

COMPILATION: CONSULTATION ORDINANCES

I. INTRODUCTION

Arizona Tribes have a right to meaningful government-to-government consultation both as sovereign nations and as a part of the federal government's trust responsibility to Indian tribes.¹ This right is confirmed in the U.S. Constitution, and related case law, as well as in certain treaties, executive and secretarial orders. The United States has also prescribed varying processes for its agencies and departments to engage in consultation with affected Indian tribes on matters affecting tribal interests. Thus, almost all of the federal agencies and departments within the United States' executive branch have procedures (to varying degrees of specificity) that outline when and how consultation should occur. These procedures can be found in agency and department policies, guidance documents and handbooks.² Unfortunately, the United States has - at virtually every level of government - either wholly failed to fulfill its consultation obligations to Indians, nations and communities across the country and here in Arizona or has implemented government-to-government consultation in such a confusing or ineffective manner as to render the consultation process meaningless. The lack of respectful and meaningful consultation on the part of federal agencies and departments has resulted in a myriad of adverse consequences to tribal governments and Indigenous People, including injury to their tribal resources; holy places and sacred sites; and religious, traditional and cultural life-ways.

One possible solution to this pervasive problem is for Arizona tribes to exercise their own sovereign authority to enact tribal law that sets forth a baseline for how meaningful government-to-government consultation should be effected.

This research represents a compilation of available Indigenous, Aboriginal, and Tribal consultation policies, some best practice materials, and a few choice federal agency policies.³ This research will be used to guide the development of a draft model ordinance, available for use by the Arizona Tribes. The hope is that tribes will use this model to adopt and enforce a uniform, baseline set of consultation laws that all federal (and state) agencies and departments would be required to comply with when consulting with the Indian Tribes in Arizona.

¹ For a background history on the status of tribes in the United States, *see* U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1-8 (2011).

² For a complete list of relevant executive orders, regulations, statutes, and federal agency consultation policies *see* table of authority attached as Appendix I and made a part of the Indigenous Peoples Law and Policy Program website at the Rogers College of Law, University of Arizona at www.tribalconsultation.arizona.edu; *see also* NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 6-11 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf; *see also* USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 7-8 (2012) [hereinafter "SACRED SITES REPORT"], *available at* <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf> (giving examples of federal laws specifically addressing consultation); U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE (2011).

³ All material referenced will be available in a hard copy attachment to this document. For a review of how well Federal Agencies have implemented the most recent Presidential mandate to consult, Executive Order 13175, *see* NATIONAL CONGRESS OF AMERICAN INDIANS, CONSULTATION WITH TRIBAL NATIONS: AN UPDATE ON IMPLEMENTATION OF EXECUTIVE ORDER 13175 (2012), *available at* http://www.ncai.org/attachments/Consultation_hxjBLgmqyYDiGehEwgXDsRIUKvwZZKjJOjwUnKjSQeoVaGO Mvfl_Consultation_Report_-_Jan_2012_Update.pdf.

The decision to adopt tribal consultation laws may be a critical step in asserting tribal sovereignty and demanding that tribes' rights be recognized. The adoption of a tribal consultation ordinance may also remove the argument often heard from federal agencies that they are "confused" as to what meaningful consultation should look like, because it will lay out an agreed-upon procedure that the federal government⁴ must follow to consult with Arizona Tribes.⁵ It will lay out clearly the roles and responsibilities of both parties in the process.⁶ This will help to assure meaningful and ongoing consultation. In the case it is not followed, the Tribes could assert a legal remedy for the violation of tribal law and the federal trust responsibility.⁷

a. Origins of the Duty to Consult

i. Sovereignty

Native American Tribes are sovereign nations and each Tribe is a distinct political community.⁸ Tribes are autonomous, stemming from a pre-existing, inherent sovereignty that was never taken away.⁹ Tribes hold a unique government-to-government relationship with United States.¹⁰ A government-to-government relationship involves the "mutual recognition of the authority of the respective parties," and is modeled after principles of international law such as the United Nations Declarations on the Rights of Indigenous Peoples, hereafter "Declaration") and diplomacy governing formal relationships between nations.¹¹

This government-to-government relationship is very different than the relationship that the United States may have with any other public agency, special interest group, stakeholder or even the public at large.¹²

⁴ Often, governments outsource their human rights obligations to third parties, and it is incumbent upon Native Nations to also develop adhesive protocols for their interactions with private third party contractors. *See, e.g.*, the UN Global Compact's ten principles in the area of human rights, *available at* www.unglobalcompact.org/aboutthegc/thetenprinciples/; the UN Special Rapporteur on the Rights of Indigenous People's Report on Extractive Industries and Indigenous Peoples, *available at* www.unsr.jamesanaya.org/notes/special-rapporteur-issues-report-on-extractive-industries-and-indigenous-peoples/; the Ruggie Report, *available at* www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2011.

⁵ Language taken from FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 1, s.1.1, s.1.2, *available at* <http://caid.ca/FSINConPol.pdf>.

⁶ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 1, s.1.1, *available at* <http://caid.ca/FSINConPol.pdf>.

⁷ To find out more about litigation strategies for failure to consult, *see generally* INDIGENOUS PEOPLE'S LAW AND POLICY PROGRAM, UNIVERSITY OF ARIZONA, ENVIRONMENTAL AND SACRED SITES LITIGATION AND CONSULTATION IN INDIAN COUNTRY: A COMPREHENSIVE PRACTITIONER'S GUIDE.

⁸ Respect Act, H.R. 5023, 111th Cong. § 501(c)(2) (2009-2010); U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1, 2, 4 (2011). Throughout this Memorandum we may cite documents of the United States where consultation priorities are mandated. Our references to these materials in no way means that we agree that those mandates are followed by agency personnel.

⁹ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1, 4 (2011).

¹⁰ Respect Act, H.R. 5023, 111th Cong. § 501(c)(1) (2009-2010); U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1(2011)

¹¹ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 8 (2011) (noting a list of practical considerations to this point, that Federal Agencies should consider when dealing with Tribes, including assuring appropriate senior staff are present, understanding the Tribe's political structure, being respectful of cultural differences, and avoiding paternalism).

¹² USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 8 (2012) [hereinafter "SACRED SITES REPORT"], *available at*

As a result, Tribes are entitled to a distinct consultation process, including direct, two-way communications between the Tribes and the government, and sometimes, where deemed appropriate by the Tribe, three way conversations between the Tribe, government, and third parties.¹³

The right to be consulted is but one piece of recognizing the Tribe as a sovereign nation.¹⁴ Sovereignty involves the power to govern.¹⁵ As sovereign nations, Tribes have the rights of self-government and self-determination.¹⁶ The Executive Branch agencies have been directed to assure that a working relationship with tribes fully respects these dual rights.¹⁷ The Tribal rights of self-determination and self-governance include a responsibility to protect the welfare of Tribal people.¹⁸ This means, “the right to protect their cultural and religious properties and the right to be treated with respect by federal agencies.”¹⁹ The federal agencies and departments must do **more** than merely acknowledging in their policies, guidance documents and the like the right of each Tribe to set its own goals in developing, protecting, and managing its natural and cultural resources; rather, these agencies and departments must truly respect, listen to and take appropriate action in response to Tribal goals and positions.²⁰

Because Tribal governments overall have lost up to 98% of their aboriginal land base, the overwhelming majority of tribal property of cultural and religious significance are located outside of reservations and trust lands.²¹ Thus, the federal government is required to recognize the validity of tribal concerns for protecting on *and* off reservation properties of religious and cultural significance.²²

<http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf> (in the consultation process, this means that the tribe’s input should be tracked separately and may be treated as confidential and exempt from disclosure); *see also* FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 15 (2005) (“First Nations may not be treated as just another stakeholder.”), *available at* http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹³ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 25, *available at* <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>.

¹⁴ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 6 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf; NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 6 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf (“the government of the United States has an obligation to consult with Tribes as sovereign nations on matters of interest and concern to Tribes.”); U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 3-8 (2011).

¹⁵ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 4 (2011).

¹⁶ Respect Act, H.R. 5023, 111th Cong. § 501(c)(2) (2009-2010).

¹⁷ *See* Federal Executive Orders collected in Appendix I and digitized at www.tribalconsultation.arizona.edu.

¹⁸ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 2, *available at* <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

¹⁹ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 2, *available at* <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

²⁰ U.S. DEP’T OF ENERGY, AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY 3 (2001), *available at* <http://www.schlosserlawfiles.com/consult/DOEindian.pdf>.

²¹ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 1, *available at* [3](http://fedbar.org/Image-</p></div><div data-bbox=)

In sum, tribes are sovereign nations with responsibilities to their people that extend to both on and off reservation development, to any piece of land or property that has significance to the tribe. Recognition of this requires government-to-government consultation on all matters that affect the Tribe's interests – regardless of the location of the project or proposed activity on or off the Reservation.

ii. Trust Relationship

Because of the status of Tribes as sovereign nations within the United States, the Federal Government has enacted statutes, regulations and policies in an attempt to effectuate its trust relationship with Tribes.²³ This trust relationship is long established.²⁴ The relationship is a common law obligation to act as a fiduciary, and it is imposed on all federal agencies and departments acting on behalf of the United States.²⁵ The obligation includes supporting tribal sovereignty and self-government.²⁶ It extends to land and resources, as well as the rights of Tribes to govern their own reservations.²⁷

Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

In practice, the United States has not recognized tribal concerns about impacts to tribal ancestral lands. While we have, for examples, EO 13007 and the NHPA, Tribes are simply not notified or consulted about impacts off their reservations and, in most instances, tribal concerns are not heard or considered. What little has been codified in some manner by the United States on this issue has provided very little by way of remedy for the tribes.

²² Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 2, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

Actually, in practice, the United States has not recognized tribal concerns about impact to Tribal ancestral lands. Again, while we have, for examples, EO 13007 and the NHPA, Tribes are simply not notified or consulted about impacts off the Reservation and in most instances. Tribal concerns are not heard or considered. What little has been codified in some manner by the United States on this has provided very little by way of legal remedy for Tribes.

²³ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1, 7 (2011) (The Federal trusteeship over Tribes established in *Cherokee Nation v Georgia*).

²⁴ Respect Act, H.R. 5023, 111th Cong. § 501(c)(3) (2009-2010); USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 31 (2012) [hereinafter "SACRED SITES REPORT"], available at <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf> (noting the trust responsibility applies to Congress and all Executive Branch agencies as well); U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1-2, 7-8 (2011).

²⁵ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 5, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER) (discussing the development of the trust doctrine in US case law via the "Marshal Trilogy" of cases).

²⁶ USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 31 (2012) [hereinafter "SACRED SITES REPORT"], available at <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>; U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1-2, 7-8 (2011).

²⁷ USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 31 (2012) [hereinafter "SACRED SITES REPORT"], available at <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>; Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 5, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

As part of the trust relationship, “the United States has a responsibility to consult with tribes on a government-to-government basis when formulating policies and undertaking activities that will have impacts on tribal lands and interests.”²⁸ Inherent in the government-to-government relationship is the presumption of inclusiveness and of meaningful exchange of ideas and information.²⁹ Part of the trust responsibility is “following guidelines, already in place, that allow tribes sufficient opportunity to express their perspectives, concerns, and alternatives to the policies and actions of the Executive Branch agencies, and that such information is thoughtfully weighed in the decision making process.”³⁰

In sum, in order for the federal government to fulfill its trust responsibility to act as a fiduciary to tribes, it must consider their interests in development and management decisions that would affect them. The way to do this is, in part, through meaningful and ongoing consultation.

iii. Treaty Obligations

Consultation duties may also arise from treaty obligations.³¹

iv. Consultation as a Federal Mandate³²

The obligation to consult with tribes on a government-to-government basis is found in the U.S. Constitution, and is solidified in statutes, executive orders, regulations and the policies of federal agencies.³³ Federal law requires that if a federal agency has jurisdiction over a project, permit or action, whether on or off reservation, that the agency must meaningfully consult with affected Indian tribes.³⁴

²⁸ Respect Act, H.R. 5023, 111th Cong. § 501(c)(4) (2009-2010); NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 11 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf (“the nature of the government’s trust relationship [] mandates consultation.”).

²⁹ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1 (2011).

³⁰ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 1 (2011).

³¹ See e.g., *Navajo Treaty of Hell Gate, 1868*; *Apache Treaty 1852* (US to act to secure the “permanent prosperity and happiness” of the Apaches)

Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 7-9, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

³² Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 4-5, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

³³ See, the chart in the Appendices for a listing of executive orders, regulations, and policies of federal agencies, and the website located at www.tribalconsultation.arizona.edu.

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 6 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf (noting the consultation obligation begins with the Commerce Clause, where Congress is empowered to regulate commerce with foreign governments, between states and with the Indian Tribes); Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 3, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER); U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 2 (2011).

³⁴ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 2, available at [5](http://fedbar.org/Image-</p></div><div data-bbox=)

The obligation to consult has existed since treaty times in the United States, under both the express terms of treaties and the “age-old international legal norms governing US treaty obligations.”³⁵

Thus, the United States and its agencies have formally recognized that consultation is a trust responsibility; an affirmation of tribal sovereignty, self-determination, and self-governance; and a recognition of the shared government to government relationship. Stemming from this recognition, many agencies have moved to internalize this principle within their own policies.³⁶ For example, in the Forest Service’s 2012 Sacred Sites Report, the agency states that:

Federal agencies, including land management agencies, should approach their trust responsibilities to FRTs in a way that gives effect to Federal Indian policy, is protective of Tribal property interests, and ensures Tribe’s political and cultural well being and survival. Government to government communication is essential to understanding Tribal rights and interests and fulfilling trust responsibilities to Tribes. While implementing Federal law pertaining to Federal lands, land managers should also consider how their actions will support Tribe’s ability to protect their own members, manage their resources, and generally maintain their distinct cultural and political identities.³⁷

v. International Law

Indigenous peoples have a recognized consultation right in international law as well, specifically in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or Declaration) and the ILO Indigenous and Tribal Peoples Convention No. 169.

Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

³⁵ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 1, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

³⁶ See, e.g., NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 6-11 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf; USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 7-8 (2012) [hereinafter “SACRED SITES REPORT”], available at <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf> (giving examples of federal laws specifically addressing consultation); U.S. DEP’T OF ENERGY, AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY (2001), available at <http://www.schlosserlawfiles.com/consult/DOEindian.pdf>; FED. COMM. COMM’N, STATEMENT OF POLICY ON ESTABLISHING A GOVERNMENT TO GOVERNMENT RELATIONSHIP WITH INDIAN TRIBES (2000), available at http://www.ncai.org/attachments/Consultation_vtDJKgewkugoCsRWfwlBfFyFHbcVhbpuXzHoUWCSbQeKeBLyqr_f_8%20FCC_Tribal_Policy.PDF.

³⁷ USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 31 (2012) [hereinafter “SACRED SITES REPORT”], available at <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>. For another good example of federal agency policy, see U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE (2011).

The United States announced its support for UNDRIP in 2010.³⁸ The UNDRIP is the main international instrument defining and protecting indigenous people's rights and laying out obligations of the States.³⁹ UNDRIP's purpose, as stated by the High Commissioner for Human Rights, is to "remediate the disadvantaged position of indigenous peoples and to ensure effective equality between indigenous peoples and all other sectors of a given society."⁴⁰ The High Commissioner points out that these are not unique rights, but universal human rights, conceptualized in the context of collective indigenous communities.⁴¹

With this goal in mind, consultation is recognized as the mechanism by which Indigenous peoples participate in decisions that will affect them.⁴² Among the specific provisions in the Declaration regarding consultation are Articles 19 and 32, which require states to "**consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent.**"⁴³ Article 19 lays out a general duty on the State to consult with Indigenous people before adopting and implementing legislative or administrative measures that may affect them.⁴⁴ Article 32 requires consent in more specific situations: prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploration of mineral, water or other resources.⁴⁵ Article 38 instructs the States to take measures to implement these protections.⁴⁶ These duties apply whenever a State decision would affect Indigenous peoples "in ways not felt by others in society."⁴⁷ This has been interpreted to mean whenever a given measure is likely to affect Indigenous peoples' collective rights.⁴⁸

The consultation right is echoed and reinforced in the ILO Indigenous and Tribal Peoples Convention No. 169.⁴⁹ A duty to consult can also be found within the broader human rights framework, and in core human rights treaties.⁵⁰

³⁸ USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 10 (2012) [hereinafter "SACRED SITES REPORT"], *available at* <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>.

³⁹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 13 (June 2012).

⁴⁰ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 12 (June 2012).

⁴¹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 12 (June 2012).

⁴² Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 12 (June 2012).

⁴³ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 18 (June 2012).

⁴⁴ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 18 (June 2012).

⁴⁵ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 18 (June 2012).

⁴⁶ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 18 (June 2012).

⁴⁷ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 18 (June 2012).

⁴⁸ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 18 (June 2012).

⁴⁹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 14 (June 2012).

In international law, the right to consultation is not simply a reactive right.⁵¹ It is linked with the rights of indigenous people to self-determination, by which they can control their own economic, social and cultural development; and with indigenous people's right to meaningfully participate in the decisions of the larger society.⁵²

vi. Prior Occupation (Canada)

In Canada, First Nations have called on the government to recognize consultation and accommodation rights stemming from **prior occupation**, as well as statutes and case law.⁵³ The Assembly of First Nations of Quebec and Labrador lay out in their Consultation Policy that:

At the most fundamental level, federal and provincial government's duty to consult and accommodate First Nations flows from the fact of prior First Nations occupation of their traditional territories as self governing peoples relying on the natural resources of the land and maintaining a sustainable way of life and economy.⁵⁴

Likewise, the Hul'qumi'num Treaty Group asserted "aboriginal title" to their land within their Consultation policy.⁵⁵

b. Lack of Meaningful Consultation So Far

Generally, the consultation mandates coming from the government are stated in broad policies, not in specific rules. While consultation is required, the level and quality of that consultation is not specified. As a result, formal procedures, guidelines, and rules on consultation often lack uniformity, are confusing or unclear, or simply not followed. This has resulted in confusion over which process federal agencies are actually required to follow in order to meet the mandate to "consult" (i.e. simple notice, input, discussion, etc.).

The lack of guidance has led to a situations where, "federal agencies have been reluctant to comply" with the federal consultation mandate in any meaningful way.⁵⁶ While many federal agencies have internal

⁵⁰ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 15 (June 2012) (CERD Convention, ICCPR, American Convention on Human Rights).

Note, that the USDA and Forest Service reference the Declaration in its 2012 Sacred Site Report, and the Advisory Council for Historic Preservation is undertaking a review to determine how to implement the Declaration.

⁵¹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 19 (June 2012).

⁵² Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 19 (June 2012).

⁵³ See FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 10 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf; see also HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>.

⁵⁴ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 10 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

⁵⁵ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 10, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

documents espousing a tribal consultation policy, “not all of them have translated this policy into action.”⁵⁷

One article points out that federal law requiring consultation is “conveniently overlooked.”⁵⁸ Galanda specifically points to the IRS, the NIGC, and the EPA as examples of agencies that are especially “intrusive,” in that they “assume free reign over the promulgation of their prerogative in Indian Country.”⁵⁹ To support this conclusion, Galanda reiterates that each of the above named agencies has a specific protocol or policy or regulations mandating consultation, yet these mandates were ignored in most cases.⁶⁰

The reality of consultation often looks like this: consultation is initiated by sending a letter to a tribe informing the tribe, in non-specific or sometimes hyper-technical terms, that a proposed action has triggered the need for consultation.⁶¹ Lack of response at that stage may lead the federal government to assume consent and proceed with a project without tribal input.⁶² Even if the tribe is not informed by an initial letter, it may gain knowledge⁶³ of a project once it begins to physically impact the tribe. The tribe

⁵⁶ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 2, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER). Galanda gives several examples of case law in which tribes have been forced to go to the courts when federal agencies failed to consult, and the courts have had to enforce the duty to consult after the fact: p. 5 (giving two examples of litigation forcing the BIA to follow its own consultation policies: one involving failure of the BIA to follow internal policy guidelines, brought by the Ogala Sioux Tribe of Indians, and the other involving Secretarial Order 3175 and a corresponding Department Manual requiring consultation, brought by the Lower Brule Suix Tribe); p. 6-7 (Klamath Tribe was granted an injunction against the Forest Service when the agency created and implemented a forest and timber plan that would impact the tribe, without ensuring there was consultation on a government to government basis, and later the Confederated Tribes and Bands of the Yakama Nation was granted an injunction when the USDA permitted a contractor to move garbage onto an area the tribe used without their consultation).

⁵⁷ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 15 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf (“For many agencies, there remains a significant problem with implementation.”).

⁵⁸ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 4, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

⁵⁹ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 3-4, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

⁶⁰ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 4, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

⁶¹ INDIGENOUS PEOPLE’S LAW AND POLICY PROGRAM, UNIVERSITY OF ARIZONA, ENVIRONMENTAL AND SACRED SITES LITIGATION AND CONSULTATION IN INDIAN COUNTRY: A COMPREHENSIVE PRACTITIONER’S GUIDE 6.

⁶² INDIGENOUS PEOPLE’S LAW AND POLICY PROGRAM, UNIVERSITY OF ARIZONA, ENVIRONMENTAL AND SACRED SITES LITIGATION AND CONSULTATION IN INDIAN COUNTRY: A COMPREHENSIVE PRACTITIONER’S GUIDE 6.

⁶³ Often, these letters end up in the mailbox of an elected official, such as a Chairperson, and they become buried with other non-essential communications. This often results in little to no follow up within the Tribe. Sometimes the

is still entitled to consultation at that point, but it is obviously in a more disadvantaged position.⁶⁴ Often, tribes are either then simply informed of the decisions of the agency after they have been made, or else are sent a letter inviting the tribe to a “consultation,” without any specific information on the proposed project or an explanation as to why consultation is being requested in the first instance.⁶⁵

Procedures for proper consultation are desperately needed at this time. This is evidenced by the many failures of federal agencies to effect meaningful and ongoing consultation with tribes when conducting projects that impact Tribal interests.⁶⁶ Lack of clear guidance and a clear remedy on this important issue has caused serious injury to tribes.⁶⁷

According to Galanda, the policies mandating consultation are likely to continue being overlooked “unless tribes aggressively assert their federal Indian consultation right.”⁶⁸ **In response to the failure of the government to provide meaningful consultation on its own prerogative, several tribes have begun to demand this** by developing their own policies, ordinances, and agreements that lay out exactly what measure of consultation they require.

This sample ordinance will refer to some of these, and all will be attached to this document for reference.

i. Examples

The White Mountain Apache Tribe gives the following reasoning for its adoption of Resolution No. 02-94-060:

letters are sent to outdated points of contact or to the wrong person or department, meaning that the opportunity to inform the tribe is lost.

⁶⁴ INDIGENOUS PEOPLE’S LAW AND POLICY PROGRAM, UNIVERSITY OF ARIZONA, ENVIRONMENTAL AND SACRED SITES LITIGATION AND CONSULTATION IN INDIAN COUNTRY: A COMPREHENSIVE PRACTITIONER’S GUIDE 6.

⁶⁵ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 3 n.14, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER) (citing a study found in SHERRY HUTT & JAIME LAVALLEE, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 7 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf).

⁶⁶ See, e.g., NAT’L CONGRESS OF AMERICAN INDIANS, RESOLUTION # ECWS-11-012 (2012) (laying out the legal mandate to consult, but asserting that many federal agencies have not complied with the President’s most recent Executive Order 13175, and continue to breach the tribal consultation right); RESOLUTION OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION NO. 02-94-060 (Responding to the US & Wildlife Service position that ESA applies to tribes and their land, and allows the agency to condemn tribal land/designate it Critical Habitat without tribal consultation; claiming it was a violation of the trust obligation of the US government and tribal sovereignty. Resolution asserted that all agencies in the future were to be denied future access to the land without express written consent of the tribe, and that the tribe would create its own department to manage the plant and animal species on the reservation.).

⁶⁷ See NAT’L CONGRESS OF AMERICAN INDIANS, RESOLUTION # LNK-12-023 (2012) (explaining the adverse impacts of the current methods of planning on ancestral lands and cultural resources), available at http://www.ncai.org/attachments/Resolution_jTWFxrmYUWulyXmMpXvgRkgoyrCUqtwZUtLafuVzpezLwywdnjR_LNK-12-023.pdf.

⁶⁸ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 4, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

the United States Fish and Wildlife Service within the last five years has by administrative fiat adopted the position that the ESA applies to tribes and their lands, has knowingly ignored the government-to-government and trust relationship between the tribes and the United States Government, and has violated well established legal principles of tribal sovereignty over wildlife, plants, water, timber and grazing rights within tribal lands and lands subject to treaty rights.⁶⁹

The United States Fish and Wildlife Service continues to ignore the unique status of Indian lands, the political relationship of tribes to the United States government and has sought to condemn without tribal consultation and despite tribal opposition, millions of acres of Indian land and reserved water rights through the administrative rulemaking process by declaring Indian lands Critical Habitat⁷⁰ . . . [it goes on]

As part of the Hul'Qumi'Num Consultation Policy, the First Nations outline many of the problems they have experienced with consultation; experiences that likely propelled them to create their own consultation policy.⁷¹ Among them were:

- inadequate consultation, for which the Nation demanded a mutually agreed to and meaningful consultation process;
- lack of financial resources available to the Nation with which to properly analyze and respond to consultation requests;
- rigid timelines for responses imposed by the government;
- an unclear process, for which the Nation demands that they be involved in a consultation process agreed to before the consultation begins;
- unclear information, for which the Nation demands that information provided to the tribes about proposed projects be accurate, clear and accessible; and lastly,
- “sharp dealings” or dishonorable behavior.⁷²

The First Nations of Quebec and Labrador reported similar negative experiences as the impetus for creating their own Policy.⁷³ They note a difference in the consultation processes in those communities with agreements and partnerships with government and agency, for which clear rules have been agreed upon; and those communities who have no agreements, for which the generally applicable laws and policies have proven unsatisfactory.⁷⁴ The Policy lays out a very familiar story: it mentions that First Nation communities are being approached for consultations surrounding use and development of native

⁶⁹ RESOLUTION OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION NO. 02-94-060, at 4-5.

⁷⁰ RESOLUTION OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION NO. 02-94-060, at 5 (expanding on this issue until p. 7). For the resolutions developed to address this, see pp. 7-8.

⁷¹ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 30, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>.

⁷² HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 30-31, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

⁷³ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 8 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

⁷⁴ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 8 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

territories, but no clear process was established for those consultations.⁷⁵ Problems ensued when the reasons for the consultations are not communicated clearly, or when the governments requesting consultations were unaware of the rights of the Nation, or their legal obligation to consult and accommodate.⁷⁶ The Nation similarly complains of rigid timelines imposed by the government, reason being that consultation materials have already been developed without the participation of the nation, who is being contacted usually at the conclusion of development plans.⁷⁷ Also, no reports are ever developed as to the consultation process, so the Nations never knew if their concerns were considered.⁷⁸ They mention that sometimes a consultation summary is prepared, but that this is not enough. Once initial consultations are over, the Nations are excluded from the subsequent decision making process.⁷⁹ Sometimes silence in response to a consultation request was interpreted as consent; other times, projects have gone ahead despite clear objection and without substantially incorporating any Aboriginal concerns⁸⁰

c. Good Business Practice

Consultation with tribes on a government-to-government basis is also now considered **good business practice** for the United States.⁸¹ In a survey done by the National Historic Preservation Office, they found that “effective consultation is seen by both federal agencies and the tribes as a positive factor in project efficiency.”⁸²

It is in the best interests of business⁸³ to consult early, and throughout the life of a project, because it “promotes smooth project execution and makes work stoppages to conduct remedial consultation less

⁷⁵ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 8 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

⁷⁶ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 8 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

⁷⁷ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 8 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

⁷⁸ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 8 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

⁷⁹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 8 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

⁸⁰ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 8 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

⁸¹ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 6 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

⁸² NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 42 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf; see also UN Global Compact’s ten principles, *supra* note 4.

⁸³ We have lumped private business in with the government when discussing consultation. While tribes may or may not choose to communicate directly with private businesses or other interests, this is a secondary issue compared to consultation. Where consultation is done correctly, projects can be streamlined and business interests are helped through project certainty.

likely to occur.”⁸⁴ Consistency of contact between agencies and tribes is crucial to open working relationships.⁸⁵ “Tribal opposition to a federally licensed, permitted or stimulus-funded project can cost contractors time and money, and in some cases may even stop a project dead in its tracks.”⁸⁶

Additionally, proceeding with a project without the consent of a concerned tribe would “undermine the legitimacy, results and sustainability of such an action.”⁸⁷ This should be sufficient reason for third party businesses to respect the rights of indigenous communities as well, even if they may not hold the same legal obligations. The Office of the High Commissioner of Human Rights points out:

Operating with due diligence in respect of indigenous peoples’ rights – within legal and political frameworks that respect these rights –lead to security of investments, mutually beneficial partnerships and conflict resolution. There is a growing recognition among private sector actor that attaining the highest possible standards in respect of indigenous peoples’ rights is as a matter of applying sound business principle.⁸⁸

To summarize, there are both legal obligations and sound business planning reasons for federal agencies to engage in meaningful consultation with tribes.⁸⁹ Thus, when a federal agency is contemplating a project near tribal lands or in areas where a tribe may have an aboriginal or other traditional cultural connection, they should “engage in meaningful consultation with concerned tribes, and do so early.”⁹⁰

II. CONSULTATION PURPOSE, PRINCIPLES, AND APPLICABILITY

a. Underlying Principles

i. Defining and Understanding Consultation

⁸⁴ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 11 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

⁸⁵ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 11 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

⁸⁶ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 2, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

⁸⁷ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 21 (June 2012).

⁸⁸ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 30 (June 2012) (A/HRC/14/27).

⁸⁹ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 2, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER) (“If a federal agency has jurisdiction over a project, be it on or off reservation, then federal law requires that the agency meaningfully consult with any concerned tribe.”).

⁹⁰ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 2, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

There is no agreed upon definition of “consultation” within the federal government.⁹¹ However, the term is used throughout government documents, including in executive and secretarial orders, regulations and policies, and appears historically in treaties to describe the process of maintaining and continuing formal federal-tribal communications.⁹² Tribes therefore have it within their own sovereign authority and discretion to define consultation and the level of consultation they will recognize.⁹³

The definition of consultation given by the UN High Commissioner of Human Rights is “a genuine dialogue, aimed at reconciling interests and opinions, and with the objective of achieving free, prior, and informed consent.”⁹⁴ Like UNDRIP, the ILO Convention requires consultation occur with the objective of obtaining consent.⁹⁵

Within the UNDRIP definition, “free” implies a lack of coercion or pressure in a decision, and the ability of the indigenous peoples to make independent decisions.⁹⁶ “Prior” means prior to the adoption of measures related to projects that affect indigenous peoples.⁹⁷ “Informed” means that indigenous peoples should have full access to all information about a project that could influence their decision.⁹⁸ The “informed” requirement mandates that information be presented in a way so that indigenous peoples can fully understand the implications of their decision.⁹⁹ To this point, it may be necessary in some cases to provide indigenous peoples with access to funding and external and independent advice and expertise, which would ideally be provided by the government or third party.¹⁰⁰

The international instruments generally do not mention a veto right, but stress that any consultation that is a simple formality will not be in compliance with these international instruments.¹⁰¹ Consultation should be conceptualized as a negotiation.¹⁰² In this way, it is stressed that consultation should be seen as a process, and not a single event. It is the purpose of the proposed intertribal consultation ordinance that the

⁹¹ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 14 (2011).

⁹² U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 14 (2011).

⁹³ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 15 (2011). The Fish and Wildlife Service explain that consultation may also be defined on a spectrum, depending on the importance of the issue.

⁹⁴ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 18 (June 2012); *see also* NAT’L CONGRESS OF AMERICAN INDIANS, RESOLUTION # LNK-12-023 (2012) (adopting this definition into their resolution), *available at* http://www.ncai.org/attachments/Resolution_jTWFxrmYUWulyXmMpXvgRkgoyrCUqtWZUtLafuVzpezLwywdnjR_LNK-12-023.pdf.

⁹⁵ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 20 (June 2012).

⁹⁶ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 22-23 (June 2012).

⁹⁷ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 23 (June 2012).

⁹⁸ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 24 (June 2012).

⁹⁹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 24 (June 2012).

¹⁰⁰ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 24 (June 2012).

¹⁰¹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 20-21 (June 2012).

¹⁰² Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 22 (June 2012).

tribes will have recourse under their own laws to take action if the international duties of consultation are not complied with properly.¹⁰³

The United States Congress has also recognized that consultation should constitute more than just notice.¹⁰⁴ Tribes must be able to have an impact on the final decision as to whether a project will move forward. For this reason, *meaningful* consultation must take place *in advance* to any decision making, with those who are authorized to present tribal views.¹⁰⁵

Meaningful consultation requires informed participants.¹⁰⁶ True consultation requires open communication and coordination throughout.¹⁰⁷ The process of consultation involves seeking out, discussing, and considering the views of the other participants, and then seeking agreement on how to proceed.¹⁰⁸ The key elements of successful consultation are direct interaction and exchange of views.¹⁰⁹

Consultation could involve a meeting, where a federal agency can notify the tribe of its proposal and can justify its reasoning.¹¹⁰ However, the consultation process can involve many other mediums as well, including written correspondence, meetings, telephone conferences, site visits, emails, online information sharing, and others.¹¹¹

At the core of this process is mutual understanding and respect. This is exemplified by a two-way exchange of information, a willingness to listen, and an attempt to understand and consider each others' opinions.¹¹² While an ultimate agreement may be the goal, successful consultation is defined by respectful, direct communication and, to some degree, by action forcing the government to actually consider what it is hearing and to implement it in the decision making process.¹¹³ That being said, to be

¹⁰³ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 18 (June 2012).

¹⁰⁴ See Respect Act, H.R. 5023, 111th Cong. § 101 (2009-2010).

¹⁰⁵ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 3, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

¹⁰⁶ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 42 (2005) (A meeting without a previously disclosed agenda or information on the scope and impact of a project is not consultation), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹⁰⁷ Respect Act, H.R. 5023, 111th Cong. § 101 (2009-2010).

¹⁰⁸ Respect Act, H.R. 5023, 111th Cong. § 101 (2009-2010).

¹⁰⁹ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 14 (2005) (relying on Secretary of Interior Guidelines and the case Pueblo of Sandia v US, 50 F.3d 856 (10th Cir. 1995)), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹¹⁰ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 3, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

¹¹¹ Respect Act, H.R. 5023, 111th Cong. § 101 (2009-2010).

¹¹² Respect Act, H.R. 5023, 111th Cong. § 101 (2009-2010).

¹¹³ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 14 (2005) (relying on Secretary of Interior Guidelines and the case Pueblo of Sandia v US, 50 F.3d 856 (10th Cir. 1995)), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

meaningful, the tribe should be free to reject or accept the agency proposal or decision, pursuant to its own tribal law or procedure.¹¹⁴

1. Examples

In the Carcross/Tagish First Nation Protocol, consultation is defined as:

Providing notice of the matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter, providing a reasonable period of time to prepare and opportunity to present such views to the party obliged to consult, and full and fair consideration by that party.¹¹⁵

The Confederated Tribes of Umatilla define consultation as: a formal process of negotiation, cooperation and policy level decision making between the Tribe and the government.¹¹⁶ Thus consultation is conceptualized as a bilateral decision making process between two sovereigns, or a formal effort between two sovereigns to make policy level decisions.¹¹⁷

The Tribe also defines consultation in the negative. It asserts what consultation *is not*. Consultation is not: a notification that an action is about to occur, a request for written comments on that prospective action, and then proceeding with that action regardless of the response.¹¹⁸ The key to consultation is that the ultimate decision be affected by what the consultation process reveals.¹¹⁹

The Department of Energy Policy defines consultation as:

prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process,

¹¹⁴ Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 3, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER).

¹¹⁵ CARCROSS/TAGISH FIRST NATION & GOVERNMENT OF YUKON, CONSULTATION PROTOCOL 2 (July 23, 2007).

¹¹⁶ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CONSULTATION: GOVERNMENT TO GOVERNMENT, 1, available at <http://www.dahp.wa.gov/sites/default/files/Confederated%20Tribes%20of%20the%20Umatilla%20Indian%20Reservation.pdf>.

¹¹⁷ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CONSULTATION: GOVERNMENT TO GOVERNMENT, 1, available at <http://www.dahp.wa.gov/sites/default/files/Confederated%20Tribes%20of%20the%20Umatilla%20Indian%20Reservation.pdf>.

¹¹⁸ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CONSULTATION: GOVERNMENT TO GOVERNMENT, 1, available at <http://www.dahp.wa.gov/sites/default/files/Confederated%20Tribes%20of%20the%20Umatilla%20Indian%20Reservation.pdf>.

¹¹⁹ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CONSULTATION: GOVERNMENT TO GOVERNMENT, 1, available at <http://www.dahp.wa.gov/sites/default/files/Confederated%20Tribes%20of%20the%20Umatilla%20Indian%20Reservation.pdf>.

including final decision-making and action implementation as allowed by law, consistent with a government to government relationship.¹²⁰

ii. Guiding Principles

The purpose of this model ordinance will be to lay out the minimum requirements for consultation and to explain the purpose and the need for such a law. Attached will be examples of what some tribes have already put forth in consultation policies.

1. Examples

The **guiding principles** of this ordinance can be found in international instruments.¹²¹ An example of a policy based on international principles can be found in the Goldfield Land and Sea Council Mining Policy.¹²² The Council used Australia's many international obligations to form the backdrop of their policy.¹²³ One of the purposes of the policy then, was "to ensure proper observance of these UN covenants as they relate to all development projects and other activities on the traditional lands of the Aboriginal people of the Goldfields-Esperance region."¹²⁴

As another possible method, as seen in the Consultation Policy of the Federation of Saskatchewan Indian Nations, is to base "guiding principles" on common sense respect and good business practice.¹²⁵ The Federation's guiding principles include:

- that consultations must be conducted in good faith,
- before decisions are made,
- with adequate time for consideration by the Nation,
- with the objectives and scope of the proposal clearly communicated before consultation begins,
- with communication by the government on how they used feedback of the Nations,
- in a climate of mutual respect, and
- removing any barriers to participation of the Nation by giving background information, using accessible locations, offering translated documents, and providing financial support.¹²⁶

¹²⁰ U.S. DEP'T OF ENERGY, AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY 2 (2001), *available at* <http://www.schlosserlawfiles.com/consult/DOEindian.pdf>.

¹²¹ GOLDFIELDS LAND & SEA COUNCIL, MINING POLICY, 3, *available at* <https://docs.google.com/a/email.arizona.edu/viewer?a=v&pid=sites&srcid=Z2xzYy5jb20uYXV8Z29sZGZpZWxkcy1sYW5kLWFuZC1zZWEtY291bmNpbHxneDoyYjRiMDBiNWUyNTdhY2Ri>.

¹²² GOLDFIELDS LAND & SEA COUNCIL, MINING POLICY, *available at* <https://docs.google.com/a/email.arizona.edu/viewer?a=v&pid=sites&srcid=Z2xzYy5jb20uYXV8Z29sZGZpZWxkcy1sYW5kLWFuZC1zZWEtY291bmNpbHxneDoyYjRiMDBiNWUyNTdhY2Ri>.

¹²³ GOLDFIELDS LAND & SEA COUNCIL, MINING POLICY, 3, *available at* <https://docs.google.com/a/email.arizona.edu/viewer?a=v&pid=sites&srcid=Z2xzYy5jb20uYXV8Z29sZGZpZWxkcy1sYW5kLWFuZC1zZWEtY291bmNpbHxneDoyYjRiMDBiNWUyNTdhY2Ri>.

¹²⁴ GOLDFIELDS LAND & SEA COUNCIL, MINING POLICY, 3, *available at* <https://docs.google.com/a/email.arizona.edu/viewer?a=v&pid=sites&srcid=Z2xzYy5jb20uYXV8Z29sZGZpZWxkcy1sYW5kLWFuZC1zZWEtY291bmNpbHxneDoyYjRiMDBiNWUyNTdhY2Ri>.

¹²⁵ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 2-3, *available at* <http://caid.ca/FSINConPol.pdf>.

¹²⁶ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 2-3, *available at* <http://caid.ca/FSINConPol.pdf>.

Providing financial support is key. It is very difficult to consult with a tribal council on a particular and often technical matter when the tribe lacks the financial resources within its own departments to review and advise the tribal government. Significant aspects of the consultation, such as ethnographic studies, cannot be completed unless there is funding available within the tribe to locate and secure interviews with the right tribal members who are knowledgeable on the subject.

In the Carcross/Tagish First Nation and Yukon Consultation policy, the intention laid out was that the policy would promote meaningful consultation and would enhance government-to-government relations.¹²⁷ With that in mind, the Nation laid out these guiding principles: that consultation be transparent, proactive, flexible, workable and effective; and that it should be recognized that the nature and scope of consultation may vary from obligation to obligation, or from case to case.¹²⁸ Principles underlying the policy are that parties will consult in a mutually respectful manner, in order to demonstrate: shared understanding of the purpose of the consultation, clear communication, timeliness in initiating and responding to consultations, and an appreciation of the need for workable approaches and solutions.¹²⁹

In the Simpchw First Nation Guidelines, the underlying principles were laid out more like rules.¹³⁰ They require the government to consult, with respect, to any proposed activity affecting the Nation, and to follow the guidelines when doing so.¹³¹ In addition, the Nation imposed a possible duty on Third Parties to also follow their guidelines.¹³² The Nation writes each of the preliminary rules as a mandate on both the government and third parties. For example:

- that the consultation with the Simpcw be separate from other consultations with the government/third parties and interest groups,
- that the government/third parties come to the table willing and required to be flexible,
- that the Simpcw have opportunity to express their concerns and proposed alternatives and
- that these must be addressed and accommodated by the government/third parties,
- negotiations must be in good faith and all alternative options (including a no action option) be on the table,
- that consultation occur at all stages of activities that may infringe in Simpcw rights (legal and policy changes, strategic planning, scientific and technical decision making, assessment of environmental impacts, operational plans, approvals that may lead to a permit license or lease or change in land status, monitoring, and any amendments to any of the above decisions),
- decision made on government to government basis- meaning the larger government should not make decisions without full participation and approval by the Simpcw, and

¹²⁷ CARCROSS/TAGISH FIRST NATION & GOVERNMENT OF YUKON, CONSULTATION PROTOCOL 2 (July 23, 2007).

¹²⁸ CARCROSS/TAGISH FIRST NATION & GOVERNMENT OF YUKON, CONSULTATION PROTOCOL 2 (July 23, 2007).

¹²⁹ CARCROSS/TAGISH FIRST NATION & GOVERNMENT OF YUKON, CONSULTATION PROTOCOL 2 (July 23, 2007).

¹³⁰ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 3, *available at* www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

¹³¹ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 3, s.5.1, *available at* www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

¹³² SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 3, s.5.2, *available at* www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

- that legal policy and strategic decisions about tenuring allowable annual cut and land use planning will be made first on a government to government basis and *will bind third parties*.¹³³

In the Confederated Tribes of Umatilla, the objectives of the consultation policy are to assure the Tribe has the information necessary to make an informed policy decision; to improve policy decisions by both parties; to allow for bilateral decision making by two sovereigns; to assure compliance with tribal law; to assure compliance with federal laws; to protect Tribal lifestyle, culture, religion, economy; to develop and achieve mutual decisions; and to improve the integrity and longevity of decisions.¹³⁴

The National Association of Tribal Historic Preservation Officers has identified some best practice principles in regard to tribal consultation which may be incorporated here.¹³⁵ They found that in order to effect actual government-to-government contact, actual meetings must occur between the agency representative and appropriate tribal leaders.¹³⁶ Successful consultation involved multiple contacts that begin *early* in the planning process and *continue* through the life of the project.¹³⁷ Best practices here reiterated that location of meetings should be flexible and include venues close to the tribe.¹³⁸ The existence of a clearly identified *point of contact*, or an agency tribal liaison, also supported more successful consultations.¹³⁹ This is absolutely key: there must be more than one contact. A letter to the Chairman or a tribal official is not enough, and each agency should work with its local field offices to identify contacts inside and outside the tribe that are able to review requests for consultation and to elevate important requests instead of trivial requests. Tribes need to be provided full and candid

¹³³ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 4, s.5.3-5.7.2, *available at* www.simpw.com/simpw-first-nations-policies/doc/3/raw; *see also supra* note 4. Governments cannot outsource their consultation responsibilities to third parties in the consultation process with tribes.

¹³⁴ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CONSULTATION: GOVERNMENT TO GOVERNMENT, 1-2, *available at* <http://www.dahp.wa.gov/sites/default/files/Confederated%20Tribes%20of%20the%20Umatilla%20Indian%20Reservation.pdf>.

¹³⁵ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 39 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹³⁶ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 39 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹³⁷ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 39 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹³⁸ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 39 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹³⁹ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 39 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

information prior to the first meetings, so that the agenda was transparent.¹⁴⁰ Usually a successful result was found when an agreement was reached, but this should not be seen as an end in itself.¹⁴¹

Based on these principles, the Office produced a best practice outline of how meaningful government –to-government consultation can be achieved. It has seven steps: (1) the agency compiles a draft of the scope of the project, then (2) determines who should be consulted – here the agency should have a list of tribal contacts who may have an interest, those tribes should be contacted to ascertain if there is indeed an interest, (3) initial contact should be made: mailing a copy of the proposal and requesting a meeting (although best results are achieved with in person follow-up calls and not just informal, unclear letters and emails), (4) then arrangements for initial and follow up meetings, addressing barriers to tribal participations, establishing goals for consultations, (5) actual consultation meetings, (6) repeated meetings if necessary, (7) a final resolution or agreement on how to proceed.¹⁴²

iii. Scope and Applicability: When is the duty triggered?

Usually, consultation policies are geared towards governments (and their agents and employees). For the reasons mentioned above, governments have a special relationship and fiduciary duty to tribes in the United States. The governments clearly have a duty to consult, but the confusion arises as to when the duty is triggered, and how much consultation is required when it is. Tribes have taken different approaches as to how specific they want to be in their policy on this point.

1. Examples

In the Hul'qumi'num policy, for example, it is stated that the policy applies to any consultation by the government arising out of any of its various duties to consult.¹⁴³ The policy goes on to state that it applies to third parties as well.¹⁴⁴ This policy lays out a good, clear example of when the duty to consult arises:

The duty to consult arises when the Crown or an agent of the Crown has real or constructive knowledge of the potential existence of the Aboriginal right or title and contemplates Activity that might adversely affect the HMFN or treaty process . . . Each HMFN and HTG expect the provincial and federal Crowns, and if appropriate, Third Parties to undertake consultation whenever a proposed Activity might affect individual

¹⁴⁰ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 39 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹⁴¹ NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 40-41 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹⁴² NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (NATHPO), TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 40-41 (2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

¹⁴³ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 18 (listing the Crown's fiduciary duty to First Nations, their statutory duty, the duty arising out of their assertion of sovereignty in the face of prior occupation of the First Nations, etc.), *available at* <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁴⁴ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 18, *available at* <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

HMFN traditional territory, or collective HMFN territory, or any geographic areas that might affect how each individual HMFN exercises its Aboriginal rights.¹⁴⁵

The Hul'qumi'num Policy goes on to create a non-exclusive list of undertakings they wish to be consulted on when occurring within their traditional territories.¹⁴⁶ The list includes: resource extraction, exploration activities, alteration to Heritage Objects or Sites, strategic or operational plans related to the lands or exploration of resources, Crown Patent grants or alienation of lands within their territory, and any plans, licenses, permits or authorization related to lands and resources.¹⁴⁷ This may seem very specific, but it also affords clarity to developers or business proponents who may otherwise claim ignorance. Developers and private interests do not consult government-to-government. It is the federal agency or department that consults though private interests may be in the loop and may provide information. Tribes may or may not choose to meet with the private interest and they should not be required to do so.

The Assembly of First Nations of Quebec and Labrador also lay out in their policy a clean, precise definition of who holds the duty to consult and when it is triggered.¹⁴⁸ Their policy, like the Hul'qumi'num Policy, includes examples of specific triggers. Under their policy, the duty arises:

When contemplating any action that may affect First Nations, federal and provincial governments have a constitutional obligation to consult with First Nations and accommodate their interests. Actions that may trigger the duty include: modification or adoption of statutes and regulations, policy-making, planning processes, modification or adoption of regimes of resource allocation and management . . . and the approval of specific projects and allocations of resources.¹⁴⁹

The alternative is to keep it simple. The Federation of Saskatchewan Indian Nations policy states simply that the policy will be used in all consultation processes.¹⁵⁰ In the international arena, the duty is triggered anytime “a State decision may affect indigenous peoples in ways not felt by others in society.”¹⁵¹

iv. Timing

¹⁴⁵ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 19, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁴⁶ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 19, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁴⁷ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 19, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁴⁸ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 15 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁴⁹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 15 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁵⁰ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, s.4.2, available at <http://caid.ca/FSINConPol.pdf>.

¹⁵¹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples (June 2012) (part of “key messages”).

One of the negative experiences tribes have with consultation under the current regime is that they are approached too late, after much of the planning is done, and the project is underway.¹⁵² To address this, tribes can put clear guidelines in their Policy as to when they wish to be contacted.

1. Examples

The Hul'qumi'num Policy requires consultation begin “at the earliest state of any such consideration, before the issue or approval of any plans, licenses, permits or other authorization.”¹⁵³ The Assembly of First Nations of Quebec and Labrador Policy likewise requires “consultation at the beginning of the decision making process . . . [it] must occur well before any action is taken that may affect First Nation interests.”¹⁵⁴ In addition to early consultation, the Assembly requires a “continuing constitutional obligation, reflecting a permanent relationship that cannot be satisfied on a once-off basis. It must be respected throughout the decision making processes and over the life of the action or project.”¹⁵⁵ Logically, this requires follow up as well, “to ensure that the results of the consultation and accommodation are respected and implemented.”¹⁵⁶

International law has a similar outlook: “Consultation should be initiated prior to decision making, providing indigenous peoples with real possibility of influencing decisions.”¹⁵⁷ Also, “consultation is to be regarded as a process rather than a single event.”¹⁵⁸

It is seen as an obligation that applies retroactively. In cases where consultation was omitted in the first instance, the ILO supervisory bodies have suggested that “late is better than never . . . they may also be in time to adjust the consequences to the needs of the indigenous and tribal peoples concerned- to establish monitoring process, to fix compensation, to adjust the path of a road or the exact placement of a dam, for example.”¹⁵⁹ Lastly, the consultation process itself should adjust to the timing required for the indigenous

¹⁵² See Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty IncurSION*, FEDERAL BAR ASSOCIATION: INDIAN LAW SECTION, 3 n.14, available at <http://fedbar.org/Image-Library/Sections-and-Divisions/Indian/Federal-Indian-Consultation-Right.pdf> (special feature article in conjunction with Fall 2010 issue of FEDERAL INDIAN LAWYER) (citing a study found in SHERRY HUTT & JAIME LAVALLEE, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 7 (2005), available at http://www.nathpo.org/PDF/Tribal_Consultation.pdf).

¹⁵³ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 20, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁵⁴ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 16 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁵⁵ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 16 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁵⁶ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 16 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁵⁷ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples (June 2012) (“key messages”).

¹⁵⁸ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples (June 2012) (“key messages”).

¹⁵⁹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 24 (June 2012) (citing Consultation and Indigenous and tribal peoples: Practical guidance in applying International standards, Lee Swepston, paper prepared for the ILO, 2010).

people's own decision making process, which will vary according to the traditions of the specific tribe concerned.¹⁶⁰

The Department of Energy Policy also contains language recognizing that consultation should begin early and be a continuing process. It reads:

To ensure protection and exercise of tribal treaty and other federally recognized rights, the DOE will implement a proactive outreach effort of notice and consultation regarding current and proposed actions affecting tribes, including appropriate fiscal year budget matters. This effort will include timely notice to all potentially impacted Indian nations in the early planning stages of the decision-making process, including predraft consultation, in the development of regulatory policies on matters that significantly or uniquely affect their communities . . . The DOE will continue to conduct a dialogue with Indian nations for long and short term decision-making when DOE actions impact Indian nations.¹⁶¹

III. CREATING A CONSULTATION PROCESS

The actual process for consultation varies between tribes, and should be based on the needs of each tribe. Below is a list of considerations, steps to include in a final process, and some sample language from other Tribal and First Nation policies.

a. How to initiate consultation

Once it is determined that there is a duty to consult, defining the trigger for when there is a duty to consult is key. This is where the first failure can occur. Contact must be made with the tribe to begin the process. The best way to assure a positive working relationship is for the Agency to proactively initiate consultation.¹⁶² The tribes can facilitate this process by designating a known point—or points— of contact for communicating with the government regarding consultation issues, and making it clear who has authority to make final decisions.¹⁶³ There may be more than one point of contact, or different points of contact for different issues. The agency should keep an updated list of these people and the agency is not relieved from providing follow up information in the event a contact person is no longer working for the tribe or is unavailable. Final decisions are also typically, and almost always should be, rendered by the tribal council; otherwise agencies will talk to department heads or even employees so as to say that they have a final decision on behalf of the entire tribe.

i. Examples

In the Hul'qumi'num Policy, initial outreach is made by a notice, in writing, to specifically designated contact people.¹⁶⁴ For the Hul'qumi'num, those contact people are the Chiefs and Chief Negotiator.¹⁶⁵

¹⁶⁰ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 24 (June 2012).

¹⁶¹ U.S. DEP'T OF ENERGY, AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY 4 (2001), *available at* <http://www.schlosserlawfiles.com/consult/DOEindian.pdf>.

¹⁶² U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 17 (2011).

¹⁶³ *See* INDIGENOUS PEOPLE'S LAW AND POLICY PROGRAM, UNIVERSITY OF ARIZONA, ENVIRONMENTAL AND SACRED SITES LITIGATION AND CONSULTATION IN INDIAN COUNTRY: A COMPREHENSIVE PRACTITIONER'S GUIDE 6-9.

¹⁶⁴ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 22, *available at* <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

The Policy even lays out a mailing address in the policy itself, so there is not confusion.¹⁶⁶ The Policy is also very clear about what the notice should contain. Specifically, the notice should address: the nature and scope of the proposal; its timing; location; how the proposal might affect the traditional territory of each HMFN;¹⁶⁷ who is involved; who will be making the final decision for the Crown and who will be assisting in that decision; all documents referenced, including applications, studies, assessments and policies available for review; what collateral or related processes or approvals are being undertaken by the Crown; relevant deadlines or filing dates; the Crown's proposed form of consultation; contact information of relevant parties.¹⁶⁸

In the Assembly of First Nations of Quebec and Labrador Policy, the initial consultation process laid out in an eleven-step process.¹⁶⁹ It begins with an initial notice to the First Nation. The form of the initial contact can be in writing or electronic form, through an informational session, and in all cases shall be made available in the language of the First National being consulted.¹⁷⁰ The initial notice should include at a minimum, clear identification of the action being contemplated, clear identification of the territory that may be affected, the proposed timelines for the action being contemplated, and all expert reports available and/or information on reports that will become available in the future.¹⁷¹ Upon initial notice, Nation will either respond or assert their consultation right.¹⁷² At that point, the eleven-step process is triggered, and the First Nation will usually conduct an internal community scoping process to consider the issues related to the proposal.¹⁷³

For the Carcross/Tagish Protocol, the Nation requires written notice of intent to consult, delivered personally or by courier, transmitted by fax, mailed by prepaid registered or certified post in Canada, or by any other means agreed to by the parties.¹⁷⁴ It lays out for each of the mentioned methods when the notice will be deemed "received."¹⁷⁵

¹⁶⁵ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 22, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁶⁶ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 22, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁶⁷ Note, this is critical because often, the agency has an idea of what the impact might be and, or, why it is important that the tribe pay attention to the proposal; agencies then neglect to specify and bury it in technical details.

¹⁶⁸ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 22-23, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁶⁹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 17-22 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁷⁰ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 19 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁷¹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 19 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁷² FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 17 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁷³ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 17 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁷⁴ CARCROSS/TAGISH FIRST NATION & GOVERNMENT OF YUKON, CONSULTATION PROTOCOL 3, s.2 (a)-(c) (July 23, 2007).

¹⁷⁵ CARCROSS/TAGISH FIRST NATION & GOVERNMENT OF YUKON, CONSULTATION PROTOCOL 3, s.2(d) (July 23, 2007).

In the Fish & Wildlife Service Consultation Guide, that agency has made clear that protocol differs for “service-initiated” consultation and “tribal-initiated” consultation.¹⁷⁶ That policy says that if initiated by the Agency, it should be at least 30 days before a consultation meeting, and should be in the form of a formal letter from the decision maker in the Service to the tribal leader.¹⁷⁷ Then, the policy says a few weeks after the letter is mailed, the Agency will contact the tribal technical staff and managers to determine their desire to consult.¹⁷⁸ This can be dangerous, because, on one hand, follow up calls are very important and should take place. However, it is the tribe and not the managers, who determines whether there is a “desire” to consult. Leaving the decision to department personnel is not acceptable. The protocol is clear that several consultation meetings may be needed, and that sending just the letter with no follow up is not consultation.¹⁷⁹ If it is the tribe initiating consultation, it may occur through letter, email or phone call.¹⁸⁰ The policy also lays out guiding steps for the Agency for developing more tailored, individual consultation protocols with tribes in which a agreed upon process is implemented.¹⁸¹

b. Form and Conduct of Consultation

The form of the consultation is to be set out by the tribe in their individual consultation policies. Some examples of what tribes have done to this effect are below. Additionally, it should be noted that most of the available procedures in the United States are currently found in memorandums of understanding between federal agencies and tribes, which are usually the result of case by case negotiations and not a formal policy.¹⁸² Because the goal here is to create a baseline for consultation, the focus will not be on memorandums of understandings, although some will be attached for reference to the appendix to the final ordinance.

i. Examples

The Hul’qumi’num, for example, require consultation to be either (but not limited to): oral consultation with the Chiefs and Council and Elders of each individual HMFN, and the Chief Negotiator of HTG with or without legal counsel; or written consultation with each of the Chiefs and Councils and the Chief Negotiator.¹⁸³ The Nation follows this by clarifying: “the appropriate form of consultation must be established collaboratively at the outset by the HMFN, HTG and the Crown, on a case by case basis in accordance with the specific demands of each Action.”¹⁸⁴ In another part of the policy, it is states that consultation could be in the form of meetings, focus groups, expert presentations and/or community

¹⁷⁶ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 21 (2011).

¹⁷⁷ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 21 (2011).

¹⁷⁸ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 21 (2011).

¹⁷⁹ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 21 (2011).

¹⁸⁰ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 21 (2011).

¹⁸¹ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 28-31 (2011).

¹⁸² *See, e.g.*, MOU Among the FHA, IL HPO, IL DOT & Federally Recognized Tribes Interested in Illinois Lands, Regarding Tribal Consultation Requirements for the Illinois Federal Transportation Program (2011) (addressing timing, notification, points of contact, consultation procedure, procedure for unanticipated discoveries, confidentiality, dispute resolution, consequences for failure to comply, etc.); MOU Between the US Army Corps of Engineers, Memphis District & Osage Tribe of Indians, Pursuant to the National Historic Preservation Act and Other Authorities (2006).

¹⁸³ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 23, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁸⁴ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 23, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

gatherings.¹⁸⁵ There may also be collaborative meetings with internal and external stakeholders, including third parties.¹⁸⁶

The Assembly of First Nations of Quebec and Labrador took the route of listing possible consultative activities, which include:

- meetings between decision-makers of equal standing;
- meetings between experts mandated by First Nations, Canada and/or the provinces;
- interest-based negotiations, rather than adversarial negotiations or positional bargaining;
- community meetings or “town-hall” type meetings at which members of First Nation communities provide input regarding the action being contemplated;
- focus groups;
- small meetings with First Nation constituencies (e.g. elders, youth, trappers, fishermen, loggers, business people); project site visits and visits to traditional territory; interviews with members of First Nation constituencies;
- newsletters and pamphlets;
- surveys conducted in First Nation communities;
- radio show phone-ins;
- distribution of questionnaires in First Nation communities; and
- solicitation of First Nations’ input through electronic, web-based, forums.¹⁸⁷

The ultimate plan for a consultation with the Assembly must include provisions regarding: setting the agenda for meetings and distribution thereof in advance, determining who shall chair meetings, determining who shall attend meetings, determining who shall record and distribute minutes of meetings, determining who shall record and distribute the results of community-based activities aimed at soliciting input from First Nation communities, and the propriety of engaging the services of third party facilitators for some consultative activities.¹⁸⁸ The Plan must also include set dates for when subsequent ongoing updates on the decision making process will occur.¹⁸⁹

The Federation of Saskatchewan Indian Nations Policy also includes a list of general elements of what a final consultation policy should include.¹⁹⁰ The final plan should: identify the objectives of the specific Consultation; develop an action plan setting out roles and responsibilities, including financial resources, both internally and with the participants; Ensure that the values, interests, knowledge and contribution of participants are considered in a meaningful way; Identify in advance what information will be needed to

¹⁸⁵ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 25, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁸⁶ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 25, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁸⁷ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 20, s.49 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁸⁸ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 20, s.50 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁸⁹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 20, s.54 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

¹⁹⁰ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 3, available at <http://caid.ca/FSINConPol.pdf>.

support the Consultation process and how this will be shared with First Nations, and other persons who may be affected; Determine how communications will be managed before, during and after the Consultation process; and Identify evaluation and feed-back mechanisms.¹⁹¹

Various *methods* of consultation are also authorized by the FSIN, including, in list form:

- Large scale face-to-face Consultations;
- Small group Consultations/focus groups;
- Discussion paper with written input;
- Questionnaires; Interviews;
- Internet discussions;
- Surveys;
- Public opinion polling; and/or
- as directed by First Nations.¹⁹²

It is left up to the Federation to choose one or more of the methods listed in any given circumstance.¹⁹³

The Simpcw First Nation Policy also has very clear and specific seven-step consultation process.¹⁹⁴ In step one, the initial information package from the government is required to be submitted at the earliest possible stage, and must contain: the name and telephone number of the contact person, maps of the area in question, inventories/assessments/other background information upon which proposals are based, a description of the proposed activity, a timeframe for commencement and completion, anticipated impacts to the land and the First Nation rights, economic impacts for the Nation and any other requested information.¹⁹⁵ This initial information step is followed by an initial community review, an initial community response, Third Party/Crown reconsideration, consultation and accommodation negotiations, dispute resolution if necessary, and finally, implementing and monitoring.¹⁹⁶

Federal agencies will also have protocol for how to effect consultation. For example, the Bureau of Land Management conceptualizes consultation as having 4 elements: Identifying the appropriate tribal governing body or individual with whom to seek input, conferring with them and asking their views, treating tribal information as a necessary factor in defining the range of acceptable public land management options, and then creating and maintaining a record to show how that tribal information was obtained and used in the decision making process.¹⁹⁷ As you can see, this is not fleshed out to the extent some of the tribally created procedures are, which is another reason for tribes to be the ones creating their own such procedures.

ii. Disclaimers within the Ordinance

¹⁹¹ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 3, s.7.2, *available at* <http://caid.ca/FSINConPol.pdf>.

¹⁹² FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 4, s.8.1, *available at* <http://caid.ca/FSINConPol.pdf>.

¹⁹³ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 4, s.8.2, *available at* <http://caid.ca/FSINConPol.pdf>.

¹⁹⁴ *See* SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 9, *available at* www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

¹⁹⁵ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 9, *available at* www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

¹⁹⁶ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 9-10, *available at* www.simpcw.com/simpcw-first-nations-policies/doc/3/raw

¹⁹⁷ BUREAU OF LAND MANAGEMENT, GENERAL PROCEDURAL GUIDANCE FOR NATIVE AMERICAN CONSULTATION (2004); *see also* BUREAU OF INDIAN AFFAIRS, GOVERNMENT-TO-GOVERNMENT CONSULTATION POLICY (2000).

Several of the Policies contained clear **disclaimers** as protection for the tribe. The disclaimers below protect against false claims of consultation or consent.

The Hul'qumi'num policy contains a disclaimer that, “no other form of contact [except what is listed in the policy] between the Crown and each HMFN will be considered consultation. Telephone calls to Band and HTG officials and employees, faxes and material sent to the Band office will not be considered consultation and in no way discharge the Crown’s honorable duty to consult.”¹⁹⁸

The Hul'qumi'num also have several other disclaimers for clarification: that the agents and employees of the Nation are not bodies authorized to consult, and that consultation can only be effected with the relevant decision maker, or a representative of the relevant decision maker agreed to in advance, in writing.¹⁹⁹ Likewise, the Crown decision maker conducting the consultation must have adequate authority to consult with the tribe and address and achieve accommodation.²⁰⁰

The Assembly of First Nations of Quebec and Labrador also has similar disclaimers. First, it states that “the duty to consult and accommodate cannot be fulfilled by improvised or discretionary measures added to the general statutory powers of the federal and provincial governments. Consultation and accommodation must be in accord with specific criteria and further to a clear process established by agreement with First Nations or in legislation that complied with this Protocol or its equivalent.”²⁰¹ Second, it contains the disclaimer: that refusals to participate or withdrawal from participation do not constitute consent to the actions proposed by the government.²⁰²

iii. Key Component: Requiring Funding for Consultation

Several of the First Nations in Canada have provisions in their policies requiring **funding** from the federal government for consultation purposes. This is something that has basis in international law, but is not seen as heavily in the United States policies.

We see *permissive* funding language in the Forest Service American Indian and Alaska Native Relations Handbook. In section 12, the Handbook lays out that agency officials are encouraged to facilitate tribal participation in decision making, and while there is no legal requirement to compensate, the Service can provide compensation to tribes or tribal representatives for extraordinary situations and specialized expertise.²⁰³

¹⁹⁸ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 23, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

¹⁹⁹ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 24, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁰⁰ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 24, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁰¹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 16 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

²⁰² FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 17, s.26 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

²⁰³ U.S. FOREST SERVICE, AMERICAN INDIAN AND ALASKA NATIVE RELATIONS HANDBOOK (2012). The handbook also notes other ways to facilitate participation, including scheduling meetings at convenient times and places for tribal members. If the tribe or relevant tribal department does not have the funding (tribes are funded disproportionately to other agencies and departments [and state governments]), the consultation cannot be meaningful.

The Hul'qumi'num Policy explains that a major concern for First nations is the lack of financial and human resources needed to properly analyze and respond to consultation requests.²⁰⁴ They assert that funding is a piece of the duty to consult and accommodate, because a lack of funding prevents the tribe from participating effectively.²⁰⁵ They give the example of the various technical analyses that are needed from a variety of specialists in order to determine potential impacts on Aboriginal rights and title.²⁰⁶ Without resources, the Nation cannot process and respond to applications, to conduct their own analyses, or to ultimately engage in meaningful discussions with the Crown and/or Third Parties.²⁰⁷

The Assembly of First Nations of Quebec and Labrador and the Simpcw First Nation policies both requiring funding as well, which should occur very early in the consultation process.²⁰⁸ For the Assembly, federal or provincial funding must be made at the “information stage,” and includes costs of internal coordination, consultation and scoping, remuneration of community and other experts (...), research budgets, professional fees and consultant services.”²⁰⁹

The Simpcw require that the Crown provide an “immediate and on-going share of resource revenue sufficient to enable the Simpcw People to meaningfully participate in land and resource decision-making.”²¹⁰ Specific costs include: Time and expense of staff and other experts; Travel and honoraria costs for elders and community resource people; Costs for necessary Simpcw planning, assessments, studies and research; and Training for Simpcw members.²¹¹ In addition, Third Parties will normally be required to contribute to Simpcw capacity and costs of a meaningful consultation process as well, to be laid out in each particular consultation agreement.²¹²

c. Working in Traditional Knowledge

In the consultation and development context, dealing with traditional knowledge requires an understanding of what may **permissibly** be shared with outsiders. Traditional knowledge is sometimes the only way for tribes to explain the cultural, religious, or historic importance of a certain place. The problem then, is how to respect the confidentiality of those portions of traditional knowledge denoted as

²⁰⁴ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 24, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁰⁵ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 24, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁰⁶ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 24, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁰⁷ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 24, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁰⁸ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 19 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf; SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 7, available at www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

²⁰⁹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 19, s.40 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf

²¹⁰ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 7, s.11, available at www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

²¹¹ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 7, s.11, available at www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

²¹² SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 7, s.12, available at www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

“confidential” to the greatest extent possible, yet at the same time provide for its use in order to assure that, for example, a certain space is demarcated as sacred to a tribe and therefore must be preserved.

A secondary problem exists in assuring outsiders the validity of such traditional knowledge. Traditional knowledge may be presented in a way the mainstream public may not be used to. Yet, it is often very relevant information to land use planning and development.²¹³ For this reason, tribes may decide in the future to create laws that self-validate such knowledge.²¹⁴

In any event, many struggle with how to incorporate it into consultation process. For this reason, it should be addressed.

i. Examples

Several consultation policies have successfully acknowledged and incorporated traditional knowledge. One good example comes from an agreement on how to manage sensitive information between the White Mountain Apache Tribe and US Fish & Wildlife Service.²¹⁵ The Protocol was developed to address how to keep tribal information collected on the Reservation from being disseminated without the consent of the Tribe.²¹⁶ The general rule is that any potentially sensitive information should stay in the custody of the Tribe.²¹⁷ However, in the case that such information is released, there is a clear procedure for dealing with it, starting with a written request for the sensitive information from the Service to the Tribe, a consultation, and an approval or rejection.²¹⁸

Another example is the Goldfield Land and Sea Council's Mining Policy, which lays out that “participation and decisions under this Policy will be based on the best available traditional and commercial knowledge, other scientific information and expert opinion.”²¹⁹ The Policy also includes protection for any sacred traditional knowledge disclosed in the consultation process:

In making any traditional knowledge or land use information available to a mining Proponent and/or the State . . . [a written agreement shall be made] for the use and security of the information. That agreement would ensure at least the following: the information is acknowledged as the intellectual property of the TOs; the method of accessing the information by the Proponent is described; the information will be used

²¹³ The obligation of agencies and departments to engage in true and meaningful consultation necessarily calls for them to adapt to understand the unique ways that tribes gather, maintain, protect and understand information related to their religion, traditions and culture. Tribal, traditional knowledge is very accepted in the mainstream scientific community, and it has been relied upon by the USFWS and the NOAA in specific designations of critical habitat for species. Religious, cultural and other information may not be able to be shared with the public at large. This, however, does not relieve the agency from considering this pertinent information in its decision making process.

²¹⁴ See Robert Alan Hershey, et. al., *Mapping Intergenerational Memories: Proving the Contemporary Truth of the Indigenous Past* (forthcoming); see also, BRUCE GRANVILLE MILLER, ORAL HISTORY ON TRIAL (2012).

²¹⁵ WHITE MOUNTAIN APACHE TRIBE AND U.S. FISH & WILDLIFE SERVICE, REGION 2, PROTOCOL FOR INFORMATION MANAGEMENT

²¹⁶ WHITE MOUNTAIN APACHE TRIBE AND U.S. FISH & WILDLIFE SERVICE, REGION 2, PROTOCOL FOR INFORMATION MANAGEMENT, at 1.

²¹⁷ WHITE MOUNTAIN APACHE TRIBE AND U.S. FISH & WILDLIFE SERVICE, REGION 2, PROTOCOL FOR INFORMATION MANAGEMENT, at 2 (also gives a definition of what “potentially sensitive information” is).

²¹⁸ WHITE MOUNTAIN APACHE TRIBE AND U.S. FISH & WILDLIFE SERVICE, REGION 2, PROTOCOL FOR INFORMATION MANAGEMENT, at 2. The Protocol agreement also addresses how information will be classified, how it will be identified, how it will be collected, reviewed, and used. *Id.* at 3-4.

²¹⁹ GOLDFIELDS LAND & SEA COUNCIL, MINING POLICY, 13, s.39 available at <https://docs.google.com/a/email.arizona.edu/viewer?a=v&pid=sites&srcid=Z2xzYy5jb20uYXV8Z29sZGZpZWxkc y1sYW5kLWFuZC1zZWEtY291bmNpbHxneDoyYjRiMDBiNWUyNTdhY2Ri>.

only for the stipulated purposes and for no other purpose, unless otherwise agreed to by the TOs; the information will not be distributed beyond those persons associated with the Proponent and/or the relevant government agency who have permission to see and use the information for the specified purposes; all electronic and hard copies will be disposed of in the manner set out in the agreement; the information will not be published in any reports or maps issued by those persons associated with the Proponent and/or the relevant government agency in a form that is not described in the agreement or otherwise not formally approved by the TOs; and any costs to TOs incurred in the production or transfer of the information are recovered from the Proponent.²²⁰

The Forest Service has also recognized the importance of traditional knowledge.²²¹ In their 2012 Sacred Sites Report, the Service states:

We heard and recognize that *Traditional Ecological Knowledge (TEK)*, and the traditional cultural practices associated with TEK represents a body of knowledge that transcends Western science for many AI/AN people. For traditional leaders and practitioners, TEK and associated cultural practices are at the core of their world view. The lessons learned by generations of people living on the land are lessons that may enhance peer-reviewed and academic sciences. Through the lens of TEK, we can see that sacred sites may include landscapes and biological communities. *We intend that agency planning processes, such as land management and travel management planning, will consider TEK along with the many sources of scientific and technical information that feed the planning process.*²²²

The U.S. Fish and Wildlife also touched on traditional knowledge in their consultation policy. The Service recognizes that traditional knowledge is sensitive information, and recommends that the Service refrain from acquiring this sensitive information.²²³ The Agency protocol suggests that tribes should only submit to the Service information they would be willing to release as part of the public record. In the event tribally sensitive information is collected during consultation, the Service “recommends” that the staff consider certain principles: that the information should be protected to the maximum extent practicable, that the Agency should inform the tribe that the information could become part of the public record. However, the Protocol advises that there are three exemptions to withholding tribal information that could protect that material in the event that FOIA requests disclosure of tribal information, including under the Self Determination Act, the National Historic Preservation Act, and the Archaeological Resources Protection Act.²²⁴ This is not acceptable. Such recommendation is used as a tool to keep the Service from having to meaningfully consider important information on a topic that Native Peoples have

²²⁰ GOLDFIELDS LAND & SEA COUNCIL, MINING POLICY, 13, s.39 *available at* <https://docs.google.com/a/email.arizona.edu/viewer?a=v&pid=sites&srcid=Z2xzYy5jb20uYXV8Z29sZGZpZWxkcy1sYW5kLWFuZC1zZWEtY291bmNpbHxneDoyYjRiMdBiNWUyNTdhY2Ri>.

²²¹ USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 20 (2012) [hereinafter “SACRED SITES REPORT”], *available at* <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>.

²²² USDA OFFICE OF TRIBAL RELATIONS & USDA FOREST SERVICE, USDA POLICY AND PROCEDURE REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 20 (2012) [hereinafter “SACRED SITES REPORT”], *available at* <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>; *see also id.* at 27 (discussing statutory mechanisms for keeping traditional knowledge confidential including FOIA, exceptions under the 2008 Farm Bill, NHPA and ARPA).

²²³ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 33 (2011).

²²⁴ U.S. FISH & WILDLIFE SERVICE, TRIBAL CONSULTATION GUIDE 34 (2011).

chosen to provide them. This information should be considered and summarized as appropriate, with the specifics not being released to the public. Changes to federal law also govern this discussion.²²⁵

The Department of Energy Policy states that “To the extent allowed by law, consultation will defer to tribal policies on confidentiality and management of cultural resources.”²²⁶ This opens up the door for tribes to create their own specific law on this point, if they have not done so already.

A last possibility, not found in any protocol, is to treat indigenous knowledge as information obtained under a confidential relationship. There is already an established procedural scheme in the legal system to deal with this kind of information, which minimizes the exposure of the information to the public. Thus, protections like in-camera review could be used to keep indigenous knowledge as confidential as possible. NAGPRA can be interpreted to view indigenous knowledge as valid knowledge under Federal law. To strengthen this, the ordinance should also assert that oral history should be considered self-validating.

d. The duty to accommodate

Consultation without accommodation is meaningless. The duty to accommodate requires the government be flexible enough to change plans based on information that emerges during the consultation process.²²⁷ The purpose of consultation is to ascertain the possible impact of a project and to then work together to mitigate the impact, if possible. Thus, when the consultation duty reveals a conflict, this leads to a duty to accommodate a change in plans or policy.²²⁸

International law officially recognizes a duty to accommodate.²²⁹ In Canada, accommodation is a sister mandate to the consultation duty. In the United States, it should also be assumed to be the necessary other half to consultation. Logically, a consultation cannot be meaningful unless the government is willing to adapt plans to accommodate what they find during the consultation.

i. Examples

For the Hul’qumi’num, certain factors must be considered when identifying appropriate accommodations.²³⁰ These include economy, culture, heritage, health, environment, and society.²³¹ Methods of accommodation could include:

- modifying or adopting legislations, policies, planning processes, resource-allocation regimes or treaty-related measures;
- engaging in memorandums of understanding or agreements;

²²⁵ See, e.g., Food, Conservation, and Energy Act of 2008, Public Law 110-246, Title VIII, Forestry, Subtitle B, Cultural and Heritage Cooperation Authority, Sections 8101-8107 (June 18, 2008).

²²⁶ U.S. DEP’T OF ENERGY, AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY 4 (2001), available at <http://www.schlosserlawfiles.com/consult/DOEindian.pdf>.

²²⁷ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 26, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²²⁸ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 26, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²²⁹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 28 (June 2012) [Confidential?].

²³⁰ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 26, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²³¹ HUL’QUMI’NUM MEMBER FIRST NATIONS & HUL’QUMI’NUM TREATY GROUP, CONSULTATION POLICY, 26, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

- revising or adapting existing Crown policy and plans;
- joint decision making;
- creating interim accommodation measures;
- abandoning the proposed Activity;
- developing land or resource protection measures and transfers;
- changing the location of a proposed Activity;
- creating alternatives to the proposed or contemplated Activity that adequately address HMFN or HTG interests;
- conducting cumulative impact studies and making project adjustments accordingly or, where necessary, creating strategic level plans based on the impact study results;
- taking all necessary steps to avoid irreparable harm to Hul'qumi'num Mustimuhw's rights or title, or minimize the effects of infringement;
- providing compensation, where the HMFN and, if appropriate, the HTG determines that compensation is appropriate;
- conducting impact benefits studies;
- revenue/benefit sharing;
- capacity building;
- setting requirements for Third Parties;
- providing for ongoing consultation and accommodation; especially following up with mitigation and compliance-monitoring activities that include consequences for failure to meet the requirements for ongoing consultation and accommodation.²³²

The Assembly of First Nations of Quebec and Labrador similarly lists a variety of methods whereby their interests can be accommodated.²³³ These are:

- abandoning the action being contemplated,
- alternatives to the contemplated action that adequately address the interests on all sides,
- minor or major changes to the action being contemplated,
- modifying a proposed project, providing for First Nation participation in an action or project,
- compensating the First Nation,
- providing for ongoing consultation and accommodation of the First Nation with respect to an action or project and notably follow-up, mitigation and compliance monitoring activities,
- First Nation economic benefits such as compensation, royalties, profit-sharing, equity interest, joint ventures, contracting, employment, and
- consent and agreement to a new action, modified to accommodate First Nation interests.²³⁴

The Simpw First Nation also lists a variety of possible accommodation mechanisms.²³⁵ These are:

²³² HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 27-28, available at <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²³³ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 20, s. 48.5 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

²³⁴ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 20, s. 48.5 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

²³⁵ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 5, available at www.simpw.com/simpw-first-nations-policies/doc/3/raw.

- Modifying or cancelling a proposed Activity to avoid or minimize the infringement of Simpcw Signatories Aboriginal Title and/or Rights;
- Conducting joint land use planning, or reconciliation of Crown and Simpcw land use plans where available;
- Co-management involving at least equally shared decision-making authority;
- Participation in future joint decision-making;
- Undertaking up-front conservation measures and where necessary, restoration;
- Revenue sharing;
- Resource allocations to the Simpcw Signatories;
- Compensating the Simpcw Signatories for the infringement;
- Providing economic development opportunities or other economic measures to the Simpcw People; Limiting resource harvesting and extraction; Providing training;
- Agreements or partnerships with industry or proponents;
- Contracts for Simpcw individuals and businesses;
- Participation in future joint decision-making;
- Joint ventures;
- Compensatory damages for past infringements;
- Other arrangements.²³⁶

The Federation of Saskatchewan Indian Nations addresses their accommodation policies by acknowledging the duty, but by allowing the actual protocol on accommodating to be reviewed on a case by case basis.²³⁷

ii. Identifying Interests that Need to be Accommodated: Impact Assessment

Accommodation is based on the identification of tribal interests. This may be obvious, but, in order to accommodate tribal interests, those interests must be identified. This is crucial: if the agency or department is viewing the situation from an ethnocentric light, or simply not choosing not to listen, this is a barrier to success. Thus, it may be wise to include language on how those interests will be determined and assessed.

The Assembly of First Nations of Quebec and Labrador's policy offers a good example of this.²³⁸ In step two of the consultation process, the Policy lays out that it is the Nation itself who should identify its own interests through an internal community scoping process.²³⁹ It goes on to give a comprehensive list of issues to consider.²⁴⁰

²³⁶ SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 5, *available at* www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

²³⁷ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 6, s.12.1-12.3, *available at* <http://caid.ca/FSINConPol.pdf>.

²³⁸ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 17, 19 (2005), *available at* http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

²³⁹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 17 (2005), *available at* http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

²⁴⁰ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 17-19 (2005) (risks and benefits of the project, litigation issues, issues related to negotiation, issues related to jurisdiction, business related issues, and policy related issues, to name a few), *available at* http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

At the international level, accommodation is assumed to be a piece of the consultation duty.²⁴¹ Both UNDRIP and ILO Convention No. 169 require consultation when an activity affects an indigenous group, and “the way to determine whether, how and to which degree a given measure or project is likely to affect indigenous peoples, will often be through impact assessments.”²⁴² Convention No. 169, article 7(3) specifically requires co-operative studies be carried out to assess the social, spiritual, cultural and environmental impact of development activities, the results of which should be considered fundamental criteria for implementation of those activities.²⁴³

The accommodation piece comes in at the end of these studies, when there is a duty to consider the results of such assessments in decision making.²⁴⁴ If the assessment reveals there will be a significant impact on indigenous peoples’ lives or territories, there is a “strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.”²⁴⁵ The key question is how far the template will go in prompting a veto for the tribes over projects. In the event that a veto option is ineffective, how this affects the tribes in the end game is an issue. This is a balancing act that will require careful discussion with the tribes.

e. The Outcomes of Consultation: Final Agreements

As mentioned in the above section, if consultation reveals any possible negative impacts to Tribal interests, the process should involve negotiations on how best to accommodate them. The final outcome of any consultation is ideally (but not necessarily) a written agreement on how to move forward.

Some tribes and the First Nations lay out in their consultation policies what those agreements should include. For example, the Goldfields Land and Sea Council requires a final accommodation agreement, which addresses environmental protection measures, including monitoring and management programs and follow-up studies; measures to protect traditional land use practices and rights from project impacts; measures to support TO land use practices and rights; provisions for monitoring performance of the operation/operations and conducting inspections and environmental audits, as may be required; economic benefits to the TO community, including business and employment opportunities, community development program contributions, training and education programs, financial contributions, and any other socio-economic benefits negotiated for TOs and their community members; mechanisms for sharing revenues from resource development; and other such measures agreed by the Parties.²⁴⁶

i. Dispute Resolutions

A few tribes included provisions for how **disputes** should be resolved.

²⁴¹ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 28 (June 2012).

²⁴² Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 28 (June 2012).

²⁴³ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 28 (June 2012).

²⁴⁴ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 28 (June 2012).

²⁴⁵ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 28 (June 2012).

²⁴⁶ GOLDFIELDS LAND & SEA COUNCIL, MINING POLICY, 12, s.37, available at <https://docs.google.com/a/email.arizona.edu/viewer?a=v&pid=sites&srcid=Z2xzYy5jb20uYXV8Z29sZGZpZWxkc1sYW5kLWFuZC1zZWEtY291bmNpbHxneDoyYjRiMDBiNWUyNTdhY2Ri>.

The Federation of Saskatchewan Indian Nations has a more delineated process within their policy.²⁴⁷ They lay out a clear process to follow for when meaningful consultation has not occurred. First, the First Nation brings concerns to a joint Executive Council and Indian Government Commission, which reviews the issue.²⁴⁸ If further information or review is needed, the Council and Commission will appoint an independent body to review the facts of the consultation and bring back a final determination/remedy to the Council and Commission.²⁴⁹ The independent body consists of external technicians, including legal counsel, financial experts, and other members at large who can provide assistance in the review.²⁵⁰ Once a concern is brought forward, consultation will be suspended until the review is complete, unless directed otherwise by the First Nation or the Council or Commission.²⁵¹ Likewise, in future, the event of any other dispute or disagreement arising from interpretation of any term/condition/word/procedure in the policy will be referred to the Council and Commission for a decision, which will be binding on all parties.²⁵²

The Hul'qumi'num also have a delineated dispute resolution process in their policy.²⁵³ Decision making under the duty to consult and accommodate in that policy is divided into two stages. In stage one, all parties work collaboratively to ensure: the process is based on joint decision-making; the process incorporates the principles agreed to by the parties at the table; and the process must be workable and effective.²⁵⁴ If the parties cannot arrive at a compromise decision, then move to an institutional structure set out in Stage Two.²⁵⁵ In stage two, the parties mutually agree to use an institutional structure to resolve disputes will include: identification of an independent body; determination of the composition; determination of which Alternative Dispute Resolution (ADR) processes and principles will apply; and clarity on how binding decisions will be arrived at.²⁵⁶

A question remains as to the scope of federal remedies available to Native Nations/Tribes for the breach by governmental agencies of their consultation obligations. We are working on a separate Memorandum that articulates those remedies and which will be made available upon completion²⁵⁷

²⁴⁷ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 6-7, s.13.1-13.4, *available at* <http://caid.ca/FSINConPol.pdf>.

²⁴⁸ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 6, s. 13.1, *available at* <http://caid.ca/FSINConPol.pdf>.

²⁴⁹ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 6, s. 13.2, *available at* <http://caid.ca/FSINConPol.pdf>.

²⁵⁰ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 6, s. 13.3, *available at* <http://caid.ca/FSINConPol.pdf>.

²⁵¹ FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 7, s. 13.4, *available at* <http://caid.ca/FSINConPol.pdf>.

²⁵² FEDERATION OF SASKATCHEWAN INDIAN NATIONS, CONSULTATION POLICY, 7, s. 16.1, *available at* <http://caid.ca/FSINConPol.pdf>.

²⁵³ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, *available at* <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁵⁴ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 29, *available at* <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁵⁵ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 29, *available at* <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁵⁶ HUL'QUMI'NUM MEMBER FIRST NATIONS & HUL'QUMI'NUM TREATY GROUP, CONSULTATION POLICY, 29, *available at* <http://www.hulquminum.bc.ca/pubs/ConsultationCover.pdf>

²⁵⁷ See, e.g., Seth Davis, *Tribal Rights of Action* HARVARD LAW SCHOOL [45 COLUMN. HUM. RIGHTS L. REV. (FORTHCOMING 2014)]; Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695 (2000); J.R. Mueller, *Restoring Harmony through Nalyeeh: Can the Navajo Common Law of Torts be Applied in State and Federal Forums?*, www.tlj.unm.edu/tribal-law-journal/articles/volume_2/mueller/content.php; *Alliance to Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. SUPP. 2d 1 (2007).

ii. Follow Up

The final agreement should also lay out how ongoing consultation and follow up will occur. A crucial part of meaningful consultation is that it is a process, not a one-time event. It should be clear in any consultation or accommodation agreement that the agreement is not a termination of the relationship, but should lay out continuing responsibility.

Sample language to this effect can be found in the Assembly of First Nations of Quebec and Labrador Policy. The policy establishes a mechanism for follow up as part of the eleven step consultation process. First, it provides that after an agreed number of consultative activities, as provided for in the Consultation Plan, Canada or the Province shall provide the First Nation with a written Update of its decision-making process.²⁵⁸ The Update needs to include an explanation of the ways in which First Nation interests have been considered and accommodated and a new, revised, description of the action being contemplated.²⁵⁹

f. Third Parties

Lastly, the completed policy may want to address obligations of third party developers. There remains a question of whether non-governmental bodies have the same legally mandated duties that apply to the government. Under international law, private sector companies do have an obligation to act with due diligence to avoid infringing on the rights of Indigenous peoples.²⁶⁰ That duty can also be established through contract, and can be implied through good business practice.

The Assembly of First Nations of Quebec and Labrador addressed this issue with the following:

Project promoters and other non-governmental bodies are not constitutionally obliged to consult and accommodate First Nations. However, they may be bound by legislation or licence conditions to modify projects and use of resources to allow federal and provincial governments to give effect to their duty to consult and accommodate. They may also be liable to First Nations for negligence, breach of contract and dishonest dealings.²⁶¹

The Simpw First Nation imposes explicit third party obligations as well, requiring that third parties: Recognize that the Simpcw First Nation is a level of government in Simpcwul'ecw; Recognize that in the absence of proper consultation with, and accommodation of the Simpcw People about their Activities, Third Parties may find themselves without the right to operate in Simpcwul'ecw; and Where requested by

²⁵⁸ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 22, s. 58 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

²⁵⁹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 22, s. 59 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf.

²⁶⁰ See note 4, *supra*; see also Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples (June 2012) (“key messages”).

²⁶¹ FIRST NATIONS OF QUEBEC AND LABRADOR SUSTAINABLE DEVELOPMENT INSTITUTE, ASSEMBLY OF FIRST NATIONS OF QUEBEC AND LABRADOR, CONSULTATIONS PROTOCOL OF FIRST NATIONS OF QUEBEC AND LABRADOR 16, s. 15 (2005), available at http://www.nafaforestry.org/forest_home/documents/AFNQL-consult-protocol2005.pdf; see also *supra* note 4.

the Simpcw Band Council, engage in cooperative planning prior to submitting plans to the Simpcw and Crown for approval.²⁶²

Under UNDRIP and ILO No. 169, private businesses have a “responsibility to respect” indigenous peoples in their dealings with them.²⁶³ The UN Special Rapporteur on the Rights of Indigenous Peoples has contextualized this “responsibility to respect” to the situation of indigenous peoples, stating that:

Among the due diligence measures that they must exercise to respect indigenous rights, **companies must ensure** that they, through their own acts, **do not contribute** to any act or omission on the part of the State that could lead to violations of those rights. Thus, companies **must not accept** any award or commence any activity if the State has failed to hold prior and adequate consultations with the indigenous communities concerned, and companies, in exercising due diligence, **may not simply assume** that such consultations have taken place prior to the award being granted. Likewise, companies **must not hold consultations that endeavour to or actually replace the State’s obligation** to consult with indigenous peoples in relation to activities affecting them.²⁶⁴

In what is termed the “Protect, Respect and Remedy” Framework, there are three pillars in the human rights and business framework. These are: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.²⁶⁵

Thus, third parties should be governed by international standard in their dealings with indigenous peoples, and be guided by the rights recognized in the UNDRIP and the ILO Convention No. 169.²⁶⁶ As already mentioned, “Operating with due diligence in respect of indigenous peoples’ rights – within legal and political frameworks that respect these rights –lead to security of investments, mutually beneficial partnerships and conflict resolution. There is a growing recognition among private sector actor that attaining the highest possible standards in respect of indigenous peoples’ rights is as a matter of applying sound business principle.”²⁶⁷

²⁶² SIMPCW FIRST NATIONS, CONSULTATION AND ACCOMMODATION GUIDELINES, 6, *available at* www.simpcw.com/simpcw-first-nations-policies/doc/3/raw.

²⁶³ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 29 (June 2012).

²⁶⁴ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 29 (June 2012).

²⁶⁵ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 29 (June 2012) (A/HRC/14/27).

²⁶⁶ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 29 (June 2012) (A/HRC/14/27).

²⁶⁷ Draft Guidance Note, Office of the High Commissioner for Human Rights, Indigenous Peoples and Minority Section, Consultation with Indigenous Peoples 30 (June 2012) (A/HRC/14/27).