

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 has 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, 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 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 healthcare. Treaties are to be interpreted as a grant of rights from Tribes, and a reservation of those rights not granted; thus, Tribes possess proprietary rights and sovereign control not conveyed by the treaty or other federal law.

Principles for Tribal Consultation Policies:

- Tribes are sovereign nations with self-governance and self-determination rights.
- Tribes have a government-to-government relationship with the United States.
- Treaties are substantive federal law of equal importance to other federal laws and obligations.
- There is a general trust relationship 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. The nature of the trust relationship is defined by federal law (i.e., treaties, statutes, federal regulations) and can include particular duties or fiduciary obligations.
- Treaties, statutes, and regulations may, if they establish specific fiduciary duties, create a federal trust responsibility to protect treaty rights.
- Under the “reserved rights doctrine,” rights not addressed by Indian treaty provisions are presumptively reserved. Rights expressly articulated in Indian treaties are reservations of inherent governmental rights of Indian Tribes and individual rights of individual Indians.

- A meaningful consultation is one which is, among other inclusive practices and to the extent practical under the circumstances, 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), when appropriate and to the extent permitted by Federal law.
- The Tribal consultation should identify for the Tribe the means of dispute resolution regarding Tribal complaints about the consultation process, where treaty or reserved rights are implicated by the agency action.
- The U.S. Supreme Court has long applied “canons” or rules of interpretation for Indian treaties. These include 1) treaty language must be construed as the Indians would have understood it at the time of treaty negotiations, 2) doubtful or ambiguous expressions in a treaty should generally be resolved in favor of the Tribes, and 3) treaty provisions should be interpreted in light of the surrounding circumstances and history. Furthermore, Congress must clearly express any intent to abrogate Indian treaty rights.

Best Practices for Advance Work to Identify Treaty, Reserved and Other Similar Rights:

- Federal agency staff should be trained on appropriate consultation protocols; treaty rights, reserved rights and other similar rights; and working with Tribal governments
- Agencies should map the spaces or areas where they operate (e.g., where they carry out rulemakings, actions, or permit, license, or financially assistance actions). As a starting point, consider asking these questions:
 - Where are agency installations, offices, or other facilities? What physical territory does an agency administer or manage its operations?
 - In what areas does the agency license, permit, or fund actions?
- Agencies should identify Tribal historical and cultural connections to spaces or areas where they operate to the extent practicable.
 - What Tribes may have cultural, ancestral, or historical connections to such spaces?
 - Are there relocated Tribes that may have a connection to their ancestral homelands?
- Where agency actions may implicate treaty, reserved, or other similar rights, agencies should compile a list of potential treaties implicated by agency action sorted by geographical location.
 - Consider utilizing the Oklahoma State Tribal Treaty Database tool (<http://treaties.okstate.edu>) or other reliable sources to provide relevant background on treaty language.
 - Ensure agency representatives have performed the necessary background research into treaties applicable to the potential agency action.

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

- Ask these three threshold questions:

- Do treaties, reserved rights, or other similar rights exist that are implicated by proposed agency actions?
- What treaty rights, reserved rights, or other similar rights may exist in, or what treaty-protected resources rely upon, the area affected by the proposed action?
- How might treaty rights, reserved rights, or other similar rights potentially be affected by the proposed action?
- For purpose of determining/identifying Tribes that may have treaty rights, reserved rights, or other similar rights implicated by a proposed agency action, invite Tribal Leaders of Tribes with treaty, reserved, or other rights related to the project area, regardless of the Tribe's current location.
 - Consider that treaty-ceded lands may be located far from a Tribe's existing reservation.
- Identify the appropriate federal agency official or decisionmaker (e.g., those officials with delegated authority) to conduct consultation.
 - Ensure the appropriate federal agency official(s) or decisionmaker(s) are provided sufficient information concerning applicable treaties and/or reserved or other similar rights implicated by the agency proposed action.
- Schedule consultation to allow timely, adequate notice to the Tribe(s), absent extenuating circumstances. Notice should, to the extent practicable:
 - Be sent far enough in advance to allow participation by interested Tribe(s).
 - Be detailed enough to permit Tribal participants time to review the agency's proposed understanding of the treaty right, reserved rights, or other similar right that may be implicated and to allow time for the Indian Tribe to respond with information that may inform agency decision making.
 - Provide consultation that will be accessible and convenient to Tribal participants.
- Information received by the federal government during Tribal consultation regarding treaty and reserved rights should be meaningfully considered in the decision-making or regulatory process, and agencies should be transparent about how the information was considered.
- 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 affected agencies that may have decision-making responsibilities for the proposed action) before addressing any such disputes in agency decision-making.
- It may be useful to develop consultation protocols ahead of time to recommend procedures for how consultation will occur.
 - Protocols may establish minimum consultation periods and a timeline for written comments depending on the subject matter of the consultation.
 - Protocols may establish a step-by-step process for notification, communication, access, and incorporation of feedback from Tribes into the agency decision-making process.