

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

**September 2022**

**WORKING GROUP OF THE MEMORANDUM OF UNDERSTANDING REGARDING  
INTERAGENCY COORDINATION AND COLLABORATION FOR THE  
PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS**

Advisory Council on Historic Preservation, U.S. Department of Agriculture, U.S. Department of  
Commerce, U.S. Department of Defense, U.S. Department of Education, U.S. Department of  
Energy, U.S. Department of Homeland Security, U.S. Department of Housing and Urban  
Development, U.S. Department of the Interior, U.S. Department of Justice, U.S. Department of  
Labor, U.S. Department of State, U.S. Department of Transportation, U.S. Department of  
Veterans Affairs, U.S. Environmental Protection Agency, U.S. Office of Personnel Management,  
White House Council on Environmental Quality

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This document contains legal principles, best practices, and aspirational and intentionally transformative policy goals for strengthening the protection of treaty and reserved rights, as well as strengthening Tribal consultation and outcomes, and the government-to-government relationship between the federal government and our Tribal government partners. Federal agencies retain the discretion to adopt approaches on a case-by-case basis that differ from these practices and policies where appropriate.

This document is subject to modification as agencies refine their practices and policies with respect to Tribal treaty rights and consultation. It is not intended to be a comprehensive statement of all considerations that should go into treaty rights or consultation practices or decisions. This

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<sup>1</sup> <https://www.doi.gov/sites/doi.gov/files/mou-interagency-coordination-and-collaboration-for-the-protection-of-indigenous-sacred-sites-11-16-2021.pdf>.

<sup>2</sup> <https://www.whitehouse.gov/ostp/news-updates/2021/11/15/white-house-commits-to-elevating-indigenous-knowledge-in-federal-policy-decisions>.

<sup>3</sup> <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf>.

Report is intended only to improve the internal management of the executive branch, and its provisions are not intended to be applied by a court.

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## I. Background

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000) directs federal agencies to “have an accountable process to ensure meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.”<sup>4</sup> The Executive Order further directs that “[o]n issues relating to Tribal self-government, Tribal trust resources, or Indian Tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.”<sup>5</sup> By Presidential Memorandum of January 26, 2021, President Biden reaffirmed the federal government’s commitment to Tribal consultation, and directed agencies to develop a plan of action for the implementation of the policies and directives in the Executive Order.<sup>6</sup>

In November 2021, the Administration announced that 17 federal agencies signed the *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty and Reserved Rights* (MOU).<sup>7</sup> In the MOU, the agencies committed to enhance efforts to integrate consideration of Tribal treaty and reserved rights early into agency decision-making and regulatory processes, and to strengthen consultation policies in this regard. The MOU calls for the formation of a Working Group made up of members of each of the signatory parties and a legal subgroup to enhance interagency collaboration and coordination and identify best practices for the protection of Tribal treaty and reserved rights. The Treaty and Reserved Rights Working Group (Working Group) was formed and began work in August 2021.

## II. Purpose of the Report

The Working Group has collected and reviewed agency Tribal consultation policies and has prepared this document to outline legal principles and best practices for integrating the consideration of Tribal treaty<sup>8</sup> and reserved rights into agency consultation processes. Although the efforts of the Working Group have been directed at Tribal treaty and reserved rights, the application of these best practices applies with equal force to other Tribal rights recognized by other sources of law, including Tribal agreements with the United States (U.S.), Executive orders, statutes, regulations, or case law.

This Report serves several functions. First, it provides information about the existing federal policy framework governing both Tribal consultation and federal decision-making on

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<sup>4</sup> Executive Order 13175, at Section 5(a), (Nov. 9, 2000), *available at*: <https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments>.

<sup>5</sup> *Id.* at Section 5(d).

<sup>6</sup> White House, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, (January 26, 2021), *available at*: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

<sup>7</sup> Advisory Council on Historic Preservation, et. al., *Memorandum Of Understanding Regarding Interagency Coordination And Collaboration For The Protection Of Tribal Treaty Rights And Reserved Rights*, (November 15, 2021), *available at*: <https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf>.

<sup>8</sup> References here and throughout this document, when referring to “treaty” or “treaties”, are referencing treaties between the United States and tribal nations, unless otherwise indicated.

treaty and reserved rights of the signatory parties to the MOU. Second, the final version of this Report will serve as a record of Tribal input on this topic, summarizing both written and oral comments received during the consultations, and written comment period. Third, to improve both consultation and treaty and reserved rights protection processes, this Report recommends that agencies undertake a thorough review of their consultation policies and practices and implement the recommendations and best practices contained herein. The Report provides an initial federal response to Tribal comments and recommendations made during tribal consultation on the MOU and these documents along with a set of principles that should inform future Tribal consultations that impact treaty and reserved rights. Finally, the Report highlights best practices gleaned from what Tribes identified as successful Tribal consultations and makes recommendations for further research and administrative, regulatory, or legislative action.

### III. Overview of Key Concepts and Legal Framework

Treaties are legally binding formal agreements between two or more sovereign nations and are, along with the Constitution and federal laws, the supreme law of the United States.<sup>9</sup> From 1778 to 1871, the United States' relations with American Indian tribes were defined and conducted largely through treaty-making. Through these treaties, Indian tribes ceded land and other natural and cultural resources to the United States, while retaining all rights not expressly granted. The United States Supreme Court has affirmed this principle of reserved rights, explaining that treaties are “not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.” *United States v. Winans*, 198 U.S. 371, 381 (1905).

The authority for ratification of the treaties was delineated in the U.S. Constitution's Treaty Clause in Article II, Section 2. In total, the U.S. ratified approximately 374 treaties with Native nations. These treaties were not always entered into entirely voluntarily by Tribal nations. The U.S. also sometimes failed to live up to agreements negotiated between Tribes and the federal government as the United State expanded westward across the North American continent.

Tribal treaties not only recognize Tribal sovereign authority, but also reserve to Indian Tribes and individuals all rights not expressly granted to the U.S. Treaties with Tribal nations may explicitly or implicitly secure rights to the Tribe, including lands, fishing and hunting rights, water rights, and goods and services such as food, education, and healthcare. Tribal treaties are to be interpreted as a grant of rights from Tribes, and a reservation of those rights not granted; thus, Tribes possess proprietary and use rights and sovereign control not conveyed away by the Tribal treaty or other federal law. After 1871, other forms of federal government decision-making were utilized by the various branches of government to recognize Tribal rights, including, but not limited to: Executive orders; military decrees; federal legislation; and judicial decisions.

Through Tribal treaties and other means, Tribes exchanged some of their sovereign powers and lands for the federal government's acknowledgement and assumption of a special duty of protection. *See, e.g., Worcester v. Georgia*, 31 U.S. 515, 552, 555 (1832). Many Tribal treaties include stipulations that the Tribe would be “under the protection of the United States,”

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<sup>9</sup> An international organization may also be party to treaty.

or similar language. *See, e.g.*, Treaty with the Cherokee, July 2, 1791, Art II, 7 Stat. 39; Treaty with the Navaho, Sept. 9, 1849, Art. I, 9 Stat. 974. The Supreme Court has repeatedly recognized the federal government’s duty of protection and a general trust relationship with Tribes. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-74 (2011).

More recently, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has influenced federal policy towards Tribal nations.<sup>10</sup> The UNDRIP is a nonbinding document that discusses both the human rights of indigenous individuals and the collective rights of indigenous peoples.

The Memorandum of Understanding on Treaty and Reserved Rights references the UNDRIP. Among the relevant provisions of the UNDRIP is Article 37:

“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”<sup>11</sup>

The U.S. voted against the UNDRIP when it was adopted in 2007, but in 2010, announced its support for the UNDRIP, noting that “[f]or the United States, the Declaration’s concept of self-determination is consistent with the United States’ existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance.”<sup>12</sup> The United States supports the Declaration, which – while not legally binding or a statement of current international law – has both moral and political force.

The statement of support also explicitly recognized the importance of consulting with Tribal leaders before decisions or actions are undertaken and expressed an intention to consult and cooperate in good faith with federally recognized Tribes (and, as applicable, Native Hawaiians) in accordance with federal law and executive directives.<sup>13</sup>

The Executive Branch has expressly stated its policy of consulting with Tribal nations on policies with Tribal implications via Executive Order 13175, *Consultation and Coordination*

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<sup>10</sup> United Nations General Assembly, Declaration on the Rights of Indigenous Peoples, (October 2, 2007), available at [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf); *see also* United States Department of State, “U.S. Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples,” reprinted in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 262 *et seq* (Elizabeth R. Wilcox ed., 2010) (“U.S. Announcement of Support”), available at <https://2009-2017.state.gov/documents/organization/154782.pdf>.

<sup>11</sup> UNDRIP at 25-26. Also of relevance is Article 19, which reads “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them.” The United States 2011 Statement of Support of UNDRIP “recognizes the significance of the Declaration’s provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”

<sup>12</sup> U.S. Announcement of Support, *supra* note 8 at 5.

<sup>13</sup> *Id.* at 4-5.

*With Indian Tribal Governments*, as well as through numerous federal policies and guidance documents on consultation and the consultation process. Executive Order 13175 explicitly references the United States’ protection of Tribal nations and the self-governance rights of Tribes inherent to Tribal sovereign powers.<sup>14</sup> When formulating and implementing policies that have Tribal implications, the Executive Order directs federal agencies, to the extent permitted by law, to encourage Tribal nations to develop their own policies to achieve agency program objectives;<sup>15</sup> to defer to Tribal standards where possible;<sup>16</sup> and, in determining whether to establish federal standards, to consult with Tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards or otherwise preserve the prerogatives and authority of Indian Tribes.<sup>17</sup> When departments and agencies undertake regulatory rulemakings that have Tribal implications and other enumerated criteria, they are directed to consult with Tribal governments to the extent practicable and permitted by law.<sup>18</sup> On issues relating to Tribal self-government, resources held in trust by the federal government on behalf of Tribes, or Tribal treaty or reserved rights, federal departments and agencies are directed to “explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.”<sup>19</sup>

Treaties are substantive federal law of equal importance to other federal laws and obligations. Federal agencies must give effect to treaty language and ensure that federal agency actions do not conflict with Tribal treaty and reserved rights. When a federal agency is engaging in regulatory or certain other decision-making processes, the agency should engage, through consultation, with Tribes to determine whether Tribal treaty or reserved rights would be impacted by the proposed federal action. In consultation, agencies should carefully consider Tribal views on the nature and scope of the treaty and reserved rights. Agencies should also consider Tribal views on the likelihood and level of impact to those rights by the proposed agency action, and how to best accommodate Tribal rights.

#### **IV. Consultation on Treaty and Reserved Rights MOU Implementation**

The Treaty and Reserved Rights Work Group consulted with Tribal governments on the implementation of the Treaty and Reserved Rights Memorandum of Understanding and this Best Practices document in the late Summer of 2022.

#### **V. Placeholder for Summary of Tribal Comments**

The Treaty and Reserved Rights Work Group received comments from XX tribes and Tribal organizations.

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<sup>14</sup> Executive Order 13175, Sec. 2 Fundamental Principles (a) - “Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection;” and (b) – “Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic, dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory.”

<sup>15</sup> *Id.* at Sec. 3 Policymaking Criteria (c)(1).

<sup>16</sup> *Id.* at Sec. 3 Policymaking Criteria (c)(2).

<sup>17</sup> *Id.* at Sec. 3 Policymaking Criteria (c)(3).

<sup>18</sup> *Id.* at Sec. 5 Consultation.

<sup>19</sup> *Id.* at Sec. 5 Consultation (d).

## VI. Tribal Recommendations

Tribes and Tribal organizations made XX number of recommendations.

## VII. Key Principles and Recommendations from the Work Group

It is clear federal agencies can improve their processes for identifying Tribal treaty, reserved and similar rights, and considering, through Tribal consultation, how best to protect those rights consistent with authorities provided in federal law. The Administration has stated that respect for Tribal treaty rights is a cornerstone of federal Indian policy.<sup>20</sup>

This Report serves as a first step toward identifying and recommending actions and best practices that federal agencies can implement to honor Tribal treaty, reserved, and other similar rights; to update and strengthen Tribal consultation policies; and to improve the government-to-government relationship.

***This Section of the Key Principles should reflect Tribal feedback received during Tribal consultation on the MOU and this document.***

## VIII. Recommendations for Tribal Consultation Policies Acknowledgments

Tribal consultation policies should acknowledge:

1. Tribes are sovereign nations with self-governance and self-determination rights.<sup>21</sup>
2. Tribes have a government-to-government relationship with the United States.
3. Tribal treaties are substantive federal law and do not derive from other federal statutes.
4. Treaties, like the U.S. Constitution and federal statutes, are the supreme law of the land.<sup>22</sup>
5. Tribal treaties are binding legal agreements between or among two or more sovereign nations.
6. The general trust relationship is between the United States (including all agencies of the federal government) and Indian Tribes, in which the government “has charged itself with moral obligations of the highest responsibility and trust.”<sup>23</sup> The nature of the trust relationship is defined by federal law (i.e., treaties, statutes, Executive orders, federal regulations) and can include particular duties or fiduciary obligations.
7. When the United States announced its support for the UNDRIP in 2010, it issued a statement including the following:

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<sup>20</sup> White House, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, Jan. 26, 2021, available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>. “It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.”

<sup>21</sup> This reference to Tribal self-determination is distinct from the right of peoples to self-determination in international law; it is consistent with the United States’ existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance. This statement also applies to all Tribes, not just those with self-determination contracts or self-governance compacts under the Indian Self-Determination and Education Assistance Act of 1979, Pub. L. 93-638, as amended.

<sup>22</sup> U.S. Const. art. VI, cl. 2.

<sup>23</sup> *Seminole Nation v. United States*, 316 U.S. 286 (1942).

- a. “The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force.”<sup>24</sup>
- b. “It is also crucial that U.S. agencies have the necessary input from Tribal leaders before those agencies themselves take actions that have a significant impact on the tribes.”<sup>25</sup>
- c. “The United States understands [free, prior, and informed consent] to call for a process of meaningful consultations with Tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”<sup>26</sup>

## IX. Definitions in Federal Consultation Policies

One comment received from Tribes during the consultations that surrounded the implementation of the review of Tribal consultation policies following President Biden’s Presidential Memorandum was that the lack of consistency in definitions in federal Tribal consultation policies added administrative cost and effort to Tribal governments. Harmonizing consultation policies to uniformly define key terms would reduce administrative burdens on Tribal nations as well as federal agencies. The Treaty and Reserved Rights Working Group recommends harmonizing consultation terms and provides the following list of examples from existing consultation policy definitions for agencies to consider. For agencies and departments whose existing policies do not currently contain “Definition” or “Glossary” sections, the Treaty and Reserved Rights Work group recommends adding this section.

As many of these terms and definitions have significant legal implications, the example definitions in the **Appendix** are provided for illustration purposes only and may not be appropriate in all contexts or for all agencies. In considering which definitions may be appropriate, agencies should consider their statutory authorities, common subjects of Tribal consultation, and what types of agency actions are likely to affect treaty and reserved rights.

**For tribal consultation – Tribal officials - please provide any preferred definitions and priorities for harmonization of definitions. We refer you to the tribal consultation policies cited in this document for additional existing examples.**

1. **Accountable Process**
2. **Decisionmaker/Delegated Authority**
3. **Consulting Official**
4. **Indian Canons of Construction**
5. **Reserved Rights Doctrine**
6. **Treaty Rights**

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<sup>24</sup> Wilcox, *supra* n. 8 at 264.

<sup>25</sup> Wilcox, *supra* n. 8 at 269.

<sup>26</sup> *Id.*

7. **Off-Reservation Rights**
8. **On-Reservation Rights**
9. **Other similar rights** (as that term is used in the TTR MOU)
10. **Meaningful Consultation**

## **X. Key Principles to Consider When Preparing for Consultation**

Agencies should consider including the following principles in consultation policies to confirm that Tribal rights are fully considered in federal decision-making and regulatory processes.

- Tribal treaty rights, reserved rights, and other similar rights are substantive law of equal importance as other federal laws and obligations.
- Indian Treaty Canons of Construction
  - Federal departments and agencies should endeavor to interpret Tribal treaty and reserved rights, in consultation with Indian Tribes, in the sense that they would have been understood by the Indian Tribes at the time of Tribal treaty signing.<sup>27</sup>
  - Federal departments and agencies should recognize that ambiguous Tribal treaty provisions are to be interpreted in the Indian Tribe’s favor, in consultation with Indian Tribes.
- Under the “reserved rights doctrine,” rights not addressed by Tribal treaty provisions are presumptively reserved so long as the rights retained are consistent with the Tribe’s sovereign status. Reserved rights include those expressly articulated in Indian treaties and those reserved by implication; federal departments and agencies should generally interpret silence in a Tribal treaty in accordance with the reserved-rights doctrine.<sup>28</sup>
- Treaties, statutes, executive orders, and regulations may, if they establish specific fiduciary duties, create a federal trust responsibility to protect Tribal treaty rights and reserved rights, including the lands and habitats that support hunting, fishing, and gathering rights which may be on or, where applicable, off reservation.

## **XI. Best Practices for Consultation Advance Work to Identify Tribal Treaty, Reserved and Other Similar Rights**

Agencies should consider the following types of advance work to identify Tribal treaty rights, reserved rights, and other similar rights:

- Federal agency staff should be trained on appropriate consultation protocols; Tribal treaty rights, reserved rights, and other similar rights; and working with Tribal governments.

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<sup>27</sup> *Worcester v. Georgia*, 31 U.S. 515, 553 (1832); *see also Jones v. Meehan*, 175 U.S. 1 (1899); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) at 196.

<sup>28</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905) (“In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them -- a reservation of those not granted.”).

- Agencies should map the spaces in which they operate (e.g., in which they carry out actions, or permit, license, or assist actions).
  - Where are agency installations, offices, or other facilities?
  - What physical territory does an agency administer or manage?
  - In what areas does the agency license, permit, or fund actions?
  - What natural or cultural resources may be implicated by agency actions?
- Agencies should identify historical and cultural connections to such spaces.
  - What Tribes may have cultural, ancestral, or historical connections to such spaces?
    - Note: just because a Tribe has long since been relocated away from an area does not mean that their connection to their ancestral homelands has been extinguished.
  - What, if any, interests to such natural or cultural resources do the Tribes in question maintain?
- Agencies should compile a list of potential treaties implicated by agency action sorted by geographical location.
  - Consider Oklahoma State Tribal Treaty Database tool (<https://treaties.okstate.edu/>) or the National Archives Digital Tribal Treaty Database (<https://www.archives.gov/research/native-americans/treaties/catalog-links>).
- Consider establishing a Tribal standing committee to address issues relating to Tribal self-governance, Tribal trust resources, or Tribal treaty and other rights. Agencies should consider compliance with FACA and other statutory requirements in creating any committee.

## **XII. Best Practices to Implement During Tribal Consultation**

The Work Group identified the following best practices and encourages departments and agencies to consider the following practices to better establish and implement consultation policies to identify Tribal treaty rights, reserved rights, and other similar rights:

- Consultation should begin early in a project, policy, or other federal action planning.
- Consultation requires good faith, mutual respect, and trust among the parties.
- Federal agencies should consult with potentially affected Tribes before decisions on regulatory policies affecting Tribal interests (or other actions that trigger consultation under the agency's consultation policy) are made. Information obtained from Tribes should be given particular, though not necessarily dispositive, consideration; this can happen only if Tribes are both properly informed and Tribal input is solicited early enough in the planning process that it may actually influence the decision to be made.<sup>29</sup>
- Consultation should recognize the government-to-government relationship between the federal government and Indian Tribes.

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<sup>29</sup> United States Department of Defense, United States Army Corp of Engineers, *American Indian and Alaska Native Policy*, footnote (k), p. 5, (2013) available at: [https://www.spk.usace.army.mil/Portals/12/documents/tribal\\_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf](https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf).

- A meaningful consultation is, among other inclusive practices: carried out in a timely, efficient, and responsive manner; transparent, and predictable; accessible, reasonable, flexible, and fair; founded in the principles of good faith and respectful of the sovereignty of Indian Tribes; and includes reasonable accommodation (e.g., changing of timelines, project parameters), where appropriate.
  - Information received by the federal government during Tribal consultation regarding Tribal treaty and reserved rights should be meaningfully considered in the decision making or regulatory process, which should be transparent in how the information was considered and resolved (e.g., provide a public summary of how Tribal comments were considered and resolved).
- Federal agencies are responsible for notifying and inviting all potentially affected Tribes to consult.
- In carrying out consultation, the designated official or decisionmaker should consult with representatives designated or identified by the Tribal government.
- In consultation with potentially affected Indian Tribes(s), federal departments and agencies should assess whether Tribal treaty or reserved rights are affected by the proposed action, consider what steps are needed to protect the right(s), and consult on what is needed. Government-to-government consultation is the best practice, but in some circumstances federal departments and agencies might use informal means for consulting and requesting Tribal input when necessitated by statute, court-ordered deadlines, or other legal requirements.
- Federal agencies should consider opportunities to apply Indigenous Knowledge consistent with Tribal direction. Application of Indigenous Knowledge should follow dialogue between federal agencies and Tribes that identifies the proposed application of the Indigenous Knowledge as well as the associated benefits and risks to allow Tribes to decide whether to share Indigenous Knowledge. As part of this dialogue, federal agencies should inform Tribal representatives that certain federal laws (e.g., FOIA) may require disclosure of information provided by the Tribe. Federal agencies should take measures to protect the confidentiality of any sensitive Indigenous Knowledge consistent with Tribal direction and the law.

### **XIII. Recommended Consultation Activities**

Consultation policies should put the following statements into practice relating to consideration of Tribal treaty rights, reserved rights, and other similar rights:

- Ask three threshold questions:<sup>30</sup>
  - Do treaties, reserved rights, or other similar rights exist that are implicated by proposed agency actions?

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<sup>30</sup> See Environmental Protection Agency, *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights*, p. 3, (2016), available at: [https://www.epa.gov/sites/default/files/2016-02/documents/tribal\\_treaty\\_rights\\_guidance\\_for\\_discussing\\_tribal\\_treaty\\_rights.pdf](https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf).

- What Tribal treaty rights, reserved rights, or other similar rights may exist in, or what Tribal treaty-protected resources rely upon, the area affected by the proposed action?
- How might Tribal treaty rights, reserved rights, or other similar rights potentially be affected by the proposed action?
- For purpose of determining/identifying Tribes that may have Tribal treaty rights, reserved rights, or other similar rights implicated by a proposed agency action, invite Tribes with historical or cultural connections to the project area to consult regardless of the Tribe's current location.
  - Note: Tribal 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 decision-making or delegated authority) to conduct consultation.
- 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 Tribal 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 opportunities that will be accessible and convenient to Tribal participants.
- 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 formalize how consultation will occur.<sup>31</sup>
  - Protocols may establish minimum consultation periods and a timeline for written comments depending on the subject matter of the consultation.
  - Protocols may establish step-by-step processes for notification, communication, access, and incorporation of feedback from Tribes into the agency decision-making process, etc.
- It is not uncommon for Indian tribes to raise treaty rights concerns during the Section 106 review required by the National Historic Preservation Act for proposed federal undertakings (*see* 54 U.S.C. § 306108). Cultural resources, including those of religious and cultural significance to Indian tribes, are considered in the Section 106 process if the

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<sup>31</sup> See Advisory Council on Historic Preservation, *CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: THE HANDBOOK*, p. 15/33 (2021), available at: <https://www.achp.gov/sites/default/files/2021-06/ConsultationwithIndianTribesHandbook6-11-21Final.pdf>. See also United States Department of the Air Force, Interactions With Federally Recognized Tribes, Instruction 90-2002, at p. 19, available at: <https://www.denix.osd.mil/na/policy/dod-instructions/af-instruction-90-2002/Tab%20USAF%20Instruction%2090-2002%20Interactions%20with%20Federally%20Recognized%20Tribes%2024%20Aug%202020%20FINAL.pdf>.

property meets the eligibility criteria for listing in the National Register of Historic Places. There may be instances in which a historic property may also be protected or impacted by treaty or reserved rights. The federal agency should assess potential impacts to treaty and reserved rights prior to proceeding with the Section 106 review for a proposed undertaking. Federal agencies should be prepared to explain to consulting parties how consideration of treaty or reserved rights may affect its decision making.

- Dispute Resolution
  - Tribal consultation policies should include a means of dispute resolution regarding Tribal complaints about the sufficiency of, timing for, and agency interactions during consultation.
  - A separate document will be appended to this guide which will include:
    - (1) proposed guidance for interpreting the MOU provision on dispute resolution;
    - (2) agency considerations for designing and implementing a dispute resolution process;
    - (3) resources and example dispute resolution processes; and
    - (4) framework for a dispute resolution process that may be incorporated into an agency's Tribal consultation policy.

#### XIV. Conclusion

Placeholder for conclusion after tribal consultation.

#### Appendix - Definitions

1. **Accountable Process:** A process by which the Agency is able to track and report on the efforts on any given Tribal consultation, from initial outreach and consultation activities to how the results of consultation were used by the agencies. See D.R. 1350-002.5.b.<sup>32</sup>
2. **Decisionmaker/Delegated Authority:** The appropriate DOI officials are those individuals who are knowledgeable about the matters at hand, are authorized to speak for a bureau/office, and who exercise delegated authority in the disposition and implementation of a bureau/office action.<sup>33</sup> The Secretary of the Interior has broad powers to delegate authority that derive from 5 U.S.C. 302, Reorganization Plan No. 3 of 1950, etc., and that authority may be delegated through the Department's management hierarchy to the lowest practical level. However, an officer who delegates or re-delegates authority does not divest himself or herself of the power to exercise that authority, nor does the delegation or re-delegation relieve that official of the responsibility for actions taken pursuant to the delegation. In most instances, the person with the most detailed

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<sup>32</sup> United States Forest Service, Forest Service Manual, Chapter 1560, at 1563.05 Definitions (2016) at 45, available at: [https://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/fseprd517821.pdf](https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd517821.pdf).

<sup>33</sup> United States Department of the Interior, 512 DM 5, Procedures for Consultation with Indian Tribes, (2015) available at: <https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-5.pdf>.

knowledge and understanding of local tribal issues will be the local field office manager, who is often the first to contact a tribe on any issue.<sup>34</sup>

3. **Consulting Official:** For the Forest Service, an employee with delegated authority to conduct Tribal consultation. Consultation may only be conducted by employees who have delegated authority for consultation. This delegation occurs through the Secretary to Department Leadership, and flows from the Under Secretaries to the agencies. Whether the Consulting Official is the Secretary, Deputy Secretary, Assistant Secretary, Under Secretary, agency head, or another agency official depends on the nature of the regulation, policy, program or planning decision and how it may affect the consulting Tribe(s). For the Forest Service, Consulting Officials may be Line Officers, or, in certain cases, other Forest Service employees delegated – in writing and on a case-by-case basis – to be “Chief’s Representatives” as Consulting Officials.<sup>35</sup>
4. **Indian Treaty Canons of Construction:** The 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 negotiation<sup>36</sup>; (2) doubtful or ambiguous expressions in a treaty should generally be resolved in favor of the Tribes<sup>37</sup>; and (3) treaty provisions should be interpreted in light of the surrounding circumstances and history.<sup>38</sup> Furthermore, Congress must clearly express any intent to abrogate Indian treaty rights.<sup>39</sup>
5. **Reserved Rights Doctrine:** Indian Tribes retain all rights not explicitly given up in treaties or other legislation.”<sup>40</sup>

The Bureau of Land Management defines Reserved Rights as: “Reserved rights: Those rights not specifically extinguished through a treaty or agreement. Rights may include hunting, fishing, and gathering privileges, or water and other resource use guarantees.”<sup>41</sup>

6. **Treaty Rights:** “Those rights or interests reserved in treaties for the use and benefit of Tribes. The nature and extent of treaty rights are defined in each treaty. Only Congress

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<sup>34</sup> Bureau of Land Management, BLM Handbook 1780-1, Improving and Sustaining BLM-Tribal Relations (P), (2016), available at: [https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1\\_0.pdf](https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1_0.pdf).

<sup>35</sup> United States Department of Agriculture, Departmental Regulation 1350-002, Tribal Consultation, Coordination, and Collaboration, p. 19, (2013), available at: [https://www.usda.gov/sites/default/files/documents/USDA\\_DR\\_Tribal\\_Consultation\\_Coordination\\_and\\_Collaboration\\_OTR\\_final\\_1\\_18.pdf](https://www.usda.gov/sites/default/files/documents/USDA_DR_Tribal_Consultation_Coordination_and_Collaboration_OTR_final_1_18.pdf).

<sup>36</sup> See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

<sup>37</sup> See, e.g., *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985).

<sup>38</sup> See, e.g., *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432-32 (1943).

<sup>39</sup> See, e.g., *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019).

<sup>40</sup> United States Forest Service, Forest Service Manual, *supra* n. 30 at 49.

<sup>41</sup> Department of the Interior, Bureau of Land Management, BLM 1780 Tribal Relations (2016), p. G-4, available at: <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>.

may abolish or modify treaties or treaty rights.”<sup>42</sup>

7. **Off-Reservation Rights:** The superseded Forest Service *National Resource Guide to American Indian and Alaska Native Relations* defined off-reservation rights as: “Off-reservation (property) rights reserved by treaties on National Forest System lands are very important to Indian tribes.”<sup>43</sup>
8. **On-Reservation Rights:** The superseded Forest Service *National Resource Guide to American Indian and Alaska Native Relations* defined On-Reservation Rights as: “Tribal governments have exclusive jurisdiction over the right of tribal members and non-tribal people to hunt and fish within reservation boundaries. In a 1983 federal court decision, *New Mexico v. Mescalero Apache Tribe*, the U.S. Supreme Court upheld the tribe’s exclusive right to regulate non-Indian hunting and fishing on a reservation.”<sup>44</sup>
9. **Other Similar Rights** (as that term is used in the TTR MOU): Language in the enacted *Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination for Indian Tribes* (PROGRESS) Act of 2019, reads: “any treaty-reserved right or other right of any Indian Tribe as recognized by any other means, including treaties or agreements with the United States, Executive orders, statutes, regulations, or case law.” The text is from a limiting “Effect of Provisions” section but from that language it is clear that other sources of government authority can create rights similar to treaty and reserved rights for tribes.<sup>45</sup>
10. **Meaningful Consultation:** “In the context of government-to-government consultation as expressed in EO 13175, “meaningful consultation” means that the information and dialogue exchanged actually has the potential to affect a decision for which the Agency has discretion. If a Tribe is part of a consultation and their views have no real potential to be used in the related decision, the consultation is not meaningful.”<sup>46</sup>

The Army Corp of Engineers American Indian and Alaska Native Policy states: “(k) The single most important element of consultation is to initiate the dialogue with potentially affected tribes before decisions affecting tribal interests are made. Meaningful consultation demands that the information obtained from tribes be given particular, though not necessarily dispositive, consideration; this can happen only if tribal input is

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<sup>42</sup> United States Forest Service, Forest Service Manual, Chapter 1560, at 1563.05 Definitions (2016) at 50.

<sup>43</sup> United States Forest Service, *National Resource Guide to American Indian and Alaska Native Relations* FS-600, (1997) at Section 2: Treaty Rights and Forest Service Responsibilities, p. 44 (superseded by FSM 1500 – External Relations March 9, 2016); available at <https://www.fs.usda.gov/people/tribal/trib-2.pdf>.

<sup>44</sup> *Id.* at p. 45.

<sup>45</sup> Public Law 116-180 amending 25 USC 5301 (2020); available at: <https://www.congress.gov/116/plaws/publ180/PLAW-116publ180.htm>.

<sup>46</sup> United States Forest Service *supra* n. 40 at 48.

solicited early enough in the planning process that it may actually influence the decision to be made. Consultation is worth very little if decisions have already been made.”<sup>47</sup>

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<sup>47</sup> United States Army Corp of Engineers, *supra* n. 27 at footnote (k), p. 5.