

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

November 30, 2022

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

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This is not a stand-alone document, but a living document which should be read in conjunction with other agency policies, including departmental and agency Tribal Consultation policies, the Memorandum Of Understanding Regarding Interagency Coordination And Collaboration For The Protection Of Indigenous Sacred Sites,¹ the commitment expressed by the White House to Elevate Indigenous Knowledge in Federal Policy Decisions,² and the Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters.³ This document contains legal principles, best practices, and aspirational and intentionally transformative policy goals intended to strengthen the protection of treaty and reserved rights, agency Tribal consultation practices, and the government-to-government relationship.

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

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

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

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

This document is not intended to be a comprehensive statement of all considerations that should go into treaty rights decisions. This Report is intended only to improve the internal management of the executive branch, and its provisions are not intended to be applied by a court.

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I. Background

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

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

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

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

⁵ *Id.* at Section 5(d).

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

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

II. Purpose of the Best Practices Report

The Working Group has prepared this document to outline legal principles and best practices for integrating the consideration of Tribal treaty⁸ and reserved rights into agency consultation processes. Although the efforts of the Working Group have been directed at Tribal treaty and reserved rights, the application of these best practices applies with equal force to Tribal rights recognized by other sources of law, including Executive orders, statutes, regulations, or case law.

This Report serves several functions. First, it provides information about the existing federal policy framework governing both Tribal consultation and federal decision-making on treaty and reserved rights. Second, it serves as a record of Tribal input on this topic, summarizing both written and oral comments received during two consultation sessions and a written comment period; the Report provides an initial federal response to Tribal comments and recommendations made during tribal consultation on the MOU. Third, to improve the protection of treaty and reserved rights, this Report urges agencies to undertake a thorough review of their consultation policies and practices, while considering the principles and best practices identified in this Report.

III. Overview of Key Concepts and Legal Framework

Treaties are legally binding formal agreements between two or more sovereign nations and are, along with the Constitution and federal laws, the supreme law of the United States.⁹ Through these treaties, Indian Tribes ceded land and natural resources to the United States, while retaining all rights not expressly granted. The United States Supreme Court has affirmed this principle of reserved rights, explaining that treaties are “not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.” *United States v. Winans*, 198 U.S. 371, 381 (1905).

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

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

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

⁹ An international organization may also be party to treaty.

federal law and the Tribe’s sovereign status; agencies should generally interpret silence in a Tribal treaty in accordance with the reserved-rights doctrine. Tribal treaties are to be interpreted as a grant of rights from Tribes, and a reservation of those rights not granted; thus, Tribes possess proprietary and use rights and sovereign control not conveyed away by the Tribal treaty or other federal law. After 1871, other legal mechanisms were utilized by the various branches of government to recognize Tribal rights, including, but not limited to, Executive orders, military decrees, federal legislation, and judicial decisions.

Through Tribal treaties and other means, several Tribes exchanged some of their sovereign powers and lands for other interests, as well as the federal government’s acknowledgement and assumption of a special duty of protection. *See, e.g., Worcester v. Georgia*, 31 U.S. 515, 552, 555 (1832). Many Tribal treaties include stipulations that the Tribe would be “under the protection of the United States,” or similar language. *See, e.g., Treaty with the Cherokee*, July 2, 1791, Art II, 7 Stat. 39; *Treaty with the Navaho*, Sept. 9, 1849, Art. I, 9 Stat. 974. The Supreme Court has repeatedly recognized the federal government’s duty of protection and a general trust relationship with Tribes. *See Board of Com’rs of Creek County v. Seber*, 318 U.S. 705, 715 (1943); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-74 (2011).

The Supreme Court has long applied “canons,” or rules of interpretation, for Indian treaties. These include: (1) treaty language must be construed as the Indians would have understood it at the time of treaty negotiation; (2) doubtful or ambiguous expressions in a treaty should generally be resolved in favor of the Tribes; and (3) treaty provisions should be interpreted in light of the surrounding circumstances and history. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). Furthermore, Congress must clearly express any intent to abrogate Indian treaty rights. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019). Agencies should be cognizant of these canons when making decisions that impact Tribal treaty, reserved rights, or other similar rights.

A. Executive Actions

The Executive Branch has expressly stated its policy of consulting with Tribal Nations on policies with Tribal implications via Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments*, as well as through numerous federal policies and guidance documents on consultation and the consultation process. Executive Order 13175 explicitly references the United States’ protection of Tribal Nations and the self-governance rights of Tribes inherent to Tribal sovereign powers.¹⁰ When formulating and implementing policies that have Tribal implications, the Executive Order directs federal agencies, to the extent permitted by law, to encourage Tribal Nations to develop their own policies to achieve agency program

¹⁰ Executive Order 13175, Sec. 2 Fundamental Principles (a) - “Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection;” and (b) – “Our Nation, under the law of the United States, in accordance with treaties, statutes, executive orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic, dependent nations, Indian Tribes exercise inherent sovereign powers over their members and territory.”

objectives;¹¹ to defer to Tribal standards where possible;¹² and, in determining whether to establish federal standards, to consult with Tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards or otherwise preserve the prerogatives and authority of Indian Tribes.¹³ When departments and agencies undertake regulatory rulemakings that have Tribal implications, they are directed to consult with Tribal governments to the extent practicable and permitted by law.¹⁴ On issues relating to Tribal self-government, resources held in trust by the federal government on behalf of Tribes, or Tribal treaty or reserved rights, federal departments and agencies are directed to “explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.”¹⁵

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

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

It is not uncommon for Indian Tribes to raise treaty rights concerns during the Section 106 review required by the National Historic Preservation Act for proposed federal undertakings (see 54 U.S.C. § 306108). Cultural resources, including those of religious and cultural significance to Indian Tribes, are considered in the Section 106 process if the property meets the eligibility criteria for listing in the National Register of Historic Places. There may be instances in which a historic property may also be protected or impacted by treaty or reserved rights. The federal agency should assess potential impacts to treaty and reserved rights prior to proceeding

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

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

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

¹⁴ *Id.* at Sec. 5 Consultation.

¹⁵ *Id.* at Sec. 5 Consultation (d).

with the Section 106 review for a proposed undertaking. Federal agencies should be prepared to explain to consulting parties how consideration of treaty or reserved rights may affect its decision-making.

B. United Nations Declaration on the Rights of Indigenous Peoples

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

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

“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”¹⁷

Although the U.S. voted against the UNDRIP when it was adopted in 2007, in 2010, it announced its support for the UNDRIP, noting that “[f]or the United States, the Declaration’s concept of self-determination is consistent with the United States’ existing recognition of, and relationship with, federally recognized Tribes as political entities that have inherent sovereign powers of self-governance.”¹⁸ The United States supports the Declaration, which – while not legally binding or a statement of current international law – has both moral and political force.

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

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

¹⁶ United Nations General Assembly, Declaration on the Rights of Indigenous Peoples, (October 2, 2007), available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf; see also United States Department of State, “U.S. Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples,” reprinted in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 262 *et seq* (Elizabeth R. Wilcox ed., 2010) (“U.S. Announcement of Support”), available at <https://2009-2017.state.gov/documents/organization/154782.pdf>.

¹⁷ UNDRIP at 25-26. Also of relevance is Article 19, which reads “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them.” The United States 2011 Statement of Support of UNDRIP “recognizes the significance of the Declaration’s provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”

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

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

IV. Consultation on Treaty and Reserved Rights MOU Implementation

The Treaty and Reserved Rights Work Group consulted with Tribal governments on the implementation of the Treaty and Reserved Rights Memorandum of Understanding, this Best Practices document, a Field Guide for Federal Staff, and a Flow Chart in September 2022. Two consultation sessions were held, and Tribal leader comments were invited before and during the consultations, including for a period of 30 days after the consultations.

V. Tribal Comments

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

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

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

Summary of Tribal Comments

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

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

¹⁹ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

VII. Key Principles and Recommendations from the Work Group

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

This Report serves as a first step toward identifying and recommending actions and best practices that federal agencies can implement to honor Tribal treaty, reserved, and other similar rights; to update and strengthen Tribal consultation policies to help protect those rights; and to improve the government-to-government relationship. The following principles and recommendations have been revised based on the Tribal feedback received during the consultation sessions and written comment period.

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

A. Fundamental Principles for Tribal Consultation Policies

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

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

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

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

²² U.S. Const. art. VI, cl. 2.

and predictable; accessible, reasonable, flexible, and fair; founded in the principles of good faith and respectful of the sovereignty of Indian Tribes; and includes reasonable accommodation (e.g., changing of timelines, project parameters), where appropriate.

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

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

B. Best Practices for Tribal Consultation Processes

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

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

²⁴ See Advisory Council on Historic Preservation, *CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: THE HANDBOOK*, p. 15/33 (2021), available at: <https://www.achp.gov/sites/default/files/2021-06/ConsultationwithIndianTribesHandbook6-11-21Final.pdf>. See also United States Department of the Air Force, Interactions With Federally Recognized Tribes, Instruction 90-2002, at p. 19, available at: <https://www.denix.osd.mil/na/policy/dod-instructions/af-instruction-90-2002/Tab%20USAF%20Instruction%2090-2002%20Interactions%20with%20Federally%20Recognized%20Tribes%2024%20Aug%202020%20FINAL.pdf>.

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

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

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

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

8. **Notifying Appropriate Tribal Participants:** Federal agencies should notify and invite all potentially affected Tribes to consult. For purpose of determining/identifying Tribes that may have Tribal treaty rights, reserved rights, or other similar rights implicated by a proposed agency action, invite Tribes with historical or cultural connections to the project area to consult regardless of the Tribe's current location. Note: Tribal traditional and historical lands may be located far from a Tribe's existing reservation. Off- reservation rights to hunt and fish may be located on lands that are not treaty-ceded land.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XV. Conclusion

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