

Tribal Consultation

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Consultation

Consultation is a critical part of the Trust Responsibility, perhaps the most important part.

Consultation is about respect. There would be far fewer lawsuits against federal agencies—and greater cooperation—if federal officials meaningfully consulted with Indian tribes. Through meaningful consultation, a federal agency can learn and appreciate tribal values, avoid errors and false presumptions about tribal interests, and make informed decisions.

Consultation (cont.)

As former Ass't Secretary of Indian Affairs Kevin Washburn has stated, "the United States must never take an action affecting Indian tribes without first consulting with them."

Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. FORUM 200, 217-18 (2017)

Consultation

Presidents Clinton and Obama each issued Orders requiring federal agencies to engage in meaningful consultation with Indian tribes that continue to be in effect today. The first of these was President Clinton's Executive Memorandum "Government-to-Government Relationship with Native American Tribal Governments." 59 Fed. Reg. 22951 (1994).

Consultation (cont.)

The 1994 Executive Memorandum requires that all agencies within the executive branch must operate “within a government-to-government relationship with federally recognized tribal governments [and] shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments.”

In 2000, President Clinton issued Executive Order 13175 requiring consultation with tribes in “the development of Federal policies that have tribal implications.”

Consultation (cont.)

During his first year (2009), President Obama issued his “Presidential Memorandum on Tribal Consultation,” 50 Fed. Reg. 57,881. The Memorandum cites President Clinton’s Executive Order of 2000 and requires each federal agency to develop within 90 days a plan for engaging in meaningful tribal consultation. Thus, each agency should now have its own policy on tribal consultation.

Consultation (cont.)

Within days of taking office, President Biden issued a Memorandum declaring that it was “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.”

Consultation (cont.)

The Biden/Haaland Administration has made a greater effort to consult with tribes than any previous Administration. The DOI even held a 4-day virtual session in March called “Consultation at Interior on Improving Consultation.” The DOI also issued a “Framing Paper” on “Improving Interior’s Consultation with Tribes” that discusses the DOI’s commitment to consultation (available at: <https://www.doi.gov/sites/doi.gov/files/framing-paper-consultation-with-tribes.pdf>.)

Consultation (cont.)

Consultation is required by many statutes and federal agency regulations. A comprehensive list of consultation requirements is available at:

<http://www.schlosserlawfiles.com/consult/PoliciesReConsult%20w-IndianTribe.htm>

Department of the Interior Policy on Consultation with Indian Tribes (2011)

“Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent.”

USDA Dept'l Reg. 1350-002: Tribal Consultation, Coordination, and Collaboration (2013)

“Introduction”

All USDA agencies must “engage with Tribes in timely and meaningful consultation on policies that have substantial direct effects on one or more Tribes. Consultation, coordination, and collaboration are different but not mutually exclusive; rather, they are mutually supportive. Together, they lead to information exchange, mutual understanding, and informed decision making.”

USDA Dept'l Reg. 1350-002 (cont.)

“Consultation Process”

“Tribal consultation is the timely, meaningful, and substantive dialogue between USDA officials who have delegated authority to consult, and the official leadership of Federally recognized Indian tribes, or their designated representative(s), pertaining to USDA policies that may have tribal implications.”

USDA Dept'l Reg. 1350-002 (cont.)

“Compliance”

“To the extent practicable and permitted by law, no USDA agency shall promulgate any regulation or policy that has Tribal implications . . . unless . . . (2) The agency, prior to the formal promulgation of the regulation or policy . . . consulted with Tribal officials in the process of developing the proposed regulation or policy.”

Statutes that require consultation

The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA) authorizes Indian tribes to administer programs funded by the Department of Health and Human Services and by the DOI. The Act requires those agencies to consult with tribes in setting up and administering ISDEAA programs.

Statutes that require consultation

The Archeological Resources Protection Act of 1979 requires consultation with tribal governments before federal agencies approve excavations on tribal land.

Statutes that require consultation

The Native American Graves Protection and Repatriation Act of 1990 requires consultation with tribal governments, traditional religious leaders, and lineal descendants about the disposition of human remains, funerary objects, and other sacred burial items.

Statutes that require consultation

Congress passed the National Historic Preservation Act of 1966 (NHPA) to help protect and preserve property within the U.S. that has historic significance. Section 106 requires federal agencies to take historic preservation into consideration in every project those agencies undertake, fund, or permit.

Statutes that require consultation

Agencies must allow any party to voice its opinion on a proposed project if the property is listed on, or qualifies for listing on, the National Register of Historic Places, which is administered by the National Park Service, an agency within the DOI. The Register is the nation's official list of properties recognized for their significance in American history, architecture, archeology, engineering, or culture.

Statutes that require consultation

NHPA was amended in 1992 to provide that properties eligible for listing on the National Register include property “of traditional religious and cultural importance to an Indian tribe.” The amendment also requires that federal agencies consult with any federally recognized Indian tribe or Native Hawaiian organization “that attaches religious and cultural significance” to any historic property that may be affected by an agency’s undertaking. The consultation requirement applies regardless of whether the historic property is located on or off an Indian reservation, but the action must be a federal undertaking and not a purely private one.

Consultation

Consultation has two components: procedural and substantive.

Procedural:

1. Notify the tribe early about plans, possible actions, and provide information to the tribe on an on-going basis.
2. See if the tribe needs assistance, such as technical or legal.
3. Consult with the proper tribal officials.
4. Listen to what the tribe says and what the tribe wants.
5. Make the process accessible and convenient for the tribe.
6. Give the tribe ample time to investigate and reply.
7. Document the entire process and send written confirmations periodically, inviting tribal feedback.

Consultation (cont.)

Substantive:

1. “Consultation does not require” the agency to accept the Tribe’s recommendation “but rather requires USDA to take the Tribe’s views, information, rights, and interests into serious, deliberative consideration.” Reg. 1350-002
2. If the tribe’s recommendation is not accepted, look for a compromise, and if there isn’t one, explain why the tribe’s recommendation was rejected and seek a way to minimize any harm to the tribe.

Consultation Cases

1. *Nez Perce Tribe v. United States Forest Service*, 2013 WL 5212317 (D. Idaho 2013).

“The Forest Service has a statutory duty, under the National Forest Management Act,” to respect tribal interests. “Overarching this statutory duty is the Government’s duty as a trustee over the Tribe.”

“A meaningful consultation takes place typically *before* undertaking a course of action.” Here, the FS decided to allow the shipment to proceed through the forest before consulting with the tribe, a decision the court held was “an abdication” of its duty to consult.

Consultation Cases

2. *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Dept. of the Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

“The required consultation must at least meet the standards set forth in [the agency’s consultation policy] and should begin early. The Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted. The Tribe’s consulting rights should have been respected. It is clear that did not happen here.”

Consultation Cases

3. *Klamath Tribes v. United States*, 1996 WL 924509 (D. Ore. 1996).

“The court grants the Tribes’ motion for a preliminary injunction prohibiting the federal defendants from proceeding with ‘salvage’ logging that will affect wildlife resources within the Tribes’ former reservation, without ensuring, in consultation with the Klamath Tribes on a government-to-government basis, that the resources on which the Tribes’ treaty rights depend will be protected.”

Consultation Cases

4. *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

The court reversed the decision of the Forest Service and required additional consultation because the court found that the agency had withheld relevant information during the consultation process, making an informed decision by the tribe difficult.