

Lewis & Clark Law School

Lewis & Clark Law School Digital Commons

Faculty Articles

Faculty Scholarship

2022

Tribal Consultation: Toward Meaningful Collaboration with the Federal Government

Michael Blumm

Lewis & Clark Law School, blumm@lclark.edu

Lizzy Pennock

Lewis & Clark Law School

Follow this and additional works at: https://lawcommons.lclark.edu/faculty_articles



Part of the [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Blumm, Michael and Pennock, Lizzy, "Tribal Consultation: Toward Meaningful Collaboration with the Federal Government" (2022). *Faculty Articles*. 145.

https://lawcommons.lclark.edu/faculty_articles/145

This Article is brought to you for free and open access by the Faculty Scholarship at Lewis & Clark Law School Digital Commons. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Lewis & Clark Law School Digital Commons. For more information, please contact sarahjohnson@lclark.edu.

Tribal Consultation: Toward Meaningful Collaboration with the Federal Government

Michael C. Blumm* & Lizzy Pennock**

One of the bedrock principles of federal Indian law is a centuries-old understanding that the tribes, as “domestic dependent nations,” have a “government-to-government” relationship with the federal government, which has a trust obligation concerning the tribes, their sovereignty, and their cultural resources. Although this relationship was first judicially articulated in the nineteenth century, it was interpreted to require federal “consultation” with the tribes under a series of executive orders beginning in the 1970s and the National Historic Preservation Act (“NHPA”). However, this government-to-government consultation has been largely disappointing. The tribes have often complained that federal agencies have reduced consultation to procedural “box-checking,” with little or no evidence of substantive results. As a result, the tribes have called for “meaningful consultation” and the resulting “collaborative management” going forward.

This paper discusses the origins of the modern consultation doctrine and considers several case studies that have and have not produced substantive results. We draw some lessons from the case studies that the Biden Administration, which has professed an interest in engaging in

* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. We thank our colleague, Dan Rohlf, Professor of Law, Lewis and Clark Law School, for incisive comments on a draft of this paper, and Nicholas James Crockett for expert editing.

** Attorney, WildEarth Guardians, J.D. 2021 Lewis and Clark Law School. Copyright Michael C. Blumm and Lizzy Pennock.

meaningful consultation, may draw upon. If the Biden Administration does engage in meaningful consultation, tribes may gain an important management role concerning off-reservation resources that are significant to their history and culture.

INTRODUCTION

Tribal knowledge of the environment is vast¹ but often untapped or ignored by federal natural resource managers when making decisions that affect tribal land and natural resources of cultural significance.² Although the federal government has long had a government-to-government relationship with governments of federally recognized tribes,³ it has often failed to live up to its end

¹ See, e.g., Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1067–68 (1997) (describing the “quality of language . . . typical of Indian gatherings,” emphasizing “how we are all connected to nature,” and sending a “reminder of how much knowledge exists in Indian country.”).

² See, e.g., Letter from Mark Ingersoll, Chairman of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, to Larry Roberts, Acting Assistant Secretary of Indian Affairs (Nov. 30, 2016), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-055648.pdf> [hereinafter Mark Ingersoll Letter] (“Agencies seem either reluctant or ill-suited to properly evaluate cumulative and regional environmental impacts on Indian lands, treaty rights (on and off-reservation), sacred places, and Tribal community health and environment.”); see also Wilkinson, *supra* note 1, at 1064 (“[M]any a federal official has eschewed government-to-government dealings because of a busy schedule, inadequate knowledge of complex subject matter, or indifference that can border on racism.”); Hannah Northey, *About-face: Army Corps to consult with tribes on WOTUS*, E&E NEWS (Apr. 21, 2021), <https://www.eenews.net/stories/1063730549> (explaining the Biden Administration’s plan to rescind “guidance issued in January that directed the [Army Corps] Los Angeles District not to consult with tribes regarding the proposed Rosemont Copper Mine,” a ban that “was being implemented across the nation.”).

³ Tribal governments are distinct from state and local governments. Some county governments, for example, are “quietly passing ordinances that assert a government-to-government role in managing public lands alongside federal agencies.” Michael C. Blumm & James A. Fraser, “Coordinating” with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands, 38 PUB. LAND & RES. L. REV. 1, 3 (2017). These counties rely on statutory provisions directing federal agencies to coordinate with state and local governments in public land planning, but the ordinances attempt to usurp federal authority. *Id.* at 4. The federal Supremacy Clause preempts most of these ordinances. *Id.* Similarly, the Supremacy Clause applies to state governments. See, e.g., *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (explaining that based on the U.S. Constitution’s Supremacy Clause, it “has been settled that state law that conflicts with federal law is ‘without effect’ ”) (citation omitted). A federal law is the “supreme law of the land,” U.S. CONST. art. VI, cl. 2, and tribes are generally shielded from the application

of the bargain—tribal calls for meaningful consultation, or any consultation at all, have often gone unheeded.⁴

Nixon first called for a government-to-government relationship in 1970, envisioning a mutual “partnership,” wherein both federal and tribal sovereignty are respected.⁵ Since then, the federal government has consistently failed to achieve Nixon’s vision. The Chairman of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians describes federal consultation efforts as “too little, too late” in most cases.⁶ As a result, tribal leaders today are calling on the Biden Administration and Secretary of the Interior Deb Haaland to quickly remedy the dissatisfactory consultation doctrine by establishing a rigorous, collaborative

of state or local laws. *See, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983), in which the Supreme Court unanimously ruled that federally approved tribal hunting and fishing regulations preempted state regulations on-reservation. The Court stated that the tribe’s comprehensive management of on-reservation fish and wildlife resources displaced state regulation because state regulation could “effectively nullify the Tribe’s unquestioned authority to regulate the use of its resources by members and nonmembers . . . and threaten Congress’ firm commitment to the encouragement of tribal self-sufficiency and economic development.” *Id.* at 344.

⁴ *See, e.g.*, NAT’L CONG. OF AM. INDIANS, Res. #SAC-12-036, SUPPORT FOR A STRONG NATION-TO-NATION RELATIONSHIP AND EFFECTIVE, MEANINGFUL CONSULTATION 2 (Oct. 2012) (“[N]ot all of the agencies under the control of the President have yet developed the government-to-government consultation policies required of them under” President Clinton’s Exec. Order 13,175 on consultation); *see also* Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895, 904 (2012) (describing how tribal consultation is “at the heart of the procedural requirements of the NHPA” but that “in practice, tribal consultation under the NHPA has not always been carried out efficiently or to the mutual benefit of tribes and federal agencies”); U.S. DEP’T. OF THE INTERIOR ET AL., *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions 2* (Jan. 2017), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/pdf/idc2-060030.pdf> [hereinafter Departments’ Consultation Report] (“With regard to infrastructure projects, historically Federal agencies have not, as a matter of policy, sought out Tribal input or consistently worked to integrate Tribal concerns into the project approval process.”). While this chapter was in press, Monte Mills and Martin Nie published an important report on tribal co-management, which assessed the history, law, and politics of tribal co-management for consideration of tribes, the federal government, and Congress, to which we will cite in these notes. *See* Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. L. & RES. L. REV. 49 (2021) [hereinafter *Bridges to a New Era*].

⁵ *See* Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 TULSA J. COMP. & INT’L L. 129, 138 (1999) (describing the “government-to-government” policy between the federal government and tribes, first “encouraged by Nixon,” as a “partnership . . . within a mutually defined framework that respected tribal sovereignty and U.S. sovereignty. . .”).

⁶ Mark Ingersoll Letter, *supra* note 2, at 7 (“Whether intentional or inadvertent, government-to-government consultations between agencies and Tribes are usually a case of ‘too little, too late.’”).

consultation process that consistently includes tribes in environmental and natural resource-related decision making and respects tribal sovereignty.⁷

Consultation is significant to tribes for several reasons. Tribes frequently have a land management approach distinct from that of other governments and entities, which non-tribal officials do not adequately understand.⁸ Policies and regulations formed without tribal consultation, or any consideration of tribal values or rights at all, can consequently force a management scheme on tribes inconsistent with their needs, historical resource management programs, and legal rights.⁹ Tribes also place considerable cultural, religious, and historical significance on places and resources that other land managers often do not recognize or protect.¹⁰ Moreover, when tribes must defend their rights and resources after being left out of federal decision making, the result is often significant expenditures of funding, time, and legal resources¹¹ that otherwise

⁷ See Biden-Harris Campaign, *Biden-Harris Plan for Tribal Nations*, <https://joebiden.com/tribalnations/> (last visited Apr. 17, 2021) (“Throughout [American] history, th[e] promise [of equality for all] has been denied to Native Americans who have lived on this land since time immemorial.”); see also Jennifer Yachnin & Jeremy P. Jacobs, *Tribes expect a voice on land and waters under Haaland*, GREENWIRE (Feb. 4, 2021), <https://www.eenews.net/stories/1063724399> (last visited May 2, 2021) (“Tribal leaders and experts have identified common issues they expect [Secretary of the Interior Deb Haaland] to act on quickly . . . including an overarching need for better consultation and recognition of tribal sovereignty across Interior’s wide authority over lands and waters.”); see also *id.* (“Consultation with federal agencies is honored and at the highest level, and it’s not just a check-the-box process[.]”) (quoting Shannon Wheeler, chairman of the Nez Perce Tribe).

⁸ Wilkinson, *supra* note 1, at 1068 (explaining how some tribes thought the Endangered Species Act was “too narrow” because it focuses on single species as opposed to the tribes’ “holistic management approach,” which focuses on “whole natural systems”); see also Yachnin & Jacobs, *supra* note 7 (“Many tribal nations want more influence because they have long histories of being good stewards of their lands.”) (quoting Sarah Krakoff, University of Colorado Law Professor).

⁹ Wilkinson, *supra* note 1, at 1080 (“[W]hen the ramifications of treaty rights and the trust relationship had been fully explored [in consultation meetings], it became apparent that the ESA should be applied differently, and in a more limited manner, with respect to consultations under Section 7 and takings under Section 9 than is the case with any other entities or persons.”).

¹⁰ See, e.g., Dean B. Suagee, *Consulting with Tribes for Off-Reservation Projects*, 25 NAT. RES. AND ENV’T 54, 56 (Summer 2010) (describing the “special expertise [of tribes] regarding impacts on places that have religious and cultural significance”); Charles Wilkinson, *At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top: The Creation of the First Native National Monument*, 50 ARIZ. ST. L. J. 317, 318 (2018) (explaining that “Bears Ears holds profound significance” for multiple tribes, and that “Native people come to Bears Ears for many reasons, including holding ceremonies, hunting, celebrating family occasions, and gathering medicines, roots, nuts, berries, and weaving materials.”).

¹¹ Mark Ingersoll Letter, *supra* note 2, at 3 (“[W]e have been forced to devote

would be unnecessary.

The government-to-government relationship between tribes and the federal government arises out of the trust doctrine; government-to-government consultation is a substantial aspect of this relationship.¹² The federal government's trust responsibility toward Indian tribes emerged from early federal-tribal treaties, executive orders, statutes, the U.S. Constitution, and various Supreme Court opinions.¹³ In his 1831 *Cherokee Nation v. Georgia* decision, Chief Justice John Marshall declared that Indian tribes were "domestic dependent nations" that "look[ed] to [the federal] government for [their] protection."¹⁴ Felix Cohen's *Handbook of Federal Indian Law* considers *Cherokee Nation* to have laid the foundation for the government-to-government relationship as a trust relationship with an accompanying "federal duty to protect tribal rights to exist as self-governing entities."¹⁵ In the nineteenth and twentieth centuries, the federal government's interpretation of its trust responsibility skewed toward "a nearly absolute and unreviewable congressional plenary

extraordinary amounts of staff time, legal resources, and scarce funding over the past decade in an effort to compel the Federal Energy Regulatory Commission (FERC) to simply do what is required of them by [the NHPA], and by FERC's federal trust responsibility.").

¹² See, e.g., U.S. DEP'T OF THE INTERIOR, SECRETARIAL ORDER NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES 4 (Aug. 20, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf> [hereinafter SECRETARIAL ORDER NO. 3335] ("The Department [of the Interior] has . . . sought to build a strong government-to-government relationship with Indian tribes. The Department of the Interior Policy on Consultation with Indian Tribes, which was adopted in December 2011, sets forth standards for engaging with Indian tribes on a government-to-government basis to ensure that the decisions of the Department consider the impacts on affected Indian tribes and their members.").

¹³ See COHEN'S HANDBOOK ON FEDERAL INDIAN LAW § 5.04[3](a) (Nell Jessup Newton ed., 2012) [hereinafter COHEN TREATISE] ("The concept of a federal trust responsibility to Indians evolved from early treaties with tribes; statutes, particularly the Trade and Intercourse Acts; and opinions of the Supreme Court. Today, the trust doctrine is one of the cornerstones of Indian law."). The Supreme Court cases which had a considerable role in defining the trust relationship are *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832). See also *Bridges to a New Era*, *supra* note 4, at 64–83 (discussing "first principles" of Federal Indian Law).

¹⁴ *Cherokee Nation*, 30 U.S. at 17. See also COHEN TREATISE, *supra* note 13, § 5.04[3](a) (describing *Cherokee Nation v. Georgia* as the case that "provided the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities").

¹⁵ COHEN TREATISE, *supra* note 13, § 5.04[3](a) ("*Cherokee Nation v. Georgia* provided the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities.").

power,”¹⁶ but the modern trust doctrine purports to recognize tribal self-determination and sovereignty.¹⁷

The consultation requirement arises out of the trust duty as well as in other contexts, like that prescribed by the NHPA.¹⁸ If consultation in any context is to be meaningful, however, federal agencies must treat tribes as distinct from members of the public or stakeholders commenting on proposed actions.¹⁹ To adequately address tribal concerns and perspectives, federal officials must understand tribal culture, history, and legal rights.²⁰ Tribes are sovereign nations with unique expertise and sovereignty—not merely interest groups.²¹ In order to truly treat tribes as sovereigns, federal officials must understand Indian law and the unique status of tribal governments in U.S. law, including the government-to-government relationship under the federal trust obligation.²²

¹⁶ *Id.* (“In the late 19th and early 20th centuries, courts relied on [early Supreme Court decisions] to justify broad exercises of power to dispose of tribal property and alter the relationships of tribes to the federal government, even without tribal consent. . . . The trust relationship thus formed the linchpin for the excesses of the late 19th and early 20th century invocations of a nearly absolute and unreviewable congressional plenary power.”).

¹⁷ *Id.* (discussing an order by the Secretary of the Interior “reaffirming the federal trust responsibility’s application to all Interior agencies and bureaus” and a subsequent order “promot[ing] cooperative management and partnerships with Indian tribes in managing federal lands and resources.”); *see also* SECRETARIAL ORDER NO. 3335, *supra* note 12, at 4 (“During the last few decades, the trust relationship has evolved” into today’s “Era of Tribal Self-Determination[.]”).

¹⁸ National Historic Preservation Act, 54 U.S.C. § 300101 *et seq.*; *see infra* Part III.A.

¹⁹ *See Bridges to a New Era*, *supra* note 4, at 88–105 (including recommendations for consultation reform); *see also infra* notes 47–79 and accompanying text.

²⁰ Federal agencies that lack a basic understanding about how individual tribes function cannot consult adequately. *See, e.g.,* Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of Interior, 755 F. Supp. 2d 1104, 1112 (S.D. Cal. 2010) (enjoining a solar development project for the Bureau of Land Management’s (“BLM”) failure to adequately consult the Quechan Tribe, noting that the BLM grouped “tribes” together on the theory that consulting with one satisfied consulting with all, prompting the court to explain that “Indian Tribes aren’t interchangeable”); *see also* Departments’ Consultation Report, *supra* note 4, at 2–3 (“Federal staff need better training prior to working with Tribes.”).

²¹ Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021) [hereinafter Biden’s Consultation Memo] (recognizing that “American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions[.]” and that “[t]he Federal Government has much to learn from Tribal Nations”).

²² Letter from Brian Cladoosby, President of the Nat’l Cong. of Am. Indians, to Ryan Zinke, Sec’y of the Dep’t of Interior, at 1 (July 14, 2017), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/19-NCAI.pdf> (explaining that the “federal trust responsibility to Indian tribes . . . is rooted in the land cessions that formed

Meaningful consultation requires that federal government officials regard tribal governments and tribal officials neither as members of the general public, nor as adversaries nor obstacles, but instead as management partners.²³ A government-to-government relationship between sovereigns cannot exist if the federal government systematically fails to recognize tribal governments as collaborative managers of lands and resources of cultural significance. Achieving this relationship requires a commitment by the federal government to eschew a tradition of paternalism toward tribes.²⁴

Meaningful tribal consultation can prevent federal agencies from making uninformed decisions affecting culturally significant tribal lands and resources and may come in various forms.²⁵ For example, the intertribal coalition that successfully petitioned President Barack Obama to proclaim Bears Ears a National Monument described the desired relationship as one of ongoing “collaborative management.”²⁶ According to the coalition, collaborative management harmonizes Western science with traditional knowledge founded on native cultural values and should engage tribes from the beginning to the end of

the United States[.]” and that this responsibility “is one of the most fundamental aspects of the federal government’s relationship to Indian tribes and all federal departments and agencies play a vital role in upholding the federal trust responsibility”). *See also* Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RES. J. 585, 594 (2008) (providing “some foundational principles of Indian law” that must be understood to effectuate “tribal co-management,” which “differs from other types of collaborative management for federal lands[.]” including tribal sovereignty, “inherent powers of self-government[.]” and the trust relationship); Biden’s Consultation Memo, *supra* note 21, at 7491 (“The United States has made solemn promises to Tribal Nations for more than two centuries.”).

²³ Mark Ingersoll Letter, *supra* note 2, at 4 (“Agencies like the Federal Energy Regulatory Commission and the U.S. Army Corp of Engineers (“USACE”) often seem to view applicants and other government entities as allies, and Indian Tribes as adversaries.”).

²⁴ Signaling a renewed federal commitment to the government-to-government relationship and elevating tribal government status, Secretary of the Interior Deb Haaland recently “touted the Biden administration’s focus on Indigenous representation across all levels of government.” Heather Richards, *Haaland promises bold thinking on Indigenous issues*, E&E NEWS (Apr. 23, 2021) (“Every federal agency needs to be thinking boldly about our obligations to Indigenous peoples[.]”) (quoting Haaland).

²⁵ *See* Presidential Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. (Nov. 5, 2009), <https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president> [hereinafter Obama’s Consultation Memo] (“Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.”).

²⁶ Wilkinson, *supra* note 10, at 326 (describing “collaborative management” as a “deeper tribal-federal relationship” than merely “co-management,” not limited to the role of “advisors” and “consultants”; instead, one which provides “true joint responsibility” where tribes are involved in the entire land management decision-making process).

the consultation process.²⁷ Another successful consultation resulted in the 1997 Joint Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.²⁸ The order's consultation called for high-level government officials and tribal representatives to engage in highly structured negotiations that made time for presentations on, and an accurate understanding of, the relevant cultural, historical, and legal issues. This process was meant to enable federal negotiators to understand tribal experiences and backgrounds.²⁹

This Article contends that the current practice of tribal consultation in land and resource management for culturally significant tribal lands is often “too little, too late.”³⁰ But federal agencies can remedy this injustice by incorporating the essential elements of meaningful consultation. We analyze various consultation arrangements, some of which have achieved successful consultation, and others that have been failures, both of which provide lessons for the future.

Part I of this paper provides a brief background on the dawn of the modern era of federal Indian policy, originating with President Richard Nixon's landmark announcement on tribal self-determination in 1970. Part II describes the executive orders requiring federal agencies to engage in meaningful consultation under the government-to-government relationship, as well as the statutorily prescribed consultation under the NHPA. Part III analyzes several examples of tribal consultation, highlighting processes that have led to meaningful

²⁷ BEARS EARS TRIBAL COAL., PROPOSAL FROM THE BEARS EARS INTER-TRIBAL COALITION TO PRESIDENT BARACK OBAMA 28 (Oct. 15, 2015), <http://www.bearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf> [hereinafter Bears Ears Proposal] (presenting the “formulation” of “Collaborative Management” “as an effective, workable way to bring the Traditional Knowledge, scientific expertise, management experience, and commitment of the Tribes to the Bears Ears National Monument in concert with Federal agencies.”). See also Wilkinson, *supra* note 10, at 332 (“Traditional knowledge is derived from the sturdy foundation of data derived from keen observation carried out and passed down over hundreds, even thousands, of years[,]” as well as “traditional stories about events, people and the land.”).

²⁸ U.S. DEP'TS OF COMMERCE & INTERIOR, SECRETARIAL ORDER NO. 3206, JOINT SECRETARIAL ORDER ON AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL-TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT, (June 5, 1997), https://www.fws.gov/leavenworthfisheriescomplex/secretarial_order.pdf [hereinafter Joint Secretarial Order].

²⁹ Wilkinson, *supra* note 1, at 1077–79 (“[C]ritically, the negotiators recognized that the subject was thick with context, especially on the tribal side, and the negotiators would have to allow ample time for presentations on, and understanding of, the cultural, historical and legal background[,]” and the meetings “were designed to allow the tribal side to explain some of the many unique and varied circumstances that apply when federal laws are sought to be extended into Indian country.”).

³⁰ Mark Ingersoll Letter, *supra* note 2, at 7 (“[G]overnment-to-government consultations between agencies and Tribes are usually a case of ‘too little, too late.’”).

consultation and those that failed to do so and discussing how the lessons learned can inform the meaning of consultation going forward. We suggest three essential elements for meaningful consultation: (1) early and consistent tribal engagement; (2) face-to-face interactions; and (3) a deep understanding by federal officials of tribal cultures and land management practices.³¹ These elements will lead to meaningful consultation by assuring robust tribal participation in land and resource management, which makes it more likely that tribes will substantively influence management decisions. We conclude that meaningful consultation requires face-to-face negotiations from the beginning to the end of decision-making processes, thus incorporating tribal perspectives, knowledge, and rights into these interactions.³² Through meaningful consultation, the federal government can begin to fulfill its trust obligation to honor the government-to-government relations with tribes.³³ Decision making that incorporates tribal perspectives and knowledge of land, as well as resource management for culturally significant lands, will result in better federal land management.

³¹ In 2021, Bryan Newland, the acting assistant secretary of Indian affairs for the Department of the Interior, highlighted his takeaways from meetings with tribal leaders, who “mentioned the need to begin consultation long before decisions are made or documents are generated, and in doing so, take into account tribal ceremonial times to make sure that there’s adequate time for tribes to respond[.]” Newland added that leaders spoke of “the need to ensure that there’s a consistent application of the consultation requirement among agency field offices.” See Michael Doyle, *Biden’s Indian Affairs nominee listens hard*, E&E NEWS (Apr. 26, 2021) (quoting Newland).

³² Departments’ Consultation Report, *supra* note 4, at 2–3 (“Even where such rights and responsibilities are explicit in law, regulation, or policy, Tribes asserted that Federal agencies often fail to fully implement them. Along these lines, Tribes further remarked that even the best-written agency Tribal consultation policies are often poorly implemented.”).

³³ See Michael Doyle, *Problems, opportunities aplenty await Haaland at Interior*, E&E NEWS (Feb. 22, 2021) (“Honoring our nation-to-nation relationship with Tribes and upholding the trust and treaty responsibilities to them are paramount to fulfilling [the Department of the] Interior’s mission[.]”) (quoting Ann Marie Bledsoe Downes, “Interior’s designated tribal governance officer and deputy solicitor for American Indian affairs”); see COHEN TREATISE, *supra* note 13, at §§ 5.04[3], 5.05 (outlining the federal trust obligation); see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1505–06 (1994) (“[T]he trust doctrine is an important legal tool to protect native rights against adverse agency action. . . . The trust doctrine transcends specific treaty promises and embodies a clear duty to protect the native land base and the ability of tribes to continue their ways of life.”).

I. THE NIXON ANNOUNCEMENT OF A GOVERNMENT-TO-GOVERNMENT RELATIONSHIP BETWEEN TRIBES AND THE FEDERAL GOVERNMENT

In 1970, after two centuries of turbulent tribal policy,³⁴ President Nixon announced the federal government's commitment to encouraging tribal self-determination and to fostering a government-to-government relationship with tribes.³⁵ The announcement was a landmark policy shift, officially ending the termination era³⁶ and declaring a "new direction of Indian policy aimed at Indian self-determination."³⁷

The announcement moved the federal government away from both

³⁴ Since 1778, federal Indian policy has moved through many phases. *See generally* COHEN TREATISE, *supra* note 13. The "treaty era" started in 1778 and was marked by treaties made between Congress and Native Americans primarily for land cession. Congress has often "renege[d] [on] the promises" made in these treaties after securing land, or later unilaterally altered treaties to the detriment of tribal signatories. The "removal era" followed, in which the federal government sought to displace Native Americans from Indian country and move them west of the Mississippi River, including the infamous Trail of Tears. Removal preceded the "reservation era," in which tribes were consigned to government-selected land regulations, often with other tribes with which they had no prior relationship. The reservation era was followed by the "allotment and assimilation era," which sought to control and alter the customs and practices of Native Americans so that they might more closely resemble those of white Americans. The "reorganization era" followed under the New Deal, marking the first time that the federal policies toward Native Americans sought to help tribes govern themselves and returned some land taken in the allotment era. Unfortunately, the tide shifted again in 1953 with the beginning of the "termination era," which reversed policies geared toward Indian self-government, and in which the federal government sought to terminate its trust relationship with tribes by terminating the special trustee relationship tribes held with the United States. Around 1970, the "self-determination era" began (the Cohen treatise, cited above places the beginning of the era at 1961), which continues today. This now half-century-old era is notable for its push to protect Native American civil rights and "forc[ing] the United States to reckon with its history of mistreatment toward Native Americans." Howard Univ. Sch. of L., *Indigenous Peoples' Civil Rights*, <https://library.law.howard.edu/civilrightshistory/indigenous/selfdetermination> (last visited Apr. 17, 2021).

³⁵ Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970) [hereinafter Nixon Announcement].

³⁶ The termination era saw a "harsh attack on tribal sovereignty and cultures," where the federal government's goal was "pro-assimilation and anti-special rights for Indians." The government "abrogated express treaty rights" and "unilaterally ended the government-to-government relationships" that the United States had with over one hundred tribes. Carole Goldberg, *President Nixon's Indian Law Legacy: A Counterstory*, 63 UCLA L. REV. 1506, 1510 (2016).

³⁷ Nixon's announcement condemned forced termination because it terminated the trustee relationship between the Indian people and the federal government, resulting in the

termination and paternalism,³⁸ creating a policy in which the federal government instead put Indian people at the helm of decision making related to them.³⁹ Nixon suggested that achieving the “new and balanced” federal-tribal government-to-government relationship meant that both governments must “play complementary roles” when it came to “Indian problems.”⁴⁰ The self-determination policy ushered in a new era of relations between the federal government and tribal governments concerning decision making affecting tribal people and resources.

Nixon’s announcement seemingly quashed the notion that the federal government might not have a responsibility to consult with tribes as sovereigns; for it made it clear that the only question for the federal government to consider was *how* to carry out its responsibility and how to make Indian self-determination an enduring national policy.⁴¹ If the federal government does not consult meaningfully with tribes in environmental decision making regarding culturally significant tribal lands and resources, the vision for a balanced relationship in which the federal and tribal governments have complementary roles cannot exist.

However, as this paper shows, the federal government has consistently failed to provide this complementary role for tribal governments in environmental decision making. Only in some instances, tribal and federal governments have achieved the goal of co-management. These examples, discussed in Section IV, can help build a foundation to support a long-lasting and meaningful government-to-government relationship.

tribes’ loss of “any special standing they had under federal law” and dismantl[ing] the tribes by fractionating tribal property and divvying it to individual tribal members in an attempt to assimilate them into society at large. Nixon Announcement, *supra* note 35, at 1; *see also* Goldberg, *supra* note 36, at 1508–10 (explaining that Nixon’s announcement was a “landmark” statement and that it “substantially amplif[ied]” previous efforts to shift federal Indian policy in favor of tribal interests).

³⁸ Nixon Announcement, *supra* note 35, at 2 (explaining that federal termination and federal paternalism are “policy extremes,” which are both wrong and must be rejected if the federal government was to best serve the interests of tribal people).

³⁹ *Id.* at 1 (“The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”).

⁴⁰ *Id.* at 2.

⁴¹ *Id.* (“[M]ost importantly, we have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be furthered.”).

II. CONSULTATION UNDER THE EXECUTIVE ORDERS AND THE NATIONAL HISTORIC PRESERVATION ACT

Several presidents after Nixon have reaffirmed the federal policy of fostering a government-to-government relationship with tribes.⁴² Together, Congress and the Executive Branch have developed the federal policy of Indian self-determination through several executive orders and section 106 of the NHPA. Section 106 and its implementing regulations allow tribes to sue federal agencies for failure to adequately consult the tribes, which the regulations require.⁴³ The executive orders require consultation in a broader context, applying to all “regulatory policies that have tribal implications.”⁴⁴ Unlike the NHPA consultation, executive order consultation is unenforceable in court because its scope is limited to “internal management of the executive branch.”⁴⁵

A. Section 106 of the National Historic Preservation Act

Section 106 of the NHPA and its implementing regulations, forms the principal statutory requirement for tribal consultation and outlines mechanisms for consultation that help the federal government determine the potential effects

⁴² President George W. Bush harkened back to Nixon’s “national policy of self-determination for Indian tribes[,]” committing to sustaining the government-to-government relationship and respecting tribal sovereignty and self-determination. Memorandum on Government-to-Government Relationships with Tribal Governments (Sept. 23, 2004), <https://www.govinfo.gov/content/pkg/WCPD-2004-09-27/pdf/WCPD-2004-09-27-Pg2106.pdf>. President Obama endorsed President Clinton’s Indian policy, recognizing that consultation is “critical” for a “productive” government-to-government relationship, and that “failure to include the voices of tribal officials in formulating policy” has led to “undesirable” and “tragic” results. Obama’s Consultation Memo, *supra* note 25. Obama also signed Exec. Order 13,604 in March 2012, requiring consultation for infrastructure-related decision making (for transmission lines and pipelines, for example). Exec. Order No. 13,604, 77 Fed. Reg. 18,885 (Mar. 22, 2012) [hereinafter Exec. Order 13,604]. Exec. Order 13,604 directed “federal permitting and review processes” to “rely upon early and active consultation” with tribal governments, although merely for the purposes of “avoid[ing] conflicts” and alleviating “concerns.” *Id.* The Obama Executive Order declared that tribal governments “may” “have key decision-making responsibilities” for a particular project. *Id.*

⁴³ *See, e.g.,* Quechan Tribe of the Fort Yuma Indian Reservation. v. U.S. Dep’t of Interior, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010) (explaining that “[t]he Court’s review of agency action under [the NHPA] is governed by the Administrative Procedure [A]ct[,]” (“APA”), and a failure to engage in adequate consultation violates § 706(2)(D) of the APA because it is an “agency action” “without observance of procedure required by law”).

⁴⁴ *See, e.g.,* Exec. Order No. 13,175, 3 C.F.R. 304 (2000) [hereinafter Exec. Order 13,175].

⁴⁵ *Id.* § 10 (“This order is intended only to improve the internal management of the executive branch. . .”).

of a given “undertaking” (defined below). This provision of the NHPA requires federal officials with jurisdiction over a federal “undertaking” to account for the undertaking’s effects on “any district, site, building, structure or object” listed in the National Register of Historic Places before spending federal money or approving a project affecting a registered property.⁴⁶

1. The Section 106 Regulations

The NHPA’s regulations provide details concerning the requirements of section 106 and under what circumstances it applies.⁴⁷ First, there must be a federal “undertaking,” defined as a “project, activity, or program” funded in part or in whole by a federal agency, including those carried out “on behalf” of an agency, with federal financial assistance, or requiring a federal permit, license, or approval.⁴⁸ Undertakings include new and ongoing projects, activities, and programs. The regulations limit the federal government’s consultation obligations based on both the “scale of the undertaking” and the “scope of federal involvement.”⁴⁹ Because the regulations task the agency official with determining the “appropriate” level of consultation based on the scale and the scope of federal involvement, the thoroughness of consultation varies.⁵⁰ Importantly, the Act’s

⁴⁶ 16 U.S.C. § 470f (“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking” on National Register listings and “afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.”). See also Nat’l Park Serv., *What is the National Register of Historic Places?*, <https://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm#:~:text=The%20National%20Register%20of%20Historic%20Places%20is%20the,of%20the%20Nation%27s%20historic%20places%20worthy%20of%20preservatio> Then (last visited Apr. 18, 2021) (“The National Register of Historic Places is the official list of the Nation’s historic places worthy of preservation.”); *Bridges to a New Era*, *supra* note 4, at 113–33 (including recommendations for reforming to coordinate the NHPA implementation with federal land planning).

⁴⁷ 36 C.F.R. § 800.1(a) (2021) (“Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties . . . [and the] procedures in this part define how Federal agencies meet these statutory responsibilities.”).

⁴⁸ *Id.* § 800.16(y).

⁴⁹ *Id.* § 800.2(a)(4) (“The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement[.]”).

⁵⁰ *Id.*

scope is not limited to federal property, as explained below.⁵¹

Section 106 consultation is triggered when the agency with jurisdiction over the federal undertaking confirms that the undertaking has the potential to affect historic properties.⁵² Because section 106 applies only to historic properties, that is, properties listed on or eligible for the National Register, the federal government may still adversely affect culturally significant tribal properties without consulting tribes if those properties are not deemed eligible or are not already listed.

The regulations require consultation to begin “at the early stages of project planning” to identify historic properties the undertaking may affect and to assess alternatives to “avoid, minimize or mitigate any adverse effects” of the undertaking on historic properties.⁵³ Federal agencies must give the Advisory Council on Historic Preservation (“ACHP”) a reasonable opportunity to comment on the undertaking and “involve the consulting parties . . . in findings and determinations made during the section 106 process.”⁵⁴ If the undertaking has the potential to affect a historic property that is religiously or culturally significant to any federally recognized tribe,⁵⁵ that tribe is a “consulting party” that must be involved in the process.⁵⁶

⁵¹ U.S. DEPT. OF INTERIOR, *National Historic Preservation Act, Section 106: A quick guide for preserving Native American cultural resources* (2012), <https://www.nps.gov/history/tribes/Documents/106.pdf> [hereinafter 106 Guide].

⁵² Advisory Council on Historic Pres., *An Introduction to Section 106*, <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106> (last visited Apr. 14, 2021). (“If a federal or federally-assisted project has the potential to affect historic properties, a Section 106 review will take place.”). *See also* 106 Guide, *supra* note 51 (defining “historic properties” as “any prehistoric or historic districts, sites, buildings, structures, or objects that are eligible for or already listed in the National Register of History Places[,]” including “any artifacts, records, and remains . . . that are related to and located within the historic properties and any properties of traditional religious and cultural importance to Tribes”).

⁵³ 36 C.F.R. § 800.1(a).

⁵⁴ *Id. See also id.* § 800.2(b) (“The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.”).

⁵⁵ As of May 2021, there were 574 federally recognized tribes. U.S. Dept. of Interior, Indian Affairs, *Frequently Asked Questions*, <https://www.bia.gov/frequently-asked-questions> (last visited May 1, 2021). Although the regulations recognize both Indian tribes and Native Hawaiian organizations, *see, e.g.*, 36 C.F.R. § 800.2(c)(2)(ii) (describing the requirements for “[c]onsultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.”), the scope of this Article is limited to Indian tribes.

⁵⁶ 36 C.F.R. § 800.2(c)(2)(ii). Other parties with “consultative roles in the 106 process” are: (1) the state historic preservation officer, representing the interests of a state

The regulations extend consultation rights to any Indian tribe that “attaches religious and cultural significance to historic properties” the undertaking may affect, regardless of whether the property is situated on tribal land.⁵⁷ To satisfy its tribal consultation obligation, the agency must provide a tribe with a “reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . , articulate its views on the undertaking’s effect of such properties, and participate in the resolution of adverse effects.”⁵⁸ The regulations recognize the “unique legal relationship” between the federal government and Indian tribes, and encourage a section 106 consultation process that is both “respectful of tribal sovereignty” and recognizes “the government-to-government relationship.”⁵⁹

However, several procedural and administrative elements have hampered implementation of section 106. The law’s scope is limited since consultation is relative to the “scale of the undertaking” and the federal government’s involvement.⁶⁰ If an undertaking is small and the federal government has only a distant role in its implementation, the tribes involved may not be consulted as thoroughly as they would for a more substantial undertaking. Therefore, the federal government can be involved with projects, activities, or programs that have the potential to adversely affect culturally significant tribal properties while avoiding rigorous consultation if federal involvement is limited. Further, section 106 applies only to properties and sites listed on or eligible for the National Register of Historic Places,⁶¹ so not all sites with cultural value to tribes may be subject to the consultation requirements of section 106.

and its citizens; (2) Indian tribes and Native Hawaiian organizations; (3) representatives of local governments with jurisdiction over the area in which the effects of an undertaking may occur; (4) applicants for federal assistance, permits, licenses, or approval; and (5) a catch-all group including “individuals and organizations with a demonstrated interest in the undertaking.” *Id.* § 800.2(c)(1)–(5).

⁵⁷ *Id.* § 800.2(c)(2)(ii).

⁵⁸ *Id.* § 800.2(c)(2)(ii)(A).

⁵⁹ *Id.* § 800.2(c)(2)(i)(B)–(C).

⁶⁰ *Id.* § 800.2(a)(4).

⁶¹ See Nat’l Endowment for the Humanities, *Frequently Asked Questions about Section 106 of the National Historic Preservation Act*, <https://www.neh.gov/grants/manage/frequently-asked-questions-about-section-106-the-national-historic-preservation-act> (last visited Aug. 4, 2021) (“Section 106 of the National Historic Preservation Act . . . and its implementing regulations . . . is a law that requires federal agencies to consider the effects of federally funded projects on historic properties (i.e., listed or eligible for listing, in National Register of Historic Places[.]”).

2. Section 106 and Meaningful Tribal Consultation

Although section 106 expressly requires tribal consultation, the federal government's efforts often fall short of ensuring meaningful tribal engagement.⁶² Agencies frequently perform rote and less-than-rigorous consultation—that is, so-called “box-checking.”⁶³

Instead of engaging in meaningful back-and-forth consultation, federal agencies sometimes document “every contact or communication with a tribe, no matter how inconsequential,” as proof that consultation took place.⁶⁴ Contact can include one-way communications like mailing a notice of agency intent to prepare an environmental impact statement to a tribe, or a tribal member simply speaking at a public meeting.⁶⁵ Federal agencies have sometimes treated tribes as interchangeable, counting communications with one as communications with all.⁶⁶

In some instances, archaeological surveys conducted by private entities have failed to recognize tribally significant resources.⁶⁷ A complication is that tribes sometimes intentionally withhold information from the federal government for the purposes of National Register listing because they do not want to make cultural resources publicly accessible.⁶⁸ For the NHPA to apply, tribes must disclose information to government officials and project applicants in order to demonstrate that a historic property is listed, or is eligible for listing, on the National Register, in the hope that doing so will lead to protection.⁶⁹ If a tribe

⁶² For example, in the *Quechan Tribe* case discussed *infra* notes 66–77 and accompanying text, the court ruled against the BLM for its failure to adequately consult with the tribe, describing the BLM's “consultation” as “an empty formality.” *Quechan Tribe of the Fort Yuma Indian Reservation. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010).

⁶³ See Yachnin & Jacobs, *supra* note 7 (discussing President Biden's executive order promising “regular, meaningful, and robust consultation” with tribes and quoting Shannon Wheeler, Chair of the Nez Perce Tribe, to the effect that consultation is a treaty obligation that must be honored at the highest level, and “not just a check-in-the-box process”).

⁶⁴ Mark Ingersoll Letter, *supra* note 2, at 7.

⁶⁵ *Id.*

⁶⁶ *Quechan Tribe*, 755 F. Supp.2d at 1112 (noting that the BLM's documented “consultation” efforts for the project at issue referred to consultation with “tribes,” treating them “interchangeab[ly]”).

⁶⁷ Mark Ingersoll Letter, *supra* note 2, at 18 (“[M]any archaeologists and other professionals employed by [project] applicants may not be able to identify Tribal resources for lack of training or familiarity with the sites and resources.”).

⁶⁸ *Id.* (“Tribes may have intentionally withheld information because of concerns about data disclosure, either inadvertently, or willfully by tribunals or applicants.”).

⁶⁹ See 36 C.F.R. § 800.4(a)(4) (discussing the identification of historic properties in

instead wishes to withhold information detailing the location or the attributes of culturally or religiously significant resources, that resource risks being destroyed during the course of project development. In some cases, even when tribes have willingly disclosed information, the federal government has failed to consider tribal concerns before granting project approval.

Although the actions discussed above might seem like consultation, they are not *meaningful*. Federal agencies are unlikely to actually grasp tribal knowledge and perspectives and apply them in decision making by simply mailing notices and attending public meetings. Because individual tribes are unique, none can be overlooked, and the appropriate authorities within each tribe must be consulted for any consultation to be truly meaningful.

An example of failed consultation was the 2010 case of *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, in which the Quechan tribe alleged that the Bureau of Land Management (“BLM”) approved a solar energy project without engaging in the tribal consultation required by the NHPA.⁷⁰ During the BLM’s decision-making process, the tribe maintained that the project would destroy hundreds of ancient cultural sites.⁷¹ The tribe learned informally that the BLM was developing a programmatic agreement, which the BLM would approve by a specific date, and sent a letter to the agency expressing its concerns that the decision-making process did not allow adequate time for consultation.⁷² The BLM approved the project over the tribe’s objections.⁷³

A federal district court granted the tribe a preliminary injunction, holding that the BLM failed to “initiate government-to-government contact” with the tribe

consultation with tribal representatives, which requires “[g]ather[ing] information from any Indian tribe or Native Hawaiian organization . . . to assist in identifying properties [which] . . . may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites”).

⁷⁰ *Quechan Tribe*, 755 F. Supp.2d at 1107.

⁷¹ *Id.* (“The area where the project would be located has a history of extensive use by Native American groups” and it was uncontested that “459 cultural resources” were identified in the project area, including burial sites. . . .).

⁷² *Id.* at 1110–11 (explaining the defendants’ argument that they satisfied their section 106 duties through the execution of a programmatic agreement under 36 C.F.R. § 800.14(b)(1)(ii)). The section 106 regulations explain that the ACHP and the federal agency official “may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.” 36 C.F.R. § 800.14(b)(1). Under § 800(b)(1)(ii), used by the BLM in this case, a programmatic agreement “may be used . . . [w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking.”

⁷³ *Quechan Tribe*, 755 F. Supp.2d at 1118 (describing the Tribe’s first contact with the BLM for this project in February 2008, which “put BLM on notice [of] historical and cultural sites within the project area . . . considered important to the Tribe,” but that “the documentary evidence [did not] show that BLM ever met with the Tribe’s government until October 16, 2010, well after the project was approved”).

and “glide[d] over requirements imposed” by the NHPA and its implementing regulations.⁷⁴ The court decided that the BLM violated the NHPA because the agency’s communications were “cursory and inadequate.”⁷⁵ It also determined that the BLM contacted the tribe “late in the planning process,” leaving inadequate time for an alternatives analysis that could avoid culturally significant sites.⁷⁶ The court consequently enjoined the BLM from beginning the first phase of the project until adequate NHPA consultation occurred.⁷⁷ This result demonstrates how tribes can enforce section 106 against federal agencies if tribes believe consultation has been inadequate.⁷⁸

Even when tribal consultation complies with section 106 regulations, it does not automatically satisfy the government-to-government consultation obligation. Section 106 requires that consultation recognize the government-to-government relationship and requires the responsible agency official to consult with tribal government representatives “in a manner sensitive to the concerns and needs” of the tribe.⁷⁹ Government-to-government consultation, as required by section 106, however, does not alone “protect tribal rights to exist as self-governing entities,” as required for general consultation outside of the NHPA.⁸⁰ Mere contact between federal and tribal government officials, even if conducted in a sensitive manner, does not necessarily protect tribal self-governance. Whether compliance with section 106 fully satisfies the government-to-government consultation obligation depends on the level of tribal participation in the resolution of adverse effects.⁸¹

B. The Clinton Executive Orders

Throughout his tenure, President Bill Clinton used executive orders (“E.O.”) to strengthen the federal government’s commitment to a government-to-

⁷⁴ *Id.* at 1119.

⁷⁵ *Id.* at 1111.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1120–22.

⁷⁸ See also *infra* Part III(A), discussing additional NHPA section 106 litigation.

⁷⁹ 36 C.F.R. § 800.2(c)(2)(ii)(C).

⁸⁰ See COHEN TREATISE, *supra* note 13, § 5.04(3)[a] (discussing the federal trust responsibility).

⁸¹ See 36 C.F.R. § 800.2(c)(2)(ii)(A) (“The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.”).

government relationship with tribes. Clinton promulgated E.O. 12875 in 1993, focusing on unfunded federal mandates that strained tribal budgets.⁸² E.O. 13007 in 1996 promised protection of Indian sacred sites.⁸³ E.O. 13175 in 2000 (superseding E.O. 13084 from 1998) focused explicitly on federal consultation with tribal governments.⁸⁴ These executive orders strengthened the federal government's commitment to meaningful consultation as a means of implementing the federal policy of a government-to-government relationship with tribes.

1. Indian Sacred Sites

E.O. 13007 directed federal agencies with land management authority to: (1) “accommodate access to and ceremonial use of Indian sacred sites”; and (2) avoid causing “adverse” effects to the “physical integrity” of sacred sites.⁸⁵ The E.O. defined a “sacred site” as “any specific, discrete, narrowly delineated location on Federal land” identified to the appropriate federal agency either by a tribe or a qualified individual tribal member.⁸⁶ This definition invites concerns similar to those of National Register listings, because, in order to qualify for protection, tribes must disclose to federal agencies—and consequently to the public—sensitive information about the locations and attributes of sacred sites.⁸⁷

E.O. 13007's definition of “consultation” is vague, requiring only that federal land management agencies prepare a report within one year of the effective date of the E.O., detailing how the agency plans to implement its directives.⁸⁸ Nor

⁸² Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (Oct. 26, 1993) [hereinafter Exec. Order 12,875] (“[T]he cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments.”).

⁸³ Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 29, 1996) [hereinafter Exec. Order 13007] (focusing on “protect[ing] and preserv[ing] Indian religious practices”).

⁸⁴ Exec. Order 13,175, *supra* note 44 (purporting to “establish regular and meaningful consultation and collaboration with tribal officials . . . [and] to strengthen the United States government-to-government relationships with Indian tribes”). Exec. Order 13,175 superseded and revoked Exec. Order 13,084. *Id.* § 9(c) (“Executive Order 13084 . . . (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.”). *See also* Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

⁸⁵ Exec. Order 13,007, *supra* note 83, § 1(a).

⁸⁶ An Indian tribal member who identifies a sacred site must be “determined to be an appropriately authoritative representative of an Indian religion.” *Id.* § 1(b)(iii).

⁸⁷ *See, e.g.,* Native Am. Rts. Fund, *Protecting Bears Ears National Monument*, <https://www.narf.org/cases/bears-ears/> (last visited Apr. 15, 2021) [hereinafter NARF, *Protecting Bears Ears*].

⁸⁸ Exec. Order 13,007, *supra* note 83, § 2(b). Agency reports must include “any changes necessary to accommodate” tribal access and use of sacred sites and “any changes necessary to avoid adversely affecting the physical integrity of the sites.” *Id.* § 2(b)(i)–(ii).

does the E.O. provide consultation standards. Instead, it merely asks agencies to report on “procedures implemented or proposed to facilitate consultation” with tribes whose sacred sites might be affected.⁸⁹ Thus, the E.O. gave federal agencies considerable discretion in determining how to protect and accommodate access to cultural sites and how to design a framework to govern consultation when federal land management decisions put sacred sites at risk.

2. *Regular and meaningful consultation*

The other Clinton administration executive orders aimed to “establish regular and meaningful consultation and collaboration” with tribal governments.⁹⁰ E.O. 12875 in 1993 declared a policy of protecting the American people from the consequences of “unfunded federal mandates” on state, local, and tribal governments.⁹¹ But because the “regular and meaningful consultation” directed by E.O. 12875 included consultation with state, local, and tribal governments, it placed each of them on the same level, even though the federal government’s responsibility towards tribes is clearly distinct.⁹²

In contrast to E.O. 12875, E.O. 13175 in 2000 recognized as “fundamental” the “unique legal relationship” between the federal government and tribal governments, under which the federal government has, over time, “establish[ed] and define[d] a trust relationship with Indian tribes.”⁹³ E.O. 13175 promoted tribal “self-government,” “sovereignty[,] and self-determination”⁹⁴ by requiring federal agencies, through “regular and meaningful consultation” in a government-to-government framework,⁹⁵ to carry out the “complementary roles” that Nixon’s announcement envisioned 30 years earlier.

⁸⁹ *Id.* § 2(b)(iii).

⁹⁰ *See* Exec. Order 12,875, *supra* note 82 **Error! Bookmark not defined.**; Exec. Order 13175, *supra* note 44.

⁹¹ Exec. Order 12,875, *supra* note 82 (“[T]he cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments. . . . These governments should have more flexibility to design solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation from the Federal Government.”).

⁹² *See, e.g.*, 36 C.F.R. § 800.2(c)(2)(ii)(B) (“The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation should be conducted in a sensitive manner respectful of tribal sovereignty.”).

⁹³ Exec. Order 13,175, *supra* note 44, § 2(a).

⁹⁴ *Id.* at § 2(c).

⁹⁵ *Id.*

E.O. 13175 directed federal agencies⁹⁶ to establish an “accountable process” to ensure tribal officials have an opportunity to contribute “meaningful and timely” input when agencies develop regulatory policies that have tribal implications, and to consult tribal officials early in the development process.⁹⁷ For example, to fulfill its E.O. 13175 obligations, the 2013 “accountable process” of the U.S. Army Corps of Engineers promised an “[o]pen, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect, and shared responsibility,” working toward a “mutual consensus and begin[ning] at the earliest planning stages, before decisions are made and actions are taken; [with]. . . active and respectful dialogue”⁹⁸ The E.O. also directed agencies to provide a “tribal summary impact statement,” describing the extent of the consultation, summarizing tribal concerns, and explaining the extent to which the agency resolved those concerns.⁹⁹ Section 5(d) of the E.O. instructed that agencies “should explore, and, where appropriate, use consensual mechanisms for developing regulations” on issues affecting tribal self-government, trust resources, and treaty rights.¹⁰⁰

In 2012, President Obama strengthened the federal government’s commitment to tribal consultation with the promulgation of E.O. 13604, focused on infrastructure and requiring federal permitting and review processes for projects to rely “upon early and active consultation with . . . tribal governments[.]”¹⁰¹ In contrast, the earlier E.O. 13175 used weaker language, directing that agencies “*should* . . . use consensual mechanisms [with tribes] for developing regulations” with tribal impacts.¹⁰²

These E.O.s incorporated some elements that are essential to meaningful consultation. E.O. 13175 recognized the value of “early” consultation and back-

⁹⁶ *Id.* § 1(c) (defining “agency” as “any authority of the United States that is an ‘agency’ under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. § 3502(5)”).

⁹⁷ *Id.* § 5(a).

⁹⁸ U.S. ARMY CORPS OF ENG’RS, TRIBAL CONSULTATION POLICY 2 (2013) https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USACE%20Native%20American%20Policy%20brochure%202013.pdf (“E.O. 13175 requires all federal agencies to formulate an accountable process. . . . This document affirms the [USACE] commitment to engage in consultation with federally recognized tribes.”). In contrast, the Trump Administration USACE Consultation Policy banned the Corps from consulting with tribes at all for the proposed Rosemont Copper Mine in Arizona. Northey, *supra* note 2 (describing the Trump policy).

⁹⁹ Exec. Order 13,175, *supra* note 44, § 5(b)(2)(A)–(B).

¹⁰⁰ *Id.* § 5(d).

¹⁰¹ Exec. Order 13,604, *supra* note 42, § 1(a). (emphasis added).

¹⁰² Exec. Order 13,175, *supra* note 44 **Error! Bookmark not defined.**, § 5(d). (emphasis added).

and-forth communication in which tribal officials provide concerns that the agencies must consider before issuing a policy or regulation.¹⁰³ Section 5(d) of E.O. 13175 resembles what some tribes have described when calling for meaningful consultation—using “consensual mechanisms” that could lead to federal-tribal consensus, rather than one-way communication by an agency.¹⁰⁴ The Bears Ears coalition, for example, proposed “joint decision-making” under a process developed by both tribal and federal agency representatives.¹⁰⁵ Similarly, although the E.O. does not define “consensual mechanisms,” it suggests “negotiated rulemaking” on the text of a proposed rule, with a goal of reaching consensus among federal officials and representatives of various interest groups.¹⁰⁶

As noted, one drawback to these E.O.s is the sometimes-vague nature of the instructions they provide, which opens the door for consultation that is less than meaningful. The Clinton administration’s E.O.s do not define “meaningful consultation.” Although consulting tribes early in the process is essential to allowing agencies to incorporate tribal perspectives meaningfully, E.O. 13175 left the details of how to engage in meaningful and timely consultation to the federal agency. Moreover, the E.O. does not require an agency to act on tribal concerns, but merely to summarize those concerns and the agency’s response to them.¹⁰⁷ An agency could conceivably satisfy its E.O. 13175 obligation through email exchanges alone. Consultation under E.O. 13604 is more stringent than that of E.O. 13175 but still leaves substantial discretion to federal agencies. Achieving E.O.-based consultation does not necessarily equate to achieving meaningful consultation. Nor does it automatically satisfy government-to-government consultation as required under the trust doctrine. The agency discretion granted by the E.O.s for fashioning consultation does not “protect tribal rights to exist as

¹⁰³ See *supra* notes 44 and 82 and accompanying text.

¹⁰⁴ Exec. Order 13,175 does not define “consensual mechanisms,” but provides “negotiated rulemaking” as an example. Exec. Order 13,175, *supra* note 44, § 5(d). Negotiated rulemaking is “a process which brings together representatives of various interest groups and a federal agency to negotiate the text of a proposed rule,” with a goal of “reach[ing] consensus.” U.S. EPA, *Negotiated Rulemaking Fact Sheet*, <https://archive.epa.gov/publicinvolvement/web/pdf/factsheetregneg.pdf> (last visited Apr. 26, 2021). See also Mark Ingersoll Letter, *supra* note 2, at 7–8 (“[M]eaningful consultation should always be undertaken with the goal of reaching consensus. Without this goal, there is no actual consultation. . . . [T]he federal government and Tribes should be sitting down with one another, engaging in meaningful back-and-forth, and reaching agreement to facilitate project development.”).

¹⁰⁵ Bears Ears Proposal, *supra* note 27, at 30; see also *id.* at 22 (proposing that the agencies and tribes “shall, from the beginning to the conclusion of all plans and projects, collaborate jointly on all procedures, decisions, and other activities[.]”).

¹⁰⁶ Exec. Order 13,175 *supra* note 44, § 5(d).

¹⁰⁷ See *id.* § 5(b)(2)(B).

self-governing entities” because it does not give tribes any decision-making power, but instead relegates them to participating in whatever process the agency decides on.¹⁰⁸

III. TRIBAL CONSULTATION CASE STUDIES

This section analyzes the consultation processes via several case studies: (1) the Secretarial Order on the ESA; (2) the proclamation (and diminishment) of Bears Ears National Monument in Utah; (3) oil and gas lease sales in Chaco Canyon, New Mexico; and (4) the Oak Flat, Arizona land exchange and mining project. These case studies are not exhaustive,¹⁰⁹ but are representative of several

¹⁰⁸ See COHEN TREATISE, *supra* note 13, § 5.04[3](a); see also *Bridges to a New Era*, *supra* note 4 **Error! Bookmark not defined.**, at 169–74 (recommending a new executive order on tribal co-management).

¹⁰⁹ Other consultation case studies we considered included the Jordan Cove liquid natural gas (“LNG”) project and the memorandum of agreement to remove four dams on the Klamath River. The Jordan Cove project proposed to put a LNG terminal in Coos Bay on the southern Oregon coast, in an area including “archaeological resources, human burials, and sacred places.” Mark Ingersoll Letter, *supra* note 2 **Error! Bookmark not defined.**, at 3–4. The Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians spent over a decade attempting to compel FERC to meaningfully consult under the NHPA. *Id.* at 5–6. Instead, consultation efforts cataloged by FERC were limited to a notice of intent to the general public, a series of written communications between FERC and the tribes, and tribal member attendance at public meetings. *Id.* FERC proceeded to issue a final EIS in 2015, despite the tribes’ request for a government-to-government consultation meeting. *Id.* at 6. In early 2020, Oregon denied several permits for the project, citing “significant adverse effects” under the Coastal Zone Management Act, and NOAA upheld the state’s Coastal Zone Management Act findings in early 2021. See Ted Sickinger, *Feds uphold state denial on Jordan Cove LNG’s coastal zone permit, another roadblock for the controversial project*, THE OREGONIAN: OREGON LIVE (Feb. 9, 2021), <https://www.oregonlive.com/environment/2021/02/feds-uphold-state-denial-on-jordan-cove-lngs-coastal-zone-permit-another-roadblock-for-the-controversial-project.html>. Since tribal consultation was not as prominent an issue as the state’s rejection of the project, we elected not to include this case study.

Consultation was also implicated in the Klamath dam removal process. The major parties involved in dam removal are PacifiCorp (the previous owner of the dams), the Karuk Tribe, Yurok Tribe, States of Oregon and California, and Klamath River Renewal Corporation (“KRRC”). *Memorandum of Agreement*, at 1 (Nov. 2020), <http://www.klamathrenewal.org/wp-content/uploads/2020/11/Klamath-MOA.pdf> (implementing the Klamath Hydroelectric Settlement Agreement for Dam Removal). The parties filed applications with FERC to transfer the dam licenses to the KRRC, which would undertake the removal of four dams. *Id.* at 1–2. In July 2020, FERC responded to the transfer request by requiring PacifiCorp to remain a co-licensee “to aid in covering any major liability.” See Jamie Parfitt, *Fight over Klamath River Dam Removal Project Goes to Federal Regulators*, KDRV NEWS (Feb. 16, 2021), <https://www.kdrv.com/content/news/Fight-over-Klamath-River-dam-removal-project->

aspects of the tribal consultation process. Each discusses whether federal agencies engaged in any consultation and, if so, whether it was meaningful or amounted to so-called box-checking. Procedural aspects of successful consultation include, for example, the rank of the federal official that engages in consultation, and whether an agency consults tribes directly or groups them in with the public or non-tribal stakeholders. Substantive aspects include tribal identification of places and resources of cultural significance and co-management frameworks between tribal governments and state or federal governments—like the framework arising out of the Belloni decision, discussed below.

An early example of meaningful consultation that preceded the E.O.s grew out of Judge Robert Belloni's historic decision in *Sohappy v. Smith*, later consolidated into *U.S. v. Oregon*.¹¹⁰ After ruling that Columbia River treaty tribes were entitled to a “fair share” of salmon harvest allocation because of treaty language expressly assuring them of “a right of taking fish in common with” white settlers, Judge Belloni called for meaningful tribal participation in fishery management.¹¹¹ Despite the *Sohappy* decision, Oregon continued to discriminate against tribal fishers as late as 1975, so Judge Belloni ordered the tribes and states

goes-to-federal-regulators-573806011.html. In response to FERC, the governors of California and Oregon signed onto the dam removal project as “guarantors,” so that PacifiCorp may fully step away. *Id.* Since FERC is currently reviewing the counter proposal, *id.*, we elected not to include this case study. If FERC approves the revised proposal, KRRC plans to begin dam removal in 2023, which will mark the beginning of the “largest dam-removal and salmon-restoration proposal in history.” Konrad Fisher, *The Klamath River's Advocates Succeed on Their Second Try with New Agreement for Largest-ever Dam Removal*, WATERKEEPER ALL., <https://waterkeeper.org/magazines/volume-13-issue-1/klamath-river-dam-removal/> (last visited Apr. 27, 2021).

¹¹⁰ The federal government began to take action on behalf of the tribes to protect treaty fishing rights in the late 1960s, including representing individual treaty fishermen in state criminal prosecutions. See Michael C. Blumm & Cari Baermann, *The Belloni Decision and Its Legacy: United States v. Oregon and its Far-Reaching Effects After a Half-Century*, 50 ENV'T. L. 347, 365 (2020). Tribal activists, including Sohappy, sued Oregon state officials in 1968, “challenging the state’s restrictions on treaty fishing and seeking to stop the state’s arrests of treaty fishermen.” *Id.* at 364. In the same year, the United States initiated the *U.S. v. Oregon* suit to similarly protect tribal treaty rights for salmon harvest, and due to “the overlap of treaty rights issues, Judge Belloni consolidated the two cases” in 1969. *Id.* at 366–67.

¹¹¹ *Sohappy v. Smith*, 302 F. Supp. 899, 911–12 (D. Or. 1969) (“The treaty Indians, having an absolute right to [Oregon’s salmon] fishery, are entitled to a fair share of the fish produced by the Columbia River system. . . . [The] effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago.”). See also Blumm & Baermann, *supra* note 110, at 352 (“To achieve [fair share allocation], Belloni established a number of innovative procedural requirements, like ‘meaningful’ tribal participation in managing the fishery. . . .”); *Id.* at 366 (describing the Columbia River treaty tribes as including the tribes of the Yakama, Umatilla, and Warm Springs reservations and the Nez Perce Tribe).

to cooperate on developing a comprehensive fish management plan.¹¹² Belloni's order thus laid the groundwork for decades of meaningful negotiations, which have resulted in a series of management plans governing salmon harvests under a co-management framework.¹¹³ The management plans, requiring concurrence of both the states and the tribes, are a significant substantive result of the negotiations ordered by Judge Belloni and may serve as a general model for co-management in other contexts.¹¹⁴

Judge Belloni anticipated the call for meaningful participation by the political branches in the NHPA regulations and the E.O.s decades later, and his decision illustrated the role that court oversight can provide in ensuring meaningful tribal participation when culturally significant resources are at stake.¹¹⁵ The long-term success of state-tribal collaboration with federal court oversight in managing salmon harvests, which can fluctuate widely from year to year, was confirmed in 2018 when one of Judge Belloni's successors attempted to dismiss the half-century-old case, and every party to the case—five tribes, three states, and the federal government—objected,¹¹⁶ a testament to the meaningful consultation the judge initiated.¹¹⁷ The case is now in its fifty-second year of proceedings, perhaps the longest ongoing case in the country.

Both the example set by Judge Belloni and the case studies below reveal

¹¹² See Blumm & Baermann, *supra* note 110, at 374.

¹¹³ See *id.* at 373–74. By 1977, “tribes and states finally adopted a five-year co-management plan.” *Id.* at 374. See A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries Above Bonneville Dam (1977) (entered into pursuant to *Sohappy*, 302 F. Supp. at 912). See also Blumm & Baermann, *supra* note 110 (describing the ten-year Columbia River Fish Management Plan of 1988, followed by a series of short-term agreements governing management of salmon harvests, and a new ten-year plan in 2008, developed “after years of negotiations”).

¹¹⁴ See Blumm & Baermann, *supra* note 110, at 385 (describing the “co-management plans that the Belloni decision prompted” as “tangible results of the 1969 decision a half-century later,” which “were the first judicial call for the states and the tribes to use their sovereign authorities to create co-management principles to govern an extremely valuable but increasingly scarce natural resource that they shared.”). Note, however, that this apparent tribal veto in the co-management framework came as a result of a federal court’s interpretation of management necessary to satisfy express treaty rights by states and tribes, not the federal government.

¹¹⁵ See *id.* at 377 (“Through several generations of plans, the parties have negotiated agreements establishing collaborative fishery management that reflected a spirit of cooperation between the tribes and states that did not exist prior to the *Sohappy* decision.”).

¹¹⁶ See *id.* at 378–79 (explaining that Oregon District Judge Michael Mosman, one of Judge Belloni’s successors, “unexpectedly dismissed the case [in 2018],” and “[t]he states of Idaho, Washington, and Oregon, all five of the tribes now party to the case, as well as the United States Department of Justice quickly filed motions seeking clarification of the dismissal and requesting reconsideration.”).

¹¹⁷ See *id.* at 380–83 (discussing the legacy of Judge Belloni’s decision).

that there is no one definition of “meaningful consultation.” An analysis of several agency consultation efforts shows that meaningful consultation must include, at a minimum, face-to-face discussions and early and consistent engagement with tribes by federal agencies. The case studies also show that meaningful consultation arises when federal agencies—or the federal judiciary—adequately understand tribal cultures and their land and natural resources management practices.

Below we review examples of meaningful consultation as well as consultation that did not meet this standard.

A. *The Joint Secretarial Order on Tribal Rights and the Endangered Species Act*

The process that led to the Joint Secretarial Order on Tribal Rights and the Endangered Species Act (“ESA”) in 1997 is a prominent example of meaningful consultation.¹¹⁸ Like the collaboration that Judge Belloni ordered in *Sohappy*, this consultation happened before the Clinton administration’s E.O.s requiring “regular and meaningful consultation” in 1998 and 2000, and it demonstrates several essential elements of meaningful consultation in action.¹¹⁹ The Order attempted to harmonize federal law with “[t]ribal rights to manage their resources in accordance with their own beliefs and values.”¹²⁰

Tribes came together in the mid-1990s to discuss how to protect tribal interests in light of the ESA because its enforcement often disregarded “tribal sovereignty and resource management practices.”¹²¹ A group of tribal resource managers and lawyers organized efforts on a national scale to develop a tribal consensus on the ESA implementation in Indian country, beginning at a workshop in February 1996.¹²²

¹¹⁸ The background information describing the consultation process relies on Wilkinson, *supra* note 1, which he wrote based on his personal experience as one of the tribal representatives.

¹¹⁹ See Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 405 (1998) (“Notably, a tribal initiative provided the impetus for the Order — unlike most federal Indian policies, the Order was not generated by centralized federal decision making and handed down to the tribes.”).

¹²⁰ Wilkinson, *supra* note 1, at 1072.

¹²¹ *Id.* at 1065 (explaining that “tribes were facing considerable pressure from ESA enforcement over matters such as timber harvesting, building construction, water development, and salmon harvesting[.]”). See also *id.* at 1070 (“Many people at the [tribal ESA] workshop expressed outrage at any attempt to regulate Indians under the ESA because it implies that tribes lack the capability to manage their resources in a way that protects animal species.”).

¹²² *Id.* at 1066.

The tribal consensus that emerged reflected a desire “to avoid ESA conflicts through good, cooperative tribal land management.”¹²³ Once participants settled on sending this central message to the federal government, they began drafting a proposal calling for a joint secretarial order to apply nationwide that would establish working relationships between tribal governments and the federal agencies for the ESA implementation.¹²⁴ The tribes soon presented their proposal to the Department of the Interior, which began the consultation process.

Consultation on the Secretarial Order demonstrated how to effectively implement several essential elements of achieving meaningful consultation, especially highlighting several important procedural aspects of consultation. First, then-Secretary of the Interior Bruce Babbitt had a Special Counsel who briefed him on the issues and the nature of the tribal position.¹²⁵ Second, Babbitt met face-to-face with the tribal leaders who presented the national tribal consensus, instituting a year and a half of negotiations.¹²⁶ Babbitt’s efforts to comprehend the tribal position paper meant that he began the process with an understanding of the importance of this issue to the tribes. As a result, he appointed an appropriate negotiating team that included high-level federal representatives.¹²⁷

Unlike the consultation that would emerge later under the Clinton administration’s E.O.s, which gave federal agencies enormous discretion in creating the consultation process, the “structure and protocols of the negotiating sessions were carefully negotiated between [tribal and federal] representatives.”¹²⁸ The negotiating sessions devoted substantial time to developing a deep understanding of “the cultural, historical, and legal background” of the relationship between the ESA and Indian wildlife management.¹²⁹ These two elements—early and consistent tribal engagement and a deep understanding by federal officials of tribal cultures and land management practices—are essential because tribal members are the appropriate source for

¹²³ *Id.* at 1074.

¹²⁴ *Id.* at 1075 (“The basic policy decision [for the draft position paper calling for the order] was that such an administrative system, if effective, might result in deference to tribal sovereignty and good working relationships with the federal agencies. . .”).

¹²⁵ *Id.* at 1076 (“Babbitt had been briefed on the issues and the nature of the tribal position by advisors, including Professor David Getches . . . who . . . was serving as Special Counsel to Babbitt.”).

¹²⁶ The tribal leaders were Billy Frank, Jr., John Echohawk, Richard Trudell, Ted Strong, and Jaime Pinkham. *Id.* at 1075.

¹²⁷ *Id.* at 1076.

¹²⁸ *Id.* at 1077.

¹²⁹ *Id.* at 1078 (“[C]ritically, the negotiators recognized that the subject was thick with context, especially on the tribal side, and the negotiators would have to allow ample time for presentations on, and understanding of, the cultural, historical, and legal background.”).

instructing agencies on how best to interact with them, and because agency officials may not effectively apply that information without understanding the context from which it arises.¹³⁰

The final Secretarial Order that emerged from these consultations was, according to Professor Charles Wilkinson, “a sensible harmonizing of Indian law and the ESA”¹³¹ and can serve as a positive example of a government-to-government relationship in which both sides are respected as sovereigns. The Secretarial Order called for “extensive cooperation between tribes and federal administrators”¹³² and required the agencies to provide scientific, technical, and informative assistance for tribal development of conservation and management plans for ecosystems on which ESA-listed or listing-eligible species depend.¹³³ A federally assisted tribal management plan development enables tribal participation in resource management. This result was achievable because federal agency officials took the time to understand tribes’ positions and designed a consultation framework *with* tribal members. This consultation went well beyond what President Clinton’s E.O.s would later prescribe and shows that, if consultation is to achieve meaningful federal-tribal collaboration, it must go beyond the minimum legal requirements.

B. Bears Ears National Monument

Native Americans have called the Bears Ears region in southeastern Utah home for many thousands of years. The area is dominated by a pair of culturally significant buttes (resembling the ears of a bear), surrounded by largely undeveloped federal public lands.¹³⁴ Bears Ears is, according to the Native

¹³⁰ *Id.* at 1079 (“The importance of this aspect of the process cannot be overstated. The detailed education about tribal issues allowed federal negotiators, most of whom had previously spent little time on Indian matters, to understand the true distinctiveness of Indian policy . . . [and] [w]ith that foundation, the federal negotiators were able to see the tribal positions with new eyes.”).

¹³¹ *Id.* at 1081.

¹³² *Id.* at 1082.

¹³³ Joint Secretarial Order, *supra* note 28, at Principle 3(A).

¹³⁴ Elouise Wilson, Mary R. Benally, Ahjani Yepa, & Cynthia Wilson, *Women of Bears Ears are Asking You to Help Save It*, N.Y. TIMES (April 25, 2021) (“We are among the Women of Bears Ears – Indigenous women who support our families and communities in the protections of ancestral lands. . . . From these Southwestern lands, twin buttes rise; they are known as Bears Ears.”); *see also* Bears Ears Inter-Tribal Coal. *Native American Connections*, <https://bearssearscoalition.org/ancestral-and-modern-day-land-users/> (last visited Apr. 26, 2021) (“Several southwestern tribes trace their ancestry to the ancient peoples who populated the [Bears Ears] region since time immemorial. . . .”); Bears Ears Educ. Ctr., *Bears Ears Buttes*, <https://bearssearsmonument.org/bears-ears-buttes/> (last

American Rights Fund, “one of the densest and most significant cultural landscapes in the United States.”¹³⁵ However, looting, vandalism, and development for resource extraction have long threatened the integrity of the area.¹³⁶ Legal efforts to protect Bears Ears span the past decade.¹³⁷ In 2010, several tribes with deep ties to the area formed the Bears Ears Intertribal Coalition.¹³⁸ Despite repeated requests, these tribes were excluded from land management planning by members of the state’s congressional delegation and local governments.¹³⁹ In response, the coalition sent a proposal to President Obama in 2015, requesting that he proclaim Bears Ears a national monument and establish a framework for collaborative federal-tribal management of the monument.¹⁴⁰ President Obama responded by establishing the monument and a

visited Apr. 26, 2021) (“The namesake and heart of the landscape, these twin buttes stand over 8,700 feet in elevation. They are sacred places to many Indigenous Tribes and Pueblos who share spiritual connections to the area.”).

¹³⁵ Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016) (establishing the Bears Ears National Monument) [hereinafter Obama Proclamation]. (“For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops,” and today there remains “[a]bundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts. . .”).

¹³⁶ Dean B. Suagee, *Tribes Call for Collaborative Management of Bears Ears National Monument*, THE HILL (June 10, 2016), <https://thehill.com/blogs/congress-blog/judicial/283078-tribes-call-for-collaborative-management-of-bears-ears-national> (“As the tribes see it, there is a need to protect this landscape from ongoing grave-robbing and looting which rob us of our heritage. There is also concern about the impacts of extractive resource development such as oil and gas drilling and uranium mining, and the roads that go along with such development.”).

¹³⁷ Bears Ears Proposal, *supra* note 27, at 14–15 (“Bears Ears [was] of grave concern to us but for many years we did not address it comprehensively. . . . In February 2010, former Senator Bob Bennett . . . helped lead an effort [with Tribal elders] . . . to develop a shared legislative proposal[,]” and at the same time, the Navajo Nation started the process of “requesting a presidential proclamation under the Antiquities Act.”).

¹³⁸ Wilkinson, *supra* note 10, at 323–25 (discussing the origin of the coalition, beginning with a group of Diné people who “came together to address the continuing sense of loss and pain over having been removed from Bears Ears,” and whose efforts led to the formation of an “intertribal organization of five tribes with especially strong ties to the Bears Ears Region” who would guide the proposal-writing efforts).

¹³⁹ *Id.* at 327 (“United States Senators and Representatives were hard at work on their own plan for how they thought the land should be handled . . . [which] tilted sharply toward industrial development and away from land protection and creation of a tribal-federal collaborative management.”). *See also* NARF, *Protecting Bears Ears*, *supra* note 87 **Error! Bookmark not defined.** (explaining that, after a series of fruitless meetings, tribal representatives were disinvited from the final meeting, after which the county commissioners adopted a final land management proposal “without input from the Tribes.”).

¹⁴⁰ Bears Ears Proposal, *supra* note 27, at 1 (“This is a Tribal proposal for a Presidential proclamation under the Antiquities Act of 1906 to protect . . . an area of 1.9

tribal advisory commission in December 2016.¹⁴¹ Efforts to lobby the Biden Administration to reinstate the monument boundaries that President Trump severely diminished were ongoing as this paper went to press.¹⁴²

1. Background

In 2011, then-Navajo Nation President Ben Shelley met with then-Secretary of the Interior Ken Salazar to request national monument protection for Bears Ears.¹⁴³ In 2013, the Navajo Nation began to work with the newly formed nonprofit organization, Utah Diné Bikéyah (“UDB”), to represent tribal interests in the debate over management of Utah public lands, including Bears Ears.¹⁴⁴ UDB engaged the local community through town hall meetings, hosted numerous tribal gatherings focused on land protection strategies, and developed a sophisticated map of Bears Ears—highlighting the cultural significance of specific lands.¹⁴⁵

Meanwhile, the San Juan County commissioners and members of Utah’s congressional delegation worked on land management plans, although they failed to meaningfully engage the tribes, despite tribal efforts to participate.¹⁴⁶ The Navajo Nation and UDB submitted their proposal to the county. The commissioners engaged in a series of meetings with UDB in early 2015, but they achieved little progress. By August 2015, the county urged the state legislature to

million acres of ancestral land . . . [, and] [w]e propose that the most appropriate and effective management regime is Collaborative Management by the Tribes and Federal agencies.”).

¹⁴¹ Obama Proclamation, *supra* note 135.

¹⁴² Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017) (modifying the Bears Ears National Monument) [hereinafter Trump Proclamation]. On the restoration efforts, see Nicole Chavez, *Navajo Nation calls on restoration of Bears Ears National Monument during Deb Haaland visit to Utah*, CNN (Apr. 8, 2021), <https://www.cnn.com/2021/04/08/us/bear-ears-deb-haaland-visit/index.html> (discussing the coalition’s current lobbying efforts to restore the monument boundaries and “have a voice in how their ancestral homelands are managed”).

¹⁴³ Bears Ears Proposal, *supra* note 27, at 15.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (“[UDB] has interviewed and surveyed thousands of people; held eight Town Hall meetings; obtained over 15,000 statements of support; held five annual gatherings of Tribes at Bears Ears to discuss land protection strategies; interviewed dozens of elders and medicine men; developed sophisticated GIS data and many maps displaying that data; and obtained 24 resolutions of support from many Navajo chapter houses and Tribes.”). See also NARF, *Protecting Bears Ears*, *supra* note 87; Bears Ears Inter-Tribal Coal., *Interactive Map*, <https://bearscoalition.org/interactive-map/> (last visited Apr. 18, 2021) (providing an interactive map including photos of “remarkable places” and the associated information, as well as the proposed 1.9 million-acre national monument).

¹⁴⁶ Bears Ears Proposal, *supra* note 27, at 15.

pass a bill that would open culturally significant areas for resource extraction.¹⁴⁷ At the same time, Utah Congressmen Rob Bishop (R-Utah) and Jason Chaffetz (R-Utah) were pushing the Public Land Initiative (“PLI”) in Congress.¹⁴⁸ UDB and the Navajo Nation shared an early version of their proposal with federal officials involved in the PLI process and visited Washington D.C. to meet with congressmen who supported the PLI, but the tribes never received a single substantive response to their proposal.¹⁴⁹ In 2016, Congressman Bishop released the PLI, which would protect 1.39 million acres of Bears Ears without any tribal management.¹⁵⁰ Realizing there was little hope for a version of the PLI that would protect tribal interests, the tribes began working on a separate proposal to protect Bears Ears using a presidential proclamation under the Antiquities Act,¹⁵¹ maintaining the campaign that the Navajo Nation began in 2011.¹⁵² The Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni tribal governments united in July 2015 to form the Bears Ears Intertribal Coalition, which would draft the Bears Ears proclamation proposal.¹⁵³

*The “Collaborative Management” Proposal of the Bears Ears
Intertribal Coalition*

In October 2015, the coalition submitted a comprehensive land

¹⁴⁷ NARF, *Protecting Bears Ears*, *supra* note 87 (explaining that one month after a series of meetings with UDB, Navajo Nation, and Ute Mountain Ute Tribe, the San Juan County Commissioners “urged the Utah State Legislature to pass HB 3931,” which undermined the Bears Ears proposal by “designat[ing] large areas of Bears Ears as “Energy Zones” to use for fast-tracked [] grazing, energy, and mineral development.” Later meetings between the county and the tribes “did not produce any results.”).

¹⁴⁸ Bears Ears Proposal, *supra* note 27, at 15.

¹⁴⁹ *Id.* at 16.

¹⁵⁰ NARF, *Protecting Bears Ears*, *supra* note 87.

¹⁵¹ Antiquities Act, 54 U.S.C. § 320301 (2018).

¹⁵² Anna Brady, *Through Bears Ears, Tribes Lead the Way for True Collaboration over Utah’s Public Lands*, UNIV. OF UTAH S.J. QUINNEY COLL. OF L. (Nov. 9, 2015), <https://law.utah.edu/through-bears-ears-tribes-lead-the-way-for-true-collaboration-over-utahs-public-lands/> (“The Bears Ears Nat’l Monument proposal and indeed the Bears Ears Inter-Tribal Coalition itself, developed as a grassroots response to the Utah Public Lands Initiative—a multi-year, statewide stakeholder engagement process sponsored by Utah Representatives Rob Bishop and Jason Chaffetz with the elusive goal of reaching consensus regarding designation and management of public lands in Utah.”).

¹⁵³ Suagee, *supra* note 136 (“Five federally recognized Indian tribes[,]” the Hopi, Navajo, Uintah and Ouray Ute, Ute Mountain Ute, and Zuni, “have formed a coalition to seek presidential designation of a National Monument to protect the home of their ancestors.”). *See also* Wilkinson, *supra* note 10, at 325 (discussing the formation of the intertribal organization in which the board was composed of one member from each tribe, with a goal to write the proclamation proposal to present to Obama).

management proposal to President Obama, requesting that he proclaim 1.9 million acres of land surrounding Bears Ears as a national monument under the Antiquities Act.¹⁵⁴ The proposal called for collaborative management of the lands within the proclamation boundaries.¹⁵⁵ The tribes' proposed version of collaborative management would combine native traditional knowledge and culture with existing federal public land practices¹⁵⁶ and include more than just consultation with federal agencies—it would require long-term, active engagement by the tribes in managing the conservation of Bears Ears.¹⁵⁷

Under the collaborative management proposal, an administrative commission with eight members would oversee management of the monument.¹⁵⁸ The commission would have one person from each tribe in the coalition and one person from each of the three federal agencies with public lands in the proposed monument boundaries: the BLM, the U.S. Forest Service, and the National Park Service.¹⁵⁹ Through joint decision making, the commission would oversee the development of the governing management plan and formulate policy.¹⁶⁰

The Bears Ears coalition envisioned a framework that would fuse Western land management with tribal knowledge.¹⁶¹ Its proposal would integrate traditional knowledge with existing federal land management practices as a centerpiece of collaborative management, and a proposed institute would ensure the incorporation of traditional knowledge into Western science.¹⁶² A monument manager would report to the commission and oversee operational staff experienced in both traditional Native American values and knowledge as well as Western science and public land management.¹⁶³

¹⁵⁴ Utah Diné Bikéyah, *What is the Bears Ears Proposal*, <https://utahdinebikeyah.org/overview/> (last visited Apr. 13, 2021).

¹⁵⁵ Wilkinson, *supra* note 10, at 331.

¹⁵⁶ *Id.* at 319.

¹⁵⁷ *See, e.g.*, Bears Ears Proposal, *supra* note 27, at 22 (“The Agencies and the Tribes shall, from the beginning to the conclusion of *all plans and projects*, collaborate jointly on all procedures, decisions, and other activities. . . .”) (emphasis added).

¹⁵⁸ *Id.* at 29.

¹⁵⁹ Brady, *supra* note 152.

¹⁶⁰ Bears Ears Proposal, *supra* note 27, at 29–30 (“Th[e] Commission would be the policy making and planning body for the monument and would have supervisory authority over the Monument Manager.”).

¹⁶¹ *Id.* at 31.

¹⁶² *Id.* at 31–33 (discussing, for example, combining tribal oral history with archaeological findings and creating map art, fusing “culture, art, the natural world, and geography.”). *See also infra* text accompanying notes 269–76 (discussing how to achieve meaningful consultation through educating agencies on Indigenous and local knowledge).

¹⁶³ Bears Ears Proposal, *supra* note 27, at 29.

Collaborative management, as proposed, would replace the consultation required of federal agencies in similar contexts, such as under Clinton's E.O.s. While E.O.-based consultation often "becomes merely a box to be checked that allow[s] federal agencies to proceed on the projects which they prefer," the coalition's proposed framework would ensure long-term co-decision making through establishing the commission and monument manager.¹⁶⁴ In short, the intertribal coalition sought a deep fusion of Western and tribal practices to ensure management of the monument.

3. *Obama's Bears Ears Proclamation*

In December 2016, during the last weeks of his second term, President Obama proclaimed Bears Ears a National Monument.¹⁶⁵ The monument's boundaries fell short of what the tribes had proposed, preserving only 1.35 million acres.¹⁶⁶ However, Obama did create the Bears Ears Commission "to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historic knowledge."¹⁶⁷ The commission would have an elected representative from each of the five tribes, but no federal officials.¹⁶⁸ It would continuously partner with the federal agencies for general decision making, and the agencies would "carefully and fully consider integrating" the commission's knowledge and expertise.¹⁶⁹ The resulting management plan would codify a framework for ongoing meaningful engagement between the commission and the federal agencies.¹⁷⁰

The Obama proclamation set a high bar for what is possible for a government-to-government relationship, reflecting respect for tribal culture and Bears Ears' importance to the tribes.¹⁷¹ Like the Secretarial Order, the

¹⁶⁴ Wilkinson, *supra* note 10, at 326.

¹⁶⁵ Obama Proclamation, *supra* note 135.

¹⁶⁶ *Id.* at 1143.

¹⁶⁷ *Id.* at 1144.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1140 ("The area's cultural importance to Native American tribes continues to this day. As they have for generations, these tribes and their members come here for ceremonies and to visit sacred sites. . . . Traditions of hunting, fishing, gathering, and wood cutting are still practiced by tribal members. . . . The traditional ecological knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation . . . is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come."). *See also* Wilkinson, *supra* note 10, at 329 ("The Proclamation, which spans about ten pages single-spaced and

proclamation demonstrated that substantive results could ensue from the federal government developing a deep understanding of tribal culture and values. This cooperative process could create a meaningful role for tribal governments to contribute to the management of public lands, especially of resources that are culturally significant to the tribes.

Although the proclamation did not adopt every aspect of the coalition's proposal, the collaboration it outlined went well beyond what President Clinton's Executive Orders required. E.O. 13175 called for "regular and meaningful consultation," but gave federal agencies considerable discretion in fashioning that process.¹⁷² The Bears Ears management proposal would enable tribes to instruct federal agencies in how to engage them meaningfully. E.O. 13175 required only tribal summary impact statements detailing tribal concerns and describing the extent to which an agency addressed them.¹⁷³ The Obama proclamation, on the other hand, required agencies to provide a "written explanation of their reasoning" if they "decide[d] not to incorporate specific recommendations" submitted by the commission.¹⁷⁴ Thus, agencies could no longer merely list tribal concerns without actually addressing them before moving forward with a project.

Using tribal involvement to design a consultation framework is redolent of what the Nixon announcement called for in 1970 when it recognized that federal programs and funding would be more effective "if the people who are most affected by these programs are responsible for operating them."¹⁷⁵ By applying tribal knowledge of the culturally significant tribal lands and natural resources within Bears Ears, the federal government could further its responsibility to tribes and achieve a balanced relationship between the two governments.¹⁷⁶ The Bears Ears management scheme envisioned a genuine government-to-government relationship between sovereigns.

4. Trump, Biden, and the Future of Bears Ears

Within a year of Obama's proclamation, the Trump administration used the Antiquities Act to reduce Bears Ears' boundaries by more than eighty-five

is well worth reading from beginning to end, glows with respect for tribal culture, tribal experience, tribal expertise, and tribal knowledge. . . .").

¹⁷² Exec. Order 13,175, *supra* note 44 (requiring agencies to establish an "accountable process" that would provide tribal officials an opportunity to contribute "meaningful and timely" input).

¹⁷³ *Id.* § 5(b)(2)(B).

¹⁷⁴ Obama Proclamation, *supra* note 135, at 1144.

¹⁷⁵ Nixon Announcement, *supra* note 35. Using tribal involvement to instruct federal agencies in the most effective ways to engage them in decision making is also reminiscent of Nixon's 1970 announcement. *Id.*

¹⁷⁶ *Id.* at 2.

percent, splitting the remaining fifteen percent into two segments.¹⁷⁷ In early 2020, the Trump administration's Department of the Interior promulgated a management plan that would allow drilling, mining, and grazing on lands that the Administration had removed from protection.¹⁷⁸ Several groups representing the interests of the five tribes in the coalition filed lawsuits challenging this action.¹⁷⁹ But President Biden's January 21, 2021 E.O. 13990,¹⁸⁰ which directed the Secretary of the Interior to conduct a sixty-day review of the Trump administration's proclamation, stayed the litigation. The Biden review required consultation with the Attorney General, several other agency secretaries, and tribal governments to determine whether the Biden administration could restore the boundaries established by the Obama administration.¹⁸¹

In April 2021, the coalition reported that it had engaged in consultations with the Departments of the Interior and Agriculture,¹⁸² including a face-to-face meeting with Secretary of the Interior Deborah Haaland, the first Native American

¹⁷⁷ Trump Proclamation, *supra* note 142. See Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining 'the Public' in Public Land Law*, 48 ENV'T. L. 311, 322–29 (2018) (discussing the Bears Ears proclamation and the Trump diminishment); see also *Hopi Tribe v. Trump*, No. 1:17-cv-02590-TSC U.S. Dist. LEXIS 106244, at *14 (D.D.C. Mar. 20, 2019) (“Shortly [after Trump decreased the Bears Ears National Monument] . . . , Plaintiffs sued, alleging that President Trump’s Proclamation was not authorized by the [Antiquities] Act, and violates the United States Constitution.”). See also NARF, *Protecting Bears Ears*, *supra* note 87 (“President Trump’s action . . . to revoke and replace the Bears Ears National Monument attacks the five sovereign nations with deep ties to the Bears Ears region and violates the separation of powers enshrined in our Constitution” and it is “not legal to do so. Only Congress may alter a monument.”).

¹⁷⁸ See Michael Doyle & Jennifer Yachnin, *Biden’s legal team has done its Bears Ears homework*, E&E NEWS (Feb. 5, 2021), <https://www.eenews.net/stories/1063724513>.

¹⁷⁹ *Hopi Tribe*, 2019 U.S. Dist. LEXIS 106244 at *11 (Three cases were filed against the Trump diminishment, including *Hopi Tribe v. Trump*, No. 17-cv-2590 (TSC), *Utah Diné Bikéyah v. Trump*, No. 17-cv-2605 (TSC), and *Natural Resources Defense Council v. Trump*, No. 17-cv-2606 (TSC), which were consolidated before the federal district court in D.C.).

¹⁸⁰ Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021) (Biden Exec. Order 13,990, Protecting Public Health and Environment and Restoring Science to Tackle the Climate Crisis), § 3(a) [hereinafter Exec. Order 13,990].

¹⁸¹ *Id.* (directing the Secretary of the Interior to “conduct a review of the monument boundaries and conditions that were established by [Trump’s proclamation],” in consultation with the Attorney General, the Secretaries of Agriculture and Commerce, the Chair of the Council on Environmental Quality, and Tribal governments).

¹⁸² Bears Ears Inter-Tribal Coal., *Our Request Stands: Prompt Action is Needed to Restore Protections for Bears Ears*, (Mar. 17, 2021), <https://bearscoalition.org/protections-need-to-be-quickly-restored-to-protect-bears-ears/>.

cabinet secretary.¹⁸³ Results of the consultations presumably will flow from the reestablishment of the Bears Ears Commission and the co-management framework, either as proposed by the coalition or as proclaimed by President Obama.

The coalition urged Secretary Haaland to recommend that Biden reestablish the monument at the originally proposed 1.9 million acres and, in the interest of expediency, advocated for executive branch action (rather than legislative).¹⁸⁴ Executive action restoring or enlarging the monument as proclaimed by Obama, however, may invite litigation from the monument's opponents, who maintain that the Obama-era monument was too large, and who may be encouraged by a recent statement from Chief Justice John Roberts questioning the scope of presidential authority under the Antiquities Act.¹⁸⁵ Nonetheless, Secretary Haaland has signaled that the Executive Branch will move forward with Biden's directive to determine whether it can restore the boundaries.¹⁸⁶

C. *The Chaco Canyon Oil and Gas Leases*

Chaco Canyon, much of which is part of Chaco Culture National Historical Park, and the surrounding land in the San Juan Basin in northwestern New Mexico, supported a sprawling mecca of Native American life for hundreds of years. The sites remain important to the Navajo Nation and more than twenty Pueblo tribes.¹⁸⁷ Culturally significant tribal sites in the basin are at risk from

¹⁸³ See Jennifer Yachnin, *Haaland's Utah Trip beset by Bears Ears lobbying*, E&E NEWS (Apr. 8, 2021); see also *Secretary Deb Haaland*, U.S. DEP'T. OF THE INTERIOR, <https://www.doi.gov/secretary-deb-haaland> (last visited Apr. 13, 2021).

¹⁸⁴ See Yachnin, *supra* note 183. See also Jennifer Yachnin, *Tribal leaders: Bears Ears Can't Wait for Legislative Fix*, E&E NEWS (Apr. 21, 2021) [hereinafter Yachnin, *Legislative Fix*].

¹⁸⁵ Utah's governor "warned . . . that his state could file its own legal challenge if Biden opts to restore the monument ahead of congressional action." Yachnin, *Legislative Fix*, *supra* note 184. Governor Cox argued that "the Antiquities Act provides a limit on the size" of protected sites, and Chief Justice Roberts "recently appeared to invite new challenges to the law," in a statement "question[ing] whether presidents ignored language in the Antiquities Act" that monuments should be as small as possible to protect the relevant objects. *Id.* See also Jennifer Yachnin, *Chief Justice Roberts invites Antiquities Act challenges*, E&E NEWS (Mar. 24, 2021) ("Chief Justice John Roberts this week openly urged opponents of sprawling national monuments to continue their legal fight, suggesting the Supreme Court may be eager to take a fresh look at precedent.").

¹⁸⁶ See Exec. Order 13,990, *supra* note 180.

¹⁸⁷ See Jonathon Thompson, *Drilling Chaco: What's Actually at Stake*, HIGH COUNTRY NEWS (Apr. 13, 2015) <https://www.hcn.org/articles/drilling-chaco-whats-really-at-stake> (describing Chaco Canyon as "the center of a larger society that extended hundreds

private companies seeking to drill for oil and gas. Tribes in the area allege that federal land managers with authority over oil and gas drilling have consistently failed to adequately consult them concerning management of Chaco Culture National Historical Park and the surrounding area.¹⁸⁸

1. Chaco Canyon's Resource Management Plan

A resource management plan (“RMP”) published by the BLM in 2003 authorized nearly 10,000 oil and gas wells in the San Juan Basin, of which about 4,000 have already been drilled.¹⁸⁹ The RMP, encompassing 4.2 million acres of land, including over 675,000 acres of Navajo Nation trust surface land and 210,000 acres of allotments held by individuals of the Navajo Nation,¹⁹⁰ governs land and resource management in the basin, including decision-making processes for oil and gas development.¹⁹¹ The BLM began the process of amending the 2003 RMP in 2014, and in 2016 the BLM and the Bureau of Indian Affairs¹⁹²

of miles beyond the canyon’s walls” to many historical sites “concentrated in the central San Juan Basin”). *See also* Arlyssa Becenti, *Feds proceed with Chaco drilling plan while tribes distracted by pandemic*, NAVAJO TIMES (June 4, 2020) <https://navajotimes.com/coronavirus-updates/feds-proceed-with-chaco-drilling-plan-while-tribes-distracted-by-pandemic/> (“The Navajo Nation is not the only tribe that has historical ties to Chaco Canyon . . . Pueblo tribes consider Chaco Canyon as their ancestral home. . .”).

¹⁸⁸ Thompson, *supra* note 187 (listing formally protected sites as Aztec and Salmon Ruins, and Chimney Rock, and describing the rest as a “prime target for oil and gas drillers”). Several structures, including Chaco Canyon and Pueblo Bonito, are protected from oil and gas drilling as part of the Chaco Culture National Historic Park; the surrounding areas are not. Oil and gas drilling adjacent to protected areas has negative effects regardless—drilling creates light and noise pollution. *See id.* (“Chaco Canyon, Pueblo Bonito and its sibling structures are all part of the Chaco Culture National Historic Park, and thus protected from oil and gas and other development (though drilling-related light and noise pollution are a legitimate and significant concern.”). *See also* Joey Keefe, *Groups Blast Trump Administration Plans for More Drilling at Chaco Canyon*, N.M. WILD (Sept. 26, 2020), <https://www.nmwild.org/2020/09/26/groups-blast-trump-administration-plans-for-more-drilling-at-chaco-canyon/> (quoting executive director of New Mexico Wild, who described the BLM’s “consultation” process during the pandemic as “shameful” and “compounding a tragic history of disrespect and broken trust”).

¹⁸⁹ *See* Thompson, *supra* note 187.

¹⁹⁰ *See* Becenti, *supra* note 187.

¹⁹¹ *See id.* (“The Draft RMPA/EIS provides a unified document that resource managers can use for land use management purposes. This planning effort will update management decisions such as oil and gas development, lands and realty, lands with wilderness characteristics, and vegetation.”).

¹⁹² U.S. Dept. of Interior, *Interior Department Announces Broader Plan to Review Management of Lands in Northwestern New Mexico* (Oct. 20, 2016), <https://www.doi.gov/pressreleases/interior-department-announces-broader-plan-review-management-lands-northwestern-new> [hereinafter DOI Press Release 2016] (explaining

announced a joint effort to analyze land management in the area for both public and tribal lands.¹⁹³

2. Consultation on the Management Plan Amendment

The BLM began the process of section 106 consultation under the NHPA because Chaco Canyon is a qualifying property under the National Register of Historic Places.¹⁹⁴ But when BLM began to amend the RMP in 2014, the agency failed to consider tribal lands,¹⁹⁵ even though the RMP governs almost 1 million acres of trust lands and tribal member-owned allotments.¹⁹⁶ In 2016, the BLM announced that, together with the Bureau of Indian Affairs, it would expand the RMP effort that was underway to address concerns related to resource development adjacent to Chaco Park.¹⁹⁷ The BLM began the 2016 RMP amendment consultation process by seeking public comments.¹⁹⁸ Between October 2016 and February 2017, the consultation consisted of meetings with interested stakeholders and public scoping meetings.¹⁹⁹

Meanwhile, the BLM continued to auction lease sales under the 2003 RMP, which was developed without adequate tribal consultation.²⁰⁰ Specifically,

the Bureau of Indian Affairs ("BIA") involvement, focused on "issues and concerns related to including BIA-managed mineral leasing and associated activities in the Environmental Impact Statement . . . which is being prepared as part of the [RMPA]".

¹⁹³ *Id.* ("For the first time, the [BLM] and the [BIA] . . . will jointly conduct an expanded analysis of management in the area that covers both public and tribal lands. . . . BIA's decision to join the BLM's planning effort as a co-lead reflects the complex land tenure around the park. . . . The joint effort . . . reflects the Department of Interior's emphasis on working with Native American leaders to provide expanded opportunities for integrating traditional knowledge and expertise in the management of public lands that have a special historical, cultural, or geographic connection with indigenous communities.").

¹⁹⁴ See *Diné Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031, 1051 (D.N.M. 2018) (explaining that "[a] historic property includes those in the 'National Register of Historic Places maintained by the Secretary of Interior.' Chaco Park fits that definition.") (internal citation omitted).

¹⁹⁵ DOI Press Release 2016, *supra* note 192 (announcing in 2016 an "effort to include tribal lands in the area" in the RMP development process, even though "BLM initiated a process to update its [RMP] . . . in 2014").

¹⁹⁶ See Becenti, *supra* note 187.

¹⁹⁷ DOI Press Release 2016, *supra* note 192.

¹⁹⁸ *Id.*

¹⁹⁹ See Rebecca Sobel, *Greater Chaco Coalition Responds to BLM's Broken Promises*, WILDEARTH GUARDIANS (Mar. 2, 2020), <https://wildearthguardians.org/press-releases/greater-chaco-coalition-responds-to-blms-broken-promises/>.

²⁰⁰ See *Greater Chaco Spared from Fracking Auction: Community Responds to Cancellation of Chaco Canyon Oil and Gas Lease Sale*, FRACK OFF CHACO (Mar. 2, 2018)

the BLM proposed to sell oil and gas leases for 4,500 acres of land for in March 2018.²⁰¹ The Greater Chaco Coalition—an ad hoc group formed by tribal, environmental, and local community groups—protested the lease auctions sale, claiming that tribal consultation was inadequate.²⁰² These protests caused the agency to cancel the sale, and the BLM acknowledged a failure to adequately survey the area for cultural resources.²⁰³

Even after announcing an expanded analysis in 2016 that was to include tribal lands, and in which the Department of the Interior touted its “commitment to ensuring that the region’s rich cultural and archaeological resources are protected,”²⁰⁴ the BLM consistently failed to directly engage tribes.²⁰⁵ After committing, in 2016, to working with Native American leaders and integrating traditional knowledge in the management of culturally significant tribal lands, and after admitting its failure in 2018 to consult with tribes when canceling the lease sale, the BLM released the draft RMP amendment in February 2019.²⁰⁶ The amendment’s “preferred alternative” approved over 3,050 new wells in the planning area—just thirty-three wells short of that proposed under the plan’s maximum development alternative.²⁰⁷

Tribes alleged that the BLM’s consultation for the RMP amendment draft again failed to directly engage with them. Public review began in February 2020, just days before New Mexico’s COVID-19 “stay-at-home” orders went into

<https://www.frackoffchaco.org/blog/chacospared> [hereinafter Greater Chaco Spared]. (“The [BLM] had planned to move forward with the leases based on an outdated [RMP] that was written before new fracking methods were feasible in the region, and without meaningful Tribal consultation or consent from Navajo Nation and Pueblos who consider Chaco sacred.”).

²⁰¹ *Id.*

²⁰² *See id.* (“Thousands of people have rallied in opposition to the lease sale, and 459 administrative protests were filed in opposition of the March auction, by far the most protests the state has ever received for an oil and gas lease sale. . . . The Navajo Nation and All Pueblo Council of Governors, National Congress of American Indians, 15 Navajo Chapter Houses, the New Mexico Legislature, and over 400,000 public citizens have requested a moratorium on drilling until health, cultural and environmental impacts can be analyzed.”).

²⁰³ *See Sobel, supra* note 199. *See also* Greater Chaco Spared, *supra* note 200 (explaining that the department canceled the leases in part because the sales were approved “without meaningful Tribal consultation or consent from Navajo Nation and Pueblos,” and that “[the bureau] announced the lease sale would be canceled until the agency can further consult with Tribes and local leaders”).

²⁰⁴ DOI Press Release 2016, *supra* note 192.

²⁰⁵ *See Sobel, supra* note 199.

²⁰⁶ *See id.*

²⁰⁷ *See id.* (noting that the BLM’s plan remained “squarely focused on facilitating more industrialized fracking and resource degradation”).

effect.²⁰⁸ Those orders meant that public meetings held in May 2020 would be virtual.²⁰⁹ The Navajo Nation and the Pueblos repeatedly requested that the BLM prolong the public process for the RMP amendment until there could be in-person, face-to-face consultation instead of virtual meetings.²¹⁰ In response, the BLM added “four additional ‘virtual’ open houses” in August 2020, during which no public comments became part of the official record.²¹¹

The Navajo tribe filed suit alleging that the BLM had failed to consult with tribes about the effects of issuing oil and gas leases near Chaco Culture National Historical Park and that the agency failed to analyze the indirect effects the wells would have on the park.²¹² The district court ruled that the BLM did not violate the NHPA, finding its analysis adequate for historic sites potentially affected by oil and gas drilling, since the park itself was not slated for leasing.²¹³ Employing what might be classified as “soft glance” review,²¹⁴ the court explained that it was “not tasked with determining if [the BLM] correctly decided whether an oil well . . . altered a historic site” under the NHPA, but merely

²⁰⁸ See *Greater Chaco Coalition Demands BLM Respect Tribes and Communities, Echoes Request to Postpone Drilling Plan*, FRACK OFF CHACO (Sept. 17, 2020), <https://www.frackoffchaco.org/blog/press-release-9-17-2020> [hereinafter *Coalition Demands BLM Respect*].

²⁰⁹ See Becenti, *supra* note 187 (noting that the regional bureau office “held five virtual public meetings May 14 to 18” that “weren’t ideal for tribal members who would be directly impacted by the proposed plan, either because many are without internet/broadband connection” or “were busy with community obligations” regarding COVID-19).

²¹⁰ *Letter from Daniel Tso, Chairman of the Navajo Nation Health, Educ. and Hum. Servs. Comm. to Tim Spisak, Dir. Of Bureau of Land Mgmt. N.M. State Off.* (Aug. 13, 2020), https://drive.google.com/file/d/1u_Zdp7ssxaDbfF0fcS6TmBw-AQoTIikx/view.

²¹¹ *Id.* (Daniel E. Tso, the Chairman of the Health, Education and Human Services Committee of the Navajo Nation, sent a letter on August 13, 2020, to the Bureau’s state office regarding a request to “immediately, and indefinitely, suspend” the RMPA process. He explained that “the Navajo Nation is still in the midst of an extreme human health emergency,” and the tribe could not be expected to engage in “meaningful consultation” because it could not be in person, and tribal members lacked internet access. He also requested translating into the Navajo language.) See also *Coalition Demands BLM Respect*, *supra* note 208 (“Adding insult to injury, [the agencies] hosted four additional ‘virtual open houses’ August 26–29[.]” during which “the agencies refused to make comments part of the official record, and chose not to broadcast or post these proceedings publicly despite receiving formal comments of protest from Navajo Nation and Pueblo community members and Tribal leadership.”).

²¹² *Diné Citizens Against Ruining Our Env’t*, 312 F. Supp. 3d at 1081.

²¹³ *Id.* at 1099.

²¹⁴ See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L. J. 1321, 1407 (2010) (explaining that a court using the “soft glance” standard for review gives agency decisions “considerable deference”).

whether the BLM “followed the proper procedures.”²¹⁵ Documentation supporting the “agency’s findings need not be a topic treatise or even an essay,” the court reasoned, but must provide only “some explanation.”²¹⁶ Consequently, the court held that the BLM did not violate the NHPA, a determination that the Tenth Circuit upheld in 2019.²¹⁷

Most tribes view the district court’s deference to the BLM’s consultation as an example of judicial box checking, illustrating a court’s willingness to rubber-stamp the BLM’s section 106 procedures. Tribes maintain that in both Chaco consultation processes, the BLM failed to engage in meaningful consultation with the Navajo Nation and the Pueblos. By failing to provide even cursory consultation, the BLM did not engage the tribes early in the decision-making process, as directed by the Clinton administration’s E.O. 13175.²¹⁸ When the BLM canceled the lease sale in 2018, it conceded that it had erroneously approved the sale despite tribal concerns about the proximity of the sales to Chaco Canyon and uncertainty concerning their effect on tribal cultural resources.²¹⁹ As of 2020, the BLM had conducted no new cultural resource studies.²²⁰

Tribes maintain that the BLM failed to provide meaningful consultation by refusing face-to-face interactions. The tribes lacked the funding and human resources to adequately participate in the RMP amendment because they were fighting the disproportionate effects of COVID-19 in their communities.²²¹ An agency cannot “ensure meaningful and timely input by tribal officials”, as

²¹⁵ *Diné Citizens Against Ruining Our Env’t*, 312 F. Supp. at 1100.

²¹⁶ *Id.* at 1101.

²¹⁷ *Id.* at 1109, *aff’d*, *Diné Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 850 (10th Cir. 2019).

²¹⁸ See Exec. Order 13,175, *supra* note 44 and accompanying text.

²¹⁹ See John R. Moses, *Zinke places Chaco Canyon Drilling leases on hold, pending cultural review*, FARMINGTON DAILY TIMES (Mar. 2, 2018), <https://www.daily-times.com/story/news/local/navajo-nation/2018/03/02/chaco-drilling-leases-hold-pending-zinke-cultural-review/389984002/> (quoting then-Secretary of the Interior, Ryan Zinke).

²²⁰ See Katie Pellicore, *Take Action to Defend Chaco from Oil and Gas Development*, SAN JUAN CITIZENS ALL. (Aug. 26, 2020), <https://www.sanjuancitizens.org/oil-and-gas/take-action-to-defend-chaco-from-oil-and-gas-development> (“Consultation with consulting parties and cooperating agencies (including tribes) remains incomplete under the [NHPA] and National Environmental Policy Act. Ethnographic studies and cultural resources analyses have not been conducted and documentation of consultation requirements stops in 2017 in the RMPA EIS in Chapter 4 in the Consultation and Coordination section.”).

²²¹ Becenti, *supra* note 187 (explaining that several tribes, like the Navajo, with “historical and cultural ties to Chaco Canyon” were struggling to deal with the pandemic, which disproportionately affected the tribes).

required by the Clinton 2000 executive order.²²² if the tribes lack the capacity to review the documents. While tribes responded to a health emergency, the BLM moved to quickly approve the amendment, authorizing nearly 3,000 new gas and oil wells.²²³

Tribes view the federal government's process during the oil and gas leases in Chaco Canyon not only as a failure to consult but as a display of disrespect, prioritizing the approval of oil wells over the health and interests of tribal members at disproportionate risk during a global pandemic.²²⁴ In March 2021, the Biden administration placed an indefinite moratorium on new oil and gas lease auctions,²²⁵ meaning that the 3,000 oil wells proposed under the latest RMP alternative²²⁶ cannot be sold—at least for now.

D. Copper Mining at Oak Flat

Chi'Chil Bildagoteel, or Oak Flat, Arizona, has been a culturally significant and sacred site to Western Apache tribes for thousands of years.²²⁷ But Congress approved a land exchange in a 2014 appropriation rider that would

²²² Exec. Order 13,175, *supra* note 44, § 5(a).

²²³ Becenti, *supra* note 187 (“BLM and other agencies decided to move forward with the public comment period and virtual meetings” although Vallo said the tribes “had requested to pause any public comment period because the tribe hadn’t reviewed thoroughly the draft RMPA” and didn’t have a chance to “regroup with other tribes and agencies to discuss” a covid-era process.)

²²⁴ See, e.g., Liz Mineo, *For Native Americans COVID-19 'Is the Worst of Both Worlds at the Same Time'*, HARVARD GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-covid-19-on-native-american-communities/> (“As of April 30[, 2020], the Navajo Nation had the third-highest per capita rate of COVID-19 in the country, after New Jersey and New York. Worsening the situation, Native Americans appear to have a higher risk of serious complications. . .”).

²²⁵ Donald McGahn II, Jeffery Schlegel, David Stringer, & Charles Wehland, *Biden Administration Announces Moratorium on New Federal Oil and Gas Leases*, JONES DAY (Mar. 24, 2021), <https://www.mondaq.com/unitedstates/oil-gas-electricity/1050810/biden-administration-announces-moratorium-on-new-federal-oil-and-gas-leases> (“The moratorium represents a step further than Secretarial Order No. 3395 issued by the acting [Interior] secretary . . . on January 20, 2021, which implemented a 60-day suspension of new oil and gas leasing and drilling permits for federal land and water. The moratorium will extend the duration of the temporary suspension . . . by an unknown amount of time.”).

²²⁶ In January 2021, the BLM listed the Chaco RMP amendment as “in progress,” after the extended public comment period ended on September 25, 2020. Bureau of Land Mgmt., *Farmington Mancos-Gallup RMP Amendment*, BLM NAT'L NEPA REGISTER, <https://eplanning.blm.gov/eplanning-ui/project/68107/510> (last visited Apr. 27, 2021).

²²⁷ *Congress Can Protect Sacred Oak Flat in Arizona from Mining Project*, SAN CARLOS APACHE TRIBE (Apr. 13, 2021) [hereinafter San Carlos Apache Tribe April Press Release] <http://www.chairmanterryrambler.org/congress-can-protect-oak-flat/>.

enable the Australian-owned company, Resolution Copper Mining, to establish a copper mine on a 2,422-acre parcel that included Oak Flat.²²⁸ In return, the company agreed to convey to the United States 5,344 acres of “equal value” land.²²⁹ The rider required that the land exchange not take place until the Forest Service issued a final Environmental Impact Statement (“EIS”) on the mine plan under the National Environmental Policy Act.²³⁰ The mining of Oak Flat would create a 1.8-mile-wide crater at least 800 feet deep.²³¹

1. Oak Flat Consultation

The land exchange rider directed the Secretary of Agriculture to “engage in government-to-government consultation” with the affected Indian tribes regarding “issues of concern.”²³² It appeared that section 106 consultation would be necessary as well because Oak Flat was listed on the National Register in 2016 as a “historic property of religious and cultural significance to multiple Apache tribes.”²³³ Nonetheless, the appropriation rider directed the Secretary of

²²⁸ Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 § 3003(c)(1), 128 Stat. 3733 (2014) [hereinafter FY2015 NDAA] (“Subject to the provisions of this section, if Resolution Copper offers to convey to the United States all right, title, and interest of Resolution Copper in and to the non-Federal land, the Secretary is authorized and directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land.”); *id.* § (b)(2) (defining the federal land at issue as “the approximately 2,422 acres of land located in Pinal County, Arizona”). The rider was sponsored by the late Senator John McCain (R-AZ).

²²⁹ *Letter from Rick Gonzalez, Vice Chairman of the Advisory Council on Historic Preservation, to Tom Vilsack, Secretary of Agriculture* (Mar. 29, 2021), VilsackResolutionCopperLTR20210329.pdf (achp.gov) [hereinafter ACHP Comment]. See also San Carlos Apache Tribe April Press Release, *supra* note 227 (describing the land exchange as a “travesty that occurred in 2014 when a last-minute, nongermane provision was inserted, without debate, into the annual [NDAA].”).

²³⁰ FY2015 NDAA, *supra* note 228, § 3003(c)(10) (“Not later than 60 days after the date of publication of the final environmental impact statement, the Secretary shall convey all right, title, and interest of the United States in and to the Federal land to Resolution Copper.”).

²³¹ ACHP Comment, *supra* note 229, at 1–2 (explaining that removing the copper ore from underneath Oak Flat “would result in a crater between 800 and 1,115 feet deep and roughly 1.8 miles across” and that removing Oak Flat from federal ownership would “eliminat[e] the mining restrictions . . . in place.”).

²³² FY2015 NDAA, *supra* note 228, § 3003(c)(3)(A).

²³³ *National Register Database and Research*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nationalregister/database-research.htm#table> (showing Chi’Chil Bildagoteel Historic District, listed March 4, 2016) (last visited Apr. 18, 2021). See also ACHP Comment, *supra* note 229, at 2 (“Early on in the consultation process, the [Tonto National Forest] determined that the undertaking would result in adverse effects to numerous identified historic properties, including the National Register of Historic Places-listed Chi’chil Bildagoteel Historic District, known also as Oak Flat.”).

Agriculture to exchange the land and facilitate the project.²³⁴ After the Secretary delegated the exchange and project to the Forest Service because Oak Flat was located on national forest land,²³⁵ the Service assumed responsibility for both the transfer of land and section 106 consultation.²³⁶

Section 106 consultation was unique for the Oak Flat exchange because the legislated nature of the land exchange constricted the consultation process.²³⁷ Since Congress required the Forest Service to exchange the 2,422-acre parcel with Resolution Copper Mining, the agency's reasonable alternatives to minimizing the project's adverse effects on historic properties were quite limited.²³⁸ The Forest Service could not, for example, choose a no-action alternative (normally required by the National Environmental Policy Act), nor could it alter the number of acres or location of land to exchange.²³⁹ Still, the rider required that the Secretary of Agriculture seek "mutually acceptable measures" in order to address the concerns of affected Indian tribes and to minimize the undertaking's adverse effects on the tribes.²⁴⁰

The Forest Service initiated consultation with tribes in 2015, a year after the legislation passed; however, consultations were not consistently characterized as section 106 consultations until 2017, when the agency began consulting with

²³⁴ FY2015 NDAA, *supra* note 228, § 3003(b)(8) (defining "Secretary" as the "Secretary of Agriculture"); *id.* § 3003(c)(1) (authorizing Secretary to exchange the land).

²³⁵ ACHP Comment, *supra* note 229, at 1.

²³⁶ *ACHP Issues Comments to USDA on Resolution Copper Project and Southeast Arizona Land Exchange*, ADVISORY COUNCIL ON HISTORIC PRES. (Mar. 29, 2021), <https://www.achp.gov/news/achp-issues-comments-usda-resolution-copper-project-and-southeast-arizona-land-exchange>. *See also* 3 TONTO NAT'L FOREST, USDA FOREST SERV., FINAL ENVIRONMENTAL IMPACT STATEMENT: RESOLUTION COPPER PROJECT AND LAND EXCHANGE 820 (2021) <https://www.resolutionmineeis.us/documents/final-eis> [hereinafter OAK FLAT FEIS] ("The Secretary of Agriculture authorized the Forest Supervisor, Tonto National Forest, to consult with Resolution Copper to seek mutually acceptable measures to address the concerns of the affected tribes and minimize the adverse effects from mining related activities on the conveyed lands.").

²³⁷ ACHP Comment, *supra* note 229, at 3.

²³⁸ *Id.* *See also* FY2015 NDAA, *supra* note 228, § 3003(b)(2) (describing the federal parcel as "2,422 acres of land. . ."). NEPA requires federal agencies to assess the environmental effects of their proposed actions before making decisions. *See, e.g., What is the National Environmental Policy Act?*, EPA, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Aug. 4, 2021). The assessment includes analyzing a range of reasonable alternatives, which "must be rigorously explored and objectively evaluated." *NEPA's Forty Most Asked Questions*, U.S. FISH AND WILDLIFE SERV., https://www.fws.gov/r9esnepa/NEPA_Handbook/40_Asked_Questions.pdf (last visited Aug. 4, 2021).

²³⁹ FY2015 NDAA, *supra* note 228, § 3003(b)(2) (defining the federal land at issue as a 2,422-acre parcel "depicted on the map entitled 'Southeast Arizona Land Exchange and Conservation Act of 2011–Federal Parcel–Oak Flat'").

²⁴⁰ *Id.* § 3003(c)(3)(B)(i)–(ii).

Arizona's State Historic Preservation Officer.²⁴¹ The Service determined in 2017 that the undertaking had a "very high potential to directly, adversely, and permanently affect numerous cultural artifacts, sacred seeps and springs, traditional ceremonial areas, resource-gathering localities, [and] burial locations."²⁴² This acknowledgement prompted the ACHP's involvement in the consultation between several tribes and other consulting parties.²⁴³ After the Forest Service identified historic properties, with the assistance of tribal monitors and tribal field visits,²⁴⁴ the agency drafted a programmatic agreement, including mitigation measures, plans for recovering data from those historic properties that would be destroyed, including at Oak Flat, and a system to continue identifying culturally significant historic properties as the undertaking proceeded.²⁴⁵

Several tribes described the consultation as inadequate and, after reviewing the section 106 process, the ACHP agreed.²⁴⁶ The ACHP concluded that even though the Forest Service initiated consultation early with tribes, its

²⁴¹ ACHP Comment, *supra* note 229, at 3. *See also* 36 C.F.R. § 800.2(c)(1)(i) ("The [State Historic Preservation Officer ("SHPO")] reflects the interests of the State and its citizens in the preservation of their cultural heritage[,] . . . [and] the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities. . . .").

²⁴² OAK FLAT FEIS, *supra* note 236, at 820.

²⁴³ ACHP Comment, *supra* note 229, at 3–4 ("Consultation has included the SHPO; the Fort McDowell Yavapai Nation, the Gila River Indian Community, the Hopi Tribe, the Mescalero Apache Tribe, the Pueblo of Zuni, the Salt River Pima-Maricopa Indian Community, the San Carlos Apache Tribe, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai-Apache Nation, the Yavapai-Prescott Indian Tribe, the Ak-Chin Indian Community, the Fort Sill Apache Tribe, the Pascua Yaqui Tribe, and the Tohono O'odham Nation; and other consulting parties, including Archaeology Southwest, Arizona Mining Reform Coalition, Boyce Thompson Arboretum, Inter Tribal Association of Arizona and others. . . .").

²⁴⁴ *Id.* at 2.

²⁴⁵ *Id.* at 4 ("These measures included treatment plans for data recovery efforts for the numerous historic properties that would be physically destroyed or damaged as part of the undertaking, including a specific plan for the Oak Flat Parcel."). The programmatic agreement also included mitigation measures "[b]ecause of the size and complexity of the undertaking and the scale of the adverse effects" and various off-site measures to mitigate for the destruction of culturally significant tribal lands. *Id.* ("[O]ff-site measures" included "mitigation funds that would support tribal initiatives, including cultural resources, education and youth programs; archaeological database funding; and development funds for historic properties in the local community.").

²⁴⁶ *Id.* at 5–6. The ACHP reviewed Tonto National Forest's section 106 consultation in 2020 at the request of Terry Rambler, the Chairman of the San Carlos Apache Tribe. *Id.* at 4. *See* 36 C.F.R. § 800.2(b) (explaining the ACHP's role in section 106—the ACHP "issues regulations to implement section 106, provides guidance and advice on the application" of the section 106 procedures, and "generally oversees the operation of the section 106 process.").

consultation efforts lacked transparency and were inconsistent.²⁴⁷ The agency's communications concerning the purposes of its consultation meetings, and who should attend them, were "irregular and erratic," and the section 106 process was often entangled with public outreach and other environmental review processes.²⁴⁸ The ACHP also determined that the proposed mitigation measures were "wholly inadequate" to alleviate the destruction that the undertaking would cause on the culturally significant properties.²⁴⁹ In December 2020, the ACHP recommended that the Forest Service proceed with section 106 consultation, suggesting that it still needed to summarize its responses to comments received on the programmatic agreement and explain to the consulting parties how it would respond to them.²⁵⁰

To tribes, the Oak Flat consultation is another example of agency box-checking. The agency checked the "early" box as required by E.O. 13175 and section 106.²⁵¹ But it failed to engage with tribes consistently or transparently. The Forest Service hired tribal monitors to identify tribal properties, thus checking the section 106 box requiring the agency to consult with tribes such that tribes can "advise on the identification and evaluation of historic properties."²⁵² But other than involving tribes in site identification, the Forest Service did little to give tribes an opportunity to meaningfully participate in the resolution of adverse

²⁴⁷ ACHP Comment, *supra* note 229, at 5. The ACHP determined that the Service "struggled to manage its consultation efforts," and that the Service's "records show the undertaking was not fully defined for Indian tribes at the outset of the Section 106 review process and that the agency's early outreach efforts to tribes often lacked transparency and consistency." *Id.* The Service also "inconsistent[ly] manage[d] the pace of consultation," *id.*, the Service's "communication on the purpose of, and audience for, consultation meetings was often irregular and erratic," and "[t]here was a general lack of clarity delineating the section 106 consultation from the NEPA review process and public outreach." *Id.* at 6.

²⁴⁸ *Id.* ("There was a general lack of clarity delineating the Section 106 consultation from the NEPA review process and public outreach.").

²⁴⁹ *Id.* at 5 ("While the ACHP routinely advises agencies to seek creative ways to mitigate adverse effects where possible, it finds the mitigation measures within the [programmatic agreement] to be wholly inadequate in light of the magnitude of adverse effects to this and other historic properties of such significance to numerous Indian tribes.").

²⁵⁰ *Id.* at 4.

²⁵¹ Exec. Order 13,175, *supra* note 44, (requiring consultation "early in the process of developing the proposed regulation"); 36 C.F.R. § 800.1(c) (stating that the "agency official shall ensure that the section 106 process is initiated early in the undertaking's planning").

²⁵² 36 C.F.R. § 800.2(c)(2)(ii)(A). *See also* Mark Ingersoll Letter, *supra* note 2, at 11, 18 (explaining that tribal surveyors are superior to private because conflicts of interest sometimes arise when agencies contract out survey work to private archaeologists, who can be project beneficiaries, or who "may not be able to identify Tribal resources for lack of training or familiarity with sites and resources.").

effects, as required under section 106.²⁵³ After monitors identified more than 500 additional sites eligible for listing or in need of further evaluation,²⁵⁴ the agency made no changes to its consultation schedule to enable evaluation of these sites. Although a substantive aspect of consultation occurred with the tribal identification of culturally significant properties, consultation ultimately fell short of producing substantive results because the agency ignored the new information.

When the ACHP concluded its review in December 2020, it recommended that section 106 consultation continue because the “historic significance of Oak Flat cannot be overstated and neither can the enormity” of the undertaking’s adverse effects on this property.²⁵⁵ Two weeks after receiving the ACHP’s recommendation to continue section 106 consultations,²⁵⁶ the Forest Service issued a 2,708-page final EIS (“FEIS”)—despite failing to address hundreds of outstanding site reviews—which started the sixty-day land exchange timeline mandated by Congress.²⁵⁷ The ACHP consequently terminated consultation under section 106, citing “failure to resolve adverse effects.”²⁵⁸ Despite the lack of meaningful consultation, the FEIS concluded that “[a]dverse impacts on historic properties would be avoided, minimized, or mitigated through the section 106” consultation—the same consultation process that the Forest Service limited to sixty days.²⁵⁹

2. The Fate of Oak Flat

In March 2021, in response to President Biden’s memorandum on tribal consultation,²⁶⁰ the Secretary of Agriculture directed the Forest Service to

²⁵³ § 800.2(c)(2)(ii)(A).

²⁵⁴ ACHP Comment, *supra* note 229, at 3.

²⁵⁵ *Id.* at 5.

²⁵⁶ *See id.* (“On December 15, 2020, the ACHP provided its observations and recommendations to the [service] on how to continue moving the Section 106 consultation process forward.”).

²⁵⁷ OAK FLAT FEIS, *supra* note 236, at 820.

²⁵⁸ *See* 36 C.F.R. § 800.7(a)(4); ACHP Comment, *supra* note 229, at 4.

²⁵⁹ OAK FLAT FEIS, *supra* note 236, at 824. *See also* Annette McGivney, *Biden Administration Pauses Transfer of Holy Native American Land to Mining Firm*, GUARDIAN (Mar. 2, 2021), <https://www.theguardian.com/environment/2021/mar/02/arizona-oak-flat-biden-administration-pauses-transfer-native-american-site-mining-resolution-copper> (“Parts of the handover had been rushed to completion in the waning days of the Trump administration, in an effort to give Resolution Copper control over Arizona’s Oak Flat region before or soon after Trump left office.”).

²⁶⁰ *See* Biden’s Consultation Memo, *supra* note 21 (“This memorandum reaffirms the policy announced in” Clinton’s Exec. Order 13,175; “[t]ribal consultation under this order strengthens the Nation-to-Nation relationship between the United States and Tribal

withdraw its FEIS pending further consultation, thereby pausing the sixty-day clock.²⁶¹ The agency stated that “additional time is necessary to understand concerns raised by the Tribes . . . and the project’s impacts to these important resources,” which could take “several months.”²⁶² Thus, the renewed consultation may elevate the substantive aspect of consultation—tribal identification of places—into a result if any of the 500 potential listing sites require section 106 consultation, and the Forest Service enables tribal participation in the resolution of adverse effects on these properties. The Secretary of Agriculture is to issue another EIS to un-pause the tolled sixty-day clock,²⁶³ but must first “take into account” the ACHP’s recommendation for legislative action to stop the land exchange.²⁶⁴ The Secretary must provide a “rationale for the decision and evidence” that it considered the Council’s comments if it issues another FEIS and moves forward with the undertaking.²⁶⁵ The Secretary can, of course, comply with section 106 and still proceed with the exchange. However, even if the Secretary agrees with the ACHP and tries to work with Congress to amend or repeal the rider, it does not mean that Congress will act.

Aside from the ACHP, momentum is building for congressional action via the Save Oak Flat Act, which would repeal the National Defense

Nations,” and “after consultation by the agency with Tribal Nations and Tribal officials,” agencies must submit implementation plans for the policy directives in Exec. Order 13,175.).

²⁶¹ *Resolution Copper and Land Exchange Environmental Impact Statement, Project Update*, USDA (as of Mar. 1, 2021), <https://www.resolutionmineeis.us/> (discussing the rescinded FEIS and explaining that “[t]he recent Presidential Memorandum on tribal consultation and strengthening nation to nation relationships counsels in favor of ensuring the Forest Service has complied with the environmental, cultural, and archaeological analyses required.”). *See also* San Carlos Apache Tribe April Press Release, *supra* note 227 (noting that the Forest Service withdrew the FEIS, halting the land swap, and that Forest Service officials credited the move in part to Biden’s memorandum regarding tribal consultation and strengthening nation-to-nation relationships).

²⁶² McGivney, *supra* note 259.

²⁶³ The NDAA rider legislating the exchange and project dictates that a final EIS must be published for the 60-day clock to begin. Thus, since the FEIS was revoked, the agency must issue another final EIS to restart the clock. FY2015 NDAA, *supra* note 228, § 3003(c)(10) (“Not later than 60 days after the date of publication of the final environmental impact statement, the Secretary shall convey all right, title, and interest of the United States in and to the Federal land to Resolution Copper.”).

²⁶⁴ 36 C.F.R. § 800.7(c)(4). The ACHP concluded that congressional action “would provide the most complete and appropriate protection of Oak Flat” and other properties. *See* ACHP Comment, *supra* note 229, at 6 (“USDA should work with the Administration and Congress to take immediate steps to amend or repeal the legislation directing the transfer or otherwise prevent it from happening as proposed.”).

²⁶⁵ 36 C.F.R. § 800.7(c)(4).

Authorization Act rider that legislated the exchange and mining project.²⁶⁶ House Representative Raúl Grijalva (D-Ariz.) introduced a bill to do just that in March 2021, as he did in 2015, 2017, and 2019, although the House has never voted on any of these bills.²⁶⁷ The House Subcommittee for Indigenous Peoples of the United States held a hearing on April 13, 2021 to consider the proposed legislation.²⁶⁸

CONCLUSION

Federal agencies can technically meet the consultation requirements under the NHPA and government-to-government consultation prescribed in executive orders without actually consulting meaningfully with tribes. This does not mean that the federal government does not have an obligation to go above these bare minimum legal requirements. To fulfill its trust obligation to engage in a government-to-government relationship with tribes²⁶⁹ and “protect tribal rights to exist as self-governing entities,” the federal government must engage in meaningful consultation.²⁷⁰ Incorporating the essential elements of meaningful consultation is necessary for a government-to-government relationship between sovereigns. A partnership in which the federal government treats tribes as respected sovereigns cannot exist if federal agencies leave tribes out of the decision-making processes that affect their culturally significant lands and natural

²⁶⁶ Save Oak Flat Act, H.R. 1884, 117th Cong. (2021). *See also* Madeleine Carey, *Ask Congress to Support the Save Oak Flat Act*, WILDEARTH GUARDIANS (Apr. 24, 2021), <https://wildearthguardians.org/brave-new-wild/opinion/ask-congress-to-support-the-save-oak-flat-act/> (encouraging the public to write their members of Congress in support of the Act).

²⁶⁷ Sahar Akbarzai, *Arizona Democrat Reintroduces Bill to Protect Sacred Apache Site from Planned Copper Mine*, CNN (Mar. 18, 2021), <https://www.cnn.com/2021/03/18/politics/oak-flat-copper-mine-legislation/index.html>.

²⁶⁸ *Legislative Hearing on Save Oak Flat Act*, NAT. RES. COMM. (Apr. 13, 2021), <https://naturalresources.house.gov/hearings/legislative-hearing-on-save-oak-flat-act>; *See also* Save Oak Flat Act, H.R. 1884, 117th Cong. (2021).

²⁶⁹ *See* Mark Ingersoll Letter, *supra* note 2, at 3 (discussing FERC’s failure to adhere to its federal trust responsibility).

²⁷⁰ *See* COHEN TREATISE, *supra* note 13. *See also* Wood, *supra* note 33, at 1472, 1500 (“This relation [between the Cherokee Nation and the United States] was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting, as subjects, to the laws of a master.”) (quoting *Worcester v. Georgia*, 31 U.S. 515, 555 (1832)); Yachnin & Jacobs, *supra* note 7 (“We want [] consultations to be meaningful to put treaty rights and inherent rights where they should be, [to see] [t]hat federal agencies take that trust responsibility seriously.”) (quoting a letter from Shannon Wheeler, Chairman of the Nez Perce Tribe).

resources. When the federal government merely engages in “box-checking” consultation and proceeds to damage culturally significant tribal lands and resources, it is acting in a manner inconsistent with its trust obligation.

The case studies discussed in this Article expose the lengths to which tribes must go to ensure that the federal government adequately considers their interests. Even though some tribes succeeded in getting their voices heard, the legal, administrative, financial, and personnel resources required to do so are often beyond the means of most tribes. In the Bears Ears and Secretarial Order case studies discussed above, in which meaningful consultation was eventually achieved, the tribes shouldered the burden of making the federal agencies—which have a trust responsibility to protect tribal interests—understand the value and importance of their lands, cultures, and traditions. The Obama Administration’s Bears Ears proclamation rested on the proposition that the intertribal coalition and UDB prepared over many years, which described the cultural significance of Bears Ears.²⁷¹ Tribal negotiators for the Secretarial Order also dedicated substantial amounts of time to educating federal negotiators about tribal experiences and issues.²⁷² To require tribes to regularly perform this labor just to get a seat at the table is not sustainable for every consultation process.²⁷³

Even if the federal government did not have consultation obligations, the government’s best interests are served by meaningfully consulting with tribes in land and natural resource management decision making that affects properties with cultural importance to the tribes. At a minimum, federal agencies can avoid litigation and project delays that occur when tribes assert their rights, which were ignored as in the Oak Flat and Chaco Canyon case studies.²⁷⁴ Federal agencies have much to gain from understanding and incorporating unique tribal knowledge and expertise in land management, and thus so does the public. One way to help federal land managers gain this understanding would be to establish institutes to promote the use of “scientific knowledge, Indigenous knowledge, and local

²⁷¹ See Wilkinson, *supra* note 10, at 325 (describing the development for the monument proposal, beginning in July 2015, which included five “all-day” meetings and numerous proposal drafts to ensure “that the Indian voice and Native culture [were] fully integrated into the document.”). See also *id.* at 323–24 (describing tribal efforts beginning in 2010 to develop the Bears Ears cultural map, including a “substantial research campaign” to “determine what the boundaries of a national monument” would eventually be); Yachnin, *Legislative Fix*, *supra* note 184 (“Years of grassroots work and inter-tribal collaboration went into our original proposal to President Obama. . .”).

²⁷² See Wilkinson, *supra* note 1, at 1078–79.

²⁷³ See *id.* (explaining that the “wealth of information” coming from the “detailed education about tribal issues” arising out of consultation “came at a cost” because it was “enormously burdensome” and required “substantial amounts of time”).

²⁷⁴ See *id.* at 1075 (describing the proposed working relationship between tribal governments and federal agencies, and that this could “obviate or greatly diminish the need for legislation or litigation”).

knowledge” in management decision making, as suggested in the Bears Ears proposal.²⁷⁵ These institutes could provide access to tribal knowledge needed to ensure meaningful tribal participation in federal decision making. In the words of Russell Attebery, Chairman of the Karuk Tribe, “nobody knows Indian country like the people who live there.”²⁷⁶

²⁷⁵ See Bears Ears Proposal, *supra* note 27, at 31 (suggesting an institute which would focus on “Traditional Knowledge” combined with “western science”). See also Betsy Baker, *Smart as SILK: An Innovative Advisory Body for Implementing the Knowledge-based Requirements of the Central Arctic Ocean Fisheries Agreement*, WILSON CTR.: POLAR INST. (Apr. 2021) <https://www.wilsoncenter.org/publication/polar-perspectives-no-4-smart-silk-innovative-advisory-body-implementing-knowledge> (proposing the “SILK committee,” “a design and working title” for the “type of body that will assist” signatories in carrying out their obligation to “take into account Indigenous knowledge and local knowledge as well as the best available scientific information when making implementing decisions” under the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018)).

²⁷⁶ See Oregon Humanities, *A Conversation on the History and Future of Settlement and Water Use in the Klamath Basin*, YOUTUBE (Mar. 15, 2021), <https://www.youtube.com/watch?v=rzmo2qYSgG0> (Russel Attebery at 15:54, discussing meaningful consultation).