

DRAFT

The Government-to-Government Relationship in a Changing Climate: A review of federal consultation policies

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Tribal Climate Change Project:

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I. INTRODUCTION

Overview

Climate change has the potential to impact a wide range of landscapes and resources that are vital to indigenous populations throughout the United States. American Indians, Alaska Natives and Native Hawaiians have contributed little to the causes of climate change, and yet they face disproportionate risks. These indigenous groups have unique rights, cultures, and economies that are particularly vulnerable to climate change impacts (Lynn 2011). Accordingly, federal management policies and programs should provide for meaningful tribal involvement in the formation of climate change policies and plans. An effective government-to-government relationship is essential to ensuring that tribes have the capacity to address the impacts of climate change on tribal lands and resources.

This report examines more than twenty federal agency consultation policies with a goal of identifying strategies to increase the effectiveness of the federal-tribal relationship in addressing climate change. Specifically, this report examines the scope of federal consultation policies in the context of climate change and highlights specific policies that include mechanisms that may result in more direct and meaningful consultation on climate change issues. The conclusion of this report provides a summary of key considerations and recommendations for strengthening the federal-tribal relationship in understanding and addressing the impacts from climate change.

While many policies instruct agencies how to carry out consultation, tribes and agencies often have different understandings of what constitutes meaningful consultation, and in some cases, agency staff lack understanding of consultation obligations. This report seeks to address this knowledge gap by providing examples of federal policies that are likely to result in meaningful consultation regarding natural resource and climate change policies.

Background and Context

Federally recognized tribes have a government-to-government relationship with the United States. Federal agencies have a responsibility to consult with tribes when “engaging in policy making or undertaking initiatives that will affect the vital interests of tribes” (Parker 2009) under numerous federal statutes, regulations and Presidential executive orders (Galanda 2011).

Beyond federal obligations, however, consultation is a tool that can be employed to further government-to-government collaboration between federal agencies and tribes to protect and manage tribal resources both on and off reservations. Consultation is a part of a larger process for tribes and federal agencies to engage in dialogue to identify challenges, provide opportunities for collaboration and reconcile differences. Outcomes from consultations can include an improved government-to-government relationship, policies and programs that meet the needs of both tribal and non-tribal communities and the collaborative development of strategies, plans, and measures to address climate change.

Impacts from climate change may include changes to ecological processes and to the quantity and distribution of plant and animal species and other natural resources that have cultural or economic importance to indigenous populations. As stated in Galanda (2011), “*Since 1492,*

Indian tribal governments within what is now the United States have, as a group, lost up to 98 percent of their aboriginal land base.¹ As a result, the overwhelming majority of tribal properties of cultural and religious significance are located outside Indian reservations and federal trust lands.²” As many of these tribal lands and resources are held in trust by the federal government for a tribe, these resources must be managed for the benefit of the tribe. Whether held in trust or otherwise managed by the federal government, federal management plans should address the cultural, economic and ecological impacts of climate change on tribal resources and recognize that the preservation of culturally important species and resources are tied to the cultural identity and values of tribes.

Federal agencies have a responsibility to consult with tribes before implementing policies and programs including resource management plans that may have implications on tribal resources (Executive Order 13175 § 5). Consultations regarding resources, including place-based, culturally relevant and treaty-protected resources, should ensure that tribal rights and access to these resources are addressed within agency climate change policies and planning efforts. This is particularly important given that tribal cultures and treaty rights are place-based so local manifestations of climate change can impact tribal communities in unique ways.

The federal obligation to consult with federally recognized tribes originates in federal laws, statutes and executive orders. Executive Order 13175: *Consultation and Coordination with Indian Tribal Governments* requires federal agencies to “have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications” (§ 5(a)). In addition to the executive order, consultation obligations are found in numerous statutes, ranging from the National Historic Preservation Act to the Federal Land Policy and Management Act.

Climate change poses direct threats to tribal lands and resources that may be held in trust and/or managed by federal agencies. As agencies move forward with climate change assessments, adaptation plans, and other efforts, there is a need for consultation on proposed actions, and direct engagement in understanding the potential impacts of a changing climate to tribal resources.

¹ Gregory A. Smith, *The Role of Indian Tribes in the Section 106 National Historic Preservation Act Review Process*, SJ053 ALI-ABA 649 (2004).

² John Petoskey, *Indians and the First Amendment, in American Indian Policy in the Twentieth Century* 221 (Vine Deloria, Jr. ed. 1985).

TREATIES, SOVEREIGNTY AND CONSULTATION

This section is intended to provide a general overview of the federal-tribal relationship and the federal trust responsibilities. The information is excerpted from the chapter on Federal Policy in the 2006 Tribal Wildfire Resource Guide (http://tribalclimate.uoregon.edu/files/2010/11/TWRG_final.pdf). For a more comprehensive list of terms and definitions, go to [Appendix A](#) of this document.

Treaties

Treaties are legally binding agreements established between two or more sovereign governments. From 1778 to 1871—the “treaty-making era”—the federal government negotiated, signed, and ratified nearly 400 treaties with Indian Nations. The Indian treaties set out basic elements of federal Indian law:

- **The Trust Relationship.** When the United States entered into treaties with Indian tribes to quiet tribal claims to the land, it agreed to honor commitments to provide tribes with goods and services and to preserve their ability to exercise rights reserved by the signatory tribes, such as fishing, hunting, gathering, and trapping on open and unclaimed land. Because tribal peoples were unfamiliar with the ways and values of non-Indian society, the United States assumed a fiduciary obligation to protect tribes and their resources from depredation by non-Indians. Explicit fiduciary trust obligations were created under the 1887 General Allotment Act (Dawes Act) and other statutes.
- **Tribal Governmental Status.** Indian tribes are political sovereigns with inherent rights to self-government. State law does not apply to Indian tribes without the consent of Congress.

Federal law recognizes that:

- Tribes were not granted sovereignty; they have always possessed it;
- Indian tribal governments have always maintained sole right to self-determination and exercise authorities as defined by their inherent sovereignty, treaty or other statute; and
- Depending upon the legal document establishing a tribe’s status and recognition, tribal rights and authorities can only be altered externally by explicit intent of Congress and the Administration.

The unique legal status of American Indian and Alaska Native peoples requires that government entities consult directly with tribal governments when addressing issues that may affect tribal lands, resources, members, and welfare. Because of their unique political status, federal and state agencies must treat tribes in a fundamentally different way from the processes employed to solicit input from interested members of the general public. Tribes have established special agreements with such agencies to ensure the government-to-government relationship is recognized and upheld.

President Clinton’s Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” requires each federal agency to have an accountable process to ensure meaningful and timely input by tribal officials into the development of regulatory policies that have tribal implications. Federal agency action shall be guided by the principles of respect for Indian self-government and sovereignty, tribal treaties and other rights and responsibilities that arise from the special trust relationship between the federal government and Indian tribes.

Federal action shall also favor maximum tribal participation and defer to the laws and policies established by Indian tribes to the extent permitted by law. Key aspects of federal consultation policy should include:

- Notifying Indian tribes as soon as possible regarding formulated or proposed federal actions;
- Providing opportunities for tribes to be designated as cooperating agencies;
- Informing Indian tribes of the potential impact of formulated or proposed federal actions;
- Informing Indian tribes of those federal officials charged with making the final decisions with respect to the federal action;
- Having the input and recommendations of Indian tribes be fully considered by those officials responsible for the final decision; and
- Providing Indian tribes with feedback regarding the adoption or rejection of tribal recommendations by those federal official involved in the decision-making process.

Scope of the Research

This study includes an examination of federal departmental and agency policies that are directly or indirectly related to climate change, with a focus on policies from land and resource management agencies.

On November 5, 2009, Barack Obama signed a Presidential Memorandum that ordered federal departments to create an action plan to implement Executive Order 13175 on Tribal Consultation. This set in motion the creation of departmental action plans and the revision of many consultation policies. In order to capture the most recent federal policy on consultation, this report examines agency action plans and draft consultation policies developed pursuant to the Presidential Memorandum. This report references different types of agency materials, including consultation policies and agency implementation and action plans and compares them through the lens of tribal consultation. The intent of this report is not to compare different agency policies and plans, but to identify examples that may positively influence the federal-tribal relationships through specific language or recommendations. The policies and agency action plans reviewed as part of this report are listed in Table 2.

Methodology: Consultation Policy Review

To examine each policy, we developed a questionnaire (included in Appendix D of this report) that reflected factors that may influence the effectiveness of the federal-tribal relationship. To select these factors we referenced two recent reports that provide specific recommendations for the improvement of federal-tribal relations and consultation procedures: *Strengthening the Federal-Tribal Relationship: A Report on Monitoring Consultation under the Northwest Forest Plan* (Harris 2011), and a report on input provided by tribes to the USDA Forest Service regarding the revision of its sacred sites policy (USDA Sacred Sites Listening Session).

The review of each consultation policy focuses on the development of an effective, long-term, and culturally sensitive government-to-government relationship. Major themes of this investigation include the use of written agreements, the nature of the federal-tribal relationship, the scope of the policy's consultation requirements, training programs, and funding.

Table 1, below, lists the themes explored in the policy review, and the factors that may influence the effectiveness of a federal-tribal relationship. The report describes key findings from the policy reviews for each of the themes, and highlights specific examples of policies that may exemplify strategies to increase the effectiveness of the federal-tribal relationship. Policy examples highlighted throughout the document also include a brief discussion of the impact that policy may have on agency actions.

Table 1. Organization of the Consultation Policy Review

Theme	Factors Influencing Federal-Tribal Relationships
Strategies to strengthen the federal-tribal relationship	<ul style="list-style-type: none"> • Understanding the federal-tribal relationship • Value of long-term relationships • Cultural Sensitivity • Shared understanding of consultation protocols and outcomes <ul style="list-style-type: none"> ○ Memoranda of Understanding (MOU) • Reducing the “Burden” of Consultation <ul style="list-style-type: none"> ○ Reducing the burden of consultation on tribes by entering into agreements that identify the scope of tribal interests and prescribe the method of notices given to the tribe. ○ Coordination across federal agencies to minimize duplicative interactions with tribes or requests for information.
Activities Requiring Consultation	<ul style="list-style-type: none"> • Agency actions to plan for or respond to potential climate changes • Cultural resource and land management decisions • Climate change assessments (and the role of traditional ecological knowledge in those assessments) • Management of off-reservation resources • Administration of grant programs
Implementation of Consultation Policies	<ul style="list-style-type: none"> • When consultation occurs • Level of federal officials involved in consultation • Interagency collaboration • Consistency in consultation policies • Mutually beneficial resource management strategies • Evaluation
Training and Funding	<ul style="list-style-type: none"> • Training <ul style="list-style-type: none"> ○ The existence and quality of federal agency training programs related to tribal consultation and the improvement of cross-cultural communication. • Staff Turnover <ul style="list-style-type: none"> ○ Strategies to address the impact of staff turnover on federal-tribal relationships. • Funding for consultation • Funding for tribes outside of consultation

Table 2. List of Consultation Policies Reviewed

Federal Dept./Agency	Name of Policy Document	Reference
U.S. Dept. of Energy (DOE)	U.S. Dept. of Energy American Indian & Alaska Native Tribal Government Policy (January 20, 2006)	DOE
U.S. Dept. of Agriculture (USDA)	U.S. Dept. of Ag. Action Plan for Tribal Consultation and Collaboration (Plan submitted pursuant to Presidential Memorandum dated Nov. 5, 2009) (February 2010)	USDA Action Plan
	Dept. Regulation # 1350-001: Tribal Consultation (Sept. 11, 2008)	USDA Dept. Regulation
U.S. Dept. of Interior (DOI)	Dept. of Interior Secretarial Order No. 3317: Policy on Consultation With Indian Tribes (Dec. 1, 2011)	DOI Sec. Order 3317
	Dept. of Interior Secretarial Order No. 3289: Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural and Cultural Resources (Sept. 14, 2009)	DOI Sec. Order 3280
	Departmental Manual Part 512: Ch. 2: Dept. Responsibilities for Indian Trust Resources (Dec. 1, 1995) Ch. 3: Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites (June 5, 1998)	DOI Sacred Sites
U.S. Dept. of Commerce (DOC)	American Indian and Alaska Native Policy of the U.S. Dept. of Commerce (Mar. 30, 1995)	Commerce
U.S. Dept. of Transportation (DOT)	Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175 (February 2010)	DOT Action Plan
	Sec. Order 5301.1: DOT Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes (Nov. 16, 1999)	DOT Sec. Order
U.S. Dept. of Commerce and Interior	Secretarial Order # 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997)	Joint Sec. Order on ESA
USDA Forest Service	Forest Service Manual § 1563: American Indian And Alaska Native Relations (March 3, 2004)	Forest Service Manual
	Draft Report To The Secretary: USDA's Office of Tribal Relations and Forest Service Policy and Procedures Review: Indian Sacred Sites (July 2011)	USDA Draft Sacred Sites
USDA Natural Resources Conservation Service	General Manual: Title 410: Rural Development Part 405: American Indians and Alaska Natives (October 2010)	NRCS
DOI National Park Service	National Park Service Management Policies § 5.2.1: Consultation (2006)	NPS
DOI Fish & Wildlife Service	The Native American Policy of the U.S. Fish and Wildlife Service (June 28, 1994)	FWS
DOI Bureau of Land Mgmt.	BLM Guidelines for Conducting Tribal Consultation; BLM Manual § 8120: Tribal Consultation Under Cultural Resources (Dec. 3, 2004)	BLM
DOI Bureau of Reclamation	Reclamation's Protocol Guidelines: Consulting with Indian Tribal Governments (Published Feb. 3, 1998) (Revised Feb. 9, 2001)	Reclamation
Environmental Protection Agency	EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011)	EPA
NOAA: Nat. Marine Fisheries Svc.: Alaska Region	Additional Response to Nov. 2009 Recommendations about the Alaska Region's Tribal Consultation Process (June 16, 2010)	NMFS Alaska
Bonneville Power Admin.	BPA Tribal Policy: It's about trust (April 30, 1996)	BPA

II. CONSULTATION POLICY REVIEW

Factors influencing the Federal-Tribal Relationship

Understanding the federal-tribal relationship

A key factor influencing the federal-tribal relationship is agency understanding of federal obligations to tribes and the role of consultation in interacting with tribes and managing for culturally important resources. Specifically, a federal trust responsibility may impose additional requirements on resource management decisions. If a resource is held in trust by the federal government, that resource must be managed for the benefit the tribe. In order for a trust responsibility to exist, a treaty, statute, or regulation must acknowledge the trust relationship, as nearly every modern statute dealing with Indian tribes does (Newton 2009).

Some federal consultation policies examined in this report are broadly designed to strengthen all aspects of a government-to-government relationship, while others focus more narrowly on the task of individual consultations. Narrowly designed policies focus on procedures that ensure meaningful consultation occurs between the agency and the indigenous group. Broadly designed policies explicitly recognize that individual consultations represent only one aspect of an indigenous group's relationship with the federal government, and focus on increasing the effectiveness of the entire government-to-government relationship. This section provides definitions of meaningful consultation, as well as examples of broad and narrow consultation goals. This section also examines the value of long-term relationships and cultural sensitivity in consultation policies as well as the use of written agreements in consultation processes.

Harris (2011) defines meaningful consultation as consultation where both parties identify objectives and goals for consultation and jointly discuss expectations about proposed actions. The following table highlights examples of varying definitions of consultation within selected federal policies.

Policy Examples	Impact
"Meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions" (EPA § I).	A narrowly defined goal for consultation includes engaging in meaningful consultation.
"To keep Native American governments involved from initiation to completion of Service activities" (FWS, 5)	
Establish protocol memoranda of understanding with tribes and increase opportunities for tribes to develop and manage their own resources (Reclamation).	Broadly defined goals for consultation include the establishment of MOUs and mutually beneficial resource management strategies.
Forest Service Manual § 1563.02: 1) To develop and maintain effective working relationships with American Indian and Alaska Native Tribes taking into account the cultural concerns and interests of Tribes. 2) To ensure that Forest Service officials, programs, and activities respect tribal self-government and sovereignty and honor tribal rights and interests. 3) To ensure consultation with Tribes when undertaking the formulation and implementation of policies that may have	Broadly defined set of goals for consultation focuses on the relationship between the tribe and federal government. In the Forest Service's policy, an effective relationship is defined to include consideration of tribal cultures, respect for self-government, and recognition of mutually beneficial resource management strategies.

tribal implications[.] 4) To establish and ensure effective government-to-government working relationships with Tribes to achieve the common goal of promoting and protecting ecosystem health	
BPA § III(A): 1) Assure that Tribal policy makers and elected officials understand the technical and legal issues necessary to make informed decisions; 2) Improve policy-level decision making of both the Tribes and BPA; 3) Encourage Tribal implementation of fish and wildlife measures [with] BPA funds; 4) Protect Tribal lifestyles, culture, religion, economy ... 7) Improve the integrity and longevity of decisions; 8) Strive to develop and achieve mutually agreeable decisions reflecting a consensus”	Broadly defined set of goals for consultation assuring that tribes understand the issues, utilizing mutually beneficial fish and wildlife management strategies, protecting tribal cultures, and crafting decisions that will stand the test of time.

Value of long-term relationships

Tribes often view the federal government’s policy through its historical lens: starting with treaty making, including allotment, assimilation, and termination from the mid-1800s to mid-1900s, and only recently progressing to today’s self-determination era. In light of this historical backdrop, tribes recommend that federal agencies engage in open communication, cultural education, and strive to establish long-term relationships with tribal governments (Harris 2011).

The USDA listening sessions for the draft sacred sites policy in 2011 including findings related to the need for relationship building that transcends formal consultations:

“The dialogue this review has engendered is merely a beginning and that better, more consistent, and more meaningful consultation, communication, and understanding between the agency and Native Americans will be necessary if we are to avoid similar circumstances in the future. The Forest Service will strive to achieve these ideals while balancing the complexities of its statutory mandates.” (USDA Draft Sacred Sites, 7)

Building effective working relationships may take longer than agency officials expect, and will likely be based on personal interactions and impressions (Harris 2011). Tribes “described a strong federal-tribal relationship as one that recognized and followed formal protocols, but also included informal communication, personal contact, and sustained interest in working with the tribe by the federal agency” (Harris 2011).

The following table includes examples of how consultation policies address the value of long-term relationships.

Policy Examples	Impact
“The [National Park] Service will establish and maintain continuing relationships with outside parties to facilitate future collaboration, formal consultations, and the ongoing informal exchange of views and information on cultural resource matters” (NPS § 5.2.1).	While not exclusively addressing tribal issues, this policy establishes the federal agency’s commitment to developing long-term relations with stakeholders.

BLM, Reclamation	In contrast, the Bureau of Reclamation’s policy does not include mandatory language but does encourage positive long-term relationships with Indian tribes.
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Cultural Sensitivity

Tribes often stress the importance of intercultural dialogue, the need for culturally sensitive consultation practices, and their desire for federal officials to understand tribal cultural values (Harris 2011). A better understanding of tribal cultural values may result in improved communication and may lead to the use of traditional ecological knowledge by federal decision makers. The following table includes examples of federal policies addressing cultural sensitivity.

Policy Examples	Impact
BLM, DOI Sacred Sites, NPS	These policies limit the consideration of tribal cultures to the protection of confidential information regarding sacred sites.
“BPA will enhance cultural awareness among its staff and will seek other opportunities to establish consistent individual working relationships between BPA and Tribal staff at all levels” (BPA § VI), and “Protect Tribal lifestyles, culture, religion, economy” (BPA § III(A)(4)).	These policies acknowledge that tribal cultures are different and encourage a culturally sensitive consultation process.
Reclamation, DOI Sec. Order 3280, Forest Service Manual, FWS, Joint Sec. Order on ESA, USDA Action Plan, USDA Draft Sacred Sites	
Bureau of Reclamation guidance on Cultural Diversity and Awareness, recommends federal officials: <ul style="list-style-type: none"> • show respect for tribe’s beliefs and practices. This may include prayers or blessings before the beginning of meetings. • be mindful of humor because it sometimes does not translate well across cultures. • be aware that many Indian cultures include more silence than we are used to. • be aware that meetings can start late and run several hours. • select sites reasonably accessible to the tribe. • promise only what can be delivered. • consider the use of visual aids (17-23). 	Reclamation’s guidance includes specific recommendations for culturally sensitive consultation practices.

Cultural sensitivity includes not only the content, but also the method of communication. Agency staff may lack knowledge and training on effective strategies for reaching out to tribal governments. Consultation policies often provide general advice, but each tribe is unique, and agencies should consider the individual tribe’s preferred form of communication (Reclamation). Some tribes have indicated that they prefer in-person consultations, as opposed to those conducted by written correspondence, teleconference, or electronic communication (Harris 2011, USDA Sacred Sites Listening Session). The following table shows policies that address communication methods and protocols for consultation.

Policy Example	Impact
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<p>The Bureau of Reclamation recommends its employees come to an agreement with tribes on the protocol to be used for consultation (Reclamation). Protocol means “The etiquette or manner used when conducting federal-tribal interactions and communications, with particular consideration given to applying an understanding of cultural diversity and awareness, and being respectful of sovereignty” (Reclamation, 11). This protocol includes an agreement on methods for federal-tribal communication (Reclamation).</p>	<p>Communication with tribes should be in a form that is respectful of tribal cultures.</p>
<p>BLM, DOI Sacred Sites, EPA</p>	

Additionally, tribes and federal officials “may have different expectations about what is meant by consultation and how it should be conducted” (Reclamation, 7). Training on effective government-to-government relationships should address cultural sensitivity and suggest that federal officials work with tribes to develop shared goals through a written agreement (Harris 2011).

Memoranda of Understanding (MOU)

Studies recommend the use of written agreements to “formalize consultation protocols and provide agencies and tribes an opportunity to build a shared agreement of the needs and objectives of consultation” (Harris 2011, 66, USDA Sacred Sites Listening Session, 2). The process of developing an MOU can establish a foundation for a long-term cooperative government-to-government relationship and provides an opportunity for the tribe to articulate unique consultation needs and desired level of involvement in decision-making to federal officials (Harris 2011). This process can result in a written agreement tailored to a specific federal-tribal relationship. MOUs should include a shared understanding of the scope, objectives, and communication methods for consultation (Harris 2011).

The following table provides examples of policies that encourage the use of MOUs, followed by a list of suggested goals for the creation of MOUs.

Policy Examples	Impact
<p>“[E]stablishing protocols [through MOUs is a] critical starting point for providing assistance to Indian tribes, through partnerships, so that they can develop and manage their water and related resources” (Reclamation, Preface).</p> <p>BLM, DOI Sacred Sites, Forest Service Manual, FWS, Joint Sec. Order on ESA, NPS, USDA Draft Sacred Sites</p>	<p>Federal agencies are encouraged to use protocol MOUs to define the scope and outcomes of consultation.</p>

Goals for the Creation of MOUs.
<p>The Bureau of Reclamation suggests the following goals for the creation of MOUs:</p> <ul style="list-style-type: none"> • Provide a framework for maintaining a government-to-government relationship; • Agreement on appropriate methods for maintaining communication; • Establish procedures and designate representatives with authority for conducting consultation on a government-to-government basis, including the types of issues that will require high level meetings; • Enhance timely and open lines of communication, including periodic high-level meetings; • Clarify expectations and promote the recognition of tribal and federal interests; • Establish termination, duration, and/or modification provisions; • Establish dispute resolution mechanisms (Reclamation, 27-29).

Reducing the “Burden” of Consultation

In the preparation of this report, advisory committee members shared a concern that the federal government sends too many notifications of consultation opportunities. As a result, tribes are often unable to effectively respond to the flood of notices that cross their desks. Tribal representatives also expressed gratitude to federal agencies that enter into MOUs with the tribe to limit the quantity and prescribe the form of consultation notifications. After engaging with a federal agency, tribes are often able to articulate those issues or geographical areas in which the tribe would like to receive notification of consultation opportunities, and those which fall outside of the tribe’s areas of interest. Additionally, the tribe may specify the type of notification it would like to receive from the federal agency.

Only one agency policy examined in this report, the USDA Action Plan, addressed this issue. It does so by creating regional, department-wide consultation venues:

“Regional USDA Tribal consultation venues will seek to not only alleviate the travel, time, and financial impact on Tribal leaders to attend consultation meetings, but will also open up the Tribal consultation process to a more integrated, representative approach across all mission areas and agencies of the Department. This integrated, regional approach will allow the Department to deploy senior management in a cohesive, coordinated, and financially responsible fashion and through combined, collaborative, consultation opportunities, meet a secondary goal to identify those areas in which the sprawl of the Department can be overcome and the interrelated programs administered by the Department can be more effectively brought to bear on challenges faced by Tribal governments, communities and individuals.” (USDA Action Plan, 13)

Activities Requiring Consultation

Section 5 of Executive Order 13175 requires consultation on regulations that may preempt tribal law and any “policies that have tribal implications.” The table below provides language used to define activities that trigger a consultation requirement. This section then examines the impact that climate change may have on consultation requirements, authorities that require consultation, as well as consultation issues related to cultural resources, land management, off-reservation resources, and tribal grant programs.

Policy Example	Impact
Departmental Action with Tribal Implications. Regulation, rulemaking, policy, guidance, legislative proposal made by the Department, grant funding formula changes, or operational activity that may have a substantial direct effect on Tribe or Tribal resources, or access to traditional areas of cultural or religious importance on Federally-managed lands; or the ability of the Tribe to govern its members or to provide services to its members; or that may impact the Tribe(s) relationship with the Department or the distribution of responsibilities between the Department and Indian Tribes (Draft DOI Consultation Policy § III.D 2011).	A wide variety of federal actions, including implementing policies, regulations, operational plans, and funding formulas that impact tribal resources trigger a consultation requirement. The final policy, DOI Sec. Order 3317, does not include a definition of “actions with tribal implications.” The definition provided in the draft policy is included because it provides a guidepost for a comprehensive definition of actions requiring consultation.

Agency actions to plan for or respond to potential climate changes

As discussed in the introduction of this report, American Indians and Alaska Natives are facing significant risks from climate change, including potential impacts to a wide range of tribal lands and cultural and natural resources that are on and off-reservation. These impacts may include shifting habitat ranges, rising sea levels, an increased intensity of extreme weather events, and declines in precipitation, among many others (Lynn et al. 2011). These impacts trigger a variety of tribal needs, many of which can be addressed through consultation on adaptation actions and changes to resource management plans. At least one federal climate change policy, excerpted in the table below, explicitly requires consultation.

Policy Example	Impact
<p>American Indians and Alaska Natives. Climate change may disproportionately affect tribes and their lands because they are heavily dependent on their natural resources for economic and cultural identity . . . the Department will ensure consistent and in-depth government-to-government consultation with tribes and Alaska Natives on the Department's climate change initiatives (DOI Sec. Order 3289 § 5).</p>	<p>Acknowledges the cultural importance of natural resources and ensures consultation regarding climate change policy.</p>

Climate change has the potential to impact a wide range of tribal resources that are managed by the federal government. Indigenous people have an intimate connection to the land through their culture, and many tribal cultures value a subsistence way of life and have a strong connection to certain areas, plants, and animal species (Lynn et al. 2011). Many of these culturally important resources are federally managed. Climate change may impact these federally managed resources by diminishing the value of culturally important lands, shifting the range of plant and animal species onto, off of, or within federally managed lands, and altering the suitability of tribal lands for culturally and economically important activities.

Cultural resource and land management decisions

Meaningful consultation can address conflicts over land management and develop protocols for managing cultural resources (Harris 2011). The federal government has a treaty, federal statute, or Executive Order based obligation to provide tribes with access to culturally important lands and natural resources (Executive Order 13007). Accordingly, federal agencies that manage tribal resources are likely required to consult with tribes regarding the development of climate change management and adaptation plans, and their impact on these resources. The table below highlights policies that explicitly require consultation in coordination with cultural resource and land management activities.

Policy Examples	Impact
<p>Land Management Plans. Tailor protection of Sacred Sites to an individual forest or grassland and the Native Americans concerned with those areas using the forest or grassland’s resource management plan and other planning processes.</p> <ol style="list-style-type: none"> 1) Using collaboration and consultation, develop wording in forest and grassland planning documents that appropriately protect Sacred Sites. 2) Require that land management planning procedures consider protection of Sacred Sites through land use designations, standards, guidelines, or other measures 	<p>Focuses land managers’ attention on local tribal needs regarding the protection of cultural resources under their control.</p>

appropriate to particular sites and the plan’s desired future conditions (USDA Draft Sacred Sites, 16).	
DOI Sec. Order 3289 (see table above).	

As climate change shifts the habitat range of culturally important plant and animal species, these species may move onto, off of, or within federal lands. Some previously on-reservation resources may move off-reservation, and previously off-reservation resources may move farther away from tribal lands. The next section discusses consultation regarding off-reservation resources.

Climate change assessments

Climate change vulnerability assessments and studies examining the potential impacts of climate change can be informed by traditional ecological knowledge (Harris 2011). Traditional ecological knowledge is the indigenous way of knowing, and can be defined in various ways. Author Fikret Berkes defines it as a “cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment” (Berkes, 7). The following table provides examples of policies that allow for the use of traditional ecological knowledge in making federal decisions.

Policy Examples	Impact
“The Department will support the use of the best available science, including traditional ecological knowledge, in formulating policy pertaining to climate change” (DOI Sec. Order 3280 § 5).	Allows the use of traditional ecological knowledge by federal decision makers.
Tribal Relations Program Managers have the responsibility to advise line officers of their responsibility to seek traditional ecological knowledge that may be relevant to the management of natural and cultural resources (Forest Service Manual § 1563.04f(7)). The Forest Service should also seek to identify traditional tribal knowledge about ecosystems that may be helpful in meeting management objectives of both the Forest Service and Tribes” (Forest Service Manual § 1563.5).	
BLM, FWS, Joint Sec. Order on ESA, USDA Draft Sacred Sites.	
NPS, Reclamation	Traditional ecological knowledge is mentioned without a provision that allows for its use.

Management of off-reservation resources

Many tribes hold the right to utilize natural resources located outside the boundaries of their reservations, on lands owned by the federal government or private individuals. These natural resources include sacred sites, and culturally important plant and animal species. Many tribes need periodical access to sacred sites located on federal land to conduct ritual activities (DOI Sacred Sites). Additionally, many tribes in the Pacific Northwest have a treaty right to hunt and fish at their usual and accustomed places, including federally and privately owned lands (*US v. Winans*, 198 U.S. 371 (1905)). Other tribes hold treaty rights to gather plants for food and other culturally important practices (*Lac Courte Oreilles v. Voight*, 700 F.2d 341 (7th Cir. 1983)). Some of the most significant climate change impacts to tribes may be the shift in the habitat

range for these species and the impacts to tribal treaty rights related to hunting, gathering, and other tribal traditions.

In the Pacific Northwest for example, many treaty fishing rights were designed to protect the tribe’s cultural, economic and nutritional reliance on anadromous Salmon (Hanna and Squillace 2007). As climate change occurs, precipitation levels vary, and river temperatures fluctuate, treaty fishing rights may be threatened. Accordingly, tribes have an interest in maintaining sustainable salmon runs, access off-reservation fishing locations, and accessing treaty resources located on lands the tribe does not control. This ensures that the tribe’s spiritual customs and economic livelihood will be safeguarded (Hanna and Squillace 2007). The following table illustrates how some federal policies address tribes’ off-reservation rights.

Policy Examples	Impact
The Fish and Wildlife Service “recognizes and supports the rights of Native Americans to utilize fish and wildlife resources on non-reservation lands where there is a legal basis for such use” (FWS, Policy Principle III). Forest Service Manual § 1563.01d	Instructs land managers to support tribal access to off-reservation resources.
Requires consultation regarding the development of management plans of tribal trust resources outside of Indian lands (Joint Sec. Order on ESA § 5(Principle 3)(B)). Forest Service Manual, DOT Sec. Order, DOI Sacred Sites, FWS, BLM, and DOE	
	Instructs agencies to consult with tribes regarding the management of off-reservation resources.

Administration of grant programs

Tribes are eligible to apply for or participate in grants awarded by many agencies. For example, the federal government often funds the creation of disaster management plans, and studies indicate that climate change will increase the intensity of hurricanes on the gulf coast (Lynn et al. 2011). Federal agencies that manage disaster-planning grants may consult with gulf coast tribes regarding their planning needs.

Generally, some grant programs are open to states and tribes, others to private entities and tribes, yet others are restricted only to federally recognized tribes. The following table describes the interaction between the consultation policies examined in this report and grant programs.

Policy Examples	Impact
DOT Action Plan, 4.	Requires consultation regarding procedures and formulas used to administer grants that are available exclusively to tribes.
BPA § III(A)(3).	Encourages tribal implementation of BPA’s fish and wildlife program, including grants for the purchase of land, that are open to tribes, state governments, and private entities.

Uniquely, the USDA Action Plan discusses a review that may allow some tribes to access to additional grant programs. The USDA General Counsel is conducting a “comprehensive analysis of all USDA mission and agency related legislation for impact on programs and services important to tribal governments” (USDA Action Plan, 16). While the description of the review

in the action plan does not mention grant opportunities, at the request of tribal stakeholders it may be possible to initiate a new review, or to expand the review to include the identification of additional funding sources.

Implementation of Consultation Policies

Consultation policies not only define the scope of activities requiring consultation, but also the process used to consult. This section explores policies specifying when consultation should occur, the level of federal official that should be involved in consultation, how federal departmental and agency consultation policies should interact, and how the process should be concluded and evaluated.

When consultation occurs

The policies examined in this report vary when discussing at what point consultation should be initiated. Tribes request that consultation occur “very early in the planning and decision making process” (USDA Sacred Sites Listening Session, 4). At a minimum, policies require consultation before a decision is made or action is taken (BPA, DOT, NRCS). Executive Order 13175 requires consultation to occur “early in the process” (§ 5(f)(1)). While this may satisfy agency responsibilities, meaningful consultation occurs only when agencies engage with tribes much earlier in the process, even to the point of giving tribes the opportunity to guide where and how projects occur (Harris 2011). Many policies accordingly require consultation to occur as early as possible, (Forest Service Manual, USDA Draft Sacred Sites) or sufficiently early to allow for meaningful input and tribal concerns addressed (Commerce, EPA).

When initiating consultation immediately before agency decisions are made or action is taken, tribal opportunities to influence the outcome of the decision is limited. In contrast, if consultation is initiated at a point when action plans are still being formulated, tribal input may result in modifications to the scope of the action plan rather than merely providing input on a plan that is already developed.

Level of federal officials involved in consultation

In the 2011 Northwest Forest Plan report, many tribes stated that they expect federal officials empowered to make decisions regarding a particular project to engage directly in consultation (Harris 2011). In addition, tribes may consider relationships based on personal understanding and trust with local staff to be an important aspect of the larger federal-tribal relationship (USDA Sacred Sites Listening Session). Developing local relationships allows for more frequent in-person interactions, a stronger federal-tribal relationship, and more effective consultation regarding local resource and land management. The following table includes consultation policies that explicitly and implicitly recognize local relationships.

Policy Examples	Impact
<p>“Implementation of the Plan will . . . encourage and promote the use of effective personal and ad hoc communications that can create the foundation for meaningful and fruitful relationships at all levels of the Departmental organizations; including the important local level, where many of the key Department functions are carried out” (USDA Action Plan, 9).</p> <p>NPS</p>	<p>Policies explicitly recognize the important of local relationships in consultation</p>

BLM, Reclamation, NRCS, USDA Draft Sacred Sites	Policies implicitly recognize local relationships by requiring local officials to carry out consultation
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Many federal decision makers are not located in close geographic proximity to tribal land or resources, yet tribes have a desire to build relationships with federal officials through in-person meetings (USDA Sacred Sites Listening Session). The USDA addressed this tension by designing “a series of formal, structured regional consultations with senior management,” with the goal of reducing consultation time and cost for tribes and the department’s senior management (USDA Action Plan, 13). Additionally, the USDA will explore creating Regional Centers for Excellence in Tribal Consultation and Collaboration to “support financially and programmatically ... to serve as physical locations for standing regional USDA and other federal government-involved consultations with Tribal governments, intertribal organizations and communities” (USDA Action Plan, 18).

Interagency collaboration

About half of the policies examined for this study promote cross agency cooperation and communication. Some tribes expressed concern that multiple agencies often seek consultation with tribes regarding related topics, and yet limited tribal resources make it difficult to engage in consultation with each separate agency (Harris 2011). Policies that allow for and encourage interagency consultation on related topics have the potential to reduce the burden of consultations on tribes and federal agencies. For example, the National Park Service, National Forest Service, and eight tribes on Washington’s Olympic Peninsula participated in a training session on cross-cultural communication. This gathering led to the development of a Memorandum of Understanding that provides for annual meetings where the needs of the parties are addressed (Harris 2011). These intertribal meetings limit the need for individual consultations and save time for all participants. The following table includes examples of policies designed to promote interagency collaboration.

Policy Examples	Impact
The agency will “encourage and facilitate communication and cooperation among Native American governments, States, Federal agencies and others to identify and delineate respective roles and responsibilities to ensure that issues of common interest and concern are discussed” (FWS, 5).	Facilitates cross-agency communication and encourages various levels of government to work together.
“Bureaus and offices will seek to promote cooperation, participation, and efficiencies between agencies with overlapping jurisdiction, special expertise, or related responsibilities” (DOI Sec. Order 3317 § 4(c)).	Collaboration with other departments or agencies in the context of consultations is encouraged.
Commerce, DOT Action Plan, EPA, USDA Action Plan, USDA Draft Sacred Sites	
“The department will explore the use of regional interagency consultations on topics where agency responsibilities overlap, including “forest management, natural resource management, subsistence, nutrition and health” (USDA Action Plan, 13).	Department-wide consultations in regions established. Specific areas of overlapping responsibility are identified. Tribes may choose to address the impacts of climate change on their resources in these join sessions.

Consistency in consultation policies

Many consultation policies exist at the federal department and agency level, but not all of these policies are necessarily utilized when regional or local offices carry out consultations. Inconsistent consultation policies within a department may be challenging for tribes that deal with several agencies in the same department. Integrating consultation protocols within federal, state, and regional policy may help ensure that tribal needs are considered at every level (Harris 2011). The following table includes examples of consultation policies that require consistency within a federal entity.

Policy Examples	Impact
“[B]ureaus and offices will review their existing practices, [and] revise those practices as needed to comply with this policy” (DOI Sec. Order 3317 § 5(c)).	Addresses the integration of consultation policies by requiring subordinate agencies to modify or create policies to be consistent with the higher-level policy. This should result in consistent policies across the department.
DOI Sacred Sites, DOT Sec. Order, NPS, USDA Action Plan, USDA Draft Sacred Sites	
EPA, Forest Service Manual	Indirectly addresses the integration of consultation policies by requiring the use of the national-level policy directly at all levels of the agency.

Consideration of tribal input and notification of how tribal input is utilized

The report examining the federal-tribal relationship under the Northwest Forest Plan notes that some tribes view the Forest Service’s management plans as incompatible with the tribes’ management objectives because of differences in cultural values (Harris 2011). Tribes also raised concerns during listening sessions on the USDA Forest Service sacred sites policy that “economic values often hold greater weight in agency decision-making” than cultural values. In these same sessions, Forest Service staff stated, “they had no way of ‘valuing’ Sacred Sites in the current agency analysis and decision-making framework” (USDA Sacred Sites, 7). To ensure that outcomes from consultation consider and incorporate tribal cultural values, congressional direction and/or agency policy changes that give tribal cultural values the same weight and consideration as agency economic values are needed.

The consultation process, as described in Executive Order 13175 and agency policies, provides tribes a procedural right to be engaged in the decision making process; it does not give tribes veto power over federal decisions. Tribes often express frustration that their views have not been given thorough consideration following consultation and have expressed a desire for feedback from the agency regarding the adoption or rejection of tribal recommendations (Harris 2011). The following table provides examples of policies that require this type of feedback to be given to tribes.

Policy Examples	Impact
“Inform Tribes how their information and recommendations were considered in Forest Service decisions, including explanations in the event that tribal input was not adopted or incorporated” (Forest Service Manual § 1563.11(6)).	After the decision is made, tribes are fully informed as to how their input was used in the decision-making process.
BLM, EPA, Forest Service Manual, Joint Sec. Order on ESA, USDA Dept. Regulation	

Cooperative Management

Another potential outcome from consultation is agreement between the tribe and consulting agency on mutually beneficial resource management strategies (Harris 2011). This section discusses tools that are available for federal agencies and tribes to work together implementing agreed-upon management strategies. The Fish and Wildlife Service’s Native American policy clearly differentiates between two types of implementation: co-management and cooperative management.

Policy Example	Impact
“Co-Management - Two or more entities, each having legally established management responsibility, working together to actively protect, conserve, enhance, or restore fish and wildlife resources” (FWS, 8).	All parties have legally established management responsibilities, and jointly implement conservation strategies.
“Cooperative Management —Two or more entities working together to actively protect, conserve, enhance, or restore fish and wildlife resources” (FWS, 8).	The legal authority for management is in the hands of one party, and all parties jointly implement conservation strategies.

Legal authority for off-reservation resource management is derived from federal law. Some laws, including the Indian Self Determination and Education Assistance Act, allow for certain federal agencies to delegate management responsibilities to a tribe. A treaty that reserves to a tribe the right to manage or control access to a natural resources would similarly give a tribe legal authority, allowing co-management. Goodman (2000) argues that all treaties reserving off-reservation hunting and fishing rights include the legal authority to co-manage.

On a tribal reservation that has not been diminished,³ legal authority for the management of natural resources may rest with the tribe. A tribe’s inherent sovereignty over reservation lands, including the authority to manage natural resources, persists if not altered by federal law or treaty. Some federal laws act to affirm tribal authority to regulate on-reservation resources, including the tribal management of hunting, trapping, and fishing (18 U.S.C. § 1165). Yet other federal laws, including those governing the management of timber on Indian lands (25 U.S.C. §§ 406-407), allow federal agencies to sell tribal resources without the tribe’s consent.

The following table lists policies that provide for co-management and cooperative management of natural resources.

Policy Example	Impact
FWS “supports the rights of Native Americans to be self-governing, and further supports the authority of Native American governments to manage, co-manage, or cooperatively manage fish and wildlife resources, and to protect their Federally recognized authorities” (FWS, 4).	Allows the use of intergovernmental agreements for co-management and cooperative management.
“Tribal governments have the primary authority and responsibility for many reservation affairs, and may be co-managers of natural resources within their respective ceded, treaty, or usual and	

³ Establishing if a reservation has been diminished is a process used by courts to determine the extent that tribes retain the ability to regulate activity on the reservation. The analysis includes an examination of laws that impact the reservation and the percentage of the reservation inhabited by tribal members. For more information on diminishment, see *Cohen's Handbook of Federal Indian Law* § 3.04 (Newton 2009).

accustomed areas” (BPA § II).	
Cooperative law enforcement agreements are authorized in the Joint Sec. Order on ESA (App. §3(F)(1)).	Smith (2008) characterizes enforcement agreements as a form of co-management.
An agreement was reached between the National Marine Fisheries Service and Alaska Natives to limit enforcement of migratory bird takings violations (Smith 2008).	
FWS “is committed to entering into contracts, cooperative agreements, or grants with Native American governments at their request for the administration of fish and wildlife conservation programs” (FWS, 4).	Allows the use of intergovernmental agreements for cooperative management and implementation of conservation programs
The Forest Service has authority to enter into cooperative management programs including “challenge Cost-Share agreements, Wyden agreements, participating agreements, MOUs, or stewardship agreements pursuant to the Tribal Forest Protection Act” (USDA Sacred Sites 2011) (Forest Service Manual § 1563.01b, implementing the Federal Land Policy and Management Act).	
Forest Service regulations allow tribes to enter into “cooperating agency status,” giving additional opportunities for input in resource management planning (36 CFR Pt. 219).	
Joint Sec. Order on ESA	

The USDA’s Draft Sacred Sites Report recommends that the Forest Service provide tribes examples of agreements that show how the agency and tribal governments can work together to reach shared management goals (USDA Sacred Sites 2011). Furthermore, many tribes requested that sacred sites be managed jointly through co-management agreements (USDA Sacred Sites 2011). The Draft Sacred Sites Report indicates the Forest Service has the authority to enter into some types of cooperative agreements (see table above), but not to delegate decision-making authority to an entity outside of the federal government (USDA Sacred Sites 2011). This report analyzes agency policies, and did not examine specific laws or treaties to determine if the authority for co-management is present.⁴

There are a growing number of examples of cooperative management between tribes and federal agencies. One such example is the partnership between the Tulalip Tribes and the U.S. Forest Service to enhance huckleberry fields for tribal gathering in the Mount Baker-Snoqualmie National Forest. As noted in recent feature article on the Northwest Indian Fisheries website: *“Tulalip’s partnership with the Forest Service is an example of cooperative management intended to ensure sustainability and access to treaty-reserved resources on public lands. In western Washington, reservation lands alone do not provide enough food, traditional plants and other resources to sustain tribal culture.”*⁵

⁴ Authorities for co-management are analyzed in *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right* (Goodman 2000).

⁵ Northwest Indian Fisheries Commission. December 2011. <http://nwifc.org/2011/12/tulalip-tribes-replenish-huckleberry-gathering-areas/>

Evaluation

Tribes and federal agencies may have different perspectives on what constitutes an effective government-to-government relationship. Evaluations that only include input from agency participants may not reflect the tribe’s opinion, especially if the tribe’s opinion differs from the agency. Furthermore, there is a need to ensure that tribal governments receive feedback from the agencies on how tribal input was used in agency decision-making.

Policy Examples	Impact
Establishes a joint federal-tribal team that meets twice annually to identify “priorities that will improve the quality of the Department’s consultation practices” (DOI Sec. Order 3317 § 9).	Requires tribal input in the evaluation of the consultation process.
“The secretary of energy will conduct periodic summits with tribal leaders for performance review of policy implementation and issue resolution. The Secretary will engage tribal leaders in periodic dialogue, to discuss the Department’s implementation of the American Indian and Alaska Native Policy. The dialogue will provide an opportunity for tribal leaders to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues” (DOE, 6).	

Training and Funding

Training

Training is an integral way that federal officials can learn about tribal cultures, the federal government’s trust responsibility, and consultation protocols. In the face of potential impacts to tribal resources from climate change, it is important for officials to recognize the types of federal activities that may affect tribal resources and treaty rights. Additionally, training for federal officials and tribes provides a way to improve government-to-government relationships (Harris 2011). In the USDA Sacred Sites Listening Session, tribes requested that agency employees be given training on cultural sensitivity, and to ensure that trainings involve tribal members. The following table provides examples of how federal agencies integrate training into tribal policies.

Policy Examples	Impact
“Training should cover relationship building, protection, tools, and cultural competency; Native Americans should be invited to assist” (USDA Draft Sacred Sites, ii).	Federal officials are given notice of available training opportunities and encouraged to participate in training. Funding for training was not discussed in any policy examined by this report.
DOI Sec. Order 3317, DOT Action Plan, DOT Sec. Order, Forest Service Manual, FWS, NCRS, Reclamation, USDA Action Plan	

Staff Turnover

A relationship, at its core, is an interaction between individuals. Effective government-to-government relations often exist because a specific federal official has taken the time to learn tribal consultation needs and maintain a long-term relationship with the tribe (Harris 2011). Staff turnover disrupts established personal relationships and can negatively impact federal-tribal relationships without adequate planning (Harris 2011). For example, tribes comment that Forest Service leadership transitions result in disruptions in the use of programmatic agreements and

MOAs (USDA Sacred Sites Listening Session). One policy examined in this report addressed the impact of staff turnover:

“We acknowledge that *continuity of leadership* is often lacking due to frequent turnover of Forest Service line officers, as well as tribal leaders. This turnover can present challenges to establishing and maintaining relationships between the Forest Service and Tribes. The development and maintenance of *agreements* between Tribes and agencies can help to bridge these transitions while new leaders build personal relationships. However, some work to ensure incoming leaders are familiar with existing agreements is required. Written agreements and memorandums of understanding are among the best ways to establish stable, consistent understanding and provide a foundation for relationships between Tribes and the agency. Agreements can establish estimated timeframes, schedules of regular communication, methods of communication, and processes for protection of Sacred Sites . . . [E]stablishing a schedule for regular consultation meetings at the forest level to help improve relationships and move towards better overall communication.” (USDA Draft Sacred Sites, 8)

Funding for consultation

A written policy may be ineffective if funds are not allocated to implement it. Tribes have requested funding to aid federal agencies in performing consultation, as well as financial assistance to the tribe itself as compensation for consultation activities (Harris 2011). This section discusses how the policies examined in this report deal with funding for federal agencies and tribes.

Five of the policies examined in this report discuss funding for federal agencies’ consultation responsibilities (DOT Action Plan, FWS, NRCS, Reclamation, USDA Action Plan, USDA Draft Sacred Sites). None of the policies discuss the allocation of funds for agencies to effectively engage in consultation. For example, USDA’s Draft Sacred Sites Report notes that funding is usually available on a project-by-project basis, and that no dedicated source of funding is available. Reclamation’s policy specifically says that consultation is an unfunded program and its costs are to be drawn from Regional and Area budgets.

The USDA Action Plan takes an innovative approach to funding. It suggests the creation of “Regional Centers for Excellence in Tribal Consultation and Collaboration” to be supported financially and programmatically “to serve as physical locations for standing regional USDA and other federal government-involved consultations with Tribal governments, intertribal organizations and communities. These Centers could also serve as physical locations for the conduct of periodic technical assistance for tribes, communities and individuals concerning the programs, program application requirements, and the technical expertise necessary to successfully participate in USDA programs” (USDA Action Plan, 18).

In addition to providing funding for agencies to engage in consultation, two policies identified in the table below discuss discretionary funding of tribal government’s consultation efforts.

Policy Examples	Impact
“The Forest Service may compensate Tribes for specialized tribal expertise or other extraordinary consultation costs to the extent	Funding for tribes to effectively engage in consultation is considered but not required.

authorized by law” (Forest Service Manual, § 1563.13(3))	
NMFS Alaska	
The Department will “support substantive participation by tribes in deliberations on climate-related” rules and regulations (DOI Sec. Order 3280, 4).	It is unclear if the support discussed in this policy is financial or not.

Funding for tribes outside of consultation

The policies identified in the table below discuss tribal funding opportunities for activities other than consultation. Several policies require agencies to provide technical assistance to tribes, while others increase contracting and cooperative management opportunities for tribes. For more information, see “Administration of Grant Programs,” above.

Policy Examples	Impact
“The goal is to increase Forest Service employees and tribal understanding and of the opportunities to enter into contracts, grants, and agreements with tribal governments and Native American-owned businesses. Increased tribal participation in contracting and agreements is an important aspect of our responsibilities to consult, coordinate, and communicate with Tribes” (Forest Service Manual § 1563.6).	Increases tribal access to agency contracting opportunities
“The Service is committed to entering into contracts, cooperative agreements, or grants with Native American governments at their request for the administration of fish and wildlife conservation programs under the terms, conditions, and to the extent provided by the Indian Self Determination and Education Assistance Act (Act)” (FWS, Policy Principle IV).	Agency is encouraged to enter into contracts and cooperative management agreements with tribes.
“Assist American Indian and Alaska Native Tribal Governments by providing technical, educational, financial, and other information, and establish information exchanges where mutually agreed to and authorized by law” (Forest Service Manual § 1563.03(8)).	Agency provides technical assistance to tribes.
BPA, BLM, DOE, FWS, Joint Sec. Order on ESA, NRCS, DOT Action Plan, DOT Sec. Order, USDA Dept. Regulation, USDA Draft Sacred Sites.	

III. CONCLUSION: MEANINGFUL CONSULTATION IN A CLIMATE CONTEXT

This report examines federal consultation policies in order to highlight examples of policies that may strengthen the federal-tribal relationship in the context of climate change. Federal agencies are actively engaging in climate change assessments and adaptation plans, and making resource management planning decisions based on understanding of the potential impacts from climate change. These assessments, plans and decisions will have an impact on tribal resources and culture. This section provides a summary of key considerations and recommendations for strengthening the federal-tribal relationship through meaningful consultation as a mechanism for tribes and agencies to work together in understanding and addressing the impacts from climate change.

Education and Training

- **Establish common understandings of the role, purpose, and principles of "consultation"**. A lack of understanding of the obligations for consultation is common among both agencies and tribes. Consultation policies are not the sole domain of agencies - tribes can and have their own consultation policies to deal with the many different policies that agencies operate under, and both agencies and tribes can initiate consultation. Differences between sovereigns that arise during consultation processes are to be addressed through dialogue between equals - that means that agencies do not enjoy unilateral latitude and discretion in decisions affecting tribes and tribes must be provided with access to relevant information with sufficient time to understand the implications of agency actions.
- **Evaluate current knowledge among agency staff about the federal-tribal relationship; develop strategies to address gaps in knowledge**. The current level of training and education among agency staff about the federal-tribal relationship will directly affect the ability of agencies and tribes to engage meaningfully on climate change issues, as well as address issues related to staff turnover. This may call for a review of the existence and quality of federal agency training programs related to tribal consultation and result in improvement of cross-cultural communication.

Agency Climate Change Plans, Policies, Research and Assessments

- **Agency climate change policies, research, resources and plans should directly and meaningfully address issues related to American Indians, Alaska Natives and Native Hawaiians**. When agency products and initiatives related to climate change only include tribes as general stakeholders, they fail to recognize the contributions that indigenous communities in the U.S. can offer in addressing climate change, as well as the implications that climate change may have on off-reservation tribal resources and ancestral territory. Strengthening the federal-tribal relationship to address climate change requires recognition of tribal sovereignty among all levels of agency engagement on climate change issues.
- **Directly involve tribes in local, regional and national climate change assessments**. There are a multitude of efforts to assess climate change at local, regional and national scales in the United States. Many of these assessments will include tribal lands and resources. Without the

direct engagement of tribes in these efforts, however, the scale and scope of the assessments may not be useful to tribes.

- **Establish formal recognition for the role of traditional knowledge in climate change assessments.** Some tribes have adopted their own policies and programs to assess climate change impacts on resources of concern, and many of these efforts incorporate the use of traditional knowledge. Traditional knowledge can play an important role in understanding the impacts from climate change and identifying strategies for adaptation. Consultation should involve procedures for sharing information, as well as strategies to ensure the protection of culturally sensitive tribal information from disclosure.⁶
- **Examine how the impacts of climate change on the quantity and distribution of culturally important species will affect tribal access to and management of these tribal resources, on- and off-reservation.** Climate change may result in changes to ecological processes, as well as the quantity and distribution of species that have cultural and economic importance to tribes. These shifts create the need to examine treaty rights and federal land management obligations in consulting with tribes to assess and plan for the potential socio-economic and ecological impacts from climate change. There is a need to examine how tribal rights and access to culturally important resources (both on- and off-reservation) will be affected by the impacts from climate change. This level of investigation must happen at a local level and through direct consultation and collaboration between tribal and agency leadership and staff in order to identify strategies to protect tribal access to these resources in the future.

Capacity to Engage in Consultation

- **Identify resources to provide tribes with the capacity to engage in consultation policies.** Tribes are faced with numerous calls for "consultation" and finding the resources and staff to travel, respond to requests for information, or participate in consultations may be problematic and limit tribal responses to consultation requests.

⁶ For more detailed recommendations on the role of traditional knowledge in climate change initiatives, see “*A Synthesis of Literature on Traditional Ecological Knowledge and Climate Change.*” Draft January 2012. Email kathy@uoregon.edu for a copy.

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U.S. Dept. of Agriculture. 2010. Action Plan for Tribal Consultation and Collaboration (Plan submitted pursuant to Presidential Memorandum dated Nov. 5, 2009) (February 2010)

<http://www.usda.gov/documents/ConsultationPlan.pdf>

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Title 410: Rural Development Part 405: American Indians and Alaska Natives (October 2010)

<http://directives.sc.egov.usda.gov/RollupViewer.aspx?hid=17072>

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1997) http://www.nmfs.noaa.gov/pr/pdfs/recovery/appendix_f-j.pdf

U.S. Department of Interior. 1994. The Native American Policy of the U.S. Fish and Wildlife Service (June 28, 1994)

http://www.fws.gov/nativeamerican/graphics/Native_Amer_Policy.pdf

U.S. Department of Interior. 1995. Interior Departmental Manual Part 512: Ch. 2: Dept. Responsibilities for Indian Trust Resources (Dec. 1, 1995)

<http://elips.doi.gov/elips/release/3049.htm>

U.S. Department of Interior. 1998. Ch. 3: Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites (June 5, 1998)

http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3214

U.S. Department of Interior. 2001. Bureau of Reclamation's Protocol Guidelines: Consulting with Indian Tribal Governments (Published Feb. 3, 1998) (Revised Feb. 9, 2001)

<http://www.usbr.gov/native/naao/policies/protguide.pdf>

U.S. Department of Interior. 2004. BLM Guidelines for Conducting Tribal Consultation; BLM Manual § 8120: Tribal Consultation Under Cultural Resources (Dec. 3, 2004)

http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.80216.File.dat/8120.pdf

U.S. Department of Interior. 2006. National Park Service Management Policies § 5.2.1: Consultation (2006) <http://www.nps.gov/policy/mp/policies.html - Consultation521>

U.S. Department of Energy. 2006. American Indian & Alaska Native Tribal Government Policy (January 20, 2006) http://apps1.eere.energy.gov/tribalenergy/pdfs/doe_indian_policy2006.pdf

U.S. Department of Interior. 2009. Secretarial Order No. 3289: Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural and Cultural Resources (Sept. 14, 2009) <http://www.doi.gov/whatwedo/climate/cop15/upload/SecOrder3289.pdf>

U.S. Department of Interior. 2011. Secretarial Order No. 3317: Department of the Interior Policy on Consultation with Indian Tribes (Dec. 1, 2011) <http://www.doi.gov/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf>

U.S. Department of Interior. 2011. Draft DOI Policy On Consultation With Indian Tribes (Jan. 14, 2011) <http://www.bia.gov/idc/groups/public/documents/text/idc013023.pdf>

U.S. Department of Transportation. 1999. Sec. Order 5301.1: Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives, and Tribes (Nov. 16, 1999) <http://isddc.dot.gov/OLPFiles/OST/009273.pdf>

U.S. Department of Transportation. 2010. Plan to Develop a Tribal Consultation and Coordination Policy Implementing Executive Order 13175 (February 2010)

<http://www.dot.gov/tribal/docs/consultationplan.pdf>

APPENDIX A. DEFINITIONS

Tribal Sovereignty

Tribal sovereignty is the right of tribes, as domestic dependent nations, to exercise self-determination and the right to self-government. These rights are in effect unless the powers have been modified by treaty or by an Act of Congress.

<http://www.epa.gov/owindian/wetg/training/EPA/common/data/text-only/Old/epa01a.htm>

Federally recognized tribe

A federally recognized tribe is 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, and is eligible for funding and services from the Bureau of Indian Affairs. Furthermore, federally recognized tribes are recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States. At present, there are 566 federally recognized American Indian and Alaska Native tribes and villages.

<http://www.bia.gov/FAQs/index.htm>

<http://aspe.hhs.gov/SelfGovernance/faqs.htm>

Indian Treaty Rights

From 1778 to 1871, the United States' relations with individual American Indian nations indigenous to what is now the U.S. were defined and conducted largely through the treaty-making process. These "contracts among nations" recognized and established unique sets of rights, benefits, and conditions for the treaty-making tribes who agreed to cede of millions of acres of their homelands to the United States and accept its protection. Like other treaty obligations of the United States, Indian treaties are considered to be "*the supreme law of the land,*" and they are the foundation upon which federal Indian law and the federal Indian trust relationship is based. As such, the protection of treaty rights is a critical part of the federal Indian trust relationship. Tribes with reservations are also entitled to other rights, such a United States reserved water rights for Indian reservations.

<http://www.bia.gov/FAQs/index.htm>

<http://aspe.hhs.gov/SelfGovernance/faqs.htm>

Federal Indian trust responsibility

The **federal Indian trust responsibility** is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States, 1942*). This obligation was first discussed by Chief Justice John Marshall in *Cherokee Nation v. Georgia (1831)*. Over the years, the trust doctrine has been at the center of numerous other Supreme Court cases, thus making it one of the most important principles in federal Indian law. The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States 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. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes.

<http://www.bia.gov/FAQs/index.htm>

<http://aspe.hhs.gov/SelfGovernance/faqs.htm>

Indian Country

Indian country is defined in 18 USC 1151 as follows: (1) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (3) All Indian allotments, the Indian titles to which have been extinguished, including rights-of-way running through the same.

Federal Indian Reservations

A federal Indian reservation is an area of land reserved for a tribe or tribes under treaty or other agreement with the United States, executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe. Approximately 56.2 million acres are held in trust by the United States for various Indian tribes and individuals. Some reservations are the remnants of a tribe's original land base. Others were created by the federal government for the resettling of Indian people forcibly relocated from their homelands. Not every federally recognized tribe has a reservation.

<http://www.bia.gov/FAQs/index.htm>

Allotted lands are remnants of reservations broken up during the federal allotment period of the late nineteenth and early twentieth centuries. By 1885, over 11,000 patents had been issued to individual Indians under various treaties and laws. Starting with the General Allotment Act in 1887 (also known as the Dawes Act) until the Indian Reorganization Act of 1934, allotments were conveyed to members of affected tribes and held in trust by the federal government. As allotments were taken out of trust, they became subject to state and local taxation, which resulted in thousands of acres passing out of Indian hands. <http://www.bia.gov/FAQs/index.htm>

Trust land is land held by the U.S. government in trust for Native Americans, usually a tribe. The trustee is the federal government. The holder of the beneficial title may be a tribe or an individual Native American. The holder of the fee simple title is the U.S. government.

<http://www.epa.gov/owindian/wetg/training/EPA/common/data/text-only/Old/epa01a.htm>

Fee land is land owned by a nonmember, that is, an individual who is not a member of a federally-recognized Native American tribe, within the boundaries of a reservation. The land is held in fee simple, rather than trust. <http://www.epa.gov/owindian/wetg/training/EPA/common/data/text-only/Old/epa01a.htm>

Ceded territory refers to land within a reservation or aboriginal territory that has been sold by a tribe or taken by the U.S. government. Tribes may retain treaty rights to hunt, fish, and/or gather other resources and the right to regulate members exercising the reserved rights, for example, some Great Lakes or Northwest tribes. <http://www.epa.gov/owindian/wetg/training/EPA/common/data/text-only/Old/epa01a.htm>

Reserved Rights. In *United States v. Winans*, 198 U.S. 371 (1905)[1], the U.S. Supreme Court case held that the Treaty with the Yakima of 1855, as well as treaties similar to it, protected the Indians' rights to fishing, hunting and other privileges. Through *U.S. v. Winans*, the Reserved Rights Doctrine was established, which states that treaties are not rights granted to the Indians, but rather "*a reservation by*

the Indians of rights already possessed and not granted away by them."

http://en.wikipedia.org/wiki/United_States_v._Winans

APPENDIX B. LIST OF FEDERAL TRIBAL CONSULTATION STATUTES, ORDERS, REGULATIONS, RULES, POLICIES, MANUALS, PROTOCOLS AND GUIDANCE – JANUARY 2009

This list was prepared by the White House – Indian Affairs Executive Working Group (EWG) Consultation and Coordination Advisory Group (CACAG) in January 2009. It contains those federal Tribal consultation statutes, orders, regulations, policies, manuals, and protocols that specify procedures as to how Departments, agencies and bureaus are to carry out consultation, It also includes many of the laws, orders, regulations and policies requiring that government-to-government relationships with tribes be carried out however, it does not purport to be comprehensive or all encompassing.

Relevant Excerpts to this report are listed below. For full text of the memo, visit:

http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20AHP%20version_6-09.pdf

Part 1. Legal Authorities Requiring Consultation - Government-wide

A. Statutes Requiring Consultation – Government-wide:

1. American Indian Religious Freedom Act (AIRFA) (16 U.S.C. 1996)

AIRFA establishes the policy of the federal government “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”

2. Archeological Resources Protection Act of 1979. (ARPA) (16 U.S.C. 470aa-mm)

ARPA requires federal agencies to consult with tribal authorities before permitting archeological excavations on tribal lands (16 U.S.C. 470cc(c)). It also mandates the confidentiality of information concerning the nature and location of archeological resources, including tribal archeological resources. (Also refer to the ARPA implementing regulations concerning consultation.)

3. National Historic Preservation Act (NHPA) (16 U.S.C. 470 et seq.)

In carrying out its responsibilities under section 106 of this Act, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A). (Section 101(d) (6) (B))

4. Native American Graves Protection and Repatriation Act (25 U.S.C. 3001, et. seq.)

NAGPRA requires consultations with Indian tribes, traditional religious leaders and lineal descendants of Native Americans regarding the treatment and disposition of specific kinds of human remains, funerary objects, sacred objects and other items. Under the Act, consultation is required under certain circumstances, including those identified in Sections 3002(c), 3002(d), 3003, 3004, and 3005. (Also refer to the NAGPRA implementing regulations concerning consultation. Detailed information about NAGPRA and its implementing regulations is available at the National Park Service (NPS) National NAGPRA website, which can be found at: <http://www.nps.gov/history/nagpra/>

B. Regulations Requiring Consultation - Government-wide

1. Native American Graves Protection and Repatriation Act (NAGPRA) Implementing Regulations (43 CFR 10)

The NAGPRA implementing regulations refer to consultation or consultation-related concerns in several sections, including (but not limited to): 43 CFR 10.5 (consultation requirements for intentional excavation or inadvertent discovery), 43 CFR 10.8 (consultation requirements for summaries), 43 CFR 10.9 (consultation requirements for inventories). The regulations also specify other requirements for communicating with tribes, though without requiring consultation.)

2. National Environmental Policy Act (NEPA) Implementing Regulations 40 CFR Part 1500

NEPA requires the preparation of an environmental assessment (EA) or environmental impact statement (EIS) for any proposed major federal action that may significantly affect the quality of the human environment. While the statutory language of NEPA does not mention Indian tribes, the Council on Environmental Quality (CEQ) regulations and guidance do require agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of an EA or EIS. CEQ has issued a Memorandum for Tribal Leaders encouraging tribes to participate as cooperating agencies with federal agencies in NEPA reviews. Section 40 CFR 1501.2(d)(2) requires that Federal agencies consult with Indian tribes early in the NEPA process. Other sections also refer to interacting with Indian tribes while implementing the NEPA process.

3. National Historic Preservation Act (NHPA) Regulations Implementing Section 106 (36 CFR Part 800)

The regulations implementing Section 106 of the NHPA require consultation with Indian tribes throughout the historic preservation review process. Federal agencies are required to consult with Indian tribes on a government-to-government basis, in a manner that is respectful of tribal sovereignty. The regulations require federal agencies to acknowledge the special expertise of Indian tribes in determining which historic properties are of religious and cultural significance to them.

C. Executive Orders and Memoranda Requiring Consultation – Government-wide

1. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000). <http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html>

2. EO 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994) - Published in Federal Register, 59 FR 7629, Wednesday, February 16, 1994 <http://www.hud.gov/offices/ftheo/FHLaws/EXO12898.cfm>

Section 6-606, entitled “Native American Programs,” requires that each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally recognized Indian Tribes.

Part II: Legal Authorities Requiring Consultation - Two or More Agencies

1. Statutes Requiring Consultation

a. DOI and HHS: Indian Self-Determination and Education Assistance Act (25 U.S.C. 450)

The Indian Self-Determination and Education Assistance Act (Public Law 93-638, as amended) applies to certain activities of the Department of the Interior and the Indian Health Service, located in the Department of Health and Human Services). The Act establishes a Self-Determination Policy and permits federally recognized Indian tribes to plan, conduct, and administer programs and services that traditionally have been managed by the federal government, subject to the conditions specified by the Act and its implementing regulations. Both the Act and regulations require that consultation be carried out under specified circumstances.

3. Secretarial Orders and Memoranda Requiring Consultation

a. DOC and DOI: Dept. of the Interior

1. SO 3206: Tribal Rights, Trust Responsibilities and the Endangered Species Act (June 5, 1997)

This order was issued jointly by the Secretaries of the Interior and Commerce, and applies to both Departments. It provides guidance about the federal-tribal relationship and how this relationship should affect the implementation of the Endangered Species Act. The order requires consultations with tribal governments in several situations described in the order, including Principal 1's requirement that whenever "agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable and Principal 3(B)'s requirement that the "Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species."

Part III: Legal Authorities and Other Policies, Procedures or Guidelines Requiring Consultation - Department, Agency, or Bureau Specific

GOVERNMENT-WIDE EXECUTIVE DEPARTMENTS

DEPARTMENT OF AGRICULTURE (USDA)

- USDA Web Page: <http://www.usda.gov/na>
- USDA Departmental Regulation, 1350-001, September 11, 2008, Tribal Consultation: <http://www.ocio.usda.gov/directives/doc/DR1350-001.pdf>
- USDA Departmental Regulation, 1340-007, March 14, 2008, Policies on American Indians and Alaska Natives: <http://www.ocio.usda.gov/directives/doc/DR1340-007.pdf>
- USDA Departmental Regulation 1020-005, October 3, 2008 Native American Working Group: <http://www.ocio.usda.gov/directives/doc/DR1020-005.htm>

Forest Service

- FSM (Forest Service Manual) – 1500 -External Relations; Chapter 1560 – State, Tribal, County, and Local Agencies, Public and Private Organizations. Forest Service Tribal Policies, Including Consultation, are contained in Section 1563, available at: http://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsm?1500 (Available in word document or text document, select 1562 – 1566.11 from list)

Natural Resources Conservation Service (NRCS)

- General Manual: Title 410-Rural Development, Part 450-American Indians and Alaska Natives: <http://directives.sc.egov.usda.gov/17072.wba>
- General Manual: Title 420-Social Sciences, Part 401 Cultural Resources (Archeology and historical Properties): <http://directives.sc.egov.usda.gov/17073.wba>
- Handbook: Title 190-Ecological Sciences, Part 601-National Cultural Resources Procedures Handbook. (see 601.62): <http://directives.sc.egov.usda.gov/17090.wba>

Rural Development

- www.rurdev.usda.gov/rd/aian

Office of the Assistant Secretary of Civil Rights

- <http://www.ascr.usda.gov/partnerships.html>
- <http://www.ascr.usda.gov/doc/MOAUSDAAIHECSIGNED2508.pdf>

DEPARTMENT OF DEFENSE (DOD)

Department of Defense American Indian and Alaska Native Policy

- <https://www.denix.osd.mil/portal/page/portal/content/environment/NA/1-American%20Indian%20and%20Alaska%20Native%20Policy.pdf>

Department of Defense American Indian and Alaska Native Policy (Annotated)

- [https://www.denix.osd.mil/portal/page/portal/content/environment/NA/3-composite%20annotated%20policy%20for%20posting%20TA%206-08%20\(2\).pdf](https://www.denix.osd.mil/portal/page/portal/content/environment/NA/3-composite%20annotated%20policy%20for%20posting%20TA%206-08%20(2).pdf)

Department of Defense American Indian and Alaska Native Policy - Instruction

- <https://www.denix.osd.mil/portal/page/portal/content/environment/NA/2-Policy%20Instruction%20for%20Posting%20RB%206-08.pdf>
- Department of Defense Instruction No. 4710.02: DoD Interactions with Federally- Recognized Tribes (2006). See especially Enclosure 8, "Principles for Consultations with Native Americans." <http://www.dtic.mil/whs/directives/corres/pdf/471503.pdf>

Department of the Navy

- *Department of the Navy Policy for Consultation with Federally Recognized Indian Tribes.* (2005) <http://doni.daps.dla.mil/Directives/11000%20Facilities%20and%20Land%20Management%20Ashore/11-00%20Facilities%20and%20Activities%20Ashore%20Support/11010.14A.pdf>
- Instruction No. 11010.14A, Department of Navy Policy for Consultation with Federally Recognized Indian Tribes. (2005) <http://doni.daps.dla.mil/Directives/11000%20Facilities%20and%20Land%20Management%20Ashore/1100%20Facilities%20and%20Activities%20Ashore%20Support/11010.14A.pdf>

Marine Corps

- Marine Corps Order (MCO) 5090.2A, Chapter 8, provides cultural resources policy (including consultation) for the Marine Corps. In preparation.

Department of the Army

- Army Regulations 200-4: Cultural Resources Management Program (2004) See especially Section 1-

9(c) on government-to-government relations and consultation.

<http://www.gordon.army.mil/dpw/enrmo/ar200-4.html>

- U.S. Army Corp of Engineers, Civil Works, Policy Guidance Letter 57: Tribal Policy Principles. 1998. “Consulting with Tribal Nations: A Guide for the US Army Corps of Engineers”. (2008)
www.usace.army.mil/cw/tribal/index.html

Department of the Air Force

- Air Force Instruction 32-7065; Cultural Resources Management Program (2004) See especially Chapter 3.2 “Consultation with Native Americans.”
http://www.afpmb.org/military_entomology/usafento/files/afi32-7065.pdf

DEPARTMENT OF ENERGY (DOE)

- US Department of Energy American Indian Policy: www.ci.doe.gov/tapolicy.htm
- *A Guide for DOE Employees Working with Indian Tribal Nations* (2000)
http://homer.ornl.gov/oepa/guidance/cultural/em_guide.pdf
- DOE American Indian and Alaska Native Tribal Government Policy: The Department's Tribal Policy
www.ci.doe.gov/tapolicy.htm
- Framework for the Implementation of the DOE American Indian Alaskan Native Tribal Government Policy for the Offices of Environmental Management, Nuclear Energy, Science, and National Nuclear Security Administration: The implementation of the Policy as applied to specific offices with landlord responsibilities near specific Indian lands.
- DOE Employee Guide: *Working With Indian Tribal Nations (DOE/EM-0771, December 2000)*: An introduction for federal government employees who work with American Indian staff or governments
- DOE Order 1230.2: Internal DOE Order transmitting the Tribal Policy and identifying the responsibilities of individual programs to identify points of contact for tribal issues
- Native American Consultation Information Brief” (DOE/EH-41-0019/1204, December 2004 Environmental Guidelines for the Development of Cultural Resource Management Plans Update” (DOE Guide 450.1-3)
- Working with Indian Tribal Nations; December, 2000 U.S. Department of Energy Transportation Resources for Tribes; July, 2003 U.S. Department of Energy

Bonneville Power Administration

- *BPA Tribal Policy*. (1996) <http://www.bpa.gov/corporate/kt/tribpolx.shtml>

DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS)

- HHS Tribal Consultation Policy
<http://www.hhs.gov/intergovernmental/tribal/docs/tribalconsultationpolicyfeb08.pdf>
- All HHS Agency Consultation Plans <http://www.hhs.gov/intergovernmental/tribal/allplans.pdf>
- All HHS Staff Divisions Consultation Plan: <http://www.hhs.gov/intergovernmental/tribal/osplan.html>

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)

- Government-to-Government Tribal Consultation Policy:
http://www.hud.gov/offices/pih/ih/regs/govtogov_tcp.cfm

DEPARTMENT OF INTERIOR (DOI)

1. Department-wide:

- (1) *Departmental Responsibilities for Indian Trust Resources* (1995) [Series: Intergovernmental Relations; Part 512: American Indian and Alaska Native Programs; Chapter 2: Departmental Responsibilities for Indian Trust Resources; 512 DM 2] - <http://elips.doi.gov/elips/release/3049.htm>. This DM requires consultation with potentially affected recognized Indian tribal governments in the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety.
- (2) *Departmental Manual Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites* (1998) [Series: Intergovernmental Relations; Part 512: American Indian and Alaska Native Programs; Chapter 3: Departmental Responsibilities for Protecting/Accommodating Access to Indian Sacred Sites; 512 DM 3] - http://elips.doi.gov/app_dm/act_getfiles.cfm?relnum=3214. This DM requires consultation with potentially affected federally recognized tribal government(s) when taking actions pursuant to this DM, which pertains to avoiding adverse impacts to and providing access to Indian sacred sites.
- (3) ECM 97-2 Departmental Responsibilities for Indian Trust Resources and Indian Sacred Sites on Federal Lands <http://oepc.doi.gov/ECM/ECM97%2D2%2Epdf>. Requires DOI offices and bureaus to consult with tribes in the course of carrying out environmental compliance when potential impacts to Indian Trust Resources or Indian Sacred Sites are identified.

2. Bureau-specific

a. Bureau of Indian Affairs

- *Government-to-Government Consultation Policy*. (2000). http://www.fpa.nifc.gov/Library/Memos/Docs/Bureau_of_Indian_Affairs_Consultation_Policy.pdf.
- *Government-to-Government Consultation Policy* (2000). http://www.doi.gov/bia/tribal_consultation.html

b. Bureau of Indian Education

- Department of the Interior, Bureau of Indian Affairs Programs. Policy for Indian Control of Indian Education (25 U.S.C. 2011). The statute mandates secretarial consultation with tribes to ensure quality education for all tribal members. It includes a definition of consultation. (*Note: The Office of Indian Education Programs was taken out of the Bureau of Indian Affairs in 2007 to become the Bureau of Indian Education (BIE). This statute only applies to BIE, within the Department of Interior.*)

c. U.S. Geological Survey

- U.S. Geological Survey Manual, Section 500.4 Policy on Employee Responsibility Towards American Indians and Alaska Natives. (1995) <http://www.usgs.gov/usgs-manual/500/500-4.html>
- U.S. Geological Survey Manual, Section 500.6 American Indian and Alaska Native Sacred Sites. (1997) <http://www.usgs.gov/usgs-manual/500/500-6.html>

d. National Park Service

- A compilation of NPS management policies pertaining to Native Americans. (2001) <http://www.nps.gov/policy/NativeAmericanPolicies.htm>
- *National NAGPRA Online Databases: Native American Consultation Database*. <http://www.cast.uark.edu/other/nps/nacd/>

e. Bureau of Reclamation

- Protocol Guidelines: Consulting with Indian Tribal Governments
<http://www.usbr.gov/native/naao/policies/protguide.pdf>
- Guidance for Implementing Indian Sacred Sites Executive Order (September 16, 1998) Indian Policy of the Bureau of Reclamation. (1998) <http://www.usbr.gov/native/naao/policies/indianpol.pdf>
Note: This list does not include all Bureau of Reclamation policies or guidance indicating that consultation with tribal governments should be carried out, but omits policies which merely augments other, higher level sources, such as statutes, CFR's, EO's, SO's or DM's, which require consultation under specific circumstances.

f. Bureau of Land Management

- Manual 8120 Tribal Consultation under Cultural Resource Authorities. (2004)
http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.80216.File.dat/8120.pdf
- Handbook H-8120-1 Guidelines for Conducting Tribal Consultation. (2004)
http://www.blm.gov/style/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.86923.File.dat/h8120-1.pdf

DEPARTMENT OF JUSTICE (DOJ)

- Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes. (1995) <http://www.usdoj.gov/ag/readingroom/sovereignty.html>

DEPARTMENT OF TRANSPORTATION (DOT)

- DOT Order 5301.1. Department of Transportation Programs, Policies, and Procedures affecting American Indians, Alaska Natives and Tribes.
<http://www.environment.fhwa.dot.gov/guidebook/vol2/5301.1.pdf>

Federal Highway Administration

- Section 106 Tribal Consultation Q & A's: <http://www.fhwa.dot.gov/hep/tribaltrans/tcqa.htm>

Federal Aviation Administration

- *American Indian and Alaska Native Tribal Consultation Policy and Procedures.* (2004)
http://overflights.faa.gov/apps/GetFile.CFM?File_ID=88
- FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation Policy and Procedures (2004) http://www.faa.gov/regulations_policies/orders_notices/media/1210.pdf

APPENDIX C. FEDERAL CONSULTATION RESOURCES

White House List of Tribal Resources within U.S. Federal Agencies:

<http://www.whitehouse.gov/nativeamericans/resources>

Orders and Policies regarding consultation with Indian Tribes:

<http://www.schlosserlawfiles.com/consult/PoliciesReConsult%20w-IndianTribe.htm>

American Association of State Highway and Transportation Officials (AASHTO) Center for Environmental Excellence - Tribal Consultation Resources:

http://environment.transportation.org/environmental_issues/tribal_consultation/docs_reports.aspx#bookmarkFederalPoliciesandProcedures

Federal Emergency Management Agency. (2010) *FEMA Tribal Policy*.

<http://www.fema.gov/government/tribal/natamerpolicy.shtm>

Federal Energy Regulatory Commission. (2003). *Policy Statement on Consultation with Indian Tribes in Commission Proceedings*.

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U.S. Dept. of Health and Human Services. (2010). Tribal Consultation Policy

<http://www.hhs.gov/intergovernmental/tribal/tcp.html>

National Congress of American Indians – Consultation and Federal Tribal Relations:

<http://ncai.org/Consultation-and-Tribal-Federa.30.0.html>

- CONSULTATION WITH TRIBAL NATIONS: AN UPDATE ON IMPLEMENTATION OF EXECUTIVE ORDER 13175 (JANUARY 2012): http://www.ncai.org/fileadmin/policy/consultation/Consultation_Report_-_Jan_2012_Update.pdf

U.S. Environmental Protection Agency. Tribal Portal – Consultation

- <http://www.epa.gov/indian/consultation/index.htm>

U.S. Department of Defense – Native American Affairs

- DoD Tribal Consultation site: <http://www.denix.osd.mil/na/TribalConsultation.cfm>
- Consultation tools - <http://www.denix.osd.mil/na/ConsultationTools/>
- DoD Consultation Plan (2010): <http://www.denix.osd.mil/na/upload/DoD-Plan-of-Action-re-Tribal-Consultation-Jan-2010.pdf>
- DoD Consultation Plan Update: <http://www.denix.osd.mil/na/upload/DoD-Progress-Report-to-OMB-on-Tribal-Consultation-Aug-2010.pdf>.
- DoD Legacy Resource Management Program: This report identifies DoD installation obligations arising from treaties and agreements negotiated by the U.S. and Indian nations between 1775 and 1954. The DoD initiated this study to obtain information essential to efforts to uphold federal legal obligations to Indian tribes and to enhance DoD-tribal relationships.
<http://www.denix.osd.mil/cr/upload/Legacy-Treaty-Exec-Summary.pdf>

US Department of Interior BIA Consultation Policy

- http://www.fpa.nifc.gov/Library/Memos/Docs/Bureau_of_Indian_Affairs_Consultation_Policy.pdf

Native American Consultation Database

The Native American Consultation Database (NACD) is a tool for identifying consultation contacts for Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations. The database is not a comprehensive source of information, but it does provide a starting point for the consultation process by identifying tribal leaders and NAGPRA contacts. <http://grants.cr.nps.gov/nacd/index.cfm>

National Parks Service - Native American Graves Protection and Repatriation Act

<http://www.nps.gov/nagpra/>

- NAGPRA Glossary: <http://www.nps.gov/nagpra/TRAINING/GLOSSARY.HTM>

APPENDIX D: FEDERAL CONSULTATION POLICY REVIEW QUESTIONS

Level of initiation and impact

1. At what level was the policy developed?
 - a. What level of official signed the cover letter transmitting the policy to the tribes?
 - b. Which department(s)/agencies does the policy apply to?
2. If a national or department policy: Does the policy provide for the creation of regional/agency policies, or use of the national policy at the regional/agency level?
 - a. Is there any information on how the policy relates to external departments and agencies?
 - b. How does this document relate to previous policies promulgated by the agency?
 - c. Does the policy include consideration of the creation or use of inter-agency consultations?
3. Does the consultation policy address the stage in the decision-making process consultation should be initiated?
4. Does the policy recognize the value of place-based relationship and the importance of local staff engaging with tribes?
 - a. Note tension between the need for high-level and local relationships.
5. Who is authorized to speak for the tribes?

Outcomes

1. What are the purposes and intended outcomes of the policies?
2. Does the policy require notification of how the tribe's input was used in the decision making process?
3. Does the policy contemplate the value of long-term relationships with tribal leaders and staff?
4. Does the policy provide a means for tribes and the government to evaluate the effectiveness of their government-to-government relationship and consultation policies?

Scope

1. Scope of activities requiring consultation.
 - a. Are policies related to climate change, land management and natural resource management included in the scope of the consultation policy?
 - b. Are off-reservation resources contemplated?
 - c. Does the policy include the consideration of tribal interests when administering a federal or state grant program?
 - d. Does the policy address cooperating agency status or issues related to co-management?
2. Does the policy include the consideration of tribal cultures, and if so, where?
 - a. Does the policy contemplate the use of traditional ecological knowledge?
 - b. Does the policy define the form of notice/communications, training requirements, or general considerations for policy implementation in relationship to tribal cultures?
3. Is the use of MOUs contemplated?
 - a. If so, how?

- b. In MOUs and specific examples, how does the “effective government-to-government relationship” go beyond formal consultation?
- 4. Does the consultation policy require or encourage the U.S. government to engage in a process that allows tribes to limit the scope of notifications they receive?
 - a. Does the agency attempt to alleviate the burden of “too many consultations,” or “notice about too many decisions that do not impact the tribe.”

Training and funding

- 2. Is training mentioned in the policy? If so, is the type of training required defined and prescribed for agency employees?
 - a. Is funding for training considered?
 - b. How do training programs and policies compare across departments and/or agencies?
- 3. Are funding mechanisms considered in the policy?
 - a. Funding for agencies to effectively consult
 - b. Funding for tribes to effectively engage in consultation
- 4. Does the policy address the impact of staff turnover on federal-tribal relationships?
 - a. Consider turnover for federal agency and tribal staff.

Legal Issues

- 1. What important definitions are included in the policy?
- 2. What is the legal authority cited for the promulgation of the consultation policy?
- 3. Is there a note that says the policy does not impact the legal rights of tribes?