



## NATIONAL CONGRESS OF AMERICAN INDIANS

### Proposed Federal Permitting Improvement Steering Council and Office of Management and Budget Guidance:

#### *Principles & Best Practices for Infrastructure Permitting Relating to Tribal Nations and the Federal Trust Responsibility*

November 2016

#### **I. Authority to Issue Policy Statement under the FAST Act**

The Fixing America's Surface Transportation (FAST Act), Pub. L. 114-94 (Dec. 4, 2015), requires that the Federal Permitting Improvement Steering Council make recommendations to its Executive Director regarding certain best practices including enhancing stakeholder engagement and improving coordination between Federal and non-Federal governmental entities. Sec. 41002(2)(B). The Executive Director, in turn, is authorized to recommend that the Office of Management and Budget (OMB) issue guidance to effectuate these best practices. In accordance with the recommendations of the Executive Director, the OMB hereby directs all Federal agencies to implement the following 12 principles and best practices for infrastructure permitting that impacts Tribes, with the goal of expediting infrastructure development while protecting Tribal lands and areas of traditional and cultural significance to Tribes.

#### **II. Statement of 12 Principles & Best Practices**

##### **A. Principles**

**1. Recognition of Tribal Sovereignty.** Tribes are sovereign governments pre-dating the United States and retaining the right to govern their own people and lands. From this, stems a nation-to-nation relationship affirmed in the U.S. Constitution, treaties, statutes, policies, and judicial decisions. Tribes should not be treated as members of the public entitled to limited information and ability to comment. Rather, agencies are charged with carrying out substantive legal responsibilities to Tribes. In carrying out these responsibilities, one primary tool is consultation to ensure consideration and accommodation of those substantive rights.

**2. Compliance with the Federal Trust Responsibility, Including Tribal Informed Consent.** Rooted in lands cessions made by Tribes and U.S. promises to protect rights of self-governance on reserved lands, the federal trust responsibility requires the United States to protect and enhance Indian trust resources and Tribal self-government. The United States is held to the highest standards of good faith consistent with principles of common law trust. These principles prohibit self-dealing and further requiring that trust assets, including land, not be managed to the benefit of the trustee without the informed consent of the beneficiary.

**3. Respect for Tribal Treaty Rights.** Federal law protects Tribal treaty rights, including off-reservation rights. To facilitate and safeguard the exercise of these rights, Tribes often engage in regulatory, management, conservation, and law enforcement activities going well beyond the borders of Indian Country, frequently in close cooperation with federal and state governments. The United States has the responsibility to protect all treaty rights, as well as cultural rights as trust resources.

**4. Upholding Statutory Obligations.** The United States must work cooperatively with Tribal governments to fulfill statutory obligations in the same manner as it works with state and local governments. These statutory obligations include, without limitation, those encompassed in the National Historic Preservation Act, National Environmental Policy Act; Clean Water Act; Rivers and Harbors Act; Mineral Leasing Act; Native American Graves Protection and Repatriation Act; American Indian Religious Freedom Act; Archaeological Resources Protection Act; and other federal laws.

**5. Ensuring Environmental Justice.** The United States is obligated to ensure that the benefits of infrastructure development are fully shared by Tribes and that the burdens of infrastructure projects do not fall disproportionately on Tribal communities, lands, or resources. In considering alternatives for projects, routes or options deemed unfit when they burden non-Tribal communities should be automatically considered unacceptable for burdening Tribal communities.

## **B. Best Practices**

**1. Consultation in Early Planning and Coordination.** Meaningful consultation requires that Tribes be included in setting infrastructure development priorities; that Tribes be consulted from the very earliest stages of projects; that consultation be undertaken with the goal of reaching consensus; and that Tribal consent be obtained when projects are likely to significantly impact Tribal resources. Engaging in meaningful, early Tribal consultation facilitates project development by avoiding late and costly Tribal objections that can lead to administrative appeal, litigation, or public protest.

**2. Regional Mapping and Tribal Impact Evaluation.** Federal agencies shall work together to do appropriate mapping of Tribal lands, both historic and current, in the area of infrastructure development based on self-identification by Tribes, to facilitate early and effective communication between Federal agencies, Tribes and other interested parties, as appropriate. The Federal Communication Commission has developed such a confidential system on a nation-wide basis to facilitate communications between the FCC, Tribes and tele-communications companies, in order to expedite infrastructure development while protecting areas of traditional and cultural significance to Tribes.

**3. Early, Adequate Notice and Open Information Sharing.** Tribal governments should be notified at the earliest possible time in an agreed manner that results in actual notice and that is sufficiently detailed such that it results in an understanding of potential benefits and risks and distinguishes new projects from routine permit renewals. Information must be shared with Tribes in the same manner as with state and local governments.

**4. Funding for Tribal Participation in Process.** Tribes must have access to funding to participate in permitting processes, including funding for Tribal Historic Preservation Offices and for Tribal environmental review. Funding is necessary for Tribes to educate themselves about their rights under various statutes and to analyze and respond to the many notices they receive regarding federal infrastructure projects. Ensuring that Tribal consultation occurs and Tribal rights are respected is a federal responsibility, and the federal government should provide funding for Tribal participation in that process.

**5. Training for Agencies to Improve Understanding of Tribal Stakeholders.** Agency staff require training to increase familiarity with Tribal lands, rights, and concerns. Trainings should be held regularly in addition to occurring whenever there are leadership changes. Trainings should include an understanding of Tribal cultures, Tribal trust and treaty rights, and relevant consultation obligations. Tribes should be included in the development of training materials.

**6. Indian Trust Impact Statement and Trust Responsibility Compliance Officer.** Prior to permitting actions that may significantly impact Tribal rights or resources, agencies should submit to the Tribe a statement identifying the proposed action; the potentially impacted Tribal rights; whether the Tribe consented; discussion of how Tribal rights were accommodated and impacts mitigated and how the Federal trust responsibility was balanced against additional statutory duties; and, if involving a taking or otherwise affecting Indian lands, in lieu lands must be offered. The statement must include a certification of Tribal consent or an account of the extraordinary circumstances where a compelling national interest requires action. Any determination that extraordinary circumstances and national interest require action in the absence of tribal consent should be reviewed by a Trust Responsibility Compliance Officer. This Officer should be the Secretary of the Interior for projects permitted by other agencies and should be the Managing Director of the Council on Environmental Quality for Interior-permitted projects.

**7. Cumulative Impacts and Regional Environmental Impact Statements.** Environmental and cultural assessments should also 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.