

TOWARD GENUINE TRIBAL CONSULTATION IN THE 21ST CENTURY

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The federal government's duty to consult with Indian tribes has been the subject of numerous executive orders and directives from past and current U.S. Presidents, which have, in turn, resulted in the proliferation of agency-specific consultation policies. However, there is still no agreement regarding the fundamental components of the consultation duty. When does the consultation duty arise? And what does it require of the federal government?

The answers to these questions lie in the realization that the tribal consultation duty arises from the common law trust responsibility to Indian tribes, which compels the United States to protect tribal sovereignty and tribal resources, as well as to provide certain services to tribal members. In that respect, the federal government's duty to consult with Indian tribes has a unique foundation that distinguishes it from decisions to consult with State governments or encourage public participation through the Administrative Procedures Act.

This Article argues that the duty to consult with Indian tribes is properly viewed as a procedural component of the trust responsibility. It further argues that a more robust, judicially enforceable consultation requirement would be the most effective way to ensure that the federal government fulfills the substantive components of its trust responsibility to Indian tribes, while avoiding the difficult line-drawing that would be inherent in direct enforcement of those components. In this way, the consultation duty could become a powerful tool to ensure that federal agencies know and consider the impacts their actions will have on Indian people, before those actions are taken.

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INTRODUCTION

One of the foundational principles of Indian law is that the federal government has a trust responsibility to Indian tribes. This doctrine has its origin in *Cherokee Nation v. Georgia*, where Chief Justice John Marshall described Indian tribes as being “in a state of pupilage” with “[t]heir relation to the United States resembl[ing] that of a ward to his guardian.”¹ The contours of this trust responsibility, however, have changed dramatically over the past 180 years. In the late 1800s, the trust responsibility was used to justify congressional plenary power over Indian affairs.² Today, it imposes certain substantive duties on the federal government, including the duty to provide services to tribal members (e.g., healthcare and education),

1. 30 U.S. 1, 17 (1831).

2. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Kagama*, 118 U.S. 375, 383–84 (1886).

the duty to protect tribal sovereignty, and the duty to protect tribal resources.³ A robust body of scholarship has already addressed many issues surrounding these substantive components.⁴

Interestingly, an important procedural component of the trust responsibility—the federal duty to consult with Indian tribes—has been virtually ignored by scholars. This consultation duty is necessary to effectuate the substantive components of the trust responsibility. For instance, without consultation, the federal government might not know the locations of Indian sacred sites; therefore, a federally approved pipeline project could inadvertently destroy those sites⁵ in violation of the federal government’s duty to protect tribal resources. Similarly, without consultation, federal officials may not know whether diabetes-prevention or smoking-cessation efforts are most needed in a particular tribal community, making it impossible to fulfill the government’s duty to provide services given the resource constraints imposed by Congress.

The importance of this procedural right to consultation has been recognized by both the legislative and executive branches in recent years. Congress has passed several statutes that explicitly require federal agencies to consult with Indian tribes.⁶ Presidents William Clinton, George W. Bush, and Barack Obama have issued executive orders and memoranda that require executive branch agencies to

3. See *infra* Part I.C.

4. Most of the scholarly debate has focused on whether, in an era that encourages tribal self-determination, the federal government should still be “protecting” tribal resources by exercising approval authority over an Indian tribe’s resource management decisions. See, e.g., Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993) [hereinafter Clinton, *Legacy of Conquest*]; Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317 (2006); Stacey L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439 (2006); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109.

5. See Carol Berry, *Pipeline Creates Tribal Dissent*, INDIAN COUNTRY TODAY (Sept. 27, 2010), <http://indiancountrytodaymedianetwork.com/ictarchives/2010/09/27/pipeline-creates-tribal-dissent-81747> (questioning the adequacy of consultation before federal government’s approval of the Ruby Pipeline Project, which destroyed sacred sites in Nevada and Oregon); Rob Capriccioso, *House Passes Keystone XL Pipeline Provision*, INDIAN COUNTRY TODAY (Dec. 14, 2011), <http://indiancountrytodaymedianetwork.com/2011/12/14/house-passes-keystone-xl-pipeline-provision-67568> (“The Obama administration decided last month to delay approval of the [Keystone] pipeline after vast protests from Indians and others who said the project would harm public health as well as endanger tribal culture and lands. Tribes have also expressed concern over lack of consultation.”).

6. See *infra* Part II.A.2.

consult with Indian tribes.⁷ Finally, federal agencies have promulgated regulations and crafted policies and procedures that recognize the right to federal-tribal consultation.⁸

Despite all of this activity, there is no consensus regarding the nature of the components of the consultation duty. In fact, federal agencies even have differing views about what “consultation” means.⁹ Does it simply require notification of and the ability to comment on any federal actions that may impact tribes? Or does it require meaningful dialogue between federal and tribal officials? This article highlights current inconsistencies in the interpretation and application of the consultation duty. It then provides suggestions for changes that can be implemented by the legislative, executive, or judicial branches.

In Part I, we provide a brief overview of the development of the trust responsibility and explain how it came to include three substantive duties: to provide services to tribal members, to protect tribal sovereignty, and to protect tribal resources. In Part II, we offer the first detailed explanation of how the procedural duty to consult with Indian tribes developed from the trust responsibility, and discuss recent attempts by the Obama Administration to reform the federal government’s consultation duty. In Part III, we analyze the consultation policies that have been developed by federal agencies. In doing so, we identify four flaws that have prevented these policies from being truly effective—namely, a lack of enforceability, specificity, uniformity, and substantive constraints. Finally, in Part IV, we present our proposal for reforming the consultation duty through legislation and offer suggestions that can be implemented by the judicial and executive branches before such legislative changes are enacted.

I. THE FEDERAL TRUST RESPONSIBILITY

During treaty negotiations and informal meetings with federal officials in the eighteenth and nineteenth centuries, Indian tribes often referred to the President of the United States as “the Great Father.” The Great Father metaphor was used to convey the Indians’ belief that the United States possessed familial-like obligations

7. See *infra* Parts II.A.3 & II.B.

8. See *infra* Part II.

9. See *infra* Part III.B.1.

to provide them with protection and economic support.¹⁰ Federal officials misinterpreted this metaphor, believing it to be an acknowledgement of white superiority and power.¹¹ In a series of cases spanning more than one hundred years, federal courts vacillated between these two disparate visions of the federal-tribal relationship before ultimately combining them into a doctrine that has been variously characterized as a guardian-ward relationship, a fiduciary relationship, or the federal trust responsibility.¹²

Today, the federal trust responsibility is part common law and part statutory law. It obligates¹³ the federal government to provide certain services to tribal members; it is the historical origin of congressional plenary power over Indian affairs;¹⁴ and it requires federal officials to protect tribal resources and tribal sovereignty.¹⁵ Because this trust responsibility is the foundation of the federal government's consultation duty to Indian tribes,¹⁶ a brief summary of its development follows.

A. *The Cherokee Cases: A Sovereign-Protectorate Relationship*

The federal trust responsibility began as a creature of common law, and was first articulated by Chief Justice John Marshall in his

10. Indian tribes commonly used familial terms as metaphors to describe the relationships they had with other tribes. For example, the Lenni Lenape (Delaware) tribe was referred to as "grandfather" by other Algonkian tribes, a term of great respect that was given in recognition of the tribe's peacekeeping ability. C.A. WESLAGER, *THE DELAWARE INDIANS: A HISTORY* 8 (1972); see also Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 *BUFF. L. REV.* 805–08, nn.3–7 (1998) (noting that within the Haudenosaunee (Iroquois) Confederacy, the Mohawk, Onondaga, and Seneca were referred to as "Older Brother," while the Oneida and Cayuga were the "Younger Brothers").

11. See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 1–2 (5th ed. 2007); 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* xxviii (1984).

12. See, e.g., *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473–74, 477 (2003) (variously describing the federal government's obligation to tribes as a "fiduciary duty," "fiduciary relationship," and "trust relationship"); *Seminole Nation v. United States*, 316 U.S. 286, 295–98 (1942) (casting the federal government's relationship with tribes as a "fiduciary duty," "fiduciary obligation," and "distinctive obligation of trust"); *United States v. Kagama*, 118 U.S. 375, 383 (1886) ("Indian tribes are the wards of the nation.").

13. This is not to say that the "obligations" under the trust responsibility are rigid. Although the federal government is legally obligated to adhere to its responsibility, it also defines the obligations that comprise the responsibility.

14. See *infra* Part I.B.

15. See *infra* Part I.C.

16. See *infra* Part II.

1831 decision in *Cherokee Nation v. Georgia*.¹⁷ The Cherokee Nation filed suit under the original jurisdiction of the Supreme Court¹⁸ seeking to enjoin enforcement of certain recently enacted Georgia statutes.¹⁹ Those statutes purported to annul the laws of the Cherokee Nation, confiscate Cherokee lands guaranteed by treaties with the United States, and extend Georgia laws over all persons residing on those lands.²⁰

The Supreme Court did not reach the merits of the case, holding instead that it lacked original jurisdiction because the tribe was not a “foreign state” within the meaning of Article III of the U.S. Constitution.²¹ In reaching this decision, Chief Justice Marshall agreed with the Cherokees’ contention that they were a “state” in the sense of being “a distinct political society, separated from others, capable of managing its own affairs and governing itself.”²² After all, they had entered into several treaties with the United States, and these treaties, along with their implementing legislation, were an undeniable acknowledgment of Cherokee sovereignty.²³ Even so, the Court refused to characterize Indian tribes as “foreign.”²⁴

The Cherokee Nation argued that since they were a state composed of non-U.S. citizens, they must be a foreign state within the meaning of the Constitution.²⁵ While Marshall found this argument

17. 30 U.S. 1, 17 (1831). Chief Justice Marshall was likely influenced by the writings of Francisco de Vitoria, a Spanish cleric and professor of theology at the University of Salamanca, Spain. Unlike many during his time, Vitoria believed that Indians were entitled to the same rights enjoyed by other humans, and that Indian tribes were sovereign, self-governing entities. *See, e.g.,* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43–44 (1947) (“In the main, [our concepts of Indian title] are to be traced to Spanish origins, and particularly to doctrines developed by Francisco de Vitoria, the real founder of modern international law.”); Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L. J. 1, 11–14 (1942).

18. The Cherokee Nation could not have filed its lawsuit in the lower federal courts, because Congress did not extend federal question jurisdiction to those courts until 1875. *See* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. Additionally, the Nation could not have brought its lawsuit in Georgia courts because then-existing precedent provided that states possessed sovereign immunity in proceedings before their own courts, but not in federal court proceedings that involved a foreign nation. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 111–12 (5th ed. 2005); *see also* *Nevada v. Hall*, 440 U.S. 410, 414–15 (1979) (noting that under English common law, a sovereign possessed immunity from suits in its own courts, “but each petty lord was subject to suit in the courts of a higher lord” except for the King, for there was no higher court where he could be sued). The U.S. Supreme Court was therefore the Cherokee Nation’s only option.

19. *Cherokee Nation*, 30 U.S. at 15.

20. *Id.*

21. *Id.* at 20.

22. *Id.* at 16.

23. *Id.*

24. *Id.* at 20.

25. *Id.* at 16.

“imposing,”²⁶ he ultimately rejected it for three reasons. First, Indian lands were within the geographical limits of the United States.²⁷ Foreign nations recognized this, and any attempt to trade with Indian tribes would be considered an act of war.²⁸ Second, many Indian treaties, including treaties negotiated with the Cherokee Nation, acknowledged that Indian tribes were under the protection of and dependent on the United States government.²⁹ Third, the only mention of Indian tribes in the Constitution was in Article I, section 8, clause 3, which empowered Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Chief Justice Marshall was particularly swayed by the fact that this clause distinguished Indian tribes from foreign nations by name.³⁰

Rather than holding that the tribe constituted a separate foreign state, Marshall described the federal-tribal relationship as follows:

[Indian tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.³¹

He concluded that Indian tribes were “domestic dependent nations,”³² even while admitting that he was making a “peculiar and cardinal distinction [] which exist[s] no where else” in domestic or international law.³³

26. *Id.*

27. *Id.* at 17 (“[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations.”). In an earlier case, the Court had concluded that the doctrine of discovery vested title to lands in the discovering nation, which left the Indian inhabitants with only aboriginal occupancy rights. *Johnson v. McIntosh*, 21 U.S. 543, 574 (1823). Following the American Revolution, the United States became the successor in interest to the titles that England had acquired as a discovering nation, placing Indian lands within the geographical boundaries of the United States. *See id.* at 584–85.

28. *Cherokee Nation*, 30 U.S. at 17–18.

29. *Id.* For example, Article III of the Treaty of Hopewell states that “[t]he said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever.” Treaty of Hopewell, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18.

30. *Cherokee Nation*, 30 U.S. at 18–19.

31. *Id.* at 17.

32. *Id.*

33. *Id.* at 16.

Despite the fact that only one other Justice joined Chief Justice Marshall's opinion in *Cherokee Nation*,³⁴ a majority of the Court confirmed Marshall's vision of the federal-tribal relationship just one year later in *Worcester v. Georgia*.³⁵ In *Worcester*, the Court overturned the criminal convictions of two missionaries who had not obtained a license mandated by the State of Georgia for all persons residing in Cherokee Territory.³⁶ Writing for the Court, Chief Justice Marshall held the Georgia statute unlawful under the Supremacy Clause.³⁷

Marshall concluded that Indian tribes "had always been considered as distinct, independent political communities retaining their original natural rights."³⁸ To justify this assertion, he analyzed treaties between the United States and various Indian tribes (including the Cherokee Nation) and laws passed by Congress governing trade with tribes.³⁹ While many treaties acknowledged that tribes were under the protection of the United States, Marshall acknowledged that "[a] weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."⁴⁰ In fact, he compared the Cherokee's situation to tributary and feudal states in Europe, and he concluded by firmly stating that

[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.⁴¹

34. Chief Justice Marshall was joined only by Justice McLean; Justices Johnson and Baldwin concurred in the result, but believed that tribes possessed no sovereignty. Justice Thompson, joined by Justice Story, dissented, arguing that the Cherokee Nation was a foreign state. As a result, a majority of the Justices held that the Cherokee Nation was a state (Marshall, McLean, Thompson, and Story), but not a *foreign* state (Marshall, McLean, Johnson, and Baldwin). *Id.*

35. 31 U.S. 515 (1832).

36. *Id.* at 538–39.

37. *Id.* at 561–62.

38. *Id.* at 559.

39. *Id.* at 549–57.

40. *Id.* at 561; *see also id.* at 555 ("This relation 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.").

41. *Id.* at 561.

Cherokee Nation and *Worcester* have been the subject of much scholarly attention and have been interpreted in widely divergent ways.⁴² These two cases appear, however, to describe a federal-tribal relationship that is characterized by the existence of a sovereign and its protectorate.⁴³ The Court recognized that Indian tribes were “states” as that term is used in international law, and that they possessed exclusive sovereignty within their territory.⁴⁴ Their dependent status was actually a source of Indian rights.⁴⁵ The United States, according to the Court, had a duty to protect tribes from foreign nations, from U.S. states attempting to exert sovereignty over Indian country, and from U.S. citizens who wanted to take their land.⁴⁶

42. Many scholars have argued that *Cherokee Nation*, among other early cases, enshrined racism and colonialism in federal Indian law. See, e.g., Alex Tallchief Skibine, *Duro v. Reina and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 789–91 (1993); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 255–57. Yet others have pointed out that Court decisions in the late 1800s subverted the unique federal-tribal relationship that Marshall developed in his cases. See, e.g., William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 2–5 (1987); Clinton, *Legacy of Conquest*, *supra* note 4, at 110–25. Marshall’s construction, by contrast, was very protective of tribal sovereignty. See, e.g., Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 390–406 (1993).

43. See Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1219 & n.34, 1220 (1975); see also Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1498 & n.124 (characterizing the federal-tribal relationship articulated by Marshall as a “sovereign trusteeship”).

44. See *Worcester v. Georgia*, 31 U.S. 515, 547 (1832) (“[O]ur history furnishes no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances.”); *id.* at 557 (describing Indian tribes as “distinct political communities, having territorial boundaries, within which their authority is exclusive”).

45. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1167–68 n.328 (1995).

46. Marshall’s approach had seemingly been sanctioned by Congress in the Trade and Intercourse Acts, which prohibited non-Indians from entering Indian territories without permission, provided for the removal of intruders, and denied non-Indians and local governments the right to purchase Indian lands. See, e.g., Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of July 22, 1790, ch. 33, 1 Stat. 137. These Acts were all framed as prohibitions and restraints against non-Indians, not assertions of power over Indians. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790–1834*, at 48 (1962).

B. Kagama and Lone Wolf: *The Guardian-Ward Relationship*

The position of Indian tribes vis-à-vis the federal government changed dramatically in the fifty years following *Cherokee Nation* and *Worcester*. In the 1840s, Congress approved the annexation of Texas, a treaty with the British resulted in acquisition of the Oregon Territory, and the Mexican-American War ended with the United States' purchase of most of the Southwest in the Treaty of Guadalupe Hidalgo.⁴⁷ U.S. citizens flooded the west to settle this newly available land, destroying large numbers of bison and other game that tribes relied upon for sustenance.⁴⁸ Tribes were forced to cede more and more of their land to make way for settlers. With less territory and diminishing game, many tribes lost the ability to support themselves. As a result, treaty annuities became the primary means of Indian subsistence.⁴⁹

With the power and territory of Indian tribes diminished, many federal officials began viewing tribal sovereignty as a fiction created by the federal government to make land acquisitions easier.⁵⁰ In 1871, Congress put an end to treaty making with Indian tribes⁵¹ and

47. Act of Mar. 1, 1845, 5 Stat. 797 (annexing Texas to the United States); Act of Aug. 14, 1838, ch. 177, 9 Stat. 323 (organizing the Oregon Territory); Treaty with Great Britain, June 15, 1846, 9 Stat. 869; PRUCHA, *supra* note 11, at 316. The Oregon Territory encompassed an area that today includes the states of Washington, Oregon, Idaho, and parts of Montana and Wyoming. In the Treaty of Guadalupe Hidalgo, Mexico ceded an area that now includes all of California, Nevada and Utah, and portions of Arizona, New Mexico, Colorado, and Wyoming. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922.

48. PRUCHA, *supra* note 11, at 340.

49. For many tribes, if annuity payments were not made on time, tribal members faced starvation. *See, e.g.*, ROY W. MEYER, HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL 112-14 (1967) (noting that one of the causes of the Sioux Uprising of 1862 was the federal government's failure to provide timely treaty annuities, which led to starvation-like conditions for many Minnesota Dakota Indians).

50. For example, during the debate on an amendment to the Indian appropriations bill that effectively ended treaty making with Indian tribes, California Representative Sargent stated that Indians

are simply the wards of the Government, to whom we furnish means of existence, and not independent nations with whom we are to treat as our equals. Ought not that fact to be admitted? Has not the comedy of "treaties," "potentates," "nations," been played long enough? Is it not played out?

CONG. GLOBE, 41st Cong., 3d Sess. 765 (1871).

51. Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 566 ("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an [independent] nation, tribe, or power with whom the United States may contract by treaty."). This provision is of dubious constitutionality, because it is an attempt by the Legislature to circumscribe the treaty making power entrusted in the Executive Branch by the Constitution. Nevertheless, no President has negotiated a treaty with an Indian tribe since 1871.

instead began unilaterally enacting statutes to govern their “helpless” wards, who federal officials believed were incapable of managing their own affairs. A prime example of this new perspective towards Indian nations was Congress’s passage of a statute declaring all contracts with Indians or Indian tribes “relative to their lands” or “growing out of or in reference to [their] annuities” null and void unless they had been approved by both the Commissioner of Indian Affairs and the Secretary of the Interior.⁵²

It was against this backdrop that the U.S. Supreme Court decided *United States v. Kagama*.⁵³ In 1885, Congress passed the Major Crimes Act, a statute that applied federal criminal laws to certain serious crimes committed by and against Indians within Indian country.⁵⁴ Kagama, an Indian who was charged with murdering another Indian on the Hoopa Valley Reservation, argued that the Act was unconstitutional.⁵⁵ The Supreme Court agreed with Kagama’s contention that the Indian Commerce Clause did not authorize the creation and enforcement of federal criminal law on Indian reservations, but nonetheless sustained the constitutionality of the statute.⁵⁶

The *Kagama* decision reflects a significant shift in how the federal government perceived Indian tribes at the end of the nineteenth century. Abandoning Chief Justice Marshall’s characterization of tribes as “domestic dependent nations,” the *Kagama* Court now referred to tribes as “local dependent communities.”⁵⁷ This was not simply a change in vernacular. The Court now believed that Indian tribes did not possess sovereign authority. Therefore, the operative question was not whether Kagama’s tribe had the authority to prosecute the crime, but whether the federal or the state government

52. *Id.* at 570–71. This statute was passed to protect Indians from falling victim to fraudulent schemes. As Senator Davis told his colleagues, “[t]here are no Indians, as a tribe or as individuals, that are competent to protect themselves against the enterprise and the fraud and the robbery of the white man.” CONG. GLOBE, 41st Cong., 3d Sess. 1484 (1871). These statements were echoed by other senators who offered anecdotal evidence that Indian tribes were being tricked into promising a large percentage of their annuities to individuals who, although claiming to be able to assist them in presenting their grievances to Congress, were nothing more than frauds. *See id.* at 1484–86 (statements of Senators Corbett, Wilson, and Harlan).

53. 118 U.S. 375 (1886).

54. 18 U.S.C. § 1153 (2006). Before this statute, federal criminal laws had only extended to interracial crimes in Indian country. *See* Indian Country Crimes Act, Act of June 25, 1948, ch. 645, 62 Stat. 683, 757 (codified at 18 U.S.C. § 1152 (2006)).

55. *Kagama*, 118 U.S. at 376.

56. *Id.* at 378–79.

57. *Id.* at 382.

had authority to prosecute Indians for crimes committed within Indian country.⁵⁸

The Court concluded that the federal government possessed this power. It found support for this conclusion in the concept of the guardian-ward relationship:

It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States—Dependent largely for their daily food; Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.⁵⁹

Subsequent cases built upon the reasoning in *Kagama*. The most important was *Lone Wolf v. Hitchcock*,⁶⁰ in which the Court declared that the power derived from the guardian-ward relationship was “plenary,” and that its exercise produced a nonjusticiable political question.⁶¹ As a result, the Court upheld a statute that allotted the Kiowa and Comanche reservations to tribal members and sold the remaining “surplus” lands without the consent of three-quarters of those tribes’ adult male members—consent that an 1867 treaty between the United States and these tribes had required.⁶² The Court reasoned that the treaty could not operate to limit Congress’s authority to care for and protect Indian people.⁶³

After *Lone Wolf*, Congress immediately began to change the way that it dealt with Indian property. Commissioner of Indian Affairs William Jones⁶⁴ suggested that Congress dispose of Indian lands without even seeking tribal consent: “Supposing you were the guardian or ward of a child 8 or 10 years of age,” he told the House Indian Affairs Committee, “would you ask the consent of a child as

58. *See id.* at 379, 381–82.

59. *Id.* at 383–84.

60. 187 U.S. 553 (1903).

61. *Id.* at 565. In this context, the term “plenary” refers to a federal power that is “without subject-matter limitation.” Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 413, 418 (1988).

62. *See Lone Wolf*, 187 U.S. at 564.

63. *See id.*

64. Jones held the post of Commissioner of Indian Affairs from 1897 to 1905. FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920*, at 3 (2001).

to the investment of its funds? No; you would not.”⁶⁵ Congress followed Jones’ suggestion and, without even initiating negotiations, proceeded to adopt allotment statutes for many Indian reservations.⁶⁶

Congress was even more aggressive when it came to Indian timber and mineral resources. Federal officials believed that Indians, like “all primitive peoples,” were “grossly wasteful of their natural resources.”⁶⁷ To remedy this problem, in 1910 Congress gave the Secretary of the Interior the discretionary authority to dispose of trees on trust lands without obtaining the consent of the Indian tribe or individual allottee on whose lands the trees grew.⁶⁸ Likewise, Congress authorized the Secretary of the Interior to unilaterally issue leases for mining gold, silver, copper, and other minerals on tribal lands in nine Western states.⁶⁹

Thus, the guardian-ward relationship that had protected tribal sovereignty and territorial boundaries in *Cherokee Nation* and *Worcester* was now significantly recast. Whereas Indian dependency had been a source of Indian rights in *Worcester*, it was now the source of unlimited federal power. All three branches of the federal government emphasized that Indians were uncivilized and incompetent. Indians were dependent on the federal government for food and shelter. The federal government purported to have the power and duty to protect Indian people not only from outsiders, but from themselves.

C. The Modern Trust Responsibility

Due in large part to changes in congressional policy, the trust responsibility has undergone yet another transformation in the century after *Lone Wolf*. In 1934, Congress passed the Indian Reorganization Act (IRA),⁷⁰ which abandoned the federal policy of forced assimilation and allotment, encouraged Indian tribes to reassert

65. *Id.* at 155.

66. Congress allotted, among others, the Crow and Flathead Reservations in Montana, the Spirit Lake Reservation in North Dakota, and the Wind River Reservation in Wyoming in this manner. *Id.* at 156–57.

67. *Id.* at 167–68.

68. Act of June 25, 1910, ch. 431, § 7, 36 Stat. 855, 857; see also HOXIE, *supra* note 64, at 185.

69. Act of Dec. 16, 1926, ch. 12, 44 Stat. 922, 922–23; Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 31–34.

70. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2006)).

their sovereignty through the formation of constitutional governments, and sought “to get away from the bureaucratic control of the Indian Department . . . [by giving] the Indians control over their own affairs.”⁷¹ While the latter goal was not achieved by the IRA, it has become the principal aim of federal policy over the past four decades.

In 1970, in a special message to Congress, President Nixon acknowledged that the federal government’s previous attempts to forcibly terminate Indian tribes and assimilate tribal members had been wrong.⁷² He suggested that Congress finally repudiate this policy and, in its place, adopt a legislative program within which the “Indian future is determined by Indian acts and Indian decisions.”⁷³ While Nixon was certainly not the first federal official or even the first President to express these sentiments, Congress was finally ready to listen.⁷⁴ The era of tribal self-determination was thus born, and Congress began enacting legislation that turned the governance of Indian reservations over to Indian tribes.⁷⁵

During this era, Congress has attempted to marry tribal self-determination and the federal trust responsibility, despite the inherent conflicts between these doctrines. Today, the modified trust responsibility contains at least three different duties: (1) to provide federal services to tribal members; (2) to protect tribal sovereignty; and (3) to protect tribal resources.

Duty to Provide Services: The trust responsibility is the source of a federal duty to provide governmental services to tribal members such as health care and educational benefits.⁷⁶ Indian land cessions

71. 78 CONG. REC. 11,125 (1934) (statement of Sen. Wheeler).

72. Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970), in DOCUMENTS OF UNITED STATES INDIAN POLICY 256, 257 (Francis Paul Prucha ed., 2000).

73. *Id.*

74. See Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 787–93 (2006) (concluding that President Johnson’s War on Poverty was the unintended birthplace of the tribal self-determination movement); see also Lyndon B. Johnson, Special Message to Congress (Mar. 6, 1968), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 249, 249 (Francis Paul Prucha ed., 2000) (“I propose a new goal for our Indian problems: A goal that ends the old debate about ‘termination’ of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help.”).

75. See, e.g., *infra* note 80.

76. Just as the duty of protection began as an explicit treaty right for some tribes that was extrapolated to all tribes as part of the general common law trust responsibility, the same holds true for the duty to provide services. For example, an 1803 treaty with the Kaskaskia Indians provided that “[t]he United States will take the Kaskaskia tribe *under their immediate care and patronage*, and will afford them a protection as effectual against the other Indian tribes and against all other persons whatever as is enjoyed by their own citizens.” Treaty with the Kaskaskia art. II, August 7, 1803, Stat. 78 (emphasis added). Other treaties provided that money annuities or goods would be provided in perpetuity to the signatory tribes. See, e.g.,

enabled significant growth and development in the United States, yet they diminished the ability of Indian tribes to continue their traditional way of life. Some amount of federal care for tribal members can therefore be implied in this exchange.⁷⁷ While no court has ever enforced this obligation,⁷⁸ Congress has implicitly and explicitly recognized it through the passage of several statutes that require that money and services be provided to Indian tribes.⁷⁹ As part of the federal government's move towards self-determination, Congress has transferred a substantial amount of control over the administration of these services to Indian tribes.⁸⁰

Duty to Protect Tribal Sovereignty: Early Supreme Court cases that defined the contours of the federal-tribal relationship underscore an important facet of the trust responsibility: In administering the trust, the federal government has a duty to protect tribal sovereignty. In *Cherokee Nation*, Chief Justice Marshall emphasized that tribes looked to the federal government for protection while still acknowledging that tribes were “distinct political societ[ies].”⁸¹ Describing the federal-tribal relationship in *Worcester*, Marshall reiterated that a tribe may place itself under the protection of the more powerful United States “without stripping itself of the right of government, and ceasing to be a state.”⁸² In this sense, the protection of tribal nations as a part of the trust responsibility does not simply

Treaty with the Sioux art. II, Sept. 29, 1837, 7 Stat. 538, 539 (stating that the U.S. would invest \$300,000 in state stocks and pay the Dakota “annually, forever, an income of not less than five per cent” interest on that sum); Treaty of Canandaigua art. VI, Nov. 11, 1794, 7 Stat. 44, 46 (providing that \$4,500 “shall be expended yearly forever” for the Haudenosaunee (Six Nations)).

77. Nixon, *supra* note 72, at 257 (“[T]he Indians have often surrendered claims to vast tracts of land In exchange, the government has agreed to provide community services such as health, education and public safety . . .”).

78. See *infra* Part III.D.

79. See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 701, 115 Stat. 1425, 1907 (codified at 20 U.S.C. § 7401 (2006)) (“It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.”); Snyder Act of 1921, Pub. L. No. 67-85, 42 Stat. 208, 208–09 (codified at 25 U.S.C. § 13 (2006)) (authorizing the BIA to expend money that Congress may appropriate “for the benefit, care, and assistance of the Indians,” including for education, health, and farming); Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400, 1400 (codified at 25 U.S.C. §§ 1601–1683 (2006)) (“Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people.”).

80. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, § 2, 88 Stat. 2203, 2203 (codified as amended at 25 U.S.C. § 450). See also Act of Oct. 25, 1994, Pub. L. No. 103-413, 108 Stat. 4250 (Amendments to the Self-Determination Act).

81. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16–17 (1831).

82. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

involve protecting distinct groups of people. Rather, it is about protecting distinct *political* groups and the inherent aspects of sovereignty that they maintain within their territories.⁸³ Indeed, as Marshall recognized, the protection of a sovereign cannot be successfully accomplished without protecting its underlying sovereignty.

Just as originally conceived, the federal government still has a duty to protect tribal sovereignty against incursions by states and their citizens. One way in which the federal government fulfills this duty today is by bringing lawsuits against states. Congress has authorized the U.S. Attorney to represent tribes in “all suits at law and in equity.”⁸⁴ Using this statutory directive, the Department of Justice frequently initiates or joins lawsuits designed to protect tribal sovereignty by, for example, preventing states from collecting taxes on tribal members within Indian country⁸⁵ or forcing states to acknowledge the territorial boundaries of a tribe.⁸⁶ Another way in which the federal government protects tribal sovereignty is by taking actions designed to strengthen tribal court systems, to ensure that they can serve as a viable alternative forum to their state and federal counterparts. Thus, in enacting the Indian Tribal Justice Act of

83. See *id.* at 547. The notion that the trust responsibility includes a duty to protect tribal sovereignty is supported by scholarship that describes the federal-tribal relationship as one of a sovereign and a protectorate. See sources cited *supra* note 43. Inherent in this characterization is the assumption that to protect the tribe as a sovereign, the federal government must protect the tribe’s sovereignty.

84. 25 U.S.C. § 175 (2006).

85. United States *ex rel.* Cheyenne River Sioux Tribe v. South Dakota, 105 F.3d 1552 (8th Cir. 1997) (successfully bringing suit for declaratory, injunctive, and compensatory relief against the State for wrongfully collecting motor vehicle excise taxes and registration fees from tribal members residing on the Cheyenne River Reservation).

86. Saginaw Chippewa Indian Tribe v. Granholm, No. 05-10296-BC, 2011 WL 1884196, *1 (E.D. Mich. 2011) (noting that the United States intervened in the tribe’s lawsuit against the State of Michigan, and argued that all lands within six townships in central Michigan were part of the tribe’s treaty-created reservation and remained Indian country).

The federal government also fulfills its duty to protect tribal sovereignty by preempting state law within Indian country. Preemption analysis is different in Indian law than it is “in a field which the States have traditionally occupied.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (noting that “[t]he unique historical origins of tribal sovereignty” make it “treacherous to import . . . notions of pre-emption that are properly applied to [federal enactments regulating States]”). Indian preemption is determined by balancing federal, state, and tribal interests, and this balancing test applies regardless of whether there is a federal statute on point. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding that state game laws could not apply to non-Indians within the boundaries of the Tribe’s reservation, because they were preempted by federal and tribal interests).

1993, which authorized federal financial support for tribal court systems, Congress stated that “the United States has a trust responsibility to each tribal government *that includes the protection of the sovereignty of each tribal government.*”⁸⁷

Today, however, tribal sovereignty is attacked not only by states and their citizens, but also by the federal government itself. Following judicial recognition of congressional plenary power over Indian affairs,⁸⁸ the trust responsibility has necessarily expanded to include the duty to protect tribal sovereignty from inadvertent divestment by Congress. Courts require clear and explicit congressional intent before reading legislation in a way that diminishes tribal rights.⁸⁹ Courts may also refuse to apply general federal laws within reservation boundaries by giving expansive effect to treaty provisions that restrict intrusions into a tribe’s territory. For example, in an 1868 treaty with the Navajo, the United States promised “that no persons except those herein so authorized . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.”⁹⁰ The Tenth Circuit interpreted this provision to preclude federal employees operating under the Occupational Safety and Health Act from inspecting tribal businesses operating solely within the Navajo Reservation.⁹¹ A handful of decisions have prevented the

87. Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, § 2, 107 Stat. 2004, 2004 (codified at 25 U.S.C. § 3601 (2006)) (emphasis added).

88. In recent cases, the Supreme Court has claimed that congressional plenary power is more properly considered to be derived from the Indian Commerce Clause, the Treaty Clause, or both, rather than the trust responsibility. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004). Congress’s plenary power has been tempered slightly by subsequent Supreme Court cases acknowledging that congressional actions are reviewable by the courts and constrained by the Bill of Rights. *United States v. Sioux Nation*, 448 U.S. 371, 413 (1980) (“[T]he idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review . . . has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm. v. Weeks*.”); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–85 (1977) (applying rational-basis review when Indian-related congressional legislation is challenged); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937) (holding that the power to take Indian property and abrogate Indian treaties is limited by the Fifth Amendment’s just-compensation requirement).

89. *See, e.g.*, *United States v. Dion*, 476 U.S. 734, 738 (1986) (“Congress’ intention to abrogate Indian treaty rights [must] be clear and plain.”); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (stating that diminishment of a reservation “will not be lightly inferred” and “requires that Congress clearly evince an ‘intent . . . to . . . change boundaries’”) (ellipsis in original) (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968) (holding that an act terminating the tribe did not abrogate its implied right to hunt and fish within former reservation boundaries).

90. *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709, 711 (10th Cir. 1982).

91. *Id.* at 712.

application of general federal laws to other Indian tribes when similar treaty provisions exist.⁹²

Duty to Protect Tribal Resources: As discussed in Part I(B), following *Lone Wolf*, the federal government began to exercise its plenary power by unilaterally assuming control over tribal resources. Plenary power over Indian affairs remains today, but the degree to which it is utilized to control Indian resources has significantly diminished. For example, pursuant to statutes such as the American Indian Agricultural Resource Management Act of 1993⁹³ and the National Forest Resources Management Act,⁹⁴ tribes usually decide whether to lease their land, mineral, and timber resources. By giving tribes control over these initial decisions, self-determination is advanced. Yet federal law provides that these leases are void until approved by the federal government in its role as trustee over tribal resources.⁹⁵ These approval provisions are vestiges of the guardian-ward relationship envisioned by *Kagama* and *Lone Wolf*, within which the federal government paternalistically seeks to protect tribes from entering into improvident agreements.

In those rare cases where the federal government maintains complete control over tribal resources, the Supreme Court has said that the trust responsibility requires its actions to “be judged by the most exacting fiduciary standards.”⁹⁶ For example, in *United States v. White Mountain Apache Tribe*,⁹⁷ the Supreme Court concluded that the

92. See, e.g., *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989) (holding that the Age Discrimination in Employment Act (ADEA) was not applicable because its enforcement would “directly interfere with the Cherokee Nation’s treaty-protected right of self-government”).

93. American Indian Agricultural Resource Management Act of 1993 (AIARMA), Pub. L. No. 103-177, 107 Stat. 2011 (codified at 25 U.S.C. §§ 3701–3745 (2006)). The AIARMA explicitly states that its purpose is to “carry out the trust responsibility of the United States and promote the self-determination of Indian tribes.” 25 U.S.C. § 3702 (2006).

94. National Indian Forest Resources Management Act (NIFRMA), Pub. L. No. 101-635, § 301, 104 Stat. 4532 (codified at 25 U.S.C. §§ 3101–3120 (2006)). One of NIFRMA’s stated purposes is to “allow the Secretary of the Interior to take part in the management of Indian forest lands, with the participation of the lands’ beneficial owners, in a manner consistent with the Secretary’s trust responsibility and with the objectives of the beneficial owners.” 25 U.S.C. § 3102(1) (2006).

95. 25 C.F.R. §§ 84.003, 84.008, 162.207, 163.14, 163.20 (2012).

96. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). In *Seminole Nation*, the Supreme Court held the United States liable for monetary damages when, at the request of the Nation’s tribal council, it distributed treaty annuities directly to the tribal treasurer and certain creditors rather than to individual tribal members. The United States knew that there were allegations of corruption within the Nation’s government, and the money was in fact misappropriated. *Id.* at 295. The Court concluded that in undertaking its guardianship over Indian tribes, the federal government “has charged itself with moral obligations of the highest responsibility and trust” and its conduct “should therefore be judged by the most exacting fiduciary standards.” *Id.* at 297.

97. 537 U.S. 465 (2003).

United States could be liable for damages for not maintaining tribal trust property. A federal statute provided that the former Fort Apache Military Reservation was to be “held by the United States in trust for the White Mountain Apache Tribe” but that the Secretary of the Interior could continue to use the land and improvements for administrative or school purposes.⁹⁸ The Secretary had been using more than two dozen of the reservation’s buildings but had not been maintaining them. A study commissioned by the Tribe established that it would cost approximately \$14 million to rehabilitate the property.⁹⁹ Finding that all the elements of a common law trust were present,¹⁰⁰ the Court held that the federal government had the “the fundamental common-law duties of a trustee . . . to preserve and maintain trust assets” and should thus “be liable in damages for the breach of its fiduciary duties.”¹⁰¹

In conclusion, many of the substantive elements of the trust responsibility that were established in *Cherokee Nation*, *Worcester*, *Kagama*, and *Lone Wolf* remain today. The federal government provides certain services to tribes and their members, and it has a duty to protect tribal sovereignty and resources.

II. FEDERAL-TRIBAL CONSULTATION

The trust responsibility is not limited to the substantive components discussed in Part I. It also imposes a procedural duty on the federal government to consult with federally recognized Indian tribes. Meaningful consultation with federal officials is necessary to determine what services are most needed by tribal members, to understand how federal and state actions may be encroaching on tribal sovereignty, and to analyze whether a federal project will have an adverse effect on tribal resources. While consultation should therefore play an integral role in the federal government’s fulfillment of the trust responsibility to Indian tribes, organized consultation began only recently.

In 1954, the National Congress of American Indians (NCAI) launched an offensive to stop Congress’s then policy of terminating Indian tribes and forcibly assimilating their members. Among other things, NCAI’s “Declaration of Indian Rights” stated that Indian

98. Pub. L. No. 86-392, 74 Stat. 8, 8 (1960).

99. *White Mountain Apache Tribe*, 537 U.S. at 469.

100. The federal government was the trustee, the beneficiary was the Tribe, and the trust corpus was the buildings comprising the Fort Apache Military Reservation, which were under the control of the federal government. *See id.* at 474–75.

101. *Id.* at 475–76.

tribes should be informed of and consulted about federal policies that may affect their rights.¹⁰² While it took another fifteen years before the federal government agreed with NCAI, today the consultation duty is explicitly acknowledged in myriad executive orders, agency policies and regulations, and congressional enactments.

A. Development of the Consultation Right

1. Consultation and the Duty to Provide Services

In his special message to Congress in 1970, President Nixon acknowledged that the federal government had a duty “to provide community services such as health, education and public safety” to Indian people.¹⁰³ He also noted that only 1.5 percent of the Department of Interior’s programs that were directly serving Indians were under Indian control.¹⁰⁴ The President admonished Congress and federal officials that “we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and support.”¹⁰⁵

As a first step towards implementation of Nixon’s vision, the Bureau of Indian Affairs (BIA) began seeking ways to increase the number of Indian employees in high-ranking agency positions.¹⁰⁶ It also began drafting procedures for increasing tribal participation in the agency’s personnel decisions. In the summer of 1971, the agency circulated a draft consultation policy to federally recognized Indian tribes.¹⁰⁷ After a period of comment and discussion, the revised policy, entitled “Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs” (1972 Guidelines), went into effect in May 1972.¹⁰⁸

102. *Consultation and Coordination with Indian Tribal Governments Act: Hearing on H.R. 5608 Before the H. Comm. on Natural Res.*, 110th Cong. 83–84 (2008) [hereinafter *Hearing on H.R. 5608*] (statement of the National Congress of American Indians).

103. Nixon, *supra* note 72, at 257.

104. *Id.* at 258.

105. *Id.*

106. See *Morton v. Mancari*, 417 U.S. 535, 538, 545 (1974) (discussing the new BIA policy adopted in June 1972, which extended the Indian Reorganization Act’s Indian-preference mandate to include not only initial hiring decisions, but also promotions within the agency).

107. The policy is discussed and excerpted at length in *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717–21 (8th Cir. 1979).

108. *Id.* at 717.

The 1972 Guidelines defined consultation simply as “providing pertinent information to and obtaining the views of tribal governing bodies.”¹⁰⁹ They indicated that the precise parameters of tribal consultation would vary depending on the circumstances, and they suggested that the BIA negotiate agreements with individual tribes to ensure that the parties had a “clear understanding” of the scope and intensity of tribal consultation.¹¹⁰ The policy did, however, articulate some specific instances when consultation should occur, including (1) the hiring of an Area Director or Agency Superintendent; (2) recommendations on “personnel policies, programs and procedures”; and (3) circumstances affecting overall staffing (e.g., funding and reorganization).¹¹¹

These consultation provisions were the basis for a handful of successful lawsuits that were later brought by tribes.¹¹² For example, in *Oglala Sioux Tribe of Indians v. Andrus*, the BIA decided to transfer the Superintendent of the Pine Ridge Agency because his brother was elected President of the Oglala Sioux Tribe, creating a potential conflict of interest.¹¹³ The Tribe brought suit, arguing that they had not been sufficiently consulted before the transfer order, and the Eighth Circuit agreed. The Court held that the BIA had not complied with the 1972 Guidelines or with the trust responsibility more generally:

Failure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decision-making, but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.¹¹⁴

Despite these initial litigation successes, the 1972 Guidelines were the only consultation provisions that then existed and were limited to the BIA’s personnel issues.

109. *Id.*

110. *Id.*

111. *Id.* at 717–18.

112. In *Lower Brule Sioux Tribe v. Deer*, the District Court for the District of South Dakota held that the reduction-in-force notices issued to six BIA employees on the Lower Brule Reservation were void. 911 F. Supp. 395, 402 (D.S.D. 1995). Both the 1972 Guidelines and subsequent agency pronouncements required the agency to consult with the Tribe before their issuance. *Id.* at 398–99.

113. 603 F.2d 707, 709–10 (8th Cir. 1979).

114. *Id.* at 721 (internal citations omitted) (quoting *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)).

In 1975, Congress responded to the suggestions in President Nixon's message by enacting the Indian Self-Determination and Education Assistance Act, which created a mechanism for transferring control over services previously offered by the BIA to willing Indian tribes.¹¹⁵ The Act allows tribes to enter into one or more agreements with the United States, known as "638 contracts," whereby the tribes obtain money in lieu of specific federal services. Tribes then use the money that they receive to offer those same services directly to the reservation community.¹¹⁶

The Self-Determination Act was also the first statute that required consultation with Indian tribes in certain circumstances. The Secretary of Interior and the Secretary of Health, Education, and Welfare were required to consult with "national and regional Indian organizations" while drafting both the initial regulations implementing the provisions of the Act and any future amendments thereto.¹¹⁷ And Congress required consultation with any Indian tribe that could be impacted by any BIA decision to assist a state in site acquisition, construction, or renovation of a school on or near an Indian reservation.¹¹⁸

A few years later, Congress passed the Education Amendments of 1978.¹¹⁹ Title XI of that Act was devoted to Indian education, and Congress directed that "[i]t shall be the policy of the [BIA] . . . to facilitate Indian control of Indian affairs in all matters relating to education."¹²⁰ To help ensure that this goal was achieved, the Act

115. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-458ddd-2 (2006)).

116. 25 U.S.C. § 4501 (2006); 25 C.F.R. § 271 (1996); Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1262-63 (1995). Congress broadened the Self-Determination Act in 1994 by adding a "Tribal Self-Governance" program. Pub. L. No. 103-413, 108 Stat. 4250, 4270 (1994). Indian tribes are now allowed to enter into a broad compact with the BIA that covers virtually all federal services on a reservation. Johnson & Hamilton, *supra*, at 1267-68. They then receive a block grant in lieu of these federal services, and can allocate this grant money in accordance with tribal priorities. *Id.* The Self-Determination and Tribal Self-Governance programs have been so successful that today, more than one-half of the BIA's budget and nearly one-half of the Indian Health Service's budget is distributed directly to Indian tribes. S. Bobo Dean & Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L. REV. 349, 349-50 (2000); see also Henry M. Buffalo, Jr., *Implementing Self-Determination and Self-Governance* 173, 174 (2003) (course materials for the 28th Annual Federal Bar Association Indian Law Conference, Albuquerque, N.M., Apr. 10-11, 2003) (noting that these programs have since grown to involve more than 226 tribes in more than eighty-five funding agreements).

117. Pub. L. No. 93-638, § 107(b), 88 Stat. 2203, 2212 (1975) (codified as amended at 25 U.S.C. §§ 450-458ddd-2 (2006)).

118. *Id.* § 204(e), 88 Stat. at 2215.

119. Pub. L. No. 95-561, 92 Stat. 2143, 2321 (1978).

120. *Id.* § 1130, 92 Stat. at 2314 (codified as amended at 25 U.S.C. § 2011(a) (2006)).

required that Indian tribes be “actively consulted”¹²¹ in the planning and development of educational programs for Indian children¹²² and in the production of a number of congressionally mandated studies and surveys.¹²³

Consequently, in the 1970s, the federal-tribal consultation right was limited to instances in which the Departments of the Interior and of Health, Education, and Welfare were providing services to tribal members. Courts appeared willing to enforce this procedural right against the federal government, whether it was articulated in a statute or an internal agency policy. More than a decade would pass, however, before the consultation right was broadened to include other agencies that provide services to tribal members¹²⁴ and to other areas of the trust responsibility.¹²⁵

2. Consultation and the Duty to Protect Tribal Resources

After requiring consultation with Indian tribes regarding the provision of federal services mandated by the trust responsibility, Congress enacted a series of statutes requiring consultation for federal activities that impact Indian historic, cultural, and religious sites.¹²⁶ Consultation provisions were included in, among other legislation, the Archeological Resources Protection Act of 1979,¹²⁷ the Native

121. *Id.* § 1101(c), 92 Stat. at 2314.

122. *Id.*

123. *Id.* at §§ 1121–1122, 92 Stat. at 2316–18.

124. See *infra* Section II.A.3. The same day that President Clinton issued his 1994 Memorandum directing all agencies to consult with Indian tribes on actions that could impact the tribes or their resources, the U.S. Department of Housing and Urban Development issued a policy statement acknowledging that the trust responsibility “extends to the provision of decent, safe, sanitary and affordable housing to the members of Federally recognized Indian Tribes” and agreeing to “consult with American Indian and Alaska Native Tribal governments, Indian housing authorities and national Indian organizations when developing legislation, regulations and policies that affect those Tribes.” *American Indian and Alaska Native 1994 Policy Statement*, U.S. DEP’T OF HOUS. AND URBAN DEV, http://www.hud.gov/offices/pih/ih/regs/1994_policystmt.cfm (last updated June 13, 2001).

125. See *infra* Section II.A.2.

126. See, e.g., Pub. L. No. 103-104, 107 Stat. 1025, 1026 (1993) (establishing the Jemez National Recreation Area and requiring the Secretary of Agriculture to, “in consultation with local tribal leaders, ensure the protection of religious and cultural sites” within that area).

127. Archeological Resources Protection Act of 1979 (ARPA), Pub. L. No. 96-95, 93 Stat. 721 (1979). ARPA authorizes the imposition of civil and criminal penalties against persons who remove or damage archaeological resources on federal lands without first obtaining a permit from the appropriate federal agency official. The Act provided for the promulgation of uniform regulations only “after consultation with . . . Indian tribe[s].” *Id.* § 10, 93 Stat. at 727 (codified as amended at 16 U.S.C. § 470ii (2006)). Additionally, before the issuance of any permit that may result in harm to a site of religious or cultural significance to an Indian tribe, ARPA’s regulations require the responsible federal official to notify and consult with affected tribes. 43 C.F.R. § 7.7 (2011).

American Graves Protection and Repatriation Act of 1990,¹²⁸ and the 1992 Amendments to the National Historic Preservation Act.¹²⁹ Federal courts interpreted similar statutes, such as the American Indian Religious Freedom Act, to implicitly include a tribal consultation right.¹³⁰

The agencies charged with administering these statutes promulgated more detailed regulations that governed the consultation process. For example, the National Historic Preservation Act (NHPA) of 1966¹³¹ requires federal agencies to evaluate the potential impacts that agency actions may have on sites that are either listed or eligible for listing on the National Register of Historic Places.¹³² The NHPA was revised in 1992 to make it clear that properties of cultural or religious significance to federally recognized Indian tribes are eligible for listing on the National Register.¹³³ If a federal undertaking has the potential to cause adverse effects to those properties, agency officials must initiate government-to-government consultations with the Indian tribe.¹³⁴

The NHPA's implementing regulations define consultation as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process."¹³⁵ The regulations require that the consultations "be appropriate to the scale of the project,"¹³⁶ that they "commence early in the planning

128. Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013 (2006)). NAGPRA provides a process for museums and Federal agencies to return Indian remains and certain cultural items to lineal descendants, culturally affiliated Indian tribes, or Native Hawaiian organizations. NAGPRA requires extensive consultation with Indian tribes. *See, e.g.*, 25 U.S.C. § 3002(c)(2) (2006) (Native American cultural items can be removed from federal lands only after consultation with the appropriate Indian tribe); 25 U.S.C. § 3005(a)(3) (2006) ("The return of cultural items covered by this chapter shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items").

129. Pub. L. No. 102-575, § 4006(a), 106 Stat. 4600, 4757 (1992).

130. *See* 42 U.S.C. § 1996 (2006) ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . ."); *Wilson v. Block*, 708 F.2d 735, 746 (D.C. Cir. 1983) (holding that under the AIRFA, the federal government "should consult Indian leaders before approving a project likely to affect religious practices").

131. Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470–470x-6 (2006)).

132. 16 U.S.C. § 470f (2006).

133. Pub. L. No. 102-575, 106 Stat. 4753 (1992).

134. 16 U.S.C. § 470a(d)(6)(B) (2006).

135. 36 C.F.R. § 800.16(f) (2011).

136. *Id.* § 800.2(a)(4).

process,”¹³⁷ and that they “provide[] the Indian tribe . . . a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . and participate in the resolution of adverse effects.”¹³⁸

Following the enactment of these statutes, the Department of the Interior decided to expand its consultation program. In Order No. 3175, dated November 8, 1993, the Department informed agency officials that if “evaluation [of a proposal] reveals any impacts on Indian trust resources,” then consultation with the affected Indian tribe was required.¹³⁹ The heads of all the Department’s bureaus and offices were required to “prepare and publish procedures and directives” to ensure proper implementation of the order.¹⁴⁰ A handful of other agencies also followed the congressional trend and crafted their own consultation policies.¹⁴¹ Still, nearly all¹⁴² of these policies provided for consultation only when federal actions could impact tribal resources. Federal regulations and policies that could impact tribal sovereignty were still not subjected to any federal-tribal consultation process.

137. *Id.* § 800.2(c)(2)(ii)(A).

138. *Id.*

139. U.S. DEP’T OF THE INTERIOR, DEPARTMENTAL RESPONSIBILITIES FOR INDIAN TRUST RESOURCES § 3 (1993) [hereinafter Secretarial Order No. 3175], *available at* <http://www.fws.gov/midwest/Tribal/documents/11-8-93SecOrder3175.pdf>.

140. *Id.*

141. *See, e.g.*, U.S. DEP’T OF AGRIC., POLICIES ON AMERICAN INDIANS AND ALASKA NATIVES (Oct. 16, 1992) (“USDA officials will consult with tribal governments . . . regarding the influence of USDA activities on water, land, forest, air, and other natural resources of tribal governments. . . .”); U.S. DEP’T OF ENERGY, AMERICAN INDIAN TRIBAL GOVERNMENT POLICY, 1992 WL 12001032, at *5 (1992) (requiring each field office or DOE installation to consult with American Indians about the potential impacts of proposed DOE actions on areas of cultural or religious concern to American Indians, and avoid unnecessary interference with traditional religious practices) [hereinafter 1992 DOE CONSULTATION POLICY]; Mary Christina Wood, *Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration’s Promises and Performance*, 25 ENVTL. L. 733, 754–55 (1995) (discussing the Bureau of Reclamation’s “Indian Trust Policy,” which requires the Bureau to “carry out its activities in a manner which protects trust assets and avoids adverse impacts when possible”).

142. Despite including a specific consultation policy for cultural resources, the DOE policy also notes that “[t]he Department will consult with tribal governments to assure [sic] that tribal rights and concerns are considered prior to DOE taking actions, making decisions or implementing programs that may affect tribes.” *See* 1992 DOE CONSULTATION POLICY, *supra* note 141, at *5.

3. Clinton's Executive Orders and Across-the-Board Consultation Requirements

A major milestone in the development of the tribal consultation right came when William Clinton was elected President of the United States. In his first year in office, President Clinton issued Executive Order 12875, entitled "Enhancing the Intergovernmental Partnership."¹⁴³ In that Executive Order, he directed agencies to reduce the number of unfunded federal mandates imposed on "State, local, and tribal governments" and to develop a process that would permit elected officials, including tribal officials, "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."¹⁴⁴ More broadly, the Executive Order required agencies "to establish regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities."¹⁴⁵

While Executive Order 12875 recognized that consultation was an important part of intergovernmental cooperation generally, the next year, President Clinton also acknowledged that consultation with Indian tribes was also required by the trust responsibility. On April 29, 1994, he issued a memorandum stating that the "unique legal relationship with Native American tribal governments" required that all executive agencies consult with Indian tribes:

Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments.¹⁴⁶

This memorandum was presented at an historic tribal summit, where President Clinton invited leaders from all of the federally recognized Indian tribes to meet and discuss Indian policy with him.¹⁴⁷

Over the next several years, President Clinton further defined and strengthened this general consultation mandate through the

143. Exec. Order No. 12875, *Enhancing the Intergovernmental Partnership*, 58 Fed. Reg. 58,093 (Oct. 26, 1993).

144. *Id.*

145. *Id.*

146. *Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies*, 59 Fed. Reg. 22,951, 22,951 (Apr. 29, 1994) [hereinafter 1994 Memorandum or Clinton Memorandum].

147. Douglas Jehl, *Clinton Meets Indians, Citing a New Respect*, N.Y. TIMES, Apr. 30, 1994, at 10.

issuance of Executive Order 13084¹⁴⁸ and Executive Order 13175.¹⁴⁹ In particular, the latter order transformed the rather vague language in the 1994 Memorandum into a detailed directive with deadlines for the creation of internal consultation processes:

Each agency shall have an accountable process to ensure the meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days . . . the head of the agency shall designate an official with the principal responsibility for the agency's implementation of this order. Within 60 days . . . the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.¹⁵⁰

The scope of Executive Order 13175 extends beyond notice-and-comment rulemakings to include "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes."¹⁵¹

Clinton's 1994 Memorandum and 1998 and 2000 Executive Orders resulted in a proliferation of internal consultation policies¹⁵²

148. Executive Order No. 13084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 14, 1998).

149. Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000).

150. *Id.* at 67,250.

151. *Id.* at 67,249.

152. *See, e.g.*, U.S. DEP'T OF ENERGY, U.S. DEPARTMENT OF ENERGY AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY 4 (2006) (amending Aug. 21, 2001 policy) (noting that the Department will consult "regarding current and proposed actions affecting tribes," by providing timely notice in the early planning stages, and pre-draft consultation sessions), available at http://apps1.eere.energy.gov/tribalenergy/pdfs/doe_indian_policy_2006.pdf; National Indian Gaming Commission, Government-to-Government Tribal Consultation Policy, 69 Fed. Reg. 16,973, 16,978 (Mar. 31, 2004) (committing to "consultation and collaboration" with Indian tribes when formulating regulations, bulletins, guidelines, or preparing legislative proposals or comments for Congress); U.S. DEP'T OF HOUS. & URBAN DEV., GOVERNMENT-TO-GOVERNMENT TRIBAL CONSULTATION POLICY (2001), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/ih/regs/govtogov_tcp; U.S. DEP'T OF DEF., AMERICAN INDIAN AND ALASKA NATIVE POLICY (1998) (committing to, among other things, "[p]roviding timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands"), available at <http://aec.army.mil/usacc/cultural/nativepolicy.pdf>; U.S. ARMY CORPS OF ENG'RS, POLICY GUIDANCE LETTER NO. 57: INDIAN TRIBAL SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN TRIBES (1998) (promising "pre-decisional and honest consultation" by involving tribes "in collaborative processes designed to ensure information exchange, consideration of disparate viewpoints before and during decision making, and utiliz[ing] fair and impartial dispute resolution mechanisms"), available at <http://www.usace.army.mil/Portals/2/docs/civilworks/pgls/pgl57a.pdf>; Department of Justice Policy on Indian Sovereignty and Government-to-

and regulations¹⁵³ within federal agencies. Since then, each President has reaffirmed that the federal government has a duty to consult with Indian tribes as necessary to achieve the substantive goals of the trust responsibility.¹⁵⁴

B. Recent Attempts to Reform the Consultation Right

Despite all of these statutes, executive orders, regulations, and agency policies, implementation of the federal duty to consult with Indian tribes has been lacking. For example, in 2003, the Department of the Interior was considering a major reorganization that proposed to separate the Office of Indian Education Programs from the BIA and reorganize that office into a new Bureau of Indian Education Programs. The Department did not consult with Indian tribes while it was developing this proposal and only began to do so after the National Congress of American Indians passed a resolution demanding such consultation.¹⁵⁵ Furthermore, the consultation that ultimately occurred was inadequate because the Department failed to fully describe the proposed reorganization and, without this information, tribes were not able to make informed decisions about their views on the proposal.¹⁵⁶ It was only after the reorganization was actually implemented that Indian tribes discovered that many programs would be cut and fewer resources would be made available to federally operated schools.¹⁵⁷

Government Relations with Indian Tribes, 61 Fed. Reg. 29,424 (June 10, 1996) (“Consistent with federal law and other Departmental duties, the Department will consult with tribal leaders in its decisions that relate to or affect the sovereignty, rights, resources or lands of Indian tribes.”); BONNEVILLE POWER ADMINISTRATION, TRIBAL POLICY (1996) (“BPA will consult with Tribal governments . . . when a proposed BPA action may affect the Tribes or their resources.”), available at <http://www.bpa.gov/news/Tribal/Documents/Trbl-policy.pdf>; U.S. Dep’t of Interior, *Departmental Responsibilities for Indian Trust Resources*, in U.S. DEP’T OF INTERIOR, DEPARTMENTAL MANUAL, pt. 512, ch. 2 (revised following the 1994 Clinton Memorandum to indicate that it was the Department’s policy “to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety”), available at http://www.usbr.gov/native/policy/DM_FInal_12-1-95_512%20DM%202.pdf.

153. See, e.g., *Policy Statement on Consultation with Indian Tribes in Commission Proceedings*, 104 F.E.R.C. ¶ 61,108 (July 23, 2003) (18 C.F.R. Part 2).

154. See, e.g., President George W. Bush, Memorandum on Government-to-Government relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004) (disseminated to the heads of executive departments and agencies).

155. NAT’L CONG. OF AM. INDIANS, RES. NO. PHX-03-038, REQUEST TO HALT BIA REORGANIZATION OF OFFICE OF INDIAN EDUCATION PROGRAMS (2003).

156. NAT’L CONG. OF AM. INDIANS, RES. NO. SAC-06-026, CALLING FOR THE CREATION OF AN AD HOC TRIBAL TASK FORCE TO RE-EVALUATE THE FEDERAL CONSULTATION POLICY (2006).

157. *Id.*

Including consultation as a poorly coordinated afterthought to government action was not an isolated incident. Problems with the application of the federal consultation duty were widespread in the years that followed Executive Order 13175.¹⁵⁸ In 2008, while introducing legislation that was intended to reform the consultation duty,¹⁵⁹ Representative Nick Rahall claimed that the Bush administration “has flagrantly ignored this responsibility.”¹⁶⁰ It “takes actions that often have serious and negative consequences on Indian country, without any consultation at all.”¹⁶¹

Even when some amount of consultation occurred, tribal leaders found the process ineffectual. Joe Shirley, then President of the Navajo Nation, explained his frustration in a hearing before the House Committee on Natural Resources:

One need only look to the [BIA] to see the ineffectiveness of tribal consultation. . . . [The BIA budgetary] process culminates each year with a meeting in a Washington area conference facility where tribal leaders come in to ask the BIA for help to protect our resources, our culture, our existence. . . . While the tribal leaders pour out their hearts talking about the needs of their people, BIA bureaucrats sit there impassively listening. All the while, the BIA officials know that the budgetary

158. For example, the NHPA’s consultation requirement has only been in place since 1992, yet it has spawned a large number of cases brought by Indian tribes unsatisfied with the process. *See, e.g.,* Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior, 608 F.3d 592 (9th Cir. 2010); Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006); Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995); Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

159. 154 CONG. REC. 4156 (Mar. 13, 2008) (introducing H.R. 5608).

160. 154 CONG. REC. E383, E384 (Mar. 13, 2008) (statement of Rep. Nick J. Rahall). When the House Committee on Natural Resources held hearings on the bill, Representative Rahall and others gave specific examples of the federal government’s failure to consult with Indian tribes. One such example involved the BIA, which had released a memorandum called “Guidance on Taking Off-Reservation Land into Trust for Gaming Purposes.” This memorandum required that new trust land acquisitions be within a “commutable distance” from the tribe’s existing reservation. The very next day, the BIA used this guidance memorandum to support its decisions to deny several pending land-in-trust applications. The possibility of a “commutable distance test” had never even been mentioned to Indian tribes, and no consultation occurred before the release of this memorandum. *See Hearing on H.R. 5608, supra* note 102, at 2 (statement of Rep. Nick J. Rahall, Chairman, H. Comm. on Nat. Res.); *see also Department of the Interior’s Recently Released Guidance on Taking Land into Trust for Indian Tribes and Its Ramifications Policy on Off-Reservation Acquisition of Land in Trust for Indian Gaming, Hearing Before the H. Subcomm. on Natural Res.*, 110th Cong. 70 (2008) (statement of Kevin K. Washburn, Oneida Indian Nation Visiting Professor of Law, Harvard Law School) (calling development of Interior’s policy “haphazard,” and noting that “the weakness of the Guidance Memorandum is directly attributable to the failure to consult on these important policies with tribal governments”).

161. 154 CONG. REC. E383, E384 (Mar. 13, 2008) (statement of Rep. Nick J. Rahall).

decisions have already been made, and that ‘consultation’ is nothing more than a pretense to being able to say that we listened and took notes but other priorities governed the process.¹⁶²

While the consultation process was undoubtedly in need of reform, the legislation proposed by Representative Rahall was flawed. Tribal leaders were unhappy that, as it was drafted, the bill would have only applied to the Department of the Interior, the Indian Health Service, and the National Indian Gaming Commission.¹⁶³ Administration witnesses pointed out that the bill did nothing to clarify what constitutes consultation, but instead simply required that each agency develop its own “accountable consultation process.”¹⁶⁴ These witnesses believed that this would result in an overwhelming amount of litigation brought by Indian tribes.¹⁶⁵ After hearings on the bill were held in the House Committee on Natural Resources, no further action was taken.

On November 5, 2009, President Obama issued a memorandum to the heads of executive departments and agencies. That memorandum formally adopted President Clinton’s Executive Order 13175, and it reminded federal officials that they “are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.”¹⁶⁶ It also directed each agency to submit a detailed plan describing the actions that it would take to implement this mandate.¹⁶⁷ The Obama Memorandum required that agency plans be submitted to the Office of Management and Budget (OMB) within ninety days. Agencies were also expected to submit an annual progress report on the status of each action item within their plan.¹⁶⁸

162. *Hearing on H.R. 5608, supra* note 102, at 25 (statement of Joe Shirley, President, The Navajo Nation).

163. *See, e.g., id.* at 36 (statement of Gerald Danforth, Chairman, Oneida Nation of Wisconsin).

164. *See id.* at 11 (statement of Phil Hogen, Chairman, National Indian Gaming Commission).

165. *Id.* at 12.

166. President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009) [hereinafter Obama Memorandum].

167. *Id.*

168. *Id.*

While at least one commentator has lauded the issuance of President Obama's memorandum,¹⁶⁹ it falls short of initiating meaningful changes to the federal-tribal consultation process. The Memorandum requires agencies to submit a detailed plan of action and annual updates, but it does not provide a concrete timeline by which agencies are to have a final a consultation policy in place. In fact, agencies can comply with the letter of the Obama Memorandum without actually developing a final policy at all.

This problem is illustrated by the Office of Science and Technology Policy (OSTP), which submitted its consultation plan to the OMB in January 2010.¹⁷⁰ The short plan indicated that the OSTP would develop a consultation policy and publish a draft of that policy in the *Federal Register*.¹⁷¹ One year later, however, the agency has still not published a draft policy.

The OSTP did file an annual progress report, which was only one-half page in length.¹⁷² That report claims that three actions establish its compliance with the President's Memorandum. First, it "posted its plan on the OSTP website to promote effective communication between the agency and tribal nations."¹⁷³ Second, the agency "has determined that it will use web-based technology, telephone calls, letters, email, and face-to-face meetings for its tribal consultations,"¹⁷⁴ a laundry list that includes forms of communication (e.g., letters, email) that are not conducive to consultation. And third, the agency's only consultation with tribes prior to drafting this annual progress report was through participation in two teleconferences, arranged by an entirely different agency—the Department of the Interior—in January 2010.¹⁷⁵ The OSTP's annual report provides no update on the status of the agency's draft consultation policy, and both the plan and progress report show that the agency has spent little time thinking about the federal government's consultation duty.

169. See Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FED. INDIAN LAW (2010), available at <http://apps.americanbar.org/buslaw/committees/CL121000pub/newsletter/201101/galanda.pdf>.

170. OFFICE OF SCI. & TECH. POLICY, OFFICE OF SCIENCE AND TECHNOLOGY POLICY PLAN TO DEVELOP A TRIBAL CONSULTATION AND COORDINATION POLICY IMPLEMENTING EXECUTIVE ORDER 13175 (2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/OSTP-Tribal-Consultation-Policy-Plan.pdf>.

171. *Id.* at 2.

172. OFFICE OF SCI. & TECH. POLICY, OFFICE OF SCIENCE AND TECHNOLOGY POLICY PROGRESS REPORT IN COMPLIANCE WITH EXECUTIVE ORDER 13175 ON "CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS" (2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/OSTP-Tribal-Consultation-Progress-Report.pdf>.

173. *Id.* at 1

174. *Id.*

175. *Id.*

Other agencies are taking the Obama Memorandum more seriously. Unfortunately, they have not been provided with any guidance about how to improve their existing, Clinton-era policies. The Obama Memorandum does not even explain what “consultation” means or when the consultation right is triggered. In sum, while well-intentioned, the Obama Memorandum falls short of creating any real change to the federal-tribal relationship.

III. LIMITATIONS OF EXISTING CONSULTATION POLICIES

Federal-tribal consultation provisions have continued to proliferate following President Obama’s Memorandum, but instead of creating fanfare, they have been received with a great deal of skepticism. In fact, one tribal attorney has claimed that consultation is simply a modern means of perpetuating the betrayal of Indians by the federal government.¹⁷⁶ While this statement may be extreme, it correctly indicates that there are a number of limitations to the federal-tribal consultation right as it is currently structured. These include problems with enforceability, specificity, uniformity, and a lack of substantive constraints.

A. *Enforceability Issues for the Procedural Right to Consultation*

As discussed above, the duty to consult with Indian tribes is rooted in the federal government’s common law trust responsibility to tribes. Despite this, no court has held that this common law duty, standing alone, creates a private cause of action for Indian tribes.¹⁷⁷

176. Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 24 (2000).

177. In fact, only a handful of courts have even referred to the common-law consultation duty. See *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979) (holding that the BIA’s actions in transferring the Superintendent of the Pine Ridge Agency, without first consulting with the Oglala Sioux Tribe, violated not only the agency’s consultation policy but also “the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people”) (quoting *Morton v. Ruiz*, 415 U.S. 199, 236 (1974)); *Confederated Tribes and Bands of Yakama Nation v. U.S. Dep’t of Agric.*, No. CV-10-3050-EFS, 2010 WL 3434091, at *4 (E.D. Wash. Aug. 30, 2010) (determining that the decision to grant a private contractor the right to move garbage from Hawaii over the Tribe’s ceded lands in Washington State posed “serious questions about whether [the USDA] adequately consulted with the Yakama Nation as required by . . . federal Indian trust common law”); *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (“In practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources.”); *Mescalero Apache Tribe v. Rhoades*, 804 F. Supp. 251, 261–62 (D.N.M. 1992) (quoting *Oglala Sioux Tribe*).

The reluctance to recognize a private cause of action for violations of the common law consultation right stems from federal courts' current confusion over trust responsibility claims in general.

Over the past thirty years, the Supreme Court has heard several cases in which Indian tribes sought monetary damages against the federal government for mismanagement of Indian trust property.¹⁷⁸ These lawsuits were permitted because the United States waived its sovereign immunity through the Indian Tucker Act.¹⁷⁹ The limited waiver of immunity contained in that Act, however, requires that tribal claims be based on the U.S. Constitution, federal statutes, or Executive Orders.¹⁸⁰ Because of these restrictions on the United States' waiver of sovereign immunity, the Supreme Court has denied tribal claims for breach of the trust responsibility when those claims rely exclusively on the federal government's common law duties and do not possess any statutory support.¹⁸¹

These cases, however, should have no impact on tribal claims for declaratory or injunctive relief for breaches of the trust responsibility.¹⁸² Pursuant to the Supreme Court's longstanding decision in *Ex Parte Young*, no waiver of sovereign immunity is required if a plaintiff claims that a federal official has violated federal law (including federal common law) provided that the plaintiff names the federal official, rather than the agency itself, as the defendant.¹⁸³ Still, lower federal courts have failed to recognize this distinction. Instead, recent cases have concluded that trust responsibility litigation can only be successful if it is tied to the violation of a specific statute

178. See *United States v. Navajo Nation* (Navajo II), 556 U.S. 287 (2009); *United States v. Navajo Nation* (Navajo I), 537 U.S. 488 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Mitchell* (Mitchell II), 463 U.S. 206 (1983); *United States v. Mitchell* (Mitchell I), 445 U.S. 535 (1980).

179. See 28 U.S.C. § 1505 (2006); see also *Mitchell II*, 463 U.S. at 216 ("If a claim falls within the terms of the [Indian] Tucker Act, the United States has presumptively consented to suit.")

180. The Indian Tucker Act provides:

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band, or group.

28 U.S.C. § 1505 (2006).

181. *Navajo I*, 537 U.S. at 503 ("To state a litigable claim, a tribal plaintiff must invoke a rights-creating source of substantive law . . .").

182. See Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 368 (2003).

183. *Ex parte Young*, 209 U.S. 123 (1908).

or regulation.¹⁸⁴ Courts holding such a limited view of the trust responsibility therefore do not recognize the federal government's enforceable common law duty to consult with Indian tribes before taking actions that may impact them.

As a result, tribes are forced to point to a particular statute, agency regulation, policy, or executive order that gives them a right to consult with federal officials. As discussed in Part II(A) *supra*, most of the statutory provisions that require consultation with Indian tribes are limited to the BIA's provision of services and to federal activities that may impact Indian cultural or religious sites.¹⁸⁵ Only Clinton's executive orders and the agency policies they produced extend the federal government's consultation duty to all areas of the federal trust responsibility.

These broader provisions, however, are largely unenforceable. Courts typically hold that executive orders are unenforceable unless the plaintiff can show both that the President issued the order pursuant to a statutory mandate and that the order indicates that the President intended to create a private cause of action.¹⁸⁶ Clinton's executive orders do not rely on any statutory mandate; instead, they admit that the consultation duty arises from the trust responsibility, which is derived from the "Constitution of the United States, treaties, statutes, Executive orders, and court decisions."¹⁸⁷ Furthermore, Clinton's orders explicitly disclaim the creation of any private cause of action: Executive Order 13084, for example, states that it "is intended only to improve the internal management of the executive branch" and "does not[] create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States."¹⁸⁸ President Obama's recent memorandum contains similar restrictions.¹⁸⁹ Unsurprisingly, federal courts have refused to entertain lawsuits alleging a

184. See *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998) ("[A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."); *accord Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006).

185. See text accompanying notes 114–115 & 123–126.

186. See, e.g., *Zhang v. Slattery*, 55 F.3d 732, 747–48 (2nd Cir. 1995); *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993); *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975).

187. Clinton Memorandum, *supra* note 146, at 22,951.

188. Executive Order No. 13084, 63 Fed. Reg. 27,655, 27,656 (May 14, 1998). In *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, the Ninth Circuit refused to enforce an executive order containing similar language. See 161 F.3d 569, 575 (9th Cir. 1998).

189. Obama Memorandum, *supra* note 166, at 57,882 ("This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at

violation of the consultation duty that arises out of Clinton's and Obama's executive orders and memoranda.¹⁹⁰

Lastly, Clinton's Executive Order 13175 directed each federal agency to create internal consultation processes. Rather than create these processes through notice-and-comment rulemaking, nearly every agency chose to comply with this directive by issuing orders, creating informal policies, and revising handbook procedures. Like the executive orders from which they are derived, these policies are largely unenforceable by Indian tribes.

Some of these agency policies explicitly state that they are not meant to create a private cause of action for Indian tribes.¹⁹¹ For example, the National Indian Gaming Commission's (NIGC) tribal consultation policy states that it "is not intended to nor does it create any right to administrative or judicial review, or any other right, benefit, trust responsibility, or cause of action, substantive or procedural."¹⁹² When the policy was in draft form, several Indian tribes asked that this provision be removed because they felt that it "absolve[d] the NIGC of all responsibility to adhere to the policy."¹⁹³ The agency declined to do so, however, noting that "[s]tatements of policy do not typically create rights to administrative or judicial review, nor other causes of action," and that this provision was therefore necessary to avoid misunderstandings.¹⁹⁴ Nevertheless, this response did not address the broader issue of why the agency, which was already complying with the Administrative Procedure Act's (APA's) notice-and-comment procedures, did not simply adopt these consultation provisions as enforceable regulations.

Other agency policies are silent as to the creation of a cause of action, but longstanding precedent typically prevents their enforceability. For example, the Ninth Circuit has concluded that handbook provisions are not binding on an agency unless they "have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements

law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.").

190. See, e.g., *George v. Comm'r of Internal Revenue*, No. 19063-03, 2006 WL 1627980, at *3 (T.C. June 13, 2006) ("Executive Order 13175 lacks the force and effect of law because it is not grounded in a statutory mandate.").

191. For example, the Department of the Interior's Secretarial Order No. 3175 noted that it was "for internal management guidance only, and shall not be construed to grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations." Secretarial Order No. 3175, *supra* note 139, at § 1.

192. National Indian Gaming Commission, Government-to-Government Tribal Consultation Policy, 69 Fed. Reg. 16,973, 16,979 (Mar. 31, 2004).

193. *Id.* at 16,976.

194. *Id.* at 16,977.

imposed by Congress,” and “prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice.”¹⁹⁵ While this rule was not created in the specific context of tribal consultation policies, it has been applied to such policies by the Ninth Circuit.

In *Hoopa Valley Tribe v. Christie*,¹⁹⁶ the Tribe brought suit seeking to enjoin the BIA from moving its Northern California Agency office from the Hoopa Valley Reservation to Redding, California. Among other things, the Tribe claimed that it was not properly consulted prior to this decision, as required by the BIA’s 1972 *Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs*.¹⁹⁷ The Court held that the BIA’s consultation guidelines were unenforceable because the agency had not conceded they had the force of law, and instead of being promulgated through notice-and-comment rulemaking, the guidelines were “in letter form and unpublished.”¹⁹⁸ In fact, only the United States Court of Appeals for the Eighth Circuit has ever enforced a federal-tribal consultation policy that was found outside of a statute or regulation.¹⁹⁹

Finally, not only is judicial review unavailable in most cases, but agencies have not created internal dispute-resolution processes that would allow Indian tribes to challenge a lack of federal-tribal consultation. In fact, only one agency—the Administration for Children and Families within the U.S. Department of Health and Human Services—has a policy that establishes a mechanism for tribal officials to raise concerns about the consultation process to

195. *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982); see also *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071–72 (9th Cir. 2010); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 901–02 (9th Cir. 1996).

196. 812 F.2d 1097 (9th Cir. 1987).

197. *Id.* at 1103.

198. *Id.*

199. The only consultation policy enforced by the Eighth Circuit has been the BIA’s 1972 Guidelines. In the first case addressing the Guidelines, the BIA conceded that they were enforceable, and the Court readily agreed. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979). When the BIA argued that these Guidelines were unenforceable in later litigation, District courts in the Eighth Circuit rejected this about-face. See *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D.S.D. 2006) (“Where the BIA has established a policy requiring prior consultation with a tribe, and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given.”); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399–400 (D.S.D. 1995) (noting that the BIA had interpreted these consultation provisions as binding in the past and had not narrowed or eliminated them, and requiring the agency to “tell[] the truth and keep[] [its] promises”); see also *Winnebago Tribe of Neb. v. Babbitt*, 915 F. Supp. 157, 163 (D.S.D. 1996) (holding that the BIA has the discretion to terminate employees but must first consult with the affected tribe).

high-ranking agency officials.²⁰⁰ Only the limited consultation duties found in federal statutes and regulations are thus typically enforceable by Indian tribes. This lack of enforceability has severely restricted the effectiveness of the tribal right to consultation, and it has reduced tribes' willingness to work with federal agencies.²⁰¹

B. Lack of Specificity for Procedural Requirements

The effectiveness of federal-tribal consultation is impeded by another practical roadblock. The consultation requirement currently lacks the specificity needed to provide clear guidelines to agency actors, tribal officials, and reviewing courts. While it has become "fashionable" to talk of tribal consultation, "consultation remains an ill-defined term."²⁰²

1. Of What Does Consultation Consist?

Congress has enacted several statutes that require federal agencies to consult with Indian tribes,²⁰³ but none of these statutes includes a definition of consultation. Likewise, the executive orders and memoranda issued by Presidents Clinton and Obama fail to provide a definition of this key term, and conflicting inferences can be drawn from those documents. On the one hand, Clinton's 1994 Memorandum and Executive Order 13084 require executive

200. If an impasse arises between the Administration for Children and Families (ACF) and a tribe concerning compliance with the consultation policy or the outcome of consultation, the tribe may file a written notice of conflict resolution. Department of Health and Human Services, Administration for Children and Families, Tribal Consultation Policy, 76 Fed. Reg. 55,678, 55,678 (Sept. 8, 2011) [hereinafter ACF Consultation Policy]. The agency's policy states that "any action that is the subject of an impasse will be stayed until the conflict resolution process with ACF is complete to the extent practicable and permitted by law." *Id.* at 55,687. After filing a written notice, the tribe will meet with the Assistant Secretary for Children and Families, a Deputy Assistant Secretary, the Commissioner for the Administration for Native Americans, or the ACF Regional Administrator for the Regional Office that provide services to the affected tribe. *Id.* If the tribe is unhappy with how the official resolves the matter, it may then raise its concerns with the Secretary of the Department of Health and Human Services. *Id.* While this process is a far cry from judicial review, it does provide Indian tribes with a way to discuss their concerns with high-ranking agency officials while the matter is held in abeyance.

201. Haskew, *supra* note 176, at 27–28 (asserting that lack of enforceability "ultimately will damage federal-tribal relations," because if an agency is able to ignore its own policies, that agency's "poor behavior may reduce the tribes' willingness to work with the agency" or other agencies in the future).

202. *Id.* at 23 (internal quotation marks omitted).

203. See, e.g., *supra* Part II.A.2.

branch agencies to ensure that tribes have the opportunity “to provide meaningful and timely input” about federal proposals.²⁰⁴ This phrase could be interpreted to require only that Indian tribes have an opportunity to provide information and express their views about a federal proposal. On the other hand, Executive Order 13175 requires “consultation and collaboration” with Indian tribes²⁰⁵ and Obama’s Memorandum refers to the necessity of “*meaningful dialogue* between Federal officials and tribal officials.”²⁰⁶ These more recent pronouncements seem to require that the two parties engage in back-and-forth discussions to work towards a joint resolution of the issues presented.

Without clear and consistent direction from either Congress or the President, agencies have, unsurprisingly, interpreted the consultation requirement differently. Several agencies have issued draft or final consultation policies that claim that publication of a proposal for federal action in the *Federal Register* is sufficient, by itself, to satisfy the government’s consultation duty to Indian tribes. For instance, the Office of National Drug Control Policy released a draft consultation policy in April 2011, which specifies that the agency’s consultation will consist of “one or more of the following”: written correspondence, meetings, and *Federal Register* notices.²⁰⁷ Similarly, the Department of Education’s new three-page consultation policy explains that consultation may include “*Federal Register* documents,” which will help to facilitate “the goal of meaningful and timely participation.”²⁰⁸ The Department plans to simply “invite input from Indian tribal officials in the preamble of any notice of proposed rulemaking” if the rule might impact Indian tribes.²⁰⁹

Policies such as these improperly conflate the public’s right to notice and comment with the federal government’s consultation duty to Indian tribes. The APA already gives all persons the right to notice of and the opportunity to comment on agency rulemakings.²¹⁰ Regulations for implementing the National Environmental

204. Executive Order 13084, *supra* note 136, at 27,655; *see also* Clinton Memorandum, *supra* note 134, at 22,951.

205. Executive Order No. 13175, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000).

206. Obama Memorandum, *supra* note 153, at 57,881 (emphasis added).

207. Office of Nat’l Drug Control Policy, Exec. Office of the President, Draft Tribal Consultation Policy, 76 Fed. Reg. 18,583, 18,584 (Apr. 4, 2011).

208. U.S. DEP’T OF EDUC., CONSULTATION AND COORDINATION PROCESS WITH INDIAN TRIBAL GOVERNMENTS UNDER EXECUTIVE ORDER 13175 2 (2011) [hereinafter EDUCATION CONSULTATION POLICY], available at <http://www.tedna.org/pubs/doe%2013175.pdf>.

209. *Id.*

210. The APA provides that a proposed rule must be published in the *Federal Register*, and interested persons shall then be given “an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral

Policy Act (NEPA) similarly provide persons with notice of and the ability to comment on federal actions that could significantly impact the environment.²¹¹ These statutes were enacted in 1946 and 1969, respectively; therefore, Indian tribes and their members had an enforceable right to comment on federal actions long before the legislative and executive branches recognized the tribal consultation duty. The right to consultation would be virtually meaningless if it did not require more.²¹²

Other agencies have crafted consultation policies that acknowledge that *Federal Register* notices, standing alone, do not satisfy the consultation duty. Nevertheless, nearly all of these policies still consider such notices to constitute evidence of consultation. For example, the Administration for Children and Families (ACF) developed a detailed consultation policy that was published in the *Federal Register* on September 8, 2011.²¹³ Indeed, the overall policy seems to be a dramatic improvement on Clinton-era consultation policies. But while this policy states that *Federal Register* notices “will not be used as a sole method of communication for consultation,” it lists the mediums for conducting consultation as meetings, written correspondence, and *Federal Register* notices.²¹⁴

presentation.” 5 U.S.C. § 553(b)–(c) (2006). The APA defines “persons” to include “an individual, partnership, corporation, association, or public or private organization other than an agency.” *Id.* § 551(2). Therefore, Indian tribes and individual tribal members are able to comment on any proposal governed by the APA.

211. 40 C.F.R. § 1503.1 (2011) (providing that after preparing a draft environmental impact statement, the agency shall request comments from Indian tribes and the general public, which includes all “persons or organizations who may be interested or affected” by the agency action).

212. If the right to consultation only affords Indian tribes the right to comment, consultation could, at most, broaden rights already afforded under the APA and NEPA by providing tribes with the ability to comment on informal agency actions that are not subject to the APA. See 5 U.S.C. § 553(b)(A) (2006) (APA notice and comment procedures do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”).

213. ACF Consultation Policy, *supra* note 200.

214. *Id.* at 55,686. Similarly, the Department of the Interior’s draft consultation policy states that the Department will attempt to “avoid impersonal forms of communication,” which presumably includes *Federal Register* notices and form letters, while at the same time providing that consultations will occur through “meetings, telephone conversations, written notice, or a combination of all three.” U.S. DEP’T OF THE INTERIOR, DRAFT DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES 3 (2012) [hereinafter DOI DRAFT CONSULTATION POLICY] (emphasis added), available at <http://www.doi.gov/governments/loader.cfm?csModule=security/getfile&pageid=119393>; see also U.S. DEP’T OF AGRIC., ACTION PLAN FOR TRIBAL CONSULTATION AND COLLABORATION 14–15 (2009) [hereinafter USDA ACTION PLAN] (implying that a *Federal Register* notice does not fulfill the agency’s consultation duty by noting that “policies will encourage face-to-face consultation,” and stating that although written correspondence can also take place, it should “clearly . . . identify the potentially affected Tribes, include any agency positions on the issues, and identify the type of

There is a fundamental difference between the public participation process (notice and comment), which is an information-gathering exercise, and consultation, which is a government-to-government process that requires greater involvement in decision making by Indian tribes.²¹⁵ Yet there are only a small number of agency policies and regulations that explicitly recognize this difference. Examples include regulations that implement the NHPA, which define consultation as “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them”²¹⁶

Even when agencies consult under these regulations, however, they do not seem to alter their consultation processes to emphasize two-way dialogue. Instead, agencies routinely catalog the number of “contacts” that they have with a particular tribe through notices, letters, phone calls, and other means. They then consider all of these contacts to collectively constitute consultation. They do so without distinguishing whether this contact was designed to provide the tribe with information about the proposal, to solicit information from the tribe, or to discuss the information gathered.

For example, in the Ruby Pipeline project discussed below, one section of the project’s final environmental impact statement includes a table entitled “Native American Consultations for the Ruby Pipeline Project.”²¹⁷ That table lists scoping notices²¹⁸ published in

input sought, how to provide input and when to provide input”), available at <http://www.usda.gov/documents/ConsultationPlan.pdf>.

215. See, e.g., INDIGENOUS PEOPLES SUBCOMM. OF THE NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING 3, 5 (2000) (discussing the differences between federal-tribal consultation and public participation in agency decision making and noting that consultation “should be a collaborative process between government peers that seeks to reach a consensus on how to proceed”).

216. 36 C.F.R. § 800.16(f) (2013). Likewise, the Environmental Protection Agency’s new consultation policy defines and separates the “notification phase” from the subsequent “input phase.” ENVTL. PROTECTION AGENCY, POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 4–5 (2011) (noting that the input phase may consist of “written and oral communications including exchanges of information, phone calls, meetings, and other appropriate interactions depending upon the specific circumstances involved. . . . [that create] opportunities to provide, receive, and discuss input”), available at <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf>.

217. FERC, RUBY PIPELINE PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT tbl. 4.10.3-1, at 4-243 (Jan. 8, 2010), available at <http://www.ferc.gov/industries/gas/enviro/eis/2010/01-08-10.asp>.

218. Scoping is a preliminary stage under NEPA where agencies attempt to establish the breadth of environmental review for the proposed project. A scoping notice describes the preliminary concept of the project, and asks the public to identify potential project alternatives or specific aspects of the environmental impact that need to be analyzed. See 40 C.F.R. § 1501.7 (2013).

the *Federal Register*, public scoping meetings required by NEPA, form letters sent to Indian tribes by the project proponent, and form letters sent by federal agencies to Indian tribes that described the project and enclosed the draft environmental impact statement or related documents.²¹⁹ While none of these contacts seem to constitute instances of government-to-government tribal consultation, each tribe's receipt of these notices or letters is dutifully checked off on this "consultation" chart as evidence that federal obligations have been fulfilled.²²⁰ A chart like this obscures—whether deliberately or inadvertently—the fact that only one meeting was ever held between Federal Energy Regulatory Commission (FERC) officials and the Summit Lake Tribal Council, and the fact that that meeting was to describe the proposed project to the Tribe, not to gather information about the Tribe's specific concerns.²²¹

This anecdote is representative of many federal-tribal consultations. Faced with similar facts, the Court in *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Department of the Interior* admonished the BLM, claiming that "the sheer volume of documents" cited to support the agency's claims that consultation had occurred "is not meaningful."²²² After reviewing the record, the Court concluded that the invitation to consult on a solar project that could damage or destroy more than 350 archeological sites amounted to "little more than a general request for the Tribe to gather its own information about all sites with the area and disclose it at public meetings."²²³ The Court concluded that this was not the type of government-to-government consultation contemplated by the NHPA.²²⁴

As this discussion highlights, agencies that craft consultation policies could benefit from spending additional time considering how consultation is defined. Notice and the initial provision of information about an agency's proposed project or regulation are essential to beginning the consultation process. But genuine consultation only occurs afterward, when Indian tribes are given the opportunity to indicate how that proposal will impact their communities and discuss with federal officials how the proposal might be revised to eliminate or mitigate those impacts.

219. See *supra* note 217.

220. See *id.*

221. Reply Brief of Petitioner at 21 & n.2, *Summit Lake Paiute Tribe v. U.S. Bureau of Land Mgmt.*, No. 10-72762 (9th Cir. June 20, 2011), 2011 WL 2532829, at *21 & n.2

222. 755 F. Supp. 2d 1104, 1112–18 (S.D. Cal. 2010).

223. *Id.* at 1118.

224. *Id.* at 1119.

2. With Whom Must Consultation Occur?

Statutes, regulations, and policies nearly always require tribal consultation to be conducted in a “government-to-government” manner, but few explain what this phrase means.²²⁵ At a minimum, this term should suggest that a meeting between private contractors and Indian tribes, without the presence of federal officials, does not constitute consultation. Similarly, a meeting with pan-Indian organizations, although useful, cannot substitute for government-to-government consultation without the express consent of the tribe in question. Consultation must occur between federal officials and tribal officials. These two parties, however, often disagree about which officials should be included in a consultation session.

Indian tribes usually seek consultation sessions with high-ranking federal officials because the tribe is typically represented at these sessions by its highest elected officials (i.e., its president or tribal council). Consultation with high-ranking federal officials ensures that the person charged with making the decision respecting a federal action has been provided direct information about tribal concerns without having that information filtered, perhaps incorrectly or ineffectively, through another agency employee. In addition, participation by senior-level federal employees has the important effect of symbolically communicating to tribes that their concerns are being taken seriously.

The federal government, on the other hand, often designates low-ranking federal employees to attend consultation sessions.²²⁶ High-ranking officials have many pressing issues to address, and federal-tribal consultations can be time consuming. Additionally, high-ranking officials may not be as familiar with the details of the project or regulation in question. As a result, no existing consultation policy commits a federal agency to ensuring that consultation sessions include agency decision makers.

An example of this disagreement between Indian tribes and the federal government can be seen in the recent Ruby Pipeline Project, where the FERC was considering (and ultimately approved) a

225. See, e.g., Secretarial Order No. 3175, *supra* note 139, at § 1 (noting that “each bureau and office will operate within a government to government relationship with federally recognized Indian tribes”); Clinton Memorandum, *supra* note 146, at 22,951 (stating that its purpose is “to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes”).

226. *But see* National Indian Gaming Commission, Government-to-Government Tribal Consultation Policy, 69 Fed. Reg. 16,973, 16,979 (Mar. 31, 2004) (noting that “[t]he Chairman of the NIGC or his or her designee is the principal point of contact for consultation with Indian tribes,” and that “[t]he NIGC will strive to provide adequate opportunity for affected tribes to interact directly with the Commission”).

private party's application to build an underground natural gas pipeline through several western states. The Summit Lake Paiute Tribe of Nevada was concerned about the pipeline's potential impact on its sacred sites, and it requested that consultation meetings include FERC's Commissioners.²²⁷ Tribal Chairman Warner Barlese's letter to the agency in August 2008 stated: "You may have your senior administrative person contact our senior administrative person . . . however, on a government-to-government level, the Council expects the Commissioners to deal directly with Council members."²²⁸ FERC rejected this approach, claiming in a response letter that it was more appropriate for the staff environmental project manager and the staff archaeologist to represent the Commission in meetings with the Tribe.²²⁹

Few court decisions have addressed this issue. In *Lower Brule*, the U.S. District Court for the District of South Dakota indicated that consultation must occur "with the decision maker or with intermediaries with clear authority to present tribal views to the . . . decision maker."²³⁰ The court did not elaborate on what it meant by the latter phrase. In the more recent *Quechan Tribe*, the U.S. District Court for the Southern District of California noted that "meetings with government staff or contracted investigators," such as the Bureau of Land Management's (BLM) staff archaeologist, are helpful but do not satisfy the government's consultation duty.²³¹ The Court indicated, without explanation, that consultation should instead have occurred between the tribe and the BLM field manager.²³² No consensus has developed on this point.

A handful of agencies appear to have drafted policies or action plans following the Obama Memorandum that might offer an effective middle ground on these issues. The Department of Justice's draft tribal consultation policy acknowledges that "[t]o be meaningful, a consultation must involve individuals who have decision

227. See Letter from Warner Barlese, Chairman, Summit Lake Paiute Tribe, to Joseph T. Kelliher, Chairman, FERC (Aug. 16, 2008) (on file with author).

228. See *id.*

229. Letter from Patricia A. Schaub, Acting Dir., Office of External Affairs, FERC, to Warner Barlese, Chairman, Summit Lake Paiute Tribe (Sept. 25, 2008) (on file with author).

230. *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995).

231. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1119 (S.D. Cal. 2010).

232. *Id.* ("No letters from the BLM ever initiate[d] government-to-government contact between the Tribe and the United States [or] BLM field managers.")

making authority on the issue that is the subject of the consultation.”²³³ As a result, the policy calls for the officials to “ensure that political leadership or other relevant decision makers are substantively involved in the consultation.”²³⁴ If those persons are unable to attend an individual consultation session, the Department’s representatives are directed to both consult the decision-makers in advance of the consultation and apprise them of tribal input after the consultation session has occurred.²³⁵

The definition of “consultation” within the Department of Agriculture’s (USDA) tribal consultation action plan presupposes senior-level participation.²³⁶ The plan explains that consultation occurs when agency leaders “at the most senior[]level” and a tribal Chair, President, or leader “formally meet or exchange written correspondence to discuss issues concerning either party.”²³⁷ The USDA plan also emphasizes the need for consistency and proper coordination in consultation processes through the creation of the Office of Tribal Relations (OTR) as the “single point of contact” for all tribal consultation issues.²³⁸ Subagencies will identify a single point of contact for tribal consultation that will regularly report to the OTR.²³⁹ In theory, this will ensure greater consistency in consultation procedures, encourage increased coordination between tribes and the USDA, and allow tribal leaders to develop relationships with the USDA that will promote more meaningful and effective government-to-government consultations.

While a few agencies have adopted approaches similar to that of the Departments of Justice and Agriculture,²⁴⁰ the vast majority still permit agency employees without decision-making authority to handle consultation sessions with Indian tribes.

233. U.S. DEP’T OF JUSTICE, DRAFT TRIBAL CONSULTATION POLICY 3 (undated) [hereinafter DOJ DRAFT CONSULTATION POLICY], available at <http://www.justice.gov/otj/pdf/tribal-consultation-policy.pdf>.

234. *Id.*

235. *Id.*

236. USDA ACTION PLAN, *supra* note 214, at 14.

237. *Id.*

238. *Id.* at 18.

239. *Id.* at 19.

240. *See, e.g.*, ACF Consultation Policy, *supra* note 200, at 55,685 (stating that consulting parties for the agency will be the assistant secretary, deputy assistant secretaries, central official principals, or a designee authorized to negotiate on their behalf); DOI DRAFT CONSULTATION POLICY, *supra* note 214 (consultation will include Department officials who “are knowledgeable about the matters at hand, are authorized to speak for Interior, and have decision-making authority in the disposition and implementation of a policy or are a program manager or staff who can ensure that Tribal concerns will be brought forward to final decision makers in the event that the decision makers are not present at the consultation meeting”).

3. When Should Consultation Occur?

Consultation cannot take place until agency officials have developed a concrete proposal. On the other hand, for consultation to be meaningful, it must occur early enough in the planning or drafting process that tribal views can be adequately considered.²⁴¹ To date, federal officials have often failed to find the middle ground that protects them from consulting before an idea has been fully formed, yet still provides Indian tribes with meaningful opportunities to shape the proposal. For example, a recent study of the consultation process conducted under the NHPA concluded that many consultation sessions were, in fact, merely opportunities for agencies to inform Indian tribes of decisions that had already been made.²⁴²

Timing concerns are usually not a problem of policy but rather of its implementation. There are, however, a few notable exceptions. For example, the new consultation policy of the Department of Veterans Affairs admits that consultation “is most effective and meaningful when conducted before taking actions” that impact Indian tribes and their members.²⁴³ But the Department also claims that consulting prior to taking action is “a best case scenario,” and that, in many cases, consultation will need to be initiated as soon as possible *after* the action has been taken.²⁴⁴

Conversely, the Department of the Interior’s new draft policy promises early consultation with tribes. In particular, it states that the Department will commence consultation “when possible” at the initial planning stage.²⁴⁵ More specifically, consultation on a federal project will begin at the scoping stage under NEPA. In other cases, consultation will begin when the agency is preparing draft regulations, administration proposals, legislation, or changes to procedures or policies.²⁴⁶ Other agencies have included similar

241. See Kevin K. Washburn, *Felix Cohen, Anti-Semitism and American Indian Law*, 33 AM. INDIAN L. REV. 583, 590 (2009) (reviewing DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* (2007)) (federal officials “should consult informally as an idea develops, and should consult widely before an idea becomes firmly rooted, [but they] must have some limited and protected space in which they can think about their responsibilities and how to meet them”).

242. SHERRY HUTT & JAIME LAVALLEE, NAT’L ASS’N OF TRIBAL HISTORIC PRES. OFFICERS, *TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 5* (2005), available at http://www.nps.gov/history/thpo/downloads/NATHPO_Best%20Practices.pdf.

243. DEP’T OF VETERANS AFFAIRS, *TRIBAL CONSULTATION POLICY 7*(b) (2011), available at http://www.va.gov/TRIBALGOVERNMENT/docs/consultation_policy.pdf.

244. *Id.*

245. DOI DRAFT CONSULTATION POLICY, *supra* note 214, at VIII(A) & (D)(1).

246. See *id.* at VIII(D)(1).

provisions in their new consultation policies,²⁴⁷ but application remains uneven.

4. How Will the Tribe Be Informed of Consultation Sessions?

A proper consultation policy should also discuss how tribes will be notified of the opportunity for consultation. Any notice should provide information about the proposed action that is sufficient to enable tribal officials to prepare for the consultation session. Unfortunately, a recent study concluded that many “[a]gencies believed that consultation obligations could be met by sending a letter to Tribes inviting them to a consultation without first providing specific information about the proposed project upon which they could be prepared to comment.”²⁴⁸

Policies that were adopted in response to Obama’s Memorandum attempt to correct this problem. The Department of the Interior’s policy requires that notice include “a description of the topic(s) to be discussed . . . [in] sufficient detail . . . to allow Tribal leaders an opportunity to fully engage in the consultation.”²⁴⁹ The USDA’s action plan states that “all parties will be provided with adequate background information so that all may be . . . informed and so that the resulting consultation may be maximally effective and beneficial.”²⁵⁰ The agency should also provide enough notice of any upcoming consultation sessions to ensure that there is a reasonable opportunity for the tribe to be represented. Many of the new policies promise to provide between thirty and sixty days’ notice to Indian tribes prior to the scheduling of any consultation session.²⁵¹

247. The ACF consultation policy provides that the right to consultation is triggered whenever the agency is considering a legislative proposal, new rule, or policy change that either ACF or a tribe determines may significantly affect one or more Indian tribes. It provides that “[t]o the extent practicable and permitted by law,” the agency shall not take any action that has tribal implications unless it has “[c]onsulted with tribal officials early and throughout the process of developing the proposed regulation.” ACF Consultation Policy, *supra* note 200, at 55,686.

248. HUTT & LAVALLEE, *supra* note 242, at 5.

249. DOI DRAFT CONSULTATION POLICY, *supra* note 214, at VIII Consultation Guidelines.

250. USDA Action Plan, *supra* note 198, at 15.

251. See, e.g., ACF Consultation Policy, *supra* note 185, at 55,686 (noting that the Agency “will provide at least” 30 days’ notice to tribal officials prior to any consultation session); DOI Draft Consultation Policy, *supra* note 199, at VIII(A) (the Department “will strive to ensure that a notice is given at least 30 days prior to a scheduled consultation” and if it does not, an explanation of the exceptional circumstances precluding such notice will appear in the invitation letter); AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, TRIBAL CONSULTATION POLICY (undated) (the Agency will send at least two written notifications to the potentially affected tribes—“one at least 45–60 days prior to the consultation” session, and another 15–30 days prior to the consultation), available at <http://www.ahrq.gov/about/tribalplan.htm>.

C. Lack of Uniformity and Volume of Consultations

Another flaw in the current consultation system is that there are dozens of different statutes, regulations, executive orders, and informal agency policies that deal with tribal consultation. Assembling all of these authorities is a Herculean task, especially considering that many Indian tribes have limited resources. There are substantial differences between these policies, which can lead to misunderstandings and frustration for tribes that are forced to learn how each agency approaches this component of the federal trust responsibility.

Indian tribes are also overwhelmed by the number of consultation requests that they receive from federal agencies. When Congress passed the American Recovery and Reinvestment Act in 2009, it provided more than seven billion dollars to the Departments of Commerce and Agriculture to expand access to broadband services throughout the nation.²⁵² The two Departments received more than two thousand applications requesting funding, which was required to be disbursed before September 30, 2010.²⁵³ Many of these projects had the potential to impact traditional religious and cultural properties that were eligible for listing on the National Register. The federal government had a duty to consult with Indian tribes who could be affected, but because of tight deadlines, consultation was occurring simultaneously on these projects. At the same time that these consultations were occurring, every federal agency began crafting a consultation plan pursuant to Obama's Memorandum, for which they were seeking input from tribes. This illustrates how burdensome consultation can be in practice, particularly for small tribes with little to no resources. When a heavy volume of requests is combined with the often dissatisfying nature of the consultation process, many tribes simply opt out of this right.

252. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Titles I & II, 123 Stat. 115, 118, 128 (2009) (codified throughout scattered sections of 1, 6, 15, 19, 20, 26, 29, 31, 38, 42, and 47 U.S.C.) (appropriating \$2.5 billion to the Rural Utilities Service and \$4.7 billion to the National Telecommunications & Information Administration, respectively, for broadband development).

253. NAT'L CONG. OF AMERICAN INDIANS [NCAI], ADVANCING CONSULTATION REGARDING TRIBAL SECTION 106 CONCERNS IN THE ARRA BROADBAND PROGRAMS, RES. NO. PSP-09-087C (Oct. 11-16, 2009).

D. Enforceability Issues for Substantive Rights

Problems with the procedural right to federal-tribal consultation are further exacerbated because there are difficulties in enforcing the substantive components of the trust responsibility. First, while the federal government has a duty to provide services to tribal members, there are significant roadblocks to enforcing this common law obligation. In *Lincoln v. Vigil*, the Supreme Court heard a challenge to the BIA's decision to discontinue a program that provided diagnostic and treatment services to Indian children with cognitive impairments, mental illness, and physical disabilities in the southwestern United States.²⁵⁴ The Court held that this decision was not reviewable under the APA because it was "committed to agency discretion by law."²⁵⁵

The money used to fund this program came from a lump-sum congressional appropriation and was expended under the authority of the Snyder Act and the Indian Health Care Improvement Act.²⁵⁶ These acts provide only general guidance to the BIA, requiring, for example, that money be expended for the "relief of distress and conservation of [Indian] health."²⁵⁷ In this case, the BIA was redirecting money spent on the preexisting program to mental health-care for Indian children nationwide, and was therefore using the funds to meet permissible statutory objectives. Under these circumstances, the Court said that it could not intervene.²⁵⁸ Consequently, it is up to Congress to decide the contours of the trust responsibility's duty to provide services. Courts cannot compel the appropriation of additional monies, and because Congress typically makes lump-sum appropriations to the BIA to provide services, the

254. 508 U.S. 182, 189 (1993).

255. *Id.* at 190–91, 193 (citing 5 U.S.C. § 701(a)(2)).

256. *Lincoln*, 508 U.S. at 185.

257. 25 U.S.C. § 13 (2006).

258. *Lincoln*, 508 U.S. at 194–95. Similarly, in *Hammitte v. Leavitt*, a class action lawsuit was filed on behalf of Indians residing in or near Detroit, Michigan. No. 06-11655, 2007 WL 3013267, at *1 (E.D. Mich. Oct. 11, 2007). The plaintiffs claimed that although two-thirds of tribal members currently live in urban areas such as Detroit, the BIA allocates just 1 percent of its health care budget to urban areas. *Id.* at *3. As a result, the plaintiffs were not getting the medical care they were entitled to under the trust responsibility. The Court rejected this argument. After distinguishing the cases cited by the plaintiffs, the Court stated that there was no support

for the broad proposition that the [Indian Health Service] must fund specific health care services for specific Native American groups on the basis of a "free standing trust obligation." To the contrary, *Lincoln*, rejects such a notion . . . [and] *Lincoln* makes clear that lump-sum appropriations are not reviewable.

Id. at *6.

BIA's allocation of those appropriations are not reviewable under the APA.

Second, while the federal government has a duty to protect tribal resources, the Supreme Court has limited the availability of money damages for government mismanagement to cases where the federal government has complete control over the resources in question.²⁵⁹ Additionally, as previously discussed in Section III(A), lower federal courts have confused these Supreme Court decisions regarding money damages (which are based on the limited waiver of sovereign immunity that appears in the Indian Tucker Act) with claims for declaratory or injunctive relief. As a result, courts have concluded either that suits cannot be brought to prospectively protect tribal resources in cases where the federal government lacks complete control over those resources, or that the federal government has fulfilled its trust responsibility whenever it has complied with all statutory obligations.²⁶⁰

Finally, with our burgeoning administrative state, the duty to protect tribal sovereignty is more relevant than ever. The *Federal Register* is replete with proposals for new federal regulations that have the potential to reach into Indian country and interfere with tribal sovereignty. Even though the trust responsibility requires federal officials to protect tribal sovereignty, agencies are attempting to enforce general federal laws (e.g., the National Labor Relations Act and the Fair Labor Standards Act) and their implementing regulations against tribes. Many lower federal courts have upheld these intrusions on tribal sovereignty without even mentioning the trust responsibility.²⁶¹

Failure to enforce the substantive components of the trust responsibility means that even when tribal suggestions and requests

259. *United States v. Navajo Nation (Navajo I)*, 537 U.S. 488, 508 (2003) (“[H]ere, the [Indian Mineral Leasing Act] and its regulations do not assign to the Secretary managerial control over coal leasing.”).

260. *See Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998) (collecting cases).

261. *See, e.g., San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1318 (D.C. Cir. 2007) (concluding that the National Labor Relations Act applies to a tribal casino); *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129–30 (11th Cir. 1999) (holding that the Americans with Disabilities Act is “generally applicable” to Indian tribes operating casino and restaurant); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180–81 (2d Cir. 1996) (determining the Occupational Safety and Health Act (OSH Act) applies to tribal business performing construction work on a hotel and casino); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1118 (9th Cir. 1985) (applying the OSH Act to a tribal farm); *see also* Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994).

are properly solicited, they can be disregarded without the potential for any recourse. This has led many tribal officials to view consultation as a worthless process that drains tribal manpower and monetary resources.²⁶²

IV. OUR PROPOSAL

Given federal courts' reluctance to recognize an independent and enforceable common law duty to federal-tribal consultation, the only way to guarantee an enforceable tribal consultation right that applies to all federal agencies is through congressional legislation. Our proposal for the components of that legislation is described in this section.

As an initial matter, it is important to note that if crafted according to the priorities described below, a legislative fix would be mutually beneficial for all stakeholders. All interested parties will benefit from clear expectations and increased uniformity in consultation procedures. While agencies may at first scoff at the increased accountability that stems from enforceable consultation processes, they should be pleased with a decrease in future disagreements between parties as a result of more meaningful communication and collaboration at the early stages of projects. Moreover, a legislative fix will greatly benefit tribes by transforming consultation into a meaningful legal right. Indeed, the benefits of a clear, uniform legislative fix greatly outweigh any costs.

Until a legislative fix occurs, the President could issue an executive order that provides guidance to federal agencies about many of

262. The frustration produced by an ineffectual consultation process is demonstrated by the Timbisha-Shoshone Tribe's attempts to obtain lands suitable for its first reservation. In 1994, Congress passed the California Desert Protection Act, which included a provision instructing the Secretary of the Interior, "in consultation with the . . . Tribe," to identify suitable lands for their reservation. California Desert Protection Act of 1994, Pub. L. No. 103-433, § 705(a), 108 Stat. 4471, 4498 (codified at 16 U.S.C. 410aaa-75 (2006)). In a press release reflecting on the consultation process that resulted, Acting Tribal Chairperson Pauline Esteves stated as follows:

It was one long eleven-month "charade." Those pasty-faced bureaucrats knew from the beginning that they would not restore ancestral lands to us. They sat there through presentation after presentation by the Tribe, fooling us into believing that there could be a sincere dialogue between the federal government and its constituents. We spent over a hundred thousand dollars, hiring the best anthropologists, historians, lawyers and economic consultants, gathering data, establishing the "suitability" of segments of our traditional homelands proposed to be taken into trust. We made countless proposals. We got nothing of substance back, no effort on their part to even meet us part way. Instead of dialogue and a respectful exchange of ideas, we were stonewalled.

Haskew, *supra* note 176, at 60.

the issues discussed below. Additionally, to the extent permitted by law, the President could direct federal agencies to use notice-and-comment rulemaking in order to turn their policies and handbook provisions into mandates that are enforceable through judicial review. The likelihood of such a directive having its intended effect, however, would be based, in part, on whether the executive order itself contains provisions for enforceability.

A. Enforceability

Congressional legislation that codifies the procedural right to federal-tribal consultation should explicitly provide for judicial review through a private cause of action for Indian tribes. Lack of enforceability is currently the biggest obstacle to effective implementation of tribal consultation. When agency officials are able to openly refuse to comply with a duty that is acknowledged in numerous executive orders, memoranda, and agency policies, tribal officials understandably become disillusioned and the federal-tribal relationship suffers long-term damage.

As discussed above in Part III(D), enforceability concerns permeate all aspects of the trust responsibility; therefore, some scholars have argued that there must be increased enforcement of the substantive components of the trust responsibility.²⁶³ This would be a more direct approach. But it would also be considerably more challenging, as it would require Congress, agency officials, and the courts to engage in difficult line-drawing exercises.

For example, in *New Jersey v. EPA*, a group of Indian tribes intervened in litigation pending in the U.S. Court of Appeals for the D.C. Circuit.²⁶⁴ That litigation challenged the agency's decision to loosen its regulation of mercury emissions from coal- and oil-fired utility plants.²⁶⁵ Mercury from the atmosphere is deposited in freshwater ecosystems through precipitation and transformed into methylmercury. Methylmercury is highly toxic and rapidly accumulates in the food chain at levels that can cause serious health concerns for persons who consume fish and seafood.²⁶⁶ Following the EPA's regulation, Indian people were at the greatest risk of

263. See generally Wood, *supra* note 4; Wood, *supra* note 43.

264. 663 F.3d 1279 (D.C. Cir. 2011).

265. *New Jersey v. E.P.A.*, 517 F.3d 574, 577–78 (D.C. Cir. 2008).

266. 65 Fed. Reg. 79,825, 79826–27 (Dec. 20, 2000).

mercury poisoning because of the large number of tribal members who engaged in subsistence hunting and fishing.²⁶⁷ Thus, Indian tribes argued that in allowing increased mercury pollution, the EPA had violated tribal treaty rights, an argument that could have also been strengthened by reference to the trust responsibility to protect tribal resources.²⁶⁸

The D.C. Circuit did not address this issue and overturned the EPA rule on other grounds.²⁶⁹ Perhaps one of the reasons that the court declined to decide the question was that it was unsure where to draw the line. Does the trust responsibility require the agency to prevent *all* mercury pollution? It seems unlikely that the courts or Congress would conclude that the federal trust responsibility automatically trumps all nontribal interests. If the trust responsibility only requires the agency to prevent *some* pollution, what is the amount?

Focusing on aggressive enforcement of the procedural right to consultation avoids this difficult question. Doing so would be analogous to the approach federal courts have taken in enforcing NEPA. One of NEPA's lofty goals is to "prevent or eliminate damage to the environment."²⁷⁰ This goal is not accomplished by substantive provisions compelling agencies to adopt the most environmentally favorable project alternative. Instead, NEPA imposes action-forcing procedures,²⁷¹ which require federal agencies to carefully consider the environmental impacts of and potential alternatives to the proposed project before taking any major federal action.²⁷² These procedural requirements are then enforceable by private citizens through lawsuits filed under the APA.²⁷³

NEPA's forty-year history demonstrates that it has been effective in requiring decision makers to consider environmental consequences before resources are committed; often this leads them to

267. ENVTL. PROTECTION AGENCY, EPA TECHNICAL SUPPORT DOCUMENT: METHODOLOGY USED TO GENERATE DEPOSITION, FISH TISSUE METHYLMERCURY CONCENTRATIONS, AND EXPOSURE FOR DETERMINING EFFECTIVENESS OF UTILITY EMISSION CONTROLS 50 (undated), *available at* http://www.epa.gov/ttnatw01/utility/eff_fnl_tsd-031705_cort_oar-2002-0056-6301.pdf

268. *See generally* Final Brief of Petitioners National Congress of American Indians and Treaty Tribes, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

269. *See* *New Jersey v. E.P.A.*, 517 F.3d 574, 574 (D.C. Cir. 2008).

270. 42 U.S.C. § 4321 (2006).

271. *Kleppe v. Sierra Club*, 527 U.S. 390, 409 & n.18 (1976).

272. *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). The primary means by which NEPA achieves these goals is through the preparation of environmental impact statements and environmental assessments. *See* 42 U.S.C. § 4332(2)(C) (2006).

273. 5 U.S.C. § 702 (2006).

choose more environmentally friendly alternatives.²⁷⁴ For this reason, more than eighty countries have adopted laws based on NEPA.²⁷⁵ There is no reason to think that a procedural consultation right enforceable by Indian tribes through judicial proceedings would not be similarly effective. To ensure that judicial review is available even for Indian tribes with limited resources, any such legislation should provide that the United States must pay reasonable attorneys' fees and other costs if a tribe prevails in its lawsuit.²⁷⁶

Federal officials arguing against an enforceable consultation right have claimed, however, that it would result in a proliferation of lawsuits that would cause the government to grind to a halt. We concede that litigation will initially increase, but if consultation legislation and implementing regulations are properly drafted, litigation should taper off within a few years. This prediction is once again supported by experience under NEPA. After NEPA was enacted, a few years of intense litigation followed. But NEPA quickly became a mature and predictable program, and lawsuits began to decline by 1974—just a few years after its enactment.²⁷⁷ Even though NEPA is currently applied to 50,000–70,000 actions each year, there are fewer than 150 new NEPA lawsuits filed each year.²⁷⁸ This seems a small price to pay given the gravity of the substantive rights affected.

B. Alleviating Timing Concerns for Federal Projects

In practice, timing is one of the biggest obstacles to meaningful consultation between federal agencies and Indian tribes. This is particularly true when a project is being proposed by a private party but requires federal approval to move forward. The private party often has outside time constraints that necessitate a decision about its application by a specific date. If meaningful consultation does not occur very early in the project planning stages, it is often too late to either keep the outside deadline or to adjust the project to

274. See e.g., JAN. G. LAITOS, NATURAL RESOURCES LAW 119 (2002); Larry Canter & Ray Clark, *NEPA Effectiveness—A Survey of Academics*, 17 ENVTL. IMPACT ASSESSMENT REV. 313 (1997); COUNCIL ON ENVTL. QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS (1997) [hereinafter NEPA EFFECTIVENESS].

275. NEPA EFFECTIVENESS, *supra* note 274, at 3.

276. See, e.g., 16 U.S.C. § 470w-4 (2006) (permitting award of reasonable attorneys' fees and other costs for private suits brought to enforce provisions of the NHPA).

277. Jay E. Austin et al., *Judging NEPA: A "Hard Look" at Judicial Decision Making Under the National Environmental Policy Act*, ENVTL. LAW INST. 6 (undated).

278. *Considering NEPA: Comments to the National Environmental Policy Act Task Force*, ENVTL. LAW INST. 8 (2006).

comport with tribal input. Tribes are, more often than not, the losers in this scenario.

In the Ruby Pipeline Project, for example, the company had signed contracts with shipping companies, promising them that the pipeline would be in service by the spring of 2011.²⁷⁹ The federal government allowed its environmental and cultural resources review process under NEPA and the NHPA to be driven by these contractual deadlines. As a result, alternative routes for the pipeline were dismissed before tribal consultation even began, and the route ultimately selected ran directly through hundreds of sites eligible for listing on the National Register of Historic Places, including an important traditional religious and cultural property for the Summit Lake Paiute Tribe.²⁸⁰ These sites may have been preserved had consultation begun sooner.

One way to ensure that a tribe is consulted early in the planning stage is to have that tribe serve as a cooperating agency under NEPA. Cooperating agencies help to develop information and prepare analyses for environmental assessments or environmental impact statements.²⁸¹ Thus, these agencies “[p]articipate in the NEPA process at the earliest possible time,” which at a minimum must include the scoping process.²⁸²

The Council on Environmental Quality’s (CEQ) regulations permit Indian tribes to become cooperating agencies when the project’s “effects are on a reservation” and the lead agency agrees.²⁸³ Unfortunately, the lead federal agency rarely agrees to allow Indian tribes to become cooperating agencies. In 1999, the CEQ released a memorandum urging federal agencies to more actively solicit the participation of state, tribal, and local governments as cooperating

279. See Opening Brief of Petitioner at 22–35, *Summit Lake Paiute Tribe v. U.S. Bureau of Land Mgmt.*, No. 10-72762 (9th Cir. 2010).

280. See *id.* Similarly, in *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior*, the project proponent sought to install thirty thousand solar collectors on federal lands in California. 755 F. Supp. 2d 1104, 1107 (S.D. Cal. 2010). To obtain stimulus funds under the American Recovery and Reinvestment Act of 2009, construction needed to begin by the end of 2010. *Id.* at 1119. The time pressure resulted in the project proponent selecting a site that contained more than 450 cultural resources, as well as burial sites, ancient trails, and religious sites. *Id.* at 1114 n.5, 1119.

281. See sources cited *supra* note 272.

282. 40 C.F.R. § 1501.6 (2011).

283. *Id.* § 1508.5. On the other hand, federal and state agencies can become cooperating agencies if they have jurisdiction over the project or special expertise with respect to any environmental impact involved in the project, so long as the lead federal agency agrees. *Id.*; see also *id.* § 1501.6.

agencies in the NEPA process.²⁸⁴ Agency practice did not change, however, and the CEQ issued two more memoranda on this subject in 2002.²⁸⁵

Despite these CEQ statements, Indian tribes are still not asked to serve as cooperating parties. Without a seat at the table, it is easy to see why competing concerns voiced directly by agency officials are often given priority over tribal concerns. Congress can correct this problem by requiring that Indian tribes be invited to participate as cooperating agencies. Tribes should be invited not only if the project may significantly impact their reservations but also if a project may impact off-reservation resources such as subsistence hunting and fishing and historic, religious, or cultural sites.

Lack of monetary resources should not prevent Indian tribes from serving as cooperating agencies. Federal agencies are able to recover their costs from private parties who are seeking federal licenses or permits to build their projects.²⁸⁶ Congress should make it clear that Indian tribes are also entitled to cost recovery in these situations.

Of course, not all tribes will have the desire, or the expertise, to serve as cooperating agencies. Therefore, another approach is necessary to ensure that tribal concerns are voiced and understood early in the project planning process. Any statute must require that tribes be notified and asked to consult on projects prior to NEPA's scoping stage and at least as soon as any governor, state agency, and local government is asked to participate.

284. See GEORGE T. FRAMPTON, JR., ACTING CHAIR, COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM TO THE HEADS OF FEDERAL AGENCIES 1 (1999) (regarding "Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act"), available at <http://ceq.hss.doe.gov/nepa/regs/ceqcoop.pdf>.

285. In January 2002, the Council on Environmental Quality (CEQ) issued a memorandum stating the benefits of including Indian tribes as cooperating agencies, which included: "disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with . . . Tribal . . . procedures; and establishing a mechanism for addressing intergovernmental issues." JAMES CONNAUGHTON, CHAIR, COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM TO THE HEADS OF FEDERAL AGENCIES (2002) (regarding "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act"), available at <http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html>. The next month, the CEQ provided a similar memo to tribal leaders assuring them that the CEQ supports their involvement and encourages them to "consider accepting or requesting an invitation to participate in the NEPA process as a cooperating agency." JAMES CONNAUGHTON, CHAIR, COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM TO TRIBAL LEADERS (2002) (regarding "Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act").

286. 43 U.S.C. § 1734 (2006).

That alone may not be enough in some circumstances. If a project has the potential to impact tribal cultural and religious sites, for example, tribal members may be reluctant to disclose information about the location or use of such sites. This reluctance may exist because (1) it is culturally impermissible to share such information,²⁸⁷ (2) there is mistrust of the federal government, or (3) concerns exist among the tribe about whether the information will be made available to the public, which could result in looting or non-Indians misappropriating Indian religious beliefs.²⁸⁸ When the lead federal agency has had little contact with the tribe in the past, tribal members may be even more cautious.

It may be possible to overcome these obstacles and obtain the necessary information early in the planning process if at least one of the federal officials who elicits information from the tribe has interacted extensively with the tribe's elected leadership in the past and has acquired knowledge about the tribe's history and culture. One way to ensure the availability of such an official would be through the use of a tribal liaison.

Many agencies presently employ a tribal liaison for the purpose of consultation with Indian tribes. A recent study of the consultation process conducted under the National Historic Preservation Act concluded that "[h]aving a Tribal Liaison is a positive factor in an efficient and successful consultation."²⁸⁹ There is still significant room for improvement, however. Currently, each agency employs its own tribal liaison. While this person is likely to be much more generally knowledgeable than other federal officials about Indian tribes, the tribal liaison may know very little about the tribe involved in a particular consultation session and may not have previously met the elected tribal officials with whom he or she is consulting.

A better approach might be to hire tribal liaisons that are housed within the BIA or the Executive Office of the President. These individuals would be assigned to geographical regions and be available for consultation sessions on all federal projects within that region,

287. For example, a common theme among many tribal religions is that speaking about death, deceased relatives, or the location of burial sites, will hasten one's own death or bring disease and destruction to the community. See Ben Daitz, *With Poem, Broaching the Topic of Death*, N.Y. TIMES, Jan. 24, 2011, at D5 (discussing the difficulties inherent in teaching Navajo people about living wills and do-not-resuscitate orders because "[i]n Navajo culture, talking about death is thought to bring it about, so it is not discussed").

288. BUREAU OF LAND MGMT., GUIDELINES FOR CONDUCTING TRIBAL CONSULTATION, BLM MANUAL HANDBOOK H-8120-1, V-1 (2004) ("Particularly where places of religious importance are involved, tribes may be reluctant to provide specific information, perhaps because it is culturally impermissible to share such information outside the tribe, or because the appropriateness of BLM's use and protection of the information are not certain.").

289. HUTT & LAVALLEE, *supra* note 242, at 24.

regardless of who the lead (or cooperating) federal agency was. This approach would allow the tribal liaison to build an understanding of the history and culture of the tribes in her region and to interact with tribal officials *before* a private party files an application requesting project approval.

Another advantage of this system would be minimization of the conflicts of interest that are inherent in the federal trust responsibility.²⁹⁰ Whether enforceable or not, the federal government has substantive obligations to protect tribal resources and tribal sovereignty. The federal officials charged with executing this trust responsibility, however, also represent the broader interests of the federal government and its citizens. This conflict is present in the form of tribal liaisons currently working within federal agencies. If tribal liaisons were housed within agencies that are not involved in the project at issue, however, those individuals would be able to sit at the table with other federal decision makers and better advocate for a particular tribe's interests.

C. *Specificity and Uniformity*

Any consultation statute enacted by Congress should create uniform rules that apply to all agencies that take actions implicating a substantive prong of the trust responsibility. While the statute should be flexible enough to allow particular tribes and agencies to negotiate consultation compacts that meet their individual needs,²⁹¹ establishing a set of baseline standards that apply to all agencies absent contrary tribal agreement will simplify the current system. These standards should include the following:

Identification Stage. The agency should identify activities that may be appropriate for consultation, considering the full scope of the federal government's trust responsibility to Indian tribes. This stage should include an initial identification of the potentially affected tribe(s). Agencies, however, may not always realize that a policy contains tribal implications. For this reason, any statute must also contain a process that allows Indian tribes to trigger the consultation duty by identifying federal actions that may impact their resources, sovereignty, or the provision of services.

290. See, e.g., Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2003); Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327 (1995).

291. Gover, *supra* note 4, at 359–62 (noting the necessity of a customized trust relationship).

Notification Stage. For all matters identified by the agency as triggering the consultation duty, providing notice to the tribes that may be affected should initiate the consultation process. A posting in the *Federal Register* is far from sufficient notice. Many tribes have minimal resources, and the federal government does not fulfill its trust responsibility if it requires tribes to expend those resources scouring the *Federal Register* on a daily basis. Notice can easily be accomplished through a letter and telephone call to a tribal leader. The letter should describe the project proposal in detail that is sufficient to allow tribal officials to formulate their initial impressions of the proposal and to begin to gather pertinent information. Barring an emergency, tribes should be provided with at least thirty days' notice prior to any consultation session.

Consultation Stage. As discussed above, an agency should begin consulting with the tribe as early as possible. For federal or federally approved projects, tribes should be afforded the opportunity to become a full party—for example, through cooperating-party status under NEPA. Regardless, consultation is not satisfied simply by affording a tribe the opportunity to comment on a draft rule or draft environmental impact statement; any member of the general public has this right. Consultation requires a two-way dialogue in which tribal officials not only present information, but also discuss the proposal and alternatives to the proposal with federal officials.

Whenever possible, consultation should include federal officials who have decision-making authority over the project or proposal in question. Consultation meetings (whether held over the telephone or in person) should be summarized, and that summary should be provided to all of the participants. This will not only allow Indian tribes to clarify any misunderstandings, but it will also create a record that can be preserved for judicial review. After the agency has fully considered the tribe's suggestions, federal officials must respond to those suggestions, explaining which suggestions will be adopted as well as which ones will not be adopted, and why.

CONCLUSION

The federal government's trust responsibility includes an important procedural component: the duty to consult with Indian tribes. This consultation duty has the potential to breathe new life into the substantive components of the trust responsibility. Just as NEPA has forced federal agencies to consider how their actions may impact the environment, a robust and enforceable consultation duty would require agencies to consider whether or not they are fulfilling their

obligation to provide services to tribal members, to protect tribal sovereignty from state and federal incursions, and to safeguard tribal resources for future generations.