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Federal-Tribal Consultation: Background and Issues for Congress

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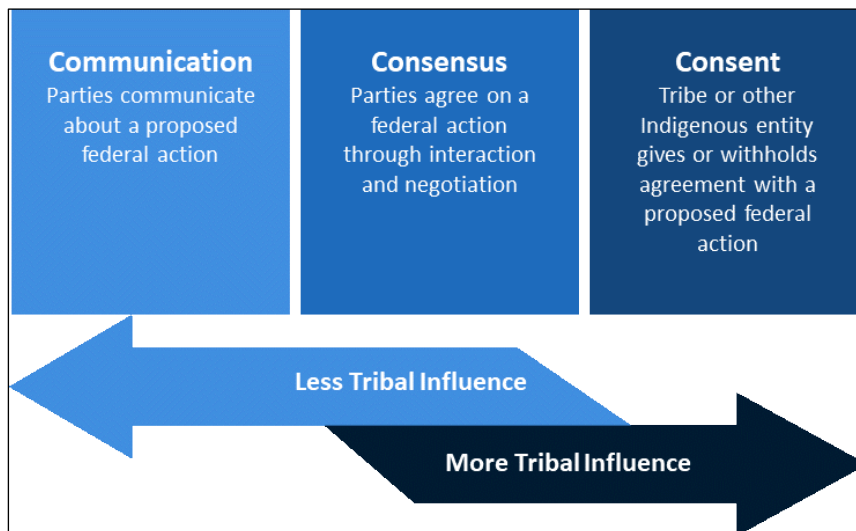


Federal-Tribal Consultation: Background and Issues for Congress

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 lands 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.

Federal-Tribal Consultation Spectrum



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. Various federal agencies, including many natural resource agencies, have issued internal federal consultation policies and have updated their guidance during the Biden Administration.

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 balance 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.⁹ During the Biden Administration, many federal departments and agencies with natural-resource-related statutory missions have issued updated guidance to reflect Administration priorities of generally increasing tribal consultation opportunities, as outlined in the “Presidential Directives” section below. This report focuses on federal departments and agencies with natural-resource-related statutory missions.

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

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 United States government negotiated tribal treaties. See National Archives, “Native American Heritage: American Indian Treaties,” at <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, art. 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 (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 (Washington: 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, at https://www.justice.gov/archive/otj/Presidential_Statements/presdoc3.htm (hereinafter E.O. 13084).

physical, cultural, spiritual, and economic relationships with their homelands, even if they no 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 balance 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, at <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 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,” at <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, ANCAs, 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, at 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.”

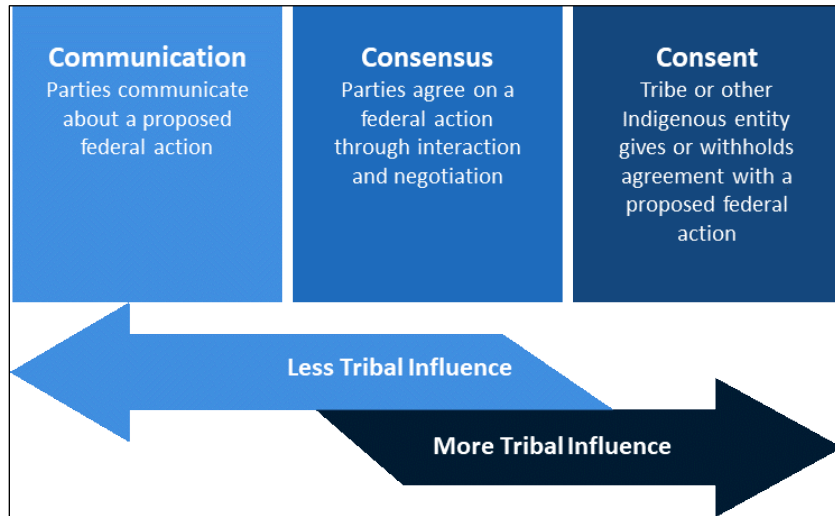
¹⁹ Often, statutory or regulatory text specifically define what constitutes *tribal land* or *Indian land* for its purposes. For information on tribal land types, see CRS Report R46647, *Tribal Land and Ownership Statuses: Overview and Selected Issues for Congress*, by Mariel J. Murray.

²⁰ BIA, “What Is Tribal Consultation?” at <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/indigenous-peoples/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 in 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 Ibid.

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 Biden Administration has described UNDRIP as “not legally binding or a statement of current international law” but having “both moral and political force.”²⁹ 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.

²³ See, e.g., DOI, “Departmental Manual: Procedures for Consultation with Indian Tribes,” November 30, 2022, p. 3, at 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, at <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, at 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, at https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf (hereinafter DOI, “Consultation 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, at <https://www.refworld.org/legal/resolution/unga/2007/en/49353> (hereinafter UNDRIP).

²⁹ 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, p. 9, at https://www.bia.gov/sites/default/files/dup/inline-files/best_practices_guide.pdf (hereinafter White House, “Best Practices Guide”).

- **Consent.** Indigenous community consent is given through an explicit statement of agreement when the process has met the other criteria (free, prior, and informed).³⁰

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.³¹ 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.”³² 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.”³³ 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 in 2011 expressed support for UNDRIP, it has not formally adopted or codified the FPIC principle.³⁴

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 are 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.³⁵ Around that time, Congress also started to provide for Indigenous input in federal decisionmaking through laws requiring federal agencies to consult with Tribes before undertaking

³⁰ 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, at <https://www.ohchr.org/en/documents/thematic-reports/free-prior-and-informed-consent-human-rights-based-approach-study-expert>.

³¹ Native American Rights Fund, University of Colorado Boulder, and University of California, Los Angeles School of Law, “Tribal Implementation Toolkit,” pp. 28-32, at <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.

³² UNDRIP, Article 19.

³³ UNDRIP, Article 32.

³⁴ 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, at <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.”).

³⁵ 25 U.S.C. §5302(b).

certain federal actions.³⁶ A selection of these statutory authorities is listed below in alphabetical order.³⁷

- **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.³⁸ 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.³⁹
- **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.⁴⁰
- **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.⁴¹ 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.⁴²
- **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.⁴³

³⁶ See, e.g., National Historic Preservation Act of 1966 (NHPA; 54 U.S.C. §§300101 et seq.), 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).

³⁷ 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.

³⁸ 42 U.S.C. §1996.

³⁹ 42 U.S.C. §1996 note.

⁴⁰ 16 U.S.C. §470ii.

⁴¹ 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.

⁴² 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).

⁴³ See generally 25 U.S.C. §§3001 et seq. *Native American* is defined as a “Tribe, people, or culture that is indigenous to the United States” (25 U.S.C. §3001(9)). For more information on NAGPRA requirements, see CRS In Focus (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.⁴⁴ 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.⁴⁵ 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.⁴⁶

National Environmental Policy Act Regulations

Agency regulations implementing statutory directives sometimes contemplate or require tribal consultations even when not expressly mentioned by the governing statute. For example, the National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 et seq.) generally requires federal agencies to consider the potential impacts of their actions on the human environment. For proposed actions likely to affect one or more Tribes, the Council on Environmental Quality regulations direct federal agencies to consult early in the planning process with Tribes whose involvement is reasonably foreseeable. Agencies must invite likely affected Tribes to participate in the scoping of issues and request comments. Through an agreement with the lead federal agency for a proposed action, a Tribe also may become a cooperating agency, which includes opportunities for participation in the lead agency’s NEPA process.

Sources: 42 U.S.C. §§4321-4327, 40 C.F.R. §1501.2(b)(4)(ii), 40 C.F.R. §1501.8(a), 40 C.F.R. §1501.9(b), and 40 C.F.R. §1503.1. For an overview of NEPA environmental reviews, see CRS In Focus IF12417, *Environmental Reviews and the 118th Congress*, by Kristen Hite.

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.⁴⁷

- **Executive Order 13084, “Consultation and Coordination with Indian Tribal Governments” (E.O. 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.⁴⁸
- **Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (E.O. 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

IF12523, *Repatriation of Native American Remains and Cultural Items: Requirements for Agencies and Institutions*, by Mark K. DeSantis and Nik Taylor.

⁴⁴ 25 U.S.C. §3071.

⁴⁵ 25 U.S.C. §3073.

⁴⁶ 25 U.S.C. §3076.

⁴⁷ 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).

⁴⁸ E.O. 13084.

direct effect” on Tribes or “tribal implications.”⁴⁹ E.O. 13175 requires agencies to develop a process to ensure “meaningful and timely input.”⁵⁰

- **Presidential Memorandum on Government-to-Government Relationship with Tribal Government (2004 P.M.).** Issued by President G.W. Bush in 2004, this memorandum recommit agencies to working on a government-to-government basis with Tribes.⁵¹
- **Presidential Memorandum of November 5, 2009 (2009 P.M.).** Issued by President Obama, this memorandum requires agencies to “prepare and periodically update” a “detailed plan of actions” to implement E.O. 13175.⁵² The 2009 P.M. 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 P.M.).** 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 E.O. 13175.⁵³ According to the 2021 P.M., the Biden Administration also prioritizes 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 P.M.).** 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

⁴⁹ Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 *Federal Register* 67249 (2000) (hereinafter E.O. 13175). Congress has stated that E.O. 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.”

⁵⁰ *Ibid.*

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* (Washington: GPO, 2004), p. 2106, at <https://www.govinfo.gov/content/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf> (hereinafter 2004 P.M.)

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

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

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

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

⁵⁶ E.O. 13084 §7, E.O. 13175 §10, 2004 P.M., 2009 P.M., 2021 P.M. §3, and 2022 P.M. §11.

⁵⁷ E.O. 13084 §4; E.O. 13175 §§3, 5, & 6; 2004 P.M.; 2009 P.M.; 2021 P.M. §3; and 2022 P.M. §§2, 5, 7, & 11.

In addition to presidential memoranda addressing federal-tribal consultation policy, the Biden Administration has 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 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

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. Many natural resource agencies have issued updated guidance in recent years to reflect Biden Administration policies. According to the White House, nine federal agencies, including the National Oceanic and Atmospheric Administration (NOAA), the U.S. Army Corps of Engineers (USACE), the U.S. Department of Agriculture (USDA), and the U.S. Department of the Interior (DOI), were revising or updating their federal-tribal consultation policies in 2023.⁶² The following includes a brief summary of those four agency or department policies addressing federal-tribal consultation.⁶³

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

⁵⁸ ACHP et al., "Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights," November 15, 2021, at <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, "Best Practices Guide."

⁶⁰ 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, at <https://www.whitehouse.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, at https://www.bia.gov/sites/default/files/dup/inline-files/ik_guidance_implementation_memo.pdf. Although there is no single definition of Indigenous knowledge, one study defined it as "a cumulative body of knowledge, practice, and belief ... handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment" (Fikret Berkes et al., "Rediscovery of Traditional Ecological Knowledge as Adaptive Management," *Ecological Applications*, vol. 10, no. 5 (2000), p. 1252, at <https://www.jstor.org/stable/2641280>).

⁶¹ CEQ and OSTP, "Guidance for Federal Departments and Agencies on Indigenous Knowledge," November 30, 2022, at https://www.bia.gov/sites/default/files/dup/inline-files/ik_guidance_implementation_memo.pdf.

⁶² White House, "2023 Progress Report for Tribal Nations," p. 10, at <https://www.whitehouse.gov/wp-content/uploads/2023/12/2023.12.04-TNS-Progress-Report.pdf>.

⁶³ These four agencies or departments have natural-resource-related missions.

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

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 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 the 2022 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

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 *Ibid.*, pp. 717-718.

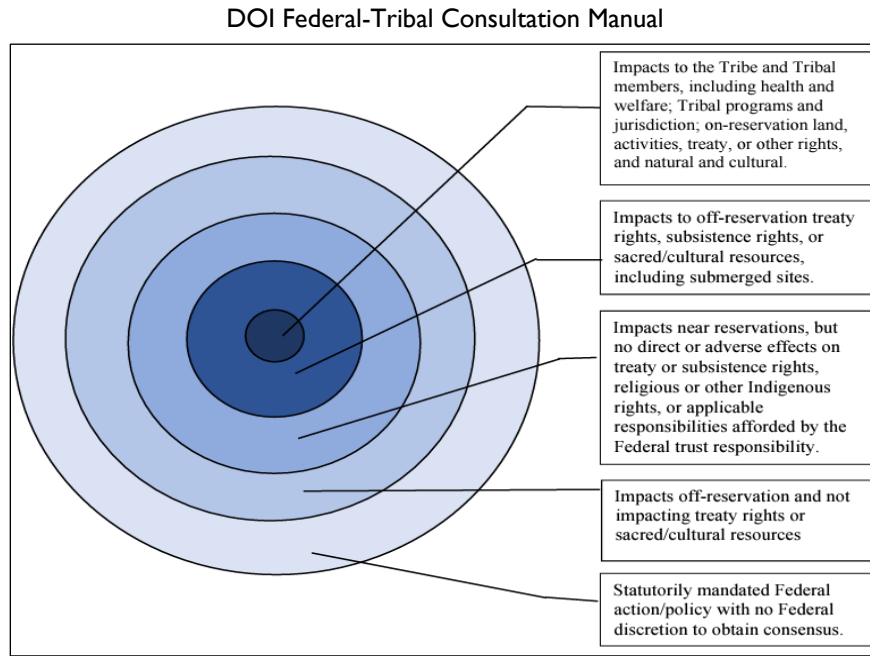
⁶⁷ For example, DOI’s Bureau of Land Management (BLM) issued a consultation policy in 2016 (BLM, “BLM Manual 1780 Tribal Relations (P),” December 15, 2016, at <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>).

⁶⁸ DOI, “Consultation DM,” p. 3.

⁶⁹ BIA, “DM Comments,” p. 6.

⁷⁰ DOI, “Consultation 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, at https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf.

Notes: In its 2022 Departmental Manual 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.

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 E.O. 13175.⁷¹ 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.⁷² 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.⁷³

In 2023, DOI issued an official policy encouraging the incorporation of Indigenous knowledge into departmental decisionmaking.⁷⁴ 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

⁷¹ DOI, “Departmental Manual: Department of the Interior Policy on Consultation with Alaska Native Claims Settlement Act Corporations,” November 30, 2022, p. 2, at <https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-6.pdf> (hereinafter DOI, “ANC Policy”).

⁷² *Ibid.*, p. 1.

⁷³ DOI, “Departmental Manual: Department of the Interior Policy on Consultation with the Native Hawaiian Community,” November 30, 2022, p. 2, at <https://www.doi.gov/sites/doi.gov/files/513-dm-1-oes-clean-508.pdf>.

⁷⁴ DOI, “Departmental Manual: Departmental Responsibilities for Consideration and Inclusion of Indigenous Knowledge in Departmental Actions and Scientific Research,” December 5, 2023, p. 1, at <https://www.doi.gov/document-library/departmental-manual/301-dm-7-departmental-responsibilities-consideration-and>.

policies.⁷⁵ However, the policy clarified that FPIC was defined as consent for DOI to use Indigenous knowledge, not to indicate consent to any underlying project.⁷⁶

U.S. Department of Agriculture (USDA)

Over the last 25 years, USDA has issued guidance on federal-tribal consultation. After E.O. 13175 was issued in 2000, USDA adopted a series of departmental regulations on tribal consultation.⁷⁷ Then, in response to the 2009 P.M., USDA issued a plan of action, which included the projected establishment of formal tribal consultation policies at all USDA agencies.⁷⁸ 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.⁷⁹ 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.⁸⁰ USDA stated that this policy would ensure that tribal priorities "are heard and fully considered" in federal decisionmaking.⁸¹

In response to the 2021 P.M., USDA submitted a plan of action and a subsequent progress report related to agency actions to achieve goals of the 2021 P.M. For example, the report discussed expanding USDA tribal expertise, updating consultation policies based on tribal feedback, and creating reporting and accountability requirements.⁸² 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.⁸³

USDA has not updated its official departmental tribal consultation policy since 2013, although individual USDA agencies have issued updated policies to reflect the Biden Administration's priorities. 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."⁸⁴ The Forest Service action plan also referenced the Interagency Treaty MOU.

⁷⁵ Ibid., p. 7.

⁷⁶ Ibid., p. 4.

⁷⁷ See, e.g., U.S. Department of Agriculture (USDA), "Departmental Regulation 1350-001: Tribal Consultation," at <https://www.usda.gov/sites/default/files/documents/DR1350-001.pdf>.

⁷⁸ 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," at <https://www.usda.gov/sites/default/files/documents/ConsultationPlan.pdf>.

⁷⁹ USDA, "United States Department of Agriculture Action Plan for Tribal Consultation and Collaboration," p. 7, at <https://www.usda.gov/sites/default/files/documents/ConsultationPlan.pdf>.

⁸⁰ USDA, "Departmental Regulation 1350-002: Tribal Consultation, Coordination, and Collaboration," January 18, 2013), at https://www.usda.gov/sites/default/files/documents/USDA_DR_Tribal_Consultation_Coordination_and_Collaboration_OTR_final_1_18.pdf.

⁸¹ Ibid.

⁸² USDA, "United States Department of Agriculture Plan of Action 270 Day Progress Report," at <https://www.usda.gov/sites/default/files/documents/usda-consultation-plan-action-270-day-report.pdf>.

⁸³ USDA, "USDA Tribal Accomplishments 2022," p. 1, at <https://www.usda.gov/sites/default/files/documents/usda-tribal-accomplishments-2022.pdf> (hereinafter USDA, "2022 Tribal Accomplishments").

⁸⁴ USDA, Forest Service, "Strengthening Tribal Consultations and Nation-to-Nation Relationships," February 2023, p. 19, at https://www.fs.usda.gov/sites/default/files/fs_media/fs_document/Strengthening-Tribal-Relations.pdf.

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 Assistant Secretary of the Army (Civil Works; ASACW) released an updated USACE Tribal Consultation Policy on December 5, 2023, replacing an earlier policy from 2012.⁸⁵ Both the 2012 and 2023 policies applied to both the USACE civil works projects and the USACE regulatory program. The new 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.⁸⁶

The new 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.⁸⁷ The ASACW's memo on the new policy directs USACE to develop implementing guidance and to plan for the necessary training and "culture changes."⁸⁸ The new

⁸⁵ 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 recommendation for updating Army Corps civil works policy priorities, including an update of its tribal consultation policies (87 *Federal Register* 33756).

⁸⁶ "U.S. Army Corps of Engineers – Civil Works Tribal Consultation Policy" enclosure in 2023 "USACE Tribal Consultation Policy." The new policy notes that a separate consultation policy with Native Hawaiian Communities is under development.

⁸⁷ 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."

⁸⁸ 2023 "USACE Tribal Consultation Policy."

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 new policy references the 2022 P.M. 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.⁸⁹ In WRDA 2022, Congress established a requirement that each USACE district containing a “tribal community,” shall have a tribal liaison.⁹⁰ According to USACE, as of December 2023, there are 51 USACE district staff members who are identified as tribal liaisons.⁹¹

USACE Historic Preservation and Tribal Consultation

USACE has several policies regarding NHPA Section 106 compliance for undertakings associated with its water projects.⁹² 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

⁸⁹ 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).

⁹⁰ 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.

⁹¹ USACE communication with CRS, December 4, 2023. Each of the 38 districts has a designated tribal liaison and 13 districts have 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 has a designated tribal liaison, and there is a senior tribal liaison position at USACE Headquarters. According to USACE, a number of district and division tribal liaisons serve full time.

⁹² This includes USACE granting easements at its projects.

USACE and the ACHP, Tribes, and other stakeholders, as noted in a 2017 ACHP report.⁹³ 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.⁹⁴

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.⁹⁵ DOC's formal federal-tribal consultation policies were last updated in 2012, via a DOC Department Administrative Order, DAO 218-8.⁹⁶ DAO 218-8 implements E.O. 13175, the 2009 P.M., 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.⁹⁷ 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 implications."⁹⁸ 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.⁹⁹ DAO 218-8 also established a DOC Tribal Consultation Official responsible for ensuring DOC compliance with E.O. 13175, DAO 218-8, and the guidance.¹⁰⁰ In 2021, DOC also signed onto the Interagency Treaty MOU.¹⁰¹

At the agency level, NOAA policies build on the same guidance and direction as DAO 218-8, the 2021 P.M., and the Interagency Treaty MOU. NOAA has laid out its federal-tribal consultation policies in a NOAA Administrative Order, NAO 218-8A, and several guidance documents, all released in 2023.¹⁰² Under NAO 218-8A, the NOAA Administrator must appoint and maintain a

⁹³ ACHP, "Improving Tribal Consultation in Infrastructure Projects," p. 13, at https://www.achp.gov/sites/default/files/reports/2018-11/ImprovingTribalConsultationinInfrastructureProjectsFinalApril272017_0.pdf.

⁹⁴ 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.

⁹⁵ National Oceanic and Atmospheric Administration (NOAA), "Our Mission and Vision," at <https://www.noaa.gov/our-mission-and-vision>.

⁹⁶ 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, at https://www.osec.doc.gov/opog/dmp/daos/dao218_8.html (hereinafter DAO 218-8).

⁹⁷ DOC, "Tribal Consultation and Coordination Policy of the U.S. Department of Commerce," 2013, at <https://www.commerce.gov/sites/default/files/media/files/2013/tribal-consultation-final.pdf> (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 (p. 5).

⁹⁸ DOC, "Tribal Consultation Policy," p. 1.

⁹⁹ *Ibid.*, p. 4.

¹⁰⁰ DAO 218-8, §5.

¹⁰¹ Interagency Treaty MOU.

¹⁰² NOAA, "NAO 218-8A: Policy on Government-to-Government Consultation with Federally Recognized Indian Tribal Governments," effective June 27, 2023, at <https://www.noaa.gov/organization/administration/nao-218-8A-policy-on-G2G-consultation-with-federally-Recognized-Tribal-Governments> (hereafter NAO 218-8A); NOAA, "NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribal (continued...)"

NOAA Tribal Liaison with a variety of responsibilities, including developing guidance and maintaining documentation of agency consultations.¹⁰³ The NOAA tribal consultation procedures require each line office, staff office, and regional team to establish tribal liaisons as well.¹⁰⁴ 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.”¹⁰⁵

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

Federal Actions Subject to Consultation (“What?”)

Many Tribes and other Indigenous entities have asked agencies to consult on federal actions 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.¹⁰⁶ 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.¹⁰⁷ For example, some Tribes and other Indigenous entities have sought to influence federal policies on mining to protect natural and cultural resources.¹⁰⁸ Some Tribes may seek to influence federal actions in the ocean, such as

Governments,” 2023, at 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,” 2023, at https://www.noaa.gov/sites/default/files/2023-07/NOAA_IK_Guidance_FINAL_2023_1.pdf (hereinafter “NOAA Guidance”).

¹⁰³ NAO 218-8A, §5.

¹⁰⁴ “NOAA Procedures,” p. 7.

¹⁰⁵ “NOAA Guidance,” p. 1.

¹⁰⁶ Letter from Fawn Sharp, President, National Congress of American Indians (NCAI), to Shalanda Young, President, Office of Management and Budget (OMB), April 9, 2021, p. 23. Available to congressional clients from the authors on request.

¹⁰⁷ 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.

¹⁰⁸ See, e.g., Chilkat Indian Village et al., “Notice of Petition and Petition for Rulemaking: Bringing Hardrock Mining (continued...)”

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.”¹⁰⁹ Yurok tribal leaders claim that the federal processes for wind farm activity have failed to include their input.¹¹⁰

Some Tribes and other Indigenous entities have asked for input in internal agency processes.¹¹¹ For example, Tribes have stated that they should be consulted throughout the federal budget formulation and execution processes “to ensure tribal funding priorities and needs are met.”¹¹² In 2022, the Government Accountability Office (GAO) 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

The National Congress of American Indians (NCAI) has asserted that Tribes should be able to request consultation on any federal action of relevance to them. Specifically, NCAI requested that OMB, which oversees federal agency management, establish a mechanism requiring agencies to consult with Tribes and other Indigenous entities upon their request.¹¹⁴ While some agencies allow for Tribes and other Indigenous entities to request consultation, this practice is not uniform across the government.

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.

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 traditional lifeways (e.g., trapping, fishing, gathering foods and times, and traditional uses of a variety of natural resources) 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.

Regulations and Policy into the 21st Century to Protect Indigenous and Public Lands Resources in the West,” September 16, 2021, p. 2, at <https://earthworks.org/assets/uploads/2021/09/APA-DOI-Hardrock-Mining-Rules-Petition-Combined-1.pdf>.

¹⁰⁹ Chez Oxendine, “Native Leaders at Yurok Summit Demand a Seat at the Table for Offshore Wind Projects,” *Tribal Business News*, February 3, 2024.

¹¹⁰ *Ibid.*

¹¹¹ OMB, “Office of Management and Budget Tribal Consultation Plan of Actions,” April 26, 2021, p. 4, at <https://www.whitehouse.gov/wp-content/uploads/2021/07/OMB-Tribal-Consultation-Plan-of-Actions.pdf>.

¹¹² *Ibid.*

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

¹¹⁴ Letter from Fawn Sharp, President, NCAI, to Shalanda Young, President, OMB, April 9, 2021, p. 7. Available to congressional clients from the authors on request.

- **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, at <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, at <https://www.gao.gov/assets/gao-19-22.pdf>. See also ACHP, “Improving Tribal Consultation in Infrastructure Projects,” May 14, 2017, p. 4, at 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.¹¹⁵ 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.¹¹⁶ Therefore, 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.¹¹⁷

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 E.O. 13175’s consultation

¹¹⁵ See Enbridge, “Enbridge Submission Docket ID No. COE-2022-0006_02.08.2022” p. 2, at <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, at <https://www.regulations.gov/comment/COE-2022-0006-0088>.

¹¹⁶ 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, at 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.”).

¹¹⁷ 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, at <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; Routel & Holth, “Genuine Consultation,” p. 466; and 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, at https://www.usetinc.org/wp-content/uploads/2022/04/USSET-SPF-Comments-RESPECT-Act-FINAL-3_11_22_-002.pdf (hereinafter USET, “Letter”).

requirements.¹¹⁸ 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)).¹¹⁹ In addition, some agencies have stated that consultation on certain issues is unnecessary or impractical.¹²⁰

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.¹²¹ 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.”¹²² 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 “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.¹²³ 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.¹²⁴ 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.¹²⁵ These presidential documents typically cite the federal trust responsibility and the holistic body of federal Indian law—rather

¹¹⁸ E.O. 13175 §1(c).

¹¹⁹ GAO, “Federal Funds,” p. 49.

¹²⁰ 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.

¹²¹ 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”).

¹²² Green & Cohn, “Meaningful Tribal Consultation,” p. 108.

¹²³ *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980).

¹²⁴ *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.

¹²⁵ See *Northern Arapaho Tribe v. Burwell*, 118 F. Supp. 3d 1264, 1281 (D. Wyo. 2015).

than specific statutory authority—as underlying the directives for federal-tribal consultation.¹²⁶ 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.¹²⁷

As described in more detail above, the presidential documents also explicitly disclaim the creation of any new, legally enforceable rights.¹²⁸ 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.¹²⁹ 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.”¹³⁰

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.¹³¹ The court criticized the Tribe for offering “no standard by which to judge ... whether a ‘listening session’ or a conference call qualifies as a consultation” and concluded that the agency’s actions satisfied both the agency’s and the dictionary’s definition of consultation.¹³²

An agency’s compliance (or lack thereof) with its own regulations or guidance, therefore, may provide a basis for judicial enforcement.¹³³ 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.¹³⁴ 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

¹²⁶ See, e.g., E.O. 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).

¹²⁷ See, e.g., Federal Transit Administration, *Tribal Consultation*, at <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”).

¹²⁸ See, e.g., E.O. 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”).

¹²⁹ 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.”).

¹³⁰ *Northern Arapaho Tribe*, 118 F. Supp. 3d at 1281.

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

¹³² *Ibid.*

¹³³ For more information about guidance documents, see CRS Legal Sidebar LSB10591, *Agency Use of Guidance Documents*, by Kate R. Bowers.

¹³⁴ *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 710 (8th Cir. 1979).

that the restructuring “could result in the loss of funding to Indian schools.”¹³⁵ 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.”¹³⁶ 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.¹³⁷ 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.”¹³⁸

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.”¹³⁹

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.¹⁴⁰ One such court denied an attempt to stop construction based on claims that the government had inadequately consulted Tribes about potential damage to Native American graves.¹⁴¹ 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.¹⁴² 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.¹⁴³

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

¹³⁵ *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).

¹³⁶ *Ibid.*, p. 785 (citing *Lower Brule Sioux Tribe*, 911 F. Supp. at 399).

¹³⁷ *Quechan Tribe of the Fort Yuma Indian Reserv. v. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1112 (S.D. Cal. 2010).

¹³⁸ *Ibid.* (“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.”).

¹³⁹ Mills & Nie, “Bridges.”

¹⁴⁰ *Manzanita Band of the Kumeyaay Nation v. Wolf*, 496 F. Supp. 3d 257, 260 (D.D.C. 2020).

¹⁴¹ *Ibid.*, pp. 268-269.

¹⁴² *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).

¹⁴³ 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.”).

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.”¹⁴⁴ Furthermore, some Members of Congress have stated that expanded federal-tribal consultation requirements could hinder “needed economic development and critical infrastructure development for Tribes.”¹⁴⁵

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.¹⁴⁶ Beyond that, Congress has, at times, required federal-tribal consultation for actions by 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.¹⁴⁷ 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, bills were introduced in the 117th and 118th Congresses that would have required agencies such as OMB and USDA to consult with

¹⁴⁴ 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 (Washington: GPO, 2019), p. 49 (hereinafter “2019 RESPECT Act hearing”).

¹⁴⁵ See Statement of Rep. Bruce Westerman, Ranking Member, “Respect Act hearing,” p. 7, at <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.”).

¹⁴⁶ 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 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).

¹⁴⁷ 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.).

Tribes on budget formulation.¹⁴⁸ Similarly, Congress has, at times, proposed and required agencies to engage in tribal consultations and negotiated rulemaking to ensure tribal input on specific initiatives.¹⁴⁹ 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. Members of Congress have introduced bills setting consultation standards that would potentially expand the number and types of activities requiring consultation.¹⁵⁰ 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."¹⁵¹ For a summary of selected consultation legislation, see the **Appendix**.

Representation of the Parties ("Who?")

Federal agencies, Tribes, and other Indigenous entities have debated about who should participate in federal-tribal consultations.¹⁵² One issue is the authority of the federal representative. In 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.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵

¹⁴⁸ See S. 5186 from the 117th Cong., which directed OMB to develop a tribal consultation policy. See also H.R. 5113 and S. 3270 from the 118th Cong., which both proposed requiring federal-tribal consultation during the budget formulation process at the USDA.

¹⁴⁹ For example, the PROGRESS for Indian Tribes Act (P.L. 116-180) required the DOI to implement the act by setting up a negotiated rulemaking committee with tribal members. In addition, H.R. 4386 and S. 981 in the 117th Cong. proposed establishing requirements for tribal consultation prior to the sale or transfer of certain federal civilian real property.

¹⁵⁰ See, e.g., H.R. 5608 from the 110th Cong.; H.R. 5023 from the 111th Cong.; H.R. 1600 from the 113th Cong.; H.R. 5379 from the 114th Cong.; and the RESPECT Act, H.R. 3587 from the 117th Cong. H.R. 5608 from the 110th Cong. 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."

¹⁵¹ H.R. 3587.

¹⁵² See, e.g., ACHP, "Improving Tribal Consultation in Infrastructure Projects," May 14, 2017, p. 4, at https://www.achp.gov/sites/default/files/reports/2018-11/ImprovingTribalConsultationinInfrastructureProjectsFinalApril272017_0.pdf.

¹⁵³ *Ibid.*

¹⁵⁴ See Statement of Vanessa L. Ray-Hodge, Partner, Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, hereinafter "2019 RESPECT Act hearing," p. 53.

¹⁵⁵ *Ibid.*

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 have committed to this practice, although Congress could consider whether to mandate this practice government-wide.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ Furthermore, they claim that the participation of other Indigenous entities such as ANCs “undermines the government-to-government relationship between Tribal Nations and the United States.”¹⁵⁹ Therefore, certain Tribes have argued against the participation of other Indigenous entities in federal consultation.¹⁶⁰

On the other hand, some other Indigenous entities assert that they should have opportunities to consult alongside Tribes.¹⁶¹ Still 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.”¹⁶² In addition, other Indigenous entities have argued that they have a right to consult based on statute rather than a historic government-to-government relationship. For example, ANCs have argued that Congress has recognized them, thereby providing them with a statutory right to consultation.¹⁶³

Members of Congress may continue to consider whether to be more inclusive in consultation requirements (all Tribes and other Indigenous entities) or less inclusive (only Tribes). Congress

¹⁵⁶ For example, DOI’s 2022 policy defined federal-tribal consultation as having both department and tribal officials with decisionmaking authorities present at the session (DOI, “Consultation 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.”

¹⁵⁷ See, e.g., USET, “Letter,” pp. 2-3.

¹⁵⁸ *Yellen v. Chehalis*, 594 U.S. ____ (2021), Brief for Respondents Confederated Tribes of the Chehalis Reservation, et al., March 24, 2021, p. 45, at https://sct.narf.org/documents/alaska_native_corp_v_chehalis/brief_respondent.pdf.

¹⁵⁹ USET, “Letter,” p. 2-3.

¹⁶⁰ *Ibid.*

¹⁶¹ Letter from Kim Reitimeier, President, Alaska Regional Association, to Executive Office of the President, February 22, 2022, p. 2 (hereinafter Reitimeier, “Letter”). Available to congressional clients from the authors on request.

¹⁶² 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 (Washington: GPO, 2022), p. 4.

¹⁶³ Reitimeier, “Letter,” p. 2.

has, at times, encouraged or required federal-tribal consultation with other Indigenous entities such as ANCs.¹⁶⁴ For example, the Consolidated Appropriations Act, 2004, as amended, required federal agencies to consult with ANCs on the same basis as Tribes under E.O. 13175.¹⁶⁵ In addition, NHPA authorizes consultation with NHOs.¹⁶⁶ In other instances, bills introduced would have limited consultation to Tribes, although none have been enacted into law.¹⁶⁷ 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.¹⁶⁸ Many Tribes and other Indigenous entities have asserted that early and consistent agency engagement is essential for meaningful federal-tribal consultation.¹⁶⁹ 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.¹⁷⁰ Furthermore, some have argued that federal consultation policies should provide multiple communication opportunities during the course of a project or policy development process.¹⁷¹

Some stakeholders, including Members of Congress, have expressed concern that timing requirements related to federal-tribal consultation could delay federal actions.¹⁷² 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.¹⁷³ 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.¹⁷⁴ Some Members of Congress have expressed concerns that broad consultation requirements would cause “catastrophic” harm to

¹⁶⁴ 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.”

¹⁶⁵ P.L. 108-199, Div. H, §161, (2004), as amended.

¹⁶⁶ 54 U.S.C. §302706(b).

¹⁶⁷ See, e.g., H.R. 5608 from the 110th Cong.

¹⁶⁸ 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, at <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.

¹⁶⁹ See, e.g., DOI, “Infrastructure Report,” p. 17.

¹⁷⁰ *Ibid.*

¹⁷¹ NCAI, “Call to Congress.”

¹⁷² See Statement of Kevin Washburn, Professor of Law, University of Iowa College of Law, Iowa City, Iowa, “2019 RESPECT Act hearing,” p. 22.

¹⁷³ Interstate Natural Gas Association of America and American Gas Association, “INGAA AGA Comments on Corps Notice,” p. 2, at <https://www.regulations.gov/comment/COE-2022-0006-0088>.

¹⁷⁴ Interagency Working Group on Mining Laws, Regulations, and Permitting, *Recommendations to Improve Mining on Public Lands*, September 2023, p. 74, at <https://www.doi.gov/sites/doi.gov/files/mriwg-report-final-508.pdf> (hereinafter Interagency Working Group, “Mining Recommendations”).

local communities by increasing permitting times, which would negatively impact activities such as grazing and energy production.¹⁷⁵

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 “commence early in the planning process.”¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸

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.¹⁷⁹ 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.”¹⁸⁰ Instead, they argue, Tribes are sovereign nations whose concerns should be considered separately from the public’s.¹⁸¹ Finally, some Tribes and other Indigenous entities have asked agencies to communicate with them after consultations regarding how their input was incorporated into agency decisions.¹⁸²

In addition, Tribes and other Indigenous entities often advocate that agencies should not only communicate but also strive to reach consensus or secure FPIC.¹⁸³ 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.¹⁸⁴ For example, some Tribes with treaty rights have asked federal agencies to stop actions until “a

¹⁷⁵ Statement of Rep. Paul Gosar, “2019 RESPECT Act hearing,” p. 49.

¹⁷⁶ 36 C.F.R. §800.2(c)(2)(ii)(A).

¹⁷⁷ See, e.g., H.R. 2532 from the 116th Cong. and H.R. 3307 from the 118th Cong.

¹⁷⁸ See, e.g., H.R. 3587, RESPECT Act, Title II, from the 117th Cong.

¹⁷⁹ Statement of Vanessa L. Ray-Hodge, Partner, Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, “2019 RESPECT Act hearing,” p. 53.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*, p. 54.

¹⁸² DOI, “Framing Paper: Improving Interior’s Consultation with Tribes: Development of the U.S. Department of the Interior’s Plan for Improving Implementation of EO 13175, Consultation and Coordination with Indian Tribal Governments,” p. 2, at <https://www.doi.gov/sites/doi.gov/files/framing-paper-consultation-with-Tribes.pdf> (hereinafter DOI, “Framing Paper”). See also 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, at <https://www.gao.gov/products/gao-19-22> (hereinafter GAO, “Tribal Consultation: Infrastructure”).

¹⁸³ See, e.g., BIA, “DM Comments,” p. 5 (“Several Tribes agreed with the intent of the consensus-seeking model.”).

¹⁸⁴ White House, “Best Practices Guide,” p. 12.

consent-based process” that “respects and prioritizes treaty rights impacts” is developed.¹⁸⁵ Others have asked agencies to use the principle of “mutual concurrence” to identify “traditional and customary use areas” and design conservation measures.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹

In addition, non-tribal 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.¹⁹⁰ 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.¹⁹¹ In addition, some stakeholders have argued that the preferences of nonfederal interests in USACE 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.¹⁹²

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

¹⁸⁵ DOI, “Secretary’s Tribal Advisory Committee, Policy Recommendations,” August 2023, p. 56, at <https://kawerak.org/policy-recommendations-from-secretarys-tribal-advisory-committee-for-the-department-of-the-interior/>.

¹⁸⁶ 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, at <https://www.alaskawild.org/wp-content/uploads/2020/07/FINAL-Southeast-Tribes-APA-Petition-7-17-2020-Nine-Tribe-Signatures.pdf>.

¹⁸⁷ 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, p. 18-19.

¹⁸⁸ 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, at <https://www.fs.usda.gov/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>.

¹⁸⁹ GAO, “Tribal Consultation-Infrastructure,” p. 30.

¹⁹⁰ North Dakota Department of Water Resources, “Comment on FR Doc #2024-02448,” pp. 5-6, at <https://www.regulations.gov/comment/COE-2023-0005-0043>.

¹⁹¹ *Ibid.*

¹⁹² National Waterways Conference, “Comment on FR Doc # 2024-02448,” pp. 27-28, at <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.

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.”¹⁹³ In addition, some regulations encourage (though do not require) consensus with Tribes, Alaska Natives, and NHOs.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ For a summary of selected legislation with consent and consensus requirements, see the Appendix.

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.¹⁹⁷ 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.¹⁹⁸ Some Tribes and other Indigenous entities have raised concerns about the potential public release of agency maps depicting culturally sensitive or religious sites.¹⁹⁹

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.²⁰⁰ Without an exemption, FOIA (5 U.S.C. §552) provides the public a right to access federal agency information.²⁰¹

¹⁹³ 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 (Washington: GPO, 2022), p. 10.

¹⁹⁴ 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)).

¹⁹⁵ See, e.g., H.R. 2689 in the 115th Cong., H.R. 2532 and S. 4331 in the 116th Cong., and H.R. 9439 and H.R. 3587 in the 117th Cong.

¹⁹⁶ S. 5186 in the 117th Cong.

¹⁹⁷ 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 (Washington: GPO, 2003), pp. 8, 20, 54-55.

¹⁹⁸ UCLA School of Law, Native Nations Law & Policy Center, “The Need for Confidentiality Within Tribal Cultural Resource Protection,” December 2020, p. 6, at https://law.ucla.edu/sites/default/files/PDFs/Native_Nations/239747_UCLA_Law_publications_Confidentiality_R2_042021.pdf (hereinafter UCLA, “Confidentiality”).

¹⁹⁹ White House, “Best Practices Guide,” p. 12.

²⁰⁰ *Ibid.*

²⁰¹ 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.

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.²⁰² 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.²⁰³ Agencies may also be statutorily required to publicly share information proactively or in response to FOIA requests.²⁰⁴

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.²⁰⁵ 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.”²⁰⁶ 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. In addition, Members have introduced legislation that would exempt information shared by Tribes or other Indigenous entities from FOIA.²⁰⁷ Other bills have included provisions requiring agencies to protect Indigenous knowledge if requested.²⁰⁸

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.²⁰⁹

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

²⁰² 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 (Washington: GPO, 2003), pp. 3-4.

²⁰³ *Ibid.*

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

²⁰⁵ 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. Some agencies have committed to treating information received during federal-tribal consultation as confidential if disclosure would negatively impact cultural or other sensitive resources. See., e.g., DOI, “ANC Policy,” p. 2.

²⁰⁶ 25 U.S.C. §3077.

²⁰⁷ See, e.g., RESPECT Act (H.R. 3587), §502, and the Safeguard Objects of Tribal Patrimony Act (S. 1471), §9, from the 117th Cong.

²⁰⁸ See H.R. 8108 and S. 4421 in the 117th Cong. and H.R. 6148 in the 118th Cong.

²⁰⁹ Interagency Working Group, “Mining Recommendations,” p. 8.

due to limited personnel and expertise.²¹⁰ 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.²¹¹ 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.²¹²

The increasing volume of consultations also affects tribal capacity, leading some Tribes to declare “consultation fatigue.”²¹³ According to NCAI, a Tribe or other Indigenous entity’s ability to consult diminishes when large numbers of consultation sessions are scheduled in a short time span or when consultation sessions on different topics overlap.²¹⁴ Some Tribes have asked for a centralized federal-tribal consultation calendar to improve scheduling efficiencies.²¹⁵ In addition, NCAI asked OMB to centralize federal policies on federal-tribal consultation to increase tribal understanding of different federal requirements.²¹⁶

At the same time, agencies may also have limited personnel, time, and expertise to conduct federal-tribal consultation. Agencies have reported demanding workloads for consultations because of large numbers of Tribes, high volumes of consultations, or lengthy consultations.²¹⁷ In addition, 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.²¹⁸ These advocates stress that meaningful consultation is possible only if federal agencies understand the “sources, scope, and significance” of tribal rights and knowledge.²¹⁹ Therefore, these groups have called for more federal trainings.²²⁰

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.²²¹ However, scheduling many in-person consultations in different locations may increase the burden on federal agencies, Tribes, and other Indigenous entities. Congress may also

²¹⁰ See GAO, “Tribal Consultation: Infrastructure,” p. 24. See also Letter from Fawn Sharp, President, NCAI, to Shalanda Young, President, OMB, April 9, 2021, p. 5. Available to congressional clients from the authors on request.

²¹¹ GAO, “Tribal Consultation: Infrastructure,” pp. 24-25.

²¹² Interagency Working Group, “Mining Recommendations,” p. 74.

²¹³ Statement of NCAI, H.R. 5608 hearing, p. 85.

²¹⁴ Letter from Fawn Sharp, President, NCAI, to Shalanda Young, President, OMB, April 9, 2021, p. 5. Available to congressional clients from the authors on request.

²¹⁵ 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,” at <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf>).

²¹⁶ Letter from Fawn Sharp, President, NCAI, to Shalanda Young, President, OMB, April 9, 2021, p. 5. Available to congressional clients from the authors on request.

²¹⁷ GAO, “Tribal Consultation: Infrastructure,” p. 30.

²¹⁸ *Ibid.*, pp. 26-27.

²¹⁹ See Statement of Vanessa L. Ray-Hodge, Partner, Sonosky, Chambers, Sachse, Mielke & Brownell, LLP, “2019 RESPECT Act hearing,” p. 55.

²²⁰ *Ibid.*

²²¹ DOI, “Framing Paper,” p. 2.

continue to consider whether agency training regarding expertise in tribal culture, history, and legal principles would improve agency capacity.²²²

In addition, Congress may continue to consider tribal suggestions to centralize consultation-related information.²²³ 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

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).²²⁴ 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 over 200 in 2022.²²⁵

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). In 2023, the Permitting Council set aside \$5 million from the fund to support tribal engagement in the environmental review and authorization process for FAST-41 covered projects.²²⁶

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.²²⁷ 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

²²² See, e.g., RESPECT Act (H.R. 3587).

²²³ 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").

²²⁴ 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).

²²⁵ See, e.g., Statement of Valerie J. Grussing, PhD, Executive Director, the National Association of Tribal Historic Preservation Officers, U.S. Congress, House Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, *PART 7 Testimony of Interested Individuals and Organizations*, 116th Cong., 2nd sess., February 6, 2020 (Washington: GPO, 2021). See also National Park Service, "Tribal Historic Preservation Office (THPO) Grants," at <https://www.nps.gov/subjects/historicpreservationfund/thpo-grants.htm>.

²²⁶ Permitting Dashboard, "ERIF Tribal Assistance Program," at <https://www.permits.performance.gov/fpsc-content/erif-tribal-assistance-program>.

²²⁷ GAO, "Tribal Consultation: Infrastructure," p. 48.

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.²²⁸

²²⁸ Ibid., pp. 49-50.

Appendix. Select Legislation That Proposed Establishing Federal-Tribal Consultation Standards

Table A-1. Select Legislation That Proposed Establishing Federal-Tribal Consultation Standards

Bills Introduced in the 117th and 118th Congress

Legislation	Congress	Brief Description	Tribal Consent or Consensus Requirement	Legislative Consideration Milestones	Most Recent Hearing (If Applicable)
Rural Economic-development Assistance and Consultation to Help Our Tribes Act (REACH Our Tribes Act), H.R. 5113/S. 3270	118 th	Proposed setting federal-tribal consultation requirements for the budget formulation process at the U.S. Department of Agriculture.	No	<p>Referred to the House Committees on Agriculture, Transportation and Infrastructure, and Financial Services on August 1, 2023</p> <p>Referred to the House Transportation and Infrastructure Committee’s Subcommittee on Economic Development, Public Buildings, and Emergency Management on August 2, 2023</p> <p>Referred to the Senate Committee on Agriculture, Nutrition, and Forestry on November 9, 2023</p>	N/A
Advancing Tribal Parity on Public Land Act, H.R. 6148/S. 3186	118 th	Proposed requiring the Secretaries of the Interior and Agriculture to consider “the rights and interests of any interested Indian Tribe” prior to disposing of federal lands.	No	<p>Referred to the House Committees on Natural Resources and Agriculture on November 1, 2023</p> <p>Referred to the Senate Committee on Indian Affairs on November 1, 2023</p>	House Natural Resources Subcommittee on National Parks, Forests, and Public Lands September 14, 2022
Honoring Promises to Native Nations Act, H.R. 9439/S. 5186	117 th	Proposed directing the White House Office of Management and Budget to develop a tribal consultation policy.	Yes	<p>Referred to the Senate Committee on Indian Affairs on December 5, 2022</p> <p>Referred to the House Committees on Natural Resources, the Budget, the Judiciary, Energy and Commerce, Education and Labor, Financial Services, Veterans’ Affairs, Transportation and Infrastructure, and Agriculture on December 6, 2022</p>	N/A

Legislation	Congress	Brief Description	Tribal Consent or Consensus Requirement	Legislative Consideration Milestones	Most Recent Hearing (If Applicable)
Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes Act (RESPECT) Act, H.R. 3587	117 th	Proposed requiring federal-tribal consultation before an agency conducts “any proposed Federal activity or finaliz[es] any Federal regulatory action that may have Tribal impacts.”	Yes	Referred to the House Committees on the Judiciary and Natural Resources on May 28, 2021 Referred to the House Natural Resources Subcommittee for Indigenous Peoples of the United States on June 28, 2021 Referred to the House Judiciary’s Subcommittee on Antitrust, Commercial, and Administrative Law on November 1, 2022	House Natural Resources Committee May 19, 2021
Assuring Regular Consultation to Have Indigenous Voices Effectively Solicited Act, H.R. 4386/S. 981	117 th	Proposed establishing requirements for tribal consultation prior to the sale or transfer of certain federal civilian real property.	No	Referred to the House Transportation and Infrastructure’s Subcommittee on Economic Development, Public Buildings, and Emergency on July 12, 2021 Referred to the Senate Committee on Environment and Public Works on March 25, 2021	N/A

Source: CRS. Legislation from the 117th and 118th Congress was selected using terms such as “tribe,” “tribal,” and “consultation.”

Note: N/A = not applicable. “Tribal consent or consensus requirement” indicates that the bill required the federal agency or agencies to obtain tribal consent or consensus as part of tribal consultation.

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