



To: Heather A. Triezenberg, Extension Specialist and Program Leader, Michigan Sea Grant

From: Olivia Deans, Ocean and Coastal Law Fellow, and Catherine Janasie, Research Counsel II (Sr), National Sea Grant Law Center

Re: Tribal Consultation (NSGLC-20-04-10)¹

Date: December 7, 2020

Michigan Sea Grant requested the National Sea Grant Law Center’s assistance with gathering information about tribal consultation in the United States to help inform their Diversity, Equity, and Inclusion efforts. Although Michigan Sea Grant does not have a legal, statutory obligation to initiate consultation with Tribes, they may be working with federal or state agency partners that do, and Michigan Sea Grant outreach and other programs may involve tribal engagement or communication. Therefore, Michigan Sea Grant desires to be aware of the federal statutes, policies, and guidelines regarding consultation and some of the best practices for tribal engagement. Section I of this document highlights federal and state consultation requirements and guidelines. This includes analysis of agency consultation practices, statutory consultation requirements, other opportunities for tribal engagement, and state consultation requirements. Section II discusses models of best practices for tribal consultation.

I. Tribal Sovereignty and Federal Trust Responsibilities

Tribes² are sovereign nations. Sovereignty confers legal rights, such as the right to self-determination, the right to self-government, and the right to enter into treaties and agreements.³ Therefore, the relationship between federally recognized Indian Tribes and the federal government in the United States is one of sovereign-to-sovereign or government-to-government. Central to this government-to-government relationship is the trust responsibility of the federal government towards Tribes. This federal trust responsibility is a legal, fiduciary duty under which the Federal Government “has charged itself with moral obligations of the highest responsibility and trust” toward Tribes.⁴

Federal trust responsibilities and statutes apply to federally recognized Indian Tribes. There are 12 federally recognized Indian Tribes in Michigan: Bay Mills Indian Community,

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² This document uses the terms indigenous, Tribes, and federally recognized Indian Tribe. These terms are not always interchangeable. The term federally recognized Indian Tribe is a statutory term that conveys legal rights and protections. When engaging with a Tribe it is usually a best practice to ask tribal members what terms they prefer.

³ See e.g., Presidential Memorandum on Tribal Consultation (2009), <https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

⁴ See *Seminole Nation v. United States*, 316 U.S. 286 (1942); see also, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).



Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Nottawaseppi Huron Band of the Potawatomi, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, Pokagon Band of Potawatomi Indians, Saginaw Chippewa Indian Tribe of Michigan, and the Sault Ste. Marie Tribe of Chippewa Indians of Michigan.⁵

The federal trust responsibility is the foundation for the legal obligations of federal agencies when working with Tribes. Presidential Executive Orders and memoranda have directed federal agencies to implement regulations and policies for working with federally recognized Tribes as sovereign nations. Agency practices often vary when implementing Executive Orders. Some agencies have promulgated regulations through notice and comment rulemaking, which creates legally enforceable obligations. Alternatively, some agencies create internal guidance documents that are not legally enforceable, but are meant to guide the agency through the decision-making process. The federal trust responsibility and subsequent Executive Orders are the central legal requirements that shape obligations for interacting with Tribes.

States have a different relationship with Tribes. While there is still a government-to-government relationship, a state does not have a trust relationship with Tribes living within their borders. Generally, states do not have jurisdiction or authority over tribal reservation territory. Therefore, it is important to distinguish federal obligations from state obligations when working with a Tribe. However, the State of Michigan also has policies for tribal engagement that Michigan Sea Grant should keep in mind.

A. Tribal Consultation Overview

The purpose of Consultation is to include Tribes in the decision-making process for actions that may affect Tribes or their members.⁶ Consultation stems from tribal rights to self-government, and the acknowledgement that Tribes know what policies are best for them and their members and should have a voice in the decision-making process for actions affecting Tribes. Consultation is defined in many ways but generally refers to the meaningful communication between Tribes and the government during the decision-making process and consideration of input from Tribes. Consultation can contribute to better regulations, policies, and projects. In this memo, when Consultation is capitalized, we are referring specifically to the formal process between the federal government and federally recognized Indian Tribes. This process is often referred to as Consultation with a Big “C.”⁷

Tribal Consultation is rooted in the relationship between the federal government and Tribes and is influenced by the U.S. Constitution, treaties, statutes, court decisions, administrative actions, and Executive Orders. Executive Order 13,175 affirmed the recognition of tribal self-government, sovereignty, and self-determination.⁸ This Executive Order was issued

⁵ 25 U.S.C. § 479; *see also*, 84 Fed. Reg. 1200 (2019).

⁶ *See e.g.*, U.S. DEPARTMENT OF THE INTERIOR, *Tribal Consultation* (describing the agency’s policy on tribal consultation), <https://www.doi.gov/subsistence/tribal-consultation#:~:text=It%20is%20the%20goal%20of,those%20Tribes%20or%20their%20membership>.

⁷ *See* BUREAU OF RECLAMATION NATIVE AMERICAN AND INTERNATIONAL AFFAIRS OFFICE, PROTOCOL GUIDELINES: CONSULTING WITH INDIAN TRIBAL GOVERNMENTS 5 (2012), https://www.usbr.gov/native/policy/protocol_guidelines.pdf.

⁸ Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments (2000), <https://www.govinfo.gov/content/pkg/FR-2000-11-09/pdf/00-29003.pdf>.

for the purpose of establishing meaningful Consultation policies and strengthening the government-to-government relationship between Tribes and the federal government. Agencies must consider the principles of tribal self-government, sovereignty, and self-determination when implementing any policies that may have tribal implications. Additionally, Executive Order 13,175 directed each agency to establish a meaningful Consultation process that included input from tribal officials.

As set forth in Executive Order 13,175, the Consultation process should include: consulting with tribal officials early in the development process; not imposing substantial compliance costs on tribal governments; exploring options for consensual mechanisms for developing regulations that include negotiated rulemaking; and to the extent practicable, not promulgating regulations that preempt tribal law.⁹ Executive Order 13,175 also stressed accountability in the government-to-government interactions and required agencies to ensure compliance with the Executive Order for any regulation that has tribal implications.

President George W. Bush echoed the commitment to respecting tribal sovereignty in a Presidential Memorandum issued in 2004 on the Government-to-Government Relationship with Tribal Governments.¹⁰ The Memorandum directed each federal agency to ensure that its relationship with federally recognized tribal governments respects the rights to self-government and self-determination. Further, in 2009, President Obama issued the Presidential Memorandum on Tribal Consultation.¹¹ Agencies were required to submit detailed plans for implementing the policies and directives of Executive Order 13,175. This Memorandum also noted that failure to include tribal input in policy could lead to undesirable or tragic results.

Additionally, Congress has passed several statutes that require agencies to consult with Tribes during the decision-making process. The National Historic Preservation Act (NHPA) requires a special type of consultation with Tribes, referred to as Section 106 Consultation, when federal agency activities may impact significant historical resources. The National Environmental Policy Act (NEPA) also requires federal agencies to consult with Tribes during the decision-making process when federal actions affect the environment. Alternatively, some Tribes have challenged federal agency decision-making on public land with religious or spiritual importance under the Religious Freedom Restoration Act (RFRA).¹² Although this is not a procedural Consultation statute, RFRA claims often accompany a NEPA claim in court. Consultation requirements may vary depending on the statute.

Each federal agency develops its own Consultation policies pursuant to statutory requirements, Executive Orders, Presidential Memoranda, and other directives. This can lead to inconsistencies in Consultation practices and variances in policies. For example, agency procedures for Consultation requirements under NEPA may be different from the Consultation procedures under the NHPA. Therefore, it is important to distinguish what tribal Consultation procedures are legally required by a statute or regulation and what consultation practices are voluntary guidelines or best practices. This section will summarize some of the Consultation practices of federal agencies, including the National Oceanic and Atmospheric Administration

⁹ *Id.* at Sec. 5.

¹⁰ Presidential Memorandum on Government-to-Government Relationship with Tribal Governments (2004), <https://www.presidency.ucsb.edu/documents/memorandum-government-government-relationship-with-tribal-governments>.

¹¹ Presidential Memorandum on Tribal Consultation, *supra* note 3.

¹² 28 U.S.C. §§ 2000bb-2000bb-4.



(NOAA), and highlight potential best practices. A broader summary of agency Consultation is included in Appendix A.

Federal agencies implement their Consultation policies either through the promulgation of regulations or the development of guidance documents, such as agency handbooks. Courts generally give more deference to agency regulations than agency handbooks, and handbooks are not always legally binding. Handbooks serve to guide the agency and inform the public about how the agency plans to meet the legal requirements and policy goals.

Additionally, agencies or organizations may communicate or have policies for engaging with Tribes outside of a formal Consultation process. This activity may also be referred to as consulting or consultation with a Tribe, and is often referred to as consultation with a Little “c.”¹³ It is important to differentiate these informal, voluntary actions involving Tribes from formal Consultation. Informal, voluntary consultation policies do not have the same legal requirements as formal Consultation. However, agency policy documents often suggest best practices for agencies to strive for. Best practices might include establishing a relationship with a Tribe, giving notice of activities that may affect the Tribe, practicing ongoing communication and exchange of information with the Tribe, and being transparent about the activity that may affect the Tribe. As discussed in more detail in Section II, descriptions of best practices for engaging with Tribes can be found in tribal ordinances, international practices, and agency reports.

B. NOAA Tribal Consultation Practices

The NOAA Tribal Consultation practices are described below. As one of the 34 Sea Grant programs funded by the National Sea Grant College Program, NOAA’s Tribal Consultation policies are directly relevant to Michigan Sea Grant’s programming. Not all agencies define Consultation or implement Consultation procedures in the same way. A summary and comparison of agency Consultation definitions and practices is included in Appendix A.

NOAA describes its Consultation process in NOAA Administrative Order 218-8¹⁴ and the NOAA Handbook for Government-to-Government Consultation with Federally Recognized Tribes (NOAA Handbook).¹⁵ NOAA defines Consultation in Administrative Order 218-8 and the NOAA Handbook as “an accountable process ensuring meaningful and timely input from tribal officials on NOAA policies that have tribal implications.”¹⁶ The NOAA Handbook and Administrative Order 218-8 require Consultation for all activities or policies that have tribal implications. As mentioned above, internal guidance documents like handbooks are not legally enforceable, but are meant to serve as a guide for agency personnel through the decision-making process.

NOAA Administrative Order 218-8 establishes a tribal liaison who is responsible for training, maintaining, documenting, and publishing public guidance regarding government-to-

¹³ See BUREAU OF RECLAMATION NATIVE AMERICAN AND INTERNATIONAL AFFAIRS OFFICE, *supra* note 7, at 6.

¹⁴ Nat’l Oceanic and Atmospheric Admin., Administrative Order 218-8, NOAA 13175 Policy: NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations (2014), https://www.noaa.gov/sites/default/files/atoms/files/NAO_218-8_UNSEC_signed.pdf.

¹⁵ NAT’L OCEANIC AND ATMOSPHERIC ADMIN., NOAA HANDBOOK FOR GOVERNMENT-TO-GOVERNMENT CONSULTATION WITH FEDERALLY RECOGNIZED INDIAN TRIBES AND ALASKA NATIVE CORPORATIONS (2013) [hereinafter NOAA Handbook],

https://www.noaa.gov/sites/default/files/atoms/files/NOAA_Tribal_Consultation_Handbook_11122013_Final.pdf.

¹⁶ Nat’l Oceanic and Atmospheric Admin., *supra* note 14.

government Consultation. The purpose of Administrative Order 218-8 is to strengthen the government-to-government relationship between NOAA and tribal governments and acknowledge that Tribes exercise inherent sovereign powers. Additionally, Administrative Order 218-8 defines “Policies that have tribal implications,” as “[a]ll regulations, legislative comments, proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Tribes, or on the distribution of power and responsibilities between the Federal government and Tribes.”¹⁷ When a policy has tribal implications, then the agency must ensure it follows the Consultation process described in the NOAA Handbook.

The NOAA Handbook also outlines the Consultation process for the agency to use when addressing tribal issues and policies that have tribal implications.¹⁸ The NOAA Handbook describes Consultation as an “open and free exchange of information” between governments. Effective Consultation requires an understanding of the historical circumstances of the Tribes, which would include relevant treaties, agreements, statutes, and past conflicts. Additionally, the NOAA Handbook notes that Consultation does not require consensus. Rather, Consultation is a process to consider tribal rights during the development of federal actions.

The NOAA Handbook recommends that NOAA offices develop individual Consultation protocols. Prior to the Consultation process, offices should prepare by:

- 1) Understanding the history of the Tribe and its relationship to the Federal government,
- 2) Understanding the Tribe’s culture,
- 3) Understanding what may or may not be appropriate within tribal culture,
- 4) Understanding the tribal perceptions of time and allow enough time to form an ongoing relationship,
- 5) Understanding the tribal structure,
- 6) Identifying tribal leadership, and
- 7) Understanding the Tribe’s decision-making process.

When a policy may have tribal implications, then Consultation is appropriate. Policies or actions that have tribal implications might include:

- 1) Actions affecting a reservation;
- 2) Actions impacting tribal trust resources or rights of the Tribe;
- 3) Actions that may affect tribal governments, or a Tribe’s traditional way of life;
- 4) Actions that may affect a facility owned by a tribal government; and
- 5) Actions that may affect tribal traditional and cultural properties or traditional use areas.

When Consultation is appropriate, the NOAA Handbook provides an overview of the Consultation steps, which are described in Table 1 below. NOAA provides that Consultation is appropriate at the earliest practicable time when a policy or action may have tribal implications. Consultation does not need to occur at every step, but it should occur early enough to allow for flexibility and modification of the policy or action. Consultation does not require that NOAA reach consensus with the Tribe regarding the action to be taken; rather, the focus of the Consultation requirement is on the process of engagement itself.

¹⁷ *Id.*

¹⁸ NOAA Handbook, *supra* note 15.

Table 1. NOAA Tribal Consultation Steps	
Step 1	The agency will initiate Consultation with the Tribe.
Step 2	The agency should determine a Consultation structure. This should include identifying issues, concerns, participants, the location of Consultation, timing of Consultation, and agreeing on the method of recordkeeping.
Step 3	Closing the Consultation with the Tribe and recording the Consultation.

C. Consultation Provisions in the National Historic Preservation Act

The NHPA requires federal agencies to consult and analyze the impacts of activities on significant historic resources.¹⁹ Historic resources include any structure, area, or district listed or eligible for listing on the National Register of Historic Places.²⁰ Section 106 of the NHPA requires Consultation with Tribes for “Federal undertakings,” in order to consider the impacts of the proposed development.²¹ Federal undertakings include projects, activities, or programs funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license, or approval.²² Generally, federal agencies appoint Federal Preservation Officers to consult with State Historic Preservation Officers and Tribal Historic Preservation Officers.

Federal agencies are responsible for complying with Section 106 Consultation. Under this process, the agency first determines if the proposed Federal action is an undertaking and whether it may affect a historic property.²³ Then the agency coordinates the Section 106 Consultation review with other project reviews and the applicable Tribal Historic Preservation Officer and State Historic Preservation Officer.²⁴ Next, the agency will involve the public in planning and involve any other consulting parties.²⁵ During the Section 106 Consultation process, the agency must make a reasonable and good faith effort to seek and gather information from the consulting parties about the potential effects to the historic property.²⁶

The National Park Service and the National Association of Tribal Historic Preservation Officers (NATHPO) released a “best practices” report for NHPA Section 106 Consultation.²⁷ NATHPO is a national organization of Tribal government officials who work with federal agencies and Tribal Historic Preservation Officers to preserve tribal cultural traditions.²⁸ The report analyzed what practices were necessary to ensure successful Section 106 Consultation. The report emphasized the following best practices:

¹⁹ National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515.

²⁰ 54 U.S.C. § 302102.

²¹ *Id.* § 30203(b).

²² 36 C.F.R. § 800.16(y) (quotations omitted).

²³ *Id.* § 800.3(a).

²⁴ *Id.* § 800.3(b)-(c).

²⁵ *Id.* § 800.3(e)-(f).

²⁶ *Id.* § 800.4(a)-(b).

²⁷ NAT’L ASS’N OF TRIBAL HISTORIC PRES. OFFICERS, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION (2005), http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

²⁸ See NATHPO, *About*, <https://www.nathpo.org/about/>.

- Early communication;
- All parties should be informed of the scope of the project;
- All parties should be informed of the potential impacts of a project;
- Site visits with agency and tribal officials;
- Use of a tribal liaison and Tribal Historic Preservation Officer during the Consultation process; and
- Demonstration of mutual respect, such as offsetting costs for tribal travel or meeting in locations convenient to tribal members.²⁹

D. Tribal Consultation and the National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires federal agencies to analyze environmental impacts from all major federal actions significantly affecting the quality of the human environment.³⁰ The statute does not explicitly require formal Consultation with Tribes. However, NEPA does require strict procedural public involvement and notification. The lead agency facilitating the NEPA environmental review is required to “diligently” involve the public during preparation and implementation of NEPA procedures.³¹ This may include giving notice to interested Tribes and following the affected Tribe’s public notice procedures.³² The Council on Environmental Quality promulgated regulations to guide the public engagement and environmental review process. Many other federal agencies have also promulgated regulations and created guidance documents for consultation in the NEPA context.

E. State of Michigan Tribal Consultation

The State of Michigan also recognizes tribal rights to self-government and self-determination. While the State of Michigan does not have a trust relationship with Tribes like the federal government, the state does have a government-to-government relationship with federally recognized Tribes. In 2002, the State of Michigan entered into a government-to-government accord agreement with several federally recognized Indian Tribes.³³ The accord agreement recognizes tribal sovereignty and the government-to-government relationship between the State of Michigan and each Tribe. The purpose of the accord agreement is to develop consultation procedures that respect sovereignty and improve the relationship between Tribes and the State of Michigan. The accord requires all State of Michigan Departments to develop procedures for consultation and engage in consultation with Tribes for all state action that will significantly affect tribal interests. Consultation is defined in the accord as “a process of government-to-government dialogue between the state and the Tribes regarding actions or proposed actions that significantly affect or may significantly affect the governmental interests of the other.”³⁴

²⁹ NAT’L ASS’N OF TRIBAL HISTORIC PRES. OFFICERS, *supra* note 27.

³⁰ 42 U.S.C. § 4332(C).

³¹ 40 C.F.R. § 1506.6.

³² *Id.* § 1506.6(b)(ii)-(iii).

³³ Executive Message to Governor John Engler Regarding the 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan (2002), https://www.michigan.gov/documents/som/2002_Tribal-State_Accord_195712_7.pdf.

³⁴ *Id.*

In 2019, Michigan Governor Whitmer issued Executive Directive 2019-17 to reaffirm and implement the commitments of the 2002 accord agreement.³⁵ The Executive Directive recognizes tribal sovereignty and the inherent right to self-government and self-determination. Each Michigan department and agency must ensure its policies recognize the tribal sovereignty, jurisdiction, and government-to-government relationship with each of Michigan’s federally recognized Indian Tribes. Additionally, the Executive Directive provides consultation steps that each department and agency must adopt and implement into its consultation process. Generally, tribal consultation policies are appropriate for activities or decisions relating to rules or adoptions, policies, guidance documents, permits, civil enforcement and compliance monitoring, emergency preparedness, federal authorizations or delegations, or efforts under state compact agreements. The Executive Directive identifies four consultation steps, which are listed in Table 2 below.

Table 2. Executive Directive 2019-17 Consultation Steps	
Step 1	<p><i>Identification:</i> The department or agency responsible for consultation must determine the complexity of the activity, the potentially affected Tribes, the potential impact to Tribes, and any constraints relevant to the application of the consultation process.</p> <ul style="list-style-type: none"> • A state department, agency, or tribal government may initiate identification. When a tribal government initiates consultation, the state agency must evaluate whether the action is appropriate for consultation and give substantial weight to the tribal government’s request. • State agencies and departments must also utilize relevant tribal partnership groups to assist in identifying actions needing consultation.
Step 2	<p><i>Notification:</i> After identifying an action needing consultation, the department or agency must promptly notify the Tribes of the activity with sufficient information to allow the potentially affected Tribe to make an informed decision.</p> <ul style="list-style-type: none"> • The notification must explain how to provide input regarding the activity, and departments and agencies should honor tribal preferences for the method of notification.
Step 3	<p><i>Input:</i> The department or agency must consider input regarding the activity from any potentially affected Tribe.</p> <ul style="list-style-type: none"> • The department or agency must ensure the Tribe receives all necessary information, has due opportunity to give input to the agency, are notified of any changes to the activity, and are provided the opportunity to give additional input for any changed circumstances.
Step 4	<p><i>Follow-up:</i> The department or agency must explain to the Tribes how their input was considered in the final decision.</p> <ul style="list-style-type: none"> • The feedback must be a written communication from a senior official to the most senior tribal official involved in the consultation.

³⁵ Governor Gretchen Whitmer, Executive Directive No. 2019-17, 2019
https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-520036--,00.html.

II. Best Practices for Tribal Consultation and Engagement

A. Tribal Consultation Practices

Some Tribes have developed tribal guidelines for consultation. Consultation practices described and practiced by Tribes may be the best source of information for how organizations and agencies should interact with Tribes. Notably, each Tribe is a distinct and sovereign Nation with different cultural and traditional practices. Therefore, although it may be helpful to review the tribal consultation processes described below, Michigan Sea Grant should ask each Tribe they are working with about their consultation practices and preferences.³⁶

The Rincon Band of Luiseño Indians, located in California, adopted a Consultation Ordinance on October 19th, 2015. Under the ordinance, Consultation is described as a process respecting tribal sovereignty and recognizing the tribal right to self-governance and self-determination. The ordinance defines Consultation as “the process of seeking, discussing, and seriously considering the views of the Rincon...and reaching an agreement with the Tribe on the development of projects...or regulations that may affect tribal sovereignty, resources, properties, culture practices, and jurisdiction.”³⁷ The ordinance firmly states that all agencies, governments, departments, or corporations that request government-to-government Consultation with the Tribe must adhere to this Consultation ordinance. Additionally, the Consultation Ordinance discusses a federal agency’s responsibility to involve the Tribe in their discussion of any project, activity, or regulation that could influence the Tribe. The main objectives of the Rincon Consultation Ordinance are ensuring that Tribal members have notice and understand issues to make informed policy decisions, ensure federal compliance with the United States’ trust obligations, and ensure protection of tribal rights and culture related to a project, activity, or regulation that could affect the Tribe.

The Rincon Consultation Ordinance describes a six-step procedure for Consultation, which is detailed in Table 3 below.

³⁶ From our research, there does not appear to be a federally recognized Indian Tribe in Michigan with published, publicly available consultation guidelines. However, a Michigan Tribe may still have established consultation practices.

³⁷ Rincon Band of Luiseno Indians, *Tribal Consultation Ordinance*, Rincon Tribal Code §2.800, 11 (2015), https://rincon-nsn.gov/wp-content/uploads/2019/05/2_0800-Tribal-Consultation-Ordinance.pdf.

Table 3. Rincon Tribe Consultation Procedure	
Step 1	A government agency or organization may request a Consultation and must give advance notice.
Step 2	The Tribe and consulting entity will conduct a pre-Consultation meeting to exchange information and establish contact information.
Step 3	The consulting entity must arrange with the Tribal Chairman a Consultation meeting and prepare a review packet.
Step 4	The entity and Tribe should continue ongoing Consultation meetings or coordination meetings.
Step 5	The agency or organization should provide the Tribe with a Consultation summary report to review all the government activities. The Consultation report can then be used by the Tribal Council for any tribal business without the consent of the consulting entity.
Step 6	The Tribe will offer a tribal resolution certifying if Consultation was completed in compliance with the ordinance.

The Rincon Consultation Ordinance is one example highlighting the perspective of a Tribe regarding Consultation. It is important to note that the Consultation Ordinance focuses on continual engagement and agreement with the Tribe throughout the Consultation process, where federal agency guidelines note that Consultation does not require agreement from the Tribe. Therefore, it may be helpful as a best practice for a consulting entity to continually communicate with a Tribe, and if there is not agreement, the consulting entity should clearly explain why the agency cannot come to agreement.

The Confederated Tribes of Umatilla in Oregon have also established Consultation guidance.³⁸ The Umatilla define Consultation as, “a formal process of negotiation, cooperation, and policy level decision making between the Tribe and government.” The Umatilla note that Consultation means the ultimate decision should be affected by the Consultation process; in other words, from the Tribe’s perspective, Consultation is not simply a notice of an action or a request for comments while proceeding with the action regardless of the comments.

The Federation of Saskatchewan Indian Nations in Canada have created guiding principles for the government or organizations to follow when consulting with the Tribe. These guiding principles state that consultation must be conducted in good faith, before decisions are made, and with adequate time for consideration by the Tribe. Also, the objectives and scope of the proposed project or regulation should be communicated clearly to the Tribe before consultation begins. The Tribe also states that they should be allowed to participate in all aspects of the consultation and given information about the proposed projects, an accessible location for meetings, and financial support if necessary.

Another Tribe located in Canada, the Hul’Qumi’Num describes government consultation as the duty to consult when the Government of Canada has knowledge of the potential existence of Aboriginal title and contemplates activity that might adversely affect the Tribe or treaty process. The Hul’Qumi Num provide a non-exclusive list of activities they wish to be consulted about which includes: resource extraction, exploration activities, alteration to heritage objects or

³⁸ COMPILATION: CONSULTATION ORDINANCES, JAMES E. ROGERS COLL, OF LAW INDIGENOUS PEOPLES LAW AND POL’Y PROGRAM 16 (2013), *available at* http://www.tribalconsultation.arizona.edu/CompilationConsultationMemo_2_03_14.pdf.

sites, operational plans related to the Tribe's lands, and any permits related to Tribal land and resources.

B. International Models for Consulting with Indigenous Peoples

International policies and models provide helpful guidelines that highlight indigenous rights and protect indigenous property and cultural traditions. While not necessarily legally binding on the U.S. federal government, international policies illustrate contemporary trends in government-to-government interactions and consensus views on the rights of indigenous people.

1. The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes and establishes rights for indigenous people and cultures.³⁹ UNDRIP is the first international declaration to declare indigenous people have a right to self-determination.⁴⁰ The articles of UNDRIP set minimum standards for the “survival, dignity, and well-being” of indigenous people throughout the world.⁴¹ Currently, the United States is not legally bound to follow the rights prescribed by UNDRIP.⁴² However, UNDRIP is still important because it summarizes primary indigenous rights norms and provides guidance for any entity or organization working with Tribes.

UNDRIP is designed to establish a comprehensive framework to support the rights of indigenous peoples. The greatest significance of UNDRIP is that it establishes standards for self-determination to help guide countries working with indigenous people within their boundaries. Additionally, UNDRIP recognizes that indigenous peoples may have rights as citizens of a national country and also hold rights to govern themselves and their land, territory, natural resources, cultural practices, and spiritual practices.

³⁹ UNITED NATIONS, UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2007), *available at* <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

⁴⁰ *Id.* at Art. 3.

⁴¹ *Id.*

⁴² Even though the United Nations General Assembly adopted UNDRIP, the Declaration is not legally binding on individual countries unless it is incorporated into a treaty to which the individual country may sign onto. The United States has not adopted this treaty.

Article 4	Self-determination means that indigenous people have a right to self-government in matters relating to their internal and local affairs. ⁴³
Article 18	Indigenous people have the right to participate in decision-making regarding matters affecting their rights. ⁴⁴
Article 19	Countries should consult and cooperate in good faith with indigenous peoples before adopting legislative or administrative measures that may affect indigenous peoples. ⁴⁵
Article 32	Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands. ⁴⁶ This Article further declares that Countries shall consult and cooperate with indigenous peoples to get their free and informed consent prior to an approval of any project affecting indigenous lands.

2. Organization of American States Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights of the Organization of American States (OAS) is a Commission with authority to initiate proceedings in the Inter-American Court of Human Rights. This Court has issued several decisions regarding land rights of indigenous peoples. For example, in 2001, the Court adjudicated a case between the United States and two members of the Western Shoshone Tribe for a claim to aboriginal title in Nevada.⁴⁷ The two tribal members argued they had a subsisting right - the right to graze cattle without a permit - because they had aboriginal title to the land from time immemorial. The Inter-American Court determined it was necessary to evaluate the tribal member's claims in light of evolving principles of human rights, customs, and other sources of international law. The Court found the United States had failed to ensure the tribal members' right to property in the Western Shoshone ancestral lands. However, the Court did not make a factual determination as to whether and to what extent the tribal members had a subsisting right to property to these lands. This case illustrates the international contemporary trend of protecting indigenous property rights.

3. Canadian Duty to Consult

The Government of Canada has an established duty to consult with indigenous groups.⁴⁸ To meet this requirement, the Government of Canada has developed relationships and consultation protocols with indigenous groups. According to the Government of Canada, consultation is appropriate when: 1) there is sufficient federal consultation activity for an agreement to be beneficial to both Canada and tribal communities; 2) provinces and territories are key partners in the process; and 3) communities are interested in working together under a

⁴³ See UNITED NATIONS, *supra* note 39, at Art. 4 (quotations omitted).

⁴⁴ *Id.* at Art. 18.

⁴⁵ *Id.* at Art. 19.

⁴⁶ *Id.* at Art. 32.

⁴⁷ *Mary & Carrie Dann v. United States*, Case 11.140, Report No. 113/01, Inter-Am. C.H.R. (2001).

⁴⁸ GOVERNMENT OF CANADA, INDIGENOUS AND NORTHERN AFFAIRS, *Government of Canada and the duty to consult*, (Apr. 16, 2019), <https://www.aadnc-aandc.gc.ca/eng/1331832510888/1331832636303#sec4>.

consultation agreement.⁴⁹ Unlike these responsibilities in Canada, the U.S. government does not have a duty to consult with Tribes. Rather, the Consultation requirements in the U.S. stem from the trust relationship between the federal government and federally recognized Indian Tribes and operate within a government-to-government framework.

III. Conclusion

Michigan Sea Grant should be aware of federal Consultation requirements and best practices for engaging with Tribes. Since Michigan Sea Grant is not a federal agency, the program would not be responsible for undertaking any statutory Consultation requirements under statutes like the NHPA or NEPA or at risk of being subject to legal complaints for failure to do so. However, as a recipient of federal grant funds, it may be helpful to understand the scope of federal statutory Consultation requirements.

For example, although Michigan Sea Grant would not be responsible for initiating or complying with the NHPA Section 106 Consultation process, the process might be triggered during the National Sea Grant Office's review of a Michigan Sea Grant-funded research project. Sea Grant projects may be considered federal undertakings for purposes of NHPA. It is the responsibility of the federal agency, here the NOAA National Sea Grant Office (NSGO), to determine whether NHPA is triggered and what formal Consultation is needed. Michigan Sea Grant is responsible for completing the NEPA questionnaire, which contains questions relating to locations that may trigger NHPA Section 106 Consultation. By fully and accurately completing the NEPA questionnaire, Sea Grant programs notify the NSGO when tribal concerns may arise. While Michigan Sea Grant should begin conversations about actions impacting tribal lands and resources when receiving relevant proposals, the program should not initiate or decide whether NHPA Section 106 Consultation is needed.

Michigan Sea Grant should consider its own interactions with Tribes and evaluate how it might provide support toward ensuring that the Consultation practices described above are implemented more effectively. While Michigan Sea Grant is not legally responsible for engaging in tribal Consultation, some research projects and extension and education programs or actions may affect tribal members or territory. Therefore, it is important for Michigan Sea Grant to develop tribal communication and engagement policies for its personnel and programming that respect tribal sovereignty.

Michigan Sea Grant, for example, may wish to consider eight key principles for tribal Consultation outlined by the U.S. Department of the Interior, the Department of Justice, and Department of Army in a paper on "Federal Consultation with Tribes Regarding Infrastructure Decision Making."⁵⁰ This paper utilized advice from forty federally recognized Indian Tribes and agencies. Unlike agency handbooks that provide guidelines, this paper identified essential principles and action items for tribal Consultation. The key principles for Consultation are:⁵¹

⁴⁹ GOVERNMENT OF CANADA, STRENGTHENING PARTNERSHIPS: CONSULTATION PROTOCOLS 2 (2014,) (quotations omitted), available at https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/consultation_protocols_brochure_may2014_1400092325879_eng.pdf

⁵⁰ U.S. DEP'T. JUSTICE, ET. AL., IMPROVING TRIBAL CONSULTATION AND TRIBAL INVOLVEMENT IN FEDERAL INFRASTRUCTURE DECISIONS 1 (2017), available at <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf>.

⁵¹ *Id.* at 16-18.



- Act consistently with the government-to-government trust relationship and understand the historical context of Tribal interests.
- Establish staff and leadership level relationships.
- Initiate Consultation at the earliest point possible, and provide sufficient information.
- Make a good-faith effort to obtain responses from the Tribe and understand the limits of tribal resources.
- Ensure federal decision-makers actively participate.
- Seek to fully understand concerns, reach a consensus when possible, and when necessary, clearly explain why tribal concerns could not be addressed.
- Exchange information and be transparent with the Tribe.
- Customize the Consultation. The cultural practices, resources, leadership structures, and communication styles vary greatly by Tribe.

As a best practice, Michigan Sea Grant should inquire with the Tribe it is working with to understand the specific practices preferred by the Tribe with respect to consultation with the federal or state government and engagement with non-governmental entities. Michigan Sea Grant or other stakeholders should recognize that a Tribe has a right to govern their people and territory even if this territory overlaps with a traditional federal or state jurisdiction. To be proactive in empowering tribal members' self-determination rights and consistent with international trends, Michigan Sea Grant should be aware of when its programs or policies could affect tribal members or their property and strive to follow best practices for tribal engagement in such situations. Even if a statute does not require Consultation with a Tribe, Michigan Sea Grant should seek to communicate, engage, and cooperate with Tribes before engaging in activities that may affect tribal members or resources within tribal territories.

Appendix A. Federal Government Tribal Consultation Policies

This table compares agency tribal definitions of Consultation and tribal policies. Applicable Executive Orders and Presidential Memorandums are included.

U.S. Army Corps of Engineers (Corps)
<p>Definitions⁵²</p> <ul style="list-style-type: none"> - <i>Consultation</i>: A process to ensure meaningful and timely input by Tribal officials into any project, program, permit or other undertaking that may have a potential to affect tribal interests, Trust resources and treaty reserved rights. - <i>Tribe</i>: Indian Tribes as defined in Executive Order 13,175, an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a. <p>Guidance Documents</p> <ul style="list-style-type: none"> - The Corps has six Tribal Policy Principles: <ol style="list-style-type: none"> 1) All Tribes are sovereign entities and will be treated with respect, 2) The Trust responsibility will be honored and fulfilled, 3) The Corps will maintain a government-to-government relationship with Tribes, 4) Pre-decisional Consultation will be an integral part of Corps planning and implementation, 5) To the extent authorized, the Corps will support Tribal self-determination, self-reliance, and capacity building, and 6) Protection of natural and cultural resources. - The Corps Tribal Policy states that in recognition of the varied organizations and customs of different Tribes, written protocols for Consultation procedures may be considered and implemented at the local level with a specific Tribe.
Bureau of Land Management (BLM)
<p>Definitions⁵³</p> <ul style="list-style-type: none"> - <i>Consultation</i>: The conduct of mutual, open, and direct two-way communication in good faith to secure meaningful and timely participation in the decision-making process, as allowed by law. - <i>Coordination</i>: Communication and dialogue between the BLM and Indian Tribes involving leadership or staff to increase cooperation between the two parties and the effectiveness of their relationship. - <i>Government-to-Government Consultation</i>: The consultation between BLM officials with decision making authority and elected Tribal officials ... It is built upon the

⁵² U.S. ARMY CORPS OF ENGINEERS, US ARMY CORPS OF ENGINEERS TRIBAL CONSULTATION POLICY AND RELATED DOCUMENTS (2013), available at https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf.

⁵³ UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, BLM MANUAL 1780 TRIBAL RELATIONS, G-1 – G-3 (2016), available at <https://www.blm.gov/sites/blm.gov/files/uploads/MS%201780.pdf>.

government-to-government exchange of information and aims to create effective collaboration and informed decision-making. Consultation is an accountable process that ensures meaningful and timely input by Tribal officials into the development of regulatory policies and agency decisions that have tribal implications.

- *Policies that have tribal implications:* Regulations, legislative comments, or proposed legislation as well as other policy statements or actions that potentially have substantial direct effects on Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Guidance Documents

- The essential elements for consultation include:
 - 1) identifying appropriate tribal governing bodies and individuals from whom to seek input;
 - 2) talking with appropriate tribal officials and/or individuals and asking for their views regarding land use proposals or other pending BLM actions that might affect traditional tribal activities, practices, or beliefs relating to particular locations on public lands;
 - 3) treating tribal information as a necessary factor in defining the range of acceptable public-land management options; and
 - 4) creating and maintaining a permanent record to show how tribal information was obtained and used in the BLM's decision-making process.⁵⁴

Bureau of Reclamation (BOR)

Definitions⁵⁵

- *Consultation:* The process of seeking and considering the views of others. It involves establishing, conducting, and maintaining formal communication with Indian Tribal governments and their members.

Guidance Documents

- BOR will pursue meaningful and proactive Consultation, consistent with applicable laws and policy, with Indian Tribal governments on matters of mutual interest, including but not limited to the protection of Indian trust assets, Indian sacred sites, and Indian cultural resources. Reclamation will work with interested Tribal governments to negotiate protocols about mutually agreed-upon principles and procedures for conducting Consultation, maintaining government-to-government relationships, and entering into partnerships and collaborative efforts.⁵⁶

⁵⁴ Bureau of Land Management, *Tribal Consultation*, <https://www.blm.gov/services/tribal-consultation>.

⁵⁵ BUREAU OF RECLAMATION NATIVE AMERICAN AND INTERNATIONAL AFFAIRS OFFICE, PROTOCOL GUIDELINES: CONSULTING WITH INDIAN TRIBAL GOVERNMENTS, 5 (2012), available at https://www.usbr.gov/native/policy/protocol_guidelines.pdf.

⁵⁶ INDIAN POLICY OF THE BUREAU OF RECLAMATION, RECLAMATION MANUAL, 3 (2014), available at <https://www.usbr.gov/recman/nia/nia-p10.pdf>.

Department of the Interior (DOI)

Definitions

- None found.

Guidance Documents

- DOI describes Consultation as a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication should be open and transparent without compromising the rights of Indian Tribes or the government-to-government Consultation process.⁵⁷
- Initiating Consultation should give tribal leaders an opportunity to provide feedback before Consultation. The agency should give at least 30-day notice of topics to be discussed, the timeline, and the potential outcomes. Tribes can also initiate Consultation.⁵⁸
- Stages of Consultation include the initial planning stage, the proposal development stage, and implementation of the final federal action stage.⁵⁹

Environmental Protection Agency (EPA)

Definitions

- None found.

Guidance Documents

- Consultation is triggered whenever an EPA decision, activity, or action “may affect tribal interests.” As a process, Consultation may include several methods of interaction that may occur at different levels and in different forms – anything from requests for comments, letters, phone calls, webinars and conference calls to group or individual meetings. As appropriate, it may be a one-time or ongoing dialogue.⁶⁰
- There is no single formula for what constitutes appropriate Consultation.⁶¹

⁵⁷ DEPARTMENT OF THE INTERIOR DEPARTMENT MANUAL, PROCEDURES FOR CONSULTATION WITH INDIAN TRIBES, Part 512 Chapter 5, 1 (2015), available at https://www.doi.gov/sites/doi.gov/files/uploads/dm_chapter_5_procedures_for_consultation_with_indian_tribes.pdf.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.*

⁶⁰ ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES, 7 (2011), available at <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

⁶¹ *Id.*

- The Consultation Policy is often supplemented by detailed office or regional Consultation plans. Each region and program office has a Tribal Consultation Advisor (TCA) to help with any Consultation questions.⁶²
- The 1984 EPA Indian Policy outlines nine principles that guide the EPA in interacting with Tribes and administering environmental programs in Indian country:
 - EPA works directly with tribal governments;
 - EPA recognizes the primary role of the tribal government on tribal lands consistent with federal authorities;
 - EPA assists Tribes in assuming regulatory and program management responsibilities;
 - EPA removes barriers to working with Tribes;
 - EPA considers tribal concerns and interests in EPA decisions;
 - EPA encourages cooperation between tribal, state, and local governments;
 - EPA coordinates with other federal agencies to support Tribes;
 - EPA works to ensure compliance with federal environmental laws on tribal lands; and
 - EPA incorporates these principles in planning and management activities.⁶³
- EPA Consultation has four phases:
 - 1) *Identification*: identify activities that may be appropriate for Consultation and any potentially affected Tribes.
 - 2) *Notification*: notify the Tribe, honor tribal preference for mode of contact.
 - 3) *Input*: EPA coordinates with tribal officials during this phase to be responsive to their needs for information and to provide opportunities to provide, receive, and discuss input. More Consultation may be needed if changes to activity.
 - 4) *Follow-up*: EPA explains how tribal input was considered in the final action. This feedback should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the Consultation.⁶⁴

Federal Emergency Management Agency (FEMA)

Definitions⁶⁵

- *Consultation*: Involves the direct, timely, and interactive involvement of tribal governments regarding proposed federal actions that have direct tribal implications. At FEMA, this means the process of communicating and collaborating with tribal officials to exchange information, receive input, and consider the views of Tribes on actions that have tribal implications
- *Direct Tribal Implications*: FEMA regulations, rules, legislative proposals, policies, directives, or other policy statements that have substantial direct effects on one or more

⁶² *Id.* at 8.

⁶³ *Id.* at 3-4.

⁶⁴ *Id.* at 4-5.

⁶⁵ FEDERAL EMERGENCY MANAGEMENT AGENCY, FEMA POLICY: FEMA TRIBAL CONSULTATION POLICY #101-002-02, 4-5 (2019), available at https://www.fema.gov/media-library-data/1562858686894-db84c110188abbfc6e7f9b693d27e833/CLEAN_FP_101-002-2_Tribal_Policy_June_2019_Signed.pdf.

tribal governments, on the relationship between the federal government and tribal governments, or on the distribution of power and responsibilities between the federal government and tribal governments.

Guidance Documents

- FEMA Consultation principles include:
 - 1) FEMA will respect and support the unique status of sovereign tribal governments by engaging in meaningful dialogue that will assist tribal communities with any emergency management needs that fall under the authority of FEMA; and
 - 2) FEMA will commit to an inclusive and collaborative tribal Consultation process and provide tribal governments sufficient time to submit input on actions that have tribal implications.⁶⁶

- FEMA has a four-stage Consultation process:
 - 1) *Identify* tribal application and determine if Consultation is required.
 - 2) *Notify* the tribal government.
 - 3) *Input* phase continues until FEMA finds that there is sufficient input to make an informed decision about the action.
 - 4) *Follow-up* with all tribal officials who were engaged in Consultation and communicate with the Tribe how input was used to inform the final decision.⁶⁷

U.S. Fish and Wildlife Service (FWS)

Definitions⁶⁸

- *Consultation*: A mutual, open, and direct two-way communication, conducted in good faith, to secure meaningful participation in the decision-making process, as allowed by law.

Guidance Documents

- Consultation protocols must be followed when it is known that a decision about a departmental action with tribal implications must be made. This includes any department regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula change, or operational activity that may have a substantial direct effect on an Indian Tribe.⁶⁹

- There is a range of Consultation contexts. Consultation may be proactive, reactive, or responsive.⁷⁰

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* at 2-3.

⁶⁸ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION HANDBOOK, 12 (2018), available at <https://www.fws.gov/TCG.pdf>.

⁶⁹ *Id.*

⁷⁰ *Id.* at 13.

United States Department of Health and Human Services (HHS)

Definitions⁷¹

- *Consultation*: An enhanced form of communication, which emphasizes trust, respect and shared responsibility. It is an open and free exchange of information and opinion among parties, which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process, which results in effective collaboration and informed decision making with the ultimate goal of reaching consensus on issues.
- *Coordination and Collaboration*: Working and communicating together in a meaningful government-to-government effort to create a positive outcome.
- *Policies with Tribal Implications*: Refers to regulations, statutes, legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Guidance Documents

- The tribal Consultation process involves identifying the critical event, identifying affected or potentially affected Indian Tribes, and determining the tribal mechanism.⁷²
- Policy actions that may require Consultation include policies that:
 - 1) Have tribal implications,
 - 2) Have substantial direct effects on one or more Indian Tribes,
 - 3) Impact the relationship between the Federal Government and Indian Tribes, or
 - 4) Impact the distribution of power and responsibilities between the Federal Government and Indian Tribes.⁷³

⁷¹ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES TRIBAL CONSULTATION TRIBAL POLICY, 17-18, (2010) <https://www.hhs.gov/sites/default/files/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf>.

⁷² *Id.* at 7.

⁷³ *Id.* at 3.