



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

SACW

5 December 2023

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF
ENGINEERS

SUBJECT: Updated U.S. Army Corps of Engineers Civil Works Tribal Consultation
Policy

1. References:

- a. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 06 Nov 2000.
- b. Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 26 January 2021.
- c. Presidential Memorandum on Uniform Standards for Tribal Consultation, November 30, 2022.

2. The Presidential Memorandum in reference 1.a requires each agency to formulate a detailed plan of actions that it will undertake to implement the policies and directives of E.O. 13175. E.O. 13175 requires all federal agencies to formulate "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." This document affirms the U.S. Army Corps of Engineers (USACE) commitment to engage in consultation with Tribal Nations and Alaska Native Corporations (ANCs).

3. The Civil Works Tribal Consultation Policy (Enclosure 1) provides guidance and definition for the USACE to build the collaborative and close relationships required for proper stewardship of our Nation's water resources and to fulfil our Constitutionally required treaty and trust responsibilities. Specifically, this policy provides meaningful definitions and clear guidance to USACE Civil Works on consultation, coordination and consensus building when working with Tribal Nations and ANCs.

4. As directed in reference 1.b, my office and USACE have collaboratively developed a comprehensive Tribal Consultation Policy. We also developed an enclosure capturing Best Practices for USACE leaders to reference when consulting or coordinating with tribal leaders. This policy was then promulgated for tribal comment and received fulsome feedback and collaboration from Tribal Nations and ANCs.

5. This memorandum directs USACE to apply the Tribal Consultation Policy to its Civil

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SUBJECT: Updated U.S. Army Corps of Engineers Civil Works Tribal Consultation Policy

Works Program, to develop implementing guidance promulgating this Policy, and to plan the commensurate training and culture changes required to implement this policy as we prepare to announce its forthcoming completion at the 2023 White House Tribal Nations Summit, currently targeted in late November or early December 2023.

6. If there are any questions, please contact COL Xander Bullock, Tribal Policy Advisor at alexander.l.bullock@usace.army.mil or at 703-340-5750.



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(Civil Works)

Encl

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**U.S. Army Corps of Engineers – Civil Works
Tribal Consultation Policy**

1. References.

- a. U.S. Constitution, Article I, Section 8; Article VI.
- b. National Historic Preservation Act (54 U.S.C. 300101 et seq.), 15 Oct 1966, as amended.
- c. Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), 18 Dec 1971, as amended.
- d. American Indian Religious Freedom Act (42 U.S.C. 1966 et seq.; Public Law 95-341), 11 Aug 1978, as amended.
- e. Archaeological Resources Protection Act (16 U.S.C. 470aa et seq.; Public Law 96-95), 31 Oct 1979, as amended.
- f. 33 CFR part 325, Processing of Department of the Army Permits, 13 Nov 1986, as amended.
- g. Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.; Public Law 101-601), 16 Nov 1990.
- h. Religious Freedom Restoration Act (42 U.S.C. 2000bb et seq.; Public Law 103-141), 16 Nov 1993.
- i. Executive Order 13007, *Indian Sacred Sites*, 24 May 1996.
- j. Department of Defense American Indian and Alaska Native Policy, 20 Oct 1998.
- k. Engineer Regulation 1105-2-100, *Planning Guidance Notebook*, 22 Apr 2000.
- l. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000.
- m. Executive Order 14096, Revitalizing Our Nation's Commitment to Environmental Justice, 21 April 2023.
- n. Consolidated Appropriations Act, 2004, as amended, Public Law 108-199, Division H., Section 161.
- o. Consolidated Appropriations Act, 2005, Public Law 108-447, Div. H., Section 518.
- p. Army Regulation 200-1, *Environmental Protection and Enhancement*, 13 Dec 2007.
- q. Engineer Regulation 1130-2-540, Project Operations – Environmental Stewardship Operations and Maintenance Guidelines and Procedures, 11 Aug 2008.
- r. Presidential Memorandum, *Tribal Consultation*, 05 Nov 2009.

- s. Announcement of Presidential support for the *United Nations Declaration on the Rights of Indigenous Peoples*, Public Papers of the President, December 16, 2010.
 - t. Section 1129 of the Water Resources Development Act of 2018, Section 1129, Public Law 115-270, 23 Oct 2018.
 - u. Department of Defense Instruction Number 4710.02: DoD Interactions with Federally Recognized Tribes, 24 Sep 2018.
 - v. Department of Defense Instruction Number 4715.16: Cultural Resources Management, Sept. 18, 2008.
 - w. Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021.
 - x. Advisory Council on Historic Preservation, Consultation with Indian Tribes in the Section 106 Review Process: The Handbook, June 2021.
 - y. Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights, November 15, 2021.
 - z. Guidance for Federal Department and Agencies on Indigenous Knowledge, November 30, 2022.
 - aa. Presidential Memorandum on Uniform Standards for Tribal Consultation, November 30, 2022.
2. Purpose. On January 26, 2021, the President issued a Memorandum to the heads of all federal agencies entitled *Tribal Consultation and Strengthening Nation-to-Nation Relationships*. The Memorandum reaffirmed Executive Order (E.O.) 13175, *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249) signed on November 6, 2000, and the policy announced in the Presidential Memorandum signed on November 5, 2009. The Presidential Memorandum also requires each agency to formulate a detailed plan of actions that it will undertake to implement the policies and directives of E.O. 13175. E.O. 13175 requires that all federal agencies formulate “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This document affirms the U.S. Army Corps of Engineers (USACE) commitment to engage in consultation with federally recognized Tribes and Alaska Native Corporations (ANCs).¹
 3. Background. There are responsibilities to Tribal Nations resulting from the Federal Trust Doctrine, which is derived from Treaties, statutes, regulations, Executive Orders, case law, and agreements between the United States government and Tribal governments. The references in paragraph 1 provide additional guidance on coordination and consultation with Tribal Nations.

¹ A separate consultation policy with Native Hawaiian Communities is under development.

4. For the purpose of this policy, the following definitions apply:
 - a. Alaska Native Corporation (ANC): Any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with 43 U.S.C. §1601, *et seq.*
 - b. Consultation: Regular, meaningful, and robust communication process involving USACE and Tribal officials with decision-making authority and which emphasizes trust, respect, and shared responsibility between USACE and the Tribal Nation or ANC. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages before decisions are made and actions are taken. Consultation is an active, respectful and timely dialogue concerning actions taken by USACE that have Tribal implications on Tribal resources, Tribal rights (including treaty rights), or tribal lands- Consultations are also conducted for actions which have a substantial direct effect on ANCs including actions on or affecting ANCSA lands, or actions for which any Tribes have expressed interest in consultation.
 - c. Coordination: Regular, informal, and/or staff level communications between USACE and the Tribal Nation or ANC. Coordination can and should occur before formal consultation, and is highly encouraged to keep all parties informed, to improve consultation, and to aid in determining when consultation is required. Tribal Nation or ANC coordination should be the primary tool to determine when formal consultation is required.
 - d. Tribe/Tribal Nation: Indian Tribes as defined in E.O. 13175, “an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 USC 479a.”
 - e. Policies that have Tribal implications: Regulations, proposed legislation and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on treaty or other reserved rights or resources, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. A further extensive list of events or actions that could have tribal implications and therefore trigger consultation is in Para 6.d.ii.
5. Applicability. This Policy applies to all Civil Works elements of USACE, including the Regulatory, Planning, and Operations Programs, at HQUSACE, Major Subordinate Commands, District Commands, the Institute for Water Resources, the Humphreys Engineering Center Support Activity, and the Engineer Research and Development Center.
6. The Tribal Policy Principles. USACE will incorporate the following six Tribal Policy Principles into its planning, management, budgetary, operational, regulatory, and legislative initiatives, management accountability systems and ongoing policy and regulation development processes.
 - a. Tribal Sovereignty.
 - i. All federally recognized Tribes are inherent sovereign governments that have not relinquished powers of self-governance and will be treated with dignity and respect.
 - ii. Sovereignty is the foundation of Tribal governments.
 - iii. Tribal governments set their own priorities, and develop and manage Tribal and trust resources, which may be based on cultural practices and timelines.
 - iv. Tribal Nations are responsible for their own governance and management.

- v. USACE recognizes and respects the distinct, unique, and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between ANCSA Corporations and the Federal Government.
- b. Trust Responsibility.
- i. The trust responsibility will be honored and fulfilled.
 - ii. The federal government has a unique legal and political relationship with Tribal governments that recognizes self-government and self-determination.
 - iii. USACE shall work to meet its trust responsibilities, protect trust resources, and obtain Tribal views of trust and treaty responsibilities for actions related to USACE, in accordance with provisions of treaties, laws and Executive Orders as well as principles lodged in the Constitution of the United States. Integrating consideration of tribal treaty and reserved rights into agency decision-making and regulatory processes is consistent with the federal government's trust responsibility to federally recognized Tribes and to fundamental principles of good government.
 - iv. As a matter of Federal law, only Congress has the authority to abrogate or interfere with tribal treaty rights, which has not been delegated to USACE. USACE cannot authorize, approve, or carry out any activities which would result in a violation of a Tribal treaty right. See Appendix A for Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making for USACE use.
 - v. USACE is committed to supporting projects and programs beneficial to Tribal Nations through partnership with them, including co-management and full-operability where appropriate.
 - vi. USACE will ensure that it considers and addresses Tribal and ANC concerns regarding protected Tribal resources, Tribal rights (including treaty rights) and lands, and ANCSA lands in a respectful way to the Tribes and to the maximum extent allowed under law by taking measures to ensure that agency actions do not impair Tribes' ability to exercise those rights.
 - vii. Through consultation with the affected Tribe(s), USACE will protect and allow access to protected Tribal resources on, under and in USACE managed lands and water resources development projects to the extent practicable and will work to develop and implement access policies as requested by Tribes or ANC.
 - viii. Through consultation with the affected Tribe(s), USACE will ensure reasonable and respectful access to sacred sites on USACE managed lands and water resources development projects in accordance with the American Indian Religious Freedom Act and other applicable laws, regulations, and guidance. Further, USACE shall to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, accommodate access to and ceremonial use of tribal sacred sites.
 - ix. USACE will share non-privileged information in a timely manner when requested by Tribal Nations and ANCs to the maximum extent allowed under law. In addition, federally recognized Tribes and ANCs do not need to submit a FOIA request for non-privileged information that is otherwise releasable under the law.
 - x. USACE welcomes receiving Indigenous Knowledge throughout the consultation process on the implementation of Civil Works functions and will respect and consider such Indigenous Knowledge throughout Civil Works implementation.

- c. Government-to-Government and Nation-to-Nation Relations.²
- i. USACE will maintain a government-to-government and Nation-to-Nation relationship with Tribal governments and Nations which may include establishing new means or processes to engage with Tribal Nations, separate from those provided to the general public or other governmental entities.
 - ii. Consultation for decision-making occurs between Tribal Leaders and USACE Commanders/Leaders and USACE Commanders/Leaders will work to achieve regular, meaningful, and robust communication with Tribal Leaders on a programmatic as well as a project-specific basis.
 - iii. A Tribal Nation or ANC has access to the Chief of Engineers, the Assistant Secretary of the Army (Civil Works), and other high-level individuals. USACE should also conduct consultation at any time that a Tribal Nation requests consultation. USACE should conduct consultation at the lowest effective level (starting at District) and elevate to resolve issues as required.
 - iv. A Tribal Nation may initiate a request for Government-to-Government or Nation-to-Nation consultation, or coordination at any time.
 - v. Regular and recurring interactions, which may include processes under Section 106 of the NHPA and environmental compliance under the National Environmental Policy Act, will primarily be staff-to-staff unless otherwise requested by the Tribes. As outlined in paragraph 6.d(x), specific protocols for elevating issues to the Government-to-Government or Nation-to-Nation level may be included to ensure resolution at the level the decision is being made.
 - vi. Tribal consultations will be assisted by an appropriate Tribal Liaison. A Tribal Liaison will be designated at each District, MSC, HQ USACE and identified as such on its website. The USACE Tribal Liaisons are assets in engaging and implementing Tribal consultation.
 - vii. Each Tribal Nation or ANC shall be consulted with separately, unless Tribal Nations or ANCs agree to act collectively, for example, after receipt of such request from USACE or on their own initiative.
- d. Consultation Elements.
- i. Consultation will be an integral, invaluable process of USACE planning and implementation for all of USACE's Civil Works projects and programs.
 - ii. Consultation will be triggered by any USACE Civil Works policy or activity that has Tribal implications or substantial direct effect on Tribes or ANCs, including but not limited to planning for and implementation of individual projects, studies, programs, general permit developments (incl Nationwide Permits), permit applications, requests for approved jurisdictional determinations, real estate outgrants and other actions, Section 408 permission requests, operations and maintenance activities, rulemaking processes, and promulgation of regulations and policies, including policy guidance on treaty rights effect determinations, regardless of land status. USACE will conduct an analysis to determine whether such USACE activities has Tribal implications or substantial direct effect on ANCs regardless of whether a Tribal Nation or ANC requests consultation.

² For purposes of this Tribal Consultation Policy, government-to-government and Nation-to-Nation are equivalent terms regarding fulfillment of Tribal trust responsibility and consultation requirements. The USACE wants to reflect the sovereignty of Tribal Nations in the use of Nation-to-Nation but does not convey any additional legal status or implications through the use of Nation-to-Nation.

Such analysis should be conducted by an individual who effectively interacts with Tribal Nations and/or ANCs.

- iii. To ensure a full understanding of when consultation will be required, USACE – through its Divisions and Districts will consult with Tribal Nations upon issuance of this Policy to further scope and identify the types of projects, actions, and decisions that will impact the Tribes and trigger consultation from the perspective of the Tribes. As stated above, USACE should also conduct consultation at any time that a Tribal Nation requests consultation, particularly if a Tribe indicates an action has substantial direct effect or tribal implications.
- iv. Robust coordination between USACE and Tribes will be central to determining when consultation is required. Good examples of coordination opportunities include planning charettes or draft project documents where coordination seeks to clarify tribal interest. USACE should consider coordination even if a determination is made that a policy will not have Tribal implications or will not have substantial direct effect on ANCs if the policy is of interest to a Tribal Nation or ANC.
- v. Potentially affected Tribal Nations and ANCs, as determined by USACE, including Tribal Nations whose ancestral territories or resource use areas extend to the lands or waters where a proposed activity would occur, will be contacted by USACE using the Tribal Nations’ and ANCs preferred mode of communication (letter, telephone and/or e-mail) sufficiently early to allow a timely review of the proposed action and for initiation of consultation. A public notice sent to Tribal Nations or ANCs is not sufficient for notification or initiation of consultation protocols, unless requested by a Tribe or ANC.
 - 1. Sufficiently early means at the earliest known planning stage or phase of a proposed project, to include scoping meetings; project kick-off meetings; pre-application/request meetings; as soon as possible upon receipt of an application or request (if a pre-application meeting has not occurred); and prior to signature of any partnering agreements.
 - 2. See Appendix B (Presidential Memorandum on Uniform Standards for Tribal Consultation) for the protocols for the Notice of Consultation. Appendix B does not supersede existing laws and regulations with established comment timelines and requirements.
 - 3. USACE may leverage coordination with Tribes to identify potential effects, preferred modes of communication, and timing, when consultation is either desired or required.
- vi. USACE district Tribal Liaisons will work to use existing resources and information from Tribal Nations and ANCs to develop and maintain a list of Tribal and ANC points of contact, preferred method of communication, and the Tribal or ANC designated decision-maker for ease of reference in consultation. USACE will also provide Tribal Nations and ANCs with points of contact on project-related issues, and issues in general.
- vii. If Tribal Nations, ANCs, or other sources identify that the USACE activity has Tribal implications on other Tribal Nations or has a substantial direct effect on other ANCs, USACE has the responsibility to notify those Tribal Nations or ANCs as well.
- viii. Consultation will provide Tribal Nations and ANCs the opportunity for a collaborative process designed to ensure information exchange, consideration of disparate viewpoints, before and during decision making.
- ix. Consultation will generally be conducted at the district or division level involving USACE and Tribal or ANC officials with decision-making authority assisted by an

individual who effectively interacts with Tribal Nations or ANCs, preferably a Tribal Liaison, unless there is a request for HQUSACE (and/or OASA(CW)) input, or if HQUSACE determines input is necessary. A Tribal Nation shall determine who represents the Tribal Nation for consultation. Consultation will be conducted at the HQUSACE and/or OASA(CW) level for actions which have nationwide implications, such as rulemaking actions.

- x. Commands will ensure that all Tribal Nations or ANCs with an interest in a particular activity that has Tribal implications or has substantial direct effect on ANCs are contacted, and their comments, views, perspectives, and knowledge are taken into consideration before decisions affecting Tribal or ANC interests are made. USACE will not assume that lack of response by a Tribal Nation or ANC is acceptance of a USACE decision or presumption of no implications to Tribal trust and treaty rights or establishes or suggests that a project or activity within USACE jurisdiction would not violate or interfere with a Tribal Nation's rights or interests. This can only be confirmed through consultation.
 - xi. In recognition of the varied organizations and customs of different Tribal Nations and ANCs, written protocols for consultation procedures may be developed and implemented at the local level with a specific Tribal Nation or ANC on an individual or programmatic basis. These protocols could include how and to what extent project proponents or non-Federal interests for water resources development projects may coordinate directly with Tribal Nations or ANCs on specific projects and programs.
 - xii. Consultation requires that information obtained from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome.
- e. USACE will support Tribal self-determination, self-reliance, and capacity building, to the fullest extent permitted by law and policy, by:
- i. Partnering with Tribal Nations on studies, projects, programs and permitting and implementation processes.
 - ii. Providing early and timely information on opportunities to compete for requests for proposals or other potential contracts with USACE.
 - iii. Sharing appropriate information on USACE programs, policies and procedures, and public documents.
 - iv. Utilizing Indigenous Knowledge for planning purposes and to inform operational activities and permit application reviews.
 - v. Supporting Tribal efforts to lease, operate, and co-manage water resource projects and lands, where appropriate.
 - vi. Identifying and implementing, within existing authority, other capacity-building opportunities as they occur.
 - vii. Identifying, assisting in pursuing, securing, and implementing existing funding opportunities for Tribes to cover expenses related to consultation, co-management, or other coordinated activities between the Tribes and USACE where they exist.
- f. Protection of natural and cultural resources.
- i. USACE recognizes the importance of strict compliance with Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA), the National Environmental Policy Act, the Endangered Species Act, and other statutes concerning cultural and natural resources.

- ii. USACE acknowledges that compliance with the above statutes may not compromise the full range of consultation, nor of cultural property and natural resource protection.
 - iii. To the extent allowed by law, USACE will protect the location of historic properties of religious and cultural significance, and archaeological resources, in consultation with and when requested by the affected Tribes(s).ⁱ
- 7. Responsibilities of Commanders and other USACE officials interacting with federally recognized Tribes and ANCs, supported by a Tribal Liaison.
 - a. Build relationships with Tribal Nations and ANCs soon after each change of command, preferably by face-to-face interaction and on tribal lands when practicable.
 - b. Develop a plan for knowledge management transfer specifically related to tribal histories and relationships from the previous Commander prior to assuming command.
 - c. Identify and remove procedural impediments to working with Tribal Nations and ANCs whenever possible.
 - d. Share appropriate USACE procedures, regulations, and organizational information with Tribal Nations and ANCs through regular, meaningful, and robust communication with Tribal leaders on a programmatic basis.
 - e. Maintain open lines of communication and transparency through consultation with Tribal Nations and ANCs during the decision-making process for those matters that have implications for Tribal Nations or have substantial direct effect on ANCs.
 - f. Correspondence with Tribal council, chair-people, and other Tribal or ANC governing leadership, will generally occur at the Commander level. Routine correspondence and follow up communications, such as a request for additional information for consultation under Section 106 of the NHPA, may be delegated. Although these interactions may be delegated, they are subject to the same level of trust obligation as those interactions at the Tribal and USACE leadership levels.
 - g. Encourage partnerships on projects with Tribal Nations wherever possible.
 - h. Encourage collaborative cooperation and partnerships with other federal and state agencies to further Tribal goals and projects.
 - i. Shall use best efforts to understand, uphold the treaties with Tribal Nations in their area of responsibility.
- 8. Documenting Tribal Input into USACE Decisions. Each Tribal Nation that is engaged in Nation-to-Nation consultation and ANCs that are engaged in consultation shall receive a timely response, in writing or in person, from the appropriate decision-maker on how its input, including the consideration and use of Indigenous Knowledge, was considered in decision-making, if provided. The decision-maker shall timely disclose to the affected Tribal Nation or ANC the outcome of the consultation and decisions made as a result of the consultation. Any in person responses provided will be followed with a written response within a timely and respectful manner. USACE will also document whether mutual consensus with a Tribal Nation or ANC was achieved in the decision-making and provide reasoning when mutual consensus was not achieved. See Appendix B Section 7.a for a description of the contents of the Record of Consultation. If the USACE does not adopt and incorporate the Tribal Nation's input or recommendations into its decision or did not modify its decision to avoid adverse effects on the Tribal Nation's rights and interests, including treaty or other reserved rights and resources, the USACE's written response should explain why the agency did not do so. The written response should also explain how the USACE decision will protect the Tribal Nation's rights and interests, including treaty or other reserved rights and resources. In certain circumstances, USACE responses may be limited by

legal or statutory restrictions, such as where the release of information may implicate safety or security functions. In those circumstances, a non-disclosure agreement may be considered to allow Tribal Nations or ANCs to receive a comprehensive response.

9. Alaska Native Corporation Consultation. When taking an action that has substantial direct effects on an ANC, USACE will initiate consultation with the ANC. To the extent concerns expressed by federally recognized Tribes and ANCs substantively differ, USACE shall give due consideration to the right of sovereignty and self-governance of federally recognized Tribes, and to the unique legal status and rights of ANCs.

10. Protocols.

- a. When participating in a consultation, USACE should take into consideration and respect Tribal protocols. In doing so, keep in mind that:
 - i. Tribal representatives may want to open a meeting with a traditional ceremony, although USACE representatives are not obligated to participate.
 - ii. USACE may need to schedule meetings well in advance in coordination with the Tribal Nation or ANC to enable the Tribal Nation or ANC to decide on appropriate attendees, such as Tribal elders, traditional religious leaders, and translators.
 - iii. Tribal representatives may be reluctant to discuss culturally sensitive information outside the Tribal Nation or at certain times of the year. Tribal representatives may need to clear information with traditional religious leaders or Tribal council members before making commitments.
 - iv. Tribal governments differ from each other in their organizational structures and corporate cultures. USACE representatives should be mindful that these differences may affect formal titles and forms of address (such as chief, governor, president, and chair) and other forms of protocol. Tribal representatives may be elected, political and/or spiritual, and exhibit other variations from Tribal Nation to Tribal Nation.
 - v. While acknowledging Tribal sovereignty, the uniqueness of Tribes in the role of government, and the usefulness of protocols, creating Tribal-specific protocols with each Tribe will be helpful in defining which engagements with the Tribe should be taken as coordination, and which should be taken as consultation.
- b. USACE will accept culturally specific information (*e.g.*, letter, e-mail, *etc.*) in any format the Tribal Nation or ANC utilizes to share, unless otherwise specified by statute, regulation, policy or agreement.
- c. Culturally specific information obtained from a recognized leader or the designated representative of a Tribal Nation or ANC in consultation should be respected. USACE will also consider specific details submitted by Tribal members regarding their exercise of a reserved treaty right.
- d. During the consultation process, USACE staff will take into account confidentiality concerns raised by Tribal Nations, including the sharing and protection of Indigenous Knowledge. See reference 1.t. USACE recognizes that a Tribal Nation may wish to keep confidential some of the culturally sensitive information during consultation. To the extent practicable and permitted by law, USACE should:
 - i. Assure Tribal Nations that USACE will make every reasonable effort, consistent with the law, to withhold from public disclosure any specific information that a Tribal Nation identifies as confidential.

- ii. Inform Tribal Nations that USACE is required to provide public access to its records in accordance with 5 U.S.C. § 552 (also known as the “Freedom of Information Act”), except those records protected from disclosure by a statutory exemption.
 - iii. Encourage Tribal Nations to seek the advice of their own legal counsel before providing sensitive information to USACE.
 - iv. Make an effort to identify confidentiality concerns then develop and agree on a process for dealing with culturally sensitive information as early as possible in the consultation process. In appropriate circumstances, consider the use of Consultation Protocol agreements.
 - v. Agreements can be made in accordance with Section 106 of the National Historic Preservation Act of 1966, as amended, and 36 CFR § 800.2(c)(2)(ii)(E), to memorialize an agreed-on process for handling culturally sensitive information related to historic properties (Section 304 NHPA) or archaeological resources over 100 years old (Section 9 Archaeological Resources Protection Act).
 - vi. In addition, USACE and the Tribal Nation may identify alternative means of providing culturally sensitive information to best ensure confidentiality, such as exploring orally provided information.
11. Education and Consistency. To develop a proactive well-informed workforce with consistent application of this Policy, in-house trainings and workshops have been developed and will be attended by USACE employees who interact with Tribal Nations and ANCs – liaisons, project managers, planners, engineers, program managers, real estate professionals, regulators, leaders, contracting specialist, legal counsel, etc. In addition, an annual meeting of USACE Tribal Liaisons will continue to occur. Trainings shall include coverage of the documents listed in the paragraph 1 references in this Policy. USACE commits to improve understanding of the federal trust responsibility and treaty rights for all USACE employees, including jointly led opportunities with Tribal members. In addition, USACE commits to ensuring regular and robust coordination will occur in all directions, both vertically to/from districts to/from divisions and to/from HQUSACE, as well horizontally within districts, divisions, and HQUSACE. For example, specific business lines within a district will ensure awareness with other business lines within the district when they have engaged in Nation-to-Nation consultation. USACE is encouraged to consult with and coordinate with the Tribes when developing and implementing training, and to use the services and expertise of the Tribal Nations Technical Center of Expertise in implementing this paragraph.
12. Accountability. To assess the effectiveness of USACE consultation, USACE will keep records of Tribal and ANC consultation meetings and other Tribal and ANC interactions and correspondence. These records will be accessible and can be made available for purposes of reporting to the Office of Management and Budget through the Department of Defense. The report will be synthesized at HQUSACE and transmitted to DoD, Office of the Secretary of Defense, on a yearly basis. A copy of this report will be distributed to federally recognized Tribes or ANCs upon request. In addition, under reference 1.s., tribal consultation on water resources development projects will be reported annually to the Senior Tribal Liaison, HQUSACE, by all MSCs for annual reporting requirements and consideration for development of annual training. Districts and divisions will report all consultations to the designated district and division Tribal Liaisons for roll-up to their designated MSC. HQUSACE will then provide a report on water resources project Tribal consultations to Congress on an annual basis (Section 1120 of Public Law 114-322).

13. General Provisions: This policy is not intended to, and does not grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, repeal, interpret, or modify Tribal sovereignty, any treaty rights, or other rights of any Indian Tribes or ANCs, or to preempt, modify or limit the exercise of any such right.

Appendix A - Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making

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

November 30, 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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Disclaimer

Recommendations in this Report do not impose legally binding obligations on any federal agency. Each of the federal agencies will act as an independent party with respect to performance of recommendations in this Report. This Report does not, and does not intend to, restrict the authority of any party to act as provided by law, statute, or regulation. This Report does not, and does not intend to, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any person against the United States, its departments, agencies, or entities, its officers, employees, or agents or any other person. Each federal agency will bear its own expenses in connection with the preparation, negotiation, and execution of any recommendations of this Report. Any activities of the agencies in implementing this Report are subject to the availability of appropriated funds. Nothing in this Report obligates any of the agencies to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations.

This is not a stand-alone document, but a living document which should be read in conjunction with 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,¹ the commitment expressed by the White House to Elevate Indigenous Knowledge in Federal Policy Decisions,² and the Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters.³ This document contains legal principles, best practices, and aspirational and intentionally transformative policy goals intended to strengthen the protection of treaty and reserved rights, agency Tribal consultation practices, and the government-to-government relationship.

Federal agencies retain the discretion whether to adopt some or all of the best practices identified in this report, in accordance with their authorities, practical considerations, and other factors.

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

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

³ <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>.

This document is not intended to be a comprehensive statement of all considerations that should go into treaty rights decisions. This 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.”⁴ 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.”⁵ 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.⁶

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).⁷ 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 to enhance interagency collaboration and coordination and identify best practices for the protection of Tribal treaty and reserved rights, as well as a legal subgroup. The Treaty and Reserved Rights Working Group (Working Group) was formed and began work in August 2021. The Working Group collected and reviewed the MOU signatory agency Tribal consultation policies, as well as other federal department and agency Tribal consultation policies to inform its efforts.

In November 2022, the Administration announced a new Presidential Memorandum on Uniform Standards for Tribal Consultation, developed in response to the plans and reporting of reforms undertaken pursuant to the President Memorandum of January 26, 2021. These new standards for Tribal consultation are incorporated into this Best Practices document.

⁴ 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>.

⁵ *Id.* at Section 5(d).

⁶ 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/>.

⁷ 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>.

II. Purpose of the Best Practices Report

The Working Group has prepared this document to outline legal principles and best practices for integrating the consideration of Tribal treaty⁸ 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 Tribal rights recognized by other sources of law, including 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 treaty and reserved rights. Second, it serves as a record of Tribal input on this topic, summarizing both written and oral comments received during two consultation sessions and a written comment period; the Report provides an initial federal response to Tribal comments and recommendations made during tribal consultation on the MOU. Third, to improve the protection of treaty and reserved rights, this Report urges agencies to undertake a thorough review of their consultation policies and practices, while considering the principles and best practices identified in this Report.

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.⁹ Through these treaties, Indian Tribes ceded land and natural 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 United States Constitution’s Treaty Clause, Article II, Section 2, Clause 2, authorizes the President to make Treaties, with the concurrence of two thirds of the Senate. In total, the U.S. ratified approximately 374 treaties with Native nations. These treaties were not always entered into voluntarily by Tribal Nations. The United States sometimes failed to live up to Tribal treaties as the country expanded westward across the North American continent.

Tribal treaties, executive orders, judicial decisions, and other agreements not only recognize Tribal sovereign authority, but also reserve to Indian Tribes all rights not expressly granted to the United States. Treaties with Tribal Nations may explicitly secure rights to the Tribe, including lands, fishing and hunting rights, water rights, and goods and services such as food, education, and healthcare. In addition to expressing reservation of Tribal authority and property, Treaties also implicitly reserved Tribal rights necessary to further the purposes associated with the Treaty—often the creation of a Tribal homeland—including rights to water and other natural resources. Under the “reserved rights doctrine,” rights not addressed by Tribal treaty provisions are presumptively reserved, so long as the rights retained are consistent with

⁸ 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.

⁹ An international organization may also be party to treaty.

federal law and the Tribe's sovereign status; agencies should generally interpret silence in a Tribal treaty in accordance with the reserved-rights doctrine. 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 legal mechanisms 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, several Tribes exchanged some of their sovereign powers and lands for other interests, as well as 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," 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 Board of Com'rs of Creek County v. Seber*, 318 U.S. 705, 715 (1943); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-74 (2011).

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; (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. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). Furthermore, Congress must clearly express any intent to abrogate Indian treaty rights. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019). Agencies should be cognizant of these canons when making decisions that impact Tribal treaty, reserved rights, or other similar rights.

A. Executive Actions

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 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.¹⁰ 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

¹⁰ 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."

objectives;¹¹ to defer to Tribal standards where possible;¹² 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.¹³ When departments and agencies undertake regulatory rulemakings that have Tribal implications, they are directed to consult with Tribal governments to the extent practicable and permitted by law.¹⁴ 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.”¹⁵

In November 2022, the White House issued a Presidential Memorandum on Uniform Standards for Tribal Consultation. This report reaffirms and expands upon many of the principles from that Presidential Memorandum. Of particular importance is that the President identifies formal Tribal consultation as acknowledging the nation-to-nation relationship between federally recognized Tribes and the United States; acknowledges that the United States owes treaty and trust responsibilities to Tribal Nations; and recognizes Tribal sovereignty as the basis for consultation.

Treaties are substantive federal law of equal importance to other federal laws and obligations. Federal agencies must give effect to treaty rights and should seek to safeguard them as agencies contemplate action. When a federal agency is engaging in certain regulatory or other decision-making processes with Tribal implications, the agency must engage, through consultation, with Tribes to determine whether Tribal treaty or reserved rights would be impacted by the proposed federal action. Consistent with Executive Order 13175, when a federal agency is engaging in regulatory action, undertaking decisions, or commenting on legislation that affect Tribes, the federal-Tribal relationship or on the distribution of power between the federal government and Tribes, the agency shall engage, through consultation, with Tribes to determine whether Tribal treaty, reserved rights, or other similar rights would be impacted by the proposed federal action. Through consultation, agencies should give weight and effect to Tribal views on the nature and scope of the treaty and reserved rights. Agencies should inquire about Tribal perspectives of the likelihood and level of impact to those rights by the proposed agency action, and how to ensure that agency actions do not impair Tribes’ ability to exercise those rights.

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 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

¹¹ *Id.* at Sec. 3 Policymaking Criteria (c)(1).

¹² *Id.* at Sec. 3 Policymaking Criteria (c)(2).

¹³ *Id.* at Sec. 3 Policymaking Criteria (c)(3).

¹⁴ *Id.* at Sec. 5 Consultation.

¹⁵ *Id.* at Sec. 5 Consultation (d).

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.

B. United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has influenced federal policy towards Tribal Nations.¹⁶ The UNDRIP is a nonbinding document that discusses both the human rights of indigenous individuals and the collective rights of indigenous peoples.

The MOU 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.”¹⁷

Although the U.S. voted against the UNDRIP when it was adopted in 2007, in 2010, it 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.”¹⁸ The United States supports the Declaration, which – while not legally binding or a statement of current international law – has both moral and political force.

Of particular relevance to this document is this paragraph outlining the policy of the United States under the Obama-Biden Administration regarding Tribal consultation:

The United States intends to continue to consult and cooperate in good faith with federally recognized Tribes and, as applicable, Native Hawaiians, on policies that directly and substantially affect them and to improve our cooperation and consultation processes, in accordance with federal law and President Obama’s call for better implementation of Executive Order 13175. The United States does so with the firm policy objective, where possible, of obtaining the agreement of those Tribes consistent with our democratic

¹⁶ 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; 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>.

¹⁷ 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.”

¹⁸ U.S. Announcement of Support, *supra* note 16 at 5.

system and laws. At the same time, the United States intends to improve our engagement with other indigenous individuals and groups. The United States will also continue to implement the many U.S. laws that require the agreement of federally recognized Tribes or indigenous groups before certain actions can be taken or that require redress for takings of property.¹⁹

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, this Best Practices document, a Field Guide for Federal Staff, and a Flow Chart in September 2022. Two consultation sessions were held, and Tribal leader comments were invited before and during the consultations, including for a period of 30 days after the consultations.

V. Tribal Comments

In addition to comments received during two days of Tribal consultations, the Treaty and Reserved Rights Work Group received written comments from twenty-four (24) Tribes and two Tribal organizations.

While most Tribes expressed support for the efforts of the Tribal Treaty Rights (TTR) MOU and the three best practices documents it was equally clear that Tribal governments believe there are many opportunities to improve the federal government's identification and protection of Tribal treaty and reserved rights. Tribal input received during the consultations identified systemic opportunities to improve the way federal agencies solicit and account for Tribal input regarding the protection of Tribal treaty and reserved rights and repeatedly emphasized the need for government-wide consistency in federal Tribal consultation efforts.

A more detailed Tribal Consultation Summary Report will be available on the White House Council on Native American Affairs (WHCNA) website and shared with Tribes who shared verbal or written consultation comments.

Summary of Tribal Comments

Tribes and Tribal organizations made over 30 recommendations in relation to the Best Practices Documents. They also made several comments about improving consultation generally and made several legislative recommendations. Specific responses will be developed in a Tribal Consultation Summary Report, which will be attached to this document as a future appendix.

Tribal comments acknowledged the importance of protecting Tribal treaty rights, while also underscoring that an emphasis on Tribal treaty rights should not diminish other Tribal rights. Tribal comments called on the U.S. to maintain a government-to-government relationship and fulfill the trust responsibility to all Indian Tribes irrespective of individual treaty status. One Tribal organization and a coalition of recently federally recognized Tribes stressed the need for the federal government to honor the treaties that were made by Tribes before the creation of the United States, through the Doctrine of Universal Succession.

¹⁹ *Id.*

Tribes requested additional consultation on the MOU and that the WHCNAA furnish a list of the 17 agencies' consultation policies reviewed by the TTR MOU Work Group to tribal officials for review and consideration.

Tribes were extremely supportive of the statement that "treaties are substantive law" but commented that the implementation of this fundamental principle through decision-making and regulatory drafting is lacking. Tribes asserted agencies have a legal duty and a trust responsibility to uphold Tribal treaty rights and protect and improve treaty-reserved resources, not whenever convenient or "where applicable," but in all matters and manners. Tribes stated that treaty rights are not subject to an agency's discretion.

Tribes raised concerns regarding agency identification of treaty rights and urged that Tribes should be part of the process for identifying treaty rights that may be impacted by a proposed federal action. Tribes called for agencies to revise their permit applications to include requirements to identify potential Tribal impacts, which would trigger agency consultation requirements. Tribes pointed to federal regulations as failing to require affirmative steps to ascertain whether treaty or reserved rights may be impacted by an agency action. Multiple Tribal comments emphasized the need for agencies to recognize the need for earlier interagency collaboration and coordination where projects or decisions implicate multiple treaties or where there are overlapping federal agency interests.

Tribes were supportive of the training efforts begun by the TTR MOU Work Group but urged agencies to require annual federal training for all federal employees, including managers and political leadership. In regional and field offices, training should be developed in consultation and with the participation of Tribal governments, particularly regarding treaties and other agreements creating Tribal rights in the areas in which they serve and their abrogation and historical treatment of Tribes by the United States, to develop cultural competency of federal staff.

Tribes raised concerns with consultation generally. Tribes highlighted the need for consistency of Tribal consultation policies and processes across federal departments and agencies, including when Administrations change after elections. They called for harmonization of agency Tribal consultation policies and processes as a means of reducing the resource and administrative burden that variations place on Tribal governments. Tribal leaders stressed the need for agencies to ensure that they are communicating only with designated Tribal leaders during consultation. Tribes asked federal agencies to ensure that officials with decision making authority be present at Tribal consultations, as well as to commit to a singular, government-wide, Tribal consultation calendar.

Tribes spoke of a need for agencies to develop Tribal protocols. Tribes recommended that each agency should develop culturally and historically sensitive protocols for consultation, respectful of Tribally enacted consultation policies and laws, to improve regular communication, provide better service, promote information sharing, respect Tribal sovereignty, and reduce resource constraints on Tribal governments.

Tribes expressed concern over agency, office, and mission “siloeing”, causing agencies to fail to see fully how the federal trust responsibility may be impacted by a decision or action. Tribes called for a “Whole of Government” approach and emphasized that the burden should be on agencies to facilitate multi-agency coordination efforts when federal actions implicate treaty or reserved rights. Tribes clarified that some treaty and reserved rights are exercised outside of ceded land boundaries and urged agencies to inquire about historical land use and lands of cultural significance. They urged agencies to inquire about historical context and look holistically beyond treaties to other relevant documents, agreements, executive orders, and judicial decisions.

The topics of consensus and free, prior, and informed consent were raised by multiple Tribes. Some Tribes characterized current federal consultation practice solely as information sharing and listening to differing perspectives, and noted consultation requires neither consensus, nor consent on the part of Tribes. Tribes urged a return to the practice of seeking consent when treaty rights are implicated. Meaningful consultation requires sovereigns to have an open dialogue to identify relevant treaties and work in good faith towards consensus in federal decision-making and regulatory development that may impact Tribal interests, particularly where Tribal treaty and reserved rights may be impacted. Where there may be Tribal treaty impacts, Tribes asserted that the federal government go beyond simply considering Tribal treaty and reserved rights and require agencies to secure the free, prior, and informed consent of Tribal Nations. Some Tribes pointed out that their treaty language specifically requires Tribal consent for federal actions.

Tribes expressed concern that states continue to undermine treaty rights in a variety of areas. Tribes pointed to instances of being forced to litigate state restrictions on exercising treaty rights to hunt and fish. Tribes asserted that the federal government’s treaty and trust responsibility should stop looking at how treaty rights are diminished but should aspire to enhance treaty and trust resources and called for expanded detail on the duties of care for each federal trustee.

Tribes also called for greater awareness and protection of culturally sensitive resources and lands. Concerns regarding the public release of potential agency mapping of culturally sensitive, religious, and anthropological significance were expressed. Multiple Tribes requested the Administration seek an amendment to the Freedom of Information Act (FOIA) to exempt culturally sensitive information shared with agencies during consultation from public disclosure.

Tribes cited a need for an enforcement mechanism to ensure that agencies are held accountable to the best practices identified in this report. Tribes were cautiously optimistic about a dispute resolution or elevation mechanism but stated that treaty rights were not subject to agency determinations.

Tribes called for more thorough follow up with tribes following consultation. Tribes want to know how the information they shared with federal agencies was utilized and impacted the final agency decision or regulation, or if it did not, why their information or concerns were not utilized or addressed.

VII. Key Principles and Recommendations from the Work Group

The Administration has stated that respect for Tribal treaty rights is a cornerstone of federal Indian policy.²⁰ Federal agencies should work to improve their processes for identifying Tribal treaty, reserved and similar rights, and undertake, through Tribal consultation, how to protect treaty-protected rights and enhance trust resources consistent with the applicable treaties and authorities provided in federal law.

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 to help protect those rights; and to improve the government-to-government relationship. The following principles and recommendations have been revised based on the Tribal feedback received during the consultation sessions and written comment period.

This effort is undertaken as a living document with the hope that it can be revisited and continually improved as Tribes and federal agencies learn to better provide for treaty protection of Tribal resources.

A. Fundamental Principles for Tribal Consultation Policies

Agencies should consider including the following fundamental principles in consultation policies:

1. Federal Tribal consultation policies should strive for uniformity, including using common definitions, processes, and time frames, for purposes of consistency, ease of Tribal use, and for promoting a whole-of-government approach.
2. Tribes are sovereign nations with self-governance and self-determination rights.²¹
3. Tribes have a two-way Nation-to-Nation relationship with the United States.
4. Tribal consultation may be initiated at the request of a Tribal government.
5. Tribal treaties are substantive federal law and do not derive from other federal statutes.
6. Treaties, like the U.S. Constitution and federal statutes, are the supreme law of the land.²²
7. Tribal treaties are binding legal agreements between or among two or more sovereign nations.
8. Tribal consultation should be meaningful. A meaningful consultation is, among other inclusive practices: carried out in a timely, efficient, and responsive manner; transparent,

²⁰ 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.”

²¹ 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.

²² U.S. Const. art. VI, cl. 2.

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.

9. 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.”²³ 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.
10. Tribal consultation policies should incorporate a process for notifying, coordinating and collaborating with other federal agencies if multiple agencies have a vested interest in an action or decision, especially when that federal action or decision may implicate multiple Tribal Nations and/or multiple Tribal treaties.
11. Tribal consultation requires that information obtained from Tribes be given meaningful consideration and should strive for consensus or a mutually desired outcome. Tribal consultation policies should acknowledge that information received from Tribes will be given meaningful consideration.
12. Tribal consultation should generally include both federal and Tribal officials with decision-making authorities regarding the proposed policy that has Tribal implications. The head of each agency should ensure that federal representatives with appropriate expertise and, to the extent practicable, decision-making authority regarding the proposed policy are present at the nation-to-nation consultation.
13. The head of each agency should consider conducting the consultation in a manner that prioritizes participation of official Tribal government leaders. Tribal consultation policies should state that if federal agencies receive information during consultation from a source other than a Tribal government official, the agency should ascertain whether that source has appropriate Tribal authority to speak for the Tribal government, by communicating directly with Tribal government officials.
14. Agencies should be familiar with Tribally enacted consultation laws, statutes, policies, or protocols and, as appropriate, develop mutually agreed upon consultation protocols tailored to the consultation standards of individual Tribes. Employees of federal agencies and Tribal nations can and should maintain open channels of communication and readily share information. Such communication is not consultation, nor does informal engagement between federal agency and Tribal nation staff serve as a substitute for consultation and the nation-to-nation relationship.
15. In conducting the consultation agencies are required to respect and elevate Indigenous Knowledge including cultural norms and practices relevant to such consultations.
16. Tribal consultation policies should identify the department’s or agency’s process for notifying Tribes of how the Tribal input influenced the federal decision-making after the consultation has concluded and the federal decision or action has been made.
17. All of these principles should be applied to the extent practicable and permitted by law.

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

B. Best Practices for Tribal Consultation Processes

Agencies are encouraged to consider the following best practices to better establish and implement consultation policies.

1. **Begin Early:** Consultation should begin early in a project, policy, or other federal action planning. Federal agencies should consult with potentially affected Tribes before decisions on regulatory policies affecting Tribal interests (or other actions that trigger consultation under the agency's consultation policy) are made. Agency heads should ensure that agency staff undertake an analysis to determine whether consultation is required or appropriate as early as possible in their planning efforts, regardless of whether a Tribal government requests consultation. When a Tribal government requests consultation, the agency should conduct a similar analysis and respond to the Tribe within a reasonable time.
2. **Establish Protocols:** Federal agencies should develop consultation protocols ahead of time (including effective notice, establishing minimum consultation periods and timelines for written comments, ensuring appropriate access, agency follow-up) to formalize how consultation will occur.²⁴ Agencies should inquire regarding Indigenous Knowledge and Tribally developed consultation policies/processes/protocols and be respectful of those protocols in seeking consultation. In conducting the consultation agencies are required to respect and elevate Indigenous Knowledge including cultural norms and practices relevant to such consultations.
3. **When to Consult:** If there is any question as to whether an agency policy will have Tribal implications, then consultation should be conducted. In consultation with potentially affected Indian Tribe(s), federal departments and agencies should assess whether Tribal treaty, reserved rights, or other similar rights are affected by the proposed action.
 - Do treaties, reserved rights, or other similar rights exist that are implicated by proposed agency actions?
 - What Tribal treaty rights, reserved rights, or other similar rights may exist in, or what Tribal treaty-protected resources rely upon, the area affected by the proposed action? How might Tribal treaty rights, reserved rights, or other similar rights potentially be affected by the proposed action?
4. **Identify the Appropriate Federal Decisionmaker:** Given the subject matter (treaty and/or reserved rights), each agency should ensure that federal representatives with appropriate expertise and, to the extent practicable, decision-making authority regarding the proposed policy are present at consultation.

²⁴ 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>.

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

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

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

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

8. **Notifying Appropriate Tribal Participants:** Federal agencies should notify and invite all potentially affected Tribes to consult. 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 traditional and historical lands may be located far from a Tribe's existing reservation. Off- reservation rights to hunt and fish may be located on lands that are not treaty-ceded land.

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

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

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

12. **Treaty Research Pre-Consultation:** Agencies should seek to review every treaty a Tribe has entered into when conducting research for consultation related to a Tribal treaty right,

reserved right, or other similar right matter (rather than just the most recent treaty) to understand historical context and identify potential rights, resources or impacted historical lands.

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

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

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

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

16. **Record of Consultation:** In accordance with the Presidential Memorandum on Uniform Standards for Consultation, for any consultation required under E.O. 13175, each agency must maintain a record of the consultation process that includes: a summary of Tribal input received; an explanation of how Tribal input influenced or was incorporated into the agency action; and the reasoning for why Tribal suggestions were not incorporated into the agency action or why consensus could not be attained. Each agency shall disclose to the affected Tribe(s) the outcome of the consultation and decisions made as a result of consultation in a timely manner. To the extent permitted by applicable law, the head of each agency should seek to ensure that information designated as sensitive by a Tribal government is not disclosed. For national and regional consultations, or if otherwise appropriate, the head of each agency should also consider publicly posting the record of consultation.

17. **List of Potentially Impacted Treaties:** Federal agencies should utilize an established Tribal treaty database to identify any treaties that may be affected by a proposed consultation. Potential databases include the Oklahoma State Tribal Treaty Database tool

(<https://treaties.okstate.edu/>) or the National Archives Digital Tribal Treaty Database (<https://www.archives.gov/research/native-americans/treaties/catalog-links>).

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

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

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

20. **Permitting and Regulatory Processes:** Federal departments and agencies should undertake a review of permitting forms and regulatory development processes to identify whether agencies are asking the threshold question of whether there is the potential for a Tribal impact in an agency action, decision, or proposed regulation and, where allowable, modify those permits or processes to require that that question be asked.

21. **Particular Expertise in Federal Attorney Offices:** Federal agencies should have attorney and program staff with expertise in federal Indian law. Consistent with the *Executive Order on Diversity, Equity, Inclusion, and Accessibility* in the Federal Workforce, agencies should consider inclusion of persons with Tribal perspectives on Indian law in its diversity and inclusion efforts.

22. **All-of-Government Tribal Consultation Calendar:** The WHCNA should strive to establish a single federal Tribal consultation calendar as a means of reducing administrative burdens on Tribes to track Tribal consultations across multiple federal agencies pursuant to its authority under Executive Order 13647 *Establishing the White House Council on Native American Affairs* Sec. 4(c), to coordinate a more efficient and effective process for Tribal consultation among departments and agencies.

IX. Definitions in Federal Consultation Policies – To be defined through additional tribal consultations

Following President Biden's 2021 Presidential Memorandum, many agencies undertook Tribal consultations on agency consultation policies. In these consultations, Tribes pointed out the lack of consistency in definitions among agency consultation policies, resulting in additional administrative cost to Tribal governments. While Tribal comments were supportive of efforts to

harmonize Tribal consultation policies and processes to ease administrative burden on Tribal government resources, Tribes specifically requested additional consultation on the development of these terms.

The Treaty and Reserved Rights Work Group recommends that the White House Council on Native American Affairs continue to coordinate departments and agencies in harmonizing consultation terms relating to treaty and reserved rights, with additional Tribal consultation as appropriate. The Treaty and Reserved Rights Work Group recommends that agencies and departments whose existing policies do not currently contain “Definition” or “Glossary” sections should add this section pursuant to the above process.

XV. Conclusion

There is ample opportunity for continued improvement of the federal government’s commitment to honor Tribal treaty rights, reserved rights, or other similar rights; protect Tribal treaty and enhance trust resources; and consult with Tribes on a government-to-government basis. Treaty rights and the trust responsibility are matters for the entirety of the federal government to abide by, not just the seventeen signatories of this Memorandum of Understanding. But it is by laying the groundwork here that the federal government recommits itself to those ideals and recognizes that by continuing to improve these Best Practices, it will improve the federal-Tribal relationship and meet U.S. obligations under its treaties with Tribal sovereign nations.

Appendix B – Presidential Memorandum on Uniform Standards for Tribal Consultation

Presidential Documents

Title 3—

Memorandum of November 30, 2022

The President

Uniform Standards for Tribal Consultation

Memorandum for the Heads of Executive Departments and Agencies

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Background.* The United States has a unique, legally affirmed Nation-to-Nation relationship with American Indian and Alaska Native Tribal Nations, which is recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. The United States recognizes the right of Tribal governments to self-govern and supports Tribal sovereignty and self-determination. The United States also has a unique trust relationship with and responsibility to protect and support Tribal Nations. In recognition of this unique legal relationship, and to strengthen the government-to-government relationship, Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), charges all executive departments and agencies (agencies) with engaging in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications. Executive Order 13175 also sets forth fundamental principles and policymaking criteria.

The Presidential Memorandum of January 26, 2021 (Tribal Consultation and Strengthening Nation-to-Nation Relationships), requires agencies to submit detailed plans of action to implement the policies and directives of Executive Order 13175. In response, all agencies subject to Executive Order 13175 submitted plans of action, including over 50 agencies that submitted a consultation plan of action for the first time. Agencies also conducted more than 90 national-level Tribal consultations, focusing specifically on agency Tribal consultation policies. The purpose of this memorandum is to establish uniform minimum standards to be implemented across all agencies regarding how Tribal consultations are to be conducted. This memorandum is designed to respond to the input received from Tribal Nations regarding Tribal consultation, improve and streamline the consultation process for both Tribes and Federal participants, and ensure more consistency in how agencies initiate, provide notice for, conduct, record, and report on Tribal consultations. These are baseline standards; agencies are encouraged to build upon these standards to fulfill the goals and purposes of Executive Order 13175 consistent with their unique missions and engagement with Tribal Nations on agency-specific issues.

Sec. 2. *Consultation Principles.* Tribal consultation is a two-way, Nation-to-Nation exchange of information and dialogue between official representatives of the United States and of Tribal Nations regarding Federal policies that have Tribal implications. Consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribal Nations, and acknowledges that the United States maintains certain treaty and trust responsibilities to Tribal Nations. Consultation requires that information obtained from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome. Consultation should generally include both Federal and Tribal officials with decision-making authority regarding the proposed policy that has Tribal implications. Consultation will ensure that applicable information is readily available to all parties, that Federal and Tribal officials have adequate time

to communicate, and that after the Federal decision, consulting Tribal Nations are advised as to how their input influenced that decision-making. All of these principles should be applied to the extent practicable and permitted by law.

Sec. 3. *Designating an Agency Point of Contact for Tribal Consultation.*

(a) The head of each agency shall designate a primary point of contact for Tribal consultation matters who is responsible for advising agency staff on all matters pertaining to Tribal consultation and serving as the primary point of contact for Tribal officials seeking to consult with the agency.

(b) The head of each agency shall consider designating additional points of contact as necessary to facilitate consultation on varied subject matter areas within the agency.

(c) Each agency shall provide the names and contact information of the designated agency points of contact for Tribal consultation on its website, as well as to the White House Office of Intergovernmental Affairs and the White House Council on Native American Affairs.

(d) The designated agency points of contact may delegate consultation responsibilities to other decision-making agency officials within their agency as necessary and appropriate.

Sec. 4. *Determining Whether Consultation Is Appropriate.* The head of each agency shall ensure that agency staff undertake an analysis as early as possible to determine whether Tribal consultation is required or appropriate consistent with Executive Order 13175. This analysis should occur regardless of whether a Tribal government requests consultation. When a Tribal government requests consultation, the agency—to the extent that it has not yet performed the analysis to determine whether consultation is appropriate—shall conduct that analysis as soon as possible and respond to the Tribe within a reasonable time period. If there is a reasonable basis to believe that a policy may have Tribal implications, consistent with the definition in Executive Order 13175, the agency shall follow the applicable requirements for consultation. Agencies may still engage in Tribal consultation even if they determine that a policy will not have Tribal implications, and should consider doing so if they determine that a policy is of interest to a Tribe or Tribes.

Sec. 5. *Notice of Consultation.* (a) When inviting a Tribe or Tribes to consult, the head of each agency should:

(i) develop a notice of consultation, which includes:

(A) sufficient information on the topic to be discussed, in an accessible language and format, and context for the consultation topic, to facilitate meaningful consultation;

(B) the date, time, and location of the consultation, as requested by the agency or as developed in consultation with the Tribe or Tribes;

(C) if consulting virtually or by telephone, links to join or register in advance;

(D) an explanation of any time constraints known to the agency at that time, such as statutory deadlines;

(E) deadlines for any written comments on the topic; and

(F) names and contact information for agency staff who can provide more information;

(ii) transmit the notice of consultation, using the agency's standard method of communication, to each affected Tribal government and consider posting it to the agency's website or any centralized Federal Government site for providing notice of or coordinating Tribal consultations;

(iii) provide notice of at least 30 days to the Tribe or Tribes of any planned consultations, except as provided in subsection (c) of this section;

(iv) provide appropriate, available information on the subject of consultation including, where consistent with applicable law, a proposed agenda,

framing paper, and other relevant documents to assist in the consultation process; and

(v) allow for a written comment period following the consultation of at least 30 days, except as provided in subsection (c) of this section.

(b) The head of each agency shall ensure that agency officials responsible for sending invitations to consult to interested or potentially affected Tribal governments use available tools, databases, and agency documentation, as well as communicate with agency representatives who may be knowledgeable about those Tribes and the location(s) affected by the policy with Tribal implications, to ensure their invitation efforts are appropriately inclusive. Such efforts should account for the fact that Tribes may have connections or legally protected rights to locations and resources beyond their current Tribal lands and Tribal government offices such as off-reservation fishing, hunting, gathering, or other rights.

(c) If there are time constraints such that 30 days' notice of consultation is not possible, or that the post-consultation written comment period described in subsection (a)(v) of this section must be shorter than 30 days, the notice of consultation should include information as to why the standard notice or written comment period cannot be provided. Upon the request of a Tribe, or where it would serve Tribal interests or fulfill certain trust obligations to Tribal Nations, agencies should consider adjusting deadlines for notice of consultations and for accepting written comments.

Sec. 6. *Conducting the Consultation.* Throughout a consultation, the head of each agency, or appropriate representatives, shall recognize and respect Tribal self-government and sovereignty; identify and consider Tribal treaty rights, reserved rights, and other rights; respect and elevate Indigenous Knowledge, including cultural norms and practices relevant to such consultations; and meet the responsibilities that arise from the unique legal relationship between the Federal Government and Tribal governments. The head of each agency should ensure that agency representatives with appropriate expertise and, to the extent practicable, decision-making authority regarding the proposed policy are present at the Nation-to-Nation consultation. The head of each agency should consider conducting the consultation in a manner that prioritizes participation of official Tribal government leaders.

Sec. 7. *Record of the Consultation.* (a) The head of each agency shall maintain a record of the consultation process that includes:

(i) a summary of Tribal input received;

(ii) a general explanation of how Tribal input influenced or was incorporated into the agency action; and

(iii) if relevant, the general reasoning for why Tribal suggestions were not incorporated into the agency action or why consensus could not be attained.

(b) The head of each agency shall timely disclose to the affected Tribe or Tribes the outcome of the consultation and decisions made as a result of the consultation. To the extent permitted by applicable law, the head of each agency shall seek to ensure that information designated as sensitive by a Tribal government is not publicly disclosed. Agencies should obtain advance informed consent from Tribal communities for the use of sensitive information provided by the Tribe, and should inform Tribal representatives that certain Federal laws, including the Freedom of Information Act, may require disclosure of such information.

(c) For national and regional consultations, or if otherwise appropriate, the head of each agency should also consider publicly posting the record of consultation to foster ease of reference and use by other agencies, employees, and processes, and to minimize burdens on Tribes to provide similar input in multiple consultations. Decisions regarding whether to publicly post a record of consultation should be made with Tribal input.

(d) The record of consultation does not waive any privilege or other exception to disclosure pursuant to the Freedom of Information Act or its implementing regulations.

Sec. 8. Training. (a) The head of each agency shall require annual training regarding Tribal consultation for agency employees who work with Tribal Nations or on policies with Tribal implications. This training shall include, at minimum, review of Executive Order 13175, this memorandum, and any applicable Tribal consultation policy of the agency.

(b) In addition, the Secretary of the Interior and the Director of the Office of Personnel Management (OPM), in consultation with Tribal Nations, shall establish training modules regarding Tribal consultation to be available for agency employees who work with Tribal Nations or on policies with Tribal implications. These training modules should explain the concepts of Tribal consultation, the Nation-to-Nation relationship, and Tribal sovereignty. Agencies may use these training modules to satisfy the annual training requirement set forth in subsection (a) of this section.

(c) Within 180 days of the date of this memorandum, the Director of OPM, in consultation with the Secretary of the Interior, shall report to the President on progress toward establishing training modules regarding Tribal consultation and shall identify additional resources or other support necessary to implement this training.

Sec. 9. Definitions. The terms “Tribal officials,” “policies that have Tribal implications,” and “agency” as used in this memorandum are as defined in Executive Order 13175. The terms “Tribes” and “Tribal Nations” as used in this memorandum have the same definition as the term “Indian Tribe” as defined in Executive Order 13175.

Sec. 10. Scope. Nothing in this memorandum shall be construed to impair or otherwise affect the ability of heads of agencies to set more specific or more stringent standards, or to incorporate other best practices, for conducting Tribal consultation.

Sec. 11. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

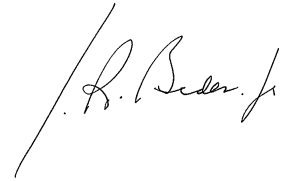
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Independent agencies are strongly encouraged to comply with the provisions of this memorandum.

(e) The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to read "R. L. Biden Jr.", is positioned in the upper right quadrant of the page.

THE WHITE HOUSE,
Washington, November 30, 2022

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