceremonial and cultural practices, and their members' survival. For example, Tribes cited the construction of dams that flooded their homes; the installation of infrastructure that destroyed resources on which the Tribe depended for hunting, fishing, and gathering; and the authorization of mining activities that degraded tribal waterways. Tribes noted that these threats continue with each new infrastructure project because of a lack of adequate Tribal participation in the Federal decision-making process.

Tribes reported feeling powerless to influence the direction of infrastructure projects in the beginning stages, or to prevent the ultimate damage or destruction of their resources, cultural items, and sacred sites and landscapes that are part of their identity, culture and spirituality, and survival. Tribes also noted that once the damage or destruction has occurred, project proponents that caused the damage or destruction and the Federal agencies that approved the projects appear to bear no consequences. Tribes indicated that their insight and expertise are often overlooked despite the fact that they have a vast amount of cultural, historical, and geographical knowledge about their ancestral territory and practices. Tribes suggested that if properly utilized by the Federal government, this knowledge could help ensure that infrastructure projects are completed in a timely manner that avoids negative impacts on Tribal resources and treaty rights and reduces the risk of subsequent disagreement or litigation.

Tribes noted that the agencies' NHPA and NEPA processes provide opportunities for Tribal input, but that agencies' approaches to obtaining input are inconsistent, and that Tribes should be given a greater voice in these processes because they are uniquely situated to identify potential impacts to Tribal interests. Tribes also emphasized the need for Tribal input into projects under the FAST Act, including input on whether projects should be eligible for "fast tracking" and ensuring ongoing Tribal input through representation on the FPISC.

Timing

Tribes stated the need to initiate consultation at the earliest possible point is of paramount importance so Federal agencies can take proper steps to mitigate impacts on Tribal interests *before a decision is made*. Tribes argued that timing is key to ensure their concerns are taken into account and addressed, thus minimizing potential delays due to disputes or litigation. Tribes suggested Federal agency leaders and staff should initiate government-to-government consultation as soon as the Federal agency is approached with a potential project affecting Tribal interests.

Scope

Tribes expressed frustration that Federal agencies' review of any particular project under NEPA and NHPA is often narrow. For example, Tribes noted a Federal agency may have jurisdiction over only a specific aspect of the project, and therefore focus its NEPA review on that specific aspect without looking at the consequences that flow from the approval of that aspect or examining the cumulative effects. Tribes also expressed concern with relying on nationwide permits and programmatic environmental assessments and environmental impact statements, which do not allow for the individualized examination of impacts to Tribal resources.

Tribal-Federal Relationship

Tribes frequently commented that Federal agency leaders and staff often treat Tribes merely as stakeholders. Tribes repeatedly emphasized that they should be regarded as sovereign governmental entities who are trust beneficiaries and holders of treaty rights.

Education & Training

Tribes stated that many Federal leaders and staff dealing with infrastructure matters lack an understanding of the trust and treaty responsibilities, how to work with Tribes effectively, Tribal histories and cultures, and Federal agency policies—all of which, in turn, affect their daily execution of agency missions. Accordingly, Tribes emphasized the need to educate Federal agency leaders and staff dealing with infrastructure matters on basic principles of the Federal Government's responsibilities to Tribes and the history of the United States' relationship with Tribes. Tribes noted that this information would assist Federal agency leaders and staff in identifying whether a given action may implicate Tribal interests, and therefore should be subject to government-to-government consultation. Likewise, such information would provide a starting point for the Federal agency leaders and staff to better understand Tribal input. In turn, Federal agencies could be better positioned to understand whether projects requiring Federal approvals may be impacting Tribes' ancestral lands that may hold human remains, cultural items, and sacred sites, or ceded lands in which Tribes have hunting, fishing, gathering, or other rights.

Resources and Tribal Capacity

During the course of the consultations, Tribes regularly cited capacity constraints as a factor in their ability to process and respond to infrastructure-related requirements and requests. Tribes asked agencies and Congress to provide funding for Tribes to increase their own capacity

to engage in Tribal Consultation and to remunerate Tribes for costs associated with consultations, such as: providing ready access to technical expertise, attending consultations, conducting studies, and producing reports. These Tribes noted that it is important that a Tribe's technical experts participate in consultations (in addition Tribal leaders and non-Tribal experts who may be involved in any given project) because they are knowledgeable about the cultural and historical considerations important to the Tribe.

B. Tribal Recommendations

Tribes offered many recommendations for improving the consultation process. Suggestions ranged from legislative changes to various administrative actions, including, but not limited to, new or revised executive orders, new Office of Management and Budget guidance, the provision of financial assistance to Tribes, and training to Federal leaders and staff. The following subsections highlight some of the most commonly heard suggested changes to the existing legal framework for Federal infrastructure permitting.

1. The Corps should revise or repeal its Appendix C and discontinue the use of Nationwide Permits for the authorization of impacts to waters associated with pipelines and other large infrastructure projects.
2. If not discontinued, the Nationwide Permitting process should be amended to include adequate time for Tribal consultation and the assessment of Tribal impacts.
3. Particularly when authorizing impacts to waters associated with major infrastructure projects via Nationwide Permits, Federal agencies should be required to consider whether additional steps or analysis are needed to evaluate and address Tribal impacts. This consideration could include independent evaluation of impacted Tribes and/or the need for additional agency reviews under NEPA or NHPA with the Tribes as cooperating agencies to identify and resolve issues of concern.
4. FPISC should better incorporate Federal agencies' obligations and responsibilities to Tribes, and consider whether qualifications for fast-track projects should exclude projects impacting Tribal interests. FPISC should work with OMB on a policy requiring all agencies to comply with trust obligations, treaties, and consultation requirements prior to the approval of an infrastructure project affecting Tribal interests. This policy should also require demonstration that agencies obtained Tribes' free, prior, and informed consent for the project, and the establishment of a Tribal Trust Compliance Officer.
5. Federal agencies should proactively consult and coordinate early with Tribes when considering the planning of Federal projects and require free, prior, and informed consent of the Tribe (as stated in the UNDRIP) before proceeding with any project. Federal agencies should facilitate open information sharing for projects under NEPA or NHPA review.
6. Federal agencies should consider broadening the cumulative impacts analysis conducted under NEPA to capture off-reservation impacts in areas where Tribes may have sacred sites or treaty rights.

7. Avoidance and protection should be the ultimate goal for Federal agencies, not mitigation. In the alternative, Federal agencies should consult with Tribes to identify culturally appropriate mitigation measures that fully consider the potential risks or impacts to Tribal rights and resources.

Tribes also suggested several legislative actions. These included:

1. Amend NHPA to:
    a. Increase ACHP's authority to enforce its decisions and issue penalties for Federal agencies that fail to comply with NHPA;
    b. Restrict Federal agencies' ability to permit a project if ACHP or other agencies call for additional NHPA-based reviews or consultations;
    c. Include additional cultural resources recognized by Tribes, such as floral, faunal, geological, and water locations Tribes deem significant or sacred;
    d. Include language requiring mitigation of adverse effects and avoiding sacred sites for certification by Tribes to gain project approval;
    e. Include minimum standards for information dissemination to Tribes and protection of confidential Tribal information;
    f. Provide ACHP with a specific role in resolving disputes on areas of potential effect, potential adverse effects on eligible sites, measures required to avoid or mitigate adverse effects, and similar matters;
    g. Allow signatory authority for Tribes on programmatic agreements or memoranda of understanding entered pursuant to Section 106 for off-reservation actions.
2. Amend NEPA to:
    a. Explicitly require carbon impact studies and cumulative impact studies whenever an environmental assessment (EA) or environmental impact statement (EIS) is required; and
    b. Clarify the need to conduct an EIS for crude oil pipeline construction and operation.
3. Amend or repeal the Mining Act to prohibit mining conducted on Federal lands, or require additional Federal control over mining conducted on Federal lands.
4. Amend the Clean Water Act to close loopholes that allow for pollution of treaty-protected waterways through expansive definitions of the terms "waste treatment system" and "fill material."
5. Add a requirement for "mandatory avoidance" of impacts on Tribal resources to every Federal statute that relates to infrastructure project permitting.
6. Enact new legislation to:
    a. Focus specifically on protecting Tribal resources (rather than relying on NHPA);
    b. Provide penalties or other consequences for any Federal agency that fails to engage in government-to-government consultation with a Tribe;
    c. Provide penalties or other consequences for private entities that damage or desecrate Tribal sacred sites;
    d. Strengthen Federal oversight of hydraulic fracturing activities.

We encourage Members of Congress and their staffs to reach out to Tribes in their states for more information on needed statutory changes to address the concerns raised by Tribes during this consultation process.

V. Key Principles and Recommendations

It is clear that Federal agencies can improve how they account for Tribal input in Federal infrastructure-related decisions. The Administration recognizes the need to better account for Tribal input in Federal decision-making on infrastructure projects. This goal is particularly relevant in the infrastructure context: in some circumstances, commencing infrastructure projects prior to adequate consultation may damage Tribal property, degrade Tribal territory, impact Tribal sacred sites, infringe upon Tribal treaty or other rights before the Federal Government fully understands the nature of the Tribal interests at issue, and/or result in project delays, disputes or litigation, and irreparable loss of American historical, cultural, and natural resources.

As such, this Report serves as a first step toward identifying and recommending actions and best practices that Federal agencies can implement to address concerns Tribes expressed through this consultation to improve the nation-to-nation relationship.

A. Key Principles for Consultation and Related Recommendations

A necessary underpinning of the Federal-Tribal relationship is effective communication with Tribes when Federal policies or actions may affect Tribal interests. Federal agencies can minimize subsequent disputes or litigation by broadly interpreting consultation triggers and, when in doubt, inquiring with the Tribe about its interests in a given project. Open, two-way communication respecting Tribal rights, seeking out common ground, and moving forward with consensus solutions is an essential part of the Federal-Tribal relationship. This Report articulates overarching principles that encourage effective communication with Tribes and meaningful consultation practices (Key Principles).

The Key Principles reflect Tribal feedback and should serve as a guidepost for Federal agencies to follow whenever their decisions may impact Tribes and their interests. Proactive, pre-construction consultation during infrastructure projects increases efficiency by mitigating the risk that infrastructure projects run into unforeseen problems, delays, or legal challenges down the road.

1. **Act consistently with the government-to-government and trust relationship and treaty rights, and understand the historical context for Tribal interests**. Actions by Federal agency leaders and staff should be consistent with Tribal sovereignty and the nation-to-nation and trust relationship between the Federal government and Tribes. Agencies, at both the leadership and staff level, play an important role in upholding that relationship. Regional and local offices of Federal agencies should understand Tribal interests and assess when a Federal action may impact a Tribe in their region, or a Tribe that has historical ties to their region. Those offices should develop expertise on the trust

relationship, the treaty rights of Tribes in their region, and the historical context for Tribes' interests in lands outside their present reservations.

2. **Establish staff-level and leadership-level relationships with Tribes. Relationships between Federal and Tribal officials can provide a foundation for effective communication and a meaningful understanding of a Tribe's concerns.** Federal-Tribal relationships should be established at all levels—between leadership of agencies and Tribes, and also between staff at the local level of each government. These ongoing relationships will help to ensure that both the Tribe and Federal officials have the appropriate contacts for both staff-level discussions and formal consultation when specific projects are proposed. These relationships also offer the opportunity to assess the effectiveness of past consultations and potential changes for future consultations. These relationships provide Federal agencies the opportunity to work with the Tribe in considering development of a dispute resolution process before there is a breakdown in communication.

3. **Initiate consultation at the earliest point possible, and provide sufficient information in the invitation. Federal agencies should reach out to Tribes and initiate consultation as soon as they are contemplating a Federal policy or action that may impact Tribal interests.** Federal staff should already have an understanding of the Tribal interests, including the historical context, so that they can easily reach out to potentially affected Tribe(s) at the earliest possible moment. An invitation to consult is most effective when it provides Tribes with the information the Tribe needs to determine whether and to what degree its interests may be impacted. Tribes are busy governments that manage many incoming requests, so Federal agencies should provide information as clearly and succinctly as possible, and with as much advance notice as is feasible, to help facilitate Tribes' review.

4. **Make good-faith efforts to obtain a response from the Tribe and be cognizant of the limits of Tribal resources.** A Federal agency sometimes interprets a lack of response from a Tribe as a lack of interest in a project. However, this may instead reflect a failure to contact the appropriate person in the Tribe, that the Tribe has been deluged with similar inquiries from Federal agencies, or that the Tribal official in question is traveling, on sick leave, or otherwise out of the office, or any number of other reasons. Thus, Federal agencies should make several good-faith efforts with the Tribe through appropriate communications (e.g., emails and phone calls). Federal agencies should also be cognizant of limitations on Tribal human and financial resources. Where possible, Federal agencies should coordinate with sister agencies engaged with the same Tribe to identify efficiencies, such as co-locating meetings and consultations. Consultations should be held in Indian country, where possible.

5. **Ensure Federal decision-makers actively participate.** While staff-level dialogue is important, government-to-government consultations should involve the participation of the Federal agency decision-makers whenever possible to allow for on-the-spot problem-solving, dialogue, and appropriate follow up. This approach ensures everyone is in the

room at the same time, which can prevent subsequent miscommunications and limit the need for follow up meetings to achieve consensus.

6. **Seek to fully understand Tribal concerns, reach a consensus where possible, and when necessary, explain clearly why Tribal concerns could not be addressed.** Tribes explained that consultations they considered "meaningful" occurred when the Federal Government took the time to understand the Tribe and its concerns about a potential Federal decision. Instead of assuming they understand the Tribe's position, Federal agencies should reach out to the Tribe to seek clarification and/or confirmation of the Tribe's views. Federal agencies should work to identify options for addressing Tribal concerns, and should be prepared to adapt to changing circumstances, contemplate creative problem solving, and exhaust every alternative to achieve mutually agreeable solutions. Agencies should explain the legal, practical, and policy constraints on their decision-making. As part of the government-to-government relationship, Federal agencies should respond in a timely manner to Tribal concerns and requests. At the end of the consultation process, Federal agencies should clearly communicate to the Tribe how the agency's ultimate decision addresses Tribal input, rather than just cataloguing the Tribe's concerns. Where the agency is unable to fully address Tribal concerns, the agency should explain its reasoning clearly.

7. **Exchange information.** Federal agencies should provide information about the Federal action being considered and the decision-making process to Tribes and obtain information from Tribes about Tribal interests in a given project. Where appropriate, Federal agencies should work with Tribes to protect the confidentiality of information provided to the Federal Government, and should be transparent about any limitations on their ability to protect confidentiality. Agencies should provide Tribes with key information related to a project, and should not require Tribes to submit Freedom of Information Act (FOIA) requests to obtain information about a project or action the Federal agency is considering.

8. **Customize the consultation.** Not all Tribes operate the same way. Each Tribe has its own customs and traditions, and some Tribes even have their own laws or protocols for Federal-Tribal consultation. Federal agencies should respect Tribal laws or protocols for Federal-Tribal consultation and work with Tribes to customize consultations and communications that respect the sovereign status of each Tribe and enhance Federal-Tribal communication. Effective consultation policies provide for local and regional diversity in working and communicating with Tribes, and allow flexibility for Federal agencies to tailor consultation to fit the needs of specific projects.

Key Principles for Consultation—Action Items:

1. Each Federal agency should undertake a thorough review of its Tribal consultation policies and practices to ensure that they reflect the Key Principles.

2. Each agency should provide a written analysis of its review to the WHCNAA and post its analysis online by April 1, 2017. The analysis should include a discussion of how its

Tribal consultation policies and practices should be updated to reflect the Key Principles of this document.

3. Any agency finding that its consultation policies and practices are not in line with the Key Principles should develop a plan for amending the agency's governing policy, staffing, and training practices, provide the plan to the WHCNAA, post the plan online, and take other necessary actions to align its policies and practices with the Key Principles.

B. Recommendations for Actions beyond Consultation Policy Updates

Tribal feedback during the infrastructure consultations indicated that updating government-to-government consultation policies is just one step towards an improved nation-to-nation relationship. According to Tribes, the consultation policies are a secondary concern to the way in which Federal agencies implement (or fail to implement) them when Federal decisions impact Tribes and their interests. In order to begin addressing the Key Principles cited above, this Report recommends specific agency action in several areas.

Timing

Tribes raised concerns that they are either not invited to consult or are invited to participate in consultation far too late to have meaningful input in the agency decision-making process. For example, Tribes noted that their opportunity for input on a project has often come well after project proponents have selected a project site or route. To address such concerns, this Report offers the following recommendations to agencies.

Timing—Action Items:

1. Each Federal agency involved in infrastructure decision-making should use mechanisms to involve Tribes early in project planning whenever possible. This should include developing procedures that facilitate permit applicants and Tribes working together before applicants make siting decisions or other commitments that impede consideration of alternatives. Federal agencies should use programmatic, landscape-level planning mechanisms to ensure thoughtful and meaningful consultation on infrastructure projects. The Federal Communications Commission (FCC) uses an approach for such interaction that endeavors to ensure that Tribes are notified and have an opportunity to timely consult on the proposed construction of communications towers and antennas in connection with FCC-licensed services. The FCC's model is described in Appendix 6.

2. Each Federal agency involved in infrastructure decision-making should develop and implement procedures for consulting with and including Tribes as early as possible in the NEPA and NHPA processes, including pre-decisional scoping discussions with the Tribes. For instance, in 2010, the Bureau of Land Management proactively entered into a programmatic agreement under Section 106 that balanced the protection of historic properties, including an estimated 10,000 prehistoric rock art panels, with energy development. The project highlights the importance and benefits of early consultation and

engagement in project planning of all interested parties, including Tribes. For more information, see Appendix 6. Further, Federal agencies should encourage Tribes to be cooperating agencies for any environmental impact statement.

Scope

Tribes raised concerns about ensuring that the scope of agency analysis for any particular project is broad enough to account for reasonably foreseeable consequences that will flow from the Federal approval, even if the Federal agency's jurisdiction is focused on a narrow aspect of the project. This is a complex topic that requires consideration of the specific legal authorities applicable to individual projects. However, agencies should take the following steps to help address Tribal concerns and to advance the public dialogue on these issues.

Scope—Action Items:

1. Federal agencies should work with Tribes to ensure robust indirect and cumulative impacts analysis in the NEPA documents. Indirect effects are causally related to proposals and thus important to decision making. Considering cumulative impacts provides critical context for decisions.[13] Tribal impacts are not necessarily limited to on-reservation activities. Often, off-reservation activities have the potential to impact Tribal resources and reserved rights.

2. Federal agencies should consider conducting regional analysis of their actions' potential impacts to Tribal interests, such as Tribal treaty rights or climate change impacts, associated with agency actions.

3. Congress should consider whether legislation specific to protection of Tribal resources is appropriate to ensure that Federal agencies are able to fully consider Tribal and other impacts that may flow from their approval of various aspects of infrastructure projects.

Relationship

Building stronger Federal-Tribal relationships is fundamental to better understanding Tribal concerns arising out of proposed infrastructure projects. It can also help mitigate the risk that infrastructure projects run into unforeseen problems, delays, or legal challenges down the road. In response to Tribal comments and recommendations relating to this issue, this Report offers several recommended actions to agencies for strengthening relationships with Tribes.

Relationship—Action Items:

1. Agencies should communicate and work with Tribes to identify areas of concern on an ongoing, non-project specific basis. This ongoing consultation activity would allow local agency decision-makers to know in advance when their decisions will impact Tribal

[13] *See* 40 C.F.R. §§ 1508.7, 1508.8(b).

interests. Two good examples for agencies to consider in establishing relationships with Tribes include the Statement of Relationship between the U.S. Fish and Wildlife Service and the Gila River Indian Community, and the Memorandum of Understanding between the U.S. Department of Agriculture and the Great Lakes Fish and Wildlife Commission. Appendix 6 describes both of these partnerships in greater detail.

2. Permitting agencies should proactively work with Tribes and become familiar with Tribal interests and concerns. Permitting agencies should also review their procedures and regulations to determine where there are barriers to earlier and more meaningful Tribal involvement, and amend those authorities to address deficiencies. North Dakota Department of Transportation's work with Tribes and the establishment of the Tribal Consultation Committee described in Appendix 6 provides a good model for Federal agencies to consider.

Education & Training

While the Federal Government has developed some training (*see* "Working Effectively with Tribal Governments" and "Native American Sacred Sites and the Federal Government"), a need for additional training is apparent. Increased educational and training opportunities for Federal agency staffs that focus on working with and understanding Tribal governments and communities will increase Federal agencies' ability to effectively consult with Tribes. Such steps will also increase the likelihood that Tribal input received during consultation on infrastructure projects has a meaningful impact. This Report identifies several education and training steps for agency implementation.

Education & Training—Action Items:

1. Prioritize and make robust training available for all agency staff who may be involved in programs, technical assistance, and decision-making that could impact Tribes. For example, the Corps' Albuquerque District modified its standard practice to recognize Tribal expertise in the geographic area. A new standard practice includes providing culturally sensitive and academically based training to key staff, which uses both Federal and Tribal staff as instructors. See Appendix 6 for more details on this successful partnership. Agencies should also consider developing, with regional and central office staff, expertise on Tribes and Indian law or, at a minimum, have formal arrangements in place that enable agencies to access this expertise when needed. This action can help ensure that even agency staff without training or expertise can readily access agency experts on Tribal issues.

2. Each Federal agency should evaluate its existing education and training practices to ensure staff have an appropriate understanding of basic Indian law and policy, treaty rights, and the Federal-Tribal relationship.

3. WHCNAA should work with agencies to ensure that appropriate education and training opportunities are made available to Federal employees whose work may impact Tribes. For example, a Federal agency could open certain education and training opportunities to

Federal employees from sister agencies and share information about upcoming trainings dates via the WHCNAA.

4. FPISC should ensure that it has staff with expertise on Tribal issues who can help ensure that Tribal rights are understood and protected by all FPISC agencies. Such steps might include identifying a primary point of contact for FPISC staff who is experienced in Tribal consultation. This individual could be responsible for working with agencies to ensure Tribal rights are considered in infrastructure development on Indian lands, or lands where Indian Tribes hold natural, historic, cultural, or spiritual resources.

Integrating Tribal Input into Existing Processes

Tribes highlighted a need to reform agency processes for integrating Tribal input into Federal decision-making. In response, this Report offers several steps to agencies for incorporating Tribal input into agency decision-making, with special attention paid to the fact that even off-reservation projects can impact Tribes, such as when their ancestral homelands and ceded territories are affected, or when a project could degrade waterways, reserved water rights, or hunting and fishing resources to which Tribes have rights.

Integrating Tribal Input into Existing Processes—Action Items:

1. Agencies should review their own internal clearance processes to ensure Departmental review processes take Tribal interests into account. For example, the internal review process at the U.S. Department of Agriculture requires that the Office of Tribal Relations, in addition to the Office of Civil Rights, Office of General Counsel, Office of Budget and Policy Analysis, etc. review major rules, notices, and other policy actions that sub-agencies intend to publish before they are provided to the Secretary's office for final review and decision.

2. Federal agencies should use the CEQ and ACHP guidance document, "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106" (March 2013), to improve integration of Tribal concerns into the NEPA and NHPA process. Federal agencies should also refer to CEQ's guidance on Non-Federal Cooperating Agencies for information on including Tribes as cooperating agencies.[14] In that document, CEQ emphasizes that before the scoping process, agencies should identify Tribal governments that may have "special expertise" that may aid in the preparation of the environmental impact statement. Tribes should be solicited to act as cooperating agencies due to their special expertise regarding on-reservation impacts, off-reservation impacts, off-reservation treaty, former treaty, and aboriginal areas. Tribes also provide important input on the development of mitigation measures to ensure these measures are acceptable and culturally appropriate. When a Tribe does not have the resources to be a cooperating

[14] Council on Environmental Quality, "Memorandum for Heads of Federal Departments and Agencies: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of NEPA," July 28, 1999.

agency, Federal agencies should continue discussions with the Tribe and provide them adequate information to enable them to engage in the NEPA process.

3. Federal agencies should research resources and how methods could be established to make it easier for those agencies to determine which Tribal governments might be impacted by a particular Federal undertaking. Such resources and methods could then help the lead Federal agency to work with the project proponent and develop a notice to the appropriate Tribal governments that would: 1) notify them of the proposed project; 2) identify the area(s) of concern for the project; 3) provide a timeframe for Tribal input or request for consultation; and 4) conduct a meaningful and respectful Tribal consultation. Federal agencies should also establish methods to ensure agency accountability for the consideration, and possible integration of Tribal input into agency decisions.

4. When looking at decision-making processes, agencies should consider early and robust Tribal involvement to prevent subsequent delays in permitting and project development resulting from Tribal objections or lawsuits. For example, FPISC could better define how it will engage with Tribes, consistent with FAST-41 requirements. FAST-41 states that the FPISC "shall meet not less frequently than annually with groups or individuals representing State, Tribal, and local governments that are engaged in the infrastructure permitting process."[15] FPISC should work with Tribes in advance of these meetings to identify ways to make these interactions most productive and, based on what is learned, develop a clear framework for regular engagement going forward.

5. The Interagency Working Group on Environmental Justice[16] should consider preparing guidance on how to properly analyze infrastructure-related environmental justice impacts on Tribal communities.

Resources & Tribal Capacity

Tribes noted that their own capacity to consult with multiple Federal agencies can be a barrier to participating in meaningful consultation. Additionally, Federal agencies recognize the limits of their own ability to meaningfully consult with 567 federally recognized Tribes in a coordinated, thoughtful, and consistent manner. This Report recommends continued discussion, research, and consultation on how to address these challenges of capacity, resources, and bandwidth.

[15] 42 U.S.C. § 4370m-1(c)(2)(C).

[16] The Interagency Working Group on Environmental Justice facilitates the active involvement of all Federal agencies to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations.

Resources & Tribal Capacity—Action Items:

1. Agencies, OMB, and Congress should look for ways to help Tribes increase their capacity to participate in meaningful consultation. This support could come in the form of new funding streams, training and technical support to Tribes, structures for coordinating consultation across geographies or agencies, and beyond.

2. Agencies, OMB, and Congress should consider committing resources to helping Tribes and Tribal Historic Preservation Officers (TPHOs) fully implement their responsibilities under NHPA Section 106.

3. Agencies should endeavor to consult with Tribes on Tribal homelands or at a location identified by the Tribe.

4. Agencies, OMB, Congress, Tribes, and stakeholders should work to organize and coordinate Tribal consultation practices, procedures, and schedules across agencies in order to reduce the burden on Tribes associated with the need to consult with several different Federal entities.

Specific Agency Actions Underway

Tribes repeatedly raised several specific policy issues throughout the consultation on Federal infrastructure decisions. This Report responds to them here with specific actions agencies are taking to address them.

1. **Appendix C.** The Army Corps of Engineers will update its Appendix C (33 C.F.R. 325) in 2017 in response to extensive Tribal comments calling for Appendix C's rescission or revision. (*See* "Federal Consultation with Tribes Regarding Infrastructure Decision-Making," transcript taken November 17, 2016, Rapid City, South Dakota, p. 34, lines 7-10, statement of Assistant Secretary of the Army Civil Works Jo-Ellen Darcy, committing to "improve" Appendix C).

2. **Tribal input under NHPA Section 106.** Since so many of the issues raised in the consultation sessions were related to the NHPA Section 106 process, the Advisory Council on Historic Preservation will be releasing in early 2017 a detailed report that outlines specific ACHP responses and recommendations for other agency actions to improve Tribal input in the Section 106 review of infrastructure projects.

3. **Sacred Sites Protection.** The Departments of the Army, Interior, Agriculture, and Energy, and the Advisory Council on Historic Preservation, signatories to the Memorandum of Understanding on Interagency Collaboration and Coordination for the Protection of Indian Sacred Sites, will integrate the findings and tribal recommendations in this report into their work under the MOU.

C. Next Steps for Federal Agencies

To promote interagency accountability for the recommendations made in this Report and to provide structure for ongoing interagency focus on how to improve the Federal infrastructure permitting process, Federal agencies should engage with the WHCNAA and Tribes.

Each of the agencies responsible for infrastructure projects should designate senior career staff representatives to be the primary points-of-contact for coordinating their respective agencies' responses to the Report. These representatives should coordinate with the WHCNAA Executive Director to provide regular updates on the progress of responding to and/or implementing the recommendations. The WHCNAA Executive Director plans to provide a briefing to the WHCNAA Chair on agency efforts to respond to the recommendations included in this Report. The WHCNAA Chair may then discuss the ongoing progress and accomplishments of the agencies with Cabinet members and other WHCNAA members at the first WHCNAA principals meetings of 2017, which is expected to occur no later than Spring 2017.[17]

The WHCNAA Executive Director also plans to also coordinate with the White House Office of Public Engagement and Intergovernmental Affairs and the White House Domestic Policy Council on a Federal-Tribal summit where the outcomes of the recommendations will be discussed with Tribal leaders. This discussion could take place at the annual White House Tribal Nations Conference. Ongoing engagement and communications with Tribal leaders on the interagency progress of the Report will be crucial to ensuring that this Report results in sustainable improvements to the Federal infrastructure permitting process.

VI. Conclusion

Tribes experience both benefits and adverse effects from infrastructure projects. Through meaningful government-to-government consultation regarding Federal decisions on these projects, Federal agencies can often maximize the benefits and minimize the adverse effects on Tribes and Tribal communities. Meaningful consultation that takes Tribal interests into account early in the project planning and Federal decision making process can also reduce the likelihood that infrastructure projects encounter unexpected delays that stem from unforeseen disputes and minimize potential delays due to disputes or litigation. This Report encourages Federal agencies to take short-term actions to improve their consultation policies and practices. In the longer term, agencies should work independently and through the WHCNAA to identify and address statutory, regulatory, and policy barriers to soliciting and addressing Tribal input. Through these continued efforts, the Federal Government can improve Federal decision-making processes that affect Tribal lands, resources, and treaty rights to ensure that those decisions are fully consistent with our obligations to Tribes.

[17] Per Executive Order 13647, WHCNAA principals meet at least three times per year.

Appendix 1. Dear Tribal Leader Letter

OCT 11 2016

Dear Tribal Leader:

On September 23, 2016, the Departments of the Interior, Justice, and Army, invited you to consult on how, prospectively, Federal decisionmaking on infrastructure projects can better allow for timely and meaningful tribal input. In that letter, we provided some general information on planned locations for the consultation sessions and committed to providing a framing paper with additional detail.

With this letter, we are providing:

- An updated detailed schedule which includes an additional consultation session.
- The framing paper providing background and questions for your consideration.

This information is also available at:

- http://www.bia.gov/WhoWeAre/AS-IA/ORM/TribalInput/index.htm.

As a reminder, if you would like to provide written input, please send it by email to: consultation@bia.gov or by mail to: Office of the Assistant Secretary – Indian Affairs, Office of Regulatory Affairs & Collaborative Action, 1849 C Street, NW, MS 3642,* Washington, DC 20240. We will consider all written correspondence received by Friday, November 30, 2016.

We look forward to your feedback as to how our Agencies, and the Federal Government as a whole, can improve Federal decisionmaking processes that affect tribal lands, resources, and treaty rights to ensure that those decisions are fully consistent with our obligations to tribal nations.

Sincerely,

Lawrence S. Roberts
Principal Deputy Assistant
Secretary – Indian Affairs

Enclosures

*Please note the updated mail stop (MS) number

Appendix 2. Framing Paper

FEDERAL CONSULTATION WITH TRIBES REGARDING INFRASTRUCTURE DECISION-MAKING

FRAMING PAPER

FALL 2016

As discussed in the September 23, 2016, consultation invitation you received, Federal agencies have committed to broad review and consultation on how, prospectively, Federal decision-making on infrastructure projects can better allow for timely and meaningful Tribal input from Federally recognized Tribes. The invitation letter identified two broad questions of particular interest to Federal agencies. Building on those two questions, Federal agencies are interested to learn best practices for Tribal consultation and to ask questions in two broad categories:

1) *Promoting Meaningful Government-to-Government Engagement within the Existing Framework.* How can Federal agencies better ensure meaningful Tribal input into infrastructure-related reviews and decisions, to protect Tribal lands, resources, and treaty rights within the existing framework? This category of questions includes topics related to how a Federal agency implements existing policies and procedures, staff training and expertise, how an agency approaches Tribal consultation, and what can be done to promote Tribal capacity to participate in timely and meaningful consultation.

2) *Identifying Any Necessary Change to the Existing Framework.* Where and when does the current framework present barriers to meaningful consultation? What changes to the current framework would promote these goals? This category of questions includes potential change to regulations, policies, and procedures, as well as statutory changes that would increase timely and meaningful consultation.

These questions are meant to serve as a reference point for participants and are not intended to limit the conversation. We have also included additional questions for your input below, following the background information on the existing framework.

This consultation will focus on how to ensure timely and meaningful Tribal input on future Federal decisions on infrastructure and infrastructure-related projects that have Tribal implications. While infrastructure is difficult to define, for purposes of this consultation, infrastructure projects include, but are not limited to, the examples listed in the text box in the background section.

Background

Infrastructure projects have grown in scope and complexity over time, as reflected in the increase in number and variety of existing laws and regulations that address infrastructure-related processes. Infrastructure is difficult to define because it encompasses a wide array of physical assets. For example, infrastructure projects include, but are not limited to, the examples listed in the text box on the right.

Examples of Infrastructure:

- Surface transportation, including highway, rail, and transit projects
- Airport capital improvement projects
- Ports and waterways
- Water resource projects
- Renewable energy generation
- Electricity transmission
- Storm-water infrastructure
- Broadband internet
- Oil or gas pipelines

The Federal Government often plays a role in reviewing these infrastructure projects. There are Federal statutes, regulations and Executive Orders that govern Federal review of infrastructure-related projects or potential impacts of infrastructure;[18] together, these create a framework that provides designated Federal agencies with the authority and responsibility to review particular aspects of the infrastructure or its impacts.

For example, statutes such as the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, and the Archeological Resources Protection Act of 1979 contain provisions addressing Tribal input into Federal decision-making under certain circumstances, such as when there will be excavation of cultural items. In addition to the statutes, Federal agencies may also have implementing regulations or guidance that assist with interpreting the relevant statute. In addition to those more specific requirements, there are also Presidential Executive Orders that direct Federal agencies to develop policies and best practices for working with Tribal governments. For example, the Executive Order on Consultation and Coordination with Indian Tribal Governments requires Federal agencies to have consultation policies in place to ensure meaningful and timely input by Tribal officials in the development of Federal policies that have Tribal implications.[19] And under the Executive Order for Improving Performance of Federal Permitting and Review of Infrastructure Projects, Federal agencies are responsible for including best practices for enhancing Federal, Tribal, and State government

[18] The Federal Environmental Review & Authorization Inventory chart, which describes many applicable rules and regulations as well as review requirements, is available at: https://www.permits.performance.gov/tools/federal-environmental-review-and-authorization-inventory. This website also provides background on the Federal "Permitting Dashboard" for certain Federal infrastructure projects.

[19] See the following webpage for a list of consultation policy examples: https://www.whitehouse.gov/sites/default/files/federal_agency_tribal_consultation_resources_updated.pdf

coordination on permitting and review processes and engaging early in the infrastructure permitting or review process. [20]

These laws and policies are part of the existing framework for Tribal input. Additional tools that are part of the legal framework are described more fully in Attachment A. We are interested in Tribes' thoughts both on ways to work within this existing framework and ways the framework might be improved.

Promoting Meaningful Government-to-Government Engagement within the Existing Framework

One of the purposes of this consultation is to obtain Tribal input on how the Federal government can more consistently, effectively, and meaningfully engage with Tribal governments on infrastructure-related projects. The existing framework imposes certain requirements and limitations on the Federal role in infrastructure decisions. For example, for certain projects, a Federal agency may only have authority to address a specific aspect of a larger infrastructure project (e.g., approving a right-of-way or a dredge-and-fill permit). In some cases, Federal agencies may not learn of the project until late in the infrastructure development process.

Within the existing framework both Federal agencies and Tribes have considerable discretionary authority as a result of variation in agency regulations and policies. Different agency structures, mission priorities, staffing, resources, cultures, and relationships with Tribes result in Federal agencies taking different approaches when implementing consultation. Despite this variation, both Federal agencies and Tribes have demonstrated the capacity to successfully engage in consultation. For example, the development of the landscape-level Desert Renewable Energy Conservation Plan (DRECP) was a deliberate attempt by numerous Federal agencies to meaningfully engage with Tribes. The DRECP is designed to conserve and manage plant and wildlife communities in the desert regions of California while facilitating the timely permitting of compatible renewable energy projects.

Federal agencies heavily engaged Tribes affected by the DRECP. For instance, prior to formal consultation, the agencies held two summits to address longstanding concerns Tribes had on impacts to traditional use areas and increasing development of energy resources. The agencies then held formal consultation over a three-year period and included extensive outreach and coordination, numerous technical meetings, meetings where Tribes were engaged in creating maps to incorporate into the DRECP, and individual meetings with 40 Federally recognized Tribes. Federal agencies also held conferences and workshops and ensured Tribes were provided with information, maps, presentations, access to executive-level Federal management, funding sources, and other specialized services. Not only did these meetings solicit Tribal input and incorporate Tribal issues into future development planning in the DRECP, the targeted outreach

[20] Executive Order 13604 on Improving Performance of Federal Permitting and Review of Infrastructure Projects, March 22, 2012.

led to the exchange of information and discussion of concerns that shaped the actual development of the DRECP.

It is our hope that this consultation on infrastructure decision-making will include discussion of other examples of effective Tribal engagement, and that together we might identify underlying principles common to all meaningful consultations that are achievable within the current statutory framework. Some of these principles may include: 1) accountability for Federal agencies to identify potential impacts on Tribes, 2) providing timely and complete notice to Tribes, and 3) working collaboratively with Tribes to address their concerns or mitigate effects. Among other questions presented, this consultation seeks additional examples of projects that Tribes view as models for successful, meaningful consultations.

To help identify common principles for meaningful Tribal input into Federal infrastructure-related decision making and opportunities for building both Tribal and Federal capacity, we are interested in Tribes' views on the following questions:

- What are examples of consultations on infrastructure projects that you consider to be meaningful? Why did you consider these consultations to be meaningful?
- What factors do you consider when determining whether a consultation on an infrastructure project is meaningful? What should agencies take into account when determining whether or not a consultation is meaningful? What are examples of collaboration (other than formal consultation) that you have found to be useful? Why did you consider these collaborations to be meaningful?
- Are there specific agencies that you find to be particularly good at consultation and what is it about how these agencies go about consultation that makes it stand out?
- What can Federal agencies do to better support Tribes' ability to provide input into infrastructure decisions? What are examples of good practices that enable Tribes to provide their views and input early in the development process or prior to Federal review of an infrastructure project?
- What steps can Federal agencies take to ensure that Federal and non-Federal parties engage meaningfully with Tribes without overwhelming Tribes' resources?

Identifying Any Necessary Change to the Existing Framework

We are also interested in Tribes' views on whether changes to the existing framework – whether to regulations, agency policies, statutes, or other legal requirements – are necessary to ensure meaningful Tribal input into infrastructure-related reviews and decisions.

In considering whether and how changes to the existing framework could result in more successful Tribal consultation, we are particularly interested in Tribes' thoughts on the following questions:

- What are good examples of existing agency policies and regulations that other Federal agencies should consider replicating?

- Does the existing framework afford ample opportunity for Tribal input? If not, what additional opportunities should there be and what would this look like?
- When and where do you currently encounter obstacles to meaningful Tribal engagement that could be addressed through changes to regulation, agency policies, or statute? What are these obstacles and what changes would best address them?

Federal agencies understand that Tribes receive many notices for consultation and requests for input from numerous Federal agencies on various projects. We recognize the cost of participating in this consultation and appreciate your willingness to participate in these discussions and offer candid feedback. As stated earlier, the discussions are not limited to the questions presented here. We welcome any input relevant to the broader topic, and this framing paper and the questions may evolve over the course of the consultation based on Tribal input.

Attachment A
Legal Framework For Tribal Input

- Executive Order 13175, Consultation and Coordination With Indian Tribal Governments (November 6, 2000) – E.O. 13175 requires Federal agencies to have an accountable process to ensure meaningful and timely input by Tribal officials in the development of Federal policies that have tribal implications. President Obama reinforced this Executive Order in a November 5, 2009 Memorandum entitled "Tribal Consultation." President Obama's memorandum stated his Administration's commitment to "regular and meaningful consultation and collaboration with [T]ribal officials on policy decisions that have [T]ribal implications…"

- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low- Income Populations (February 11, 1994) – E.O. 12098 requires Federal agencies to identify and address, as appropriate, disproportionately high and adverse human health or environmental impacts of their actions in minority and low-income populations. Each Federal agency responsibility set forth under the order applies equally to Native American programs. In addition, the Department of the Interior, in coordination with the Interagency Working Group established under the E.O, and after consultation with Tribal leaders, coordinates steps taken under the order that address Federally-recognized Tribes.

- Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects (March 22, 2012) – E.O. 13604 directs that Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities . . . . [Federal permitting and review processes] must rely upon early and active consultation with State, local, and Tribal governments to avoid conflicts or duplication of effort, resolve concerns, and allow for concurrent rather than sequential reviews.

- Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001 *et seq.* – If there will be excavation of cultural items, including human remains and objects of cultural patrimony from Federal lands, the Federal agency must consult with the appropriate Tribes prior to excavation or removal after inadvertent discovery. If the excavation will occur on "Native American or Native Hawaiian Lands" then NAGPRA requires the consent of the Tribe or Native Hawaiian organization.

- National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.* – If an activity could affect historic properties (e.g., properties that are eligible for or included in the National Register of Historic Places), then the Federal agency must engage in "Section 106 review" (as distinguished from a government-to-government consultation) with Tribes that may attach religious and cultural significance to historic properties.

- Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa–470mm – ARPA requires Federal agencies to consult with Tribes before permitting archeological excavations on Tribal lands.

National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321–4347 – NEPA procedures require public involvement including coordination with Tribes. This coordination should not be confused with a Federal agency's responsibility to engage in government-to-government consultation with Tribes. CEQ guidance encourages more active solicitation of Tribal governments for participation as cooperating agencies in NEPA documents

Appendix 3. Consultation Session Locations and Federal Attendees

10/11/2016	10/25/2016	10/27/2016	11/02/2016
Phoenix, Arizona	**Seattle, Washington**	**Albuquerque, New Mexico**	**Billings, Montana**
Listening Session	**Tribal Consultation**	**Tribal Consultation**	**Tribal Consultation**
Department of the Interior (DOI): Office of the Secretary, Assistant Secretary for Indian Affairs (ASIA), Bureau of Indian Affairs (BIA), Officer of the Solicitor (SOL), Bureau of Land Management (BLM), Office of Regulatory Affairs (ORA) **Department of Justice** (DOJ): Office of Tribal Justice (OTJ), Environment and Natural Resources Division (ENRD) **U.S. Army**: Assistant Secretary for Civil Works (ASACW), Army Corps of Engineers (USACE) **Department of Agriculture** (USDA): Office of Tribal Relations, Rural Development (RD), Natural Resources Conservation Service (NRCS)	**DOI:** ASIA, SOL, BLM DOJ: OTJ **Army:** ASACW, USACE **USDA**: NRCS, RD **Department of Energy** (DOE): Tribal Liaison **Advisory Council on Historic Preservation** (ACHP) **Department of Commerce** (DOC): National Oceanic and Atmospheric Administration (NOAA) **USDA:** Forest Service (FS)	**DOI:** ASIA, SOL, BLM, Fish and Wildlife Service (FWS) **DOJ:** OTJ **Army:** ASACW, USACE ACHP **USDA:** NRCS, RD **Federal Energy Regulatory Commission** (FERC) **DOE:** Tribal Liaison	**DOI:** BIA, ASIA, BLM **DOJ:** OTJ **Army:** ASACW, USACE **ACHP** **USDA:** FS **Federal Infrastructure Permitting Improvement Steering Council** (FPISC) **DOE:** Western Area Power Administration **Department of Transportation** (DOT): Office of the Assistant Secretary for Tribal Government Affairs **Federal Aviation Administration** (FAA)
11/10/2016	**11/15/2016**	**11/17/2016**	**11/21/2016**
Old Town, Maine	**Minneapolis, Minnesota**	**Rapid City, South Dakota**	**Teleconference**

Tribal Consultation	Tribal Consultation	Tribal Consultation	Tribal Consultation
DOI: SOL, ORA **DOJ:** OTJ **Army:** ASACW, USACE **ACHP** **USDA**: NRCS, FS **FPISC** **DOE:** Office of the Chief Operating Officer (COO) **DOT:** Office of the Assistant Secretary for Tribal Government Affairs	**DOI:** ASIA, SOL, BLM, FWS, ORA **DOJ:** OTJ **Army:** ASACW, USACE ACHP **USDA:** FS, NRCS, RD **DOE:** Office of Energy Policy and Systems Analysis **FPISC** **FAA** **DOT:** Office of the Assistant Secretary for Tribal Government Affairs **Environmental Protection Agency (EPA):** Office of Tribal and International Affairs	**DOI:** ASIA, SOL, BLM, National Parks Service (NPS) **DOJ:** OTJ **Army:** ASACW, USACE ACHP **USDA:** FS, NRCS, RD FPISC **DOE:** Office of Energy Policy and Systems Analysis **FAA** **DOT:** Office of the Secretary of Transportation, Tribal Transportation Program	**DOI:** ASIA, SOL, FS **DOJ:** OTJ, ENRD **Army:** ASACW, USACE **ACHP** **USDA:** NRCS, Office of Tribal Relations **DOT:** Office of the Assistant Secretary for Tribal Government Affairs

Appendix 4. Agency Consultation Policies and Related Guidance

U.S. Department of Agriculture

Point of Contact: Office of Tribal Relations
Email: tribal.relations@osec.usda.gov
Phone: (202) 205-2249

Consultation Policies:
Agency-wide Policy: Departmental Regulation 1350-002: Tribal Consultation, Coordination, and Collaboration
Animal Plant Health Inspection Service: Consultation with Elected Leaders of Federally Recognized Indian Tribes
Forest Service: FSM 1500 – External Relations, Chapter 1560 – State, Tribal, County, and Local Agencies; Public and Private Organizations
FSH 1509.13 – American Indian and Alaska Native Relations Handbook, Chapter 10 – Consultation with Indian Tribes and Alaska Native Corporations
Natural Resources Conservation Service: GM_410_405 Part 405 – American Indians and Alaska Natives

U.S. Department of Commerce

Point of Contact: Office of the Secretary of Commerce/OLIA
Phone: (202) 482-3663

Consultation Policies:
Agency-wide Policy: Tribal Consultation and Coordination Policy of the U.S. Department of Commerce
National Oceanic and Atmospheric Administration: Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations
U.S. Census Bureau: Handbook for Consultation with Federally-Recognized Indian Tribes American and Alaska Native Policy of the U.S. Census Bureau

U.S. Department of Defense

Point of Contact: A. Joseph (Joe) Sarcinella, Senior Advisor and Liaison for Native American Affairs to the Office of the Secretary of Defense
Email: andrew.j.sarcinella.civ@mail.mil
Phone: (571) 372-6890
Point of Contact: Charles (Chip) Smith, Assistant for Environment, Tribal & Regulatory Affairs, Office of the Assistant Secretary of the Army (Civil Works)
Email: charles.r.smith567.civ@mail.mil
Phone: (703) 693-3655
Point of Contact: (Army Corps of Engineers): Lisa Morales, Senior Tribal Liaison USACE Headquarters.
Email: Lisa.T.Morales@usace.army.mil
Phone: (202) 761-7664

Consultation Policies:
DoD and the Military Departments: www.denix.osd.mil/na/policy
DoD Department of Defense Instruction 4710.02: DoD Interactions With Federally-Recognized Tribes (2006); 4710.03: Consultation Policy With Native Hawaiian Organizations (2011)
Army: American Indian and Alaska Native Policy (2012)
Marine Corps: Marine Corps. Order 5090: Section 2
Navy: SECNAV Instruction 11010.14A: Department of the Navy Policy for Consultation With Federally-Recognized Indian Tribes (2005)
Air Force: Air Force Instruction 90-2002: Air Force Interactions With Federally-Recognized Tribes (2014)
U.S. Army Corps of Engineers: USACE Tribal Consultation Policy

U.S. Department of Education

Point of Contact: Ron Lessard, Chief of Staff, White House Initiative on American Indian and Alaska Native Education
Consultation Policies:
http://www2.ed.gov/about/offices/list/oese/oie/tribalpolicyfinal.pdf

U.S. Department of Energy

Point of Contact: Chris Deschene, Director, Office of Indian Energy
Email: chris.deschene@hq.doe.gov
Phone: (202) 586-1272

Consultation Policies
Agency-wide Policy: U.S. Department of Energy American Indian and Alaska Native Tribal Government Policy
Bonneville Power Administration: BPA Tribal Policy

U.S. Department of Health and Human Services

Point of Contact: Stacey Ecoffey, Principal Advisor for Tribal Affairs
Email: consultation@hhs.gov
Phone: (202) 690-6060

Consultation Policies
Agency-wide Policy: U.S. Department of Health and Human Services Tribal Consultation Policy
Administration for Children and Families: Administration for Children and Families Tribal Consultation Policy
Agency for Healthcare Research and Quality: AHRQ Tribal Consultation Policy
Centers for Disease Control and Prevention / Agency for Toxic Substances and Disease Registry: CDC/ATSDR Tribal Consultation Policy
Centers for Medicare and Medicaid Services: Centers for Medicare and Medicaid Services Tribal Consultation Policy
Health Resources & Services Administration: HRSA Tribal Consultation Policy

Indian Health Service: Indian Health Service Tribal Consultation Policy
National Institutes of Health: National Institutes of Health Guidance on the Implementation of the HHS Tribal Consultation Policy

U.S. Department of Homeland Security

Point of Contact: David Munro, Director of Tribal Affairs
Email: david.munro@hq.dhs.gov
Phone: (202) 447-4239

Consultation Policies
Agency-wide Policy: Department of Homeland Security Tribal Consultation Policy
Federal Emergency Management Agency (FEMA): FEMA Tribal Consultation Policy
FEMA: Tribal Policy

U.S. Department of Housing and Urban Development

Point of Contact: Rodger Boyd, Deputy Assistant Secretary for Native American Programs
Email: Rodger.J.Boyd@hud.gov
Phone: (202) 402-3326

Consultation Policies
Agency-wide Policy: Government-to-Government Tribal Consultation Policy

U.S. Department of the Interior

Point of Contact: Miles Janssen, Senior Counselor to the Assistant Secretary-Indian Affairs
Email: Consultation@bia.gov
Phone: (202) 208-7163

Consultation Policies
Agency-wide Policy: Department of the Interior Policy on Consultation with Indian Tribes
Bureau of Indian Affairs: Bureau of Indian Affairs Government-to-Government Consultation Policy
Bureau of Land Management: Tribal Consultation Under Cultural Resources
Bureau of Ocean Energy Management: Bureau of Ocean Energy Management Tribal Consultation Guidance
Bureau of Reclamation: Protocol Guidelines: Consulting with Indian Tribal Governments
National Park Service: Management Policies 2006 (Section 1.11, Page 19)
Office of Surface Mining Reclamation and Enforcement: Tribal Consultation and Protection of Tribal Trust Resources
U.S. Fish and Wildlife Service: Tribal Consultation Handbook
U.S. Geological Survey: Policy on Employee Responsibility Towards American Indians and Alaska Natives

U.S. Department of Justice

Point of Contact: Tracy Toulou, Director, Office of Tribal Justice
Email: OTJ@usdoj.gov
Phone: (202) 514-8812

Consultation Policies
Agency-wide Policy: Department of Justice Policy Statement on Tribal Consultation
Attorney General Guidelines Stating Principles for Working with Federally Recognized Indian Tribes

U.S. Department of Labor

Point of Contact: Jeremy Bishop, Senior Legislative Assistant/Principal Advisor for Tribal Affairs
Email: bishop.jeremy@dol.gov
Phone: (202) 693-4600

Consultation Policies
Agency-wide Policy: Tribal Consultation Policy

U.S. Department of State

Email: TribalConsultation@state.gov

Arctic Council Chairmanship
Roberta Burns, Office of the Special Representative for the Arctic
BurnsRR@state.gov - +1 (202) 647-1009

Erin S. Robertson, Bureau of Oceans, Environment and Science
RobertsonES@state.gov - +1 (202) 485-2874

Columbia River Treaty
Kirsten Selinger, Bureau of Western Hemisphere Affairs
SelingerKB@state.gov - +1 (202) 647-2256

Democracy, Human Rights, Labor
Lynn M. Sicade, Bureau of Democracy, Human Rights, Labor
SicadeLM@state.gov - +1 (202) 647 2362

International Development and Assistance
Brian J. Keane, U.S. Agency for International Development
bkeane@usaid.gov - +1 (202) 712-0712, +1 (202) 712-0712

International Whaling Commission
Elizabeth Phelps, Bureau of Oceans, Environment and Science
PhelpsE@state.gov - +1 (202) 647-4935

Legal issues
James L. Bischoff, Office of the Legal Advisor
BischoffJL@state.gov - + 1 (202) 647 2197

Recovery of Native American Cultural Property
Allison R. Davis, Bureau of Educational and Cultural Affairs
DavisAR@state.gov - +1 (202) 632-6305

Transboundary Infrastructure, Climate Change and Sustainability
Jack Jackson Jr., Bureau of Oceans, Environment and Science (Please note that I will be leaving my post on January 20, 2017)
JacksonJ3@state.gov - +1 (202) 647 8309

UN World Conference on Indigenous Peoples
Linda Lum – Bureau of International Organizations
LumLL@state.gov - +1 (202) 663 1632
Laure Phipps – Mission to the United Nations
PhippsLL@state.gov - +1 (212) 415-4204

Western Hemisphere Affairs
Zakiya Carr Johnson, Bureau of Western Hemisphere Affairs
CarrJohnsonZS@state.gov - +1 (202) 736-7409

U.S. Department of Transportation

Point of Contact: Deputy Assistant Secretary for Tribal Government Affairs
Email: tribalconsultation@dot.gov
Phone: (202) 366-4573

Consultation Policies
Agency-wide Policy: U.S. Department of Transportation Tribal Consultation Plan
Federal Aviation Administration: American Indian and Alaska Native Tribal Consultation Policy and Procedures
Federal Highway Administration: U.S. Code Title 23—Highways (Section 135(e)(2) and (f)(2)(c)

U.S. Department of Treasury

Point of Contact: Beverly Ortega Babers, Deputy Assistant Secretary for Management & Budget and Point of Contact for Tribal Consultation
William Norton, Senior Advisor for Tribal Affairs (william.norton@treasury.gov)
Email: tribal.consult@treasury.gov
Phone: (202) 622-2200

Consultation Policies
Agency-wide Policy: Department of Treasury Notice of Interim on Tribal Policy

U.S. Department of Veterans Affairs

Point of Contact: Stephanie Birdwell, Director, Office of Tribal Government Relations
Email: StephanieElaine.Birdwell@va.gov
Phone: (202) 461-7400

Consultation Policies
Agency-wide Policy: Department of Veterans Affairs Tribal Consultation Policy

Environmental Protection Agency

Point of Contact: Tribal Consultation Opportunities

Consultation Policies
Agency-wide Policy: EPA Policy on Consultation and Coordination with Indian Tribes

Small Business Administration

Point of Contact: David Sanborn, Assistant Administrator, Office of Native American Affairs
Email: David.Sanborn@sba.gov
Phone: (202) 401-1580

Consultation Policies
Agency-wide Policy: U.S. Small Business Administration Tribal Consultation Policy

INDEPENDENT AGENCIES AND GOVERNMENT CORPORATIONS

1. **Advisory Council on Historic Preservation**
   Point of Contact: Valerie Hauser, Director, Office of Native American Affairs
   Email: vhauser@achp.gov
   Phone: 202-517-0194

   Consultation Policies
   Consultation and Coordination with Indian Tribal Governments
   Policy Statement Regarding the ACHP's Relationships with Indian Tribes

2. **Federal Communications Commission**
   Point of Contact:
   Email:
   Phone:

   Consultation Policies
   Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes

3. **Federal Energy Regulatory Commission**
   Point of Contact:
   Email:
   Phone:

   Consultation Policies
   Tribal Policy Statement

4. **General Services Administration**
   Point of Contact:
   Email:
   Phone:

   Consultation Policies
   GSA Policy Toward Native American and Alaska Native Tribes

5. **National Indian Gaming Commission**
   Point of Contact:
   Email:
   Phone:

   Consultation Policies
   National Indian Gaming Commission Policy on Consultation with Indian Tribes

6. **Social Security Administration**
   Point of Contact: Nancy Berryhill, Deputy Commissioner, Office of Operations

Email: Nancy.berryhill@ssa.gov
Phone: (410) 965-3145

Consultation Policies:
Social Security Administration Current Process for Consultation and Coordination with Indian Tribal Governments

Appendix 5. Detailed Summary of Tribal Input

This section of the Report provides a summary record of comments received via the seven Tribal consultation sessions, listening session, and in the eighty-seven written comments received. These comments reflect the input of fifty-nine Tribes and eight organizations representing Tribal interests. This section organizes the input received into seven broad categories: 1) Tribal Consultation; 2) the National Historic Preservation Act (NHPA) and Section 106; 3) the National Environmental Policy Act (NEPA); 4) FAST Act and the Federal Infrastructure Permitting Improvement Steering Council (FPISC); 5) Mining and Hydraulic Fracturing; 6) Treaty Rights in Infrastructure Determinations; and 6) United Nations Declaration on the Rights of Indigenous Peoples. This record of what Tribes said is not Federal endorsement of the comments received or recommendations provided. See Section V of the Report for the analysis and commentary from the Federal Government on Tribal comments.

A. Tribal Consultation

As noted above, Tribes provided many oral and written comments as a part of the Infrastructure consultations Federal agencies hosted throughout the country. Many Tribes asserted that Tribal consultation is not only required by policy, but required by Federal law, including treaties, which are the supreme law of the land. A few Tribes also advised that, beyond being required by law, meaningful Tribal consultation makes practical sense—specifically, by avoiding late and costly Tribal objections that can lead to administrative appeal, litigation, or public protest. A summary of comments provided that are specific to Tribal consultation is provided below.

1. Need for Improvements, Generally

Tribes uniformly agreed that government-to-government consultations require necessary improvements regarding when and how Federal agencies consult with Tribes. A few Tribes noted that the existing legal framework could be adequate if Federal agencies were to consistently implement consultation requirements in a manner that meets the spirit of "meaningful consultation." (Specifics on what Tribes view as necessary for meaningful consultation are summarized in the following subsections.) Tribes stated they regularly experience inconsistencies in Federal agencies' consultation policies and the implementation of such consultation policies, with some Federal agencies violating their own consultation policies. A few Tribes also noted that some Federal agencies have claimed they are not required to establish their own Tribal consultation policies because they are independent agencies.

Summary of Tribal Recommendations

- Establish a document –a new statute (to last through Administration changes), Executive Order 13175 amendment, a new executive order, OMB guidance, and/or a nationwide programmatic agreement— to:
    - Establish minimum standards for the development and implementation of consultation policies for all Federal agencies:

        - With one definition of government-to-government consultation, but with the flexibility to allow consultation to occur in a manner that fits the uniqueness of each Tribe,
        - That requires early consultation, among decision-makers, providing for Federal agencies to proactively address and incorporate Tribal concerns and interests into their decisions through free, prior and informed consent (see specifics in comment summaries below);
    - Direct Federal agencies to implement twelve principles and best practices for infrastructure permitting that impacts Tribes;
    - Require each Federal agency to draft an "Indian Trust Impact Statement" when an infrastructure project is identified, to assess the Federal trust responsibility in the project, assess any harm or threat to Tribal nor native trust lands, assess any impact to cultural and other resources, including water, and document any consultation and any consent or opposition by Tribes;
    - Hold agencies accountable for failing to adhere to consultation requirements and provide enforceable remedies for failure to meaningfully consult (e.g., penalties, a right of action to seek judicial review of consultation);
    - Ensure the protection and confidentiality of Tribal information shared for the purposes of protecting Tribal interests; and
    - Reaffirm that Tribes' status, separate from public entities or stakeholders, as having "standing" and required to be engaged at the onset of exploration and throughout the process for any lands impacted by infrastructure proposals, whether governmental or privately held.
- Establish a position to oversee and assist with consultation, such as:
    - A position within the White House to oversee all Tribal consultation across all Federal agencies;
    - A "Designated Consultation Officer" on a regional level to maintain maps of Tribal interests and contacts in the area, work with each Tribe to develop written protocols for consultation at the outset of any proposal, maintain a log of interactions with Tribes, and provide Tribes with requested information within five days; and
    - Full-time Tribal liaisons who are Native American and dedicated to developing relationships with Tribes and assisting in the consultation process.
- Elevate the WHCNAA to the "White House Council on Native Nations" co-chaired by the Vice President and Secretary of the Interior, and empower it to resolve policy differences among Federal agencies regarding the application of laws that affect Tribal rights, as a mechanism to resolve differences.

2. Trigger for Consultation Identifying the Appropriate Tribes with which to Consult

Several Tribes noted that Federal agencies reach out to Tribes for consultation only if the Tribe's present-day land holdings are impacted; a practice that ignores a Tribe's connections, ties, and the rights they have in ancestral homelands and ceded territories. Many Tribes maintain connections, ties, and rights beyond their present day reservations and land holdings. Federal legislation and policy resulted in mass relocation and removal of many Tribes from their ancestral territories where sacred, archeological, and cultural items and sites remain.

Additionally, several Tribes negotiated treaties with the Federal Government to maintain their rights in ceded territory (e.g., to hunt, fish, gather). A project that affects a Tribe's ancestral homelands or ceded territories may therefore affect the Tribe's treaty rights, sacred sites, and other areas of importance to the Tribes. Moreover, such projects or Federal actions that affect Tribal ancestral homelands may be near or several states away from a Tribe's present day reservation.

Summary of Tribal Recommendations
With regard to what actions Federal agencies must consult on, Tribes recommended:

- Require consultation not just on the Federal Government's own projects, but also when the Federal Government comments on and has a role in reviewing projects, even where the approval process is primarily occurring at the state level (e.g., Sandpiper).
- Adopt a clear and unambiguous policy for identifying which Tribes the Federal agency needs to consult on a particular project, and err on the side of caution by including a Tribe when in doubt.
- Consult and notify Tribes as to Federal projects that affect not only reservation lands but also:
    - Areas within a Tribe's ancestral territory that may not be encompassed within reservation boundaries;
    - Resources, especially water, to which a Tribe may have a treaty right or property interest;
    - State or national historic sites;
    - Areas commonly, historically significant to Tribes; and
    - Cultural landmarks with historic significance to the Tribes.

To help agencies notify and consult all affected Tribes in a timely and accurate manner, Tribes recommended Federal agencies do the following to better identify the territories that each treaty governs, the present-day Tribes that were signatories to each treaty, the ancestral homelands of each Tribe:

- Work with Tribes to map Tribal lands (historical and current) in the area of infrastructure development based on self-identification by Tribes, to facilitate early and effective communication (similar to FCC's confidential, nationwide communication system to expedite infrastructure development while protecting areas of traditional and cultural significance to Tribes).
- Revise existing consultation policy to include research that identifies Tribes' existing land holdings and their treaty and ancestral territory as documented in the historical and archeological records.
- Establish a register of individual Tribes and their associated ancestral migratory territories.

3. Timing of Tribal Consultation

Many Tribes stated that, often by the time a Federal agency engages with Tribes, it is too late for the consultation to be meaningful because the agency has already determined the decision it will reach. Tribes noted that once crucial project components have already been

developed or implemented, Tribal consultation is little more than public notice and comment. One Tribe stated that it feels like an afterthought when Tribes are consulted just weeks before the intended action takes effect because it also appears no time has been left to adjust laws in response to Tribal concerns or suggestions.

Tribes emphasized that early consultation (during the initial planning or pre-licensing phase of the project) is necessary to adequately identify properties of interest to the Tribe and assess the potential impact of the undertaking on the Tribe, Tribal land, and Tribal resources. Tribes noted that failing to include them in the in the planning process, or to assess potential impacts to environmental, historical and ceremonial sites, often results in those sites being destroyed.

A few Tribes noted that state and local agencies are consulted at early stages of a proposal, and asserted that Tribes should be afforded the same respect. Tribes stated that they should be consulted months in advance of new policy or law taking effect, not weeks, because Tribes need time to research, investigate, or prepare responses to the proposal like any other affected agency.

Summary of Tribal Recommendations

- Require Federal agencies to consult with Tribes "early," meaning—
    - When the agency becomes aware of a proposed project requiring Federal approval;
    - When a project is identified, before engaging non-government actors;
    - In the pre-licensing phase; and
    - When setting infrastructure development priorities.
- Impose a specific timeframe on Federal agencies to initiate, such as within ten days of receiving a request, application, or other notification that triggers a consultation requirement.

4. Invitation to Tribes to Consult

A few Tribes noted the importance of providing timely notice to a Tribe of consultation. One Tribe stated that two or three weeks' advance notice is not sufficient due to Tribal leaders' schedules. A few Tribes took issue with the form of inviting Tribes to consultation, stating that Dear Tribal Leader letters are generic.

Summary of Tribal Recommendations

- Provide sufficient advance notice (one Tribe specified more than thirty days, on Tribe said ninety days is preferred), that:
    - Includes sufficient detail about the potential scope, purpose, and location of the entire project a for a Tribe to evaluate and determine whether it has an interest in consultation; and
    - Expressly states that affected Tribes have the right to request consultation before the agency takes any significant Federal action or decision and outline a proposed schedule for how consideration of the project will proceed.
- With regard to the form of the invitation, Federal agencies should:

    - Determine each Tribe's preferred method of communication (or come to an agreement on the method) and correspond with each Tribe accordingly;
    - Follow up after the initial notice by email or phone calls (or both) to ensure receipt, confirm the Tribe would like to actively consult, and determine next steps; and
    - Provide notification via USPS, electronic, and telephone contact.
- With regard to written correspondence on infrastructure issues, Federal agencies should:
    - Address correspondence to both the governing body of the Tribe and the THPO; and
    - Make sure Tribal contact information is correct on notices and check at least annually with Tribes for updated information.
- Federal agencies should coordinate with the Tribe on consultation timelines and understand that consultation is ongoing (notification is not a proxy for consultation).

5. Addressing Tribal Input

Many Tribes stated that Federal agencies often treat consultation as a procedural "check-the-box" exercise, in which Federal agencies come to the consultation with their minds already made up and ignore Tribal input. A few Tribes recounted that they have been in consultation sessions in which the Federal agency will listen and agree with the Tribe, but then proceed without accounting for the Tribe's concerns. One Tribe noted the awkward position in which Tribes are placed under current practices: if the Tribe meets with the agency, the agency can claim they consulted regardless of what the Tribe wants, but if the Tribe does not meet with the agency, the agency will push forward with their plans anyway. Another Tribe described current consultation practice as a "one-way street" of communication and an affront to Tribal sovereignty and directly impeding the functioning of Tribal government.

A Tribe noted that one Federal agency in particular will solicit comments then proceed without any indication of how the agency considered the comments or incorporated them into the decision. One Tribe stated that each Tribe has a story about consulting with agencies that do not act on the information Tribes give them, that Tribes spend time and limited resources consulting and then nothing happens, and the project moves forward as if the Tribes did not consult at all. Tribes stated that, in contrast to these current practices, meaningful consultation is a substantive exercise in which the Federal agencies and Tribes comprehensively review the proposal and work together to ensure the ultimate decision protects Tribal interests. Tribes stated that meaningful consultation requires a dialogue between Federal and Tribal partners with a goal of reaching consent, or work toward a compromise.

Summary of Tribal Recommendations

Tribes recommended open discussions and joint deliberations between Federal agency and Tribal partners on a potential project affecting Tribes and emphasized that Tribes must be able to influence the decision made. The recommendations on the extent of the influence varied somewhat:

- Most Tribes recommended requiring free, prior, informed consent, in accordance with the United Nations Declaration on the Rights of Ingenious People (UNDRIP), particularly

Articles 11 and 32, so that Federal agencies must obtain the concurrence of the affected Tribe before it takes any action that would negatively impact (or irreparably damage) the affected Tribes traditional lands, waters, treaty rights, resources, cultures, and ways of life.

- One Tribe recommended requiring Federal agencies to "give effect to the maximum extent possible" to the views of the affected Tribes.

Tribes also recommended that Federal agencies be required to:

- Issue a "Statement of Potential Tribal Impacts" that addresses how Tribes could be impacted in any notice on an infrastructure project - both on reservation and off-reservation, to ensure that each agency certifies, before the process starts, that it has evaluated how a project might impact Tribal interests.
- Articulate in writing why the free, prior, and informed consent of a Tribe affected by a proposal or policy was not obtained, including a detailed statement of the efforts made by the agency to obtain that consent and the statutory basis for failing to adhere to the Tribes' position.
- Review of any action in the absence of Tribal consent by a Trust Responsibility Compliance Officer (the Secretary of the Interior for projects permitted by other agencies and the Managing Director of CEQ for Interior-permitted projects).
- Treat substantive Tribal input on a proposal for infrastructure as they would the input of any other governmental entity with a jurisdictional nexus to the project.

6. Manner in which Consultation is Conducted

A few Tribes stated that consultations conducted by letter, teleconference, or webinar are not meaningful consultations. One Tribe stated that consultation should occur face-to-face and between Tribal and Federal leadership, unless there are extraordinary circumstances and the Tribe has approved another method. One Tribe recounted that a Federal agency advised them to submit comments during the comment period "like everybody else," even though the Tribe had submitted letters and/or met with Federal officials as part of a consultation.

Summary of Tribal Recommendations

- Provide Federal agencies with adequate time for negotiations with a Tribe relating to how Tribal concerns will be addressed, mitigated, and/or resolved and find a common ground that upholds the Federal trust responsibility.
- Federal agencies should:
    - Adhere to the Tribe's protocols for consultation if the Tribe has adopted its own;
    - Engage in face-to-face meetings;
    - Make every effort to meet in the Tribe's territory;
    - Regularly consult with Tribes (e.g., quarterly);
    - Work with the Tribe to bring in a mutually agreed-upon mediator, consultants or interpreters, as needed;
    - Allow adequate time for the Tribe conduct its own studies and assessments; and
    - Continue consultation until project completion, not just until the 'consultation window' is over; and
    - Work to build relationships with Tribes and treat them as partners

7. Who Participates in the Consultation

Tribes generally viewed the requirement for government-to-government consultation under Executive Order 13175 as separate and apart from the requirement for consultation with a Tribe (usually with the Tribal Historic Preservation Officer) under Section 106 of the National Historic Preservation Act. Some Tribes noted that Federal agencies sometimes send staff with no discretion to make decisions, rather than decision-makers, to government-to-government consultation. These Tribes emphasized that the decision-maker must participate in the consultation for the government-to-government consultation to be meaningful.

Several Tribes also asserted that Federal agencies cannot legally, and should not attempt to, delegate their obligation to consult to the state (even if the state is carrying out a Federal program), project proponents, their legal team, or consultants.

Summary of Tribal Recommendations

- Require consultation be conducted directly between Tribes and Federal agencies (not to any delegate).
- Consult only with Tribal representatives (governing bodies, councils) who have been authorized to engage in government-to-government consultation by the Tribal government.
- Ensure that Federal participants have actual decision-making authority.
- Work with the Tribe to designate or identify appropriate persons to engage in consultations, such as Treaty Councils or other respected/influential Tribal members to participate in consultation.
- Allow for input from multiple levels, from formal consultation with elected Tribal officials (government-to-government consultation) to less formal, more technical meetings with Tribal staff that are working to understand the project and impacts on the Tribe (e.g., NHPA Section 106 consultation).

8. Federal Agency Staff Understanding

Tribes complained about the lack of understanding among some Federal agency staff, specifically regarding the sovereign status of Tribes and the unique legal relationship the Federal Government has with Tribes (both government-to-government and trustee-beneficiary). For example, Federal agency personnel sometimes group Tribes in with other stakeholders, rather than on a government-to-government basis. Tribes noted that Federal decision makers must come to understand that it is in the national interest to uphold the promises that the U.S. made in treaties, and to exercise discretion consistent with the duties of a trustee to Tribes in every decision that impacts Tribal interests.

Tribes stated that Federal agency staff also lack knowledge in Tribal histories and cultures. For example, one Tribe stated that Federal agency staff need training and an understanding of their Tribal citizens' deep bond to the lands and waters of the Missouri River to provide the basis for understanding who the Tribe is and what Tribal citizens value, as a context

for really hearing what they are saying. Tribes also stated that Federal agency staff need training in their own Tribal consultation policies and how to implement them.

Summary of Tribal Recommendations

- Require training for Federal staff and leadership on:
  - Tribes;
  - Treaty rights;
  - Tribal lands;
  - Federal trust responsibility;
  - Unique relationship between the U.S. and Tribes;
  - Federal Indian law;
  - Federal policy of Tribal self-determination and self-governance;
  - Consultation obligations;
  - U.S.'s historical treatment of Tribes and how policies resulted in Tribes having rights and interests in off-reservation areas;
  - Tribal perspectives on the importance of the trust responsibility and how agency decisions have impacted Tribal rights in the past;
  - Vast differences among Tribal cultures;
  - Specific information about the particular Tribes in the Federal agency staff's region; and
  - How Federal staff should conduct themselves when meeting with Tribal leaders.
- Include Tribes in the development of any training materials or be offered by Tribes.
- Require an exam similar to the Foreign Service exam for Federal staff working with Tribes to ensure cultural competency.
- Require Federal agency Tribal liaisons to be Native American and be located in all regions, rather than just in DC.

9. Tribal Capacity for Consultation

Many Tribes noted that they do not have the funding or resources to participate in all consultation requests from Federal agencies. A Tribe noted that Tribes must pay to send their representatives to consultations regarding outside threats to their treaty rights and cultural resources, while those valuable resources could have been used to address other important matters.

A few Tribes stated that they are unable to respond to consultation requests simply because of their limited capacity, but advised that Federal agencies should not take a non-response or temporary delay in response to be lack of interest.

Summary of Tribal Recommendations

- Provide Federal funding, or funding from the entity requesting the agency action, for Tribal representatives to travel to consultation meeting sites.
- Promote cooperation, participation and efficiency by combining consultation on common jurisdiction and topics.
- Make more resources available to Tribes to develop the capacity to meet consultation needs in the form of grant funding, capacity-building equipment, manpower, technical

assistance, or other resources, so that the Tribes may engage the U.S. in a meaningful way.
- Do not assume that a non-response from a Tribe indicates a lack of interest; instead, additional follow up with the Tribe should be required to ensure the Tribe is uninterested in the project or Federal action.

10. Information Sharing in Consultation

Several Tribes noted that one of the purposes of consultation is for the Federal agency to obtain information from the Tribe, and that currently, agencies are not using Tribal expertise and data. These Tribes note that Tribes' unique knowledge could inform Federal decisions, and provide context, information, and perspectives to support informed decisions, including, but not limited to, knowledge about ancestral lands, treaty rights, and traditional areas of cultural and spiritual importance. However, Tribes also noted that they are expected to share their sacred sites and most culturally sensitive areas to the project proponents that may be considered adversaries threatening the sites, and that this contravenes Tribes' religious beliefs.

Tribes stated that Federal agencies sometimes withhold information from Tribes and require them to request access to information through the Freedom of Information Act (FOIA), rather than sharing the information as part of consultation. Tribes recounted Federal agency staff taking weeks and months to provide information needed for the Tribe to prepare for meetings, track progress, or meaningfully consult. Once Tribes receive the information, they are sometimes denied the time necessary to digest the information and provide meaningful responses.

Summary of Tribal Recommendations

- Notify Tribes early (at the outset) of the precise nature of the proposal (not after applications are deemed 100% complete) to ensure cultural and religious sites are properly identified and not disturbed by applicants (see, also, summary of comments on timing of consultation).
- Use Tribal expertise and knowledge.
- Require Federal agencies to develop protocols to ensure Tribal information is kept confidential.
- Consult with Tribes on how to mitigate any damage done to sites.
- Address Tribes' questions about the process and requests for clarification in writing with sufficient detail without requiring "queuing" or typical FOIA procedures.
- Place project reviews on hold until Tribes receive information relevant and central to their decision-making process.
- Provide Tribes with sufficient time to review information (e.g., a minimum of sixty days) and honor Tribes' requests for more time.

11. Accountability for Consulting

Many Tribes noted that Federal agencies bear no consequence for failing to consult with Tribes [and that the private companies bear no consequence for the resulting destruction of

sacred sites]. A few Tribes noted that while some agencies have consultation policies in place, Federal agency staff habitually violate the policies with no consequences.
(See, also, summary of comments on Tribal input, above, for accountability on how Federal agencies consider input provided by Tribes).

Summary of Tribal Recommendations

- Require penalties for Federal staff that fail to consult.
- Suspend an agency that fails to consult and make another agency the lead.
- Suspend an agency's funding if it fails to consult.
- Tribes must have the opportunity to regularly review and provide comments on the efficacy of existing policies. Policies must be amended and improved at the request of Tribes.
- Require all agencies, including independent agencies, to comply with consultation policies.
- Add oversight from the White House.
- Federal agencies should take enforcement action (work stoppage, withdrawal of permit, legal action) against private entities or government contractors harming Tribal resources.
- Prevent Federal agencies from moving forward with infrastructure projects when another Federal agency (e.g., EPA, DOI, or ACHP) calls for additional review or consultation.

B. National Historic Preservation Act and Section 106

Throughout the meetings and in the written comments, Tribal leaders and representatives identified many key issues related to the National Historic Preservation Act (NHPA) and the Section 106 regulations of that Act. A primary issue for Tribes is that Section 106 is a *process* and does not provide for—or in any way ensure protection of—Tribal resources (or non-Tribal resources).

Consultation with Tribes is not appropriately defined in the NHPA or Section 106 regulations and has been historically used as a procedural box-checking action. Tribes noted numerous times that "check the box" was a common approach to the Section 106 process by Federal agencies. Tribes also noted that the NHPA fails to address treaty rights (along with other laws applicable to Native Americans). Section 106, requiring a form of domestic consultation, does not require the Federal Government to obtain consent before taking Federal action, and consultation and consent should be required when actions affect treaty lands or resources. Issues related to treaties are discussed in a later section in this Appendix.

Tribes noted that the most problematic projects reviewed under the NHPA involve extractive industries (such as oil, natural gas and mining). Tribes also noted that in too many cases, National Environmental Policy Act (NEPA) reviews are completed without including Section 106 review of cultural resources. They also addressed the issue of the Army Corps of Engineers' (ACE) Nationwide Permit 12, which Tribes assert often circumvents Section 106 of the NHPA.

1. Inconsistent implementation of Section 106 of the NHPA and Delegation of Responsibilities

A common concern that Tribes noted is that Section 106, although a Federal law applicable throughout the U.S. and territories, is carried out inconsistently by Federal agencies, most notably the Army Corps of Engineers. Tribes noted inconsistent application leads to their inability to protect historic properties and traditional cultural properties (TCPs) and to have "meaningful consultation." Different interpretations and definitions result in diminished ability to have input on effects to important places impacted by the entire project.

Many Tribes also noted that a requirement for consensus agreement is needed, rather than the less clearly defined consultation currently in the Section 106 regulations. Other inconsistencies that Tribes noted include:

- While Tribal Historic Preservation Offices (THPOs) are mandated to follow Section 106 procedures closely (such as responding to Federal agencies within established timeframes and having the same status as State Historic Preservation Offices (SHPOs) only on Tribal lands), Federal agencies have different interpretations in what falls within an Area of Potential Effect and assume leeway in implementation of Section 106.
- Federal agencies delegate much of the work under Section 106 to private companies that should be performed by Federal agencies, or a neutral entity, if delegated at all.
- Delegation of the authority to perform and enforce certain Section 106 reviews to states is a problem.

Tribes also noted that the ability for Federal agencies, under the ACHP's regulations, to promulgate individual agency regulations for compliance with Section 106 without Congressional authority, makes such regulations illegal. Programmatic agreements (regarding terms and conditions agreed upon to resolve potential adverse effects of a Federal agency program, complex undertaking or other situations) under Section 106 were also an issue noted by Tribes, due to the common practice of deferring much of the Section 106 review process under these agreements, including consultation. Tribes stated that if programmatic agreements exist, Tribal consultation is still needed.

Many Tribes noted that too many Federal agency representatives they work with have little to no knowledge of Native American histories, cultures or protocols, in addition to lack of adequate knowledge of agency regulations and policies or Section 106 regulations.

Summary of Tribal Recommendations:

- Federal agencies should work with Tribes in the same manner they do with states and local governments.
- Tribes should be involved in the development of nationwide permits and programmatic agreements, ensuring their interests are taken into consideration in the *development* of these broad agreements designed to streamline review processes.
- Better training of Federal staff in their own agency policies and guidelines, as well as of handbooks, Federal law and National Register bulletins, could result in better and more consistent consultation practices government wide.

- Develop a nationwide centralized mapping system (similar to the one used by the Federal Communications Commission, or FCC) to facilitate better inter-agency efforts based on Tribal identification of sacred sites, places of importance, and Tribal territories at the regional level.
- Learn from the FCC model for the development of Nationwide Programmatic Agreements, these documents involve:
    - Early notification to Tribes regarding proposed cell tower sites;
    - Voluntary Tribal-industry cooperation to address Tribal concerns;
    - Recognition of the appropriateness of industry paying fees to Tribes for their special expertise in the consultation process (as they would with any other consultant).
- Affirmation of the FCC's ultimate obligation to consult with Tribes as requested or necessary.
- Implementing a requirement for ongoing consultation under programmatic agreements, including for mines and dams, and allowing for unexpected or unknown impacts and staged project development would also be useful.

2. Army Corps of Engineers' Consultation Practices and Appendix C

Tribes universally expressed concerns with Appendix C, a Corps regulation governing compliance with the NHPA. In numerous meetings and letters, Tribes called for repeal of Appendix C, noting that the Corps' application of Appendix C does not fulfill the agency's responsibility under the NHPA and is not in compliance with Section 106.

According to Tribes, the Corps' use of Appendix C has been at the heart of many consultation problems, for a number of reasons. A primary concern noted was that Appendix C has not been revised to reflect the 1992 amendments to the NHPA that make Tribal consultation mandatory. Under Appendix C, Tribes *may* be consulted as part of project reviews. Furthermore, the Tribes noted that Appendix C was never approved by the ACHP, which has repeatedly expressed its view that Appendix C is not in compliance with Section 106, and that using Appendix C does not fulfill the Corps' responsibilities under Section 106. Agencies that wish to substitute their own procedures for the Section 106 regulations must receive approval from the ACHP because it is the only agency with congressional authority to issue regulations implementing Section 106. Several Tribes also noted that the Corps' 2005 and 2007 "interim guidance" regarding compliance with the NHPA is insufficient.

Numerous Tribes commented that the NHPA (and Section 106) is more expansive and comprehensive than Appendix C in the identification and consideration of historic properties, including those significant to Tribes. Additional problems with Appendix C that Tribes noted were that it results in disputed findings, uses a narrow definition of "undertaking" and of Area of Potential Effects, results in a lack of input from Tribes, does protect confidential information, and does not address unanticipated discoveries, as required in Section 106.

Numerous Tribes also raised the issue of the Corps' Nationwide Permit General Conditions.[21] Tribes stated that in their experience, for non-Federal permittees, these General Conditions leave the responsibility of identifying historic properties in the project area to permit applicants. Tribes also noted lack of public notices for projects under these general conditions as a problem.

Summary of Tribal Recommendations:

- Repeal of Army Corps of Engineers current historic preservation compliance processes, "Appendix C."
- Improve how Section 106 is administered, including eliminating Appendix C.
- Amend "Appendix C" to be consistent with 1992 and later Section 106 revisions.
- Eliminate or modify the Corps' Nationwide Permit approach.

3. Timing of Consultations and Involvement of Appropriate Representatives

A number of Tribes remarked that too often with infrastructure projects, Section 106 consultation is delayed until late in the environmental review process, after project plans have nearly been finalized and not always as a separate review for historic and cultural resources. At that late juncture, Tribal input becomes a simple "check the box" exercise rather than the meaningful and substantive process that Federal law intends. According to the Tribes, this puts Tribes in a situation where they are seen as obstacles to overcome and put on the defensive, rather than as partners in projects.

Lack of timeliness is due, in part, to the fact that current consultation policies do not adequately define when consultation should begin.[22] Tribal governments—at the leadership level—need to be consulted earlier in project review processes to adequately identify historic properties and assess potential impacts of undertakings, just as Federal agencies consult regularly with states, cities and local municipal governments on similar projects. Tribal governments must be extended the same respect and government-to-government consultation.

Contacting Tribes at the mitigation phase, which is often defined as archaeological excavation, is too late. Once an area is disturbed, it cannot be restored, moved or replicated in another place. Therefore, it is incorrect to think that mitigation could later occur through the Section 106 process once an area has been disturbed.

Summary of Tribal Recommendations:

- Begin consultations with high level Federal decision-makers, and continue to involve them at appropriate points throughout the process.

[21] http://www.nap.usace.army.mil/Portals/39/docs/regulatory/nwp/NWP%20General%20conditions%20(2012).pdf
[22] The Section 106 regulations state that Federal agencies need to identify the appropriate SHPO and/or THPO (when on Tribal lands) and initiate consultation with the appropriate officer or officers as one of the first steps in the process. Agency consultation policies, however, may not be as clear.

- Consultation should occur at the Tribal leadership level and on Tribal lands whenever possible.
- Include Tribal governments and leaders during the pre-licensing phase of the process would ensure more comprehensive identification of historic properties and assessment of potential impact of undertakings.
- Require permitting agencies to initiate consultation within a specific timeframe (such as ten days) of receiving a request, application or other notification.
- Extend the current thirty day comment period once notified of a project, giving Tribes more time to respond in an informed manner.
- Notification does not equal consultation; agencies must ensure that consultation efforts extend beyond "Dear Tribal Leaders" letters mailed to Tribes who may be interested in projects, and include phone calls, emails and better outreach.
- ACHP regulations (Section 106) should control/supersede any other agency's regulations in conflict with the ACHP regulations.

4. Lack of Authority and Effectiveness of Section 106, Lack of Accountability or Consequences

Tribes repeatedly expressed concern that "Section 106 has no teeth." They noted that ACHP's recommendations are often ignored. They noted that currently, the ACHP is "advisory" in nature, and Federal agencies bear no consequence for failure to consult or comply with Section 106. In general, Tribes noted that stricter penalties are needed and agencies need to be accountable for non-compliance with Section 106.

Summary of Tribal Recommendations:

- Increase ACHP authority to enforce its decisions and/or penalties on Federal agencies for non-compliance with Section 106 (such as those existing in NAGPRA).
- Restrict agencies' ability to permit a project if ACHP (and/or other agencies) call for additional reviews or consultations.

5. Signatory Authority of Tribes on Section 106 Agreement Documents

A related issue regarding authority that Tribes raised is the need for Tribes to have signatory authority on all Section 106 agreements where historic properties of importance to Tribes may be adversely affected, including off Tribal lands.

Summary of Tribal Recommendations:

- Provide Tribes with full signatory status requiring agreement with MOUs/MOAs involving projects affecting sites and places of importance to them.
- Require agencies to enter into programmatic agreements with Tribes under the NHPA, and early in the consultation process for major infrastructure projects.

6. Lack of Tribal Involvement in and a Tribally-Directed Section 106 Process

Tribes noted that the Section 106 process is driven by archeologists and their values rather than by Tribes and their knowledge and concerns. Tribes are constantly told by archeologists that places and objects that are sacred or important are not within the Section 106 process (defined as historic properties eligible for or listed on the National Register). This leads to a focus on excavation (data recovery) as the most common form of mitigation and a lack of understanding that cultural resources do not equal archaeological sites. A related issue noted is that consultation is not taught in colleges and classrooms (where archaeologists are trained), but archeologist are intimately involved in the review process.

Tribes also noted that differences exist between what SHPOs consider eligible for the National Register and what Tribes and THPOs consider eligible. Additionally, the Secretary of the Interior standards for professionals working on cultural resources projects ignores knowledge of Tribes, as does National Register criteria, supporting the idea that archeologists are stewards of Native American pasts instead of Tribes, whose expertise is repeatedly dismissed or ignored. Tribal comments noted that the framework upon which the NHPA was built was not meant to incorporate Tribal sources of information and accommodate Tribal values.

Summary of Tribal Recommendations

- Historic properties should be identified in a culturally-sensitive manner, directed by the culture itself and at the Tribal level since each Tribe is unique.
- Incorporate Tribal views on identification and significance into the Section 106 process, including consultations with THPOs and/or Tribes on historical territories (ancestral lands off of modern-day Tribal lands).
- Treat Tribal Historic Preservation Officers with equal authority to others in the Section 106 process.
- Conduct cultural resource surveys with Tribal members and in compliance with Tribal standards.
- Make changes to the NHPA or craft new legislation focused specifically on Tribal resources.
- Modify the NHPA to include additional cultural resources recognized by Tribes, such as floral, faunal, geological and water locations recognized as significant and often sacred to Tribes.

7. Inadequate Funding and Capacity for Full Tribal Implementation of NHPA and Section 106

Tribes consistently noted that there is inadequate funding to support the current work of THPOs and to have Tribal monitors present at archaeological sites and ground-disturbing activities. Tribes noted that without adequate resources Tribes cannot fully participate in consultations or the Section 106 process to identify, protect and preserve historic properties.

Summary of Tribal Recommendations:

- Prompt industry to pay fees to Tribes for their special expertise in the consultation process (as they would with any other consultant).
- Develop maps that make it more clear when consultation may be necessary, e.g., FCC Model.

8. Confidentiality and Information Sharing in the Section 106 Process

Several Tribes noted confidentiality and sharing of information in the Section 106 process as areas of concern. Tribes noted that while Section 304 of the NHPA provides a framework for protecting confidentiality, in practice many agencies seem reluctant to follow this framework. Some Tribes noted that clearer guidance regarding confidentiality of information shared is needed and, in general, expressed concern over keeping confidential information regarding sacred sites and other significant places.

Conversely, Tribes also expressed frustration with Federal agencies not providing Tribes with access to information they have on project areas that agencies willingly share with SHPOs and others. According to Tribes, this is an inappropriate invoking of Section 304 (of the NHPA) to keep information about sites from Tribes.

Summary of Tribal Recommendations:

- Modify the NHPA to include some minimum information dissemination standards.
- Provide clear guidance regarding confidentiality of information to agencies.
- Ensure Tribes have access to the same information as SHPOs and others.

9. Sacred Sites

Throughout the meetings and in the letters submitted, Tribes provided a number of examples demonstrating their concern over the disregard for and desecration of sacred sites. These included a substantial list of specific sites Tribes feel have been desecrated and/or threatened by Federal agency actions. Concerns regarding sacred sites fell into a few categories: lack of consequences or accountability, general disregard for sacred sites, different understandings of what sacred sites are, and lack of a landscape-level approach in project reviews.

10. Lack of Consequences or Accountability, and a General Disregard for Sacred Sites

A number of Tribes expressed that both Federal agencies and private companies bear no consequence for allowing destruction of sacred sites, specifically noting that the Corps' Appendix C has led to the destruction of sacred sites. Current practices of the Department of Interior (DOI) also ignore the rights of Tribes regarding ancestral territory and protection of sacred sites (and associated burials and associated funerary objects). The Tribes pointed out that the United States has trust and treaty obligations to protect Tribal lands, waters and sacred places, and that "usual privileges of occupancy" noted in ceded lands include the right to access and maintain traditional sacred sites, among other things. Tribes stated that Executive Order 13007 and the current interagency Memorandum of Understanding (MOU) on sacred sites[23] exist, but are not adequate protection.

[23] http://www.achp.gov/docs/SacredSites-MOU_121205.pdf

Summary of Tribal Recommendations:

- Repeal Appendix C.
- Require agencies issuing permits for infrastructure projects affecting Tribal lands, waters or sacred places to demonstrate Tribal trust and treaty compliance.
- Insert “mandatory avoidance” in every Federal law that deals with infrastructure projects.
- Require regulatory reviews to also include a sacred sites review.

11. Differing Understandings of what Sacred Sites are and Landscape-level Approach

Another issue Tribes raised is different understandings between Tribes and Federal agencies about what sacred sites. For example, there is a lack of understanding that cultural resources are not equal to archaeological sites (as noted above), and incorrect assumptions that data recovery is the only mitigation option. Tribes noted that data recovery can destroy the sacredness of a place or some of the characteristics of a place that make it significant because data recovery in and of itself is destructive. Additionally, Tribes stated that sacred sites include land, air and water, which all need to be considered.

A Tribe noted that the definition of “sacred site” in EO 13007 is insufficient because sacred sites should not be narrowly defined vis-a-vis Federal land, but rather vis-a-vis Federal undertakings. The issue of larger TCPs and landscape-level sacred sites not being recognized or acknowledged was also raised.

Summary of Tribal Recommendations:

- Increase training for Federal agency staff on Sacred Sites and places that hold religious and cultural significance for Tribes.
- Create a new definition, or broaden the current definition(s) of Sacred Site (as defined in EO 13007).

12. Overlapping Section 106 Concerns: Confidentiality, Delegation of Authority, Lack of Funding

Several issues related to sacred sites specifically mentioned by Tribes overlap with specific Section 106 concerns. One is information regarding sacred sites being kept confidential. And the lack of understanding of "meaningful consultation" results in a "check the box" approach that threatens sacred ancestral territory (among other things).

One example provided is that Menominee sacred sites are greatly threatened, such as places or origin, burial and mound sites, ceremonial dance rings, and village sites, as a direct result of delegation of Federal authority to states, and subsequent non-inclusion of Tribes not in the state but with ancestral lands in that area. The issue of removed Tribes not always being included in consultations was mentioned several times in the meetings and letters.

Additionally, it was noted that the Corps claims it has no budget for review of sacred, cultural and historical sites (along the route of pipelines, for example) and instead defers this task to pipeline companies, which are biased in their reviews because it is not in their best interest to

identify sites that Tribes would want avoided. Related to confidentiality concerns, revealing information about sacred sites to outsiders and adversaries is required in circumstances where non-Federal parties are engaged in the consultation process.

Summary of Tribal Recommendations:

- Amend the NHPA to include language requiring mitigation of adverse effects and avoiding sacred sites to gain project approval, which would be certified by Tribes.
- Create maps, such as the FCC has done, to prompt consultation and protect Tribal sacred places.

13. Additional General Recommendations, Solutions and Best Practices Related to NHPA and Section 106

In addition to these general and specific issues and solutions noted by Tribes related to the NHPA, Section 106 and Sacred Sites noted above, a number of general recommendations and potential solutions to improve Section 106 and the NHPA were offered, including:

- Build trust between THPOs, those doing NHPA work and higher officials.
- Improve understanding of cumulative effects and indirect effects--and in a landscape context--in assessment of effects are needed; adding a dedicated paragraph or document on this would be helpful.
- Clarify consultation requirements through an Executive Order, including consultation requirements under the NHPA (and other statutes).
- Use legislation (versus Executive Orders) to fix the foundation of the NHPA.
- Include in Section 106 an inadvertent discovery plan that works for all involved.
- Amend NHPA to provide ACHP with a specific role in resolving disputes regarding the Area of Potential Effect, potential adverse effects on eligible sites, measures required to avoid or mitigate adverse effects, and similar matters.
- Require Land-managing Federal agencies to use their authority under NHPA Section 110 to manage historic properties on Federal lands that hold religious and cultural importance for Tribes in consultation with Tribes, through a type of co-management.
- Expand NHPA Section 106 consultation to include long-term project operations and ongoing maintenance with ground disturbance occurring after projects are completed and allow permitting agencies to impose these obligations on project proponents. Involve and consult with Tribes during the pre-licensing phase to ensure that cultural and religious sites are properly identified and not disturbed by applicants, with confidential information protected.
- Identify historic properties in a culturally relevant manner directed by culture (the Tribes) itself. Require all Federal agencies to make a reasonable and good faith effort to identify historic properties, including consulting with Tribes directly to identify and assess adverse effects through historic properties.

C. The National Environmental Policy Act

Tribes identified a number of problems that impact or shortcut the NEPA review process. First, the Federal Government tends to look at projects in a segmented way. The larger picture

beyond the immediate project area should always be part of any evaluation associated with major proposed developments. An example of where the failure to look at the larger picture creates a problem is the review for crude oil pipelines. The crude oil pipeline review is done in a segmented way, never looking at cumulative impacts of the project as a whole. For example, in the Dakota Access Pipeline review, four different states, three separate districts of the Army Corps of Engineers, and the Fish and Wildlife Service each looked at different parts of the project, but did not coordinate the impacts to Tribes.

In addition to the segmentation of the review causing problems, programmatic EAs and EISs and nationwide permits allow the Federal Government to shortcut the NEPA process and the Tribes pointed out the fact that even small projects have cumulative impacts. When the agencies take the approach that their jurisdiction is only over a small area of any given project (the permit area), this ignores the direct and indirect effects on cultural resources, traditional cultural property, and tangible resources that will occur later on because of the permit approval. Tribes also identified a number of problems with the NEPA documents (draft EISs or draft EAs) provided to them for review. Project proposals or draft NEPA documents often lack specific assessments that are necessary to review project impacts. The reports may not have important impact assessments and in many cases make statements that assessments will be completed in the future. However, the documents do not note when or with what other permitting process this future action will be completed. The prepared documents that Tribes have to review are also highly limited in scope. They do not fully evaluate interdependent activities associated with the proposed actions, or do not fully evaluate all potential effects of a proposed action, leading to inaccurate and incomplete project evaluation. The Tribes are concerned that this limited scope inappropriately biases project review towards project proponents.

Finally, as part of the NEPA review Federal agencies are required to implement the environmental justice requirements of the Executive Order No. 12898. The agencies have a mandate to engage Tribes on the issue of environmental justice (EJ). They are supposed to consider alternatives that would avoid disproportionate and adverse effects on minority Tribal populations and the Tribes do not believe this is happening with the current NEPA review processes. EJ is often applied in name only and Tribal communities are still placed at risk. Part of the problem is that some of the tools and techniques used to evaluate EJ concerns seem designed to address urban settings and don't apply to reservations or rural settings. A half-mile buffer zone may make sense in evaluating the environmental impact for a highway in a city, but it makes no sense to say that a half-mile buffer protects a Tribe in a rural area.

Summary of Tribal Recommendations:

- Prohibit nationwide permits for crude oil pipelines and require a full EIS on all crude oil pipelines that cross aboriginal, historic treaty or reservation lands.
- Create and require regional EAs and EISs, not nationwide ones.
- Legislation should clarify the need for an EIS for crude oil pipelines.
- The existing EO on environmental justice should provide a way to address some problems. CEQ, EPA, and Interior could join together to issue appropriate guidance for all Federal agencies on environmental justice principles for Indian tribes.

- Agencies should follow their own environmental justice policies and use their discretion to deny any projects adversely impacting cultural resources when there is no way to mitigate those environmental justice impacts.
- Agencies should be required to carry out carbon impact studies in EA or EIS documents.
- NEPA should be amended to explicitly require carbon impact studies as part of the analysis and documentation whenever an EA or EIS is required under terms of any agency's NEPA processes and procedures.
- The Federal Government or the project proponent should fund cumulative impact studies for Tribes.

D. FAST Act and the Federal Infrastructure Permitting Improvement Steering Council (FPISC)

A number of Tribes noted that the recently-passed FAST Act creates an opportunity for FPISC and OMB to include Tribes in efforts to improve Federal permitting processes. Some Tribes offered specific recommendations to accomplish this goal, in particular: (1) including Tribes or a Tribal trust compliance officer on FPISC; and (2) revising the FAST Act process to fully integrate Tribes in the streamlined process in the same way as states and local governments. Some Tribes pointed out that prior Administration materials on improvements to infrastructure permitting in part call out Tribes and Tribal interests expressly, but many Tribes commented that implementation of these efforts have not in practice included Tribes effectively nor recognized the Federal trust responsibility for Tribal lands, resources, and sacred places. Two Tribes also noted that entities have abused expedited procedures governing maintenance, finding ways to expand existing infrastructure under the guise of performing maintenance.

Similarly, several Tribes voiced concern that the "piecemeal" approach to permitting projects has weakened important protections for Tribes with respect to large-scale infrastructure projects. One Tribe noted that the Office of Management and Budget (OMB) has stated that OMB is not subject to consultation requirements, but that should not be the case given OMB's involvement on FPISC as well as OMB's important role in financial and policy-related activity across the executive branch, including the development of infrastructure-related policy.

Summary of Tribal Recommendations

- The qualifications for fast-track projects need to be narrower; any project that adversely impacts Tribes or Tribal interests should automatically disqualify for fast-tracking, or any project that requires consultation should not qualify for fast-tracking.
- The use of fast-tracking should be reviewed regularly to ensure appropriateness. Tribes should give informed consent on projects before projects can qualify for FAST Act permitting improvement procedures. The "piecemeal" approach to permitting large-scale projects needs to be better regulated or eliminated.
- FPISC should consult with Tribes about FPISC's role relative to individual agencies in the permitting process and also about how FPISC will operate. This will ensure that Tribes have information as permitting evolves and can thus provide recommendations about how to include Tribes in the FAST Act process.
- FPISC should develop and recommend to OMB guidance that includes the following:

    - All agencies issuing permits for infrastructure affecting Tribal lands, waters, or sacred places must demonstrate compliance with trust obligations, treaties, and consultation requirements and demonstrate informed consent;
    - Establishment of a Tribal Trust Compliance Officer on FPISC. The duties of this position should include:
        - Working with impacted Tribes to identify concerns,
        - Building a process, or making better use of an existing process, to ensure Tribal concerns are addressed and resolved by Federal agencies in coordination with the impacted Tribes at the policy level and also on specific projects,
        - Coordinating with Federal agencies to ensure Tribal rights are understood and protected by all agencies involved in permitting discussions and reviews and to adjust timelines for completion of reviews if additional time is needed to resolve Tribal concerns, and
        - Working with agencies to support greater Tribal control over infrastructure development on Indian lands, or lands where Indian Tribes hold natural, cultural or spiritual resources;
    - Provision of full and early participation by Tribes in "purpose and need" permitting discussions;
    - Recognition of Tribal sovereignty and the role of treaty rights in permitting projects;
    - Environmental justice protections;
    - Greater Tribal control over infrastructure development on Indian lands, or lands where Tribes hold natural, cultural, or spiritual resources, including ceded territories;
    - Institutionalization of best practices, including:
        - Early, adequate notice and ongoing information sharing,
        - Consultation in early planning stages,
        - Tribal involvement in mapping efforts,
        - Funding Tribal participation at all stages of permitting processes; and
        - Inclusion of impact statements that evaluate concerns identified by the Tribes and treaty and trust obligations.
- There should be annual, biannual, or quarterly meetings between Federal agencies and Tribal leadership to build the trust relationship, discuss upcoming projects, and address Tribal concerns.
- OMB should follow executive branch consultation requirements.

E. Mining and Hydraulic Fracturing

Many Tribes criticized the Mining Act and asserted that it is not appropriate for private companies to use public land for their financial benefit, without the consideration of alternate values such as preservation of lands and landscapes, the environmental effects of resource depletion or impacts on cultural areas. Tribes asserted that both Tribal and non-Tribal communities often share these concerns. As one Tribe expressed it, consumer demand for new technology like smaller phones leads to big open pit mines at or near cultural areas, without the consideration of the damage done to cultural properties or sacred sites. A Tribe commented that

when mining surveys are conducted on Tribal land or near Tribal communities, Tribes should at least be notified. Another Tribe expressed the view that, in reality, land belongs to a Tribe only until resources are found there, and then the government finds a way to take it away.

Many Tribes commented on the adverse environmental impacts of mining. One Tribe noted that mining can put treaty rights at risk if the mining activity pollutes land or waters where a Tribe holds treaty rights. The Tribes mentioned water pollution most frequently. Several Tribes complained about two loopholes in Clean Water Act (CWA) regulations promulgated by the Army Corps of Engineers and the EPA that they assert allow mines to pollute clean water. The first is a 2002 revision of regulations to expand the definition of "fill material" under section 404 to include contaminated mine tailings, exempting these tailings from CWA rules. The second is a regulation that allows mine developers to designate natural lakes, rivers, streams, and wetlands as "waste treatment systems" exempt from the CWA. Tribes also noted that when a mine destroys a wetland in an area where a Tribe has treaty rights, the wetland mitigation does not always occur in an area where the Tribe has treaty rights, thus diminishing the protection of the treaty resource.

Tribes also questioned whether the EPA or state environmental agencies were performing adequate water quality monitoring, or putting too much trust in self-reporting by companies. Tribes further expressed concerns about spills, and the resulting disruption of ecosystems. Tribes were particularly concerned about pollution from uranium, and the risks of exposure to radioactive materials. One Tribe expressed a view that one agency is biased in favor of uranium mining interests. Although there was not a specific emphasis on air quality in the Tribes' comments, the general concerns about the ways mining activities affect the environment appear to include concerns about air quality. Tribes also expressed concerns that agencies do not consider Tribal interests seriously in the consultation process for environmental permitting relating to mining activities.

Some Tribes expressed concern about the effects of fracking activity on Indian lands, culture, and environment; these were largely similar to concerns expressed in the context of mining. A Tribe commented that the government monitors fracking activities only for immediate environmental impacts, even though they might have long-term impacts as well. Tribes specifically expressed concern that the reinjection of the water contaminates fresh water. A Tribe also asserted that directional drilling affects total dissolved solids in nearby rivers. Tribes also commented that fracking increases the chances of earthquakes. One Tribe expressed concern that fracking wells emit methane gas.

Summary of Tribal Recommendations:

- Repeal or reform the Mining Act, to disallow mining conducted on Federal lands, or allow more government control over mining conducted on Federal lands.
- Close Clean Water Act loopholes through statutory and/or regulatory change.
- Improve enforcement of existing environmental laws.
- Strengthen governmental oversight of fracking activities through legislative action or through Federal or state agency regulation.
- Consider both immediate and long-term impacts of fracking in decision-making.

F. Treaty Rights in Infrastructure Determinations

The overarching theme that Tribes emphasized with regard to Tribal treaty rights was that, absent the consent of the affected Tribe(s), the United States should not authorize any infrastructure project that would negatively impact Tribal treaty rights, sacred sites, or ancestral lands. Tribes emphasized that Federal agencies often treated consultation on treaty rights as a "box to be checked" rather than a meaningful and substantive dialogue between two sovereigns, and voiced their concern that the United States often delegated consultation and decision-making authority on infrastructure projects to state or local governments or private parties.

Tribes were also very concerned with a number of Federal infrastructure permitting processes that they felt undermined Tribal treaty rights and allowed for the pollution of Tribal lands. In particular, multiple Tribes requested that the Corps withdraw Appendix C. These Tribes argued that the Corps implemented Appendix C without congressional authorization or the required approval from the Advisory Council on Historic Preservation, and that Appendix C ignores or contradicts ACHP's regulations implementing the NHPA. Tribes similarly opposed the use of Nationwide Permits to authorize major infrastructure projects (particularly oil pipelines), which Tribes did not believe sufficiently safeguarded treaty rights.

Other comments suggested withdrawing expansive regulatory definitions under the Clean Water Act that allow for the pollution of waterways upstream from Tribal treaty-protected waters. Numerous additional comments were received requesting that Federal agencies provide employees with training about Indian law and the trust responsibility generally as well as region-specific Tribes, lands, and treaties.

Summary of Tribal Recommendations

- Condition Federal infrastructure projects negatively impacting Tribal treaty rights, trust lands, sacred sites, or ancestral lands on the consent of the affected Tribe(s).
- Withdraw 33 C.F.R. Part 325 Appendix C.
- Do not issue Nationwide Permits for activities that can negatively impact Tribal treaty rights.
- Close loopholes in the Clean Water Act that allow for pollution of treaty-protected waterways through expansive definitions of the terms "waste treatment system" and "fill material."
- If an infrastructure project affects tribal treaty rights, the United States must not delegate consultation, permitting, or other decision-making authority to state or local governments or private individuals or corporations.
- Provide Federal agency staff training on Federal Indian law, the treaty system, and the trust responsibility, with staff in specific regions receiving additional training for regional treaties and Tribal rights.

G. United Nations Declaration on the Rights of Indigenous People

A core issue identified during the course of the consultations is the manner in which the Federal Government engages the Tribes in consultation. One of the recurring sub-issues in this

area is the lack of established, government-wide protocols governing the consultation process. In many instances, commenters pointed to the principles set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In 2010, the United States announced its support for the UNDRIP. The UNDRIP provides for consultation and cooperation in good faith with indigenous peoples to obtain their free, prior, and informed consent, through representatives of the Tribe's choosing, before adopting legislative or administrative measures that may affect them. Additionally, the UNDRIP states that where a project affects Tribal lands or territories, the government should provide effective mechanisms for redress, as well as for appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impacts.

Summary of Tribal Recommendations:

- Many Tribes referenced the UNDRIP as a good starting point and ready standard that Federal agencies could adopt.
- Some Tribes called on Federal agencies to adopt the UNDRIP principles.
- Some Tribes suggested the existing Executive Order and Presidential Memorandum on consultation be revised to reflect the UNDRIP principles.

Appendix 6. Positive Examples and Innovations that are Working for Tribes and Federal Partners Alike

Through the consultation sessions held across the country and the numerous written comments received, Tribes made note of several examples of agencies, staff, and policies that they like. A few that were mentioned more than once are noted below. They are intended to service as positive examples of steps agencies can take to innovate and change the way they do business, train and manage staff, and think about working with Tribes to the mutual benefit of Tribes, Federal partners, and often other stakeholders too.

A Statement of Relationship that Facilitates Fish & Wildlife Service Consideration of Ecological, Historical, and Cultural Knowledge at the Department of Interior

Recognizing the value of traditional ecological knowledge to the Tribal and Federal land management decision-making process, the Fish and Wildlife Service created a process by which the Gila River Indian Community is encouraged to inform and advise the Fish and Wildlife Service Region about the spiritual and cultural significance of their natural resources and the types of projects that may concern Tribes or impact their resources. This process better enables the Fish and Wildlife Service to incorporate the Gila River Indian Community's historical, ecological, and cultural knowledge into the Federal decision-making process.

The document that facilitates this partnership is a 2016 Statement of Relationship (SOR) between the Southwest Region of the U.S. Fish and Wildlife Service and the Gila River Indian Community in Arizona. The document is intended to promote communication, support a formal consultation process, and strengthen the government-to-government relationship between the Tribe and the Region.

The SOR also establishes protocols for formal communications. These guidelines encourage open discussion to facilitate proactive, cooperative efforts between Tribes and the Federal Government, and include ways to protect sensitive information. Finally, the SOR also facilitates coordination between the Tribe and the Region when there is a request for technical, biological or economic assistance. The text of the SOR can be found on page 72 and 73 of the following document: https://www.fws.gov/mountain-prairie/tribal/documents/Tribal_Consultation_Guide_Apr_2013.pdf

Planting Seeds of Understanding for more Productive Future in the Albuquerque District of the Army Corps of Engineers within the Department of Defense

Tribes manage about eighty percent of the land in the middle Rio Grande Valley. Much of the Army Corps' Albuquerque District overlaps with this area, which includes trust lands, Tribally-owned lands, and aboriginal lands of Tribes. Recognizing the importance of having significant Tribal expertise on staff in the region and modifying their standard procedures to take Tribal interests into account, the Albuquerque District has made the following standard practice—and has received high praise from some Tribes in the region:

- A full-time Tribal Liaison enhances cross-cultural communication by ensuring that Tribal perspectives and values are considered early and often
- Key Corps staff receive both academically-based and culturally-based training using both government staff and Tribal members as instructors; also partner with Pueblo de Cochiti on "immersion" training where participants live and learn at the pueblo for a work week
- New Commanders visit reservations early in their tenure and then regularly to establish and nurture a leadership relationship; staff do the same to ensure day-to-day activities are well coordinated and done in partnership with Tribes
- Tribal and Corps staff brief each other during annual partnership meetings, where they discuss successes and concerns, and plan for future activities---awareness is key to engagement, no surprises, and efficient workload management
- Tribal and Corps staff routinely create programmatic agreements (Federal agencies and Tribes co-sign)
- Corps "culture" includes the expectation that lands and resources are co-managed. Examples of co-management include the management of the natural resources in and around Lake de Cochiti in New Mexico. Other examples of co-management in other regions include a fish hatchery on the Columbia River with the Nez Perce, and wildlife management on the Missouri River with several Sioux Tribes and the Three Affiliated Tribes.

Modeling a Cooperative Relationship with Eleven Great Lakes Tribes and the Forest Service at the Department of Agriculture 1999 Tribal MOU Eastern Area

In the Great Lakes region, a Memorandum of Understanding (MOU) governs the relationship between the USDA Forest Service and eleven Lake Superior Ojibwe Tribes who are members of the Great Lakes Indian Fish and Wildlife Commission (GLIFWC).
This MOU emerged in the 1990s, stemming from shared concerns among both Tribes and the Forest Service about the exercise of treaty rights in ceded lands within National Forests. Forgoing a legal battle, Tribal and Federal governmental bodies elected to negotiate a framework by which those rights would be acknowledged, interpreted, and treaty rights implemented.
In 1999, after six years of consultation, GLIFWC member Tribes ratified an MOU along with three entities of the Forest Service: the Forest Service's Eastern Region, the Law Enforcement and Investigation Branch, and the Northern Research Station. The MOU encompasses ceded lands in the Chequamegon-Nicolet National Forest in Wisconsin and the Ottawa, Hiawatha and Huron-Manistee National Forests in Michigan. The MOU articulates the Forest Service's recognition of Tribal treaty rights, Tribal sovereignty and the capacity to self-regulate Tribal resources and their use. It acknowledges the Forest Service's role in fulfilling the Federal Government's trust responsibilities and treaty obligations.

The MOU codifies a true government-to-government relationship and establishes a framework for collaboration based on consistent and timely communication and Tribal participation in National Forest decision-making. The MOU also outlines shared goals of protecting, managing and enhancing ecosystems that support natural and culturally relevant forest resources. It also provides a broad framework for a consensus-based consultation process where Tribes have input into decisions affecting the abundance, distribution of, and access to National Forest resources. Although Tribal governments who are signatory to the MOU and the

Forest Service do not always agree, it has been instrumental in providing a forum in which they can interact as co-managers in order to resolve disagreements and coordinate activities.

Further, the MOU lays out a set of mutually agreeable regulations for the exercise of treaty gathering rights and makes clear the fact that Tribes themselves have the right and responsibility to enforce regulations. The citation for the MOU, as amended in 2012, is at the bottom of this page.[24]

Creating a System for Tribal Engagement through the Tower Construction Notification System (TCNS) at the Federal Communications Commission

The Federal Communications Commission (FCC) developed the Tower Construction Notification System (TCNS) to ensure that all potentially interested Tribes have an opportunity to comment, through the Section 106 process, on the proposed construction of communications towers and antennas in connection with FCC-licensed services.

This system was created in response to national interest in building significant wireless communications infrastructure networks, including cellular towers. The FCC recognized that it needed a process that would ensure that this infrastructure could be built in a timely manner while preserving properties of historical, cultural, religious, and ecological significance to Tribes. The program was designed to ensure FCC permit applicants have a reliable, timely way to get Tribal input and address Tribal concerns as they construct networks and that Tribes have the ability to participate in assessing and mitigating any effects that construction may have. To start, the FCC asked each Tribe to identify its geographic area of interest. With this as the foundation, the FCC created TCNS, a voluntary notice and engagement system.

Through TCNS, as part of proposing an FCC-regulated communications infrastructure project, the project sponsor uses an FCC-created electronic platform to provide potentially affected Tribes with the location and project details of each project. To ensure confidentiality of site and project information, project proponents can view only their own projects, and Tribes can view only projects within their geographic areas of interest.

At the FCC, only the Federal Preservation Officer (FPO) and Deputy, along with a few staff members, may view all TCNS records and correspondence. TCNS supports two-way communication, but Tribes also have the option of responding outside TCNS, either to the project proponent or to the FCC.

The FCC does not consider the use of TCNS by project proponents as consultation with the Tribes. Rather, TCNS is a tool through which Tribes and the FCC can determine whether or not consultation is necessary. In most cases, Tribes do not request consultation, and no

[24] https://urldefense.proofpoint.com/v2/url?u=http-3A__www.fs.fed.us_spf_tribalrelations_documents_agreements_mou-5Famd2012wAppendixes.pdf&d=DgIFAg&c=y0h0omCe0jAUGr4gAQ02Fw&r=PQMViBrsxINUKzfj8Dxda7GxMHMewl2EiYDwYE6k_DM&m=V-_pwtBNcoaqmJ6j9wD_jhrESVHcN2MZ-xzDwElLSWY&s=X1UlyRLAH2tTHG0jM9M0dzgU3RlVBr5iSvZ7OQ4UCJg&e=

consultation is needed, either because the proposed project raises no concerns or because the Tribe and the project proponent are able to agree on measures that address any concerns (for example, moving the project location or monitoring during ground disturbance). The Tribe's historic preservation staff or Tribal Historic Preservation Officer may ask the FCC's FPO to become directly involved in any Section 106 review. The Tribe may also request formal consultation between FCC management and the Tribal leadership.

Every Tribe has self-identified in TCNS a geographic area of interest based on the Tribe's understanding of its own history and traditions. These areas of interest are typically designated by county or state. Project proponents enter into TCNS the locations of their proposed constructions and other relevant information. On a weekly basis, TCNS sends notices to the Tribes (and the relevant State Historic Preservation Officer) listing all new proposed projects within their geographic areas of interest. At the same time, TCNS provides the project proponents with a list of the Tribes notified for each of their projects. The TCNS weekly notices also inform the project proponents of information that some Tribes have indicated they require in order to complete their reviews through the Section 106 process.

Tribes are encouraged to inform the project proponent whether or not they have concerns about a proposed construction within thirty days of notice. After thirty days, if a project proponent believes that the Tribe has not responded in a timely fashion, it may, after demonstrating active efforts at contact, refer the matter to the FCC staff. The FCC will review the record and make its own effort to engage the Tribe. Depending on the circumstances, the FCC may authorize the project to continue. Project proponents may also refer on a similar basis cases where communication from the Tribe has ceased after an initial response. In general, under the FCC's process, most cases where a Tribe has entirely failed to respond can be resolved within approximately sixty days after submission to TCNS. Under the FCC's rules, unless every Tribe contacted has confirmed it has no further concerns about effects on historic properties, the proponent cannot construct without specific authorization from the FCC. More information on TCNS can be found here: http://wireless.fcc.gov/outreach/index.htm?job=tower_notification.

Model Cooperation among Tribes, the North Dakota State Department of Transportation and the Federal Highway Administration (FHWA) at the Department of Transportation

For the U.S. Highway 2 project in 2000-2001, Tribal elders in the North Dakota area and State DOT archaeologists worked together in the field to identify and avoid sensitive sites, providing a model to address Tribal concerns in future highway projects, and in 2008, North Dakota Department of Transportation employed Tribal monitors in the field with archaeologists. The subsequent NW Williston Bypass project expanded the inclusion of Tribal monitors and employed fifteen Tribal members to identify stone features, delineate site boundaries, plot GPS points, prepare feature drawings, and other tasks.

As part of this process, between 2004 and 2006 a Tribal Consultation Committee (TCC) was developed, initially comprised of eight Tribes (now expanded to 19). The Tribes have drafted a Programmatic Agreement providing efficiencies and opportunities for early Tribal engagement by bringing potential issues to the TCC in advance of the planning and development process for transportation projects, thereby avoiding problems before they are created. This project created a process to fully and efficiently resolve issues where Tribal heritage is

threatened by transportation project planning and development. More information can be found at: http://www.achp.gov/docs/Section106SuccessStory_TCC.pdf

Balancing protection of historic properties and energy development in the Nine Mile Canyon through the Bureau of Land Management (BLM) at the Department of Interior

In the early 2000s, energy exploration began in the Nine Mile Canyon area of Utah. Increasing industrial activity and diesel-fueled trucks caused increased erosion of an estimated 10,000 prehistoric rock art panels etched or painted on the walls of the 45-mile canyon. In 2005, the Bureau of Land Management (BLM) released a proposal for an 800-well natural gas development that would dramatically increase traffic and potentially transform some of the area into an industrial zone.

Consultation centered on protecting historic properties, especially the fragile rock art, and resulted in a 2010 Programmatic Agreement that created a blueprint for safeguarding historic properties while allowing energy development to proceed. The Section 106 process balanced protection of historic properties with energy development. The project provides an example of how industry and preservationists can be partner and underscores that consultation must engage all interested parties at the earliest stages of project planning. More information can be found at: http://www.achp.gov/docs/Section106SuccessStoryNineMilev4.pdf