Chapter 22
NAVIGATING CULTURAL RESOURCES CONSULTATION: COLLISION AVOIDANCE STRATEGIES FOR FEDERAL AGENCIES, ENERGY PROJECT PROPONENTS, AND TRIBES

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Synopsis

§ 22.01 Introduction*

President: What is this thing?
Truman: It's an asteroid, sir.
President: How big are we talking?
Scientist: Sir, our best estimate is 97.6 billion-
Truman: It's the size of Texas, Mr. President.
President: Dan, we didn't see this thing coming?
Truman: Well, our object collision budget's about a million dollars a year. That allows us to track about three percent of the sky, and begging your pardon, sir, but it's a big-ass sky.

—*Armageddon* (Touchstone Pictures 1998)

Tribal consultation in our federal system is a lot like the "object collision budget" referenced in *Armageddon*. Stacks of laws and policies "the size of Texas" govern and inform what "consultation" means and when it means it.

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Most federal, state, and project proponent budgets devote relatively small percentages of resources to tribal consultation. But the world of tribal consultation is a "big-ass sky," and monitoring only a tiny fraction of it could find you facing down a veritable global killer asteroid of a legal problem. In short, tribal consultation is unwieldy, the laws surrounding it are myriad, and the process can be highly varied and cumbersome, but it's big enough that government agencies and proponents should see it coming and take appropriate steps to meet their obligations.

Various provisions in federal law and Executive Orders require federal agencies to consult with or notify an Indian tribe where a project or action funded, licensed, or permitted by that agency may impact protected tribal assets or interests. This is true even though the action will occur outside of an Indian reservation or other tribal land. Tribal consultation and confidentiality requirements relevant to energy project development arise under federal law from multiple sources, including (1) statutes such as the National Historic Preservation Act (NHPA),[1] the Archaeological Resources Protection Act of 1979 (ARPA),[2] the National Environmental Policy Act of 1969 (NEPA),[3] and the Native American Graves Protection and Repatriation Act (NAGPRA);[4] (2) implementing regulations for these statutes; (3) Executive Orders; (4) other relevant regulations of the various federal agencies having licensing or permitting jurisdiction over an energy project; and (5) the relevant guidelines and procedures of those agencies. The applicable responsibilities depend on the federal law or Executive Order involved, the nature and location of the tribal assets or interests to be impacted, and the nature of the impact. Indian tribes' inherent authority presents an additional potential source of authority. Further complexity arises when federal agencies, project proponents, and tribes are not clear about the source or extent of obligations with respect to any particular project.

In addition to the procedures established by these federal laws, various federal agency regulations and policies may impose obligations on a project sponsor, including responsibilities to gather and submit to the agency information needed for preparation of the project's environmental impact statement (EIS). This may include responsibilities for gathering information and coordinating with Indian tribes as required under the NHPA. Notably, these requirements may conflict with other federal laws that do

[1] 16 U.S.C. §§ 470 to 470x-6.

[2] *Id.* §§ 470aa–470mm.

[3] 42 U.S.C. §§ 4321–4347.

[4] 25 U.S.C. §§ 3001–3013.

not permit non-federal parties to engage in government-to-government consultation with Indian tribes without express tribal consent. This results in significant need for project proponents to differentiate between their roles in tribal "coordination" versus agencies' roles in tribal "consultation."[5]

The opaque web created by varying federal laws and policies, especially when multiple federal agencies may be involved in permitting an individual energy project, counsels for proactive outreach to tribes by agencies and project proponents very early in project planning and flexibility from tribes as to how they respond to the outreach directed to them.

First, this chapter provides an overview of some of the relevant legal authorities giving rise to the tribal consultation landscape that is "the size of Texas." Second, this chapter discusses recent tribal consultation experiences in connection with El Paso Corporation's Ruby Pipeline Project, a 680-mile natural gas pipeline project that entered into service in 2011 and with respect to which various tribal mitigation and coordination obligations continue. Next, this chapter summarizes some recent litigation and the potential for those cases to more broadly influence what "consultation" means and when it means it.

§ 22.02 Overview of the Legal Requirements

The following laws, Executive Orders, and related authorities prescribe tribal consultation for federal and federally assisted projects. While numerous prior Rocky Mountain Mineral Law Foundation *Annual Institute* chapters have addressed some of these sources in great detail,[6] this chapter provides a general overview of some authorities that were significant in the Ruby Pipeline consultation context.

[1] NHPA

[a] Tribal Consultation Under Section 106 and Its Implementing Regulations

The most detailed tribal consultation responsibilities are provided in section 106 of the National Historic Preservation Act (NHPA)[7] and the implementing regulations of the Advisory Council on Historic Preservation

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[5] Confidentiality is a key component of any tribal coordination or consultation effort.

[6] *See, e.g.*, Walter E. Stern, "Cultural Resources Management in the United States: Tribal Rights, Roles, Consultation, and Other Interests (A Developer's Perspective)," 59 *Rocky Mt. Min. L. Inst.* 20A-1 (2013); Stan N. Harris, "State and Federal Traditional Cultural Properties: The Designation Process and Consequences for Resource Development," 57 *Rocky Mt. Min. L. Inst.* 4-1 (2011); Lynn H. Slade, "Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights, and Culture," 56 *Rocky Mt. Min. L. Inst.* 5A-1 (2010).

[7] 16 U.S.C. § 470f.

(ACHP).[8] These regulations require the lead agency for an energy project that requires federal authorization to identify all Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the project, and to consult with any tribe that in fact attaches such significance to one or more potentially affected historic properties.

Section 101(d)(6) of the NHPA[9] provides that properties of religious and cultural significance to an Indian tribe may be determined to be eligible for the National Register of Historic Places (National Register).[10] That section also provides that in connection with its section 106 duties, a federal agency must consult with any Indian tribe that attaches religious and cultural significance to any such historic property. Since 2000, the ACHP's regulations have placed special emphasis on consultation with Indian tribes in the section 106 process.

Courts have emphasized that an Indian tribe's rights to be consulted under section 101(d)(6), and otherwise to participate in the resolution of adverse effects under section 106, are triggered when the tribe identifies one or more historic properties (1) that are listed on or eligible for listing on the National Register; (2) that will be affected by the undertaking; and (3) to which the tribe attaches religious and cultural significance.[11]

Each federal agency involved in an undertaking[12] is individually responsible for its own compliance with section 106, including its own responsibilities for tribal consultation.[13] Any such participating federal agency may designate one lead federal agency, which in turn must designate an appropriate official from that agency to act on behalf of the lead agency and all others as the section 106 lead.[14]

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[8] 36 C.F.R. pt. 800.

[9] 16 U.S.C. § 470a(d)(6).

[10] A property is considered eligible when it meets specific criteria. *See* 36 C.F.R. § 60.4.

[11] *See, e.g.*, Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F. 3d 161, 168 (1st Cir. 2003) ("Where no historic property has been identified, the Tribe has no basis under the NHPA to demand particular actions by the [federal agency official].").

[12] Under the NHPA, an agency's approval action is called an "undertaking." All federal agencies with authority to permit or approve an undertaking, such as the U.S. Forest Service's authority to approve a mine plan of operations or the U.S. Army Corps of Engineers' authority to issue a section 404 permit, must comply with the NHPA. To streamline the process and to prevent duplication of efforts, if more than one federal agency is involved in the undertaking, that agency may designate a lead federal agency to act on its behalf and to discharge its section 106 responsibilities. *See* 36 C.F.R. § 800.2(a)(2).

[13] *See id.*

[14] *Id.*

Since 1992, Indian tribes have enjoyed a greater voice in cultural resources preservation, which has impacted agencies' ability to meet their section 106 obligations. In 1992, the NHPA was amended to allow Indian tribes to establish preservation programs and to operate under the law in a manner similar to that of states under the NHPA. This amendment also made clear that "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register," and were, therefore, subject to consideration under the section 106 process.[15]

But what all this process means, practically speaking, frequently remains an open question for tribes, project proponents, and federal officials seeking to discharge their section 106 obligations. This is because the NHPA is a procedural statute. The NHPA does not mandate certain outcomes; rather, it prescribes the steps that an agency must follow before approving a permit or a license that might result in adverse effects to cultural resources.[16]

[b] Lead Agency Requirements

The lead agency is required to make a reasonable and good faith effort to identify any Indian tribes that might attach religious and cultural significance to historic properties in the undertaking's area of potential effects (APE), and invite them to be consulting parties in the review.[17] Any identified tribe that requests in writing to be a consulting party[18] shall be one.[19]

The lead agency must also gather information from any identified tribe to assist in identifying properties, including those located off tribal lands, that may be (1) of religious and cultural significance to that tribe, and (2) eligible for the National Register.[20] Based on the information gathered,

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[15] 16 U.S.C. § 470a(d)(6)(A). *See also* 36 C.F.R. § 800.2(c)(2)(i)(A) (recognizing Tribal Historic Preservation Officers (THPO)).

[16] *See* Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd., 252 F.3d 246, 252 (3d Cir. 2001) ("The NHPA is a procedural statute designed to ensure that . . . the agency takes into account any adverse effects on historical places from actions concerning that property.").

[17] *See* 36 C.F.R. § 800.3(f)(2).

[18] One of the earliest requirements of the section 106 process is to identify and invite certain parties to participate in the section 106 consultation process. "Consultation" under the NHPA is "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." *Id.* § 800.16(f).

[19] *Id.* § 800.3(f)(2).

[20] *Id.* § 800.4(a)(4).

and in consultation with the State Historic Preservation Officer (SHPO) and any identified tribes, the lead agency shall make a reasonable and good faith effort to carry out appropriate efforts necessary to identify historic properties within the APE.[21]

The remainder of the section 106 process involves evaluating the National Register eligibility of all potentially affected properties, assessing the nature of effects to those properties and, if the effects are determined to be adverse, consulting to develop appropriate measures to avoid, mitigate, or otherwise resolve those adverse effects.[22] The ACHP's rules provide that each of these three stages should be accomplished in consultation with any Indian tribe identified as attaching religious and cultural significance to the relevant historic property. Note that although the identified tribe is entitled to express its views and concerns, the ultimate authority for all decisions and findings rests with the lead agency.[23]

The section 106 process must be completed by the agency official "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license."[24]

[c] The Role of the Applicant

The ACHP rules provide that applicants for federal permits, licenses, and other approvals are entitled to participate in the section 106 review as a consulting party.[25] In addition, the lead agency official "may authorize an applicant . . . to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official."[26] The agency official must notify the relevant SHPO/Tribal Historic Preservation Officer (THPO) when an applicant is so authorized.[27]

The ACHP's section 106 rules and official guidance imply that applicants may assist the lead agency in fulfilling its duties of tribal consultation. The rules expressly provide that "[f]ederal agencies that provide authorizations to applicants [to initiate consultation] remain responsible for their

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[21] *Id.* § 800.4(b).

[22] *Id.* §§ 800.5–.6.

[23] *See generally id.* § 800.6.

[24] *Id.* § 800.1(c) (quoting 16 U.S.C. § 470f).

[25] *Id.* § 800.2(c)(4).

[26] *Id.*

[27] *Id.*

government-to-government relationships with Indian tribes."[28] The ACHP has also pointed out that neither section 106 nor the ACHP rules impose on applicants or their contractors a duty to develop information or analysis for section 106 compliance, and if the lead agency has that authority and decides to exercise it, the legal basis derives from the authorities of that agency and not from the ACHP rules.[29]

The ability of an applicant or an applicant's consultant to communicate officially with an Indian tribe in the section 106 process depends on the agreement of that tribe that the applicant may do so. The ACHP explains in its handbook for tribal consultation (ACHP Handbook)[30] the differences in the roles of the lead agency and the applicant in this way:

> [F]ederal agencies cannot unilaterally delegate their responsibilities to conduct government-to-government consultation with Indian tribes to non-federal entities. It is important to remember that Indian tribes are sovereign nations and that their relationship with the federal agency exists on a government-to-government basis. For that reason, some Indian tribes may be unwilling to consult with non-federal entities associated with a particular undertaking. Such non-federal entities include applicants for federal permits or assistance (which would include any contractors hired by the applicant), as well as contractors who are not government employees but are hired to perform historic preservation duties for a federal agency. In such cases, the wishes of the tribe for government-to-government consultation must be respected, and the agency must carry out tribal consultation for the undertaking.
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> However, *if an Indian tribe agrees in advance*, the agency may rely, where appropriate, on an applicant (or the applicant's contractor), or the agency's own historic preservation contractor to carry out day-to-day, project-specific tribal consultation. In order to ensure that the tribe, the agency, and the applicant or contractor all fully understand that the tribe may request the federal agency to step in and assume consultation duties if problems arise, the agency should obtain the tribe's concurrence with the agency's delegation in writing.
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> . . . . The government-to-government relationship requires that the federal agency is ultimately responsible for tribal consultation.[31]

The ACHP Handbook was developed as a reference for federal agency staff responsible for compliance with section 106. Though not binding, several federal agencies use it as a tool to ensure that their consultation efforts are sufficient under the NHPA and in the eyes of the ACHP, which is the body that issues the NHPA-implementing regulations and comments on the quality of an agency's consultation efforts.

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[28] *Id.*

[29] *See* "Fees in the Section 106 Review Process," http://www.achp.gov/regs-fees.html.

[30] ACHP, "Consultation with Indian Tribes in the Section 106 Review Process: A Handbook" (Nov. 2008) (ACHP Handbook).

[31] *Id.* at 16–17 (footnote omitted).

The ACHP Handbook mentions federal agencies' obligation to keep and manage a detailed record of "all efforts to initiate consultation with . . . Indian tribe[s] . . . as well as documenting the consultation process once it has begun."[32] Agencies should keep notes of telephone logs, emails, and correspondence, as well as the content of consultation meetings, site visits, and phone calls with dates and names of the participants. The ACHP Handbook has a helpful question-and-answer component in which it addresses issues that frequently arise during consultation; this section also interprets some of the ACHP's regulations.

Lastly, it should be noted that pursuant to section 110 of the NHPA,[33] federal agencies may have promulgated their own regulations to identify cultural resources at an early stage before a project is commenced. Project proponents should always check to see if an agency has promulgated additional rules to which a particular project must adhere. To illustrate, under the Federal Energy Regulatory Commission (FERC) regulations developed under its authority under the Natural Gas Act,[34] an applicant seeking to construct, operate, or abandon a natural gas pipeline must submit an environmental report that includes a portion on cultural resources.[35] Specifically, the report must contain documentation of the applicant's initial cultural resources consultations with Native Americans and other listed persons; overview and survey reports; an evaluation report; a treatment plan; and written comments from the SHPO and land management agency, or, if appropriate, the THPO.[36]

[2] NEPA

Federal agencies are encouraged to coordinate compliance with section 106 and the National Environmental Policy Act of 1969 (NEPA).[37]

> Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major federal action significantly affecting the quality of the human

[32] *Id.* at 11.

[33] 16 U.S.C. § 470h-2.

[34] 15 U.S.C. §§ 717–717w.

[35] *See generally* 18 C.F.R. § 380.12.

[36] *Id.* § 380.12(f)(1).

[37] 42 U.S.C. §§ 4321–4347.

> environment," and therefore requires preparation of an [EIS] under NEPA, should include consideration of the undertaking's likely effects on historic properties.[38]

While NEPA itself does not mention Indian tribes, the implementing regulations promulgated by the Council on Environmental Quality (CEQ) "do require [federal] agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of . . . [the] EIS."[39] Additionally, CEQ issued a memorandum to tribal leaders encouraging tribes to participate in NEPA reviews as cooperating agencies,[40] and the Bureau of Land Management (BLM) issued an Instruction Memorandum directing that NEPA and NHPA activities be streamlined.[41]

[3] ARPA

Intentional excavation on public lands or Indian lands of archaeological resources more than 100 years old is unlawful without a permit issued by the federal land manager under the terms of the Archaeological Resources Protection Act of 1979 (ARPA).[42] The term "archaeological resource" is defined as "any material remains of past human life or activities which are of archaeological interest," as determined under ARPA's implementing regulations, and includes "graves, human skeletal materials, or any portion or piece of any of the foregoing items."[43]

The statute provides that if the permit "may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural

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[38] 36 C.F.R. § 800.8(a)(1). It is important to remember that compliance with the NHPA does not assure compliance with NEPA; nevertheless, at least one court has mentioned that "NHPA compliance will often be relevant to a determination [under NEPA] of whether a threshold finding of no significant impact on the historic environment was reasonable." Preservation Coal., Inc. v. Pierce, 667 F.2d 851, 859 (9th Cir. 1982). However, the requirements of NEPA must be read in conjunction with other historic preservation statutes, including NHPA.

[39] ACHP Handbook, *supra* note 30, at 4. *See* 40 C.F.R. pts. 1500–1518 (CEQ implementing regulations).

[40] *See* Memorandum for Tribal Leaders, "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act" (Feb. 4, 2002).

[41] *See* BLM, Instruction Memorandum No. 2012-108, "Coordinating National Historic Preservation Act and National Environmental Policy Act Compliance" (Apr. 27, 2012) (expired Sept. 30, 2013) (IM 2012-108).

[42] 16 U.S.C. §§ 470aa–470mm.

[43] *Id.* § 470bb(1).

importance."[44] Neither ARPA nor its implementing regulations, however, require consultation with any Indian tribe in connection with the issuance of an ARPA permit, but ARPA's notice requirements are often interpreted as connected to broader consultation requirements.

[4] NAGPRA

As stated in the *BLM Manual*, the Native American Graves Protection and Repatriation Act (NAGPRA)[45] "establishes that lineal descendants, tribes, and Native Hawaiian organizations have rights of ownership to 'cultural items' (i.e., human remains, funerary objects, sacred objects, and objects of cultural patrimony, as defined in the Act), taken from Federal lands and Indian lands after the date of enactment."[46] The purpose of NAGPRA is to protect "cultural items" excavated or discovered on federal or tribal lands.[47] NAGPRA allows the intentional excavation of cultural items from federal or tribal lands if four requirements are met: (1) the objects must be excavated or removed under the requirements of ARPA; (2) the cultural items may only be excavated after consultation with, or in the case of tribal lands, with the consent of the appropriate (if any) Indian tribe or Native Hawaiian organization; (3) the ownership and right of control of the disposition of the cultural items must be in accordance with NAGPRA; and (4) proof of consultation or consent must be shown.[48]

Under the regulations governing intentional excavations,

> [t]he Federal agency official must take reasonable steps to determine whether a planned activity may result in the excavation of [cultural items] from Federal lands. Prior to issuing any approvals or permits for activities, the Federal agency official must notify in writing the Indian tribes or Native Hawaiian organizations that are likely to be culturally affiliated with any [cultural items] that may be excavated.[49]

Following consultation, the agency official must complete a written plan of action and execute the actions therein.[50]

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[44] *Id.* § 470cc(c). The term "religious or cultural site" is not defined by ARPA or its implementing regulations.

[45] 25 U.S.C. §§ 3001–3013.

[46] "Tribal Consultation Under Cultural Resource Authorities," *BLM Manual* § 8120.03(D) (Rel. 8-74 Dec. 3, 2004).

[47] *See* 25 U.S.C. § 3002; 43 C.F.R. § 10.1.

[48] 25 U.S.C. § 3002(c); 43 C.F.R. § 10.3(b).

[49] 43 C.F.R. § 10.3(c)(1).

[50] *Id.* § 10.3(c)(2).

Additionally, "[i]f the planned activity is also subject to review under section 106 of [NHPA], the Federal agency official should coordinate consultation and any subsequent agreement for compliance conducted under [NHPA] with the requirements of [43 C.F.R. §§ 10.3(c)(2) and 10.5]."[51] NAGPRA also covers inadvertent discoveries that occur once earth-disturbing activities begin.[52] Whether excavation of cultural items occurs intentionally or an inadvertent discovery of cultural items occurs on federal or tribal land, consultation must be conducted according to NAGPRA regulations.

[5] AIRFA

Section 1 of the American Indian Religious Freedom Act (AIRFA)[53] is a statement of policy regarding the rights of American Indians to believe, express, and exercise their traditional religions. It is a specific expression of First Amendment guarantees of religious freedom. It has not been implemented by regulation, and it does not require any consultation with any Indian tribe by any federal agency. However, Indian tribes frequently rely upon it as a source of federal authority recognizing and protecting their rights to engage in traditional practices in sacred spaces that may be outside tribal lands.

Tribal claims related to burdens placed on religion have generally met unfavorable litigation outcomes.[54] Moreover, religious significance has been expressly rejected by the ACHP as relevant to the section 106 analysis required of federal agencies: "Properties of religious and cultural significance to Tribes must meet the National Register criteria in order to be considered 'historic' and subject to section 106 consideration. The fact that a Tribe attaches religious and cultural significance to them does not make them 'historic' . . . ."[55] Nonetheless, the policy statements of AIRFA

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[51] *Id.* § 10.3(c)(3) (internal citation omitted).

[52] 25 U.S.C. § 3002(d); 43 C.F.R. § 10.4.

[53] 42 U.S.C. § 1996.

[54] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449–53 (1988) (disturbance to public lands of religious significance to some persons does not substantially burden exercise of religion); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc) ("[A] government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden' . . . on the free exercise of religion."). For a more fulsome discussion of AIRFA's limitations and possibilities, see Kristen A. Carpenter, "Limiting Principles and Empowering Practices in American Indian Religious Freedoms," 45 *Conn. L. Rev.* 387 (2012).

[55] Protection of Historic Properties, 65 Fed. Reg. 77,698, 77,706 (Dec. 12, 2000) (codified at 36 C.F.R. pt. 800).

resonate very strongly throughout Indian country and tend to play prominently in consultation discussions.

[6] Presidential Pronouncements

A slew of presidential pronouncements over the past 20 years have signaled that the executive branch strongly values tribal consultation. The most relevant executive authorities are summarized herein, but the tribal perception created by the totality of these authorities is more important than any individual statement. These authorities are routinely cited as the source of substantive tribal rights in consultation meetings, despite the very specific disclaimers contained in each.

President Bill Clinton's Presidential Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments,"[56] directed the heads of departments and agencies (1) to operate within a government-to-government relationship with recognized tribes; (2) to consult openly and candidly with tribal governments prior to taking actions that affect them; (3) to assess the impact of federal government plans, projects, programs, and activities on tribal trust resources and to consider tribal government rights and concerns during their development; and (4) to take appropriate steps to remove procedural impediments to working with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.

Then on May 24, 1996, in Executive Order No. 13007,[57] President Clinton directed federal agencies to manage federal lands in a manner that accommodates Indian religious practitioners' access to and ceremonial use of Indian sacred sites, and that avoids adversely affecting the physical integrity of such sites, "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions."[58] This Order does not "create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person."[59]

Perhaps the most famous presidential pronouncement on consultation came on November 6, 2000, in Executive Order No. 13175.[60] In Executive

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[56] The *BLM Manual* states that this Memorandum was elevated to Executive Order strength by reference in Executive Order No. 13007. *See BLM Manual* § 8120.03(E), (F).

[57] Indian Sacred Sites, Exec. Order No. 13007, 61 Fed. Reg. 26,771 (May 24, 1996).

[58] *Id.* at 26,771.

[59] *Id.* at 26,772.

[60] Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

Order No. 13175, President Clinton expanded on his earlier efforts to put more flesh on the bones of the tribal consultation concept. The Order was not limited to cultural resources issues. Rather, it was a broad Order that directed creation of internal federal consultation policies to "ensure [the] meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."[61] The Order indicated this direction was a result of the United States' fundamental recognition of its *sui generis* relationships with tribes and need to ensure tribal concerns are considered in federal actions with a tribal nexus.[62]

At a White House summit with tribal leaders on November 5, 2009, President Barack Obama issued a memorandum that adopted Executive Order No. 13175 and reiterated President Clinton's direction to agencies to be mindful of the United States' unique relationship with tribes and to develop consultation policies.[63] President Obama's memorandum does not impose any particular consultation requirements. It too is entirely aspirational and contains a similar disclaimer warning against any legal effect of the memorandum, but it signaled—again—that consultation is important.[64]

President Obama's June 26, 2013, Executive Order No. 13647[65] established the White House Council on Native American Affairs (Council), the interagency body headed by the Secretary of the Interior, currently Sally Jewell. The Council consists of the heads of every Cabinet department and other federal agencies, including the CEQ and ACHP. The Council's goal is to coordinate Indian policy across the federal government. Among other things, the Council is tasked with "protecting tribal lands, environments, and natural resources, and promoting respect for tribal cultures."[66]

[7] Agency Regulations

Each federal agency that might be involved in an undertaking may have its own regulations, which may supplement departmental policies and

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[61] *Id.* at 67,250.

[62] *Id.* at 67,249.

[63] Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

[64] *See* Improving Performance of Federal Permitting and Review of Infrastructure Projects, Exec. Order No. 13604, 77 Fed. Reg. 18,887 (Mar. 22, 2012) (mandated its implementation consistent with Executive Order No. 13175 and President Obama's memorandum of November 5, 2009, thus elevating the Presidential Memorandum to Executive Order status).

[65] Establishing the White House Council on Native American Affairs, Exec. Order No. 13647, 78 Fed. Reg. 39,539 (June 26, 2013).

[66] *Id.* at 39,540.

regulations. In the Ruby Pipeline context, FERC's regulations were the most significant because FERC was the lead agency and its approach to cultural resources is often very different from the policies and approaches of other federal agencies.

FERC codified its obligations with regard to consultation with Indian tribes. On August 6, 2003, FERC issued a policy statement that was adopted as a regulation effective September 5, 2003.[67] The policy recognizes the unique relationship between the United States and Indian tribes and that, as an independent federal agency, FERC "has a trust responsibility to Indian tribes and this historic relationship requires it to adhere to certain fiduciary standards in its dealings with Indian tribes."[68] FERC also recognizes that consultation with Indian tribes "should involve direct contact between agencies and tribes and should recognize the status of the tribes as governmental sovereigns."[69]

This policy states that FERC "will endeavor to work with Indian tribes on a government-to-government basis, and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to [FERC's] trust responsibility" and various relevant laws, including the Natural Gas Act, section 106 of the NHPA, and FERC's environmental and decisional documents.[70]

FERC procedures rely heavily on the project sponsor (applicant) for the discharge of many of FERC's section 106 compliance obligations, including those involving tribal consultation. In this regard, FERC has adopted a regulation governing its compliance with the NHPA and the ACHP's rules.[71] This regulation expressly assigns to the project sponsor, as a non-federal party, the responsibility of assisting FERC in meeting its obligations under section 106 and the ACHP's rules by following FERC's procedures for preparing Resource Report 4 on cultural resources in connection with the pre-filing environmental procedures.[72]

The FERC regulations expressly give the project applicant a role in dealing with Indian tribes in furtherance of FERC's section 106 compliance

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[67] Policy Statement on Consultation with Indian Tribes in Commission Proceedings, 68 Fed. Reg. 46,452 (Aug. 6, 2003) (codified at 18 C.F.R. § 2.1c).

[68] 18 C.F.R. § 2.1c(b).

[69] *Id.* § 2.1c(a).

[70] *Id.* § 2.1c(c).

[71] *See id.* § 380.14.

[72] *Id.* § 380.14(a). *See id.* § 380.12(f).

obligations. The regulations state: "[t]he project sponsor will assist [FERC] in taking into account the views of interested parties, Native Americans, and tribal leaders."[73] "The project sponsor must consult with the SHPO(s) and THPO(s), if appropriate."[74] FERC guidelines expressly extend the project sponsor's role to include tribal consultation, stating that:

> The project sponsor or its consultant should also conduct independent research into which Indian tribes historically used the project area and request the comments of those tribes regardless of where the tribes currently reside. Consultation with Indian tribes should be conducted in a manner sensitive to the needs and concerns of the tribes.[75]

This approach is different than that of other federal agencies and can create difficulties when multiple federal agencies are working with the same tribes as part of the permitting of projects that require federal authorizations.

In the Ruby Pipeline context, there was additional complexity in the overlap of FERC and BLM responsibilities. FERC's regulations provide that its NHPA § 106 responsibilities apply equally to public and private lands, but that "if Federal or Tribal land is affected by a proposed project, the project sponsor shall adhere to any requirements for cultural resources studies of the applicable Federal land-managing agencies on Federal lands and any tribal requirements on Tribal lands."[76] The BLM has its own very different interpretation of its section 106 responsibilities and its own very different statements of policy.[77] And those protocols are not static; they evolve not infrequently.

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[73] *Id.* § 380.14(a)(1).

[74] *Id.* § 380.14(a)(3).

[75] FERC, "Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects," § IV.B (Dec. 2002).

[76] 18 C.F.R. § 380.14(a)(1), (2). The exact meaning of this provision is not clear. FERC's section 106 responsibilities apply to historic properties eligible for listing on the National Register, not cultural resources, which are simply a NEPA concept.

[77] For example, BLM utilizes the Instruction Memorandum convention to address coordinating NEPA and NHPA compliance. *See* IM 2012-108, *supra* note 41. The Department of the Interior has its own umbrella tribal consultation policy. *See* Secretarial Order No. 3317, "Department of the Interior Policy on Consultation with Indian Tribes" (Dec. 1, 2011). Relevant Interior Board of Land Appeals (IBLA) decisions may also affect consultation because the IBLA may adopt its own unique interpretation of issues. One illustration is that, unlike the federal courts, the IBLA has held that any third party that is injured by a federal authorization can challenge the adequacy of tribal consultation, even if it is not a tribe. *See* S. Utah Wilderness Alliance, 177 IBLA 89, GFS(O&G) 9(2009). This leaves the adequacy of tribal consultation subject to broader scrutiny and potential challenge when BLM is involved.

[8] United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[78] was adopted by the United Nations General Assembly on September 13, 2007. A General Assembly Declaration is not a legally binding instrument under international law, but it reflects the dynamic development of international legal norms. The United Nations describes UNDRIP as "a significant tool towards eliminating human rights violations against the over 370 million indigenous people worldwide and assisting them and States in combating discrimination and marginalization."[79] At the White House Tribal Nations Conference in December 2010, President Obama announced that the United States would lend its support to UNDRIP.[80] The statement was very significant because the United States was one of only four countries that voted against UNDRIP when the General Assembly adopted it in 2007, and the last of those four to have reversed its former opposition.

Relevant to tribal consultation and cultural resources protection, article 11 of UNDRIP provides: "Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites . . . ."[81] While not legally binding, article 11 provides another important policy statement for consideration by agencies, project proponents, and tribes.

§ 22.03 The Ruby Pipeline Experience[82]

In July 2011, El Paso Corporation's Ruby Pipeline Project (Project) entered into service following more than three years of planning and permitting. The Project is a 680-mile natural gas pipeline stretching from Wyoming to Oregon and delivering Rocky Mountain region gas to

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[78]G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

[79]UN Permanent Forum on Indigenous Issues, "Declaration of the Rights of Indigenous Peoples—Frequently Asked Questions," at 2, http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf.

[80]Press Release, The White House, "Remarks by the President at the White House Tribal Nations Conference" (Dec. 16, 2010).

[81]*See* UNDRIP art. 11(1).

[82]Editor's note: Beginning in 2008, and throughout the project permitting and litigation phases, the author of this chapter represented El Paso Corporation. Ruby Pipeline, LLC, is owned by an affiliate of El Paso Corporation.

the Pacific Northwest.[83] Early in the planning stages of the Project, Ruby Pipeline, LLC (Ruby) determined to make a special effort to reach out to, and partner with, all of the Indian tribes living near, or with an ancestral connection to, the lands of the Project—which meant coordination with more than 40 tribes. This outreach program was integrated into virtually every aspect of Project planning and coordinated with other parts of the Project's community outreach. Ruby pursued what could be considered to be among the most comprehensive and sustained corporate outreach program to Indian tribes ever undertaken by any U.S. energy company. In short, Ruby exemplified the "big-ass sky" of the consultation universe, and became the standard-bearer for the process required to successfully meet all of the consultation requirements. Indeed, the executive director of the Council of Energy Resource Tribes (CERT) stated, "El Paso Corporation . . . engaged in more and better Tribal outreach on the Ruby project than I have ever seen any energy company do in more than 30 years . . . ."[84]

In addition to participating in public outreach and scoping meetings convened by FERC with tribal representatives and stakeholders during the cultural resource and environmental review process, Ruby representatives made numerous in-person visits to Indian reservations within the Project area at the invitation of elected tribal council members or their representatives. Ruby engaged in significant outreach efforts to Indian tribes regarding cultural resources issues and other Project concerns, such as impacts to wildlife and subsistence lifestyles.

Ruby's tribal outreach efforts were many-fold, including coordination of ethnographic studies with agencies and tribes, partnership with CERT to provide outreach and information to more than 70 tribal leaders from tribes along the Project route, and extensive telephone, email, and fax communication with the Native American tribes who had traditional territory in the Project area or who had expressed concerns about the Project. Ruby conducted site visits with many tribes to examine locations of concern to tribes. Ruby also sent letters and emails to tribes in response to specific questions and concerns, and continually contacted tribes to solicit their feedback and cooperation with agencies in their consultation efforts.

Ruby and its consultants made a special effort to identify and stay in close contact with all of the federally recognized Indian tribes that might attach religious and cultural significance to historic properties, including traditional cultural properties (TCP), that might be affected by the Project.

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[83] Today in Energy, U.S. Energy Info. Admin., "Ruby natural gas pipeline begins service today" (July 28, 2011).

[84] Letter from A. David Lester, Exec. Dir., Council of Energy Res. Tribes, to Hon. Kimberly D. Bose, Sec'y, FERC (Aug. 4, 2009).

Even the summary catalog of those contacts encompasses many hundreds of pages.

Ruby and its consultants were involved in communicating with the Indian tribes about FERC's initiation of project review and consultation with those tribes. This effort began with introductory letters by Ruby's consultants a year before any formal filing process began. Ruby sent letters introducing the Project to dozens of tribes identified as potentially having interest in the project, and followed up these letters with phone calls to the tribes to confirm receipt and emphasize the invitation to these tribes from FERC and the other agencies to participate in the review of the Project. Ruby scheduled and conducted visits with those tribes that expressed interest.

As FERC's non-federal representative, and as requested by FERC, Ruby made a particular effort to make sure that the participating Indian tribes received the information necessary for them to be able to comment on the identification, evaluation of eligibility, and assessment of effects to historic properties to which they attach religious and cultural significance and that may be affected by the Project, and to express views on the resolution of adverse effects to the same.

The Ruby tribal outreach team included a full-time Native American Tribal Liaison with an extensive background in cultural resources protection, mitigation, and treatment; several distinguished Native American cultural resource professional consultants; and respected legal experts for Native American law and cultural resource and historic preservation issues. This team worked directly with Native American tribal members and their elected representatives from the inception of the Ruby Project to build relationships with the sovereign governments of Indian tribes along the route. The team was supported by the work of more than a dozen cultural resources technicians from various local tribes who assisted in cultural resource surveys, and more than 100 tribal monitors from many different tribes who assisted with construction efforts.

Ensuring that Native American cultural resource officers, THPOs, ethnographers, archaeologists, and tribal elders had the tools and resources needed to identify and protect resources in the field was a high priority for the Project. In mid-2009, Ruby began identifying and training Native American tribal cultural resource technicians (CRT) along the pipeline route. These CRTs then went into the field more than a year before the anticipated start of actual construction in order to ensure that potential cultural resources were properly recognized, protected, and respected. Besides working directly on Project crews, CRTs helped facilitate tribal council and elder and ethnographer visits to the pipeline route.

Ruby's archaeological and cultural resource protection team worked with tribal governments, as well as the BLM as the lead federal land-management agency, to develop a comprehensive and federally compliant training program for tribal cultural resource monitors. This monitoring program was the most extensive ever undertaken on an energy infrastructure development project, ensuring full compliance with applicable federal laws and regulations. This voluntary monitoring program cost millions of dollars to implement and was expansive, including contracts for monitoring with archaeology firms and directly with the Klamath Tribes, as well as contracts for the provision of overnight security services by the Ft. McDermitt Paiute-Shoshone Tribe during construction periods at gravesites very near the right-of-way. Tribal monitors played a pivotal role in keeping the Project moving with the BLM and FERC in various instances when scraps of bone—or in one case a single human tooth—were found during construction.

Project team members conducted extensive outreach to Native American communities along the proposed pipeline route. This included appearing at numerous public meetings in the affected states. It also meant making site visits to dozens of Indian reservations in six states within the Project area of interest at the invitation of elected tribal council members or their representatives.

[1] Partnership with the Council of Energy Resource Tribes

Ruby sought to provide tribal governments with important new tools and resources to help them engage more effectively in the federally required government-to-government consultation process. As part of this effort, Ruby partnered closely with CERT, the leading non-profit coalition representing 58 energy-producing Indian tribes throughout North America, which promotes partnerships between tribes and energy companies.[85] CERT's membership includes some of the tribes along the route, which supported the Project in their own right. At the direction of its member tribes, CERT strongly supported Ruby.[86]

Ruby and CERT co-sponsored an event entitled, "Bear Talk: An Energy Discussion for Tribes Along the Ruby Pipeline Route," which took place

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[85] *See* CERT, "About CERT," http://www.certredearth.com/aboutus-philosophyHistory.html. *See also* FERC, "Final Environmental Impact Statement on Ruby Pipeline Project," at 4-242 (Jan. 8, 2010) (Ruby Pipeline FEIS).

[86] While the partnership with CERT was helpful and important, it was not consultation. Rather, Ruby's work with CERT supported Ruby's coordination with tribes and provided tribes with tools to improve their consultation experiences with federal agencies.

in Reno, Nevada, July 20–21, 2009,[87] and was free of charge and open to leaders from all Indian tribes and nations within the Project area. This special workshop brought tribal leaders together, provided education on national energy policy and markets, presented detailed information on the Project and its benefits, and encouraged tribal leaders' participation in the formal government-to-government consultation process on the Project. More than 70 tribal leaders participated in the event, including many tribal chairmen.[88]

One of the key findings from the Bear Talk workshop was that Ruby should continue to place emphasis on Native American employment for the duration of the Project. As a direct result, Ruby and CERT launched a series of informational tribal workshops on employment beginning in November 2009 aimed at increasing Native American hiring, both in terms of actual construction jobs and as CRTs and tribal cultural resource monitors prior to and during construction.[89]

Nearly 600 Native American tribal members participated in Ruby Tribal Employment Workshops in six states: California, Idaho, Nevada, Oregon, Utah, and Wyoming from November 2009 through May 2010. Importantly, Ruby's construction contractors participated in these sessions along with local trade union representatives. These sessions were typically sponsored by Tribal Employment Rights Offices as well.

The workshops focused on the hiring process for Project-related construction and support jobs, including union trades and crafts such as welding and pipefitting, electrical, heavy equipment operating, driving, and laborer positions. Local union representatives were invited to explain the hiring process, rules, and contractual requirements. The workshops also addressed non-union positions such as food service, janitorial, security, administrative/clerical support, and tribal monitoring and cultural resources technician programs. These workshops were a unique opportunity to enhance Native Americans' acquisition of additional job skills and certifications in order to take greater advantage of these developments, and to increase capacity-building by tribal governments. The workshops were successful: for example, more than 70% of the workers employed at the Vya man-camp were Native Americans.

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[87] Ruby Pipeline FEIS, *supra* note 85, at 4-249.

[88] *Id.* "Bear Talk" built on similar sponsorship provided by El Paso Corporation for tribal leaders from impacted tribes to participate in the CLE International "Historic Preservation Compliance for Energy Projects" conference in Denver in February 2009.

[89] Ruby Pipeline FEIS, *supra* note 85, at 4-250.

[2] Tribal Concerns

Throughout the extensive and robust process of coordinating with Indian tribes about the Project, certain themes emerged from the tribes:

- Tribal representatives emphasized that informational meetings were not consultation and were adamant that they be listed not as participating in any official capacity, but rather, only as attendees of a meeting.
- Tribal representatives indicated their general desire to meet with FERC commissioners and other agency leads.
- Tribal representatives expressed dismay at what they perceived to be the BLM's and FERC's general state of disorganization. They also found district variance hard to grasp.
- Tribal representatives indicated that they believed both tribal monitors and ethnographic surveys were needed.
- Tribal representatives expressed concerns about likely human remains along the Project's route.
- Tribes were concerned about what they considered to be poor quality work by early Project contractors.
- Tribal representatives agreed that confidentiality was a paramount concern for them. They indicated that under no circumstances would they point to locations on a map or identify cultural sites in the public record. They said that they did not have any confidence in the confidentiality measures employed by the federal government and consequently, would need to find another way of conveying concerns and information. This is a concern based, in part, on high rates of agency staff turnover.
- The tribes expressed confusion concerning the NEPA process and what effects on the environment FERC had to consider before approving the Project and issuing a record of decision. Much of the confusion was due to lack of understanding of the NEPA and NHPA processes and how FERC would meet its obligations under both statutes.
- Tribes were concerned about the impacts of pipeline construction and maintenance on areas used for traditional hunting, gathering, and spiritual practices.

These "theme" concerns were reiterated in varying specificity through the tribes' draft environmental impact statement (DEIS) and EIS comments and in litigation.

[3] Agency Work

[a] FERC

FERC[90] began its formal review of the Project on January 27, 2009, when Ruby filed an application with FERC for authorization to construct the Project.[91]

As part of FERC's pre-filing process, on March 28, 2008, nearly a year prior to Ruby's application, FERC initiated government-to-government consultation with nearly 40 Indian tribes[92] with the issuance of a public notice.[93] FERC sent individual copies of that notice to tribes, inviting them to formally cooperate in the preparation of the EIS for the Project. Through its own research and outreach, as assisted by Ruby and supplemented by information from cooperating federal agencies, SHPOs, and Indian tribes themselves, FERC identified more than 40 tribes as possibly attaching religious and cultural significance to historic properties that may be affected by construction of the Project.

In April 2008, FERC and BLM sponsored six interagency meetings. FERC contacted several dozen federally recognized Indian tribes by email or fax prior to these meetings to inform them of the meeting times and locations and solicit their attendance. FERC also followed up the emails and faxes with telephone calls. Four tribes attended one or more of the meetings.[94]

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[90] FERC was designated as the lead agency for NHPA purposes.

[91] *See* Preliminary Determination on Non-Environmental Issues, *In re* Ruby Pipeline, L.L.C., 128 FERC ¶ 61,224 (2009) (No. CP09-54-000). *See also* Order Issuing Certificate and Granting in Part and Denying in Part Requests for Rehearing and Clarification, *In re* Ruby Pipeline, L.L.C., 131 FERC ¶ 61,007 (2010) (Nos. CP09-54-000, CP09-54-001, AD10-3-000).

[92] Ruby Pipeline FEIS, *supra* note 85, at 4-242. There is no magic number of tribes that need to be invited to consult; rather, federal agencies must make a good-faith effort to identify tribes claiming religious or cultural ties to the area. The ACHP Handbook provides tips on how to identify Indian tribes that must be invited to consult, including ethnographies, local histories, consulting university experts, contacting tribal organizations like the National Congress of American Indians, and Internet research. *See* ACHP Handbook, *supra* note 30, at 14–15.

[93] *See* Notice of Pre-Filing Environmental Review for the Ruby Pipeline Project, 73 Fed. Reg. 18,788 (Apr. 7, 2008).

[94] Ruby Pipeline FEIS, *supra* note 85, at 4-242.

On September 26, 2008, FERC issued a second public notice for the Project and again sent copies to each tribe.[95] In both the March and September notices, FERC invited the tribes to comment on the Project and to attend public scoping meetings.

FERC conducted 10 public scoping meetings in 2008, several of which were attended by tribal representatives. FERC sent copies of the DEIS to 209 tribal representatives and/or individual members of the tribes.[96] FERC also responded in writing to specific inquiries. In addition, FERC continued its dialogue with tribes by responding to tribal inquiries via telephone and email contacts and communications.

In fall 2008, FERC staff met with Nevada and northeastern California tribal members to discuss the Project, including potential impacts on cultural resources and on natural resources traditionally used by the tribes, and FERC's policies regarding government-to-government consultation.[97]

[b] BLM

BLM engaged in dozens of meetings with tribal representatives, particularly in 2010, when meetings were held at least weekly between various BLM field offices and the Summit Lake Paiute Tribe, the Ft. Bidwell Indian Community, and other tribes. In litigation, the Ft. Bidwell Indian Community and the Summit Lake Paiute Tribe did not so much criticize the amount or timing of BLM's efforts as direct their criticism at FERC, and BLM's reliance upon FERC, even though FERC was not before the Ninth Circuit. There are many administrative record cites in the Ninth Circuit briefing to BLM consultation efforts.

The contacts between BLM and the tribes were numerous. BLM's National Project Manager and officials from BLM's state and district offices in the four states crossed by the Project engaged in extensive government-to-government consultation with Indian tribes interested in the Project.

In January 2009, the BLM sent letters to 31 Indian tribes and four bands of the Te-Moak Tribe,[98] describing the project and the roles of the various agencies, particularly BLM's role and objectives in government-to-government consultation, and inviting the tribes to participate in consultation. The BLM also followed up with telephone calls to the tribes, and arranged and attended meetings with those tribes that requested them.

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[95] *See* Notice of Intent to Prepare an EIS and LRMP Amendment for the Proposed Ruby Pipeline Project, 73 Fed. Reg. 57,347 (Oct. 2, 2008).

[96] Ruby Pipeline FEIS, *supra* note 85, at 4-246.

[97] *Id.* at 4-242.

[98] *Id.* at 4-246.

Ruby and its cultural resources consultants made cultural resource presentations in conjunction with some of these meetings. General concerns expressed at the meetings reflected a lack of understanding as to which agency, FERC or BLM, was responsible for what environmental and cultural resources reviews.

In April 2009, the BLM Klamath Falls Resource Area (KFRA) coordinated a meeting between the Klamath Tribes and Ruby to discuss rerouting the pipeline to avoid impacts on the NHPA-eligible Antelope Creek Archaeological District located on BLM KFRA lands. The same month, at the Reno-Sparks Indian Colony's request, the BLM sent letters to 20 tribes, inviting them to a meeting in May 2009 to continue government-to-government consultation, provide additional information and updates, and answer questions. The Reno-Sparks Indian Colony assisted in coordinating the meeting in Reno.

In September 2009 BLM sent letters to the same 20 tribes, inviting them to attend another information meeting in Winnemucca in October 2009. At this meeting, the tribes voiced concerns regarding the collection of artifacts on BLM lands during pedestrian archaeological survey of the corridor. The tribes declined to hear BLM's presentation on the status of the Project, caucused, and presented the BLM with nine points to be addressed by the BLM Nevada State Office. On November 12, 2009, the Nevada State Office responded to all 20 tribes with a letter addressing the points.

Over the Project's permitting period, many letters, emails, meetings, and field visits were held or exchanged between BLM and Indian tribes. BLM held more than 60 individual meetings with tribal representatives before the commencement of construction, including more than 20 in 2010, occurring pursuant to NEPA and the NHPA. BLM met with representatives from each of the tribes that expressed interest or concerns about the Project.

[4] Results of Ruby's Extensive Tribal Outreach

It is through these consultations with interested Indian tribes that BLM (and FERC) identified the strongest concerns of these tribes regarding archaeological sites, sacred sites, TCPs, and other historic properties of religious and cultural importance to them. As a result of these consultations, and also through Ruby's coordination and discussions with these same tribes, Ruby was able to implement variations and major and micro re-routes for the pipeline. These changes in pipeline routes and design avoided adverse effects to the vast majority of the discrete historic properties and sites that are of greatest importance to Indian tribes and that otherwise would have been directly impacted, damaged, or destroyed by the Project.

[a] Resource Identification Efforts

Cultural resource literature reviews and pedestrian surveys took place in 2009 and 2010. About a dozen tribal CRTs were involved in the later pedestrian surveys. The inventory-survey reports for each of the four states along the pipeline route, together with multiple addenda reports and the Historic Property Treatment Plans (HPTP) for each of those states, were finalized and delivered to each interested Indian tribe for review and comment in spring 2010. As described more fully below, all Indian tribes that desired to do so participated in detailed ethnographic studies designed to allow them to identify to Ruby, BLM, and FERC any historic properties, including TCPs or sacred sites, that might be affected by the Project. Those studies were all completed and the results submitted to FERC and BLM in winter 2009–2010, with two exceptions coming in summer 2010. Consultation among FERC, BLM, Ruby, and the relevant affected tribes was ongoing until construction, and these consultations reached agreement regarding avoidance of the TCP north of Summit Lake in Nevada and mitigation in the nature of a large-scale nomination to the National Register of a massive multiple property thematic group of properties in and around Willow Valley in southern Oregon.

[b] Archaeology Costs

Ruby had a different lead archaeology contractor in each of its four states. These contractors were responsible for pre-construction survey work and treatment, as well as post-construction analysis. The total archaeology costs for the project were more than $40 million. That work continues.

[c] Ethnographic Studies

For Indian tribes that requested ethnographical reports and analysis (all tribes along the route were invited to participate in ethnographic studies in spring 2009, by letter from Ruby), Ruby voluntarily provided ongoing project support and full cost reimbursement to the ethnographers of their choice. This included studies for the Klamath Tribes; the Ft. Bidwell Indian Community; the Reno-Sparks Indian Colony; the Pyramid Lake Paiute Tribe; the Wells, Battle Mountain, and Elko Bands of the Te-Moak Tribe of Western Shoshone; and for the Shoshone-Paiute Tribes of the Duck Valley Reservation and the Ft. McDermitt Paiute-Shoshone Tribe. Beginning in March 2009, Ruby also provided full cost reimbursement in lieu of an ethnographic report to the Summit Lake Paiute Tribe, which requested such assistance but chose to undertake the ethnographical review itself without assistance from professional ethnographers.[99]

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[99] Ruby funded a study by the tribe's Acting Environmental Coordinator, the goal of which was "to identify cultural resources important to the tribe, including the locations of natural

The combined costs of the ethnographic studies were substantial, totaling more than one million dollars.

[d] Avoidance Efforts

In response to tribal comments, field visits, and guidance throughout the development of the Project, Ruby made a large number of adjustments to the pipeline route to avoid adverse effects to historic properties, TCPs, and sacred sites, and generally to accommodate cultural issues as much as reasonably possible. Early in the route selection process, Ruby avoided the proposed Rock Creek Archaeological District in northwest Nevada. Later changes to the pipeline route included multiple and major shifts in the route to avoid or minimize impacts to the Barrel Springs TCP; the proposed Antelope Creek Archaeological District, historic Bureau of Reclamation canals, and a conservation easement in southern Oregon; and a significant TCP and sacred site north of Summit Lake in Nevada.

[i] Barrel Springs TCP

During summer 2009 after the DEIS was released, the Fort Bidwell Tribe identified a TCP in the Barrel Springs area. Ruby reviewed potential routing options with the tribe and several agencies. When none of those options would completely avoid the TCP and other resource concerns would be created, Ruby made numerous shifts in the existing route to avoid specific artifact concerns, relocated a main line valve site to resolve visual issues, and offered extensive additional mitigation that the tribe ultimately declined in favor of pursuing litigation. As a result of Ruby's realignment efforts, all 600+ rock features surveyed within the area of potential effect (APE) were avoided. The cost of the additional archaeology work and realignment engineering needed to accomplish this avoidance was estimated at $10 million.

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resources with cultural significance, spiritual places, and burial sites." *Id.* at 4-239. The Coordinator conducted a series of information sessions/meetings, and in September 2009, the tribe presented its report in lieu of an ethnographic study. *See* Ron Johnny & Rachael Brown, Summit Lake Paiute Tribe, "Ruby Pipeline Report" (Sept. 16, 2009) (Report) (on file with author). The 10-page Report was devoid of any information related to ethnography or cultural resources within the Project area, and concluded that "[a]lthough the cultural importance of the area of the proposed Pipeline was confirmed . . . , permission to reveal exact locations for such resources was not given to the Council . . . unless the resources are actually threatened with destruction by Ruby." *Id.* at 1–2.

The Report does list several accomplishments that resulted from Ruby's funding of cost recovery, in addition to the informational meetings, including support for government-to-government consultation with federal agencies, additional informational meetings for non-Summit Lake Paiute Tribe members, review of the DEIS and other Project-related documents, improvements to tribal facilities for meetings related to the Project, and photography and phone equipment for the tribe's cultural resource monitors working with Ruby's subcontractors. *Id.* at 4–9.

[ii] Antelope Creek Archaeological District and the Village Site

In spring 2009, during the DEIS process, at the request of the BLM Klamath Falls Resource Area and the Klamath Tribe to avoid impacts to the BLM Antelope Creek Archaeological District (Antelope Creek District) (as well as to avoid Bureau of Reclamation historic canals and a private conservation easement), Ruby relocated the pipeline route four to five miles to the south for approximately 30 miles. This alternative became the Southern Langell Valley Route Alternative[100] analyzed in the DEIS and incorporated into Ruby's final route. In the avoidance of the Antelope Creek District, Ruby's alternative route near Willow Creek Road was found potentially to affect over 900 rock stack features in the APE. Ruby then met with the Oregon BLM and members of the Klamath Tribe multiple times in the field as well as in a two-day meeting that included the Oregon SHPO, the U.S. Forest Service, and the Bureau of Reclamation, to review the Southern Langell route and assess Project impacts on rock stacks. Ruby adjusted (e.g., narrowed the workspace, blocked out individual rock stacks, relocated the centerline from 10 to 500 feet) the Project in 30 to 40 locations in southern Oregon, in some locations two or three times, to avoid 900 individual rock stack features in the APE. The Project avoided all impacts to rock stacks in this area. The route adjustments added roughly 4,000 feet of pipeline for an additional cost of over $2 million.

Although the route realignments and other shifts in Project work space avoided all rock stack features, a significant village site was still in the path of construction. When the site was evaluated during the planning process for the Project, the significance of the village site was determined to be greater than originally expected. For this reason, Ruby examined and identified a route adjustment that completely avoided the site, but had direct effects on a minimal number of rock stack features. Ruby reached an agreement with the Klamath Tribes, completely outside the formal consultation process, to accommodate cultural ceremonies to be performed at each site so the Klamath Tribes could tolerate the destruction of the rock features impacted by this alternative route.

[iii] Northwest Nevada TCP

About six weeks before FERC was expected to issue its final order on whether the Project could go forward, the BLM identified a previously unknown TCP in the area north of Summit Lake Reservation in northwest Nevada. To further mitigate possible effects to this site, Ruby identified and committed to use a route around the area identified by the BLM and

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[100] Ruby Pipeline FEIS, *supra* note 85, at 3-51 to -54.

agreed to provide monitoring of the water quality and volume at the spring before and after construction.

[iv] Mitigation Agreements

Ruby reached confidential mitigation/cost recovery agreements with the Klamath Tribes, the Reno-Sparks Indian Colony, and the Ft. McDermitt Paiute-Shoshone Tribe. These agreements were not submitted to any agency and were completely confidential. The provisions varied, but in each, Ruby voluntarily undertook multi-year obligations to assist in the resolution of tribal concerns. These agreements were completely outside the formal consultation process, but once Ruby and the tribes had reached terms, it allowed for the formal consultation process to proceed.

§ 22.04 Recent Case Studies in Federal Treatment of Cultural Resources and Historic Preservation Issues

[1] *Quechan Tribe v. DOI*[101]

In *Quechan Tribe*, the U.S. District Court for the Southern District of California determined that consultation must be conducted in a meaningful way by an agency (no proxy) and that consultations with other tribes, agencies, or the public do not count as or act as a substitute for mandatory consultation with the affected tribe.[102] What is unique about the *Quechan Tribe* case is that the court moved significantly away from the prior "checkbox" formula for reviewing consultation efforts (e.g., asking whether the agency provided tribes adequate notice of opportunities to consult) and actually scrutinized the quality of consultation with an individual tribe. The crux of *Quechan Tribe* is straightforward: "The consultation requirement is not an empty formality . . . ."[103]

In that case, the Quechan Tribe filed a suit against the BLM, alleging that its decision to approve a solar energy project in California's Imperial Valley violated the NHPA, in part because BLM knew the area was replete with cultural resources and failed to consult with the tribe despite the tribe's repeated attempts to meet with BLM. The Quechan Tribe sent many letters to BLM asking for information on the project and the project's status, but BLM did not meet with the tribe and did not involve the tribe in the consultation process until the EIS was almost finalized. BLM tried to defend its actions by showing that it had sent several letters to the tribe providing notice of consultation on the project, but the court held that sending

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[101] 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

[102] *Id.* at 1111–12.

[103] *Id.* at 1108.

voluminous documents providing notice of upcoming public comment opportunities was not consultation.[104]

The court agreed with the tribe and found that, although the developer had spent millions of dollars preparing the project and faced difficulties obtaining investment and financing if the project did not progress in a timely manner, BLM failed to meet its tribal consultation obligations and had not evaluated the complete cultural and religious importance of the prehistoric sites that would be adversely affected by the project.[105]

Though *Quechan Tribe* is not binding outside southern California and it may be considered an outlying case in both its holding and the agency's unusual attitude toward tribal consultation, the holding in *Quechan Tribe* stands for several important propositions. Specifically, the *Quechan Tribe* court noted that (1) meetings with a tribe that include other tribes, agencies, or the public do not count for or act as a substitute for mandatory one-on-one consultation with a tribe; (2) tribal confidentiality concerns should guide the agency's approach to NHPA consultations; and (3) tribes are not interchangeable—they all have different concerns and input.

Plaintiffs are often quick to cite *Quechan Tribe* to argue that agencies have not complied with their tribal consultation obligations, but recent cases have narrowed *Quechan Tribe*'s application and distinguished the case based on its facts alone.[106]

Notwithstanding the way *Quechan Tribe* has been limited to its facts by subsequent courts, a potential tribal plaintiff might use the *Quechan Tribe* case to argue that a federal agency did not engage in government-to-government consultation and instead treated the tribes as one and the same by inviting all of them to group meetings. A tribe may also argue that meetings to discuss the memorandum of agreement (MOA), HPTP, and other issues were not consultation and were not part of the section 106 process because of the presence of other tribes, agencies or the project proponent—thus raising confidentiality issues and preventing individual tribes from voicing their specific concerns. Instead, these meetings might

[104] *Id.* at 1112–18.

[105] *Id.* at 1122.

[106] *See, e.g.*, Mont. Wilderness Ass'n v. Connell, 725 F.3d 988, 1010 (9th Cir. 2013) (no section 106 violation where BLM afforded SHPO opportunity to participate and SHPO chose not to do so); Wilderness Soc'y v. BLM, 526 F. App'x 790, 793 (9th Cir. 2013) (unpublished) ("This is not a case like *Quechan Tribe*, where a tribe entitled to consultation actively sought to consult with an agency and was not afforded the opportunity."); Quechan Tribe v. DOI, 927 F. Supp. 2d 921, 933 (S.D. Cal. 2013) ("In this case, the administrative record shows that the opposite occurred compared to the facts in *Quechan*," as BLM made numerous attempts to engage the Quechan Tribe in consultation, but the Tribe refused to cooperate or participate. (internal citation omitted)).

better be characterized by agencies not as consultation, but merely as meetings designed to coordinate the drafting of an MOA or programmatic agreement. Alternatively, a tribe might argue that a federal agency did not meet its consultation obligations because the agency treated such meetings as consultation meetings under section 106, and the tribes were not free to consult because the presence of others—specifically a project proponent—inhibited dialogue and exchange of confidential information with the federal agency.

A defendant agency or intervening defendant project proponent can raise several defenses to the *Quechan Tribe* line of arguments. First, one can argue that *Quechan Tribe* (or a similar case) is not applicable; rather, that case applies to a very specific fact pattern in which an agency ignored a tribe's repeated requests to participate in the section 106 process until tribal participation was an empty and meaningless exercise. That is not the case with respect to most post-*Quechan* agency endeavors. The opposite is true: *Quechan* got agencies' attention. Recent consultations have been far from empty exercises. Agencies are taking time to meet with the tribes to identify and understand their individual concerns. Second, it may be that tribes seeking to use *Quechan* as a sword misunderstand the consultation process and want to make it more than it is—process. At the end of the day, the NHPA remains a procedural statute, not a substantive one.

In some post-*Quechan Tribe* reviews, federal agencies have been reluctant to include project proponents at all in discussions with tribes. That is a mistake. While federal agencies can and should consult with impacted tribes on a one-on-one basis, there are numerous instances in which it makes sense to have all the parties at a table, including the project proponent who knows the most about the project and can actually answer substantive questions. And federal agencies have an obligation to consult with all consulting parties, as defined in the regulations, which include the project proponent. Consulting with an Indian tribe would not absolve a federal agency from consulting with others involved in the section 106 process, including the ACHP, SHPO, local governments, the project proponent, and other interested parties, nor would such consultation take the place of consultation with the other parties. Indeed, even the ACHP Handbook recognizes that, when it is time to develop and evaluate alternatives or modifications to the undertaking to avoid, minimize, or mitigate adverse effects, the agency should "consult[] with the SHPO, Indian tribes, and other consulting parties at this phase of the Section 106 process."[107]

Most important for all section 106 defenses, the NHPA is a procedural statute. That a federal agency may have reached a decision that is unpopular

[107] ACHP Handbook, *supra* note 30, at 23.

with the tribes is irrelevant. The focus is not on the result of the decision but on whether the agency followed its process. The lesson of *Quechan Tribe* is about the quality of the consultation efforts.

[2] *DOI v. FERC*[108]

On November 18, 2013, the U.S. Department of the Interior (DOI), with amicus support from the National Trust for Historic Preservation (National Trust), sued FERC in the U.S. Court of Appeals for the First Circuit.[109] As of this writing, the case is pending and briefing is continuing through spring 2014. The DOI has petitioned for review of FERC's orders amending the hydroelectric facility license for the Lowell Hydroelectric Project No. 2790 located on the Merrimack River in the City of Lowell in Middlesex County, Massachusetts. FERC exercises licensing authority over the Lowell Hydroelectric Project pursuant to the powers vested in it by the Federal Power Act.[110]

In its orders challenged by DOI, FERC approved an application by Boott Hydropower, Inc. and Eldred L. Field Hydroelectric Facility Trust to amend their license to operate the Lowell Hydroelectric Project. In the application, to reduce upstream flooding and to provide additional benefits, the licensees sought FERC's authorization to replace the Pawtucket Dam's wooden flashboard crest control system[111] with a pneumatic crest gate system. In the course of its review, FERC determined the pneumatic system, and the mitigation measures agreed by the licensees, would not adversely affect the resources of the Lowell National Historical Park (Park) or Lowell Historic Preservation District (Preservation District), within the boundaries of which the Lowell Hydroelectric Project is located.

As described above, section 106 requires a federal agency to "take into account the effect"[112] of its actions on the historic properties included in, or eligible for inclusion in, the National Register. Both the NHPA and the Act that established the Park and Preservation District in 1978 (Lowell

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[108] No. 13-2439 (1st Cir. filed Nov. 18, 2013).

[109] *See* Brief for Petitioner, DOI v. FERC, No. 13-2439 (1st Cir. Mar. 14, 2014), 2014 WL 1093879 (DOI Brief).

[110] 16 U.S.C. §§ 791a–825r. *See* Order Amending License, *In re* Boott Hydropower, Inc., 143 FERC ¶ 61,048 (Apr. 18, 2013) (Project No. 2790-055). *See also* 16 U.S.C. § 817(1) (non-federal hydroelectric projects must be licensed by FERC if, inter alia, they are located on a navigable water of the United States, as Lowell Hydroelectric Project is because the Merrimack River is a navigable waterway).

[111] The system consists of wooden boards supported by steel pins drilled into the dam's granite capstones. Flashboards are intended to increase the dam's capacity to hold water, which permits more generation than would otherwise be possible.

[112] 16 U.S.C. § 470f.

Act)[113] are implicated in FERC's orders amending the Lowell Hydroelectric Project license. FERC determined that the pneumatic gates proposed by the licensees were a reasonable approach for controlling water levels upstream of the project while protecting the project's environmental, recreational, historic, and scenic values. FERC also determined that structural changes to the dam would not compromise its historic value or association with early industrialists. FERC staff noted that the dam had been continually modified throughout the nineteenth century and had been more recently modified by modern structures, including the addition of a fish ladder at the west end of the same, and the construction of a four-lane highway adjacent to the dam.

The Keeper of the National Register nonetheless determined that Pawtucket Dam qualified as a historic property, and based on that determination FERC concluded that the installation of the pneumatic gate would adversely affect a historic property, as it would alter the dam's architecture.[114]

The agencies attempted to resolve this adverse effect by an MOA, including mitigation measures such as interpretive exhibits with a replica of the wooden flashboard system, aesthetic modifications to the crest gate system that would mimic the existing dam's appearance, and the design and construction of associated buildings in a manner compatible with the historic nature of the adjacent architecture. These and other mitigation efforts were discussed among federal agencies for more than a year without agreement. FERC issued its approval in 2013. In response to FERC's approval, the National Trust deemed Pawtucket Dam a "National Treasure," one of only 37 such sites in the country.

DOI's lawsuit in the First Circuit quickly followed, with DOI arguing that the Lowell Act "prohibits an adverse effect on the dam,"[115] and that "[m]itigation does not eliminate the adverse effect."[116] In contrast to the Lowell Act, the ACHP's regulations specifically provide for the potential resolution of adverse effects through mitigation measures.[117] DOI distinguishes this claim from the typical NHPA context, arguing that there are substantive preservation requirements in the Lowell Act and that "[t]he entire historic preservation enterprise [under the Lowell Act] would

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[113] *See* Act of June 5, 1978, Pub. L. No. 95-290, 92 Stat. 290.

[114] DOI Brief, *supra* note 109, at 17–18.

[115] *Id.* at 40.

[116] *Id.* at 39.

[117] *See* 36 C.F.R. § 800.6(a), (b).

crumble if adverse effects could be avoided simply by documenting what used to be there."[118]

This case presents one federal agency suing another, with amicus participation by a third party chartered by Congress, all proceeding in many hundreds of pages of briefing before a federal appellate court. How can this be happening?

One reason is that federal agencies simply cannot agree as to what the "big-ass sky" of federal historic preservation laws means, and how those laws should interact with other national priorities, such as energy production. Nor can they agree about which federal decision makers should get to weigh those competing interests and decide, for the United States, which course to chart. The result is administrative paralysis and multiple federal actors arguing with each other in federal court.

But more important is the sea change in policy thinking that it appears to represent. Even under the cover of the alleged specificity of the Lowell Act, in this case DOI seems to have stepped away from its own long-standing policy positions and moved toward elevating historic preservation values above others.[119] Watching how this culture shift affects other areas of DOI's responsibility will be important for all project proponents. The case is also important because the amici invite the First Circuit to elevate DOI's views on "conflicting interpretations and applications of a [historic preservation] statute or its implementing tools" even where DOI is not the lead agency or the agency vested with authority by Congress to make the decision.[120]

§ 22.05 Conclusion

There are a lot of layers of complexity in tribal consultation matters, in terms of statutes, agency policies, tribal understandings, and project proponent goals and commitments. Out of that, one thing is clear: successful treatment of cultural resources issues for energy projects requires an abundance of patience and hard work! Don't be caught in the *Armageddon* conundrum of knowing there is a "big-ass sky" of consultation obligations and pitfalls, but only being ready for a tiny fraction of it. Take the time to understand the obligations up front, make consultation a significant part of your planning and budget, and always be ready to listen.

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[118] DOI Brief, *supra* note 109, at 40.

[119] *See* Secretarial Order No. 3330 (Oct. 31, 2013) (directing consideration of many values in permitting energy projects).

[120] Brief of the National Trust in Support of Petitioner at 25–26, DOI v. FERC, No. 13-2439 (1st Cir. Apr. 4, 2014), 2014 WL 1512734.