FEDERAL CONSULTATION WITH TRIBES REGARDING INFRASTRUCTURE DECISION-MAKING

FRAMING PAPER

FALL 2016

As discussed in the September 23, 2016, consultation invitation you received, Federal agencies have committed to broad review and consultation on how, prospectively, Federal decision-making on infrastructure projects can better allow for timely and meaningful Tribal input from federally-recognized Tribes. The invitation letter identified two broad questions of particular interest to Federal agencies. Building on those two questions, Federal agencies are interested to learn best practices for Tribal consultation and to ask questions in two broad categories:

1) *Promoting Meaningful Government-to-Government Engagement within the Existing Framework.* How can Federal agencies better ensure meaningful Tribal input into infrastructure-related reviews and decisions, to protect Tribal lands, resources, and treaty rights within the existing framework? This category of questions includes topics related to how a Federal agency implements existing policies and procedures, staff training and expertise, how an agency approaches Tribal consultation, and what can be done to promote Tribal capacity to participate in timely and meaningful consultation.

2) *Identifying Any Necessary Change to the Existing Framework.* Where and when does the current framework present barriers to meaningful consultation? What changes to the current framework would promote these goals? This category of questions includes potential change to regulations, policies, and procedures, as well as statutory changes that would increase timely and meaningful consultation.

These questions are meant to serve as a reference point for participants and are not intended to limit the conversation. We have also included additional questions for your input below, following the background information on the existing framework.

This consultation will focus on how to ensure timely and meaningful Tribal input on future Federal decisions on infrastructure and infrastructure-related projects that have Tribal implications. While infrastructure is difficult to define, for purposes of this consultation, infrastructure projects include, but are not limited to, the examples listed in the text box in the background section.

Background

Infrastructure projects have grown in scope and complexity over time, as reflected in the increase in number and variety of existing laws and regulations that address infrastructure-related processes. Infrastructure is difficult to define because it encompasses a wide array of physical assets. For example, infrastructure projects include, but are not limited to, the examples listed in the text box on the right.

Examples of Infrastructure:

- Surface transportation, including highway, rail, and transit projects
- Airport capital improvement projects
- Ports and waterways
- Water resource projects
- Renewable energy generation
- Electricity transmission
- Storm-water infrastructure
- Broadband internet
- Oil or gas pipelines

The Federal Government often plays a role in reviewing these infrastructure projects. There are Federal statutes, regulations and Executive Orders that govern Federal review of infrastructure-related projects or potential impacts of infrastructure;[1] together, these create a framework that provides designated Federal agencies with the authority and responsibility to review particular aspects of the infrastructure or its impacts.

For example, statutes such as the Native American Graves Protection and Repatriation Act, the National Historic Preservation Act, and the Archeological Resources Protection Act of 1979 contain provisions addressing Tribal input into Federal decision-making under certain circumstances, such as when there will be excavation of cultural items. In addition to the statutes, Federal agencies may also have implementing regulations or guidance that assist with interpreting the relevant statute. In addition to those more specific requirements, there are also Presidential Executive Orders that direct Federal agencies to develop policies and best practices for working with Tribal governments. For example, the Executive Order on Consultation and Coordination with Indian Tribal Governments requires Federal agencies to have consultation policies in place to ensure meaningful and timely input by Tribal officials in the development of Federal policies that have Tribal implications.[2] And under the Executive Order for Improving Performance of Federal Permitting and Review of Infrastructure Projects, Federal agencies are responsible for including best practices for enhancing Federal, Tribal, and State government

[1] The Federal Environmental Review & Authorization Inventory chart, which describes many applicable rules and regulations as well as review requirements, is available at: https://www.permits.performance.gov/tools/federal-environmental-review-and-authorization-inventory. This website also provides background on the Federal "Permitting Dashboard" for certain Federal infrastructure projects.

[2] See the following webpage for a list of consultation policy examples: https://www.whitehouse.gov/sites/default/files/federal_agency_tribal_consultation_resources_updated.pdf

coordination on permitting and review processes and engaging early in the infrastructure permitting or review process.[3]

These laws and policies are part of the existing framework for Tribal input. Additional tools that are part of the legal framework are described more fully in Attachment A. We are interested in Tribes' thoughts both on ways to work within this existing framework and ways the framework might be improved.

Promoting Meaningful Government-to-Government Engagement within the Existing Framework

One of the purposes of this consultation is to obtain Tribal input on how the Federal government can more consistently, effectively, and meaningfully engage with Tribal governments on infrastructure-related projects. The existing framework imposes certain requirements and limitations on the Federal role in infrastructure decisions. For example, for certain projects, a Federal agency may only have authority to address a specific aspect of a larger infrastructure project (e.g., approving a right-of-way or a dredge-and-fill permit). In some cases, Federal agencies may not learn of the project until late in the infrastructure development process.

Within the existing framework both Federal agencies and Tribes have considerable discretionary authority as a result of variation in agency regulations and policies. Different agency structures, mission priorities, staffing, resources, cultures, and relationships with Tribes result in Federal agencies taking different approaches when implementing consultation. Despite this variation, both Federal agencies and Tribes have demonstrated the capacity to successfully engage in consultation. For example, the development of the landscape-level Desert Renewable Energy Conservation Plan (DRECP) was a deliberate attempt by numerous Federal agencies to meaningfully engage with Tribes. The DRECP is designed to conserve and manage plant and wildlife communities in the desert regions of California while facilitating the timely permitting of compatible renewable energy projects.

Federal agencies heavily engaged Tribes affected by the DRECP. For instance, prior to formal consultation, the agencies held two summits to address longstanding concerns Tribes had on impacts to traditional use areas and increasing development of energy resources. The agencies then held formal consultation over a three-year period and included extensive outreach and coordination, numerous technical meetings, meetings where Tribes were engaged in creating maps to incorporate into the DRECP, and individual meetings with 40 federally-recognized Tribes. Federal agencies also held conferences and workshops and ensured Tribes were provided with information, maps, presentations, access to executive-level Federal management, funding sources, and other specialized services. Not only did these meetings solicit Tribal input and incorporate Tribal issues into future development planning in the DRECP, the targeted outreach

[3] Executive Order 13604 on Improving Performance of Federal Permitting and Review of Infrastructure Projects, March 22, 2012.

led to the exchange of information and discussion of concerns that shaped the actual development of the DRECP.

It is our hope that this consultation on infrastructure decision-making will include discussion of other examples of effective Tribal engagement, and that together we might identify underlying principles common to all meaningful consultations that are achievable within the current statutory framework. Some of these principles may include: 1) accountability for Federal agencies to identify potential impacts on Tribes, 2) providing timely and complete notice to Tribes, and 3) working collaboratively with Tribes to address their concerns or mitigate effects. Among other questions presented, this consultation seeks additional examples of projects that Tribes view as models for successful, meaningful consultations.

To help identify common principles for meaningful Tribal input into Federal infrastructure-related decision making and opportunities for building both Tribal and Federal capacity, we are interested in Tribes' views on the following questions:

- What are examples of consultations on infrastructure projects that you consider to be meaningful? Why did you consider these consultations to be meaningful?
- What factors do you consider when determining whether a consultation on an infrastructure project is meaningful? What should agencies take into account when determining whether or not a consultation is meaningful? What are examples of collaboration (other than formal consultation) that you have found to be useful? Why did you consider these collaborations to be meaningful?
- Are there specific agencies that you find to be particularly good at consultation and what is it about how these agencies go about consultation that makes it stand out?
- What can Federal agencies do to better support Tribes' ability to provide input into infrastructure decisions? What are examples of good practices that enable Tribes to provide their views and input early in the development process or prior to Federal review of an infrastructure project?
- What steps can Federal agencies take to ensure that Federal and non-Federal parties engage meaningfully with Tribes without overwhelming Tribes' resources?

Identifying Any Necessary Change to the Existing Framework

We are also interested in Tribes' views on whether changes to the existing framework – whether to regulations, agency policies, statutes, or other legal requirements – are necessary to ensure meaningful Tribal input into infrastructure-related reviews and decisions.

In considering whether and how changes to the existing framework could result in more successful Tribal consultation, we are particularly interested in Tribes' thoughts on the following questions:

- What are good examples of existing agency policies and regulations that other Federal agencies should consider replicating?
- Does the existing framework afford ample opportunity for Tribal input? If not, what additional opportunities should there be and what would this look like?
- When and where do you currently encounter obstacles to meaningful Tribal engagement that could be addressed through changes to regulation, agency policies, or statute? What are these obstacles and what changes would best address them?

Federal agencies understand that Tribes receive many notices for consultation and requests for input from numerous Federal agencies on various projects. We recognize the cost of participating in this consultation and appreciate your willingness to participate in these discussions and offer candid feedback. As stated earlier, the discussions are not limited to the questions presented here. We welcome any input relevant to the broader topic, and this framing paper and the questions may evolve over the course of the consultation based on Tribal input.

Attachment A
Legal Framework For Tribal Input

- Executive Order 13175, Consultation and Coordination With Indian Tribal Governments (November 6, 2000) – E.O. 13175 requires Federal agencies to have an accountable process to ensure meaningful and timely input by Tribal officials in the development of Federal policies that have tribal implications. President Obama reinforced this Executive Order in a November 5, 2009 Memorandum entitled "Tribal Consultation." President Obama's memorandum stated his Administration's commitment to "regular and meaningful consultation and collaboration with [T]ribal officials on policy decisions that have [T]ribal implications..."

- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low- Income Populations (February 11, 1994) – E.O. 12098 requires Federal agencies to identify and address, as appropriate, disproportionately high and adverse human health or environmental impacts of their actions in minority and low-income populations. Each Federal agency responsibility set forth under the order applies equally to Native American programs. In addition, the Department of the Interior, in coordination with the Interagency Working Group established under the E.O, and after consultation with Tribal leaders, coordinates steps taken under the order that address Federally-recognized Tribes.

- Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects (March 22, 2012) – E.O. 13604 directs that Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities.... [Federal permitting and review processes] must rely upon early and active consultation with State, local, and Tribal governments to avoid conflicts or duplication of effort, resolve concerns, and allow for concurrent rather than sequential reviews.

- Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001 *et seq.* – If there will be excavation of cultural items, including human remains and objects of cultural patrimony from Federal lands, the Federal agency must consult with the appropriate Tribes prior to excavation or removal after inadvertent discovery. If the excavation will occur on "Native American or Native Hawaiian Lands" then NAGPRA requires the consent of the Tribe or Native Hawaiian organization.

- National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.* – If an activity could affect historic properties (e.g., properties that are eligible for or included in the National Register of Historic Places), then the Federal agency must engage in "Section 106 review" (as distinguished from a government-to-government consultation) with Tribes that may attach religious and cultural significance to historic properties.

- Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa–470mm – ARPA requires Federal agencies to consult with Tribes before permitting archeological excavations on Tribal lands.

- National Environmental Policy Act (NEPA) 42 U.S.C. §§ 4321–4347 – NEPA procedures require public involvement including coordination with Tribes. This coordination should not be confused with a Federal agency's responsibility to engage in government-to-government consultation with Tribes. CEQ guidance encourages more active solicitation of Tribal governments for participation as cooperating agencies in NEPA documents.