

# Federal Tribal Consultation

## Introduction

Tribal consultation is the process rooted in the recognition of Tribal sovereignty by which federal agencies engage in government-to-government communication with federally recognized Tribes when the agency seeks to take, fund, or approve actions with Tribal implications. An action has Tribal implications if it imposes compliance costs or obligations on Tribes, preempts existing Tribal law, or otherwise shifts the relationship between Tribes and the United States. Such actions may include promulgation of regulations, formulation of policies, creation of land management plans, natural resources leasing, and more. While the consultation process is mandated by certain statutes, it is largely a legally non-binding requirement arising out of a mix of executive orders and memoranda, as well as agency policy. What follows is a brief overview of the Tribal consultation process as it exists today, beginning with its legal basis and followed by a summary of key Presidential, agency, and statutory sources of law and policy governing consultation.

## Legal Basis for Tribal Consultation

The legal basis for the U.S. federal government's obligation to consult with Tribes and recognize Tribal sovereignty is Article I, Section 8, Clause 3 of the U.S. Constitution, also known as the "Indian Commerce Clause," which grants Congress the authority to regulate commerce with Tribes on the same footing as foreign nations and states.<sup>1</sup> Additionally, Article VI, Clause 2, of the Constitution explicitly states that treaties, including those made with Tribes, are the supreme law of the land.<sup>2</sup> The United States entered into treaties with Tribes from the late 1700s to the 1870s, and today treaties are recognized as having created a government-to-government relationship between the United States and Tribes.<sup>3</sup>

Federal Indian policy is based on the principles of self-determination and self-governance, the practical concepts that Tribal governments—as sovereign nations whose existence predate the founding of the United States—maintain the "ability to govern and to protect

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<sup>1</sup> U.S. Const. art. I, § 8, cl. 3 ([The Congress shall have Power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

<sup>2</sup> U.S. Const. art. VI, § 2.

<sup>3</sup> Congressional treaty-making with Tribes ended in 1871 pursuant to the Act of March 3, 1871, chapter 120, section 1. 16 Stat. 544 (codified as carried forward at 25 U.S.C § 71). However, federal policy created through statutes, regulations, agreements, and executive orders continue to implement the reservation system and the federal trusteeship over Tribal landholdings. Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*: 2005 Edition 1.02-.07, 23 (Nell Jessup Newton et al. eds., 2005) [hereinafter *Cohen's Handbook*].

the health, safety and welfare of Tribal citizens within Tribal territory.”<sup>4</sup> The “federal Indian trust responsibility” is a critical principle of federal Tribal law under which the United States has a fiduciary obligation to “protect Tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native Tribes and villages.”<sup>5</sup> The “trust relationship is a doctrine originating in common law, and also expressed in numerous treaties and statutes.”<sup>6</sup> An additional aspect of the trust responsibility is the authority of the federal government—granted by legislation—to retain or hold Tribal land in trust (also known as trust lands).<sup>7</sup> Although the trust lands are to be administered by the U.S. for the benefit of Tribes, in practice, “virtually everything a tribe may wish to do with its land must be approved by the federal government.”<sup>8</sup>

The U.S. Supreme Court has long approached Tribes as “domestic dependent nations” whose sovereignty and federal trust relationship has been shaped by the Court over time. The Supreme Court formally recognized the federal trust relationship toward Tribes in *Cherokee Nation v. Georgia*,<sup>9</sup> where it described the relationship between Tribes and the United States as resembling “that of a ward to his guardian.”<sup>10</sup> In later years, the Supreme Court affirmed the importance of its fiduciary duty to Tribes, observing that the United States “has charged itself with moral obligations of the highest responsibility and trust.”<sup>11</sup> Today, the modified trust responsibility imposes on the federal government several substantive duties: “to provide federal services to Tribal members, to protect Tribal

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<sup>4</sup> Susan Johnson, Jeanne Kaufmann, John Dossett, & Sarah Hicks, *Government to Government: Understanding State and Tribal Governments*, Nat’l Conf. of State Legislatures & Nat’l Cong. Of Am. Indians (Jun. 2000), <https://cdn.sanity.io/files/raa5sn1v/production/84e33e251e1bb5aab850ae47f917ab507d3d9765.pdf>.

<sup>5</sup> *Frequently Asked Questions*, U.S. Dep’t of the Interior, Indian Affairs, <https://www.bia.gov/frequently-asked-questions> (last visited Feb. 4, 2022) [hereinafter DOI FAQ]; see also Pub. L. No. 108-199, div. H, § 161, 118 Stat. 3, 452 (2004), as amended by Pub. L. No. 108-447, div. H, tit. V, § 518, 118 Stat. 2809, 3267 (2004) (requiring federal agencies to consult with Alaska Native Corporations on the same basis as Tribes under Executive Order 13175).

<sup>6</sup> Cohen’s Handbook, *supra* note 3, at 529.

<sup>7</sup> See 25 U.S.C. § 5601.

<sup>8</sup> *Fact Sheet: American Indians and Alaska Natives- the Trust Responsibility*, Administration for Native Americans, <https://www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-trust-responsibility#:~:text=The%20trust%20doctrine%20is%20a,tribes%20and%20respect%20their%20sovereignty> (last visited Feb. 25, 2022).

<sup>9</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

sovereignty, to protect Tribal resources[,]" and the procedural duty to consult with federally recognized Tribes.<sup>12</sup>

The federal government has formally recognized that government-to-government consultation is essential to fulfilling its trust responsibility to Tribes, supporting Tribal sovereignty, and promoting Tribal self-governance. In the United States, government-to-government consultation is not a fundamental or constitutional right. Instead, consultation is a nonbinding obligation that arises in specific circumstances under executive orders, federal statutes, implementing regulations, and federal agency policies, which is discussed further in the following section. Commentators have criticized the federal consultation system for its lack of uniformity among the dozens of statutes, regulations, executive orders, and agency-issued consultation policies.<sup>13</sup> Consultation is "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."<sup>14</sup> Ideally, this process involves the timely, direct, and interactive communication with Native American or Alaska Native Tribal governments regarding proposed agency actions.

Though not uniform across agencies, the following is a summary of some common features of the consultation process. As a government-to-government negotiations process, Tribal consultation only occurs between the United States and "federally recognized" Tribes.<sup>15</sup> Non-federally recognized Tribes do not have the same legal or political status with the federal government and therefore are denied the benefits of a government-to-government relationship.<sup>16</sup> Negotiations with federally recognized Tribes are to be carried out between federal and Tribal officials with decision-making authority following procedures set forth in executive orders and implementing agency policies or

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<sup>12</sup> Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J.L. Reform 417, 430, 436 (2013); *but see* *Arizona v. Navajo Nation*, No. 21-1484, slip op. at 5 (Jun. 22, 2023) (holding that the trust relationship did not create an affirmative duty for the United States to ascertain the extent of, or support access to, Tribal reserved water rights).

<sup>13</sup> Routel & Holth, *supra*, at 463.

<sup>14</sup> Exec. Order No. 13175, 3 C.F.R. 304, § 5(a) (2001).

<sup>15</sup> *See* DOI FAQ, *supra* note 5 (defining a federally recognized Tribe as an "American Indian or Alaska Native Tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation"); *see also* H.R. Rep. No. 103-781, 103rd Cong., 2d Sess., 2 (1994); *see also* Pub. L. No. 108-199, div. H, § 161, 118 Stat. 3, 452 (2004), as amended by Pub. L. No. 108-447, div. H, tit. V, § 518, 118 Stat. 2809, 3267 (2004) (providing that Federal agencies must consult with Alaska Native Corporations "on the same basis as Indian Tribes under Executive Order 13175"); *see also* *Requirement to Consult with the Native Hawaiian Community*, U.S. Dep't of the Interior, <https://www.doi.gov/hawaiian/requirement-consult-native-hawaiian-community> (last visited Feb. 4, 2022).

<sup>16</sup> Cohen's Handbook, *supra* note 3, at 152.

guidance.<sup>17</sup> For example, the Tribal Consultation Policy for the U.S. Department of Justice explains that “consultation should involve individuals who have decision-making authority on the issue that is the subject of the Consultation.”<sup>18</sup> The consultation process may be initiated by the agency seeking to take action or by the affected Tribes or an Intertribal organization representing them.<sup>19</sup> Many of the agency policies for Tribal consultation have been developed as a response to executive orders and memoranda, particularly executive order 13175 signed near the end of the Clinton administration.

## Federal Statutes and Regulations

Tribes have a Congressionally created right of action to bring suits against federal agencies pursuant to the government-to-government consultation requirements included in a few specific statutes and their implementing regulations.<sup>20</sup>

- **National Historic Preservation Act (NHPA)** is the most significant statute regarding consultation. The statute and its implementing regulations establish the Section 106 process, which obligates federal agencies to “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.”<sup>21</sup> Consultation is defined in the Advisory Council on Historic Preservation’s (ACHP) regulations as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.”<sup>22</sup> Consultation is to occur prior to initiating a project and applies regardless of the location of the historic property.<sup>23</sup> The implementing regulations state that the goal of consultation as required by Section 106 is “to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”<sup>24</sup>
- **Archeological Resources Protection Act (ARPA)** requires federal agencies to notify a Tribe when a permit is issued to “excavate or remove any archaeological resource located on public lands or Indian lands” that may result in harm or destruction to a

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<sup>17</sup> Routel & Holth, *supra* note 13, at 458.

<sup>18</sup> U.S. Dep’t of Justice, DOJ Policy Statement 0300.01, Tribal Consultation 6 (Nov. 30, 2022), <https://www.justice.gov/sites/default/files/otj/docs/doj-memorandum-tribal-consultation.pdf>.

<sup>19</sup> U.S. Dep’t of Interior, Departmental Manual, 512 D.M. 5, § 5.5(A) (Nov. 9, 2015), <https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-5.pdf>.

<sup>20</sup> Routel & Holth, *supra* note 13, at 449; *see* Indian Tucker Act, 28 U.S.C. § 1505 (2006) (waiving federal sovereign immunity in the U.S. Court of Federal Claims for claims brought by Tribes arising under the Constitution, federal statutes and treaties, Executive orders, or claims otherwise cognizable).

<sup>21</sup> 36 C.F.R. §§ 800.2©(2)(i)-(ii); 54 U.S.C. § 302706 (b).

<sup>22</sup> 36 C.F.R. § 800.16(f)].

<sup>23</sup> 36 C.F.R. § 800.1(c).

<sup>24</sup> 36 C.F.R. § 800.1(a).

site the Tribe considers as having “religious or cultural importance.”<sup>25</sup> The implementing regulations provide that Tribes may request consultation “to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area.”<sup>26</sup> Federal agencies are referred to NAGPRA and its implementing regulations for “cases involving Native American human remains and other “cultural items.”<sup>27</sup>

- **Native American Graves Protection and Repatriation Act (NAGPRA):** NAGPRA requires federal agencies to initiate government-to-government consultation for activities on federal and Tribal land that might result in the removal of Native American human remains and cultural items.<sup>28</sup> These items must be identified in inventories in consultation with Tribal governments and repatriated or transferred to the appropriate parties once prior notice of the exchange is given.<sup>29</sup> To bolster Tribal participation, DOI updated its implementing regulations for NAGPRA effective January, 2024, requiring the National Park Service and its museums to more proactively engage in Tribal consultation and encouraging deference to Tribal cultural knowledge regarding the identification of human remains and cultural items.<sup>30</sup>

The following statutes do not explicitly create a consultation obligation. Instead, consultation duties are incorporated in the statute’s implementing regulations (e.g., NEPA) and Secretarial Orders (e.g., ESA). Secretarial Orders do not grant legally enforceable rights or trust responsibilities or modify Tribal rights.

- **National Environmental Policy Act (NEPA)** is a procedural process that aims to ensure agencies consider the impacts of proposed federal actions affecting the quality of the human environment.<sup>31</sup> NEPA’s implementing regulations encourage agencies to “consult early with appropriate State, Tribal, and local governments” when carrying out the NEPA process.<sup>32</sup> Additionally, the regulations provide that Tribal governments “may act as joint lead agencies to prepare an environmental impact statement or environmental assessment.”<sup>33</sup>

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<sup>25</sup> 16 U.S.C. §§ 470cc(a)-(c).

<sup>26</sup> 43 C.F.R. § 7.7(a).

<sup>27</sup> *Id.* § 4.4(b)(4).

<sup>28</sup> 25 U.S.C. § 3001-3013 (2018)

<sup>29</sup> 25 U.S.C. § 3003(b)(1)(A); *see also* 43 C.F.R. § 10.5, § 10.8, § 10.9.

<sup>30</sup> *Interior Department Announces Final Rule for Implementation of the Native American Graves and Repatriation Act*, U.S. Dept’ of the Interior (Dec. 6, 2023), <https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves>.

<sup>31</sup> 42 U.S.C. § 4321 *et seq* (1970).

<sup>32</sup> 40 C.F.R. § 1501.2(a); (b)(4)(ii).

<sup>33</sup> 40 C.F.R. § 1501.7(b).

- **Endangered Species Act (ESA)** creates a program to conserve threatened and endangered plants, animals, and their habitats.<sup>34</sup> Secretarial Order 3206 elaborates on the federal-Tribal trust responsibilities and mandates that departments engage in government-to-government consultations “to address the conservation needs of listed species.”<sup>35</sup> Secretarial Order 3225 establishes that federal departments will consult with Alaska Natives, Tribes and other Native organizations to determine whether these groups will be exempt from the prohibition against taking endangered or threatened species on the grounds that the group uses these species to fulfill their subsistence needs.<sup>36</sup> The Order also outlines a consultation framework that directs agencies to create “cooperative agreements for the conservation of such species and the co-management of subsistence uses.”<sup>37</sup>

## Executive Orders and Presidential Memoranda

Executive orders and presidential memoranda direct federal agencies to consult with Tribes when developing regulatory policies with “tribal implications.”<sup>38</sup> However, unlike statutes, these authorities only identify management approaches to consultation and do not create enforceable rights, benefits, or trust responsibilities against the federal government or its agencies.<sup>39</sup> As a result, federal courts have repeatedly dismissed lawsuits based solely on a duty arising out of Executive Order 13175 or other Presidential Memoranda.<sup>40</sup>

### Executive Orders

An executive order is a directive from the president of the United States to federal agencies that has the force of law. Executive orders are based on existing statutory powers and are not legislation in and of themselves, thus Congress does not have unilateral authority to

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<sup>34</sup> 16 U.S.C. § 1531-1544 (2018).

<sup>35</sup> Marren Sanders, *Implementing the Federal Endangered Species Act in Indian Country: The Promise and Reality of Secretarial Order 3206*, in Joint Occasional Papers on Native Affairs: Udall Center for Studies in Public Policy and Harvard Project on American Indian Economic Development, at 16 (2007); U.S. Dep’t of the Interior, *Secretarial Order No. 3206 (Working with Tribes | American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act)* (June 5, 1997), <https://www.fws.gov/endangered/what-we-do/tribal-secretarial-order.html>.

<sup>36</sup> U.S. Dep’t of the Interior, *Secretarial Order No. 3225 (Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206))*, (Jan. 19, 2001), <https://www.fws.gov/nativeamerican/pdf/secretarial-order-3225.pdf>.

<sup>37</sup> *Id.* at § 3.

<sup>38</sup> Exec. Order No. 13175, 3 C.F.R. 304, § 5 (2001).

<sup>39</sup> Routel & Holth, *supra* note 13, at 450-51.

<sup>40</sup> *Id.*

approve or overturn them, though it can pass legislation invalidating them.<sup>41</sup> The judiciary can overturn or stay enforcement of an executive order if it finds that the president overstepped their constitutional authority. Executive orders apply to all federal agencies. Relevant executive orders for Tribal consultation include:

- **Executive Order 13175** (E.O. 13175, signed Nov. 6, 2000 by President Clinton) charges agencies to develop consultation processes “to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”<sup>42</sup> The phrase “policies that have tribal implications” is defined in the E.O. as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes”<sup>43</sup> The E.O. orders agencies to follow a number of criteria when formulating and implementing policies that have Tribal implications, such as respecting Tribal self-government and sovereignty, encouraging Tribes to develop their own policies, deferring to the judgment of Tribes, and consulting with Tribal officials.<sup>44</sup> Agencies are instructed to consult with Tribal officials early in the process of developing a proposed regulation.<sup>45</sup> Finally, when an agency proposes regulation that has Tribal implications, imposes compliance costs on Tribes, and is not required by statute, or if the regulation preempts Tribal law, the agency must submit to the Director of the Office of Management and Budget, along with the final draft regulation, a Tribal summary impact statement detailing the extent of Tribal consultation, outlining the concerns presented by the Tribe, and a statement describing the agency’s response to those concerns.<sup>46</sup> All written communications received from Tribal officials during the course of consultation must also be submitted to the Director.<sup>47</sup>
- **Executive Order 13007** (E.O. 13007, signed May 24, 1996 by President Clinton) requires federal agencies to develop consultation procedures that are to be

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<sup>41</sup> *General FAQs on Executive Orders*, ABA (Nov. 28, 2021), [https://www.americanbar.org/groups/public\\_education/resources/teacher\\_portal/educational\\_resources/executive\\_orders/](https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/) (describing that after the legislature invalidates an executive order, the president may veto such legislation. In turn, Congress can override the presidential veto with a two-thirds majority in the House and the Senate, meaning that the legislation would stand and the executive order would be invalidated. Additionally, Congress may use its power of the purse to deny funding for an action proposed in an executive order).

<sup>42</sup> Exec. Order No. 13175, 3 C.F.R. 304, § 5 (2001).

<sup>43</sup> *Id.* at § 1(a).

<sup>44</sup> *Id.* at § 3(a)-(c).

<sup>45</sup> *Id.* at § 5(b)(2)(A).

<sup>46</sup> *Id.* at §§ 5(b)(2)(B), 5(c)(2).

<sup>47</sup> *Id.* at §§ 5(b)(2)(C), 5(c)(3).

implemented when agency action on federal lands may adversely affect a Tribe's "access to, ceremonial use of, or the physical integrity of sacred sites."<sup>48</sup>

### ***Presidential Memoranda***

The Presidential administrations of Bill Clinton, George W. Bush, Barack Obama, and Joe Biden each issued memoranda recognizing the unique legal and political relationship between Tribes and the federal government and affirming their commitment to engage in respectful government-to-government consultation.

- **President Clinton's** Memorandum on Government-to-Government Relations with Native American Tribal Governments, issued in 1994, was a precursor to the Executive Order's outlined above. It directed executive departments and agencies, to the greatest extent possible and permitted by law, to conduct "open and candid" consultation with Tribes when taking actions that affected federally recognized Tribal governments.<sup>49</sup>
- **President Bush's** Memorandum for the Heads of Executive Departments and Agencies reaffirmed Executive Order 13175, and directed the heads of executive departments and agencies to ensure the working relationship with federally recognized tribal governments respects the rights of self-government and self-determination.<sup>50</sup>
- **President Obama's** Memorandum on Tribal Consultation directed agency heads to consult with Tribes and Tribal officials to create plans of action to implement the policies of E.O. 13175 and submit them to the Director of the Office of Management and Budget.<sup>51</sup>
- **President Biden's** administration has issued three significant memorandums related to Tribal consultation:
  - The Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships affirms prior presidential memorandums directing agencies to consult with Tribal Nations and requires agencies to submit

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<sup>48</sup> Exec. Order No. 13007, 61 Fed. Reg. 26771 § 2(B) (May 24, 1996).

<sup>49</sup> *Memorandum on Government-to-Government Relations with Native American Tribal Governments*, The White House of President Clinton (Apr. 29, 1994), <https://www.doi.gov/pmb/cadr/programs/native/Government-to-Government-Relations-with-Native-American-Tribal-Governments>.

<sup>50</sup> *Memorandum for the Heads of Executive Departments and Agencies*, The White House of President George W. Bush (Sept. 23, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040923-4.html#:~:text=my%20administration%20is%20committed%20to,governments%20in%20the%20unit ed%20states>.

<sup>51</sup> *Presidential Memorandum on Tribal Consultation*, The White House of President Barack Obama (Nov. 5, 2009), <https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president>.



detailed plans of action to implement the policies and directives of Executive Order 13175.<sup>52</sup>

- The Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights signals a willingness from 17 federal agencies to work together to strengthen consultation policies and improve coordination with federally recognized Tribes.<sup>53</sup>
- The Memorandum on Uniform Standards for Tribal Consultation, which “is designed to respond to the input received from Tribal Nations regarding Tribal consultation, improve and streamline the consultation process for both Tribes and Federal participants, and ensure more consistency in how agencies initiate, provide notice for, conduct, record, and report on Tribal consultations.”<sup>54</sup> These are baseline standards; agencies are encouraged to build upon them to fulfill the goals and purposes of Executive Order 13175 consistent with their unique missions and engagement with Tribal Nations on agency-specific issues.

### Secretarial Orders, Agency Policies, Handbooks, and Manuals

In response to E.O. 13175, “nearly every agency chose to comply with the directives by issuing orders, creating informal policies, and revising handbook procedures.”<sup>55</sup> However, agency consultation policies are often characterized as “toothless” because they do not create a private right of action for Tribes and are mostly unenforceable.<sup>56</sup> Additionally, there is no requirement that agencies actually implement the final consultation policies that they develop.<sup>57</sup>

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<sup>52</sup> *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, The White House (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

<sup>53</sup> *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights*, U.S. Dep’t of the Interior (Nov. 2021), <https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf>. In response to President Biden’s Memorandum, the Department of Interior released a Detailed Plan articulating various goals for refining implementation of E.O. 13175, such as by providing timely notice to Tribes, increasing agency accountability, and improving consistency in applying consultation procedures. U.S. Dep’t of the Interior, *A Detailed Plan for Improving Interior’s Implementation of E.O. 13175* (Aug. 1, 2021), <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf>.

<sup>54</sup> *Memorandum on Uniform Standards for Tribal Consultation*, The White House (Nov. 30, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/>.

<sup>55</sup> Routel & Holth, *supra* note 12, at 451.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 447.

There is little consensus across the federal court system on whether agencies must follow their own consultation policies. In 1987, the Ninth Circuit Court of Appeals held in *Hoopa Valley Tribe v. Christie*<sup>58</sup> that the consultation policies released by the Bureau of Indian Affairs are unenforceable because they do not have the force of law and “do not establish legal standards that can be enforced against the Bureau.”<sup>59</sup> On the other hand, in 2015, the U.S. District Court of Wyoming found in *Wyoming v. United States DOI*<sup>60</sup> that Bureau of Land Management consultation efforts with the Ute Indian Tribe were insufficient pursuant to DOI consultation policies and Secretarial Order No. 3317.<sup>61</sup>

### **Secretarial Orders**

- **Secretarial Order No. 3317**, issued in 2011 by the Department of the Interior (DOI), provides guiding principles for the Department’s Tribal consultation policy and acknowledges DOI’s compliance with E.O. 13175.<sup>62</sup> The Order states that consultation “is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility” and aims to “create effective collaboration with Indian tribes and to inform Federal decision makers.”<sup>63</sup> For actions with Tribal implications, Department bureaus and offices should “seek to promote cooperation, participation, and efficiencies between agencies with overlapping jurisdictions, special expertise, or related responsibilities.”<sup>64</sup> To meet these goals, the Order established an internal consultation training program, a Joint Tribal-Federal Team to assess and refine the Department’s consultation process, and ordered the development of a Tribal leader contact database to streamline consultation.<sup>65</sup>
- **Secretarial Order No. 3335** reaffirms the application of the federal trust responsibility to all Department of the Interior offices and bureaus.<sup>66</sup>
- **Joint Secretarial Order No. 3403**, issued by the Secretaries of Interior and Agriculture in 2021, ensures that the Departments, including their Bureaus and Offices, are “managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized

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<sup>58</sup> *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1987).

<sup>59</sup> *Id.* at 1103; see Routel & Holth, *supra* note 12, at 452.

<sup>60</sup> *Wyoming v. United States Dep’t of the Interior*, 136 F. Supp. 3d 1317 (D. Wyo. 2015).

<sup>61</sup> *Id.* at 1344-46.

<sup>62</sup> U.S. Dep’t of the Interior, Secretarial Order No. 3317, Department of the Interior Policy on Consultation with Indian Tribes (Dec. 01, 2011).

<sup>63</sup> *Id.* § 4(b).

<sup>64</sup> *Id.* § 4(c).

<sup>65</sup> *Id.* §§ 6, 9, 10.

<sup>66</sup> U.S. Dep’t of the Interior, Secretarial Order No. 3335, Reaffirmation of the Federal Trust Responsibility to Federally Recognized Tribes and Individual Indian Beneficiaries (Aug. 20, 2014).

Indian Tribes including the Native Hawaiian Community.”<sup>67</sup> The Order provides that the Departments will collaborate with Tribal governments through consultation regarding decision-making concerning Federal lands and waters, will incorporate Tribal land and agriculture management plans into Federal land management efforts for certain projects, and will consider Tribal expertise and/or Indigenous knowledge concerning resource management subject to Tribal treaty rights and subsistence uses.<sup>68</sup>

### **Federal Agency Policies**

- **Department of Interior (DOI):** The Department’s Policy on Consultation with Indian Tribes<sup>69</sup> was updated in 2022 establishing a formal process for Tribal consultation for actions taken, funded, or signed off on by the Department that have Tribal implications.<sup>70</sup> The policy states that consultation should be conducted between Department and Tribal officials with decision-making authority, establishing a Tribal Governance Officer to serve this capacity on a Department-wide basis and Tribal Liaison Officers to carry out the duties within the Department’s offices and bureaus.<sup>71</sup> The policy further directs officials to proactively invite Tribes to consultation with a goal of seeking consensus on matters with Tribal implications pursuant to E.O. 13175.<sup>72</sup>
- **Environmental Protection Agency (EPA):** The Policy on Consultation and Coordination with Indian Tribes delineates the consultation process into four phases, identification, notification, input, and follow up, and describes the importance of incorporating Tribal input at each stage.<sup>73</sup> EPA later released the Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights identifying three questions EPA should resolve during consultations when proposing an action that might affect treaty rights in a specific geographic area: “(1) Do treaties exist within a specific geographic area? (2) What treaty rights exist in, or what treaty-protected resources rely upon, the specific

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<sup>67</sup> U.S. Dep’t of the Interior, Secretarial Order No. 3403, Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (Nov. 15, 2021).

<sup>68</sup> *Id.* § 3.

<sup>69</sup> Dep’t of Interior, 512 DM 4, Policy on Consultation with Indian Tribes (Nov. 30, 2022), [https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4\\_2.pdf](https://www.doi.gov/sites/doi.gov/files/elips/documents/512-dm-4_2.pdf).

<sup>70</sup> *Id.* § 4.3(B).

<sup>71</sup> *Id.* §§ 4.3(C)-(E).

<sup>72</sup> *Id.* §§ 4.4, 4.6.

<sup>73</sup> Env’t Prot. Agency, Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), <https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

geographic area? (3) How are treaty rights potentially affected by the proposed action?”<sup>74</sup>

- **Council on Environmental Quality (CEQ):** The 2021 Action Plan for Consultation and Coordination with Tribal Nations commits the agency to Tribal consultation when carrying out its duties pursuant to the National Environmental Policy Act (NEPA) in conjunction with federal agencies whose actions require NEPA review.<sup>75</sup> The Plan was developed in response to a multi-agency consultation with federally recognized Tribes about the efficacy of the Tribal consultation process across agencies following E.O. 13175.<sup>76</sup>
- **Department of Energy (DOE):** The American Indian and Alaska Native Tribal Government Policy commits DOE to ongoing dialogue with Indian nations, providing timely notice to Indian nations potentially impacted by current and proposed actions, and engaging in consultation during the development of regulatory policies on matters significantly affecting Tribal communities.<sup>77</sup> The Policy requires that DOE consult with Tribal governments that may be affected by DOE actions on properties to which the Tribe attaches religious or cultural significance.<sup>78</sup>

### ***Handbooks and Manuals***

Agencies have also issued robust handbooks and manuals providing further instruction to agency officials on consultation with Tribes. These resources often encourage agencies to initiate consultation with Tribes “early,” to craft procedures for handling confidential or culturally sensitive Tribal information, and to regard Tribal information and preferences as necessary to the decision-making process. Relevant handbooks and manuals include:

- DOI’s Department Manual on Procedures for Consultation with Indian Tribes<sup>79</sup>

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<sup>74</sup> Env’t Prot. Agency, Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights (Feb. 19, 2016), [https://www.epa.gov/sites/default/files/2016-02/documents/tribal\\_treaty\\_rights\\_guidance\\_for\\_discussing\\_tribal\\_treaty\\_rights.pdf](https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf).

<sup>75</sup> Council on Environmental Quality, Action Plan for Consultation and Coordination with Tribal Nations (Apr. 26, 2021), <https://www.whitehouse.gov/wp-content/uploads/2022/01/CEQ-Tribal-Consultation-Plan-04.26.2021.pdf>.

<sup>76</sup> *Id.*

<sup>77</sup> Dep’t of Energy, American Indian and Alaska Native Tribal Government Policy (Jan. 2006), <https://www.energy.gov/sites/default/files/DOE%20American%20Indian%20and%20Alaska%20Natives%20Tribal%20Government%20Policy.pdf>.

<sup>78</sup> *Id.*

<sup>79</sup> U.S. Dep’t of the Interior, Department Manual on Procedures for Consultation with Indian Tribes (Nov. 9, 2015), <https://www.doi.gov/sites/doi.gov/files/512-dm-5-procedures-for-consultation-with-indian-tribes.pdf>.

- Bureau of Land Management’s (BLM) 1780 Tribal Relations Handbook<sup>80</sup>
- BLM 1780 Tribal Relations Manual<sup>81</sup>
- Fish & Wildlife Service’s (FWS) Tribal Consultation Handbook<sup>82</sup>
- National Oceanic and Atmospheric Administration’s (NOAA) Tribal Consultation Handbook<sup>83</sup>

## Recent Developments on Tribal Consultation

On May 28, 2021, during the 117<sup>th</sup> Congress, Representative Raúl M. Grijalva introduced the Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes (RESPECT) Act, which would have codified E.O. 13175 and required that federal agencies consult with Tribal governments “(1) before undertaking any proposed federal activity or finalizing any federal regulatory action that may have a tribal impact, and (2) for all activities that would affect any part of federal land sharing a border with Indian land.”<sup>84</sup> Agencies would further have been required to prepare a Tribal Impact Statement and “make a good faith effort to identify areas that contain sacred sites.”<sup>85</sup> The bill also outlined specific consultation requirements and would have “require[d] agencies to take certain actions during the decision stage for a proposed activity (e.g., public comment) and for a regulatory action.”<sup>86</sup> However, after referral to the House Natural Resources Subcommittee for Indigenous Peoples of the United States in 2021 and the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law in 2022, the bill stalled.<sup>87</sup>

## Conclusion

This has been an overview of the mechanisms which establish Tribal consultation as a commitment by the United States to include Tribes in the decision-making process for actions with Tribal implications. While typically non-binding, the swell of executive orders, agency policies, and even proposed legislation in Congress over the past thirty years

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<sup>80</sup> Bureau of Land Management, BLM Handbook 1780-1 Improving and Sustaining BLM-Tribal Relations (P) (Dec. 15, 2016), [https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1\\_0.pdf](https://www.blm.gov/sites/blm.gov/files/uploads/H-1780-1_0.pdf).

<sup>81</sup> Bureau of Land Management, BLM Manual 1780 Tribal Relations (P) (Dec. 15, 2016), <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>.

<sup>82</sup> U.S. Fish & Wildlife Service, Tribal Consultation Handbook (Oct. 1, 2018), <https://www.fws.gov/sites/default/files/documents/Tribal%20Consultation%20Handbook.PDF>.

<sup>83</sup> National Oceanic and Atmospheric Administration, NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribal Governments (May 11, 2021), [https://www.noaa.gov/sites/default/files/2021-11/NOAA\\_Tribal\\_Consultation\\_Handbook\\_2021\\_1.pdf](https://www.noaa.gov/sites/default/files/2021-11/NOAA_Tribal_Consultation_Handbook_2021_1.pdf).

<sup>84</sup> Congress, H.R.3587 – *Summary: Requirements, Expectations, and Standard Procedures for Effective Consultation with Tribes Act*, <https://www.congress.gov/bill/117th-congress/house-bill/3587?r=5&s=1> (last visited May 21, 2024).

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

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

represents the shifting relationship between the United States and federally recognized Tribes, one which moves toward open dialogue and cooperation on federal decisions impacting Tribes.