

GUIDANCE FOR FEDERAL REGIONAL AND FIELD STAFF

BEST PRACTICES FOR IDENTIFYING AND PROTECTING TRIBAL TREATY RIGHTS, RESERVED RIGHTS, AND OTHER SIMILAR RIGHTS IN FEDERAL REGULATORY ACTIONS AND FEDERAL DECISION-MAKING

The Working Group established by the Memorandum of Understanding regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights (Treaty Rights MOU) has collected and reviewed agency consultation policies and prepared this summary of legal principles and best practices for integrating the consideration of treaty and reserved rights into agency consultation processes. The efforts of the Working Group have been directed at treaty and reserved rights, but these best practices may be applicable to Tribal rights recognized by other sources, including Tribal agreements with the United States, executive orders, statutes, regulations, or case law. This guide ties into other agency policies, including departmental and agency Tribal consultation policies, the Memorandum of Understanding regarding Interagency Coordination and Collaboration for the Protection of Indigenous Sacred Sites, the work of the Interagency Working Group on Indigenous Traditional Ecological Knowledge, the Presidential Memorandum on Uniform Standards for Tribal Consultation, and work done to incorporate Tribal co-management of federal lands, and is subject to modification.

Treaties are binding legal agreements between two or more sovereign nations and are, along with the U.S. Constitution and federal laws, the supreme law of the United States. Treaties with Tribal Nations may explicitly or implicitly secure rights to the Tribe and individual Tribal members, including lands, fishing and hunting rights, water rights, and goods and services such as food, education, and health care. Treaties are to be interpreted as a grant of rights from Tribes and a reservation of those rights not granted. Tribes possess rights and sovereign control not conveyed by the treaty or other federal law.

Fundamental Principles for Tribal Consultation Regarding Treaty, Reserved, or Other Similar Rights:

- Federal Tribal consultation policies should strive for uniformity, including using common definitions, processes, and time frames, for purposes of consistency, ease of Tribal use, and for promoting a whole-of-government approach.
- Tribes are sovereign nations with self-governance and self-determination rights.¹
- Tribes have a two-way Nation-to-Nation relationship with the United States.
- Tribal consultation may be initiated at the request of a Tribal government.
- Tribal treaties are substantive federal law and do not derive from other federal statutes.
- Treaties, like the U.S. Constitution and federal statutes, are the supreme law of the land.²

¹ This reference to Tribal self-determination is distinct from the right of peoples to self-determination in international law; it is consistent with the United States' existing recognition of, and relationship with, federally recognized Tribes as political entities that have inherent sovereign powers of self-governance. This statement also applies to all Tribes, not just those with self-determination contracts or self-governance compacts under the Indian Self-Determination and Education Assistance Act of 1979, Pub. L. 93-638, as amended.

² U.S. Const. art. VI, cl. 2.

- Tribal treaties are binding legal agreements between or among two or more sovereign nations.
- Tribal consultation should be meaningful. A meaningful consultation is, among other inclusive practices: carried out in a timely, efficient, and responsive manner; transparent and predictable; accessible, reasonable, flexible, and fair; founded in the principles of good faith and respectful of the sovereignty of Indian Tribes; and includes reasonable accommodation (e.g., changing of timelines, project parameters), where appropriate.
- The general trust relationship is between the United States (including all agencies of the federal government) and Indian Tribes, in which the government “has charged itself with moral obligations of the highest responsibility and trust.”³ The nature of the trust relationship is defined by federal law (i.e., treaties, statutes, executive orders, federal regulations) and can include particular duties or fiduciary obligations.
- Tribal consultation policies should incorporate a process for notifying, coordinating, and collaborating with other federal agencies if multiple agencies have a vested interest in an action or decision, especially when that federal action or decision may implicate multiple Tribal Nations and/or multiple Tribal treaties.
- Tribal consultation requires that information obtained from Tribes be given meaningful consideration and should strive for consensus or a mutually desired outcome. Tribal consultation policies should acknowledge that information received from Tribes will be given meaningful consideration.
- Tribal consultation should generally include both federal and Tribal officials with decision-making authorities regarding the proposed policy that has Tribal implications. The head of each agency should ensure that federal representatives with appropriate expertise and, to the extent practicable, decision-making authority regarding the proposed policy are present at the Nation-to-Nation consultation.
- The head of each agency should consider conducting the consultation in a manner that prioritizes participation of official Tribal government leaders. Tribal consultation policies should state that, if federal agencies receive information during consultation from a source other than a Tribal government official, the agencies should ascertain whether that source has appropriate Tribal authority to speak for the Tribal government. The agencies should do so by communicating directly with Tribal government officials.
- Agencies should develop mutually agreed upon consultation protocols with each individual Tribe by accommodating, where possible, Tribally enacted consultation laws, statutes, policies, or protocols. Employees of federal agencies and Tribal Nations can and should maintain open channels of communication and readily share information. This kind of less formal engagement is not formal consultation, nor does less formal engagement between a federal agency and Tribal Nation staff serve as a substitute for formal consultation and the Nation-to-Nation relationship. In conducting the consultation, agencies are required to respect and elevate Indigenous Knowledge (IK), including cultural norms and practices relevant to such consultations.

³ *Seminole Nation v. United States*, 316 U.S. 286 (1942).

- Tribal consultation policies should identify the department's or agency's process for notifying Tribes of how the Tribal input influenced the federal decision-making after the consultation has concluded and the federal decision or action has been made.
- All of these principles should be applied to the extent practicable and permitted by law.

Best Practices for Consultation When Treaty, Reserved, and Other Similar Rights May Be Implicated by Agency Action:

1. **Begin Early:** Consultation should begin early in project, policy, or other federal action planning. Federal agencies should consult with potentially affected Tribes before decisions on regulatory policies affecting Tribal interests (or other actions that trigger consultation under the agency's consultation policy) are made. Agency heads should ensure that agency staff undertake an analysis to determine whether consultation is required or appropriate as early as possible in their planning efforts, regardless of whether a Tribal government requests consultation. When a Tribal government requests consultation, the agency should conduct a similar analysis and respond to the Tribe within a reasonable time.

2. **Establish Protocols:** Federal agencies should develop consultation protocols ahead of time (including ensuring effective notice, establishing minimum consultation periods and timelines for written comments, ensuring appropriate access, and conducting agency follow-up) to formalize how consultation will occur.⁴ Agencies should inquire regarding Indigenous Knowledge (IK) and Tribally developed consultation policies/processes/protocols and be respectful of those protocols in seeking consultation. In conducting the consultation, agencies are required to respect and elevate IK, including cultural norms and practices relevant to such consultations.

3. **When to Consult:** If there is any question as to whether an agency policy will have Tribal implications, then consultation should be conducted. In consultation with potentially affected Indian Tribe(s), federal departments and agencies should assess whether Tribal treaty, reserved rights, or other similar rights are affected by the proposed action.

- Do treaties, reserved rights, or other similar rights exist that are implicated by proposed agency actions?
- What Tribal treaty rights, reserved rights, or other similar rights may exist in, or what Tribal treaty-protected resources rely upon, the area affected by the proposed action?
- How might Tribal treaty rights, reserved rights, or other similar rights potentially be affected by the proposed action?

⁴ See Advisory Council on Historic Preservation, *CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: THE HANDBOOK*, p. 15/33 (2021), available at: <https://www.achp.gov/sites/default/files/2021-06/ConsultationwithIndianTribesHandbook6-11-21Final.pdf>. See also United States Department of the Air Force, Interactions With Federally Recognized Tribes, Instruction 90-2002, at p. 19, available at: <https://www.denix.osd.mil/na/policy/dod-instructions/af-instruction-90-2002/Tab%20USAF%20Instruction%2090-2002%20Interactions%20with%20Federally%20Recognized%20Tribes%2024%20Aug%202020%20FINAL.pdf>.

4. **Identify the Appropriate Federal Decisionmaker:** Given the subject matter (treaty and/or reserved rights), each agency should ensure that federal representatives with appropriate expertise and, to the extent practicable, decision-making authority regarding the proposed policy are present during the consultation.

5. **Creating Effective Notice:** Consultation should be scheduled such that Tribes are provided timely, adequate notice, absent extenuating circumstances. Notice should, to the extent practicable, be sent at least 30 days in advance to allow participation by interested Tribe(s). Most Tribal comments recommended at least 60-day notice periods to allow for Tribal governmental actions to provide meaningful comments. Dear Tribal Leader Letters are often used to provide notice, in addition to publishing in the Federal Register and posting on agency websites.

The federal government should create and thereafter regularly maintain a single comprehensive list of Tribal governmental leadership who will receive electronic notification of consultation opportunities.

6. **Read-Ahead Materials with Notice:** Federal agencies should include with the consultation notice all pertinent information about the topic of the consultation, including an agenda, framing paper, and relevant legal or other documents (including identifying potentially relevant treaties) already collected or prepared in anticipation of the consultation or action. This could be a draft proposal, analysis, and initiatives. The materials should identify the agency's current understanding of what Tribal treaty right, reserved rights, or other similar rights may be implicated and invite a Tribal response to better inform agency decision-making.

7. **Access:** Federal agencies should provide consultation opportunities that are accessible and convenient to Tribal participants.

8. **Notifying Appropriate Tribal Participants:** Federal agencies should notify and invite all potentially affected Tribes to consult. To determine/identify Tribes that may have Tribal treaty rights, reserved rights, or other similar rights implicated by a proposed agency action, federal agencies should invite Tribes with historical or cultural connections to the project area to consult regardless of their current location. Note: Tribal traditional and historical lands may be located far from a Tribe's existing reservation. Off-reservation rights to hunt and fish may be specific to lands that are not treaty-ceded lands.

9. **Meaningfully Consider Information Received from Tribal Nations:** Information obtained from Tribes should be given meaningful consideration. This can happen only if Tribes are both properly informed and Tribal input is solicited early enough in the planning process that it may actually influence the decision to be made.

10. **Information from Non-Tribal Government Official:** When agencies receive information during consultation from a source other than a Tribal government official, an agency should ascertain whether that source has appropriate Tribal authority to speak for the Tribal government by communicating with Tribal government officials.

11. **Interagency Consultations:** Federal agencies should identify and notify all potentially relevant departments and agencies that may have an interest in the proposed action, decision, or regulation and coordinate their collaboration in the consultation and decision-making process.

12. **Treaty Research Pre-Consultation:** Agencies should seek to review every treaty into which a Tribe has entered when conducting research for consultation related to a Tribal treaty right, reserved right, or other similar right matter (rather than just the most recent treaty) to understand historical context and identify potential rights, resources, or impacted historical lands.

13. **List of Potentially Impacted Treaties:** Federal agencies should utilize an established Tribal treaty database to identify any treaties that may be affected by a proposed consultation. Potential databases include the Oklahoma State Tribal Treaty Database tool (<https://treaties.okstate.edu/>) or the National Archives Digital Tribal Treaty Database (<https://www.archives.gov/research/native-americans/treaties/catalog-links>).

14. **Indigenous Knowledge:** Consistent with the Indigenous Knowledge Guidance announced at the 2022 Tribal Nations Summit, federal agencies should consider opportunities to apply IK consistent with Tribal direction. Application of IK should follow dialogue between federal agencies and Tribes that identifies the proposed application of the IK, as well as the associated benefits and risks, to allow Tribes to decide whether to share IK. As part of this dialogue, federal agencies should inform Tribal representatives that certain federal laws (e.g., FOIA) may require disclosure of information provided by the Tribe. Federal agencies should take measures to preserve the confidentiality of any sensitive IK consistent with Tribal direction and the law.

15. **Decision-making and the Indians Canons of Construction:** Briefing materials prepared for the decisionmaker should include the Indians Canons of Construction and the Judicial branch's long-standing positions regarding Tribal treaty interpretation.

- a. Federal officials, departments, and agencies should endeavor to interpret Tribal treaty and reserved rights, in consultation with Indian Tribes, as they would have been understood by the Indian Tribes at the time of Tribal treaty signing.
- b. Federal officials, departments, and agencies should recognize that ambiguous Tribal treaty provisions are to be interpreted in the Indian Tribe's favor, in consultation with Indian Tribes.

16. **Considering Multiple Perspectives:** The existence, nature, or scope of an asserted Tribal right may not be clearly established or may be disputed by other Tribes, third parties, or others. In these instances, agencies should carefully consider information and views provided by Tribes and coordinate within their agency (and as appropriate, with other agencies with related interests and responsibilities that may be impacted by the decision) before addressing any such disputes in agency decision-making.

17. **Record of Consultation:** In accordance with the Presidential Memorandum on Uniform Standards for Consultation, for any consultation required under E.O. 13175, each agency must maintain a record of the consultation process that includes: a summary of Tribal input received;

an explanation of how Tribal input influenced or was incorporated into the agency action; and the reasoning for why Tribal suggestions were not incorporated into the agency action or why consensus could not be attained. Each agency should disclose to the affected Tribe(s) the outcome of the consultation and decisions made as a result of consultation in a timely manner. To the extent permitted by applicable law, the head of each agency should seek to ensure that information designated as sensitive by a Tribal government is not disclosed. For national and regional consultations, or if otherwise appropriate, the head of each agency should also consider publicly posting the record of consultation.

18. **Mapping Areas of Agency Operations:** Agencies should map the spaces in which they operate (i.e., in which they carry out actions, or permit, license, or assist actions), in consultation with Tribes, to help illustrate where agency actions may impact Tribal treaty rights, reserved rights, or similar rights. Such mapping may consider:

- Where are agency installations, offices, or other facilities?
- What physical territory does an agency administer or manage?
- In what areas does the agency license, permit, or fund actions?
- What Tribes may have cultural, ancestral, or historical connections to such spaces?
- What Tribes' natural or cultural resources may be implicated by agency actions?

19. **Training for Federal Staff:** Federal agency staff should be trained on: appropriate consultation protocols; Tribal treaty rights, reserved rights, and other similar rights; and working with Tribal governments. Agency regional and field staff should receive regular annual trainings on the treaties for the geographic areas in which they serve. Agencies should develop regional trainings, in consultation and coordination with the Tribes in the area in which they serve, relating to the applicable treaties of that service area.