

RESPECT ACT SUMMARY

FINDINGS, PURPOSES, SENSE OF CONGRESS AND STANDARDS FOR CONSULTATION

These sections reassert that the Federal Government has a unique, legally affirmed government-to-government relationship with Tribal Governments, as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. This includes the right of Tribal Governments to self-govern, and as such the Federal Government should support tribal sovereignty and self-determination in order to protect and support Tribal Governments.

This trust relationship extends to federal policies and projects that may have an impact on tribal lands or interests. As such, there needs to be a well-defined and formalized tribal consultation process across all agencies that is structured to give Tribal Governments the opportunity to provide meaningful, informed input throughout the development and decision-making processes that affect their interests. To that end, the RESPECT Act requires each agency to adhere to a legally binding framework that requires effective and meaningful tribal consultation on all activities undertaken by federal agencies that may have substantial tribal impacts.

CONSULTATION PROCEDURES

Tribal Impact Statement:

As early as possible in the planning stage of any proposed federal activity or a regulatory action, a Tribal Impact Statement must be prepared that identifies any potential tribal impacts¹. The agency that is proposing the activity or a regulatory action is responsible for generating this document, however if there are multiple agencies involved, a lead agency may be designated.²

At a minimum, the Tribal Impact Statement will include the scope of the activity or regulatory action being proposed, as well as a list of all affected Tribal Governments. It must also include any geographic areas or sacred sites important to Tribal Governments that might be affected by the proposed action.³ The agency must publish the completed Tribal Impact Statement in the Federal Register before any further action on the proposed activity or regulatory action.

Consultation Outreach:

The agency shall initiate consultation with all affected Tribal Governments as determined in the Tribal Impact Statement. This is accomplished by transmitting a formal request for a consultation meeting, along with copies the Tribal Impact Statement and the proposed activity or regulatory

¹ As defined in the Act, “tribal impacts” include any federal action that may have an impact on one or more Tribal Governments on matters including tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance, tribal treaty-protected rights, the ability of a Tribal Government to govern or provide services to its members, a Tribal Government’s formal relationship with the Federal Government, or the consideration of the Federal Government’s trust responsibility to Tribal Governments.

² Any agency that does not designate a lead agency shall remain individually responsible for the consultation responsibility.

³ The agency must make a good faith effort to identify areas that contain sacred sites important to Tribal Governments, whether such sacred sites are explicitly known to an agency or not.

action. In the case of a proposed activity on federal land, the documents will also be transmitted to the relevant Tribal governmental agencies and non-tribal stakeholders.⁴ At the request of an affected Tribal Government, the agency may also transmit the documents to non-governmental tribal stakeholders.⁵ The agency must take steps to ensure that all documents are received by all of the intended recipients in a timely manner.

If, after a good faith effort, an agency fails to engage an affected Tribal Government in the consultation process, the agency may conclude its consultation efforts by providing the Tribal Government with a written notification and explanation for its decision, signed by the head of the agency, which shall be made part of the official consultation record.

Consultation Meetings:

The agency shall negotiate with each affected Tribal Government to determine the format, agenda, and goals of a consultation meeting, and shall keep thorough documentation of all steps taken to engage the affected Tribal Government in consultation meetings. On activities that are regional in scope or that affect multiple Tribal Governments, the affected Tribal Governments may choose to form a Tribal Leader Task Force⁶ that will undertake the consultation.

Consultation meetings must be structured to allow enough time for meaningful and respectful interaction throughout the meeting among all participants and may end with planning for the next meeting, if necessary, as well as confirmation of the method of any potential interim communications between all parties participating in the consultation.

Conclusion of Consultation:

Consultation can conclude in one of two ways – successfully, with a signed memorandum of agreement (MOA) between an affected Tribal Government and an agency, or unsuccessfully without a memorandum of agreement.

A successful consultation outcome results in a signed MOA related to the proposed activity or regulatory action. This MOA may also address multiple activities or regulatory actions if they are similar and repetitive in nature, or are multistate or regional in scope, or where routine management activities are undertaken. It may also establish standard processes for certain categories of activities and regulatory actions in order to streamline future consultations.

⁴ This includes the Tribal Historic Preservation Officer or cultural resource manager, the State Historic Preservation Officer, and any local governments that have jurisdiction on any affected land via agreement with the agency.

⁵ Non-governmental tribal stakeholders include entities such as elder councils and religious leaders, or Native associations such as Alaska Native Corporations.

⁶ To the maximum extent possible, the Tribal Leader Task Force shall represent a cross-section of tribal interests with respect to the proposed activity or regulatory action.

In the case of a proposed activity on federal and, the MOA will include a provision for monitoring and reporting on the implementation of the activity, as well as provisions to address new discoveries⁷, which may include halting the activity.

Not all consultations will result in an MOA. If, after a good faith effort, an agency determines that further consultation will not be productive, it may conclude consultation by providing the Tribal Government with a written notification and explanation for its decision, including the identification of any legal, policy, or factual barriers that prevented the agency from reaching an agreement, which shall be made part of the official consultation record. Additionally, a Tribal Government may at any point decide to withdraw from the consultation process and submit a written statement, explanation, or comment on the consultation proceedings that will become part of the official consultation record. In either case, the process moves on to the decision stage.

Decision Stage for a Proposed Activity:

Upon completion of consultation procedures regarding a proposed activity, the agency will compile a proposal document consisting of the plan for the activity, its anticipated tribal impacts, and any signed MOAs. The document will be transmitted to all Tribal Governments that participated in the consultation proceedings, including any that withdrew from the process. The agency must again take steps to ensure that all documents are received by all intended recipients in a timely manner. After the agency verifies receipt of the document by all intended recipients, the proposal document shall be published in the Federal Register.

After publication of the proposal document, a period of no less than 90 days shall commence for public comment.⁸ After expiration of the public comment period, the agency shall prepare a preliminary decision letter that states the decision to proceed or not proceed with the activity. The letter shall include the rationale behind the decision, contain a list of any changes to the proposed activity made in response to the filed public comments, and shall specifically address any points where the decision conflicts with the request of an affected Tribal Government, including a detailed explanation of why the request was disregarded. The letter will be transmitted to all Tribal Governments that participated in the consultation, including any that withdrew from the process. The agency must again take steps to ensure that all documents are received by all of the intended recipients in a timely manner.

An affected Tribal Government will have a period of no less than 45 days to respond to the preliminary decision with any concerns or comments. After expiration of this period, the agency shall prepare a letter stating the final decision of the agency on the proposed activity. This letter shall include the rationale behind the decision, contain a list of any changes to the proposed activity made in response to Tribal Government comments on the preliminary decision, and shall specifically address any points where the final decision conflicts with the request of an affected Tribal Government, including a detailed explanation of why the request was disregarded. The

⁷ The term “new discovery” means any unexpected development that occurs during the course of an activity, such as the discovery of a new archeological site, unanticipated impacts on organisms or ecosystems, or the realization of unintended consequences that may have impacts on tribal lands and interests.

⁸ A 30-day extension of the 90-day period shall be automatically granted upon request by an affected Tribal Government.

final decision letter will be transmitted to all Tribal Governments that participated in the consultation, including any that withdrew from the process, and the agency must again take steps to ensure that all documents are received by all of the intended recipients in a timely manner. The agency shall then make public the final decision letter.

Decision Stage for a Proposed Regulatory Action:

The decision stage for a proposed regulatory action is structured to comply with the federal rule-making process. Upon completion of consultation on a proposed regulatory action, the agency shall prepare a letter stating the final decision of the agency. The letter shall include the rationale behind the decision, list any changes to the proposed regulatory action made at the request of a Tribal Government during the consultation process, and shall specifically address any points where the final decision conflicts with these requests, including a detailed explanation of why the requests were disregarded. The letter will be transmitted to all Tribal Governments that participated in the consultation, including any that withdrew from the process, and the agency must again take steps to ensure that all documents are received by all of the intended recipients in a timely manner.

The letter shall then be published in the Federal Register alongside the final agency decision on the regulatory action.

DOCUMENTATION AND REPORTING

During the consultation process, an agency must keep an official consultation record that allows an accurate assessment of the process so that the agency and all consulting parties can correct any errors or omissions, and to provide an official record of the process that can be referred to in any litigation that may arise. The record must document all efforts to initiate consultation, as well as documenting the official consultation process once it has begun. The official record shall include all correspondence, telephone logs, and emails, as well as notes from consultation meetings, site visits, and phone calls.

In addition, an agency is responsible for paying Tribal Governments for any costs they incur in providing specific information or documentation - specifically, if the Tribal Government is performing the duties that would usually have been delegated to a private consultant or contractor.

Finally, each agency shall submit a biennial report on its consultation activities to Congress, including the resulting outcomes.

IMPLEMENTATION AND TRAINING

To meet the needs of the Act and to foster better long-term relationships with Tribal Governments, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this Act. Additionally, each bureau or office within the agency shall designate one or more officials with the responsibility to work with the principal agency official.

To aid in providing real and meaningful consultation, it is required that each agency design training for staff aimed at improving the agency's capacity for interacting with Tribal Governments, and to strengthen the understanding of the United States' government-to-government relationship with Tribal Governments.

TRIBAL SOVEREIGNTY AND SENSITIVE TRIBAL INFORMATION

Agencies shall recognize and respect tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Tribal Governments. To that end, the Federal Government shall give Tribal Governments the maximum possible latitude in implementing federal policies.

In order to protect sensitive tribal information, consultation meetings shall be closed to the public at the request of a Tribal Government. All information designated by the Tribal Government as sensitive, such as the location of sacred sites or other details of cultural or religious practices, shall be omitted from any public documentation made as part of the consultation process or in the process of carrying out the activity. Once information has been designated as sensitive, the agency will determine in consultation with the Tribal Government who may have access to the information for the purposes of carrying out the activity.

JUDICIAL REVIEW

Lastly, a Tribal Government may seek judicial review of an agency's determination under this Act in accordance with subchapter II of chapter 5 of title 5, United States Code, and chapter 7 of title 5, United States Code (commonly known as the Administrative Procedure Act) if the Tribal Government has exhausted all other administrative remedies available to the Tribal Government.