

Federal-Tribal Consultation: Background and Issues for Congress

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Mariel J. Murray,
Coordinator
Specialist in Natural
Resources Policy

Nicole T. Carter
Specialist in Natural
Resources Policy

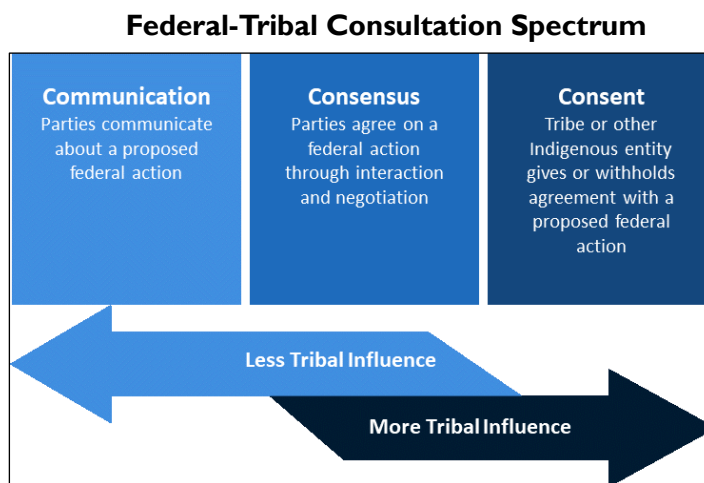
Eva Lipiec
Specialist in Natural
Resource Policy

Mainon A. Schwartz
Legislative Attorney

Federal-Tribal Consultation: Background and Issues for Congress

In recent decades, congressional interest in federal-tribal consultation on federal actions has grown, especially as some federally recognized Tribes (“Tribes”) and other Indigenous entities have sought more input into federal decisionmaking. This interest stems, in part, from Tribes’ historical connection to land and resources now owned or managed by the federal government.

Congress has not established a general tribal consultation mandate. In a variety of contexts, Members of Congress, Tribes, other Indigenous entities, the Executive, and federal agencies have characterized federal-tribal consultation in different ways. Generally, federal-tribal consultation refers to formal dialogue between official representatives of the federal government and Tribes (or, in some contexts, other Indigenous entities) that occurs while the federal agency considers or undertakes a federal action, as shown below.



Source: CRS.

Congress has required federal-tribal consultation in certain situations, such as when federal actions may impact tribal historic, cultural, and religious sites; however, none of these mandates defines the term *consultation*. Therefore, executive branch policy largely determines how consultation is performed. Since the 1970s, the executive branch has issued direction to guide federal-tribal consultation, and many agencies have issued policies tailored to that direction, including many natural resource agencies. It appears that presidential directives related to tribal consultation from prior Administrations remain in effect during the Trump Administration. However, offices within the Executive Office of the President, such as the Office of Management and Budget, have directed federal agencies to limit tribal consultation in certain contexts.

A number of issues arise for Congress related to federal-tribal consultation. These issues include consideration of federal-tribal consultation scope, timing, and representation as well as how agencies weigh input from tribal and other Indigenous entities. In addition, Congress may consider whether to maintain, expand, or curtail current consultation requirements. Some Tribes and other Indigenous entities have asserted that current agency consultation practices are inconsistent and unenforceable, and they have asked for a government-wide statutory standard. At the same time, Congress and agencies may find it challenging to weigh these interests against other statutory mandates and priorities. For example, federal-tribal consultation processes may delay federal actions.

Congress may assess current administrative and financial capacity challenges of entities conducting federal-tribal consultation. Some federal agencies, Tribes, and other Indigenous entities have identified their limited administrative capacity as hindering meaningful engagement. Whether and how much to fund consultation activities, including evaluating the costs and benefits of existing methods for financing federal-tribal consultation, are also options for Congress’s consideration.

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Introduction

The history of the relationship among the United States, federally recognized Tribes (“Tribes”), and other Indigenous entities is complex.¹ In the 18th and 19th centuries, the federal government removed many of these groups from their ancestral homelands through treaties and other means.² Various treaties reserved certain rights to Tribes, such as to continue hunting, fishing, or gathering on lands ceded to the federal government.³ Others included federal-tribal consultation obligations.⁴ The *federal trust responsibility* is a legal obligation under which the United States, through treaties, acts of Congress, and court decisions, “has charged itself with moral obligations of the highest responsibility and trust” toward Tribes.⁵ The federal trust responsibility can include obligations to protect tribal treaty rights as well as lands, assets, and resources on behalf of Tribes.

Some Members of Congress, Tribes, and scholars have characterized federal-tribal consultation as an obligation stemming from the federal trust responsibility.⁶ This trust responsibility underpins many congressional and executive branch authorities directing agencies to conduct federal-tribal consultation on federal actions.⁷ For example, Congress has mandated federal-tribal consultation when federal actions may impact tribal and Indigenous historic, cultural, and religious sites.⁸ Since the 1970s, the executive branch has also issued direction to guide federal-tribal consultation, and many agencies have issued policies tailored to that direction.⁹

In recent decades, many Tribes and other Indigenous entities have advocated for a more robust role in federal decisionmaking. Many Tribes and other Indigenous entities maintain ongoing physical, cultural, spiritual, and economic relationships with their homelands, even if they no

¹ A federally recognized Tribe (“Tribe”) is an American Indian or Alaska Native entity that is recognized as having a government-to-government relationship with the United States. See the “Terminology” section for more information about Tribes and other Indigenous entities.

² Prior to about 1871, the governments of the 13 original colonies and, subsequently, the U.S. government negotiated tribal treaties. See National Archives, “Native American Heritage: American Indian Treaties,” <https://www.archives.gov/research/native-americans/treaties>.

³ For example, the Treaty Between the United States of America and the Nez Percé Indians, U.S.-Nez Percé Tribe, Article III, June 11, 1855, 12 Stat. 957, 958, gave the Tribe “the right of taking fish at all usual and accustomed places.”

⁴ For example, the Treaty with the Kaskaskias, etc., U.S.-United Tribes of Kaskaskia & Peoria, Piankeshaw & Wea Indians, art. 7, May 30, 1854, 10 Stat. 1082, 1084, required the President to consult with the Tribes about annual payments. This report will not address specific treaty provisions regarding consultation.

⁵ *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). For a detailed discussion of the connection between the federal trust responsibility and consultation, see Colette Routel and Jeffrey Holth, “Toward Genuine Tribal Consultation in the 21st Century,” *University of Michigan Journal of Law Reform*, vol. 46, no. 417 (2013), pp. 434, 454-456, <https://repository.law.umich.edu/mjlr/vol46/iss2/2/> (hereinafter Routel & Holth, “Genuine Consultation”).

⁶ See Statement of Rep. Nick J. Rahall, “Introduction of the Consultation and Coordination with Indian Tribal Governments Act,” House debate, *Congressional Record*, daily edition, vol. 154, part 43 (March 13, 2008), pp. E383-E384. See also Statement of National Congress of American Indians (NCAI), legislative hearing on H.R. 3490, H.R. 3522, H.R. 5608, H.R. 5680, and S. 2457, 110th Cong., 2nd sess., April 9, 2008, H.Hrg. 41-818 (GPO, 2008), p. 83 (hereinafter H.R. 5608 hearing).

⁷ For purposes of this report, federal action includes federal decisions, policies, activities, and funding in addition to other actions of federal agencies.

⁸ See, e.g., the National Historic Preservation Act of 1966 (NHPA; 54 U.S.C. §§300101 et seq.).

⁹ See, e.g., Executive Order 13084, “Consultation and Coordination with Indian Tribal Governments,” May 14, 1998, https://www.justice.gov/archive/otj/Presidential_Statements/presdoc3.htm (hereinafter EO 13084).

longer live on or near those lands.¹⁰ From their perspective, federal-tribal consultation may be essential to protecting those relationships, perhaps especially when unique natural features or resources are involved and become the potential subjects of federal action. At the same time, Congress and agencies may find it challenging to weigh tribal and other Indigenous entity interests with other statutory mandates and congressional priorities.

This report begins by providing a conceptual framework for federal-tribal consultation, including a description of different types of consultation that entail varying degrees of tribal and other Indigenous entity input in federal actions. The report includes an overview of selected statutory and administrative authorities for conducting federal-tribal consultation and selected natural resource agencies' policies on federal-tribal consultation. It concludes with potential considerations for Congress, including an overview of recent legislative activities and options for addressing federal-tribal consultation. This report covers the topic of consultation broadly, but it is not a comprehensive discussion. For example, tribal co-management or co-stewardship—when Tribes and other Indigenous entities play a long-term, formal role in managing federal lands—is beyond the scope of this report.¹¹

Terminology

Tribal terminology may vary by statute. This report uses terms and phrases as follows:

- **Alaska Native.** Per the Alaska Native Claims Settlement Act (ANCSA; 43 U.S.C. §§1601 et seq.), this term generally refers to citizens of the United States who are “one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community) Eskimo, or Aleut blood, or combination thereof.”¹²
- **Alaska Native Corporation (ANC).** ANCSA divided the state of Alaska into 12 geographic regions and allowed Alaska Native Tribes to form Village and Regional ANCs, which are for-profit corporations that may own and manage resources for the benefit of their Alaska Native shareholders.¹³ ANCs themselves are not Tribes, although there are 228 Tribes located within ANC boundaries.¹⁴ They are included in “other Indigenous entities” for purposes of this report.
- **Tribe.** This term refers to any “Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe” under the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. §479a).
- **Native Hawaiian.** This term refers to any individual who is a descendant of the Indigenous people who, prior to 1778, “occupied and exercised sovereignty in

¹⁰ Monte Mills and Martin Nie, “Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-management on Federal Public Lands,” *Public Land & Resources Law Review*, vol. 44 (2021), p. 1, <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1741&context=plrlr> (hereinafter Mills & Nie, “Bridges”).

¹¹ For more information on co-management, see CRS Report R47563, *Tribal Co-management of Federal Lands: Overview and Selected Issues for Congress*, by Mariel J. Murray.

¹² Alaska Native Claims Settlement Act (ANCSA) defines the term “Native” and uses that terminology throughout (43 U.S.C. §1602).

¹³ 43 U.S.C. §§1601 et seq.

¹⁴ Department of the Interior (DOI), Bureau of Indian Affairs (BIA), “Alaska Region,” <https://www.bia.gov/regional-office/alaska-region>.

- the area that now constitutes the State of Hawaii.”¹⁵ They are included in “other Indigenous entities” for purposes of this report.
- **Native Hawaiian Organization (NHO).** This term refers to any organization that (1) “serves and represents the interests of Native Hawaiians,” (2) has “as a primary and stated purpose the provision of services to Native Hawaiians,” and (3) has “demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.”¹⁶ They are included in “other Indigenous entities” for purposes of this report.
 - **Other Indigenous Entities.** This term refers to
 - entities that are affiliated with Tribes (e.g., tribal organizations) and
 - descendants of groups that are not currently federally recognized but that inhabited the lands now comprising the United States when people of different cultures or ethnic origins arrived.¹⁷ For purposes of this report, this term includes Native Hawaiians, NHOs, ANCs, and state-recognized Tribes.
 - **State-Recognized Tribe.** This term refers to Tribes that are not federally recognized but have been acknowledged by state law and sometimes reside on state-recognized reservations.¹⁸ They are considered “other Indigenous entities” for purposes of this report.
 - **Tribal Land.** This term generally refers to land or an interest in land that is owned by a Tribe or tribal member or by the U.S. government on behalf of a Tribe or tribal member.¹⁹

Federal-Tribal Consultation: Conceptual Framework

There is no single, statutory definition of federal-tribal consultation, and Members of Congress, Tribes, other Indigenous entities, and federal agencies have interpreted and used the term in different ways. In this report, *federal-tribal consultation* refers to formal dialogue between official representatives of the federal government and Tribes (or, in some circumstances, other Indigenous entities) that can occur at various points while the federal agency is considering or undertaking a federal action.²⁰ This section presents a conceptual framework for understanding various approaches to federal-tribal consultation.

¹⁵ This report uses the NHPA’s definition of “Native Hawaiian” (54 U.S.C. §300313).

¹⁶ This report uses NHPA’s definition of “Native Hawaiian Organization” (54 U.S.C. §300314).

¹⁷ The term *Indigenous* is not consistently defined in the international or domestic legal context. Some entities, such as the United Nations, have developed general guidelines for identifying Indigenous groups based on a variety of factors (see United Nations, “Who Are Indigenous Peoples?” fact sheet, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf).

¹⁸ *Cohen’s Handbook of Federal Indian Law* (Washington, DC: LexisNexis, 2012), “Chapter 3: Indian Tribes, Indians, and Indian Country, §3.02.”

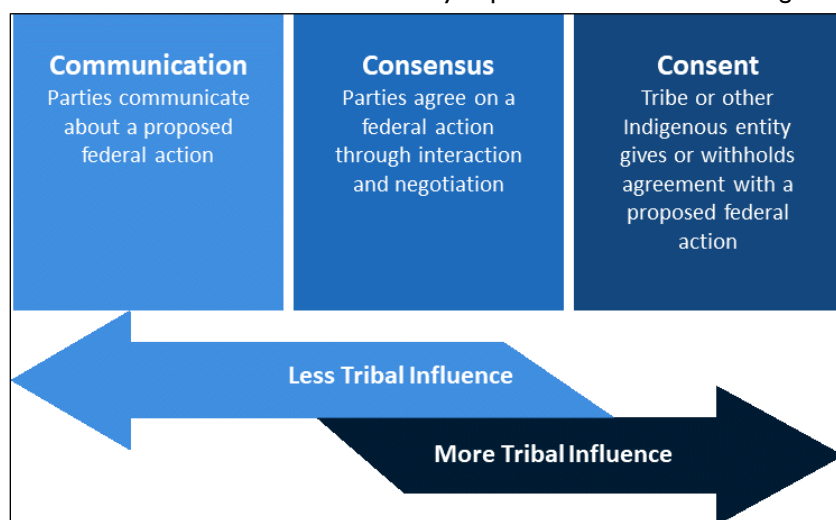
¹⁹ Often, statutory or regulatory text specifically define what constitutes *tribal land* or *Indian land* for its purposes. For information on tribal land types, see CRS Report R48360, *Tribal Lands: Overview and Issues for Congress*, by Mariel J. Murray.

²⁰ BIA, “What Is Tribal Consultation?” <https://www.bia.gov/service/tribal-consultations/what-tribal-consultation>.

Types of Consultation

Federal-tribal consultation may involve different degrees of tribal or other Indigenous entity input in federal decisionmaking. This section presents a spectrum of potential types of federal-tribal consultations, as illustrated in **Figure 1**.

Figure 1. Federal-Tribal Consultation Spectrum
Consultation Related to Federal Actions That May Impact Tribes and Other Indigenous Entities



Source: CRS.

Notes: *Federal actions* include federal decisions, policies, activities, and funding. *Consent* in this context means free, prior, and informed consent, as described in an international human rights principle from the United Nations Declaration on the Rights of Indigenous Peoples (https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf). The categories are not defined in statute and are meant to illustrate different types of consultation activities, ranging from less to more tribal or other Indigenous entity input in federal actions.

As will be discussed later in the report, existing federal-tribal consultation authorities may fall into different places along this spectrum, and not all points on the spectrum may be currently represented in law.

Communication

Communication methods for federal-tribal consultation are not specified in statute. Therefore, federal agencies have varying methods for communicating with Tribes, as outlined below in “Federal Agency Policies.” Some agencies have considered their federal-tribal consultation obligations met through one-way communication with Tribes, for example, by providing a public notice outlining potential agency actions in the *Federal Register*.²¹ Other agencies have required additional opportunities for tribal and other Indigenous entity input in decisionmaking.²² Agency federal-tribal consultation processes can also involve a period for written comments on public

²¹ Routel & Holth, “Genuine Consultation,” pp. 454-456.

²² Routel & Holth, “Genuine Consultation,” pp. 454-456.

notices; in-person or virtual national, regional, or area-specific meetings; or other possible methods.²³

Consensus

Congress has issued some direction to federal agencies on how to consider input from Tribes and other Indigenous entities in decisionmaking but has not generally required consensus. In this scenario, parties engage in a dialogue to reach a mutually agreeable course of action. Consensus requires unanimous consent but does not preclude negotiation and compromise.²⁴ Some Tribes, other Indigenous entities, and federal agencies have expressed that the goal of federal-tribal consultation should be reaching consensus.²⁵

Consent

Under current law, certain federal actions on tribal lands—for example, the establishment of rights of way—require the consent of tribal officials.²⁶ Some Tribes and other Indigenous entities have asked agencies to obtain their *free, prior, and informed consent (FPIC)* for federal actions more broadly as part of the federal-tribal consultation process.²⁷ FPIC is an international human rights principle from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).²⁸ The term’s components are summarized as follows:

- **Free:** An Indigenous community participates in consultation without intimidation, coercion, or manipulation.
- **Prior:** Federal-tribal consultation occurs as early as possible in the formulation of the federal proposal.
- **Informed:** The information provided to the Indigenous community is sufficiently quantitative and qualitative, as well as objective, accurate, and clear.
- **Consent:** Indigenous community consent is given through an explicit statement of agreement when the process has met the other criteria (free, prior, and informed).²⁹

²³ See, e.g., DOI, “Departmental Manual: Procedures for Consultation with Indian Tribes,” November 30, 2022, p. 3, https://www.bia.gov/sites/default/files/dup/tcinfo/512-dm-5-final_508.pdf.

²⁴ Judith Stein, “Decisionmaking Models,” Massachusetts Institute for Technology, Human Resources, <https://hr.mit.edu/learning-topics/teams/articles/models>.

²⁵ See, e.g., BIA, “Compilation of Comments Received on Updates to Consultation Policy 512 DM 4 and 5,” p. 5, November 2022, http://www.bia.gov/sites/default/files/dup/tcinfo/comment-summary-consultation-policy-512-dm-4-and-5-final_508_0.pdf (“Several Tribes agreed with the intent of the consensus-seeking model.”) (hereinafter BIA, “DM Comments”). See also DOI, “Departmental Manual: Department of the Interior Policy on Consultation with Indian Tribes,” November 30, 2022, p. 3, https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf (hereinafter DOI, “Consultation Policy DM”).

²⁶ 25 U.S.C. §324.

²⁷ See, e.g., BIA, “DM Comments,” p. 6. (“Tribes commented that rather than adopt the ‘consensus-seeking model,’ the Biden Administration should adopt a tribal consultation policy based on the FPIC standard.”)

²⁸ United Nations General Assembly, “United Nations Declaration on the Rights of Indigenous Peoples: Resolution/Adopted by the General Assembly,” A/RES/61/295, 2 October 2007, Articles 19 and 32, <https://www.refworld.org/legal/resolution/unga/2007/en/49353> (hereinafter “UNDRIP”).

²⁹ United Nations General Assembly, Human Rights Council, “Free, Prior and Informed Consent: A Human Rights-Based Approach—Study of the Expert Mechanism on the Rights of Indigenous Peoples,” August 10, 2018, pp. 6-9, <https://www.ohchr.org/en/documents/thematic-reports/free-prior-and-informed-consent-human-rights-based-approach-study-expert>.

Under the FPIC framework, Tribes and other Indigenous entities must have full information, time, and resources to consider federal actions in advance and the opportunity to give or withhold their consent.³⁰ UNDRIP articulates that government actors “shall consult and cooperate in good faith” with Tribes and Indigenous peoples to obtain FPIC “before adopting and implementing legislative or administrative measures that may affect them.”³¹ UNDRIP states that it is important that government actors obtain FPIC “prior to the approval of any project affecting [Indigenous] lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”³²

The FPIC standard, if codified into U.S. law, might provide Tribes and other Indigenous entities with greater influence. If Tribes disagree with a proposed action, they could potentially withhold their consent. Although the United States has expressed support for UNDRIP, it has not formally adopted or codified the FPIC principle.³³

Federal-Tribal Consultation Authorities

Agencies may be authorized or required to consult with Tribes and other Indigenous entities pursuant to various authorities. A selection of legislative and administrative authorities is provided below. Treaties and agreements between an agency and a Tribe may also shape when and how consultation occurs in specific situations; however, a discussion of those authorities is beyond the scope of this report.

Statutory Consultation Requirements

In the 1970s, Congress ushered in a new era of federal-tribal relations with a series of laws providing for tribal self-determination and federal-tribal consultation. First, the Indian Self-Determination and Education Assistance Act (ISDEAA; 25 U.S.C. §§5301 et seq.) outlined federal policy on tribal self-determination, including the “effective and meaningful participation by the Indian people in the planning, conduct, and administration of” federal programs and services.³⁴ Around that time, Congress also started to provide for Indigenous input in federal

³⁰ Native American Rights Fund, University of Colorado Boulder, and University of California, Los Angeles School of Law, “Tribal Implementation Toolkit,” pp. 28-32, <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf>. Some Tribes have incorporated the free, prior, and informed consent (FPIC) framework into tribal law, setting forth tribal consultation expectations for federal agencies.

³¹ UNDRIP, Article 19.

³² UNDRIP, Article 32.

³³ See U.S. Department of State, “Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples,” January 12, 2011, <https://2009-2017.state.gov/s/srgia/154553.htm> (The U.S. State Department has interpreted FPIC to signify “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.”). See also United States Mission to the United Nations, “Remarks on Item 3: Discussion on the theme ‘Implementing the United Nations Declaration on the Rights of Indigenous Peoples within United Nations Member States and the United Nations system, including identifying good practices and addressing challenges,’” April 21, 2025, <https://usun.usmission.gov/remarks-on-item-3-discussion-on-the-theme-implementing-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-within-united-nations-memb>.

³⁴ 25 U.S.C. §5302(b).

decisionmaking through laws requiring federal agencies to consult with Tribes before undertaking certain federal actions.³⁵ A selection of these statutory authorities is listed below:³⁶

- **American Indian Religious Freedom Act of 1978 (AIRFA; 42 U.S.C. §§1996 et seq.).** This legislation expresses the policy of the United States to protect the right of American Indians, Alaska Natives, and Native Hawaiians to “believe, express, and exercise” traditional religions and religious practices, including access to sites and use and possession of sacred objects.³⁷ AIRFA instructs the President to direct federal agencies to evaluate their policies and procedures, in consultation with native traditional religious leaders, to preserve Native American religious cultural rights and practices.³⁸
- **Archaeological Resources Protection Act of 1979 (ARPA; 16 U.S.C. §§470aa-470mm).** ARPA expresses Congress’s intent to protect archaeological resources on public lands and tribal lands. ARPA directs the Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority to consult with Tribes, among other entities, before issuing implementing regulations.³⁹
- **National Historic Preservation Act of 1966 (NHPA; 54 U.S.C. §§300101 et seq.).** The NHPA outlines a process for federal agencies to follow when projects may affect certain historic resources. Among other things, Section 106 of the NHPA requires federal agencies to take into account the effects of projects they *undertake* (carry out, authorize, or financially assist) on historic properties.⁴⁰ As part of that consideration, federal agencies must consult with any Tribe or NHO that “attaches religious and cultural significance” to historic properties potentially affected by the undertaking.⁴¹
- **Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. §§3001 et seq.).** NAGPRA requires museums and federal agencies to identify Native American human remains, funerary items, and objects of cultural significance in their collections and on federal lands and to consult with Tribes and NHOs to repatriate them.⁴²

³⁵ See, e.g., NHPA, National Environmental Policy Act of 1970 (NEPA; 42 U.S.C. §§4321 et seq.), and Archaeological Resources Protection Act of 1979 (ARPA; 16 U.S.C. §§470aa-470mm).

³⁶ For a more comprehensive list of federal-tribal consultation requirements in federal statutes and regulations, see Derek C. Haskew, “Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?” *American Indian Law Review*, vol. 24, no. 1 (1999), pp. 21-23, <https://digitalcommons.law.ou.edu/ailr/vol24/iss1/14/>.

³⁷ 42 U.S.C. §1996.

³⁸ 42 U.S.C. §1996 note.

³⁹ 16 U.S.C. §470ii. The Secretary of Defense is using a secondary Secretary of War designation under Executive Order 14347 of September 5, 2025.

⁴⁰ 54 U.S.C. §306108. The Advisory Council on Historic Preservation (ACHP) oversees the NHPA §106 review process. Created by NHPA, the ACHP is an independent agency consisting of federal, state, and tribal government members, as well as experts in historic preservation and members of the public. For more information about NHPA’s federal-tribal consultation requirements, see CRS Report R47543, *Historic Properties and Federal Responsibilities: An Introduction to Section 106 Reviews*, by Mark K. DeSantis.

⁴¹ 54 U.S.C. §302706(b). In its NHPA implementing regulations, the ACHP defined consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement” with them through this process (36 C.F.R. §800.16).

⁴² See generally 25 U.S.C. §§3001 et seq. *Native American* is defined as a “Tribe, people, or culture that is indigenous (continued...)”

- **The Safeguard Tribal Objects of Patrimony Act of 2021 (STOP Act; 25 U.S.C. §§3071 et seq.).** The STOP Act prohibits the export of cultural items covered under NAGPRA and ARPA and increases penalties for stealing and illegally trafficking such items.⁴³ It also creates an export certification system whereby anyone seeking to export an item that qualifies as a Native American cultural item (under NAGPRA) or archaeological resource (under ARPA) must apply for a certification.⁴⁴ The act directs the Secretary of the Interior to convene an advisory “Native working group” consisting of at least 12 representatives of Tribes and NHOs to develop the certification system.⁴⁵

Presidential Directives

Since the 1970s, the executive branch has issued many directives about federal-tribal consultation to federal agencies; a chronological list of selected presidential actions is below.⁴⁶

- **Executive Order 13084, “Consultation and Coordination with Indian Tribal Governments” (EO 13084).** Issued by President Clinton in 1998, this order mandates that agencies consult with Tribes in developing regulations and consider increasing the flexibility of waiver of statutory or regulatory requirements for Tribes.⁴⁷
- **Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (EO 13175).** Issued by President Clinton in 2000, this order mandates consultation with Tribes when federal agency policies involve regulations, proposed legislation, or other policy actions that have a “substantial direct effect” on Tribes or “tribal implications.”⁴⁸ EO 13175 requires agencies to develop a process to ensure “meaningful and timely input.”⁴⁹ In addition, it directs agencies to review processes under which Tribes may apply for waivers of statutory and regulatory requirements and “take appropriate steps to streamline those processes.”⁵⁰
- **Presidential Memorandum on Government-to-Government Relationship with Tribal Government (2004 PM).** Issued by President G.W. Bush in 2004,

to the United States” (25 U.S.C. §3001(9)). For more information on NAGPRA requirements, see CRS In Focus IF12523, *Repatriation of Native American Remains and Cultural Items: Requirements for Agencies and Institutions*, by Mark K. DeSantis and Nik Taylor.

⁴³ 25 U.S.C. §3071.

⁴⁴ 25 U.S.C. §3073.

⁴⁵ 25 U.S.C. §3076.

⁴⁶ For example, in a 1970 message to Congress, President Nixon expanded on the idea of the United States’ government-to-government relationship with Tribes, expressing the view that they should participate in policy development “to the greatest possible degree.” President Nixon’s Special Message on Indian Affairs, delivered to Congress in 1970, Special Message to the Congress on Indian Affairs, *Public Papers of the Presidents of the United States: Richard M. Nixon*, p. 564 (July 8, 1970).

⁴⁷ EO 13084.

⁴⁸ Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 *Federal Register* 67249 (2000) (hereinafter EO 13175). Congress has stated that EO 13175’s tribal definition includes ANCs (P.L. 108-199, as amended, provided that “[t]he Director of the Office of Management and Budget and all Federal agencies shall hereafter consult with Alaska Native corporations on the same basis as Tribes under Executive Order No. 13175.”

⁴⁹ EO 13175.

⁵⁰ EO 13175.

- this memorandum recommit agencies to working on a government-to-government basis with Tribes.⁵¹
- **Presidential Memorandum of November 5, 2009 (2009 PM).** Issued by President Obama, this memorandum requires agencies to “prepare and periodically update” a “detailed plan of actions” to implement EO 13175.⁵² The 2009 PM requires tribal consultation on agency plans prior to White House Office of Management and Budget (OMB) review.
 - **Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (2021 PM).** Issued by President Biden in 2021, this memorandum reaffirms the 2009 P.M., also requiring agencies to create a “detailed plan of actions” to implement EO 13175.⁵³ According to the 2021 PM, the Biden Administration also prioritized the following principles: respecting tribal sovereignty and self-governance; fulfilling federal trust and treaty obligations; and engaging in “regular, meaningful, and robust” consultation with Tribes.
 - **Presidential Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation (2022 PM).** Issued by President Biden, this memorandum directs agencies to implement federal-tribal consultation “best practices,” such as designating an agency point of contact for consultation, creating guidance on consultation notices, keeping records of consultation, and training, among other things.⁵⁴

All of these selected presidential actions include limitations and disclaimers.⁵⁵ For example, each includes a provision stating that it does not create any substantive or procedural right or benefit enforceable by a party against the United States.⁵⁶ Each also states that its directives should be implemented consistent with, as permitted by, or to the extent permitted by, law or notes that it should not be construed to impair or affect an agency’s legal authority.⁵⁷

In addition to presidential memoranda addressing federal-tribal consultation policy, the Biden Administration prioritized agency consideration of Tribes’ and other Indigenous entities’ rights and knowledge through federal-tribal consultation. For example, in 2021, 17 agencies signed an Interagency Treaty Memorandum of Understanding (MOU) committing to protecting tribal treaty and reserved rights to natural and cultural resources through consideration of these rights in agency decisionmaking.⁵⁸ In 2022, those agencies published a guide that included best practices

⁵¹ U.S. President (G. W. Bush), “Memorandum on Government-to-Government Relationship With Tribal Governments,” *Public Papers of the Presidents of the United States: Administration of George W. Bush, 2004* (GPO, 2004), p. 2106, <https://www.govinfo.gov/content/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf> (hereinafter 2004 PM).

⁵² U.S. President (Obama), “Memorandum of November 5, 2009: Tribal Consultation,” 74 *Federal Register* 57879, November 5, 2009 (hereinafter 2009 PM).

⁵³ U.S. President (Biden), “Tribal Consultation and Strengthening Nation-to-Nation Relationships,” 86 *Federal Register* 7491, January 29, 2021 (hereinafter 2021 PM).

⁵⁴ U.S. President (Biden), “Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation,” 87 *Federal Register* 74479, December 5, 2022 (hereinafter 2022 PM).

⁵⁵ For more information about executive orders, see CRS Report R46738, *Executive Orders: An Introduction*, coordinated by Abigail A. Graber.

⁵⁶ EO 13084 §7, EO 13175 §10, 2004 PM, 2009 PM, 2021 PM §3, and 2022 PM §11.

⁵⁷ EO 13084 §4; EO 13175 §§3, 5, & 6; 2004 PM; 2009 PM; 2021 PM §3; and 2022 PM §§2, 5, 7, & 11.

⁵⁸ ACHP et al., “Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the (continued...) ”

for federal-tribal consultation.⁵⁹ In 2021 and 2022, the White House also issued a series of policies recognizing the value of *Indigenous knowledge* and directed federal agencies to develop guidance to implement these policies.⁶⁰ These White House policies acknowledged that federal-tribal consultation may provide opportunities to understand and discuss how Indigenous knowledge can inform federal decisionmaking.⁶¹

CRS searched the United States Government Publishing Office's Compilation of Presidential Documents website and found no evidence that the Trump Administration has rescinded any presidential directives related to tribal consultation as of September 2026.⁶² Therefore, it appears that the presidential directives related to tribal consultation from prior Administrations remain in effect. However, offices within the Executive Office of the President, such as the Office of Management and Budget, have directed federal agencies to limit tribal consultation in certain contexts. For example, OMB Memorandum M-25-36, Streamlining the Review of Deregulatory Actions, states that agencies should consider deregulatory actions as "presumptively not triggering" consultation requirements. Furthermore, it states that "if there exists a particular reason for specific government-to-government consultations," agencies should presume that these consultations "should take place as part of the normal opportunity for stakeholder participation."⁶³

Federal Agency Policies

Federal agencies have responded to congressional and presidential direction on federal-tribal consultation by issuing regulations, guidance, and other administrative actions. Federal agencies with a history of interaction with Tribes and other Indigenous entities, such as the Bureau of Indian Affairs (BIA), have issued more robust policies than other agencies. During the Biden Administration, many natural resource agencies issued updated consultation guidance, which generally appears to remain in effect during the Trump Administration. The following includes a brief summary of four natural-resource-focused agency or department policies addressing federal-tribal consultation.

Protection of Tribal Treaty Rights and Reserved Rights," November 15, 2021, <https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf> (hereinafter "Interagency Treaty MOU").

⁵⁹ White House Council on Native American Affairs, "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, https://www.bia.gov/sites/default/files/media_document/best_practices_guide.pdf (hereinafter White House, "Best Practices Guide").

⁶⁰ There is no single definition of *Indigenous* knowledge, and different Indigenous peoples and federal agencies may define the term differently. For more information, see CRS Report R48317, *Indigenous Knowledge and Data: Overview and Issues for Congress*, coordinated by Mariel J. Murray. White House Council on Environmental Quality (CEQ) and Office of Science and Technology Policy (OSTP), "Indigenous Traditional Ecological Knowledge and Federal Decision Making," November 15, 2021, <https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf>. See also CEQ and OSTP, "Guidance for Federal Departments and Agencies on Indigenous Knowledge," November 30, 2022, https://www.bia.gov/sites/default/files/dup/inline-files/ik_guidance_implementation_memo.pdf (hereinafter CEQ and OSTP, "2022 IK Guidance").

⁶¹ See generally CEQ and OSTP, "2022 IK Guidance."

⁶² United States Government Publishing Office, "Compilation of Presidential Documents," <https://www.govinfo.gov/app/collection/cpd/>. CRS used the following search terms: (tribe OR tribal) NEAR/25 (consult OR consultation); Consultation and Coordination with Indian Tribal Governments; Executive Order 13175; and Uniform Standards for Tribal Consultation.

⁶³ Office of Management and Budget, "Memorandum M-25-36, Streamlining the Review of Deregulatory Actions," October 21, 2025, <https://www.whitehouse.gov/wp-content/uploads/2025/10/M-25-36-Streamlining-the-Review-of-Deregulatory-Actions.pdf?cb=1761144575>.

U.S. Department of the Interior (DOI)

Since 1972, DOI and its bureaus have issued various federal-tribal consultation policies.⁶⁴ BIA, the principal federal agency charged with administering policy and programs for Tribes and other Indigenous entities, was the first agency to issue a federal-tribal consultation policy in 1972. This policy defined *tribal consultation* as “providing pertinent information to and obtaining the views of tribal governing bodies.”⁶⁵ This policy required consultation on BIA personnel and budgetary policies and other BIA policies as BIA deemed appropriate.⁶⁶

Since then, DOI and its individual bureaus have issued many federal-tribal consultation policies, which collectively formed the foundation for DOI’s most recent consultation policy in 2022.⁶⁷ The 2022 DOI policy requires the department to consult with Tribes for any departmental action with “tribal implications,” which includes any action potentially affecting

- tribal cultural practices or treaty rights;
- the ability of a Tribe to govern or provide services to its members;
- a Tribe’s formal relationship with DOI; or
- any action planned by a nonfederal entity that involves funding, approval, or other DOI final agency action that could affect Tribes.⁶⁸

DOI did not adopt the FPIC standard in its 2022 consultation policy, stating that doing so would “deviate from the current position of the United States”; DOI did, however, include a consensus-based requirement in the policy.⁶⁹ The policy emphasized DOI’s goal “to achieve consensus wherever possible” in federal-tribal consultation using the consensus-seeking model shown in **Figure 2**.⁷⁰

⁶⁴ See DOI, “Resources for Tribal Nations,” <https://www.doi.gov/priorities/tribal-consultation/resources-tribal-nations>.

⁶⁵ The BIA guidelines are discussed and excerpted in *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717-721 (8th Cir. 1979).

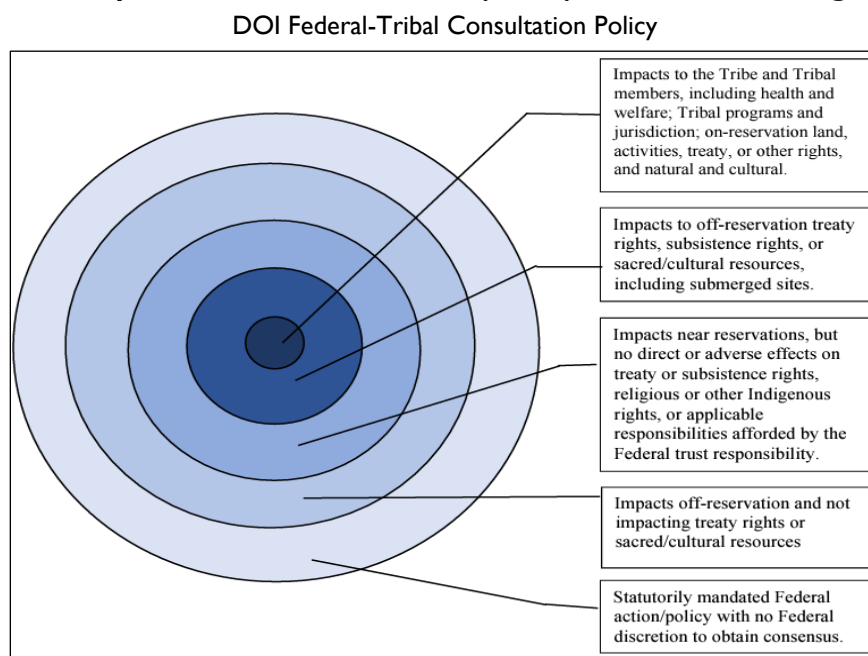
⁶⁶ *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717-718 (8th Cir. 1979).

⁶⁷ DOI, “Consultation Policy DM.” See also DOI, “Procedures for Consultation with Indian Tribes,” November 30, 2022, https://www.doi.gov/sites/default/files/elips/documents/512-dm-5_2.pdf (hereinafter DOI, “Consultation Procedures DM”). For example, DOI’s Bureau of Land Management (BLM) issued a consultation policy in 2016 (BLM, “BLM Manual 1780 Tribal Relations (P),” December 15, 2016, <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>).

⁶⁸ DOI, “Consultation Policy DM,” p. 3.

⁶⁹ BIA, “DM Comments,” p. 6.

⁷⁰ DOI, “Consultation Policy DM,” p. 8.

Figure 2. Department of the Interior's (DOI's) Consensus-Seeking Model

Source: DOI, “Departmental Manual: DOI Policy on Consultation with Indian Tribes,” November 30, 2022, https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf.

Notes: In its 2022 policy on federal-tribal consultation, DOI directed its staff “to achieve consensus wherever possible” using this model. The model illustrates low potential or need for consensus about departmental actions in the outer rings and increasing potential or need for consensus about departmental actions in the inner rings.

Alongside its consultation policy, DOI issued consultation procedures in 2022. Among other things, the procedures specified which DOI staff should attend consultations, how staff should conduct themselves in a consultation, and how they should treat confidential information received during a consultation. The document also delineated stages of consultation to include (1) initial planning; (2) proposal development; (3) record of consultation; (4) implementation of final federal action; and (5) consultation summary report.⁷¹

In 2022, DOI also issued policies directing its staff to consult with several other Indigenous entities. In one such policy, DOI stated that it would treat Tribes and ANCs the same for purposes of fulfilling federal-tribal consultation requirements under EO 13175.⁷² DOI also stated that if concerns expressed by Tribes and ANCs “substantively differ,” departmental officials “shall give due consideration to the rights of sovereignty and self-government” of Tribes and to the unique legal status and rights of ANCs.⁷³ The draft consultation policy for Native Hawaiians included DOI’s commitment to consult with them, stating that a special political and trust relationship between the federal government and Native Hawaiians may continue to exist even without a formal government-to-government relationship.⁷⁴

⁷¹ DOI, “Consultation Procedures DM.”

⁷² DOI, “Departmental Manual: Department of the Interior Policy on Consultation with Alaska Native Claims Settlement Act Corporations,” November 30, 2022, p. 2, <https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-6.pdf> (hereinafter DOI, “ANC Policy”).

⁷³ DOI, “ANC Policy,” p. 1.

⁷⁴ DOI, “Departmental Manual: Department of the Interior Policy on Consultation with the Native Hawaiian Community,” November 30, 2022, p. 2, <https://www.doi.gov/sites/doi.gov/files/513-dm-1-oes-clean-508.pdf>.

In 2023, DOI issued an official policy encouraging the incorporation of Indigenous knowledge into departmental decisionmaking.⁷⁵ Among other things, the document appeared to defer to Tribes and other Indigenous entities to provide FPIC regarding the use of their knowledge in DOI policies.⁷⁶ However, the policy clarified that FPIC was defined as consent for DOI to use Indigenous knowledge, not to indicate consent to any underlying project.⁷⁷

U.S. Department of Agriculture (USDA)

Over the last 25 years, USDA has issued guidance on federal-tribal consultation. After EO 13175 was issued in 2000, USDA adopted a series of departmental regulations on tribal consultation.⁷⁸ Then, in response to the 2009 PM, USDA issued a plan of action, which included the projected establishment of formal tribal consultation policies at all USDA agencies.⁷⁹ In addition, USDA noted that it had recently established a new Office of Tribal Relations, which would oversee the department's agency and office policies and processes for consultation, among other duties.⁸⁰ In 2013, USDA issued Departmental Regulation 1350-002, which directed USDA agencies to provide Tribes with the opportunity for consultation in policy development and program activities that have "direct and substantial effects" on one or more Tribes.⁸¹ USDA stated that this policy would ensure that tribal priorities "are heard and fully considered" in federal decisionmaking.⁸²

In response to the 2021 PM, USDA submitted a plan of action and a subsequent progress report related to agency actions to achieve goals of the 2021 PM. For example, the report discussed expanding USDA tribal expertise, updating consultation policies based on tribal feedback, and creating reporting and accountability requirements.⁸³ USDA also announced the creation of a Tribal Advisory Committee (TAC), as authorized by the 2018 farm bill (P.L. 115-334), which would advise USDA on tribal consultation.⁸⁴

USDA issued updated Departmental Regulation 1350-002 on April 30, 2024.⁸⁵ This policy was intended to implement the 2009 PM, the 2021 PM, and the 2022 PM. Among other things, the revised policy states that USDA must consult when a proposed regulation, policy, budget action, "or other USDA action (e.g., infrastructure projects, directives, funding set-asides)" could have

⁷⁵ DOI, "Departmental Manual: Departmental Responsibilities for Consideration and Inclusion of Indigenous Knowledge in Departmental Actions and Scientific Research," December 5, 2023, p. 1, <https://www.doi.gov/document-library/departamental-manual/301-dm-7-departmental-responsibilities-consideration-and> (hereinafter DOI, "IK DM").

⁷⁶ DOI, "IK DM," p. 7.

⁷⁷ DOI, "IK DM," p. 4.

⁷⁸ See, e.g., U.S. Department of Agriculture (USDA), "Departmental Regulation 1350-001: Tribal Consultation," September 11, 2008, <https://www.usda.gov/sites/default/files/documents/DR1350-001.pdf>.

⁷⁹ In its action plan, USDA acknowledged that historically, USDA had conducted consultations with Tribes on an ad hoc basis, except for two agencies: the Natural Resources Conservation Service and the Forest Service. See USDA, "United States Department of Agriculture Action Plan for Tribal Consultation and Collaboration," <https://www.usda.gov/sites/default/files/documents/ConsultationPlan.pdf> (hereinafter USDA, "Action Plan").

⁸⁰ USDA, "Action Plan," p. 7.

⁸¹ USDA, "Departmental Regulation 1350-002: Tribal Consultation, Coordination, and Collaboration," January 18, 2013), https://www.usda.gov/sites/default/files/documents/USDA_DR_Tribal_Consultation_Coordination_and_Collaboration_OTR_final_1_18.pdf (hereinafter USDA, "2013 Consultation DR").

⁸² USDA, "2013 Consultation DR."

⁸³ USDA, "United States Department of Agriculture Plan of Action 270 Day Progress Report," <https://www.usda.gov/sites/default/files/documents/usda-consultation-plan-action-270-day-report.pdf>.

⁸⁴ USDA, "USDA Tribal Accomplishments 2022," p. 1, <https://www.usda.gov/sites/default/files/documents/usda-tribal-accomplishments-2022.pdf> (hereinafter USDA, "2022 Tribal Accomplishments").

⁸⁵ USDA, "Departmental Regulation 1350-001: Tribal Consultation," April 30, 2024, <https://www.usda.gov/sites/default/files/documents/dr-1350-002.pdf>.

“tribal implications.” It defines tribal implications as including “implications for Tribes that involve their government-owned corporations, Tribal jurisdiction, and Tribal lands.” In addition to Tribes and ANCs, USDA “may also meet with” non-federally recognized Tribes and Native Hawaiian organizations.

In addition to USDA’s policy, individual USDA agencies have periodically issued their own consultation policies. For example, in 2022, the Forest Service issued its “Strengthening Tribal Consultations and Nation-to-Nation Relationships” action plan, which included the goal of “expanding scope and scale of Tribal involvement in agency work, planning, and decision making.”⁸⁶ The Forest Service action plan also referenced the Interagency Treaty MOU.

U.S. Army Corps of Engineers (USACE)

As part of its civil works responsibilities, USACE builds and operates water resource projects across the nation. USACE’s inventory of water projects includes more than 700 dams and reservoirs and almost 12 million acres of USACE-managed lands. Congress directs USACE to undertake navigation improvements, riverine and coastal flood risk management projects, and aquatic ecosystem restoration, as well as other activities. In addition to planning, constructing, and managing federal water resource projects, USACE also administers a regulatory program for the permitting of nonfederal actions affecting wetlands and navigable waters. For example, USACE administers Section 404 of the Clean Water Act and other regulatory authorities; permits under these authorities may be required for project developers to proceed with activities and projects in regulated waters.

USACE Tribal Consultation Policies and Tribal Liaisons

The then-Assistant Secretary of the Army (Civil Works; ASACW) released an updated USACE Tribal Consultation Policy on December 5, 2023, replacing an earlier policy from 2012.⁸⁷ Both the 2012 and 2023 policies applied to both the USACE civil works projects and the USACE regulatory program. The 2023 policy provides the following definition of consultation:

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.⁸⁸

⁸⁶ USDA, Forest Service, “Strengthening Tribal Consultations and Nation-to-Nation Relationships,” February 2023, p. 19, https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/Strengthening-Tribal-Relations.pdf.

⁸⁷ Memorandum from Assistance Secretary of the Army (Civil Works), Michael L. Connor, “Updated U.S. Army Corps of Engineers Tribal Consultation Policy,” December 5, 2023 (hereinafter 2023 “USACE Tribal Consultation Policy”); Memorandum from Lieutenant General Thomas P. Bostick, U.S. Army Commanding, to Commanders, Directors and Chiefs of Separate Offices, U.S. Army Corps of Engineers (USACE), “Tribal Consultation Policy,” November 1, 2012. Prior to releasing a draft policy in March 2023, in 2022 USACE had provided for tribal meetings and written recommendations for updating Army Corps civil works policy priorities, including an update of its tribal consultation policies (87 *Federal Register* 33756).

⁸⁸ “U.S. Army Corps of Engineers—Civil Works Tribal Consultation Policy” enclosure in 2023 “USACE Tribal (continued...)”

The 2023 policy identifies six tribal policy principles that broadly relate to tribal sovereignty; the trust responsibility; the government-to-government relationship; consultation elements; support of tribal self-determination, self-reliance, and capacity building; and protection of natural and cultural resources.⁸⁹ The ASACW's memo on the 2023 policy directed USACE to develop implementing guidance and to plan for the necessary training and "culture changes."⁹⁰ The 2023 policy also reflects that the Department of Defense, of which USACE is part, signed on to the Interagency Treaty MOU, which includes as an appendix the 2022 White House Council on Native American Affairs guide "Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making." (The Department of Defense is "using a secondary Department of War designation" under Executive Order 14347 of September 5, 2025.) The new policy references the 2022 PM as part of the protocols for notice of consultation and for the contents of the record of consultation.

Adoption of the new policy follows congressional attention to USACE consultation. In Section 112 of the Water Resources Development Act (WRDA) of 2020, Congress directed how USACE should conduct consultation in carrying out USACE water resource projects.⁹¹ In WRDA 2022, Congress established a requirement that each USACE district containing a "tribal community," shall have a tribal liaison.⁹²

Consultation Policy." The new policy notes that a separate consultation policy with Native Hawaiian Communities is under development.

⁸⁹ The 2023 USACE Tribal Consultation Policy states, "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." Regarding the protection of natural and cultural resources in addition to referencing NAGPRA and NHPA, the 2023 policy states "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."

⁹⁰ 2023 "USACE Tribal Consultation Policy."

⁹¹ Section 112(d) of Division AA of P.L. 116-260 states,

TRIBAL LANDS AND CONSULTATION.—In carrying out water resources development projects, the Secretary shall, to the extent practicable and in accordance with the Tribal Consultation Policy affirmed and formalized by the Secretary on November 1, 2012 (or a successor policy)—(1) promote meaningful involvement with Indian Tribes specifically on any Tribal lands near or adjacent to any water resources development projects, for purposes of identifying lands of ancestral, cultural, or religious importance; (2) consult with Indian Tribes specifically on any Tribal areas near or adjacent to any water resources development projects, for purposes of identifying lands, waters, and other resources critical to the livelihood of the Indian Tribes; and (3) cooperate with Indian Tribes to avoid, or otherwise find alternate solutions with respect to, such areas.

According to USACE, the concepts included in Section 112(d) will also be included in the development of best practices guides to accompany 2023 USACE Tribal Consultation Policy (USACE communication with CRS, December 4, 2023).

⁹² Section 8112 of Title LXXXI, Water Resources Development Act of 2022 (WRDA 2022), of Division H of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (P.L. 117-263). For this provision, WRDA 2022 defined "tribal community" as "a community of people who are recognized and defined under Federal law as indigenous people of the United States." Among the duties specified for the liaisons are "improving, expanding, and facilitating government-to-government consultation between Tribal peoples and the Corps of Engineers." Another duty is being responsible for "training and tools to facilitate the ability of Corps of Engineers staff to effectively engage with Tribal peoples." Implementation status on this provision has not been made publicly available. According to USACE, as of December 2023, there were 51 USACE district staff members who are identified as tribal liaisons (USACE communication with CRS, December 4, 2023). At the time, each of the 38 districts had a designated tribal liaison and 13 districts had at least 1 additional tribal liaison to assist with tribal consultation in the USACE Regulatory Division or other USACE mission areas. Also, each of the 8 USACE divisions had a designated tribal liaison, and there was a senior tribal liaison position at USACE headquarters.

USACE Historic Preservation and Tribal Consultation

USACE has several policies regarding NHPA Section 106 compliance for undertakings associated with its water projects.⁹³ Apart from its regulatory program, USACE generally follows the NHPA Section 106 regulations promulgated by the Advisory Council for Historic Preservation (ACHP; 36 C.F.R. Subpart 800), which establish specific consultation requirements for federal agencies when projects occur on tribal land or impact tribal historic properties. In contrast, USACE's regulatory program follows USACE-developed procedures (33 C.F.R. Subpart 325 Appendix C, "Procedures for the Protection of Historic Properties") to comply with NHPA Section 106 requirements, other applicable historic preservation laws, and presidential directives. The USACE regulatory program's Appendix C procedures have been the subject of disagreements between USACE and the ACHP, Tribes, and other stakeholders, as noted in a 2017 ACHP report.⁹⁴ For example, USACE nationwide permits allow nonfederal permit applicants to identify historic properties (or their absence) without input from Tribes. On February 9, 2024, USACE published a proposed rule to remove Appendix C and remove references to Appendix C in its regulations for the regulatory program.⁹⁵ As of September 2026, USACE had taken no further action with regard to the proposed rule, and USACE's regulatory program continued to follow Appendix C procedures for compliance with Section 106 requirements. Moreover, the entry for the rulemaking was not included in the Trump Administration's 2026 regulatory agenda and plan.⁹⁶

National Oceanic and Atmospheric Administration (NOAA)

NOAA is an agency within the Department of Commerce (DOC) with a mission to understand and predict changes in climate, weather, ocean, and coasts; to share that knowledge and information with others; and to conserve and manage coastal and marine ecosystems.⁹⁷ DOC's formal federal-tribal consultation policies were last updated in 2012, via a DOC Department Administrative Order, DAO 218-8.⁹⁸ DAO 218-8 implements EO 13175, the 2009 PM, and related OMB guidance and directs readers to a department-level guidance document describing how the DOC is to work with Tribes on a government-to-government basis.⁹⁹ The guidance, last updated in 2013, "provides uniform standards and methodology outlining consultation procedures for all [DOC] personnel working with Tribal governments regarding policies that have tribal

⁹³ This includes USACE granting easements on its projects.

⁹⁴ ACHP, "Improving Tribal Consultation in Infrastructure Projects," p. 13, https://www.achp.gov/sites/default/files/reports/2018-11/ImprovingTribalConsultationinInfrastructureProjectsFinalApril272017_0.pdf.

⁹⁵ 89 *Federal Register* 9079. As an earlier step toward the proposed changes, the Department of the Army, through publication of a *Federal Register* notice in June 2022 (87 *Federal Register* 33756), solicited comment on approaches to modernize Appendix C.

⁹⁶ RIN 0710-AB46, which was the regulatory identified number assigned to the USACE Appendix C rulemaking, was included in the spring 2025 regulatory agenda and plan, but absent from the 2026 regulatory agenda and plan; for more information, see the history of the agenda at the website for the Office of Information and Regulatory Affairs, <https://www.reginfo.gov/public/do/eAgendaMain>.

⁹⁷ National Oceanic and Atmospheric Administration (NOAA), "Our Mission and Vision," <https://www.noaa.gov/our-mission-and-vision>.

⁹⁸ Department of Commerce (DOC), Office of Privacy and Open Government, "DAO 218-8: Consultation and Coordination with Indian Tribal Governments," effective date April 26, 2012, <https://www.commerce.gov/node/4822> (hereinafter DAO 218-8).

⁹⁹ Department of Commerce, "Tribal Consultation and Coordination Policy for the U.S. Department of Commerce," 78 *Federal Register* 33331, June 4, 2013 (hereinafter DOC, "Tribal Consultation Policy"). Under the policy, DOC aims to consult with Alaska Native Corporations "in a manner as close as possible" to consultations with Tribes in Alaska (Section 8).

implications.”¹⁰⁰ Under the guidance, consultation may take a variety of forms, including meetings, letters, webinars, on-site visits, and participation in regional or national events. The consultation is to “entail an informed discussion of the proposed federal policy and associated tribal concerns” between the Tribal Consultation Official and tribal officials.¹⁰¹ DAO 218-8 also established a DOC Tribal Consultation Official responsible for ensuring DOC compliance with EO 13175, DAO 218-8, and the guidance.¹⁰² In 2021, DOC also signed onto the Interagency Treaty MOU.¹⁰³

At the agency level, NOAA policies build on the same guidance and direction as DAO 218-8, the 2021 PM, and the Interagency Treaty MOU. Since 2023, NOAA has laid out its federal-tribal consultation policies in a NOAA Administrative Order, NAO 218-8A, and several guidance documents.¹⁰⁴ Under NAO 218-8A, the NOAA Administrator must appoint and maintain a NOAA Tribal Liaison with a variety of responsibilities, including developing guidance and maintaining documentation of agency consultations.¹⁰⁵ The NOAA tribal consultation procedures require each line office, staff office, and regional team to establish tribal liaisons as well.¹⁰⁶ The agency’s best practices document on incorporating Indigenous knowledge in decisionmaking “goes beyond” the consultation procedures “to recognize and be inclusive of all Indigenous Peoples within the United States and the importance of equitable engagement and involvement of their knowledge.”¹⁰⁷

Issues and Options for Congress

Members of Congress, Tribes, other Indigenous entities, federal agencies, and others have identified various federal-tribal consultation issues that are the subjects of ongoing policy debate, including the following:

- Federal actions subject to consultation (“what?”)
- Representation of the parties (“who?”)
- Timing of consultation (“when?”)
- Agency consideration of input provided by Tribes and other Indigenous entities (“how?”)
- Administrative capacity
- Federal funding

¹⁰⁰ DOC, “Tribal Consultation Policy,” Section 1.

¹⁰¹ DOC, “Tribal Consultation Policy,” Section 7.

¹⁰² DAO 218-8, §5.

¹⁰³ Interagency Treaty MOU.

¹⁰⁴ NOAA, “NAO 218-8A: Policy on Government-to-Government Consultation with Federally Recognized Indian Tribal Governments,” effective June 27, 2023, <https://www.noaa.gov/organization/administration/nao-218-8a-policy-on-G2G-consultation-with-federally-Recognized-Tribal-Governments> (hereinafter NAO 218-8A); NOAA, “NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribal Governments,” 2023, https://www.noaa.gov/sites/default/files/2023-07/NOAA_Tribal_Consultation_Handbook_2023_FINAL.pdf (hereinafter, “NOAA Procedures”); and NOAA, “NOAA Guidance and Best Practices for Engaging and Incorporating Indigenous Knowledge in Decision-Making,” 2024, https://www.noaa.gov/sites/default/files/2024-05/NOAA_Indigenous%20Knowledge_Guidance_with_Appendix_FINAL_e-signed%205-17-24%20%282%29.pdf (hereinafter “NOAA Guidance”).

¹⁰⁵ NAO 218-8A, §5.

¹⁰⁶ “NOAA Procedures,” p. 7.

¹⁰⁷ “NOAA Guidance,” p. 1.

Federal Actions Subject to Consultation (“What?”)

Many Tribes and other Indigenous entities have asked agencies to consult on federal actions, including those potentially affecting natural resources. In particular, Tribes with reserved treaty rights may desire to be consulted even when they are not located close to the site of the federal action.¹⁰⁸ Through treaties with the United States, Tribes often ceded lands in exchange for the right to conduct certain activities, like hunting and fishing, on those lands. Tribes may seek access to federal lands or input into federal land management decisions because of the large amount of land currently owned by the federal government that once was tribal land.¹⁰⁹ For example, some Tribes and other Indigenous entities have sought to influence federal policies on mining to protect natural and cultural resources.¹¹⁰ Some Tribes may seek to influence federal actions in the ocean, such as offshore wind development. For example, the Yurok Tribe has reportedly claimed that the ocean is “unceded territory” and that “they remain stewards of their coastal waters.”¹¹¹ Yurok tribal leaders claim that the federal processes for wind farm activity have failed to include their input.

Some Tribes and other Indigenous entities have asked for input in internal agency processes. For example, Tribes have stated that they should be consulted in the federal budget process and federal rulemakings.¹¹² In addition, the Government Accountability Office (GAO) has recommended that certain agencies, including OMB and USDA, establish processes to incorporate “meaningful and timely input from tribal officials” when formulating federal budget requests.¹¹³

In addition, Tribes and other Indigenous entities may seek federal-tribal consultation on infrastructure projects where the federal government plays a role, as discussed in the text box below.

¹⁰⁸ See, e.g., the Rappahanock Tribe, “Rappahanock Tribe Consultation Policy,” <https://www.rappahannocktribe.org/consultationpolicy/>.

¹⁰⁹ White House, “Best Practices Guide,” p. 12. Tribes and other Indigenous entities’ interest in a more robust, long-term, and formal role in managing federal lands to which they have a connection is sometimes referred to as *federal-tribal co-management* or *co-stewardship*. For more information, see CRS Report R47563, *Tribal Co-management of Federal Lands: Overview and Selected Issues for Congress*, by Mariel J. Murray.

¹¹⁰ See, e.g., Chilkat Indian Village et al., “Notice of Petition and Petition for Rulemaking: Bringing Hardrock Mining Regulations and Policy into the 21st Century to Protect Indigenous and Public Lands Resources in the West,” September 16, 2021, p. 2, <https://earthworks.org/assets/uploads/2021/09/APA-DOI-Hardrock-Mining-Rules-Petition-Combined-1.pdf>.

¹¹¹ Chez Oxendine, “Native Leaders at Yurok Summit Demand a Seat at the Table for Offshore Wind Projects,” *Tribal Business News*, February 3, 2024.

¹¹² See DOI, “Secretary’s Tribal Advisory Committee, Policy Recommendations,” August 2023, p. 56, https://kawerak.org/download/doi-stac-recommendations-august-2023_signed6-pdf/?tmstv=1788535148, p. 10 (hereinafter DOI, “STAC Recommendations”) (“DOI budget requests should contain full funding figures developed in consultation with Tribal Nations.”). See also United South and Eastern Tribes (USET), “Overview of OMB Rule Proposing Significant Changes to Financial Assistance,” July 1, 2026, <https://www.usetinc.org/event/overview-of-omb-rule-proposing-significant-changes-to-financial-assistance/> (“OMB has acknowledged the need for Tribal consultation, but consultation after publication is not meaningful. Tribal Nations must be provided the opportunity to share their input with OMB before the rule and its subsequent policy framework is proposed.”).

¹¹³ GAO, *Tribal Funding: Actions Needed to Improve Information on Federal Funds That Benefit Native Americans*, GAO-22-104602, 2022, p. 38, <https://www.gao.gov/assets/gao-22-104602.pdf> (hereinafter GAO, “Federal Funds”).

Federal-Tribal Consultation on Infrastructure Projects

Infrastructure projects represent a wide array of development activities. Some infrastructure projects may be performed by federal agencies (e.g., USACE plans and constructs congressionally authorized projects). Many infrastructure projects are undertaken by nonfederal public and private entities, such as highway projects, municipal water systems, and oil and gas pipelines. Multiple federal agencies may have jurisdiction over portions of these nonfederal projects under various statutes or through federal funding. For both federal and nonfederal infrastructure projects, federal-tribal consultation may be required as part of federal review and decisionmaking (e.g., permitting). The following are some examples of federal-tribal consultation topics related to infrastructure projects.

- **NEPA compliance.** Through an agreement with the lead federal agency, a Tribe can become a *cooperating agency*, which includes opportunities for participation in the lead agency's NEPA process. Some Tribes have become cooperating agencies as part of NEPA compliance performed in connection with federal permits and approvals for infrastructure projects. While such participation may allow opportunities for Tribes to provide expertise on Indigenous knowledge and cultural resources, tribal participation as a cooperating agency requires the expenditure of tribal resources and may not extend to the consideration of other tribal concerns about a specific project.
- **FAST-41 projects.** Title 41 of the FAST Act (FAST-41; 42 U.S.C. §§4370m et seq.) created a set of procedures and funding authorities to improve the federal environmental review and authorization process for certain "covered" infrastructure projects (e.g., projects over \$200 million). Under the act, covered projects are required to develop multiagency project plans with timetables for environmental reviews and authorizations, and schedules for public and tribal outreach and coordination. The act also requires the Federal Permitting Improvement Steering Council to meet at least annually with Tribes and other stakeholders. This federal-tribal consultation requirement is separate from consultations that may be required under other laws, such as NHPA. Some Tribes have suggested establishing a framework for regular engagement under the law.
- **Delegation of federal programs to states.** Some Tribes have raised concerns that federal agency delegation of some programs for state administration (e.g., certain Clean Water Act programs) may reduce opportunities for tribal input regarding potential impacts to off-reservation rights, particularly where state law does not require tribal consultation.

Sources: See generally 40 C.F.R. §1501. See also Department of the Interior, "Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions," January 2017, <https://www.doi.gov/sites/doi.gov/files/report-improving-tribal-consultation-and-tribal-involvement-jan-2017.pdf>. See also GAO, *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*, GAO-19-22, March 2019, <https://www.gao.gov/assets/gao-19-22.pdf>. See also ACHP, "Improving Tribal Consultation in Infrastructure Projects," May 14, 2017, p. 4, https://www.achp.gov/sites/default/files/reports/2018-11/ImprovingTribalConsultationinInfrastructureProjectsFinalApril272017_0.pdf.

Clarity of Federal-Tribal Consultation Requirements

Various industry stakeholders, tribal associations, and scholars have advocated for clearer federal consultation standards. Some industry stakeholders have stated that "transparent, inclusive, and predictable" federal agency guidance would be helpful regarding which projects and activities are subject to consultation and how consultation should be conducted.¹¹⁴ Some tribal associations and scholars, as well as some Members of Congress, also have asserted that agency consultation practices not expressly directed by statute have been unenforceable and inconsistent.¹¹⁵ Therefore,

¹¹⁴ See Enbridge, "Enbridge Submission Docket ID No. COE-2022-0006_02.08.2022" p. 2, <https://www.regulations.gov/comment/COE-2022-0006-0097>; see also Interstate Natural Gas Association of America and American Gas Association, "INGAA AGA Comments on Corps Notice," p. 4, <https://www.regulations.gov/comment/COE-2022-0006-0088>.

¹¹⁵ See Statement of NCAI, H.R. 5608 hearing, p. 86; Statement of Joe Shirley, President, Navajo Nation, H.R. 5608 hearing, pp. 23-25. See also Hearing Memo, Legislative Hearing on H.R. 2930, H.R. 438, and RESPECT Act, 117th Cong., 1st sess., May 20, 2021, p. 6, https://naturalresources.house.gov/uploadedfiles/hearing_memo_2021-05-20_ip_legislative_hearing.pdf ("It is difficult to assess the adequacy of federal agency consultation with a Tribe.").

some tribal associations and scholars have asked for a statutory federal consultation standard to ensure that agencies are held accountable for “uniform, effective, and meaningful” federal-tribal consultation.¹¹⁶

On the other hand, certain agencies have resisted formalizing or expanding federal-tribal consultation procedures for various reasons. They may assert that they are already complying with legal requirements and are not required to consult. For example, independent regulatory agencies such as the Federal Communications Commission (FCC), Federal Energy Regulatory Commission, and Nuclear Regulatory Commission are not subject to EO 13175’s consultation requirements.¹¹⁷ Similarly the Department of Transportation has stated that, unlike the Indian Health Service and BIA, it is not mandated to consult under ISDEAA (25 U.S.C. §5325(i)).¹¹⁸ In addition, some agencies have stated that consultation on certain issues is unnecessary or impractical.¹¹⁹

Judicial Enforceability of Federal-Tribal Consultation

Congress has not imposed a comprehensive responsibility for tribal consultations applicable to all federal actions, complicating the question of whether existing consultation directives are judicially enforceable. In this context, *judicial enforceability* refers to the question of whether courts will issue decisions holding agencies accountable to consult with Tribes, such as by prohibiting agencies from taking certain actions until consultation has occurred. The current landscape of federal-tribal consultation is marked by impressive variability, making it challenging to arrive at universal, practical conclusions. The variability is manifold: enforcement actions may be brought by an array of interested parties, including Tribes and tribal members, against a number of agencies operating under an even greater number of statutes, policies, and regulations, in innumerable factual and highly specific scenarios.¹²⁰ Perhaps at least in part due to this variability, the evaluation of federal-tribal consultation has seemingly resisted the development of seminal definitions and tests or the widespread adoption of substantive criteria for successful consultation. Some legal scholars argue that although agency policies often “refer to ‘meaningful’ communication and dialogue” with Tribes, they are “unclear about what consultation processes specifically require,” so “consultation remains vague and [practically] unenforceable.”¹²¹ Despite the aforementioned variability affecting an assessment of judicial enforceability, the discussion below offers a few principles that may usefully frame current judicial treatment of Tribes’ attempts to enforce consultation requirements.

First, tribal consultation policies imposed solely by executive orders and presidential memoranda may not provide an independent basis for judicial enforcement. Executive orders intended

¹¹⁶ NCAI, “Resolution #MOH-17-001: A Call on Congress to Enact Legislation That Will Ensure Uniform, Effective and Meaningful Consultation with Indian Nations and Tribes Whenever Federal Activities Have Tribal Impacts,” p. 2, <https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=619>. See Mills & Nie, “Bridges,” pp. 57, 89, and 94. See also White House, “Best Practices Guide,” p. 11; and Routel & Holth, “Genuine Consultation,” p. 466.

¹¹⁷ EO 13175 §1(c).

¹¹⁸ GAO, “Federal Funds,” p. 49.

¹¹⁹ See, e.g., Statement of James Cason, Associate Deputy Secretary, DOI, in H.R. 5608 hearing, pp. 5-6, and Statement of Philip N. Hogen, Chairman, National Indian Gaming Commission (NIGC), in H.R. 5608 hearing, p. 11.

¹²⁰ As two scholars recently wrote, “[w]hile federal directives have recognized the importance of tribal consultation, agency implementation has not been consistent, with noted problems related to specificity, enforceability, and uniformity.” Kristin Green and Teresa Cavazos Cohn, “Meaningful Tribal Consultation as Part of National Forest Planning,” *Idaho Law Review*, vol. 59 (2023), pp. 105, 107 (citing Routel & Holth, “Genuine Consultation,” pp. 417, 448) (hereinafter Green & Cohn, “Meaningful Tribal Consultation”).

¹²¹ Green & Cohn, “Meaningful Tribal Consultation,” p. 108.

“primarily as a managerial tool for implementing” the president’s personal policies and that disclaim the creation of any new rights or obligations do not carry the force of law and are generally not enforceable in court.¹²² By contrast, executive orders that are grounded in powers granted directly to the President by the Constitution or by statute do carry the force of law and can be enforced by the courts.¹²³ Presidential documents related to federal-tribal consultation (such as the executive orders and memoranda discussed above) generally fall into the first category of executive orders that announce the Administration’s policies.¹²⁴ These presidential documents typically cite the federal trust responsibility and the holistic body of federal Indian law—rather than specific statutory authority—as underlying the directives for federal-tribal consultation.¹²⁵ This reliance on the federal trust responsibility is then reflected in many of the consultation regulations enacted by executive agencies through regulation or internal policy documents.¹²⁶

As described in more detail above, the presidential documents also explicitly disclaim the creation of any new, legally enforceable rights.¹²⁷ Some courts have thus declined to rule that Tribes can seek judicial enforcement of the tribal rights to consultation contained in these executive orders and presidential memoranda.¹²⁸ As one court put it, “the plain language of Executive Order 13175 does not provide any right enforceable in this judicial action alleged by the Tribe.”¹²⁹

Second, when courts do assess the sufficiency of tribal consultation, their approach generally reflects an understanding of consultation as communication-based, not consensus- or consent-based. In practice, this often means that courts may (1) focus on procedural aspects of consultation rather than substantive ones and (2) defer to agencies’ interpretations of their consultative responsibilities. For example, in one case, a court determined that the FCC had met its consulting obligations despite a Tribe’s complaints that the agency simply conducted listening sessions, briefings, and conference calls and delivered remarks.¹³⁰ The court criticized the Tribe for offering “no standard by which to judge ... whether a ‘listening session’ or a conference call

¹²² *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980).

¹²³ *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1995); *HHS v. FLRA*, 844 F.2d 1087, 1095-96 (4th Cir. 1987) (en banc). For more information on the legal enforceability of executive orders, see CRS Report R46738, *Executive Orders: An Introduction*, coordinated by Abigail A. Graber.

¹²⁴ See *Northern Arapaho Tribe v. Burwell*, 118 F. Supp. 3d 1264, 1281 (D. Wyo. 2015).

¹²⁵ See, e.g., EO 13175 (describing the United States’ “unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions” and noting that “[s]ince the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection”—i.e., the United States has recognized a trust responsibility).

¹²⁶ See, e.g., Federal Transit Administration, *Tribal Consultation*, <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/tribal-consultation> (explaining that “[t]he need and responsibility for Federal Transit Administration to consult with Indian Tribes is based on the Federal trust relationship”).

¹²⁷ See, e.g., EO 13084 (explaining that the order “does not ... create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States”).

¹²⁸ See, e.g., *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995) (“Executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits.... As argued by both the tribe and the BIA, this executive memorandum was intended primarily as a political tool for implementing the President’s personal Indian affairs policy and not as a legal framework enforceable by private civil action.”).

¹²⁹ *Northern Arapaho Tribe*, 118 F. Supp. 3d at 1281.

¹³⁰ *United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc’ns Comm’n*, 933 F.3d 728, 750 (D.C. Cir. 2019).

qualifies as a consultation” and concluded that the agency’s actions satisfied both the agency’s and the dictionary’s definition of consultation.¹³¹

An agency’s compliance (or lack thereof) with its own regulations or guidance, therefore, may provide a basis for judicial enforcement.¹³² Examples of Tribes successfully raising challenges to agency consultation often involve failures that courts may perceive as fundamental, such as finalizing decisions beforehand, concealing important information, or failing to consult with particular Tribes altogether. In one case, a court found that an agency had insufficiently consulted with a Tribe after an agency leader acknowledged at trial that the agency had already made its decision before consulting.¹³³ In another, the court found that although the BIA had held “three rounds of consultation meetings” about a proposed restructuring, it failed to give Tribes notice that the restructuring “could result in the loss of funding to Indian schools.”¹³⁴ That omission, said the court, was “not the meaningful consultation required by BIA policy” because “[f]air notice of agency intentions requires telling the truth and keeping promises.”¹³⁵ In a third case, the Bureau of Land Management (BLM) provided aggregated evidence of its consultation with Tribes, agencies, and the public but was unable to detail its consultative efforts with the Tribe seeking judicial enforcement.¹³⁶ As the court explained, the fact “that BLM did a lot of consulting in general doesn’t show that its consultation with the Tribe was adequate under the regulations.”¹³⁷

Perhaps because these examples of successful challenges to insufficient agency consultation represent somewhat glaring agency failures, a perception may persist that consultation is rarely judicially enforceable. In the context of protecting cultural resources and sacred spaces, two legal scholars wrote that “with few exceptions, tribes were unsuccessful in using the law and its consultation procedures as a stand-alone way to protect sacred sites and traditional cultural properties.”¹³⁸

Some Tribes may be most interested in judicial enforcement to guarantee tribal input *before* agency actions (rather than suing the agency for corrective steps afterward); this may lead them to seek preliminary injunctions to halt the relevant federal action from going forward while the court determines whether the agency engaged in meaningful consultation. Courts have explained that *preliminary injunctions* are “an extraordinary remedy” appropriate only in narrow circumstances that are often difficult to meet.¹³⁹ One such court denied an attempt to stop construction based on claims that the government had inadequately consulted Tribes about potential damage to Native

¹³¹ United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc’ns Comm’n, 933 F.3d 728, 750 (D.C. Cir. 2019).

¹³² For more information about guidance documents, see CRS Legal Sidebar LSB10591, *Agency Use of Guidance Documents*, by Kate R. Bowers.

¹³³ Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 710 (8th Cir. 1979).

¹³⁴ Yankton Sioux Tribe v. Kempthorne, 442 F. Supp. 2d 774, 784 (D.S.D. 2006) (emphasizing that “[b]oth Congress and the BIA have articulated a policy that mandates consultation between the BIA and the tribes in all matters affecting education” and issuing a preliminary injunction to block the planned agency action).

¹³⁵ Yankton Sioux Tribe v. Kempthorne, 442 F. Supp. 2d 774, 785 (D.S.D. 2006) (citing Lower Brule Sioux Tribe, 911 F. Supp. at 399).

¹³⁶ Quechan Tribe of the Fort Yuma Indian Reserv. v. Dep’t of Interior, 755 F. Supp. 2d 1104, 1112 (S.D. Cal. 2010).

¹³⁷ Quechan Tribe of the Fort Yuma Indian Reserv. v. Dep’t of Interior, 755 F. Supp. 2d 1104, 1112 (S.D. Cal. 2010). (“Indeed, Defendants’ grouping tribes together (referring to consultation with ‘tribes’) is unhelpful: Indian tribes aren’t interchangeable, and consultation with one tribe doesn’t relieve the BLM of its obligation to consult with any other tribe that may be a consulting party under NHPA.”).

¹³⁸ Mills & Nie, “Bridges.”

¹³⁹ Manzanita Band of the Kumeyaay Nation v. Wolf, 496 F. Supp. 3d 257, 260 (D.D.C. 2020).

American graves.¹⁴⁰ In a related case, an appeals court noted, “In casting [the Department of Homeland Security’s] consultation as too narrow,” plaintiffs failed to show “that its scope violated a specific prohibition in the statute that is clear and mandatory,” “was obviously beyond the terms of the statute,” or was “far outside the scope of the task that Congress gave it”—at least one of which was necessary for the court to invalidate what the agency had done.¹⁴¹ The high procedural hurdles of preliminary injunctions may contribute to observations that consultation requirements are challenging to enforce, even when courts may be sympathetic to a Tribe’s claims.¹⁴²

On the whole, courts generally seem to have avoided grappling with more substantive questions like how best to quantify or qualify consultation, the comparative values of different kinds of consultation, or whether there are circumstances in which consultation must result in a change from the proposed agency action. This perhaps reflects a sense that these determinations, if they are made at all, should be legislative rather than judicial. Questions of how consultation can best be measured, and by whom, may invite further consideration by lawmakers and interested parties; in particular, weighing the pros and cons of a single, unified statutory standard for federal-tribal consultation may be ripe for consideration by Congress.

Similarly, which federal actions could or should be subject to tribal consultation is a perennial topic for congressional consideration. Congress does not currently require across-the-board consultation for all federal actions that may affect tribal interests, which may reflect a balancing of competing interests. For example, some Members of Congress have opposed bills that would broaden consultation requirements, stating that new requirements would make the federal-tribal consultation process “lengthy and unrealistic.”¹⁴³ Furthermore, some Members of Congress have stated that expanded federal-tribal consultation requirements could hinder “needed economic development and critical infrastructure development for Tribes.”¹⁴⁴

With these types of concerns in mind, Congress may choose to maintain the current statutory framework, which requires consultation only for specific federal actions. As described in “Statutory Consultation Requirements,” some statutes or their implementing regulations may mandate tribal consultation when federal actions may affect tribal historic, cultural, or religious sites.¹⁴⁵ Beyond that, Congress has, at times, required federal-tribal consultation for actions by

¹⁴⁰ *Manzanita Band of the Kumeyaay Nation v. Wolf*, 496 F. Supp. 3d 257, 268-269 (D.D.C. 2020).

¹⁴¹ *N. Am. Butterfly Ass’n v. Wolf*, 977 F.3d 1244, 1262 (D.C. Cir. 2020) (discussing a nontribal nonprofit’s challenge to allegedly insufficient consultation with stakeholders regarding the construction of barriers and related infrastructure along the U.S.-Mexico border).

¹⁴² See, e.g., *Bartell Ranch LLC v. McCullough*, 558 F. Supp. 3d 974, 991 (D. Nev. 2021) (“[W]hile the Court finds the Tribes’ arguments regarding the spiritual distress that the [federal action] will cause persuasive, the Court must nonetheless reluctantly conclude that they have not shown sufficiently specific irreparable harm that aligns with the relief they could ultimately obtain in this case.”).

¹⁴³ See Statement of Rep. Paul Gosar, U.S. Congress, House Natural Resources Committee, “Legislative Hearing on H.R. 312, ‘Mashpee Wampanoag Tribe Reservation Reaffirmation Act’; H.R. 375, to Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land into Trust for Indian Tribes, and for Other Purposes; and Discussion Draft of H.R. ___, ‘RESPECT Act,’” 116th Cong., 1st sess., April 3, 2019, H.Hrg. 35-971 (GPO, 2019), p. 49 (hereinafter “2019 RESPECT Act hearing”).

¹⁴⁴ See Statement of Rep. Bruce Westerman, Ranking Member, “Respect Act hearing,” p. 7, <https://docs.house.gov/meetings/II/II24/20210520/112660/HHRG-117-II24-MState-W000821-20210520.pdf> (“While I strongly believe that federal agencies should conduct proper Tribal consultation, and projects should include tribal voices, this bill would be extremely harmful by significantly slowing down agency actions, which could hinder needed economic development and critical infrastructure development for Tribes.”).

¹⁴⁵ See, e.g., *Wilson v. Block*, 708 F.2d 735, 746 (D.C. Cir. 1983) (under the American Indian Religious Freedom Act of 1978, the federal government should “ordinarily” consult with tribal leaders before approving a project “likely to (continued...)”).

federal land management agencies. For example, some laws have required federal-tribal consultation in the establishment of national monuments, and proposed legislation would impose tribal consultation requirements for the development of federal land management plans.¹⁴⁶ Congress could also choose to remove or limit consultation requirements on particular topics or to refrain from imposing additional consultative burdens in future legislation.

Another option would be to expand consultation requirements to additional categories or types of federal actions, such as internal agency processes. For instance, S. 5240 would require federal-tribal consultation during the budget formulation process at USDA. In the 118th Congress, S. 5636 would have directed OMB to develop a tribal consultation policy.

Similarly, Congress has, at times, proposed and required agencies to engage in tribal consultations and negotiated rulemaking to ensure tribal input on specific initiatives.¹⁴⁷ In addition, Congress could consider whether, or to what extent or in what contexts, its policy goals would align with broadening, maintaining, or restricting a Tribe or other Indigenous entity's ability to prevent or delay agency actions. Other options might include considering the comparative values of different types of federal-tribal consultation, including less ad hoc forms such as working groups and advisory committees comprising tribal members.

Finally, Congress could consider broadly expanding consultation requirements to most or all federal actions affecting Tribes. Some Members of Congress have introduced bills setting consultation standards that would potentially expand the number and types of activities requiring consultation.¹⁴⁸ Some of these bills would have expanded the list of activities to include agency guidance, clarification, standards, or sets of principles. For example, the RESPECT Act, H.R. 3587 from the 117th Congress, would have required federal-tribal consultation before an agency conducted "any proposed Federal activity or finaliz[ed] any Federal regulatory action that may have Tribal impacts."¹⁴⁹

Representation of the Parties ("Who?")

Federal agencies, Tribes, and other Indigenous entities have debated about who should participate in federal-tribal consultations.¹⁵⁰ One issue is the authority of the federal representative. In

affect religious practices"); *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Cal. 2010) (Under NFPA regulations at 36 C.F.R. §800.2, "consulting parties that are Indian Tribes are entitled to *special consideration* in the course of an agency's fulfillment of its consultation obligations") (emphasis in original).

¹⁴⁶ For example, Congress mandated that the Secretary of the Interior consult with the Minnesota Chippewa Tribe and the Grand Portage Band of Chippewa Indians, Minnesota, in the planning of facilities or developments upon the lands adjacent to the Grand Portage National Monument (P.L. 85-910). See also H.R. 5243, Northern Nevada Economic Development, Conservation, and Military Modernization Act of 2021 (117th Cong.); H.R. 7665, REC Act of 2022 (117th Cong.); and H.R. 6148/S. 3186, Advancing Tribal Parity on Public Lands Act (118th Cong.).

¹⁴⁷ For example, the PROGRESS for Indian Tribes Act (P.L. 116-180) required DOI to implement the act by setting up a negotiated rulemaking committee with tribal members. In addition, H.R. 7954 from the 119th Congress would direct DOI to consult with Tribes and Tribal organizations on DOI initiatives that affect buffalo or buffalo habitat. H.R. 9425 from the 119th Congress would require USDA to consult with Tribes and Tribal organizations prior to evaluating contracts for the Food Distribution Program on Indian Reservations.

¹⁴⁸ See, e.g., H.R. 5608 from the 110th Congress; H.R. 5023 from the 111th Congress; H.R. 1600 from the 113th Congress; H.R. 5379 from the 114th Congress; and the RESPECT Act, H.R. 3587 from the 117th Congress. H.R. 5608 from the 110th Congress would have required DOI, the Indian Health Service, and NIGC to conduct federal-tribal consultation for "any measure by the agency that has or is likely to have a direct effect on one or more Tribes."

¹⁴⁹ H.R. 3587.

¹⁵⁰ See, e.g., ACHP, "Improving Tribal Consultation in Infrastructure Projects," May 14, 2017, p. 4, (continued...)

addition, concerns have been raised about whether only Tribes may engage in federal-tribal consultation or whether other Indigenous entities may also engage.

Participation of Federal Agencies

Who should represent the federal government during consultations is a source of debate.¹⁵¹ Tribes generally advocate for high-level officials with decisionmaking authority to participate in federal-tribal consultations to ensure that the federal representative is authorized or able to answer questions.¹⁵² When the federal representative cannot make decisions or answer questions, Tribes and other Indigenous entities may have a one-sided dialogue, which they may not consider “meaningful” consultation.¹⁵³ In addition, some Tribes have stated that the federal government “must not delegate its consultation obligation to third party entities” such as nonprofit organizations or industry representatives.¹⁵⁴

On the other hand, agencies may find it impractical to consistently have a decisionmaker participate in federal-tribal consultations. First, agency leaders may have competing demands on their time, which may result in the agency staggering consultations to accommodate their schedules. In addition, depending on the federal action, agency staff may be more knowledgeable than the federal leader or decisionmaker.

Congress may consider whether to designate parties to federal-tribal consultations. For example, it could limit federal-tribal consultation to officials with decisionmaking authority. During the Biden Administration, some agencies committed to this practice, although Congress could consider whether to mandate this practice government-wide.¹⁵⁵ If so, Congress may need to define “decisionmaking authority”; for example, whether decisionmakers would include federal employees at or above a certain grade level.

Participation of Tribes and Other Indigenous Entities

Which Tribes or other Indigenous entities should be eligible to participate in federal-tribal consultations is another issue. Some Tribes and tribal groups have argued that their status as sovereign nations gives them exclusive access to federal-tribal consultation.¹⁵⁶ In other words, they assert that the United States has only a government-to-government relationship with Tribes, including a duty to uphold the federal trust responsibility.¹⁵⁷ Furthermore, they claim that the

<https://www.achp.gov/sites/default/files/2019-08/ImprovingTribalConsultationinInfrastructureProjects5-24-17-2.pdf> (ACHP, “Infrastructure Report”).

¹⁵¹ ACHP, “Infrastructure Report,” p. 4.

¹⁵² See Statement of Vanessa L. Ray-Hodge, Partner, Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, 2019 RESPECT Act hearing, p. 53 (hereinafter Ray-Hodge Statement).

¹⁵³ Ray-Hodge Statement, p. 53.

¹⁵⁴ See USET, “Comments on DOI-OPM Tribal Consultation Training,” May 17, 2023, p. 3, https://www.usetinc.org/wp-content/uploads/2023/05/USET-SPF-Comments-DOI_OPM-Tribal-Consultation-Training-FINAL-5_17_23.pdf (hereinafter USET, “Training Comments”).

¹⁵⁵ For example, DOI’s 2022 consultation policy defined federal-tribal consultation as having both department and tribal officials with decisionmaking authorities present at the session (DOI, “Consultation Policy DM,” p. 2). In addition, the 2023 USACE Tribal Consultation Policy’s definition of consultation states that it involves “USACE and Tribal officials with decision-making authority.”

¹⁵⁶ See, e.g., Letter from United South and Eastern Tribes Sovereignty Protection Fund to Raul Grijalva, Chairman of the House Natural Resources Committee, March 11, 2022, pp. 2-3, https://www.usetinc.org/wp-content/uploads/2022/04/USET-SPF-Comments-RESPECT-Act-FINAL-3_11_22_-002.pdf (hereinafter USET, “Letter”).

¹⁵⁷ *Yellen v. Chehalis*, 594 U.S. ____ (2021), Brief for Respondents Confederated Tribes of the Chehalis Reservation, et al., March 24, 2021, p. 45, https://sct.narf.org/documents/alaska_native_corp_v_chehalis/brief_respondent.pdf.

participation of other Indigenous entities such as ANCs “undermines the government-to-government relationship between Tribal Nations and the United States.”¹⁵⁸ Therefore, certain Tribes have argued against the participation of other Indigenous entities in federal consultation.¹⁵⁹

On the other hand, some other Indigenous entities assert that they should have opportunities to consult alongside Tribes. Some other Indigenous entities assert that they should be treated like Tribes because they are Native Americans. For example, some Native Hawaiians have asked for “funding and programming equity for all Native Americans, including American Indians, Alaska Natives, and Native Hawaiians.”¹⁶⁰

Members of Congress may continue to consider whether to maintain the status quo or be more inclusive in consultation requirements (all Tribes and other Indigenous entities) or less inclusive (only Tribes). Congress has, at times, encouraged or required federal-tribal consultation with other Indigenous entities.¹⁶¹ For example, the Consolidated Appropriations Act, 2004, as amended, required federal agencies to consult with ANCs on the same basis as Tribes under EO 13175.¹⁶² In addition, NHPA requires consultation with ANCs and NHOs in certain scenarios.¹⁶³ In other instances, bills introduced would have limited consultation to Tribes, although none have been enacted into law.¹⁶⁴ Several agency policies explicitly provide for consultation with Tribes, ANCs, and NHOs, and Congress may consider whether consistency across the federal government would be appropriate (see discussion of agency policies in “Federal Agency Policies”).

Timing of Consultation (“When?”)

Some Tribes, other Indigenous entities, and scholars have raised concerns about the timeliness of federal-tribal consultation and the adequacy of opportunities to provide input.¹⁶⁵ Many Tribes and other Indigenous entities have asserted that early and consistent agency engagement is essential for meaningful federal-tribal consultation.¹⁶⁶ For example, they have asked federal agencies to provide them with sufficient information about a proposed federal action early in the process to determine whether, and to what degree, their interests may be affected.¹⁶⁷ Furthermore, some have argued that federal consultation policies should provide multiple communication opportunities during the course of a project or policy development process.¹⁶⁸

¹⁵⁸ USET, “Letter,” pp. 2-3.

¹⁵⁹ USET, “Letter,” pp. 2-3.

¹⁶⁰ Prepared Statement of Hon. Carmen “Hulu” Lindsey, Chair, Board of Trustees, Office of Hawaiian Affairs, U.S. Congress, Senate Indian Affairs, *Upholding the Federal Trust Responsibility: Funding and Program Access for Innovation for Native Hawaiians—Part 1 and 2*, 117th Cong., 2nd sess., June 2022, S.Hrg. 117-318 (GPO, 2022), p. 4.

¹⁶¹ For example, the ANCSA (43 U.S.C. §§1601 et seq.) highlighted the need to provide for “the real economic and social needs of Natives ... with maximum participation by Natives in decisions affecting their rights and property.” See also P.L. 108-199, Div. H, §161, (2004), as amended.

¹⁶³ 54 U.S.C. §302706(b).

¹⁶⁴ See, e.g., H.R. 5608 from the 110th Congress.

¹⁶⁵ For a detailed discussion of tribal comments about the timing of federal-tribal consultation, see DOI, “Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions,” January 2017, p. 17, <https://www.doi.gov/sites/doi.gov/files/report-improving-tribal-consultation-and-tribal-involvement-jan-2017.pdf>. See also Statement of Brian D. Vallo, Governor, Pueblo of Acoma, Legislative Hearing on H.R. 2930, H.R. 438, and RESPECT Act, 117th Cong., 1st sess., May 20, 2021.

¹⁶⁶ See, e.g., DOI, “Infrastructure Report,” p. 17.

¹⁶⁷ DOI, “Infrastructure Report,” p. 17.

¹⁶⁸ NCAI, “Call to Congress.”

Some stakeholders, including Members of Congress, have expressed concern that timing requirements related to federal-tribal consultation could delay federal actions.¹⁶⁹ For example, delays could result if an agency must consult with Tribes at several points in its decisionmaking process or wait for responses. For this reason, some industry stakeholders have asked agencies to include “reasonable time limits” for tribal consultation.¹⁷⁰ In addition, a Tribe’s need for time to evaluate proposed federal actions may conflict with pressure for the federal agency to move expediently through review and permitting processes.¹⁷¹ Some Members of Congress have expressed concerns that broad consultation requirements would cause “catastrophic” harm to local communities by increasing permitting times, which would negatively impact activities such as grazing and energy production.¹⁷²

Federal regulations sometimes include timing guidance for federal-tribal consultation, and bills have been introduced that would set timing standards. For example, NHPA regulations require that federal-tribal consultations “should commence early in the planning process.”¹⁷³ Since the 116th Congress, some introduced bills would require agencies to consult with Tribes before issuing permits or within a certain period after issuing permits.¹⁷⁴ Some bills also have included multiple mandatory time frames during the proposed consultation process to allow Tribes and other Indigenous entities time to respond to agency outreach.¹⁷⁵

Agency Consideration of Input Provided by Tribes and Other Indigenous Entities (“How?”)

How agencies consider input provided by Tribes and other Indigenous entities in decisionmaking is another issue. Federal agencies have varying methods for communicating with Tribes and other Indigenous entities during federal-tribal consultations. Historically, some agencies considered their federal-tribal consultation obligations met through one-way communication, as outlined in “Communication.” Some tribal advocates have criticized this approach, because it does not allow for their input, and a central consultation objective for Tribes is to provide federal decisionmakers with information to support decisions that protect tribal interests.¹⁷⁶ Tribal advocates have stated that one-way communication treats Tribes as members of the public and therefore as “entitled to only limited information and the ability to submit comments.”¹⁷⁷ Instead, they argue, Tribes are sovereign nations whose concerns should be considered separately from the public’s.¹⁷⁸ Finally,

¹⁶⁹ See Statement of Kevin Washburn, Professor of Law, University of Iowa College of Law, Iowa City, Iowa, “2019 RESPECT Act hearing,” p. 22.

¹⁷⁰ Interstate Natural Gas Association of America and American Gas Association, “INGAA AGA Comments on Corps Notice,” p. 2, <https://www.regulations.gov/comment/COE-2022-0006-0088>.

¹⁷¹ Interagency Working Group on Mining Laws, Regulations, and Permitting, *Recommendations to Improve Mining on Public Lands*, September 2023, p. 74, <https://www.doi.gov/sites/default/files/mriwg-report-final-508.pdf> (hereinafter Interagency Working Group, “Mining Recommendations”).

¹⁷² Statement of Rep. Paul Gosar, “2019 RESPECT Act hearing,” p. 49.

¹⁷³ 36 C.F.R. §800.2(c)(2)(ii)(A). On July 24, 2026, the ACHP voted to move forward with a Notice of Proposed Rulemaking regarding potential revisions to Section 106 implementing regulations. Although the proposed revisions have not, as of publication, been finalized, draft language would provide more discretion to federal agencies as to if or when consultation may occur. See ACHP, “ACHP Votes to Move Forward with Notice of Proposed Rulemaking,” July 24, 2026, <https://www.achp.gov/news/achp-votes-move-forward-notice-proposed-rulemaking>.

¹⁷⁴ See, e.g., H.R. 2532 from the 116th Congress and H.R. 3307 from the 118th Congress.

¹⁷⁵ See, e.g., H.R. 3587, RESPECT Act, Title II, from the 117th Congress.

¹⁷⁶ Ray-Hodge Statement, p. 53.

¹⁷⁷ Ray-Hodge Statement, p. 53.

¹⁷⁸ Ray-Hodge Statement, p. 54.

some Tribes and other Indigenous entities have asked agencies to communicate with them after consultations regarding how their input was incorporated into agency decisions.¹⁷⁹

In addition, Tribes and other Indigenous entities often advocate that agencies should not only communicate but also strive to reach consensus or secure FPIC.¹⁸⁰ If proposed federal action may impact areas of cultural or economic importance, especially treaty-protected rights to those areas, many Tribes and other Indigenous entities have asserted that FPIC should be required.¹⁸¹ For example, some Tribes with treaty rights have asked federal agencies to stop actions until “a consent-based process” that “respects and prioritizes treaty rights impacts” is developed.¹⁸² Others have asked agencies to use the principle of “mutual concurrence” to identify “traditional and customary use areas” and design conservation measures.¹⁸³ Some agencies have required FPIC through regulations. For example, the NAGPRA regulations, which were updated in December 2023, require museums and federal agencies to “obtain [FPIC] from lineal descendants, Indian Tribes, or [NHOs] prior to allowing any exhibition of, access to, or research on human remains or cultural items” (43 C.F.R. §10.1(d)).

At times, federal agencies have claimed that requiring tribal consensus or consent for agency actions may conflict with their statutory missions or be impractical.¹⁸⁴ Agencies have asserted that an FPIC or a consensus requirement would potentially require agencies to violate their statutory missions. For example, agencies have asserted that while they are often sympathetic to tribal points of view, statutory or regulatory constraints sometimes require agencies to act against tribal interests.¹⁸⁵ Finally, agencies may oppose using an FPIC standard because if a proposed federal action involves many Tribes and other Indigenous entities, it may take time to reach consensus, which could delay federal action.¹⁸⁶

In addition, nontribal stakeholders may oppose granting Tribes a right of consensus or FPIC in federal decisions. For example, states such as North Dakota have asserted that they should also have their voices heard in federal-tribal discussions.¹⁸⁷ In the context of water-related decisions, North Dakota has expressed particular concern regarding federal decisions based on tribal treaty rights, arguing that federal agencies are “not appropriate arbitrators” of those claims.¹⁸⁸ In addition, some stakeholders have argued that the preferences of nonfederal interests in USACE

¹⁷⁹ See DOI, “Infrastructure Report,” p. 18. GAO has reported that federal agencies inconsistently communicate about final agency decisions; see GAO, *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*, GAO-19-22, March 2019, pp. 21, 40-41, <https://www.gao.gov/products/gao-19-22> (hereinafter GAO, “Tribal Consultation: Infrastructure”).

¹⁸⁰ See, e.g., BIA, “DM Comments,” p. 5 (“Several Tribes agreed with the intent of the consensus-seeking model.”).

¹⁸¹ White House, “Best Practices Guide,” p. 12.

¹⁸² DOI, “STAC Recommendations,” p. 56.

¹⁸³ Organized Village of Kasaan et al., “Petition for USDA Rulemaking to Create a Traditional Homelands Conservation Rule for the Long-Term Management and Protection of Tradition and Customary Use Areas in the Tongass National Forest,” July 17, 2020, p. 1, <https://www.alaskawild.org/wp-content/uploads/2020/07/FINAL-Southeast-Tribes-APA-Petition-7-17-2020-Nine-Tribe-Signatures.pdf>.

¹⁸⁴ See, e.g., Statement of Philip N. Hogen, Chairman, NIGC, in H.R. 5608 hearing, p. 12. See also Statement of James Cason, Associate Deputy Secretary, DOI, H.R. 5608 hearing, pp. 18-19.

¹⁸⁵ See, e.g., USDA Office of Tribal Relations and USDA Forest Service, “Report to the Secretary of Agriculture: USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites,” December 2012, pp. 9-10, <https://www.fs.usda.gov/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>.

¹⁸⁶ GAO, “Tribal Consultation-Infrastructure,” p. 30.

¹⁸⁷ North Dakota Department of Water Resources, “Comment on FR Doc #2024-02448,” pp. 5-6, <https://www.regulations.gov/comment/COE-2023-0005-0043>.

¹⁸⁸ North Dakota Department of Water Resources, “Comment on FR Doc #2024-02448,” pp. 5-6, <https://www.regulations.gov/comment/COE-2023-0005-0043>.

water resource projects should “not unduly broaden the project scope or hinder consensus-building among key stakeholders,” especially when their preferences conflict with those of the project’s nonfederal sponsor.¹⁸⁹

Congress may choose to constrict, maintain, or expand statutes governing consideration of tribal input in federal decisionmaking. Congress has issued some direction to federal agencies on how to consider input from Tribes and other Indigenous entities. For example, the report accompanying the Department of the Interior, Environment, and Related Agencies Appropriations Bill, 2023, H.R. 8262, stated that, “On decisions made in consultation with Tribes, the Committee expects agencies funded in this bill to publish decision rationale in the context of and in reasonable detail to the Tribal input received during consultation.”¹⁹⁰ In addition, some regulations encourage (though do not require) consensus with Tribes, Alaska Natives, and NHOs.¹⁹¹

Another option would be to expand current law to require tribal FPIC for some or all federal actions. While the federal government has so far declined to adopt a government-wide FPIC standard, proposed legislation has referenced FPIC. During the 115th through the 117th Congresses, proposed legislation addressing potential impacts to tribal land and resources of Tribes would have required FPIC.¹⁹² For example, in the 117th Congress, S. 5186 supported the FPIC principle, requiring agencies to obtain tribal consent in certain situations, such as to allow unused electromagnetic spectrum over tribal lands to be made available to other parties.¹⁹³

Confidentiality of Information Obtained Through Consultation

How to treat information shared during federal-tribal consultations also has been raised as an issue. Some Tribes and other Indigenous entities are reluctant to share information during consultations, especially about sacred sites.¹⁹⁴ While Indigenous knowledge may be helpful in identifying potential impacts of federal actions, Tribes and other Indigenous entities may want to limit information sharing for various reasons. For example, they may want to prevent non-Indigenous people from accessing Indigenous sacred sites, or Indigenous religious, cultural, and societal norms may restrict them from sharing.¹⁹⁵ Some Tribes and other Indigenous entities have

¹⁸⁹ National Waterways Conference, “Comment on FR Doc # 2024-02448,” pp. 27-28, <https://www.regulations.gov/comment/COE-2023-0005-0048>. USACE projects’ nonfederal sponsors are typically state, local, or tribal entities, or nonprofits with the consent of the local government, that are responsible for sharing study and construction costs, providing real estate interests, and performing operations and maintenance for many types of USACE water resource projects.

¹⁹⁰ U.S. Congress, House Committee on Appropriations, *Department of the Interior, Environment, and Related Agencies Appropriations Bill, 2023*, report to accompany H.R. 8262, 117th Cong., 2nd sess., July 1, 2022, H.Rept. 117-400 (GPO, 2022), p. 10.

¹⁹¹ NHPA’s regulations define consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process” (36 C.F.R. §800.16(f)).

¹⁹² See, e.g., H.R. 2689 in the 115th Congress, H.R. 2532 and S. 4331 in the 116th Congress, and H.R. 9439 and H.R. 3587 in the 117th Congress.

¹⁹³ S. 5186 in the 117th Congress.

¹⁹⁴ See, e.g., DOI, “Infrastructure Report,” pp. 44, 58. See also Statement of Suzan Shown Harjo, President, Morning Star Institute, U.S. Congress, Senate Committee on Indian Affairs, *Native American Sacred Places*, 108th Cong., 1st sess., 2003, S.Hrg. 108-197 (GPO, 2003), pp. 8, 20, 54-55.

¹⁹⁵ UCLA School of Law, Native Nations Law & Policy Center, “The Need for Confidentiality Within Tribal Cultural Resource Protection,” December 2020, p. 6, https://law.ucla.edu/sites/default/files/PDFs/Native_Nations/239747_UCLA_Law_publications_Confidentiality_R2_042021.pdf (hereinafter UCLA, “Confidentiality”).

raised concerns about the potential public release of agency maps depicting culturally sensitive or religious sites.¹⁹⁶

Some Tribes and other Indigenous entities have asked for statutory guidance to maintain the confidentiality of information provided to agencies. For example, some Tribes and other Indigenous entities have suggested amending the Freedom of Information Act (FOIA) to exempt culturally sensitive information shared with agencies during consultation.¹⁹⁷ Without an exemption, FOIA (5 U.S.C. §552) provides the public a right to access federal agency information.¹⁹⁸

At times, federal officials have expressed concern about their ability to consider tribal and other Indigenous entity interests while maintaining confidentiality. For example, it may be difficult to protect a site on federal lands that may be impacted by a federal action while maintaining the confidentiality of information shared about the site.¹⁹⁹ Sacred sites can be hard to define and protect because they often lack clearly defined boundaries or a physical marker. Information shared by Tribes and other Indigenous entities is, therefore, often essential for the agency to identify areas for protection. Agencies may also be statutorily required to publicly share information proactively or in response to FOIA requests.²⁰⁰

Congress may choose to constrict, maintain, or expand statutes governing consideration of tribal input in federal decisionmaking. Congress has considered and enacted legislation to address tribal and other Indigenous entity interests in maintaining confidentiality in some cases. ARPA, NHPA, and NAGPRA all have statutory or regulatory confidentiality provisions and give agencies discretion in implementing these provisions.²⁰¹ In addition, the STOP Act creates a FOIA exemption for any information designated by a Tribe or an NHO as “sensitive or private according to Native American custom, law, culture, or religion.”²⁰² Similarly, the 2008 farm bill (P.L. 110-234, 25 U.S.C. §3053) authorizes the Forest Service to withhold information from the public relating to reburials, sites, human remains, or resources of traditional or cultural importance, including information provided in the course of research.

Beyond the statutory status quo, Congress may also evaluate whether it would be appropriate to codify existing agency practices or expand current statutory authorities to other agencies. For example, the Forest Service authority, including best practices, could be expanded to other land management agencies. In addition, the FCC maintains a system for confidentially managing sensitive site information and for considering that information in facility-siting proposals.²⁰³ In the 119th Congress, several bills have included provisions requiring DOI and/or USDA to protect Indigenous knowledge, for example from disclosure.²⁰⁴

¹⁹⁶ White House, “Best Practices Guide,” p. 12.

¹⁹⁷ White House, “Best Practices Guide,” p. 12.

¹⁹⁸ For more information about the Freedom of Information Act, see CRS In Focus IF11450, *The Freedom of Information Act (FOIA): An Introduction*, by Benjamin M. Barczewski.

¹⁹⁹ Statement of William Bettenberg, Director, Office of Policy Analysis, DOI, U.S. Congress, Senate Committee on Indian Affairs, *Native American Sacred Places*, 108th Cong., 1st sess., 2003, S.Hrg. 108-197 (GPO, 2003), pp. 3-4.

²⁰⁰ 5 U.S.C. §552(a) (proactive disclosure requirement), 5 U.S.C. §552(b) (requirements to disclosure records subject to a request).

²⁰¹ See ARPA (16 U.S.C. §§470hh) and NHPA (54 U.S.C. §307103). NAGPRA has confidentiality provisions in its implementing regulations (43 C.F.R. Part 10.9). For a discussion of these laws and regulations, see UCLA, “Confidentiality,” p. 9.

²⁰² 25 U.S.C. §3077.

²⁰³ Interagency Working Group, “Mining Recommendations,” p. 8.

²⁰⁴ See H.R. 8616 and H.R. 3444.

Federal and Tribal Administrative Capacity

Limited agency, tribal, and other Indigenous entity capacity are ongoing issues affecting federal-tribal consultation. Consultation may be inaccessible to some Tribes and other Indigenous entities due to limited personnel and expertise.²⁰⁵ Some Tribes, especially small or remote Tribes, may have limited staff resources, which might hinder their ability to assess potential tribal impacts and travel to consultation sessions.²⁰⁶ In addition, Tribes and other Indigenous entities may lack the technical expertise to effectively consult on some federal actions. For example, they may not be able to fully evaluate technical plans and environmental studies without additional assistance.²⁰⁷ The increasing volume of consultations also affects tribal capacity, leading some Tribes to declare “consultation fatigue.”²⁰⁸ Some Tribes have asked for a centralized federal-tribal consultation calendar to improve scheduling efficiencies.²⁰⁹

At the same time, some agencies have also reported limited personnel and time to conduct federal-tribal consultation and collaborate with Tribes.²¹⁰ Agencies have reported demanding workloads for consultations because of large numbers of Tribes, high volumes of consultations, or lengthy consultations.²¹¹ In 2026, GAO recommended that select DOI and USDA agencies assess staff capacity related to working with Tribes.²¹²

Agencies and Tribes have also raised the issue of limited agency expertise in tribal relations.²¹³ For example, some Tribes and other Indigenous entities have claimed that many agency officials lack the necessary expertise in tribal and other Indigenous entities’ culture, history, and legal principles to conduct meaningful consultation.²¹⁴ These advocates stress that meaningful consultation is possible only if federal agencies understand the “sources, scope, and significance” of tribal rights and knowledge.²¹⁵ Therefore, these groups have called for more federal trainings.²¹⁶

Congress may consider options to expand tribal, other Indigenous entity, and agency capacity for federal-tribal consultations and the advantages and disadvantages associated with these options. For example, Congress could require agencies to hold in-person consultation sessions on tribal lands and geographical regions accessible to Tribes and other Indigenous entities, or in conjunction with other events they might attend, so as to increase opportunities for participation in consultation. However, scheduling many in-person consultations in different locations may

²⁰⁵ See GAO, “Tribal Consultation: Infrastructure,” p. 24.

²⁰⁶ GAO, “Tribal Consultation: Infrastructure,” pp. 24-25.

²⁰⁷ Interagency Working Group, “Mining Recommendations,” p. 74.

²⁰⁸ Statement of NCAI, H.R. 5608 hearing, p. 85.

²⁰⁹ White House, “Best Practices Guide,” p. 11. DOI has committed to establishing this centralized database, but it has not been established to date (DOI, “A Detailed Plan for Improving Interior’s Implementation of E.O. 13175,” <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf>).

²¹⁰ GAO, “*Federal Land and Water Management: Additional Actions would Strengthen Agreements with Tribes*, 26-106626, January 28, 2026, <https://files.gao.gov/reports/GAO-26-106626/index.html> (hereinafter GAO, “Agreements with Tribes”).

²¹¹ GAO, “Tribal Consultation: Infrastructure,” p. 30.

²¹² GAO, “Agreements with Tribes.”

²¹³ GAO, “Agreements with Tribes.”

²¹⁴ GAO, “Tribal Consultation: Infrastructure,” pp. 26-27.

²¹⁵ Ray-Hodge Statement, p. 55.

²¹⁶ See USET, “Training Comments,” p. 2 (“USET SPF has long recommended mandatory training on U.S.-Tribal relations and the trust obligation for all federal employees”).

increase the burden on federal agencies, Tribes, and other Indigenous entities. Congress may also continue to consider whether agency training regarding expertise in tribal culture, history, and legal principles would improve agency capacity.²¹⁷

In addition, Congress may continue to consider tribal suggestions to centralize consultation-related information.²¹⁸ For example, a centralized calendar may reduce the federal administrative burden of conducting tribal consultations, as agencies may be able to better coordinate and leverage each other's federal-tribal consultation sessions. Centralizing agency policies on tribal and other Indigenous entity consultation may also help the parties better understand consultation requirements and potentially increase transparency. On the other hand, establishing and maintaining centralized databases of information would likely incur costs. Congress may also be interested in what metric or metrics would be needed to analyze whether a centralized calendar reduces the federal and tribal burdens on consultation.

Federal Funding

Whether, and how much, federal funding should be provided for federal-tribal consultation is another issue.²¹⁹ Congress has, at times, provided annual appropriations for agencies to help Tribes participate in consultations. For example, Congress typically appropriates annual funding to the National Park Service (NPS) for tribal historic preservation officers (THPOs).²²⁰ The funding may be used to help pay expenses relating to federal-tribal consultation on projects on or affecting resources on tribal lands. The amount granted to each THPO is determined by formula developed in consultation with THPOs. Tribes have largely viewed appropriations as insufficient because they have not kept up with the increase in approved THPOs. For example, in 1996, 12 Tribes were approved by the Secretary of the Interior and NPS to assume the responsibilities of a THPO on tribal lands, compared to more than 230 in 2026.²²¹

Congress has also appropriated supplemental funding that has been used to support federal-tribal consultation. For example, the Inflation Reduction Act of 2022 (P.L. 117-169) appropriated \$350 million to the Permitting Council's Environmental Review Improvement Fund (ERIF). The Permitting Council set aside \$5 million from the fund in 2023, and an additional \$10 million in 2024, to support tribal engagement in the environmental review and authorization process for FAST-41 covered projects.²²²

²¹⁷ See, e.g., RESPECT Act (H.R. 3587).

²¹⁸ See H.R. 9439, §12 ("the current lack of centralization in Federal agencies' Tribal consultations- (A) results in a number of challenges, including scheduling conflicts and unsustainable drains on resources of Indian Tribes and the time of Tribal leaders").

²¹⁹ In 2026, GAO found that limited agency and tribal funding impeded federal-tribal collaboration (GAO, "Agreements with Tribes").

²²⁰ A tribal historic preservation officer is appointed by the Tribe for purposes of NHPA §106 compliance on tribal lands (36 C.F.R. §800.16).

²²¹ See, e.g., Statement of Ira L. Matt, Executive Director, the National Association of Tribal Historic Preservation Officers, U.S. Congress, House Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, 119th Cong., 2nd sess., March 18, 2026.

²²² Permitting Dashboard, "ERIF Tribal Assistance Program," https://www.permits.performance.gov/fpisc-content/erif-tribal-assistance-program_old. See also Permitting Council, "Permitting Council Announces Additional \$10 Million in Tribal Funding" December 19, 2024, <https://www.permitting.gov/newsroom/press-releases/permitting-council-announces-additional-10-million-tribal-funding>.

Congress may also evaluate whether and to what degree Tribes and other Indigenous entities should be compensated for participating in consultations. A 2019 GAO report found that 10 of 21 agencies' federal-tribal consultation policies specify the extent to which the agencies may compensate Tribes and other Indigenous entities for participating in federal-tribal consultation.²²³ Based on the report, it is unclear whether the agencies lack authority or choose not to use their authority. In addition, Congress may wish to review GAO's recommendations about whether some agencies' methods for financing federal-tribal consultation activities may be applicable at other agencies, such as

- collecting fees from nonfederal infrastructure project applicants to cover agency costs of conducting federal-tribal consultation,
- distributing debit cards to tribal officials to cover travel expenses related to federal consultation, and
- contracting with third parties that reimburse Tribes and other Indigenous entities for their expertise.²²⁴

Author Information

Mariel J. Murray, Coordinator
Specialist in Natural Resources Policy

Eva Lipiec
Specialist in Natural Resource Policy

Nicole T. Carter
Specialist in Natural Resources Policy

Mainon A. Schwartz
Legislative Attorney

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²²³ GAO, "Tribal Consultation: Infrastructure," p. 48.

²²⁴ GAO, "Tribal Consultation: Infrastructure," pp. 49-50.