

Re: Federal Consultation with Tribes Regarding Infrastructure Decision-Making

*Comments by Brenda Commander, Chief, Houlton Band of Maliseet Indians
November 10, 2016*

Good morning. My name is Brenda Commander. I am Chief of the Houlton Band of Maliseet Indians. I want to thank the Departments of Interior, Justice, and Army for providing this opportunity to help you develop consultation processes that ensure federal decision-making is consistent with federal obligations to tribal nations. I was pleased to see that your invitation letter referenced treaty rights in regard to those obligations. I wish it had also mentioned the federal fiduciary trust responsibility and the inherent rights of Native American tribes described in the United Nations Declaration on the Rights of Indigenous Peoples. These are key concepts to instill in federal agencies if they are to be truly successful in meeting those obligations. The federal government must engage with us as rights holders not stakeholders.

As an elder and an elected leader of my Tribe, I am charged with the responsibility of protecting the health and welfare of our members and sustaining and renewing our traditional ways and ancient cultural ties to the environment. I believe you, as our trustees, have a legal obligation, consistent with your authorities, to support our efforts to fulfill this charge.

We Maliseets traditionally fish, trap, hunt, and gather in and around the land and waters of the Wolastoq or, as you may know it, the St. John River, as we have done for many generations. We have trust land along the Meduxnekeag, a tributary of the St. John. This water is sacred to us.

I will begin my comments today by sharing an unsatisfactory consultation experience we had with the regulatory arm of the Army Corps of Engineers that took place in 2013, regarding a General Permit proposed for New England for infrastructure development. While our input was solicited, the Corps' approach was deficient in several important ways:

- 1) It was clear to us that while the Corps felt it necessary to consult with us regarding their responsibilities under the National Historic Preservation Act, they did not believe the President's Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, had any effect in this case.
- 2) We heard that our concerns regarding the potential negative effects of their federal permitting process on our River did not warrant specific notification let alone consultation.
- 3) The Corps also did not acknowledge any federal fiduciary trust obligation to us during this process.

In contrast to our experience with the Army Corps of Engineers, the Environmental Protection Agency (EPA) has provided us with an exemplary consultation process, informed by extensive consultation with federal recognized tribes in the northeast region and across the country. While implementation of the process is still a work in progress, they have invested time, resources and commitment to EPA's 1984 Indian Policy, their fiduciary trust obligations, and most recently honoring tribal treaty rights. Curt Spaulding, Regional Administrator of EPA New England under the Obama Administration meets with Tribal leaders at biannual Tribal Leaders Summits to proactively discuss our concerns and issues. He has visited every tribal community in the Region, sometimes more than once, to see first-hand what those issues are. This consultation has netted tribes in the Region concrete actions that support the protection of tribal trust resources. This proactive approach allows agencies to anticipate concerns we may have around proposed infrastructure projects.

You have asked for examples of collaboration with federal agencies we have found useful. We are currently engaged in two collaborative efforts that both involve very positive engagement by the Corps. One project, which started several years ago, crosses the US/Canada

international boundary to develop a fish habitat assessment and management plan for our international Meduxnekeag River.

More recently, we have begun working with the Corps and other federal agencies on a second even more ambitious effort to create international collaboration around management of the entire St. John River Watershed, which includes two countries, two provinces, a state, two federally recognized tribes and six Maliseet First Nations. These collaborations have been extremely meaningful because the federal agencies involved have asked us what we need and responded in very concrete ways to address those needs.

Streamlining the consultation process across federal agencies would be a very helpful way to support our ability to provide input into infrastructure decisions. We are a small tribe with limited capacity and we are flooded with consultation requests from our very large federal government. Collaborative consultation, where possible, when multiple federal agencies are involved in common decision-making would allow us to more effectively engage in these consultations.

I have attached a specific list of recommendations developed by the United South and Eastern Tribes to answer most of your consultation questions. We are a member of that organization and generally support those recommendations.

We have made one small but significant modification of those recommendations by striking out the language “in a manner similar to state governments”. This language in other federal laws, rules and regulations has created as many problems as it has solved in our experience. Tribes are not similar to states of the US in many ways. Attempting to fit us into systems and processes designed for the federal-state relationship often doesn’t work well.

In conclusion, I want to share the sentiments of a federal employee who has supported our efforts at protecting our River for almost 20 years. When asked why, he tells people first of all because it’s the right thing to do and something he wants to do. And then he tells them that if that were not true, he would still do it, because federal law requires him to. If every federal agency and employee took this to heart, it would go a long way to improve federal/tribal relationships.

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Attachment A. USET Specific Recommendations (slightly modified, see strike-through)

- All federal agencies, including independent federal agencies, must be required to adhere to existing consultation policies with additional oversight from the White House. Tribal Nations must have the opportunity to regularly review and provide comments on the efficacy of existing policies. Policies must be amended and improved at the request of Tribal Nations.
- Tribal Nations must certify that meaningful consultation has taken place before federal infrastructure projects can move forward. Meaningful consultation includes engaging with Tribal Nations at the very beginning of any planning, assessment, or review processes on a nation-to-nation basis and positively acting upon Tribal guidance and input. Tribal consent should be required when infrastructure projects have the potential to have significant impacts on Tribal Nations' traditional lands, resources, cultures, and ways of life. New legislation may be needed to require Tribal consent.
- Since 2009, as part of the efforts to strengthen the economy and create new jobs, the Obama Administration has taken actions to expedite federal review of infrastructure projects. The Fixing America's Surface Transportation (FAST) Act of 2015 streamlines and expedites permitting for federal infrastructure projects, a process that fails to include Tribal Nations. The Office of Management and Budget (OMB), however, has the ability to ensure the Federal Permitting Improvement Steering Council adopts policy that includes Tribal Nations and honors the federal trust responsibility. Tribal policy recommendations for the Council include:
 - All agencies issuing permits for infrastructure projects affecting Tribal lands, waters, or sacred places must demonstrate Tribal trust compliance.
 - A Tribal Trust Compliance Officer, who is knowledgeable about Indian tribes and tribal lands, should be appointed to the Federal Permitting Improvement Steering Council to make sure that the tribal trust compliance is integrated into all regulations and guidance implementing the FAST Act and any other federal infrastructure permitting in any agency.
 - Tribal governments must be provided, ~~in a manner similar to state governments,~~ full and early participation in "purpose and need" infrastructure permitting discussions.
- Tribal governments must be provided, ~~in a manner similar to state governments,~~ funding for participation in federal permitting processes.
- The United States and all federal agencies must exercise appropriate oversight in the siting and construction of infrastructure projects. If private entities or government contractors are harming Tribal resources, as reported by Tribal Nations or others, the