

# Native American Caucus

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## **Comments on Tribal Trust Compliance and Federal Infrastructure Decision-making**

### **I. Executive Summary**

The unprecedented showing of support for the Standing Rock Sioux Tribe's struggle against the Dakota Access Pipeline has been in part due to the long history of infrastructure projects approved by the Federal government over the objections of Tribal Nations. These projects have brought great harms to Tribal lands, waters, treaty rights, and sacred places. Every single Tribal Nation has a story of Federally approved destruction.

The current situation highlights an all too common failure of Federal agencies to work with tribes to assess the impact of infrastructure development projects on the environment and on tribal cultural sites. It is obvious from the facts that have arisen on the ground and in newspaper headlines that the Dakota Access Pipeline is having a far greater social and cultural impacts than were ever considered. There can be no question that pushing ahead with the pipeline is not in the public interest and will likely result in increasingly violent conflict. We urge the Administration to deny the easement to cross Lake Oahe, and conduct a full environmental impact statement under the National Environmental Policy Act. We also urge the Administration to fully consider the Tribal impacts.

The movement at Standing Rock has, however, brought Indian Country an important opportunity to address the nation-to-nation relationship in the context of infrastructure decision-making. For any project affecting Tribal lands, waters, treaty rights, or sacred spaces, at the outset the United States must consider the following five principles: (1) recognition of Tribal sovereignty; (2) respect for treaty rights; (3) compliance with the Federal Trust Responsibility, including seeking Tribal informed consent; (4) upholding all statutory obligations; and (5) ensuring environmental justice.

We also recommend that the Federal government implement the following seven best practices: (1) regional mapping and Tribal impact evaluation; (2) consultation in early planning and coordination; (3) early, adequate notice and open information sharing; (4) funding for Tribal participation in processes; (5) training for agencies to improve understandings of Tribal Nations; (6) creation of Tribal impact statements and a Trust Responsibility Compliance Officer; and (7) evaluation of cumulative impacts and regional environmental impacts.

We recommend that the Administration issue guidance entitled Principles and Best Practices for Infrastructure permitting Relating to Indian Tribes and the Federal Trust Responsibility,

incorporating the twelve principles and best practices detailed in these comments. These comments also make agency-specific recommendations to assist in improving assessment of Tribal impacts and protection of Tribal rights in infrastructure decision-making processes.

## **II. The Problem of Federal Infrastructure Permitting: Harms to Tribal Lands, Waters, Treaty Rights, and Cultural Resources**

The United States has a long history of authorizing infrastructure development projects over the objections of Tribal Nations. This abdication of Federal trust and treaty obligations has had devastating effects on Tribal communities and cultures.

The Missouri Basin Pick-Sloan Plan, authorized by the Flood Control Act of 1944, built six dams that inundated over 356,000 acres of Tribal land in the 1950s and 60s in violation of several treaties and impacting seven Tribes with reservations along the Missouri River.<sup>1</sup> The Senate Committee on Indian Affairs has stated that “[t]he Missouri River’s wooded bottomlands provided the tribes’ reservation economics with fertile agricultural lands, timber for lumber and fuel, coal deposits, seasonal fruits, habitat for wild game, medicines, shelter for domestic animals, and plentiful supplies of clean water. These lands were also an important part of the tribes’ social, cultural, and spiritual lives.” S. Rep. No. 111–357 (Dec. 8, 2010).<sup>2</sup> The Three Affiliated Tribes of the Fort Berthold Reservation, for instance, had over 25 percent of their reservation’s land base flooded despite having offered an alternative reservation dam site that would have caused less damage.<sup>3</sup>

Vine Deloria, Jr., a citizen of the Standing Rock Sioux Tribe, described the Pick-Sloan Plan as “the single most destructive act ever perpetuated on any tribe by the United States.”<sup>4</sup> Among the many Tribal communities that were destroyed was the one flooded by the Oahe Dam, which created Lake Oahe. The Standing Rock Sioux Tribe, joined by many others, are now fighting yet again to keep the Army Corps from violating the Tribe’s rights by allowing the Dakota Access Pipeline to cross under Lake Oahe, which would disturb sacred sites and pose a grave threat to the Tribe’s natural resources.

Numerous other dam projects have been devastating to Tribal Nations across the country. The Army Corps’ Kinzuna Dam in New York displaced 600 Seneca families from 10,000 acres of their ancestral lands in 1964.<sup>5</sup> The dam demolished nearly one-third of the Tribe’s territory, including much of its fertile farmland. Four dams on the Columbia River in Washington State were constructed between the 1930s and 1970s, destroying communities, forcing relocation, and resulting

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<sup>1</sup> Peter Capossela, *Impacts of the Army Corps of Engineers’ Pick-Sloan Program on the Indian Tribes of the Missouri River Basin*, 30 J. Envtl. L. & Litig. 143, 145, (2015)

<sup>2</sup> Quoted in *id.* at 156–57.

<sup>3</sup> See NDSTUDIES.ORG, “Garrison Dam,”

[http://www.ndstudies.org/resources/IndianStudies/threeaffiliated/historical\\_1900s\\_garrison.html](http://www.ndstudies.org/resources/IndianStudies/threeaffiliated/historical_1900s_garrison.html) (last accessed Nov. 24, 2016).

<sup>4</sup> *Id.* at 157–68

<sup>5</sup> Seneca Nation Release, *Seneca Nation Starts 50th Anniversary of Kinzua Dam Removal Today*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 10, 2014).

in devastating economic impacts that continue to affect citizens of the Nez Perce, Umatilla, Warm Springs, and Yakama Tribes.<sup>6</sup>

Permitting infrastructure projects over the objections of Tribes and to their detriment is not, however, merely a phenomenon of an earlier era of development in the United States. In 2011, the Omaha Tribe of Nebraska was flooded when the Army Corps released record amounts of water from a dam, ruining homes, damaging businesses including the Tribal casino, and costing the Tribe \$12 million in rebuilding costs.<sup>7</sup> The Three Affiliated Tribes are currently in litigation attempting to stop Paradigm Energy Partners LLC from constructing pipelines under Lake Sakakawea (which was created by construction of the Garrison Dam in 1956).<sup>8</sup> Paradigm obtained rights-of-way from the Army Corps and the Bureau of Indian Affairs but was denied permission to drill under Lake Sakakawea by the Tribe. Nor are such problems limited to dams and pipelines. For instance, the Gila River Indian Community is presently fighting to stop the Federal Highway Administration and Arizona Department of Transportation from moving forward with a highway expansion that will desecrate the Tribe's sacred sites on South Mountain.<sup>9</sup>

In the late 1800s a growing nation looked to the Northwest to supply the lumber needed to build new cities. This brought rapid change to the Olympic Peninsula and especially to the Elwha River and the people of the Lower Elwha Klallam tribe. In the early 1900s, two dams, Elwha and Glines Canyon, were built on the river. The dams fueled regional growth, but blocked the migration of salmon upstream, disrupted the flow of sediment and wood downstream, and flooded the historic homelands, beaches and cultural sites of the Lower Elwha Klallam Tribe.

The Lower Elwha Tribe in Washington State worked for years to secure research funds to remove the Elwha Dams in the 1980's and finally in 1992, Congress passed the Elwha River Ecosystem and Fisheries Restoration Act, authorizing dam removal to restore the altered ecosystem. After two decades of planning, the largest **dam** removal in U.S. **history** began on September 17, 2011. Six months later **Elwha Dam** was gone, followed by the Glines Canyon **Dam** in 2014 at a cost of over \$350 million. This is the how much the mistakes of the federal permitting is costing the United States and does the include the 'cost' to the tribe.

The list of recent and current struggles over Federal permitting of infrastructure projects over Tribal objections is too long to catalogue here. Tribal Nations throughout the country continue to struggle to protect their lands, resources, sacred sites, and cultures in Federal permitting processes that too frequently authorize projects despite their threat to Tribes.

### **III. Tribal Trust Responsibility Compliance For All Federal Agencies**

#### **A. Federal Infrastructure Development and Tribal Nations**

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<sup>6</sup> See, e.g., Gosia Wozniacka, *Columbia River Tribes Displaced by Dams Live in Squalor, Seek Help*, SEATTLE TIMES (Nov. 9, 2014).

<sup>7</sup> See Kirby Kaufman, *Omaha Tribe Receives 15 Percent Boost in Federal Aid for 2011 Flood*, SIOUX CITY JOURNAL (Apr. 21, 2016).

<sup>8</sup> See *Paradigm Energy Partners, LLC v. Fox*, Case No. 1:16-cv-00304 (D.N.D., filed Aug. 19, 2016).

<sup>9</sup> See *Gila River Indian Community et al. v. Federal Highway Administration*, Case No. 16-16605 (Ninth Circuit, appealed Sep. 9, 2016).

Since 2009, the Obama Administration has taken actions to expedite Federal review of infrastructure projects as part of a larger effort to strengthen the economy and create new jobs. Tribal Nations, like other non-Federal governmental entities in the United States, rely on the country's infrastructure and have an interest in infrastructure development projects that: (1) are undertaken in a manner that is respectful to their unique considerations, and (2) allow Tribal citizens to share in the benefits of infrastructure development. Tribal Nations play a key role in infrastructure development because they, like state and local governments, are the permitting officials for projects within their jurisdiction. Further, Tribes have interests and rights that must be considered when the Federal government permits projects that impact Tribal rights, whether on or off the reservation.

In December 2015, the President signed into law the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94 (Dec. 4, 2015). Title XLI, entitled "Federal Permitting Improvement," establishes a Federal Permitting Improvement Steering Council (FPISC) that, in conjunction with the Office of Management and Budget (OMB), has a great deal of authority to direct all Federal agencies to improve permitting processes. Section 41002(c) of the FAST Act requires that, by December 5, 2016, the FPISC make recommendations to its Executive Director regarding certain best practices, including improving coordination between Federal and non-Federal governmental entities; creating and distributing training materials useful to Federal, State, Tribal, and local permitting officials; and addressing other impacts of infrastructure permitting, as determined by the FPISC. The Executive Director, in turn, is authorized to recommend that the OMB issue guidance to effectuate these best practices.

NATIVE AMERICAN CAUCUS strongly urges FPISC and OMB to work together to issue guidance entitled Principles and Best Practices for Infrastructure permitting Relating to Indian Tribes and the Federal Trust Responsibility. This guidance is necessary to fulfill obligations under the FAST Act as well as to guide industry and non-Tribal governments as they undertake infrastructure development projects with Tribal impacts. We recommend that the guidance incorporate the principles and best practices outlined in this comment. These principles and best practices are consistent with NCAI Resolution PXH-16-067, which recommended that:

- (1) all agencies involved in permitting infrastructure projects affecting Tribal lands, waters, or sacred places demonstrate compliance with Federal trust obligations, treaties, and consultation requirements;
- (2) Tribal trust compliance be integrated in all regulations and guidance for infrastructure permitting, including the FAST Act by designating a Tribal Trust Compliance Officer;
- (3) Federal policy support greater Tribal control over infrastructure on Tribal lands; and
- (4) Tribes be afforded full and early participation in the Federal permitting process, including at the "purpose and need" stage, like states and local governments.

The FAST Act's requirement for additional guidance regarding best practices builds on the Administration's efforts over recent years to improve and facilitate the infrastructure permitting process, which expressly includes Tribes.

In March 2012 President Obama issued Executive Order 13604 ("Improving Performance of Federal Permitting and Review of Infrastructure Projects"), which ordered that "Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities.... They must rely upon early and active

consultation with State, local, and tribal governments to avoid conflicts (and) resolve concerns....” (Emphasis added.) The management plan responding to this Executive Order was released in June, which provides: “Multiple tribal, State, and local governments may also have key decision-making responsibilities for a given infrastructure project—particularly for long, linear projects like roads, pipelines, and transmission lines. These tribal, State, and local permitting and review processes can also create delays and impact Federal decision-making timelines. It is imperative that Federal agencies coordinate early and continuously with other governmental jurisdictions in order to work efficiently and minimize duplication and delays.” (Emphasis added.)

Furthering the focus on modernizing infrastructure permitting, the Administration released its plan in May 2014 to accelerate and expand permitting reform government-wide. The plan states: “Time invested early to identify a project site that avoids ecologically or culturally sensitive areas can lead to a more efficient process and shorter overall project timeframes, and can even avoid the need for Federal reviews, approvals, or licenses pertaining to those resources. Similarly, project planning and the submitted proposal should reflect the results of early consultations with relevant stakeholders, Federal, Tribal, state, and local representatives, to ensure the proposed project accounts for these perspectives up front.” (Emphasis added). Additionally, the plan provides that “[t]he NEPA Federal Lead agency will develop, in consultation with the project applicant and all relevant Tribal, state, and local governments, a Coordinated Project Plan for each major infrastructure project.” (Emphasis added.)

Still further, in September 2015, the Directors of OMB and the Council on Environmental Quality published Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects, requiring agencies to track information for infrastructure projects across their portfolios and to report a common set of timeframe metrics for all infrastructure projects seeking Federal action. Appendix A to the guidance indicates that “Tribal Trust Responsibilities Compliance” is required for all agencies for inclusion in a project schedule. However, no other guidance has been provided on how to comply with this requirement.

Accordingly, the Administration has been invested in improving infrastructure permitting and planning, while also creating a policy structure that should provide for meaningful and effective means for Tribal consultation and incorporation of Tribal authority in the procedural aspects of those infrastructure projects. *In practice, however, Tribal consultation often does not occur or comes too late to influence decision-making.* The ease with which Tribal priorities are ignored or dismissed is alarming, as even the Department of Interior’s concerns over Tribal water supplies and cultural resources are often ignored by other agencies. For example, the Army Corps permitted the Dakota Access Pipeline without conducting an Environmental Impact Statement (EIS) despite DOI’s objections and its request that the Army Corps conduct an EIS and fully evaluate potential Tribal impacts.<sup>10</sup> Too often, if Tribes are included at all in permitting review processes, they are merely included in principle but not in practice. Further guidance, oversight, commitment, and enforcement is required to meet the requirements of both these documents and the duties inherent in the federal trust responsibility.

## **Substantive Duties Embodied in the Federal Trust Responsibility**

### **1. Recognition of Tribal Sovereignty**

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<sup>10</sup> See Letter from Department of Interior to Army Corps of Engineers (Mar. 29, 2016).

Tribal Nations are sovereign governments pre-dating the United States and retaining the right to govern their own peoples and lands. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1] (2012) (discussing the independent origin of Indian Tribal sovereignty, which forms the foundation of the exercise of modern powers of Tribal governments). As Chief Justice John Marshall recognized in *Worcester v. Georgia*, “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.” 31 U.S. 515, 559 (1832). Additionally, the United States Constitution recognizes the status of Tribal Nations as sovereign governments. US Const., art. I, § 8, cl. 3. Tribal Nations’ inherent sovereignty empowers them to govern their own citizens and territories, and Tribes retain their lands and sovereign powers unless explicitly ceded through treaties or abrogated by statute. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-203 (1999).

Tribes, therefore, are not merely another “stakeholder” or “special interest” in infrastructure permitting processes. Rather, Tribal Nations exercise jurisdiction over their retained lands and resources, both on and off the reservation. Federal permitting agencies nonetheless tend to treat Tribal Nations as members of the public, entitled to only limited information and the ability to submit comments rather than incorporating them into decision-making processes as non-Federal governmental entities. This is inappropriate and contrary to long-recognized Tribal sovereign rights. Additional policy guidance should emphasize the United States’ substantive legal responsibilities to Tribal Nations and the process of meaningful and effective consultation as a required activity to ensure consideration and accommodation of these substantive rights.

## 2. Adherence to and Protection of Tribal Treaty Rights

Federal law and relevant cases illustrate that Federal agencies: (1) must consider impacts to treaty rights in Federal decision making, and (2) have the authority to protect, and an obligation not to abrogate, treaty rights when exercising discretion in their permitting decisions. These two tenets must be integrated into and analyzed during the Federal review and approval process for projects when Tribes raise concerns or objections based on impacts to or interference with their treaty rights.

As a matter of Federal law, Indian treaties, like all treaties, are the “supreme law of the land” and have the same legal force and effect as Federal statutes. *Worcester*, 31 U.S. 515; *Skokomish Indian Tribe v. U.S.*, 410 F.3d 506, 512 (9th Cir. 2005) (en banc). Through treaties with the United States, Tribes ceded vast amounts of land in exchange for certain benefits and the reservation of rights and privileges. See, e.g., *United States v. Winans*, 198 U.S. 371, 380-81 (1901) (noting among other things that treaties are not a grant of rights to the Indian, but from them).

Federal responsibilities under treaties are significant, as explained by the Supreme Court, “[i]n carrying out its treaty obligations with the Indian Tribes the Government is something more than a mere contracting party . . . it has charged itself with moral obligations of the highest responsibility and trust.” *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). Further, treaties may not be disregarded for convenience or by implication; treaties can only be abrogated by Congress when it shows an express intent to do so. See, e.g., *United States v. Dion*, 476 U.S. 734, 738 (1986) (“We have required that Congress’ intention to abrogate Indian treaty rights be clear and plain.”).<sup>11</sup> Federal agencies, therefore, have no authority to take unilateral action that would abrogate

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<sup>11</sup> See also, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (refusing to imply that a Federal statute terminated a Tribe’s hunting and fishing rights); *United States v. Santa Fe Pac.*, R.R., 314 U.S. 339, 346 (1941) (congressional intent to abrogate Tribal property rights must be “plain and unambiguous”).

treaty rights.<sup>12</sup> Accordingly, treaties have been construed by Federal courts to reserve and protect a number of rights, both on and off reservation, such as water rights to support on-reservation activities;<sup>13</sup> off-reservation hunting and fishing rights;<sup>14</sup> and off-reservation rights to travel on public highways.<sup>15</sup>

Given the breadth of Federal projects occurring outside of Indian reservations or trust lands, but on historic tribal lands, it cannot be emphasized enough that Federal agencies must understand and recognize that treaty rights frequently extend off-reservation and it is unnecessary that “the Tribes have title to the land.” *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341, 352 (7th Cir. 1983). Such off-reservation treaty rights can include commercial uses, and their exercise is not limited to methods used at the time these rights were reserved.<sup>16</sup>

Despite the legal foundation on which treaty rights are based, Federal agencies regularly fail to recognize—or worse, they ignore—treaty rights when approving and permitting infrastructure projects, and courts then step in to protect these rights. *See, e.g., Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988) (proposed marina enjoined because it would destroy Tribe’s treaty fishing rights).<sup>17</sup> In *Muckleshoot Indian Tribe*, for example, a Federal district court had to enjoin the Army Corps of Engineers from permitting a marina project because the marina was to be built *on* a part of the Tribe’s treaty fishing area. *Id.* at 1517. The Army Corps took the position that the Tribe could go collect “their share of fish elsewhere,” but the court found this view would result in an unauthorized taking without compensation. *Id.* at 1515.<sup>18</sup>

Similarly, in *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981), plaintiffs, including three Tribes, sought to block construction of an oil pipeline that would originate in Port Angeles, Washington and end in Clearbrook, Minnesota. Among all of the issues presented for summary judgment, the Federal district court found the “most troublesome of all” was the potential interference with the off-reservation treaty fishing rights of the Tribes. *Id.* at 371. The Tribes

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<sup>12</sup> *See, e.g., Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553, 556 (D. Or. 1977) (declaring that the Army Corps of Engineers had no authority to construct a dam when it “would take treaty rights without proper authorization”). To the contrary, Federal agencies have a duty to consider and protect treaty rights when making discretionary decisions. *E.g., Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996).

<sup>13</sup> *E.g., U.S. v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1983)

<sup>14</sup> *e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *see also Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253 (8th Cir. 1995).

<sup>15</sup> *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) (treaty right to travel not subject to state licensing and fees); *U.S. v. Smiskin*, 487 F.3d 1260 (treaty right to travel precluded prosecution under Contraband Cigarette Trafficking Act, 18 U.S.C. § 2342).

<sup>16</sup> *E.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 678-79 (1979); *Grand Traverse Band of Ottawa & Chippewa Indians v. Michigan*, 141 F.3d 635, 637 (6th Cir. 1998). *See also, Grand Traverse Band of Ottawa & Chippewa Indians v. Dir. Mich. Dep’t of Natural Resources*, 141 F.3d 635, 639 (6th Cir. 1998) (“[T]reaties did not in any way, limit the means by which fish were to be taken from the lakes or restrict the treaty fishers to using technology that was in existence at the time of the treaty.”); *United States v. Michigan*, 471 F. Supp. 192, 260 (W.D. Mich. 1979) (“The right may be exercised utilizing improvement in fishing techniques, methods and gear.”).

<sup>17</sup> *See also Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 493 (7th Cir. 1993) (explaining that many people “in the United States either do not understand or do not accept the privileges that the Indian treaties grant Indians”).

<sup>18</sup> Indeed, treaty rights are property rights protected by the Fifth Amendment of the U.S. Constitution, a taking of which requires just compensation. *See, e.g., U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

alleged that the pipeline could rupture or leak as it crosses the Puget Sound affecting salmon habitat and prior rulings established that the Tribes fishing right imposed a duty on the United States to “refrain from degrading the fish habitat to an extent that could deprive the Tribes of their moderate living needs.” *Id.* at 372.<sup>19</sup>

Additionally, in *Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996), the Federal district court found the Army Corps of Engineers had a duty to consider treaty rights, even when these considerations were not in the governing regulations, because it is the “fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration.” *Id.* at 1520. The court in *Northwest Sea Farms* further found that the Army Corps simply had no authority, without Congressional authorization, to make permitting decisions that “would conflict with the Lummi Nation’s fishing rights at one of its usual and accustomed fishing places under the Treaty of Point Elliott.” *Id.*

Adherence to treaties is not a novel proposal. Indeed, the Environmental Protection Agency (EPA) recently issued an interagency Memorandum of Understanding (MOU) expressly affirming that:

the Federal government has an obligation to honor and respect Tribal rights and resources that are protected by treaties. This means that Federal agencies are bound to give effect to treaty language and, accordingly, must ensure that Federal agency actions do not conflict with Tribal treaty rights. Integrating consideration of Tribal treaty rights into agency decision-making processes is also consistent with the Federal government’s trust responsibility to Federally recognized Tribes.<sup>20</sup>

Unfortunately, it is not clear which Federal agencies have signed on to the MOU and, although the MOU is a positive advancement, making recognition of the underlying principles voluntary falls short of ensuring treaty rights are given proper consideration in agency decision-making. To ensure that treaty rights are adequately considered and protected, these principles must be recognized, implemented, and followed by all Federal agencies.

Moreover, Tribes must be included in any evaluation or analysis relating to their treaty rights. Where more than one Federal agency is involved, those agencies must also be required to work together with Tribes and perform a cumulative impact analysis that considers all Federal approvals involved in a project. And lastly, where Federal approval of a project would result in express or implicit abrogation of a treaty right, Federal policy should be clear that the law dictates that the project must be denied unless there are viable alternatives that protect the treaty right.

### **3. Tribal Consent and Compliance with the Federal Trust Responsibility**

In addition to recognizing Tribal sovereignty and upholding Tribes’ treaty rights, Federal agencies have a duty to fully respect and abide by the Federal trust responsibility to Tribes and Indian people. Critical to this responsibility is acting in Tribes’ best interests, as determined by the Tribes themselves. Obtaining Tribal consent for federal actions that affect them is the clearest way to uphold the trust responsibility.

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<sup>19</sup> See also, *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980).

<sup>20</sup> Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights (Sept. 2016), found at <https://www.epa.gov/Tribal/memorandum-understanding-regarding-interagency-coordination-and-collaboration-protection> (last visited Nov. 18, 2016).

### a. The Federal Trust Responsibility

The Federal trust responsibility to Indian Tribes has its roots in land cessions made by Tribes and in the promises made by the United States to protect the rights of the Tribes to govern themselves on their reserved lands. The principles of the trust responsibility were expounded in early Supreme Court decisions and remain foundational today. As Justice Marshall recognized in *Worcester v. Georgia*, the treaty with the Cherokee “explicitly recognize[ed] the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection; and of course pledging the faith of the United States for that protection.” 31 U.S. at 556.

Subsequent case law has confirmed that the trust doctrine includes fiduciary obligations for the management of trust lands and natural resources, including the duties to act with good faith and loyalty. The United States, acting through the Secretary of Interior, “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.” *Seminole Nation*, 316 U.S. at 297; *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Cl. Ct. 1966).

Numerous lower court cases following *Seminole Nation* have similarly applied exacting fiduciary standards when reviewing actions of the Federal Executive in its administration of Indian trust lands and natural resources. See, e.g., *Coast Indian Community v. United States*, 550 F.2d 639, 652, 653 n.43 (Cl. Ct. 1977) (holding that the United States, when acting as trustee for Indian property, “is held to the most exacting fiduciary standards” and looking to A. Scott, *Trusts* (3d Ed. 1967) to define applicable standards for leasing Indian lands).

The courts have also consistently rejected arguments that the government’s conduct in its administration of the trust can be tested simply by a standard of reasonableness, and they have instead required that the government meet the higher standards applicable to private trustees. In *Navajo Tribe of Indians v. United States*, for example, the Court of Claims rejected the Government’s argument that no fiduciary obligation exists unless there is an express provision of a treaty, agreement, executive order or statute creating such a trust relationship. 624 F.2d at 991. In *Duncan v. United States*, the court rejected an argument that Congress must spell out specifically all trust duties of the Government as trustee, finding that the creation of the trust sufficient to establish trust obligations. 667 F.2d 36, 42-43, 45 (Cl. Ct. 1981).<sup>21</sup>

Additionally, in *Pyramid Lake Paiute Tribe of Indians v. Morton*, regarding a water infrastructure project in Nevada, the Court found that the Federal trust responsibility created an obligation to protect the waters of Pyramid Lake for the Paiute Tribe. 354 F. Supp. 252, 256 (D.D.C. 1973). In

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<sup>21</sup> See also *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857-59 (10th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 970 (1986) (adopting the dissenting opinion at 728 F.2d 1555, 1563 (10th Cir. 1984) (holding Secretary’s duties in mineral lease administration are *not* limited to complying with administrative law and regulations, but are subject to “the more stringent standards demanded of a fiduciary”); *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 794 (9th Cir. 1986) (“Courts judging the actions of Federal officials taken pursuant to their trust relationship with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries”) (citing; *Seminole*) (other citations omitted); *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997) (relying on G.G. and G.T. Bogert, *The Law of Trusts and Trustees*, for standard defining the Government’s duty to provide adequate notice to Indian trust beneficiaries); *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 586 (9th Cir. 1990) (“[t]he same trust principles that govern private fiduciaries determine the scope of FERC’s obligations to the [Indian] Community”) (citation omitted).

finding that the Interior Department had not fulfilled its trust obligation the court stated: “The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. (...) Possible difficulties ahead could not simply be blunted by a ‘judgment call’ calculated to placate temporarily conflicting claims to precious water. The Secretary’s action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe. This also is an abuse of discretion and not in accordance with law.” *Id.*

In *Northern Cheyenne Tribe v. Hodel*, the district court rejected the Bureau of Land Management’s proposal to lease Federal lands for coal development just outside the Northern Cheyenne reservation because coal mining would have adverse environmental, social, and economic effects on the Tribe. The court stated: “[A] Federal agency’s trust obligation to a Tribe extends to actions it takes off a reservation which uniquely impact Tribal members or property on a reservation.”<sup>22</sup>

The vast body of case law which recognizes this trustee obligation is complemented by the detailed statutory scheme for protection of Indian affairs set forth in Title 25 of the United States Code. In fact, “[n]early every piece of modern legislation dealing with Indian Tribes contains a statement reaffirming the trust relationship between Tribes and the Federal government.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (2012).

Additionally, for the past five decades, every Presidential Administration has adhered to an Indian policy supporting Tribal self-determination.<sup>23</sup> This policy was elaborated by President Richard Nixon in his landmark Message to Congress on Indian Affairs as follows:

The special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. (\* \* \* \*) The special relationship between the Indian Tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.<sup>24</sup>

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<sup>22</sup> See, Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and resources through Claims of Injunctive Relief against Federal Agencies*, 39 Tulsa L. Rev. 355 (2003); Report of the American Indian Policy Review Commission; Chapter 4, Trust Responsibility; Reid Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stanford L.R. 1218 (1975).

<sup>23</sup> *E.g.*, Memorandum for the Heads of Executive Departments and Agencies, “Tribal Consultation,” 74 Fed. Reg. 57,881 November 5, 2009 (President Obama), <http://whitehouse.gov/the-press-office/memorandum-Tribalconsultation-signed-president>; Presidential Proclamation 7500, 66 Fed Reg. 57,641 (Nov. 12 2001) (President George W. Bush); Executive Order 13,175, November 6, 2000, “Consultation and Coordination with Indian Tribal Governments,” 65 Fed Reg. 67,249 *et seq.* (2000) (President Clinton); Statement by President George H.W. Bush “Reaffirming the Government-to-Government Relationship between the Federal Government and Tribal Governments,” June 14, 1991 PUB. PAPERS 662 (June 14, 1991); Statement of President Ronald W. Regan on American Indian Policy, January 24, 1983, PUB. PAPERS 96 (Jan. 24, 1983); President Lyndon B. Johnson, Special Message to Congress on the Problems of the American Indian: “The Forgotten American”, 113 PUB. PAPERS 335 (March 6, 1968).

<sup>24</sup> 213 PUB. PAPERS 564 (July 8, 1970) H.R. REP. NO. 91-361, 91st CONG., 2d Sess. (1970); reprinted at 116 CONG. REC. 23,258 *et seq.* (1970).

The Federal trust responsibility—as recognized by the courts, Congress, and the Executive—runs across all branches of government, and each agency is responsible for upholding the United States’ unique obligations to Tribal Nations.

### **b. Tribal Informed Consent**

By their very nature, Federal agencies involved in permitting infrastructure development projects have divided loyalties, balance competing interests, and are not solely dedicated to fulfilling the United States’ trust responsibility to Tribal Nations. Therefore, when agencies are considering projects that may have a significant negative impact on Tribal trust resources, they should seek to uphold the Federal trust responsibility by obtaining the informed consent of the potentially impacted Tribal Nations.

Common law trust principles apply to the United States’ fiduciary responsibilities regarding Tribal Nations. While courts have found that specific, trust-creating statutory language is required to sue the United States for money damages, the United States remains bound by common law trust principles, as the Supreme Court continues to recognize “the undisputed existence of a general trust relationship.” *See, e.g., United States v. Mitchell*, 436 U.S. 206, 224–25 (1983). For example, Tribes have been successful in seeking injunctive relief to hold the United States to these duties. *See, e.g., Pyramid Lake Paiute Tribe*, 354 F.Supp. at 256; *Klamath Tribes v. United States*, 1996 WL 924509 (Oct. 2, 1996) (granting preliminary injunction for proceeding with logging without ensuring protection of trust resources in consultation with Tribe).<sup>25</sup>

The foundation of any trustee/beneficiary relationship is the duty of loyalty. Trustees have “a duty to administer the trust solely in the interest of the beneficiaries.”<sup>26</sup> This “fundamental principle of undivided loyalty” is “for trustees, particularly strict even by comparison to the standards of other fiduciary relationships.”<sup>27</sup> From this duty of loyalty flows the prohibition against self-dealing. “[E]xcept in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict of interest....”<sup>28</sup> Thus, “a trustee must refrain ... from transactions in which it is reasonably foreseeable that the trustee’s future fiduciary conduct might be influenced by considerations other than the best interests of the beneficiaries.”<sup>29</sup> The rule of undivided loyalty is so strict that “it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee.”<sup>30</sup> A trustee, therefore, has a duty “not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust” and may not act “for the purpose of advancing an objective other than the purposes of the trust.”<sup>31</sup>

An exception to the rule of undivided loyalty and its prohibition against self-dealing is beneficiary consent.<sup>32</sup> Consent provided by the beneficiary must be informed consent. To consent,

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<sup>25</sup> See, Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and resources through Claims of Injunctive Relief against Federal Agencies*, 39 Tulsa L. Rev. 355 (2003)

<sup>26</sup> Restatement (Third) of Trusts § 78(1).

<sup>27</sup> *Id.* § 78 cmt. a.

<sup>28</sup> *Id.* § 78(2).

<sup>29</sup> *Id.* §78 cmt. b.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* § 78 cmt. f.

<sup>32</sup> *Id.* § 78 cmt. c.

a beneficiary: (1) must have “the capacity to do so”; (2) must be “aware of the beneficiaries’ rights and of all material facts and implications that the trustee knew or should have known relating to the matter”; (3) and must not be induced to consent by the trustee’s “improper conduct.”<sup>33</sup> Therefore, a Federal agency that has obtained Tribal consent for a federal action affecting Tribes has the clearest indication that it has properly carried out its trust duties.

Obtaining Tribal informed consent is also consistent with the United States’ international obligations regarding indigenous peoples. In 2010, the United States endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>34</sup> Article 19 of UNDRIP requires good faith consultation in order to obtain indigenous peoples’ free, prior, and informed consent before adopting measures that may affect them, and article 32(2) more specifically provides that “[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”<sup>35</sup> Indigenous peoples also have the right “to the conservation and protection of the environment and the productive capacity of their lands or territories and resources,” *id.* at art. 29, and “to determine and develop priorities and strategies for the development or use of their lands or territories and other resources,” *id.* at art. 32.

UNDRIP articulates human rights principles of universal application in the indigenous context.<sup>36</sup> Although UNDRIP itself is not formally binding, it reflects recognized norms of international law as well as principles derived from legally binding treaties and customary international law. The right to free, prior, and informed consent, as enshrined in UNDRIP, is derived from rights articulated in treaties to which the United States is a party, such as rights to self-determination for all people (art. 1) and culture (art. 27) in the International Covenant on Civil and Political Rights (ICCPR) and rights to culture, property, and political participation under conditions of equality (arts. 2, 5) in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>37</sup> These international rights and responsibilities are instructive in interpreting the United States’ obligations to Tribal Nations under domestic law.

#### 4. Upholding Statutory Obligations to Tribes

In carrying out its obligations and responsibilities to substantively and effectively include Tribes in infrastructure permitting and development, the federal government must also adhere to its duties under various environmental, historic, and cultural protection statutes. These statutes stand as a congressional declaration of the United States’ responsibilities not only to the environment and other resources, but to Tribal governments as well. In concert with the trust, treaty, and consent provisions outlined above, the federal government may look to statutes to guide its actions with respect to Tribes.

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<sup>33</sup> *Id.* § 97(a)–(c).

<sup>34</sup> <http://www.state.gov/documents/organization/153223.pdf>

<sup>35</sup> G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007).

<sup>36</sup> S. James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 *U. Haw. L. Rev.* 983, 997 (2013).

<sup>37</sup> *See, e.g.*, Commission on Human Rights, *Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, E/CN.4/Sub.2/AC.4/2005/WP.1.

Statutory obligations include those in the National Historic Preservation Act (NHPA); National Environmental Policy Act (NEPA); Clean Air Act (CAA), Clean Water Act (CWA); Rivers and Harbors Act (RHA); Mineral Leasing Act (MLA); Native American Graves Protection and Repatriation Act (NAGPRA); American Indian Religious Freedom Act (AIRFA); and Archaeological Resources Protection Act (ARPA); and other federal laws. We discuss the NHPA, NEPA, and the CWA below in summary.

### **a. National Environmental Policy Act**

The National Environmental Policy Act is the primary Federal law to insure that environmental information is available to public officials before decisions are made on Federal agency actions that affect the environment. The statutory mandate of NEPA provides that, before an agency takes a major Federal action “significantly affecting the quality of the human environment,” it must prepare an environmental impact statement (EIS). 42 U.S.C. § 4332. NEPA is implemented through binding regulations promulgated by the Council on Environmental Quality (CEQ), for which each Federal agency must adopt implementing procedures. 40 C.F.R. parts 1500–1508.

CEQ regulations establish a screening process for determining whether the impacts of a proposed federal action would be significant and thus whether an EIS is required. An agency may choose to prepare a less detailed environmental review document known as an environmental assessment (EA). If, based on the EA, the responsible Federal official determines impacts will not be significant, the agency issues a finding of no significant impact (FONSI), and an EIS is not required. Alternatively, if the Federal official determines impacts will or may be significant, then an EIS is required.

CEQ regulations also allow agencies to establish “categorical exclusions” from review under the NEPA process. For proposed actions that fit within a categorical exclusion an EA is not required unless the agency determines “extraordinary circumstances” apply. *See, e.g.*, 43 C.F.R. §§ 46.205, 46.210 (containing Department of Interior NEPA implementing procedures). NEPA is often described as a “stop, look, and listen” law. It requires Federal agencies engage in informed decision-making, but it does not mandate that they select the most environmentally preferable decision. Since its enactment in 1970, Federal agencies have gained extensive experience in conducting the analyses required for NEPA compliance.

The NEPA process presents a range of challenging issues for Tribal governments. Most Tribes have limited staff and resources and simply may not be able to actively participate for all of the proposed Federal actions that may affect their reservation environments or important off-reservation resources. For example, Tribes can participate as “cooperating agencies” for the preparation of an EIS, which typically takes a substantial commitment. Although this option offers opportunities to shape alternatives under consideration and ensure information relating to the Tribe’s interests is included in the EIS and supporting documentation, as a practical matter it will likely leave the Tribe with limited ability to engage in NEPA review for other Federal actions.

NEPA processes can trigger further requirements to comply with complementary Federal law, like NHPA, described below. 40 C.F.R. § 1502.25. CEQ and the Advisory Council on Historic Preservation (ACHP) have jointly published a guidance document, NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106 (March 2013). Federal agencies would

improve the integration of Tribal concerns regarding sacred spaces into the NEPA process if they were to follow that guidance. In sum, agencies should work to establish relationships with Tribal governments regarding their planned activities that are subject to NEPA review in order to help Tribes decide how to allocate limited resources.

### **b. National Historic Preservation Act**

The National Historic Preservation Act<sup>38</sup> is the main federal statute establishing policies and authorizing programs to support the preservation of places that are significant in American history. Many places that Tribes regard as sacred are also of historic significance. The NHPA references three different types of Tribal sites or resources that require Tribal consultation and coordination, and either consideration and mitigation of any adverse impacts or full protection of these resources. These are Tribal sacred places, Tribal historic properties (which includes applicable Tribal sites), and Tribal Cultural Resources.

NHPA section 106 establishes a review process for all Federal and Federally assisted actions, requiring agencies to consider the effect of licensing any undertaking and opening the review process to comment by the Advisory Council on Historic Preservation. 54 U.S.C. § 306108. The ACHP is responsible for implementing regulations. 36 C.F.R. part 800.<sup>39</sup> The section 106 process typically applies to large-scale infrastructure projects that require some kind of Federal action and/or Federal funding.

Tribes often turn to the section 106 process to seek protection for off-reservation sacred sites. For this reason, the NHPA and the section 106 process are vital procedures for Tribal cultural preservation and the protection of sacred, cultural, and traditional sites and resources. All too often, however, the section 106 process is short-circuited by summary conclusions that Tribal sites, properties, and resources are unaffected.

In cases where Federal agencies do not fulfill their responsibilities, the existing regulations provide some options for using the authority of the ACHP to enhance the influence of Tribes in decision-making. The section 106 process does *not* give the ACHP power to block proposed projects for which it believes that the adverse effects to historic properties are unacceptable, but it *does* have the power to make sure that such adverse effects are adequately considered and to require that a decision to proceed with a project in spite of unacceptable adverse effects must be made by the head of the agency.

The process could be more effective in avoiding initial adverse impacts to Tribal sacred places if Federal agencies were to faithfully fulfill their responsibilities under the existing statutory language and implementing regulations.

Accordingly, the section 106 process for the different types of Tribal sites, resources, and properties is a critical one. Infrastructure projects must faithfully hew to the requirements of this

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<sup>38</sup> The NHPA was originally enacted in 1966, Pub. L. No. 89-665, and has been amended many times. Formerly codified at 16 U.S.C. § 470 *et seq.*, Pub. L. No. 113-287 (Dec. 19, 2014) changed the U.S. Code designation of the NHPA from title 16 to a new title 54. 54 U.S.C §§ 300101-307107. In this memo, references to numbered sections of the NHPA refer to designations in the public law as amended prior to the 2014 revision of the codification, which made extensive changes in the organizational structure of the statute, as well as some minor, non-substantive changes in wording.

<sup>39</sup> The authority of the ACHP to promulgate regulations implementing section 106 was enacted in NHPA section 211. 54 U.S.C § 304108.

process and fulfill the spirit of the law behind them—particularly when those procedural steps are part and parcel of meeting the trust responsibility.

### Overview of the Section 106 Process

As implemented through the ACHP regulations, the section 106 process consists of several steps to determine whether a proposed Federal or Federally assisted undertaking would affect historic properties, whether any such effects would be adverse, and how to resolve adverse effects.

The first step is consultation with State and Tribal Historical Preservation Officers (“SHPO/THPO”), which must consider the views of SHPO/THPOs and seek agreement, where feasible, regarding preservation matters in the process. The ACHP has issued numerous guidance documents on inclusion of Tribes in the section 106 process, including *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*.<sup>40</sup> Among other topics, this *Handbook* explains that it is permissible, though not required, for an agency to pay expenses to facilitate consultation with Tribes, as well as to compensate Tribes for their services in helping to identify historic properties. The ACHP has also issued a memorandum interpreting “reasonable and good faith effort.”<sup>41</sup>

The second step is to provide the opportunity for the AHCP to comment on the section 106 process, which it will likely do when the process “presents issues of concern to Indian tribes or Native Hawaiian organizations.”<sup>42</sup> If, with the consultation of SHPO/THPOs, Tribes, and the AHCP, a Federal agency determines there is an adverse effect, the process typically concludes with a memorandum of agreement (MOA) specifying how adverse effects will be avoided, minimized, or mitigated. 36 C.F.R. § 800.6(c). An MOA is a legally enforceable document which “shall govern the undertaking and all of its parts.”<sup>43</sup>

Other processes may be used to fulfill section 106 requirements, including entering into a programmatic agreement (which is typical for larger products like pipelines). *Id.* § 800.14(b). Below, we discuss different types of cultural resources and how NHPA is intended to protect them.

### Tribal Sacred Places

While Federal law does not protect Tribal sacred places just because they are sacred, the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996, does proclaim that it is national policy to protect the freedom of Native American people to exercise their traditional religions, including access to sites, and Executive Order 13007 (“Indian Sacred Sites”) directs each land managing Federal agency to “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; and (2) avoid adversely affecting the physical integrity of such sacred sites.”<sup>44</sup> Historic preservation law provides a procedural framework in which to advocate for protection of places that hold religious and cultural importance for tribes, if such places also have historic significance or if their destruction would impact Indian ceremonial or religious practices.

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<sup>40</sup> ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (2012) (*ACHP Consultation Handbook*), available on the website of the ACHP Office of Native American Affairs at <http://achp.gov/nap.html>.

<sup>41</sup> ACHP, Meeting the “Reasonable and Good Faith” Identification Standard in Section 106 Review (Nov. 10, 2011).

<sup>42</sup> Appendix A, criterion (4).

<sup>43</sup> NHPA § 110(l), 54 U.S.C. § 306114.

<sup>44</sup> 61 Fed. Reg. 26771 (May 24, 1996).

### Historic Properties

NHPA defines “historic property” as “any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.” 54 U.S.C. § 300308. Tribal sacred places often, if not always, would meet this definition. As amended in 1992, NHPA section 102(d)(6) expressly states that places “of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register” and that in carrying out its responsibilities under section 106, “a Federal agency *shall consult* with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance” to a property that is eligible for the National Register. 54 U.S.C. § 302706 (emphasis added). This statutory language establishes both a duty on the part of Federal agencies to consult with Tribes in the section 106 process and a Tribal right to be consulted. This statutory language is implemented through numerous provisions in the ACHP regulations.

Consultation is required for any historic property listed on or eligible for inclusion in the National Register. Many places that Tribes regard as sacred are eligible for the National Register. A property may be eligible if it meets one or more of the criteria, i.e., if it:

- (A) is “associated with events that have made a significant contribution to the broad patterns of our history”;
- (B) is “associated with the lives of persons significant in our past”;
- (C) “embod[ies] the distinctive characteristics of a type, period, or method of construction, or ... represent[s] the work of a master, or ... possess[es] high artistic values, or ... represent[s] a significant and distinguishable entity whose components may lack individual distinction”; or
- (D) “ha[s] yielded, or may be likely to yield, information important in prehistory or history”

National Park Service (NPS) regulations also establish a process for determinations of eligibility for the National Register. 36 C.F.R. Part 63. In practice, however, identification and evaluation often takes place within the section 106 process, during the step captioned “Identification of historic properties.” 36 C.F.R. § 800.4(c).

### Traditional Cultural Properties

Many Tribal sacred places are eligible for the National Register as “traditional cultural properties” (TCPs), a kind of historic property that is the subject of an NPS guidance document. *National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties* (hereinafter “*Bulletin 38*”). As explained in *Bulletin 38*, a TCP is an historic property that is:

eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.

*Bulletin 38* provides some important guidance on applying the National Register criteria to places that hold religious and cultural significance for a tribe, and it includes oral history and traditions and broad definitions that include a Tribe’s own cultural conceptions of what is important

to the Tribe.<sup>45</sup> In addition, a TCP may be eligible for the Register because, through ethnographic or ethnohistorical research techniques, it has the potential to yield important information. This criterion often makes archaeological sites eligible, due to the information that can be derived through archaeological excavation, but conducting interviews with elders is also an acceptable way of developing information.

Although many Tribal sacred places may be characterized as TCPs, a place need not be a TCP to render the statutory right to be consulted applicable—rather, as quoted above, this right applies if a proposed Federal or Federally assisted undertaking would affect an historic property to which a Tribe attaches religious and cultural significance. Accordingly, the ACHP regulations use the statutory language of “religious and cultural significance” and do not use the term TCP. Nevertheless, the term TCP is widely used, and many sacred places are TCPs.

This process breaks down—or may be deliberately short circuited—at the stage where Tribal resources are to be identified so that the effects on them may be considered. Part of this is because many archaeologists and other professionals employed by licensees may not be able to identify Tribal resources for lack of training or familiarity with the sites and resources. Further, as we have seen with the Dakota Access Pipeline, NHPA reviews for Tribal cultural resources are based on studies or surveys done decades ago by non-Indian staff employed by infrastructure companies. This is a recipe for disregard of the section 106 processes and for the dismissal of Tribes’ interests in protecting their cultures and traditional resources.

To reverse this, Federal agencies must monitor compliance with section 106 at the earliest stages of infrastructure project and provide for stringent requirements that Tribal entities, like THPOs, be included in the project’s initial scoping and review.

### **c. Clean Water Act**

Various provisions of the Clean Water Act (CWA) require that Federal agencies consider actions relating to water resources, and to minimize the effect of activities. For example, Section 404(b)(1) requires that the Secretary of the Army, through the Army Corps of Engineers, follow EPA Guidelines when discharges of dredged or fill material affect U.S. waters. 40 C.F.R. § 230.2. These include making determinations about the cumulative impacts of discharges (40 C.F.R. § 230.11(g)), minimizing impacts to human use (40 C.F.R. 230.76), and minimizing effects to unique habitats, plants and animal populations, and endangered species (*Id.*).

The Guidelines serve as strong instructions to the Army Corps and to all applicants for a section 404 permit as to what must be included in an application and an EIS. The EPA has authority to revisit the Guidelines in order to require additional considerations of effects on human impacts, such as to cultural resources, and cumulative impacts. However, it is important to note that a person with an interest that may be adversely affected by the section 404 permit may challenge the final agency action in U.S. District Court under the citizen suit provisions of section 505 of the CWA.

The EPA should review the Guidelines, which have not been amended recently to broaden the potential adverse impact on human use to include Tribal use of traditional or cultural sites, including adverse impacts altering important landscapes.

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<sup>45</sup> *Bulletin 38*, at 11.

Section 404(c) of the CWA gives EPA a veto over the site for discharge of dredged or fill material when the EPA determines there is a likely adverse effect. The EPA may also prohibit or otherwise restrict the specification of a site with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state. Therefore, EPA may exercise the section 404(c) authority before a permit is applied for, while an application is pending, or after a permit has been issued.

The EPA should modify the definition of “unacceptable adverse effect” at 40 CFR 231.2(e) to broaden “recreation areas” to include areas used by Indian tribes with traditional and cultural resources and historic properties.

## 5. Ensuring Environmental Justice

Environmental justice was elevated as a Federal policy in 1994 when President Clinton issued Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994). The Executive Order established the “importance of identifying and addressing, where appropriate, disproportionately high and adverse human health or environmental effects of [Federal] programs, policies, and activities on minority populations and low-income populations in the United States . . . .” *Id.* In the Memorandum accompanying the Order, the President highlighted the need for all Federal agencies to “analyze the environmental effects, including human health, economic and social effects, of Federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act. [And] [m]itigation measures outlined or analyzed in an environmental assessment, environmental impact statement or record of decision, wherever feasible, should address significant and adverse environmental effects of proposed Federal actions on minority and low-income communities.” President Clinton Memorandum for the Heads of all Departments and Agencies (Feb. 11, 1994).

Within the framework of environmental justice, Federal policy uniformly defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>46</sup> “Fair treatment” is defined as ensuring that “no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies[.]” EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples at 5 (July 24, 2014). In addition, “meaningful involvement” is meant to provide uniformly that “(1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their human health or environment; (2) the public’s input can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.” *Id.*

Notwithstanding the uniformity in definitions and principles, each agency is responsible for integrating environmental justice policies into its own policies, process and decision-making. The Interagency Working Group, chaired by EPA, has worked with Federal agencies to develop agency

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<sup>46</sup> <https://www.epa.gov/environmentaljustice> (last visited Nov. 18, 2016).

specific environmental justice policies,<sup>47</sup> and in 1997, the Council on Environmental Quality, which has oversight of the government's compliance with the Executive Order, issued environmental justice guidance for NEPA.<sup>48</sup> Although agencies should continue to recognize and implement policies relating to environmental justice generally, there also needs to be recognition of the uniqueness of Tribal Nations. Federal environmental justice policy does not currently recognize that Tribes are a unique population much different than the public at large or low-income and other minority populations.

There are 568 Federally recognized Tribes, with an American Indian/Alaska Native (AI/AN) population totaling 5.2 million (1.7% of the total U.S. population), with 2.9 million of those (.9% of the total U.S. population) identifying solely as AI/AN.<sup>49</sup> Further, AI/ANs rank among the lowest on the socio-economic scale. The overall poverty rate of AI/ANs is the second highest (16%) among all minorities, ranking above Hispanics (25%).<sup>50</sup> The high school dropout rate for AI/ANs is the second highest of all minorities (11%), with Hispanics ranking the highest (13%); and AI/ANs rank the second lowest for having a bachelors degree or higher (17% of the population), with Hispanics ranking at the bottom (14% of population).<sup>51</sup> But even these statistics can be much worse when broken down to a Tribal specific inquiry. For example, the same statistics for the Standing Rock Sioux Tribe fall below the national rates for the AI/AN population as a whole, and even surpass the statistics for Hispanics. At Standing Rock 19% of the population has less than a high school degree, and while 15% are have a bachelor's degree or higher, the poverty rate at Standing Rock is 43% of the population.<sup>52</sup>

Despite these statistics, the general formulas applied in the environmental justice context for identifying minority and low-income populations do not properly account for the impacts Federal projects can have on Tribal Nations and Tribal populations both on and off reservations. *See* Promising Practices for EJ Methodologies in NEPA Reviews, Interagency Working Group at 21-26, 26-28 (Mar. 2016). Nor do they recognize that Tribes have a unique legal status and hold rights and privileges that extend to off-reservation areas where few to no members may reside. For example, given the total AI/AN population, it is likely that in any analysis of an "affected environment" for purposes of identifying minorities, it will only identify a small AI/AN population. This does not mean that the population of AI/ANs is insignificant or that AI/AN will be impacted less. In fact, quite the opposite may be true. Identification, even of a small population of AI/ANs, can have significant impacts because the identified population can constitute a large portion of the Tribe's population either on or off reservation. Moreover, in an off-reservation context, there may be little to no population of AI/ANs residing in a given area, but the area may include culturally significant or sacred sites, aboriginal or former treaty lands or treaty resources, and thus a significant portion of AI/ANs may actually be affected because they depend on those off reservation lands or resources. Indeed, many Tribes retain off-reservation treaty or statutory rights generally limited to specific areas

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<sup>47</sup> Federal agency environmental justice strategies can be found at: <https://www.epa.gov/Tribal/memorandum-understanding-regarding-interagency-coordination-and-collaboration-protection>.

<sup>48</sup> Found at <https://ceq.doe.gov/nepa/regs/ej/justice.pdf> (last visited Nov. 18, 2016).

<sup>49</sup> U.S. Census, 2010 Census Redistricting File.

<sup>50</sup> <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/> (last accessed on Nov. 21, 2016).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

that cannot be expanded or replaced if a project destroys or adversely impacts the areas or resources contained therein. Similarly, once a culturally significant or sacred site, like a burial ground, is adversely impacted, these sites cannot be replaced and Tribal people will be forever and irreversibly impacted. Environmental justice methodologies must be amended to expressly recognize and account for these unique circumstances, with particular emphasis on the point that AI/ANs can be impacted regardless of physical presence in a given area.

In addition, environmental justice places a significant amount of emphasis on mitigation as a way to minimize or reduce disproportionate or adverse impacts on minority or low-income populations. *See e.g.*, Promising Practices for EJ Methodologies in NEPA Reviews at 44 (balancing approach using mitigation measures), 47 (mitigation and monitoring) (Mar. 2016). But mitigation measures are generally developed by agency and permittee without allowing for or considering Tribal input or review of mitigation measures. Tribes must be included in discussions regarding mitigation measures and such discussions must include an analysis of accidents that may occur notwithstanding mitigation measures in order to fully evaluate the potential risks or impacts to Tribal rights and resources. To this end, Tribes should be invited to participate under NEPA as cooperating entities even where a project only impacts off reservation rights or interests. Although not currently followed by agencies, a 1999 Memorandum from the Council on Environmental Quality, emphasized that “[a]s soon as practicable, but no later than the scoping process, Federal agency officials should identify state, Tribal and local government agencies which have jurisdiction by law and or special expertise with respect to reasonable alternative or significant environmental, social or economic impacts associate[ed] with a proposed action that requires the preparation of an environmental impact statement.”<sup>53</sup> Tribes should be considered to have jurisdiction over off-reservation treaty, former treaty and aboriginal areas for purposes of NEPA, but at a minimum, Federal policy should affirmatively reflect that Tribes should always be “routinely solicited” to act as cooperating agencies due to their special expertise regarding these areas.<sup>54</sup>

#### **IV. Best Practices for Infrastructure Development Impacting Tribal Nations**

##### **A. The FCC Model: Regional Mapping and Tribal Impact Evaluation**

In August 2000, the Advisory Council on Historic Preservation established a Telecommunications Working Group to provide a forum for the Federal Communications Commission (FCC), the ACHP, the National Conference of State Historic Preservation Officers (Conference), individual State Historic Preservation Officers, Tribal Historic Preservation Officers, Tribes, communications industry representatives, and other interested members of the public to discuss improved section 106 compliance and to develop methods of streamlining the section 106 review process. This working group was necessitated because, despite Federally mandated consultation requirements, literally tens of thousands of cell towers had been constructed across the United States with virtually no effort by the FCC, who licenses transmission from these towers, to consult with tribes. The number of towers was going to increase dramatically in the coming years

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<sup>53</sup> Executive Office of the President, Council on Environmental Quality, Memorandum for Heads of Federal Agencies from George T. Frampton, Jr., Acting Chair re Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (July 29, 1999) (added italics in text).

<sup>54</sup> *See id.* (providing that “[c]onsidering NEPA’s mandate and the authority granted in Federal regulation to allow for cooperating agency status for state, Tribal and local agencies, cooperator status for appropriate non-Federal agencies should be routinely solicited.”).

and it was clear that the FCC needed to identify an effective mechanism for seeking Tribal input, while not diluting the FCC's consultation obligation to Tribes.

In these discussion, Tribes acknowledged that the construction of a universal wireless telecommunications infrastructure network was vital to the economic and social future of the United States. However, Tribes strongly maintained that the Tribal interests at issue were also vital, both to the Tribes, and to the United States in terms of its historic preservation goals and its national identity as a nation of diverse and vibrant peoples and cultures.

As explained in greater detail below, out of these discussions a Nationwide Programmatic Agreement was promulgated and the FCC implemented a system that provides for:

- early notification to Tribes with regard to proposed cell tower sites,
- voluntary Tribal-industry cooperation to address tribal concerns,
- recognition of the appropriateness of industry paying fees to Tribes for their special expertise; and
- affirmation of the FCC's ultimate obligation to consult with Tribes as requested or necessary.

This system has been in place for over a decade and has expedited the communications infrastructure build-out and dramatically eased the FCC's need to consult with Tribes by providing a mechanism for industry to work directly with Tribes to address Tribal concerns before FCC consultation would have to be invoked.

#### Initial FCC Missteps—An Attempt to Delegate FCC's Consultation Obligation

In a belated attempt to make up for past errors, the FCC at one point stated that it had delegated its consultation obligations to the cell tower companies, which subsequently began sending letters to Tribes demanding information, some of it very sensitive in nature, and asserting that if the information was not provided within a certain timeframe, usually 10 to 30 days, "[w]e will presume that a lack of response ... to this letter will indicate that the [tribe] has concluded that the particular project is not likely to affect sacred tribal resources." Tribes received hundreds and even thousands of such letters. The letters frequently referred to the Tribes as "organizations" or "groups" and generally provided insufficient information on the location and nature of proposed sites for a proper evaluation.

The principal rationale for devolving section 106 responsibilities to the cell tower companies was to address the practical difficulty of the FCC complying with section 106's mandates for literally thousands of towers. However, it was unlawful for the FCC to delegate its government-to-government consultation obligations to a private entity. The FCC eventually acknowledged this and has repeatedly affirmed that the consultation obligation remains with the FCC, even if mechanisms are put in place for Tribes to address issues of concern directly with the communications industry.

#### Establishment of the Tower Construction Notification System (TCNS)—Assuring Notice to Tribes through Comprehensive Mapping of Tribal Areas of Concern

In order to efficiently connect industry with Tribes, the FCC established a database and invited Tribes to enter the areas of interest to them. The FCC has indicated that every Federally recognized Tribe in the United States has entered its areas of interest into this database. The FCC

then asked industry to submit notifications of proposed tower construction sites to the same database.

With Tribal areas of interest established in the database, the FCC is able to match industry's proposed sites with those areas of interest of particular Tribes. The FCC then notifies the company and the affected Tribe(s) and, as a result, a Tribe(s) has early notification and the parties can communicate directly about any Tribal concerns. When a Tribe signs off on a site as not being of concern or has worked out its concern with the company, *then the company can proceed and FCC consultation is not invoked.* This system allows for early notification to tribes and resolution of concerns before there is harm to a Tribal cultural property. For industry, it provides the opportunity to have a site properly evaluated by Tribal experts who possess unique expertise, while also getting a sign off that assures that the requirements of section 106 have been complied with.<sup>55</sup>

#### Addressing Tribal Resource Needs—Allowing Fees for Tribal Services in Response to Industry Requests

Early on, before the establishment of the TCNS, cell tower companies had, with few exceptions, been unwilling to pay fees to cover Tribal costs despite the onerous workload involved in responding to letters from industry. The companies argued that Tribes should provide this information as a free government service. Of course, it is common for Federal agencies, including the FCC, to charge reasonable fees for its services. Without a Tribe's unique expertise in its cultural and religious history, it is impossible for cell tower companies to properly evaluate the historic significance of a proposed site or its potential impact on properties of cultural and religious significance to Tribes. Accessing this Tribal expertise to benefit a commercial enterprise is a wholly separate issue from a Tribe invoking its right to consult with the FCC. Even as the cell tower companies willingly paid their engineers, environmental consulting firms and others, the Tribes argued that their expertise should also be compensated for on a reasonable basis. The companies, who stood to profit greatly from these towers, were obviously the appropriate party to bear the cost of tribal expert review.

The FCC acknowledged the appropriateness of such fees in its "Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act."<sup>56</sup> In those Best Practices, the FCC stated in a section entitled "Compensation for Professional Services":

The Advisory Council regulations state that the "agency official shall acknowledge that Indian Tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." (§ 800.4(c)(1)). Consistent with the ACHP Memorandum on *Fees in the Section 106 Review Process*, payment to a Tribe is appropriate when an Agency or Applicant "essentially asks the Tribe to fulfill the role of a consultant or contractor" when it "seeks to identify historic properties that may be significant to an Indian Tribe, [and] ask[s] for specific information and documentation regarding the location, nature and condition of individual sites, or actually request[s] that a survey be conducted by the Tribe." In providing their "special expertise," Tribes are fulfilling a consultant role. To the extent compensation should be paid, it should be negotiated between the Applicant and the Tribe....

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<sup>55</sup> See generally, [http://wireless.fcc.gov/outreach/index.htm?job=tower\\_notification](http://wireless.fcc.gov/outreach/index.htm?job=tower_notification).

<sup>56</sup> These Best Practices were specifically developed in discussions with the United South and Eastern Tribes, Inc., which represents 26 federally recognized tribes in the south and eastern portions of the United States.

Overall, the Best Practices were specifically designed to:

- Facilitate the Commission’s compliance with its obligations under the NHPA;
- Facilitate Applicants’ compliance with their obligations under the Nationwide Programmatic Agreement and the Commission’s rules;
- Insure that Tribal interests in the preservation of properties of religious and cultural significance to the Tribes listed in or eligible for listing in the National Register are identified and taken account of early in the process of siting communications facilities;
- Address the needs of the Applicant in a cost-effective and efficient manner and encourage the expeditious development of wireless communications infrastructure networks that are vital to the economic and social future of the United States;
- Expedite Tribal review of proposed tower and antenna sitings; and
- Establish a process that will facilitate Commission Applicants’ obtaining access to the special expertise held by Tribes in the identification, evaluation, and assessment of impacts on properties of cultural or religious significance to Tribes that are listed in or eligible for listing in the National Register.

Between the Nationwide Programmatic Agreement and the Best Practices, the FCC implemented a system which met these goals and has expedited the build-out of the Nation’s communications infrastructure. As the build-out evolves with changing technologies, Tribes continue to hold discussions with the FCC and with industry about any needed adjustments to this system.

### **B. Adequate Notice, Consultation in Early Planning and Coordination**

The United States has, consistent with its trust obligations, committed to a policy of meaningful consultation. To ensure meaningful consultation occurs, Tribal Nations must be provided adequate notice and must be included in decision-making processes from the very earliest stages.

In 2000, President Clinton issued Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments,” reaffirmed the “fundamental principles” that the United States has a “unique relationship” with Tribal Nations, recognizes Tribes’ right to self-government, and supports Tribal sovereignty and self-determination.<sup>57</sup> It mandated that “[e]ach agency shall have an accountable process to ensure meaningful and timely input by tribal officials” and emphasized the importance of consulting with Tribes “early in the process” of developing regulations affecting them.<sup>58</sup> In 2004, President Bush issued his “Memorandum on Government-to-Government Relationship with Tribal Governments, supporting Executive Order 13175 and stating that “it is critical that all departments and agencies adhere to these principles [of tribal sovereignty and self-determination] and work with tribal governments in a manner than cultivates mutual respect and fosters greater understanding.”<sup>59</sup> In 2009, President Obama issued his “Memorandum for the Heads of Executive Departments and Agencies, stating that “[h]istory has shown that failure to

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<sup>57</sup> E.O. 13175 § 2(a)–(c) (Nov. 6, 2000).

<sup>58</sup> *Id.* § 5.

<sup>59</sup> Memorandum on Government-to-Government Relationship with Tribal Governments (Sep. 23, 2004).

include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results” and directing agencies to submit plans to comply with the requirements for meaningful consultation in Executive Order 13175.

For consultation to be meaningful, it must occur prior to key decisions being made regarding infrastructure development priorities and projects. In *Oglala Sioux Tribe of Indians v. Andrus*, the Eighth Circuit held that the Bureau of Indian Affairs failed to fulfill their obligation to meaningfully consult with a tribe by failing to assure that the tribe was “given a meaningful opportunity to express [its] views before Bureau policy is made.” 603 F.2d 707, 721 (8th Cir. 1979). The court found that holding meetings with the tribe after key decisions had been made failed to constitute meaningful consultation and, further, “violates ‘the distinctive obligation of trust incumbent upon the Government.’” *Id.* (citing *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (quoting *Seminole Nation v. United States*, 316 U.S. 186, 296 (1942))).

Tribes should be included in infrastructure decision-making from the very earliest stages, including being involved in key decisions regarding priorities for development. Tribes should also be included in any discussions regarding particular projects. For instance, as soon as Federal agencies are discussing projects with private parties or state governments, they should also be talking to Tribes. Early consultation ensures that problems are identified and resolved in a timely fashion, preventing costly delays down the line. Similarly, Tribes must receive full information about projects as soon as possible; Tribes are often faced with relying on public notices and news releases about projects while States are included in decision-making and scoping processes from the very beginning.

In addition to being early in the process, meaningful consultation should always be undertaken with the goal of reaching consensus. Without this goal, there is no actual consultation—rather, the federal government merely notifies Tribes of their intentions and catalogues Tribal concerns. Just like in any other discussions between parties with interests at stake in a particular venture, the Federal government and Tribes should be sitting down with one another, engaging in meaningful back-and-forth, and reaching agreement to facilitate project development.

In the limited context of projects with a likelihood of significant impacts to Tribal lands and resources, consultation cannot be meaningful unless Tribes have a right to say no.<sup>60</sup> Tribal informed consent must be required when infrastructure projects are likely to have a significant impact on Tribes. In such instances, successful dialogue with Tribes may be able to mitigate impacts so that Tribes consent to projects moving forward.

### **C. Funding for Tribal Participation**

Funding is necessary for Tribes to become educated about their rights under various statutes and develop the capacity to exercise those rights. For instance, Tribal Historic Preservation Offices require the resources to analyze and respond to the myriad notices of consultation that they receive

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<sup>60</sup> See, Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 Berkeley J. Int'l L. 570, 576 (2009) (stating that in some situations consultation can only be meaningful when there is “the ability to walk away from the bargaining table”).

regarding federal infrastructure projects. Identification of Tribal historical sites or assessment of potential impacts to Tribal resources requires the time and resources of already underfunded Tribal governments. Support is needed for Tribes to be able to participate in permitting processes in a meaningful way.

For instance, as previously noted, the *ACHP Consultation Handbook* explains that it is permissible, though not required, for an agency to pay travel expenses for tribal representatives and otherwise “use available resources to overcome financial impediments to effective tribal participation.”<sup>61</sup> It is also permissible for an agency, or an applicant for federal funding or a federal permit, to compensate a tribe for its services in identification and evaluation of historic properties. Though compensation is not required, the *Handbook* explains that when an agency or applicant asks a tribe for “specific information or documentation regarding the location, nature, and condition of individual sites, or even request[s] that a survey be conducted by the tribe,” the tribe is essentially being asked to perform a role “similar to that of a consultant or contractor.” Tribes are recognized sources of information about historic properties of religious and cultural significance to them, agencies should “reasonably expect” to pay tribes for their work.<sup>62</sup> In keeping with this guidance, it is not uncommon for the applicants for pipelines and other infrastructure projects to offer compensation to tribes for conducting TCP surveys and otherwise documenting information about places that may be historic properties.<sup>63</sup>

As shown in the FCC example above, it is appropriate—and most efficient—for the entity seeking the permits or federal action to provide funding for governmental processes; this is not a foreign concept for the provision of services from governmental entities. These funds may be reasonably included in application or permit fees, or required as part of the process an applicant must undertake to complete requirements. Alternatively, Federal agencies should prioritize the need to comply with Tribal trust and treaty responsibility, and fund the Tribes so they may participate in infrastructure development procedures.

#### **D. Training to Improve Agency Understanding of Tribal Nations**

All Federal personnel whose work involves participating in projects requiring Federal approval that may impact Tribal Nations, both on and off Reservations, should be required to participate in comprehensive training regarding the Federal trust responsibility and Tribes. It is difficult to work with Tribes or engage in meaningful and effective consultation without a basic understanding of the Federal government’s fundamental obligations and responsibilities to Tribes. Lack of training, however, cannot be a basis for failing to include, meet or consult with Tribes.

The United States requires substantial training before allowing any member of the Foreign Service to serve in another country and has created the Foreign Service Institute (“FSI”) for this purpose. FSI training can be one day or up to two years with the goal of “promot[ing] successful performance in each professional assignment, [ ] eas[ing] the adjustment to other countries and cultures, and [ ] enhance[ing] the leadership and management capabilities of the U.S. foreign affairs

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<sup>61</sup> *ACHP Consultation Handbook*, at 12.

<sup>62</sup> *ACHP Consultation Handbook*, at 12.

<sup>63</sup> Agreements through which compensation is provided to tribes for performing services present issues relating to topics such as confidentiality of sensitive information, intellectual property interests in work products, and tribal sovereign immunity. Such issues are beyond the scope of this memo. The development of model contract clauses and best practices could facilitate the use of such agreements.

community.”<sup>64</sup> While training on working with Tribes would not necessitate multi-year programs, the goals of such training should be similar and is needed for Federal personnel who interact with and make decisions affecting Tribes. As noted above, there are 568 Federally recognized Tribes and most differ in language, customs and traditions. To successfully work with and understand Tribes, Federal officials should have, not only a basic understanding of the trust responsibility, but also an appreciation that there will sometimes be vast differences between Tribes.

Specialized training of this type is not unique. The Department of the Interior, through the Bureau of Reclamation, for example, has developed a training program for its regional offices to learn about the trust responsibility and Tribes in the context of Indian water rights settlements. Reclamation initiated the training because it recognized that their budget was increasingly being dedicated to implementation of Indian water settlements, yet most Reclamation staff had little to no experience working with Tribes. The training has been successful, in large part, because Reclamation brought in a well-respected Indian law professor who can explain the trust responsibility in lay terms, and Tribal leaders who can speak about the importance of their water settlement, highlighting their unique history and cultural values in relation to determining their goals for settlement. This model for training needs to be required and implemented more broadly across all Federal agencies.

If it is not readily apparent that a project will impact Tribal rights or interests, once identified, training of Federal employees should occur as soon as possible, but, as noted above, lack of training is not a basis for failing to include, meet or consult with Tribes.

Training, to the maximum extent possible, should be offered and provided by experts in the field, Tribes and/or Tribal organizations and, at a minimum, must include: (1) an overview of the trust responsibility and unique relationship between the United States and Tribes; (2) an overview of the United States historical policies impacting Tribes, including how those policies resulted in Tribes having significant rights and interests in off-reservation areas; and (3) Tribal perspectives on the importance of the trust responsibility and how agency decisions have impacted Tribal rights in the past.

#### **E. Indian Trust Impact Statement and Trust Responsibility Compliance Officer**

In 1970, towards the end of the dam building era, President Nixon’s Special Message to Congress acknowledged that “the Federal government is faced with an inherent conflict of interest” between national interests and its duties to protect Tribal lands. Nixon proposed an Office of Trust Counsel, but left it to Congress to take action. Forty-six years later, the legal obligation to Tribal lands must be acted upon. The President and the Cabinet have an independent duty to fulfill federal trust obligations, whether or not those breach of those duties is subject to money damages.

The proposed Policy Statement addresses the need for concrete action in two respects. First, it would require the preparation of an Indian Trust Impact Statement before any agency takes action which may harm or threaten tribal lands, waters, treaty rights, or cultural resources. Such a statement must include a statement of tribal consent, or an account of the extraordinary circumstances where a compelling national interest requires such action.

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<sup>64</sup> <https://www.state.gov/m/fsi/> (last visited Nov. 18, 2016).

Second, it suggest that a determination that a compelling national interest outweighs tribal interests should be reviewed by a Tribal Trust Compliance Officer. To attempt to avoid conflicts of interest, the Secretary of Interior shall serve as Tribal Trust Responsibility Compliance Officer for any infrastructure project permitted by another federal agency. For Department of Interior permits and approvals, the Managing Director of the Council on Environmental Quality could serve as Tribal Trust Responsibility Compliance Officer.

Before any agency takes action which may harm or threaten Tribal lands, waters, treaty rights, or cultural resources, each permitting agency should prepare and submit to tribal government an Indian trust rights impact statement, to include, but not be limited to, the following information:

- a) Nature of the proposed action.
- b) Nature of the Indian rights which may be abrogated or in any way threatened by the proposed action.
- c) Whether consent of the affected Indians has been sought and obtained. If such consent has not been obtained, then an explanation shall be given of the extraordinary circumstances where a compelling national interest requires such action.
- d) If the proposed action involves taking or otherwise infringing Indian trust lands, in lieu lands must be offered to the affected Indian or Indians.

This proposal has long been on the table. However, establishment of a Trust Responsibility Compliance Officer and required Trust Impact Statements remain important pieces in a comprehensive effort by the Federal government to uphold trust and treaty duties.

#### **F. Cumulative Impacts and Regional Environmental Impact Statements**

Environmental and cultural assessments should take into account cumulative impacts, as well as impacts to the regional environment, including Tribal rights and resources in the region. Projects should be assessed based on their broad impacts rather than artificially segmenting or narrowing the scope of review. Lead agencies should be assessing the potential impacts and consulting with states and Indian tribes early in the process, particularly for long, linear projects like roads, pipelines, and transmission lines.

It is important to ensure that the Cumulative Impact of a project will be included in a single EIS. The CEQ rule at 40 C.F.R. § 1508.7 states: “*Cumulative impact* is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . .” For a Federal agency scoping what the EIS will cover for the range of actions, alternatives, and impact, CEQ rules emphasize the importance of considering all actions that are related by being connected, or cumulative, or similar. 40 C.F.R. § 1508.25. These rules provide that the lead agency will be able to assess the combined impacts of the action(s) that are underway or planned by evaluating them in the same EIS. When evaluating alternatives to the proposed project or route, it is important for the EIS to include a broad, regional examination of potential effects

However, the Federal agencies involved with certain infrastructure projects, most notably oil or gas pipelines, have not always met the NEPA requirements to include all cumulative impacts in

EIS. The Army Corps of Engineers, which issues permits for construction on and near waterways, often does not assess major pipeline projects as a whole, and instead considers each segment that requires a permit. The Army Corps has issued a Nationwide Permit 12 (NWP 12), which is designed to provide a “fast track” for permitting, and NWP 12 describes the process that Federal agencies must follow, which includes notice to the District engineer and the meeting the requirements of all applicable laws and regulations. However, since much of the land to be impacted by long pipelines is on private land, many of the Federal safeguards to protect historic properties and cultural resources of Tribes are simply not evaluated unless a segment of the pipe crosses Federal land or impacts waters of the United States such that a federal permit or agreement is required.

The Federal Energy Regulatory Commission (FERC) is another federal agency that is responsible for completing an EIS for the many energy projects which must be reviewed and approved by Federal agencies, such as for long pipelines for oil or gas. FERC has prepared guidance for its offices to follow which describe the need to assess cumulative impacts by identifying both direct and indirect effects. However, FERC receives numerous applications for energy generation projects, such as for solar and wind, and a number of pipeline projects. Project proponents pressure FERC to move quickly on the EIS with the affect that Tribal consultation gets short shrift. FERC must comply with its responsibility as a Federal agency to consult with affected Tribes and to seek their involvement in identifying cultural and religious resources in the area.

Only with a complete cumulative impact analysis as the foundation of an EIS, including all of the connected parts of a project, and after undertaking consultation with any potentially affected Indian tribe, can a lead Federal agency have a sufficient understanding of all impacts of a proposed project and its alternatives.

## **V. Agency-specific Recommendations**

### **A. Army Corps of Engineers**

#### **1. Repeal Appendix C and Follow ACHP Regulation**

The Army Corps of Engineers “Procedures for the Protection of Historic Properties,” codified at 33 C.F.R. part 325, Appendix C, effectively ignores the Army Corps’ statutory duty to consult with any Tribe that attaches religious and cultural significance to a historic property that would be affected by the issuance of an Army Corps permit, depriving Tribes of their statutory right to be consulted prior to issuing such a permit. Appendix C must be withdrawn.

Appendix C purports to implement the responsibilities of the Corps pursuant to the National Historic Preservation Act. Appendix C was promulgated in 1990. 55 Fed. Reg. 27003 (June 29, 1990). As discussed above, the NHPA Amendments of 1992 enacted the statutory duty on the part of Federal agencies to consult with tribes in the section 106 process when a Federal or Appendix C has not been revised to reflect this statutory mandate.

Numerous provisions of the ACHP regulations at 36 C.F.R. Part 800 implement the statutory duty of each federal agency to consult with Tribes regarding effects on historic properties of Tribal religious and cultural significance. Appendix C is, in numerous ways, inconsistent with the ACHP regulations.

The ACHP has advised the Army Corps that Appendix C “does not fulfill the requirements of Section 106 of NHPA.”<sup>65</sup> There are several reasons that Appendix is unlawful, including the following.

**a. The Corps has not followed the regulatory requirements for the adoption of Appendix C as alternate procedures.**

Although under ACHP regulations it is permissible for a Federal agency to develop and adopt “alternate” procedures, before such alternate procedures can take legal effect, the ACHP must determine that the procedures are “consistent with” its regulations. 36 C.F.R. § 800.14(a)(2). Appendix C has not been approved by the ACHP. Therefore, Appendix C does not have legal effect and must be withdrawn.

In developing the alternate procedures, a Federal agency must conduct “appropriate government-to-government consultation with affected Tribes. *Id.* § 800.14(f). The Army Corps did not comply with this requirement in promulgating Appendix C. If the Army Corps chooses to pursue the option of developing an updated version of Appendix C, then, it would be required to conduct government-to-government consultation.

**b. Appendix C deprives Tribes of their statutory consultation rights.**

The procedures in Appendix C operate to deprive tribes of their statutory right to be consulted when the issuance of a Corps permit would affect a historic property to which a tribe attaches religious and cultural significance; Appendix C is inconsistent with several provisions of the ACHP regulations intended to implement this right.

ACHP regulations explicitly refer to the statutory requirement that the Federal agency official “consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking.” *Id.* § 800.2(c)(2)(ii). Appendix C does not include any language to inform Corps officials and the regulated public regarding this statutory requirement.

At the first step in the section 106 process, the ACHP regulations provide that the federal agency official “shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.” *Id.* § 800.3(f)(2). The ACHP regulations also require the Federal agency official to consult with Tribes in the identification of historic properties, including evaluating eligibility for the National Register and in making determinations of whether an undertaking may affect historic properties. *Id.* § 800.4(b), (c), (d). Appendix C, in contrast, does not require the Army Corps to make any affirmative effort to identify Tribes that have a right to be consulted. Rather, after the district engineer has determined that an application is complete and has made a preliminary determination regarding the “presence or

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<sup>65</sup> Letter to Mr. David B. Olson, U.S. Army Corps of Engineers, “Proposal to Reissue and Modify Nationwide Permits, Docket Number COE-2015-0017 and/or RIN 07110-AA73 (August 1, 2016). The letter cites *Committee to Save Cleveland’s Huletts v. U.S. Army Corps of Engineers*, 163 F.Supp.2d 776 (N.D. Ohio 2001), case in which the court rejected the Corps’ contention that it was not bound by the ACHP regulations, but rather could follow Appendix C.

absence of historic properties and the effects of the undertaking upon these properties,” the district engineer issues a public notice and is supposed to send a copy to “appropriate” Tribes. Appendix C, para. 4.a.<sup>66</sup> The comment period is typically 30 days. 33 C.F.R. § 325.2(d)(2).

After the public notice, Appendix C does outline a process that is somewhat comparable to the steps in the ACHP regulations, but with major differences. The district engineer may decide to conduct, or to require, further investigation regarding properties that are potentially eligible for the National Register that have not previously been evaluated. At the district engineer’s discretion, such investigations may involve consultations with Tribes, among other entities. The district engineer consults with the State Historic Preservation Officer to make determinations of eligibility and to assess the effects of the permitted undertaking on historic properties. ACHP regulations provide for a 30-day review by consulting parties, including Tribes, of a finding of “no historic properties affected” or “no adverse effect.” In contrast, Appendix C does not, nor does it provide an opportunity for a Tribe to ask the ACHP to participate in the process if the Tribe objects to such a finding or objects to a proposed memorandum of agreement to resolve adverse effects.

**c. Appendix C is inconsistent with the requirement that the agency head approve decisions to proceed with undertakings with adverse effects.**

Appendix C is inconsistent with the statutory requirement that, if a Federal agency decides to proceed with an undertaking without an agreement on the resolution of adverse effect, the decision to do so must be made by the head of the agency and cannot be delegated.

Appendix C provides that, if there would be adverse effects and there is no memorandum of agreement for the resolution of the adverse effects, the district engineer will allow the ACHP 60 days to provide comments, and then the district engineer will decide whether or not to issue the permit. This is contrary to section 110(j) of the statute, 54 U.S.C. § 306114, which provides that, if an undertaking would result in adverse effects on a historic property and there is no agreement pursuant to the ACHP regulations on the resolution of adverse effects, the agency may proceed anyway, but the decision to proceed with an undertaking without an must be made by the head of the agency and cannot be delegated. This statutory provision is implemented through section 800.7 of the ACHP regulations, documenting the consideration of the ACHP’s comments and the rationale for the decision. Appendix C does not include any text relating to that section of the ACHP regulations.

Among other inconsistencies between the ACHP regulations and Appendix C is the Army Corps’ defining “historic property” and “designated historic property” as distinct terms. This is inconsistent with statute and implies giving lesser stature to previously unidentified historic properties.

## **2. Nationwide Permits**

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<sup>66</sup> The word “appropriate” is found in the Corps permitting regulations, without providing guidance on how to determine which tribes are “appropriate” to send a copy of the notice. 33 C.F.R. § 325.3(d)(1).

The appropriateness of using nationwide permits for particular projects should be re-evaluated as they come up for renewal, and the Corps should develop an alternative for permitting large projects that cover broad areas so that Tribal impacts are fully evaluated.

In particular, as discussed below, the Army Corps should prohibit application and utilization of Nationwide Permit 12 for crude oil pipelines. At a minimum more generally, in conjunction with the utilization of nationwide permits, where Tribes have raised significant concerns in relation to a proposed project, Federal policy should require Federal agencies to evaluate whether additional steps or analysis are needed to evaluate and address Tribal impacts. This could include independent evaluation of environmental justice as it pertains to impacted tribes and/or the need for additional agency reviews under NEPA or NHPA with the Tribes as cooperating agencies to identify and resolve issues of concern.

In addition, if nationwide permits are utilized, the Army Corps should inform Tribes that there is a process by which regional conditions or case-by-case conditions may be required and may be sufficient to address and resolve specific concerns raised by Tribes during the project's review. The Army Corps and affected Tribes should be required to work together, in accordance with 33 C.F.R. § 330.5, to determine what steps may be necessary to impose such modifications or conditions.

Nationwide Permit 12 (NWP 12) was utilized to provide hundreds of water crossing approvals for the Dakota Access Pipeline project without any detailed environmental or cumulative impact review. NWP 12 allows the Army Corps of Engineers to approve "utility line activities" that affect waters of the United States in situations where there are only minimal individual and cumulative environmental effects. However, this is not the case where oil pipelines are involved. Oil pipelines transport hazardous liquids and pose risks to the environment that stand in stark contrast to the minimal adverse environmental impacts that might arise from the construction and maintenance of other utilities covered by NWP 12 (i.e., electric, telecommunications, or water pipelines). Moreover, as learned in connection with the Dakota Access pipeline, nationwide permitting fails to provide adequate protections for the rights of Tribes under section 106 of the National Historic Preservation Act, because there is an unequal emphasis placed on fast-tracking the project and meeting deadlines, rather than ensuring Tribes are given adequate time for review and inclusion in the process. To ensure compliance with these Federal laws and the trust responsibility, Federal review of crude oil pipelines should instead be based on individual permit applications and full environmental reviews (i.e., environmental impact statements). But even where NWP 12 would apply (such as to electric or telecommunication lines), if a utility line crosses any reservation, historic treaty or aboriginal lands, it should be made clear that no construction should be permitted until after full and meaningful Tribal consultation is completed with all impacted Tribes.

The Corps published a proposed rule on June 1, 2016, to reissue its existing nationwide permits (NWPs), with some modifications. 81 Fed. Reg. 35186. The comment period closed on August 1, 2016. NWPs are valid for five years, and those currently in effect will expire on March 18, 2017. For reasons explained in the proposed rule, the Corps intends to publish a final rule 90 days before the current NWPs expire, which indicates a publication date in mid-December. There are numerous problems with the proposed rule.

**a. The proposed rule fails to ensure compliance with statutory Tribal consultation requirements of section 106.**

The proposed rule fails to ensure compliance with the statutory obligation of the Army Corps to consult with Tribes in the section 106 process for activities authorized by a nationwide permit that would affect historic properties of Tribal religious and cultural significance.

The proposed rule provides background information on the NWP program:

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. There are currently 50 NWPs. ...

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States. The Secretary's authority to issue permits has been delegated to the Chief of Engineers and his or her designated representatives. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (see 33 CFR part 330.1(b)). Activities authorized by NWPs and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

In the expedited procedure used for NWPs, a project proponent is sometimes allowed to proceed without any case-specific approval action by the Army Corps; in other cases, the proponent must provide to the Army Corps a "pre-construction notification" (PCN). For some NWPs, the project proponent is not authorized to proceed until the district engineer provides a decision document verifying "that the proposed NWP activity will result in no more than minimal adverse environmental effects." 81 Fed. Reg. at 35188. For NWPs for which a PCN is required, the project proponent may proceed if the does not provide a decision document within 45 days

If the activity proposed to be taken under an NWP "may have the potential to cause effects to historic properties listed, or eligible for listing in, the National Register of Historic Places" General Condition 20, entitled "Historic Preservation" requires the proponent to file a PCN with the Corps. 81 Fed. Reg. at 35187. (See also 33 CFR 330.4(g)(2).) General Condition 20 provides:

In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

81 Fed. Reg. at 35233.

However, this General Condition fails to adequately provide for compliance with NHPA section 106. The ACHP explained several flaws in General Condition 20 in its comment letter to the Army Corps on the proposed rule reissuing the NWP's, which are discussed below.<sup>67</sup>

**b. General Condition 20 improperly relies on 33 C.F.R. part 325, Appendix C.**

General condition 20 also provides that “[w]hen reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act.” The ACHP understands the term “current procedures” as a reference to Appendix C, and the ACHP regards those procedures as inadequate for compliance with NHPA section 106. As stated above, Appendix C is not consistent with existing law and must be rescinded. The wording of General Condition 20 should refer to the ACHP regulations, at least until any alternate procedures that the Army Corps may develop have been approved by the ACHP.

**c. General Condition 20 improperly delegates to non-Federal permittees responsibility to make key determinations.**

General Condition 20 delegates key decision-making to non-Federal permittees. This improper delegation includes the threshold determination of whether the permitted activity has the potential to affect historic properties. Paragraph (c) states:

Non-federal permittees must submit a pre-construction notification to the district engineer if the activity may have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties.

In making the requirement for a PCN turn on the permittee’s determination of whether the activity has the potential to cause effects to historic properties, this General Condition implicitly authorizes the permittee to determine whether properties that were not previously evaluated are eligible for the National Register, and, if so, whether any such property would be affected by the undertaking.

This General Condition also states that the district engineer is responsible for determining “whether the proposed activity has the potential to cause an effect on the historic properties” and to make this determination after having made a “reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.” However, if the permittee determines that

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<sup>67</sup> Advisory Council on Historic Preservation, Letter to Mr. David B. Olson, U.S. Army Corps of Engineers, “Proposal to Reissue and Modify Nationwide Permits, Docket Number COE-2015-0017 and/or RIN 07110-AA73 (August 1, 2016).

there is no potential to cause effects to historic properties, the permittee will not be obligated to file a PCN, and the district engineer will not even be aware of the activity to be covered by the NWP (unless a PCN is required for some reason other than the potential to affect historic properties).

As pointed out by the ACHP in its comment letter, the Corps' practice of relying on the permittee to determine the potential to cause effects to historic properties "often leads to the Corps' failure to adequately consult with Federally recognized Tribes regarding the identification of, and assessment of effects on, historic properties of religious and cultural significance to them that may be affected by the undertaking." General Condition 20 does not acknowledge the statutory duty of the Army Corps to consult with tribes in the section 106 process, as provided in NHPA section 101(d)(6). 54 U.S.C. § 302706.

The failure to consult with Tribes early in the process leads to situations in which Tribal sacred places are damaged or destroyed before they are even evaluated for eligibility for the National Register. In other situations, Tribal sacred places are identified and evaluated for eligibility only after options for avoiding impacts have been limited by the permittee's conduct in reliance on the NWP process. The Corps should revise its NWP rules in accordance with the ACHP comments.

### 3. Nationwide Permit Allows Disregard of Cumulative Impacts

Another issue with NWPs highlighted by the Dakota Access Pipeline case and in the Tribal comments during the infrastructure consultations is the use of NWP 12 two hundred and two times in the construction of a single, large-scale pipeline project without the Army Corps considering the cumulative impact of granting multiple permits.<sup>68</sup> Instead, the Corps' views each permit as granting a "single and complete project," which narrows the scope of review and does not take into account the potential adverse impacts of combining these permits together in an entire watershed or region—especially during the construction of a nearly 1,200-mile pipeline.

Under the current definition of a "single and complete project" under NWP 12, the Corps' does *not* have to consider the impact of the "cumulative total of all filled areas" for "linear projects crossing a single waterbody several times at separate and distant locations, each crossing is considered a single and complete project."<sup>69</sup> The only instance in which the cumulative total of multiple NWPs is considered is when the construction impacts several *different* areas of a headwater or isolated water, or several *different* and distinct headwaters and isolated waters.<sup>70</sup> This distinction seems to run counter to protecting the waters and aquatic areas within the Army Corps' jurisdiction, especially for projects with dozens—or hundreds in the case of Dakota Access—of crossings and impacts to single waterbody or area.

A project with numerous crossings in one waterbody, regardless of the distances between them, will have a substantial impact and must be subjected to the highest review. The Army Corps should apply the "cumulative total" standard of review to all projects subject to NWP 12 and remove the exception for linear projects which cross a single waterbody multiple times.

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<sup>68</sup> U.S. Army Corps of Engineers – Omaha District, *Frequently Asked Questions DAPL*, available at: <http://www.nwo.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/749823/frequently-asked-questions-dapl/>

<sup>69</sup> 33 CFR 330.2(i)

<sup>70</sup> *Id.*

Further, allowing construction to begin on a large-scale utility project without considering all of the impacts runs counter to the NEPA and allows the Corps to circumvent CEQ guidance on considering cumulative impacts. CEQ's 1997 "Considering Cumulative Effects Under the National Environmental Policy Act" guidance document states that cumulative effects analysis is important "to ensure that federal decisions consider the full range of consequences of actions."<sup>71</sup> However, the Army Corps' NWP 12 Decision Document states that while an Environmental Impact Statement may be required to build certain utility lines, the Army Corps can still use NWP 12 "to authorize construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, as long as the activity complies with all applicable terms and conditions and results in minimal individual and cumulative adverse effects on the aquatic environment."<sup>72</sup>

Allowing the Army Corps to only consider the impact on the aquatic environment absent the additional environmental impacts to the surrounding lands, habitat, and ecosystems ignores the cumulative impact to the entire project area and does not allow for an effective NEPA review. None of the impacts—aquatic, environmental, or cultural—can be considered independently and used on their own to begin construction. Allowing construction of a large scale utility to go forward in a piecemeal fashion, is essentially green-lighting a project or project plan despite not being the lead agency responsible for the NEPA review. No large-scale infrastructure project should be divided into smaller segments for the sake of beginning construction using NWP 12.

Finally, the Army Corps has within its currently regulatory structure the discretionary authority to place additional conditions on NWP 12 proposed activities on a regional or case-by-case basis, including the ability to require coordination with tribal governments to ensure tribal treaty natural resources and cultural resources are not adversely impacted.<sup>73</sup> In addition to revising its NWP rules in accordance with the ACHP, each Army Corps division should be required to develop regional conditions for all NWPs which require early, meaningful, and effective tribal consultation and consent. Coordinating with Tribes in the each region ahead of time will establish a more collaborative government-to-government relationship, ensure protect of Tribal resources, and allow for the development of infrastructure projects in a responsible manner.

## **B. Advisory Council on Historic Preservation**

### **1. Strengthen Memorandums of Agreement**

The ACHP can strengthen its regulations, guidance, and policies surrounding entering into memorandums of agreement where tribes are just invited signatories and do not have the ability to stop the construction of a project if they believe the proposed mitigations will not adequately protect their sacred places.

If a Federal agency finds an adverse effect during the consultation with the SHPO/THPOs, Tribes, and the AHCP, the process typically concludes with a memorandum of agreement (MOA)

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<sup>71</sup> Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act*, January 1997, at 3.

<sup>72</sup> Army Corps of Engineers, *Decision Document Nationwide Permit 12*, Feb. 13, 2012, 10, available at: [http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP\\_12\\_2012.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf)

<sup>73</sup> 33 CFR 330.4

specifying how adverse effects will be avoided, minimized, or mitigated.<sup>74</sup> An MOA is a legally enforceable document which “shall govern the undertaking and all of its parts.”<sup>75</sup>

The MOA process begins with the Federal agency, SHPO/THPO, and other consulting parties, including tribes, consulting “to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”<sup>76</sup> The FAO must notify the ACHP and in some circumstances must invite the ACHP to participate in the consultation, and a tribe may ask the ACHP to participate. The ACHP makes the decision whether or not to participate, based on the criteria in Appendix A of 36 CFR Part 800.

While all consulting parties can participate in the negotiations, an MOA may still be signed even if some consulting parties object. The regulations use the term “signatories” for the parties that have the authority to execute an MOA, but also provide for “invited signatories” and “concurring parties” whose signatures are not required to execute the MOA. While there can be no MOA without the signatories, an MOA has legal force if signed by the signatories regardless of whether invited signatories or concurring parties have signed on. As provided in § 800.6(c)(1), in the following situations, the signatories are:

- If the ACHP has participated: the Federal agency officer, SHPO/THPO, and ACHP, at least typically, except when the SHPO terminates consultation, then it is just the Federal agency officer and ACHP
- If the ACHP did not participate: the Federal agency officer and SHPO/THPO.

Thus, if the ACHP has participated, an MOA cannot take effect without ACHP signature. Under the existing regulations, a tribe does *not* have the power to block an MOA for an undertaking that would not affect tribal lands under its jurisdiction, but the ACHP can block such an MOA. If a tribe is concerned that the Federal agency officer and SHPO may agree on measures to resolve adverse effects that the tribe finds unacceptable, the tribe has to ask the ACHP to participate in the consultation and to decline to sign if the proposed measures to resolve adverse effects are not acceptable.

The ACHP should update its regulations and guidance to provide tribes with signatory status, not just invited, so that their signatures are required in order for an MOA. Often, many tribes pour their limited resources and time into projects and then are not allowed to sign the agreement and it goes forward without their express approval. Tribes must have a proactive role in protecting as a full partner in the process.

## **2. Protect Against Anticipatory Demolition**

In many federal projects, and in the current Dakota Access Pipeline case, tribes have raised the very serious concern of companies engaging in “anticipatory demolition” in order to avoid the section 106 process in its entirety. This very troubling practice is a reality that many tribes have

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<sup>74</sup> 36 C.F.R. § 800.6(c)

<sup>75</sup> NHPA § 110(l), 54 U.S.C. § 306114.

<sup>76</sup> 36 C.F.R. § 800.6(a)

unfortunately experienced. The NHPA does provide some protections against this under section 110(k) which provides:

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of section 306108 of this title [NHPA section 106], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.<sup>77</sup>

This statutory provision only applies if the tribal sacred place has been determined to be eligible for the National Register, and it has been intentionally damaged by an applicant, and does not protect a sacred place that has not yet been determined eligible for the Register.

Since so many places of religious and cultural significance for tribes takes specialized expertise and knowledge which can only be provided by tribes themselves, archaeological surveys often miss such places. The ACHP must enforce its “reasonable and good faith effort” consultation requirement,<sup>78</sup> so that early and meaningful consultation occurs before any key decisions or actions are taken. In addition, all federal agencies should be directed to follow the National Parks Service guidance, Bulletin 38.

Anticipatory demolition may also occur is when potentially eligible properties are encountered in connection with construction activities *after* the section 106 process has been completed. Such discoveries are especially likely when compliance is documented with a Programmatic Agreement rather than an Memorandum of Agreement. Section 800.13 of the ACHP regulations addresses post-review discoveries. Paragraph 800.13(c) provides that the federal agency office, “in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106.”

To protect against anticipatory demolition in this context, ACHP should implement a presumption that, if a tribe says a place is sacred, it should be treated as eligible for the Register unless and until determined to not be eligible. With respect to post review discoveries, this might be accomplished by a guidance document that says to interpret the word “may” in paragraph 800.13(c) as “will.” Such a presumption should be crafted so that it operates to establish the element of intent to cause significant adverse effects.

### **C. Federal Energy Regulatory Commission**

The Federal Energy Regulatory Commission (FERC) is an independent Federal agency charged with regulating, inter alia, interstate natural gas pipelines and the licensing of hydropower dam projects, making FERC a vitally important agency for Indian Country. Dam projects such as the Pick-Sloan Project along the Missouri River, the Dalles Dam on the Columbia River, and the Elwha River Dams on the Elwha River have had a profound impact on Tribal Nations as

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<sup>77</sup> NHPA § 110(k), 54 U.S.C. § 306113

<sup>78</sup> 36 CFR § 800.4

construction and flooding have destroyed or permanently damaged Tribal lands, natural resources, and cultural places.

One of the major concerns Tribal governments have with FERC is regarding how the Commission views its role in carrying out the Federal trust responsibility as an independent Federal agency. In its 2003 Policy Statement on Consultation with Indian Tribes in Commission Proceedings, FERC states that it “will endeavor to work with Indian tribes on a government-to-government basis, and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to the Commission’s trust responsibility . . . .” However, FERC goes on to say that its consultation authorities are limited because “[a]s an independent regulatory agency, the Commission functions as a neutral, quasi-judicial body, rendering decisions on applications filed with it, and resolving issues among parties appearing before it, including Indian tribes.” This includes not engaging in off the record, or ex parte, communication with Tribes, even in a consultation setting. Therefore, if a Tribe disagrees or raises concerns during a consultation or meeting with FERC, the Commission has to end the meeting if the other parties are not present.

Further, FERC’s Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects directs project proponents to assist the Commission in meeting its obligations under section 106 of the NHPA and states that the project sponsor “should attempt to consult with the SHPO/THPO, Indian tribes, and applicable land-managing agencies.” This inappropriately and unlawfully delegates FERC’s obligations under section 106 to a third party.

Despite recognizing its Federal trust responsibility, FERC’s policies place Tribes on equal footing with project proponents instead of acknowledging Tribal governmental status. Further, FERC seeks to delegate its statutory role to project proponents. FERC sees its role in enforcing the Federal trust responsibility as being more of a judge or mediator between various interests, not as an agency charged with upholding it.

Therefore, when the interests of FERC, a project proponent, and Tribes align, as is the case with some dam removals, it creates a positive outcome for all parties. However when their interests do not directly align, and Tribes voice their concerns with a project directly to FERC, more often than not, FERC directs the Tribe to speak to the project proponent instead of the Commission itself. This allows FERC to play a passive role in the trust responsibility and creates a more adversarial atmosphere instead of a collaborative one. This is not to say the Tribes are adverse to speaking to project proponents; nor is it to say that those discussions cannot be beneficial. Rather, the point is that FERC cannot and should not absent itself from this process.

We recommend that FERC, through Tribal consultation, revise its Tribal consultation policies to further acknowledge and strengthen its direct role in protecting the tribal resources through its trust Federal trust responsibility obligations. FERC’s policies and guidance documents must also be updated to allow for early, open, and consistent communication between FERC and Tribal governments. FERC must also clarify that, as a Federal agency, it is solely responsible to uphold its Federal trust responsibility obligation to Tribal governments.

FERC should also increase the size of its staff involved in reviewing energy project applications and preparing the EIS for each project. Currently, FERC staff is insufficient to ensure adequate Tribal consultation in the process leading up to issuing a certification. Additional staff may help FERC carry out its responsibilities to provide early notice to Tribes, fully evaluate the potential

for a project to impact Tribes, and consult with Tribes regarding potential effects to Tribal rights and resources.

#### D. Nuclear Regulatory Commission

Throughout the infrastructure consultations, many Tribal leaders noted issues with the Nuclear Regulatory Commission's (NRC) consultations and interacts with Tribal governments. As an independent regulatory agency funded through dues from the industry which it regulates, a majority of the concerns the center around how the NRC implements its Federal trust responsibility.

The NRC took an important step in improving its Tribal policies by releasing a revised *Tribal Protocol Manual: Guidance* for NRC Staff in 2014. The Guidance is currently under review after a comment period, and we believe that it can be strengthened further.

As pointed out in comments provided by the ACHP, the NRC requires its staff to conduct “outreach in an effort to encourage Tribes to participate in the NRC regulatory process when agency policies have a *substantial direct effect* on one or more Indian Tribes.”<sup>79</sup> While the “substantial direct effect” is consistent with Executive Order 13175, because of the type of hazardous materials the NRC regulates and the potential for serious impacts to Tribal lands and natural resources, the NRC should broaden this term because what Tribes might consider a “substantial direct effect,” for example the impact to reserved treaty or trust right to hunting, gathering, and fishing rights in historical lands, might not be in considered by the NRC. This highlights the need for further Tribal engagement and collaboration.

Further, Section 2.B of the Guidance provides a solid and detailed states that for Tribal consultation “to be meaningful and effective” it must “begin early in agency consideration of an action or project . . .” and it includes:<sup>80</sup>

1. establishing mutually agreed protocols for open and timely communication describing proposed agency actions,
2. establishing agency points of contact,
3. identifying tribal government leadership and staff level points of contact,
4. developing mutually agreeable schedules for meetings between Tribal officials and representatives and NRC management and staff,
5. providing opportunities for Tribes to raise concerns on the effects NRC licensing or regulatory activities may have on Tribal interests, and
6. inviting Tribal participation in the NHPA and NEPA process.<sup>81</sup>

As suggested by the ACHP, we request that “inviting” in item six be changed to “ensuring” to better reflect the Tribal trust obligation the NRC has a Federal agency and is consistent with the statutory duties it has under NHPA and NEPA.<sup>82</sup>

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<sup>79</sup> U.S. Nuclear Regulatory Commission, *Tribal Protocol Manual: Guidance for NRC Staff*, 2014, 10 (emphasis added).

<sup>80</sup> *Id.* at 14.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 9, “The Federal government has a trust responsibility to Federally recognized Tribes, which applies to all executive departments and Federal agencies that deal with Native Americans, including the NRC.”

## **E. National Park Service**

As discussed above, many Tribal sacred places are eligible for the National Register as traditional cultural properties (TCPs), a kind of historic property that is the subject of a National Park Service guidance document, Bulletin 38.

Bulletin 38 provides some important guidance on applying the National Register criteria to places that hold religious and cultural significance for a tribe. For example, the word “history” may be interpreted to include oral history, and an “event” with which a place is associated may be an event in a tribe’s oral tradition, which need not be “demonstrated scientifically” to have happened;<sup>83</sup> the “persons” who were significant in our past may be persons “whose tangible, human existence can be inferred on the basis of historical, ethnographic, or other research” or “persons’ such as gods and demigods who feature in the traditions of a group.”<sup>84</sup> In addition, a TCP may be eligible for the Register because, through ethnographic or ethnohistorical research techniques, it has the potential to yield important information.<sup>85</sup> Additionally, interviews with elders is an acceptable way of developing information to fit within the TCP criteria.

The definition of TCP and criterion identified in Bulletin 38 was codified the 1992 Amendments to the National Historic Preservation Act, and Bulletin 38 remains an important guidance document. In 2012, NPS initiated a project to produce an updated edition, which has not been released yet. As this guidance is vital to federal agencies, we urge the NPS finish its revision as soon as possible and include tribal recommendations regarding the topics were identified by NPS, including describing: a “traditional” community; “continued use” by a traditional community; Evolving uses of resources by a traditional community; evolving uses of resources by a traditional community; broad ethnographic landscapes; property boundaries; and resource integrity.

## **F. Environmental Protection Agency**

The EPA plays a critical role in Federal infrastructure project permitting, including by providing comments on EISs prepared by other agencies. There are several steps EPA can take to improve protection of Tribal rights and resources.

The EPA should update its 1984 manual entitled “Policy and Procedures for the Review of Federal Actions Impacting the Environment.” Since the manual was published, there have been many developments in the Federal government’s understanding of its responsibilities to Tribal Nations, including consultation requirements. The manual should be updated to include the most up to date best practices for engaging Tribes and protecting Tribal rights and resources.

EPA should also improve its procedures for reviewing EISs to ensure consideration of impacts to Tribal Nations, including impacts to trust property and treaty rights. The EPA regional office should initially review each project to determine whether it will have an impact on Tribes. To the extent a project would affect Tribes, EPA should evaluate how Tribes have been involved in the

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<sup>83</sup> *Id.* at 12-13.

<sup>84</sup> *Id.* at 13.

<sup>85</sup> *Id.* at 14.

process, including in the evaluation of alternatives and the identification of historic and cultural properties. This analysis should inform EPA's response to EISs.

Additionally, CEQ should amend its regulations at 40 C.F.R. § 1503(a)(2)(ii) to ensure that off-reservation rights are protected. The current regulation addresses “when the effects may be on a reservation,” and this language should be amended to state “when the effects may be on a reservation, or in an area that is protected by treaty, or an area that has traditional, cultural, and historic importance.”

Finally, CEQ should issue a strong statement to all Federal agencies stressing the importance of following CEQ regulations in every respect, including involving Tribes early in the process and having Tribes take the lead in carrying out the tasks of identifying historic, cultural, and religious sites.

## **VI. Conclusion**

Every Tribal Nation in the United States has its own story—or multiple stories—of Federally approved destruction allowed to proceed over the objections of the Tribe and to the great detriment of Tribal lands, waters, treaty rights, and sacred spaces. This reality is reflected in the current groundswell of support for the Standing Rock Sioux Tribe's opposition to the Dakota Access Pipeline, and it ensures that the conflict at Standing Rock will not be the last unless the Federal government takes significant steps to protect Tribal interests in the infrastructure decision-making process.

NATIVE AMERICAN CAUCUS urges the Administration to issue fulfill its obligations under the FAST Act by issuing guidance entitled Principles and Best Practices for Infrastructure permitting Relating to Indian Tribes and the Federal Trust Responsibility. We recommend that this guidance incorporate the principles and best practices identified in this comment. We also urge the Administration to act swiftly on the agency-specific recommendations that we have identified.

The consultations hosted by the Department of Interior, Department of Justice, and Department of the Army have been an opportunity for Indian Country to move the nation-to-nation relationship further toward a true partnership and ensure that the Federal trust responsibility and Tribal concerns are addressed in Federal permitting and approval processes. Tribal Nations have expended significant efforts to attend these consultation and to provide the Federal government with detailed accounts of the ways in which Federal permitting processes are working to the detriment of Tribes and the ways in which they must be improved. Hopefully these consultations will not be yet another example of Federal agencies documenting Tribal concerns without taking action to implement Tribal input and protect Tribal rights. We look forward to working with you as you work to improve Federal infrastructure decision-making to uphold the United States' responsibilities to Tribal Nations.