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**THE FUNDAMENTAL INADEQUACY OF TRIBE-AGENCY
CONSULTATION ON MAJOR FEDERAL
INFRASTRUCTURE PROJECTS**

*Alana K. Bevan**

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* Editor-in-Chief, Volume 6, *University of Pennsylvania Journal of Law & Public Affairs*; University of Pennsylvania Law School, J.D. Candidate, 2021; The Johns Hopkins University, Ph.D., 2009; University of Alberta, B.A. (Hon), 2003. My deepest thanks to Professor Bridget Fahey for supervising this Comment and for her thoughtful mentorship. Thanks also to the staff of the *University of Pennsylvania Journal of Law & Public Affairs* for their careful editing and review. All errors and omissions are my own.

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INTRODUCTION

On the windy banks of the Missouri River near Cannon Ball, North Dakota lies the site of Inŷanŷ Wakháŷagapi Othí, translated to English as Sacred Stone Camp.¹ For 328 days, citizens of the Standing Rock Lakota and Dakota Sioux Nations and their allies occupied Sacred Stone and three satellite camps, protesting construction of the Dakota Access oil pipeline.² As pipeline construction neared the camp site, construction company security and law enforcement clashed with protestors.³ The Standing Rock Sioux Tribe also challenged the pipeline in federal court, filing its request for declaratory and injunctive relief in the District Court for the District of Columbia in July 2016.⁴ More than four years after state authorities forcibly terminated the protest at Sacred Stone, the Tribe’s legal challenge continues.⁵

¹ SACRED STONE CAMP - IDYAD WAKHÁDAGAPI OTHÍ, <http://www.sacredstonecamp.org> [<https://perma.cc/CB3W-VTXN>] (last visited Jan. 10, 2021).

² *Id.*; Amy Sisk, *Timeline: The Long Road to #NoDAPL*, INSIDE ENERGY (Jan. 23, 2017), <http://insideenergy.org/2017/01/23/timeline-the-long-road-to-nodapl/> [<https://perma.cc/S2K9-M8CB>].

³ Alan Taylor, *Tempers Flare During Protest Against the Dakota Access Pipeline*, THE ATLANTIC (Sept. 6, 2016), <https://www.theatlantic.com/photo/2016/09/tempers-flare-during-protest-against-the-dakota-access-pipeline/498809/> [<https://perma.cc/W48X-FXBS>]; Sue Skalicky & Monica Davey, *Tension Between Police and Standing Rock Protesters Reaches Boiling Point*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/us/dakota-access-pipeline-protest.html> [<https://perma.cc/DB59-46XY>].

⁴ Complaint for Declaratory and Injunctive Relief, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77 (D.D.C. 2017) (No. 16-cv-1534). Note that additional cases filed by the Yankton Sioux and Oglala Sioux Tribes have been consolidated with this matter (16-1796 and 17-267).

⁵ Morgan Conley, *Tribes Press for Shutdown of Dakota Access Pipeline*, LAW360 (Jan. 8, 2021), <https://www.law360.com/articles/1343135/tribes-press-for-shutdown-of-dakota-access-pipeline> [<https://perma.cc/JE8J-XWXY>]; Mitch Smith, *Standing Rock Protest Camp, Once Home to Thousands, Is Razed*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/standing-rock-protest-dakota-access-pipeline.html> [<https://perma.cc/YT5X-KV59>].

Although the Dakota Access pipeline is privately owned, the Tribe filed its request for legal relief against the U.S. Army Corps of Engineers.⁶ First, the Tribe challenged the processes through which the Corps issued authorizations to build the Dakota Access pipeline underneath bodies of water upstream from the Standing Rock reservation and to discharge into waters on tribal ancestral lands.⁷ More broadly, the Tribe also challenged the processes governing the Corps' nationwide permit for the construction of oil pipelines that impact water sources.⁸ These processes, the Tribe alleged, violated the federal statutory and regulatory requirement that federal agencies adequately consult recognized Indian tribes prior to authorizing infrastructure actions with potential impacts on culturally or religiously significant sites.⁹

Although the Standing Rock Tribe's complaint contains other claims, the alleged failure of the Corps to adequately and meaningfully consult the Tribe prior to authorizing construction on the Dakota Access pipeline is central to the parties' dispute.¹⁰ The Tribe contends that any consultation by the Corps as to the planned construction's impact on sites of historic and cultural significance was cursory, belated, and incomplete, thus failing to meet the standard for consultation as established by federal law.¹¹ The Corps, in contrast, alleges that it engaged in a "robust consultation process" during its review and subsequent approval of Dakota Access pipeline construction plans, providing the Tribe with reasonable opportunities to advise the Corps on historic properties and making routine efforts to engage on matters of cultural sensitivity.¹² What the Corps describes as reasonable consultation constitutes—from the Tribe's perspective—an "attempt to circumvent the [consultation] process" and mere rubber stamping of Dakota Access's development plans.¹³

⁶ As of the time of editing, the case remains open. Note that the private owner of the pipeline project, Dakota Access LLC (a subsidiary of Energy Transfer Partners), entered the case as an unopposed intervenor—and then a cross-claimant—on August 5, 2016. Unopposed Motion to Intervene in Support of Defendant by Dakota Access LLC, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

⁷ Complaint for Declaratory and Injunctive Relief at 2, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

⁸ *Id.*

⁹ *Id.* at 31–40.

¹⁰ Leigh Paterson, *Tribal Consultation at Heart of Pipeline Fight*, INSIDE ENERGY (Sept. 23, 2016), <http://insideenergy.org/2016/09/23/tribal-consultation-at-heart-of-pipeline-fight/> [https://perma.cc/Y5KX-QALY].

¹¹ Complaint for Declaratory and Injunctive Relief at 31–40, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

¹² United States Army Corps of Engineers' Opposition to Plaintiff's Motion for Preliminary Injunction at 28, 34–35, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

¹³ Complaint for Declaratory and Injunctive Relief at 25, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 16-cv-1534).

The Standing Rock Sioux protest and legal challenge to the Dakota Access pipeline is not unique. Instead, it is part of an ongoing continent-wide story and history of agency failure to adequately and meaningfully consult tribes on major infrastructure projects. Tribal opposition to oil and gas pipelines is on the rise, as are protests and legal challenges to infrastructure projects generally, including renewable energy installations.¹⁴ The primary legal argument underpinning these challenges is that, in failing to adequately consult tribes impacted by project plans, federal agencies violate federal law.¹⁵ The high visibility and violence of the Standing Rock protests, and the intensity of the legal battle between the Standing Rock Tribe and Dakota Access, appear to have caught the attention of both the executive and legislative branches.¹⁶ Despite governmental awareness of the need for improved, meaningful consultation, Congress and federal agencies persist in using and abusing consultation in statutes, regulations, and guidance, leaning on an unworkable device to discharge their obligation to engage with impacted tribes.¹⁷ But the physical and legal clashes of Standing Rock will recur so long as consultation—a deeply flawed tool—is the default device for tribe-agency engagement on major infrastructure projects.¹⁸

¹⁴ See Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation*, 95 DENV. L. REV. 593, 599–601, 603 (2018) (summarizing recent examples of tribal action against pipeline construction or right of way permit renewals, as well as against renewable energy farm construction).

¹⁵ *Id.* at 601–03.

¹⁶ In September 2016, for example, the U.S. Departments of the Interior, the Army, and Justice invited 567 federally recognized tribal governments to participate in listening sessions and formal tribal consultations on agency processes for infrastructure-related decision-making. Press Release, U.S. Department of the Interior, The Departments of the Army, the Interior and Justice Invite Tribal Leaders to Participate in Formal Government-to-Government Consultations on Infrastructure Decision-Making (Sept. 23, 2016), <https://www.doi.gov/pressreleases/departments-army-interior-and-justice-invite-tribal-leaders-participate-formal> [<https://perma.cc/H77R-3GQB>]. Standing Rock also prompted twenty-six members of Congress to request that the U.S. Government Accountability Office prepare a report investigating all related federal agencies' policies for tribal consultation during infrastructure permitting and construction processes. See, e.g., Letter from Raul Ruiz, Ranking Member, House Subcomm. on Indian, Insular & Alaska Native Affs., & Raúl M. Grijalva, Ranking Member, House Comm. on Nat. Res., to Gene Dodaro, Comptroller Gen. of the U.S. (Sept. 8, 2016), <https://ruiz.house.gov/media-center/press-releases/ruiz-grijalva-call-greater-oversight-protect-health-and-environmental> [<https://perma.cc/ZKW4-ZVCU>]. The report was publicly released in March 2019. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-22, TRIBAL CONSULTATION: ADDITIONAL FEDERAL ACTIONS NEEDED FOR INFRASTRUCTURE PROJECTS (2019), <https://www.gao.gov/assets/700/697694.pdf> [<https://perma.cc/R3GU-QPTM>].

¹⁷ See *infra* Section II.C.3.

¹⁸ See, e.g., Nick Martin, *The Next Standing Rock Is Everywhere*, NEW REPUBLIC (Oct. 7, 2019), <https://newrepublic.com/article/155209/next-standing-rock-everywhere> [<https://perma.cc/ZKW4-ZVCU>] (“There will not be another Standing Rock. There will be dozens, maybe even hundreds, by the time the fight to avoid the encroaching crisis is finished, if it ever is.”).

This Article argues that consultation, as a legal mechanism to guarantee effective, sovereign-to-sovereign engagement and agreement on major infrastructure projects, has not and will not work. Discussion of how to improve and standardize consultation practice validates continued congressional use of consultation as an engagement device and crowds out discussion of potential (more effective and accountable) alternatives. Part I identifies the statutory, regulatory, and executive authorities requiring consultation between federal agencies overseeing major infrastructure projects and the tribes impacted by construction. Part II traces the failures of administrative procedure, judicial review, and legislative oversight to guarantee meaningful consultation, and demonstrates that consultation is an inherently flawed engagement device given its fundamental inability to be checked by legal and administrative oversight. Part III advocates for congressional and administrative reform by suggesting a spectrum of possible alternative engagement devices, including negotiated rulemaking, adversarial administrative adjudication, negotiated compact, and formal consent, each of which could provide for heightened accountability and make for better policy.

I. CONSULTATION: THE STATUS QUO FOR TRIBE-AGENCY ENGAGEMENT ON MAJOR INFRASTRUCTURE PROJECTS

A network of federal statutes, regulations, executive directives, and international guidance require or encourage federal agencies to consult with tribes prior to authorizing, funding, and permitting major infrastructure construction projects.¹⁹ The key components of federal law mandating tribal consultation for infrastructure projects are the 1966 National Historic Preservation Act (NHPA) and the 1969 National Environmental Policy Act (NEPA).

A. The National Historic Preservation Act

The NHPA uses federal measures “to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations” and to assist federally recognized tribes “to expand and accelerate their historic preservation programs and activities.”²⁰ Recognizing

¹⁹ See generally Matthew J. Rowe, Judson Byrd Finley & Elizabeth Baldwin, *Accountability or Merely “Good Words”? An Analysis of Tribal Consultation Under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENV’T L. & POL’Y 1 (2018) (providing an overview of the tribe-agency consultation requirement).

²⁰ 54 U.S.C. §§ 300101(1), (6). The NHPA was enacted in 1966, but language considering the impact of development on culturally and historically significant tribal lands was not

an implicit tension between historic and cultural preservation and modern development and infrastructure, Section 106 of the NHPA requires federal agencies with jurisdiction over a proposed “undertaking” to consider “the effect of the undertaking on any historic property.”²¹ An “undertaking” is “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency,” including projects carried out with Federal funds or requiring a Federal permit or license.²² Historic property includes not only “any prehistoric or historic district, site, building, structure, or object” but also “artifacts, records, and material remains relating to a district, site, building, structure, or object.”²³ Section 106 review requires that, in evaluating the effect of an undertaking on a historic property, federal agencies consider “property of traditional religious and cultural importance to an Indian tribe,” requiring consultation with Tribes so impacted.²⁴

The NHPA established the Advisory Council on Historic Preservation (ACHP), an independent agency that engages in the consultative process and also promulgates the regulations required to implement Section 106 review.²⁵ Section 106 regulations provide guidance and procedures by which federal agencies fulfil their statutory obligations to consult; the regulations state that “[t]he goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”²⁶ The Section 106 process requires federal agencies to “make a reasonable and good faith effort” to identify parties potentially impacted by a proposed project and, in the tribal context, to consult with the identified tribal historic

included until 1992 amendments to the Act. *See* Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600 (codified as amended in scattered sections of 16, 25, and 43 U.S.C.) (enacting new law on tribal historic preservation programs). *See generally* S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895 (2012) (providing a complete overview on consultation under the NHPA).

²¹ 54 U.S.C. § 306108.

²² *Id.* § 300320; *see also* United Keetoowah Band of Cherokee Indians in Okla. v. FCC, 933 F.3d 728, 734 (D.C. Cir. 2019) (“We have construed the statute to mean that, for an action to be a federal undertaking, ‘only a “Federal permit, license or approval” is required,’ not necessarily federal funding.”).

²³ 54 U.S.C. § 300308.

²⁴ *Id.* § 302706.

²⁵ *Id.* § 304108(a); *see About the ACHP*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <https://www.achp.gov/about> [<https://perma.cc/84A5-J9ZA>] (last visited Jan. 10, 2021) (“The Advisory Council on Historic Preservation promotes the preservation, enhancement, and sustainable use of our nation’s diverse historic resources, and advises the President and the Congress on national historic preservation policy.”).

²⁶ 36 C.F.R. § 800.1(a) (2019).

preservation officer (THPO) for each impacted tribe.²⁷ Consultation “should commence early in the planning process,” and, in a two-step process, provide the tribe with “a reasonable opportunity” to advise the agency on identification and evaluation of significant historic and cultural properties as well as to share its concerns about the undertaking’s potential impact on those properties.²⁸ This consultation is required not only for tribally-owned lands but also on other lands to which tribes attach historic or cultural significance.²⁹ Section 106 regulations emphasize that, in recognition of the “unique legal relationship” between the federal government and tribal governments, consultation “should be conducted in a sensitive manner respectful of tribal sovereignty.”³⁰ The consultative process about a planned undertaking is to recognize this “government-to-government” relationship.³¹ Section 106 consultation should occur concurrently with NEPA consultation and analysis, as environmental analyses and impact statements must consider impact on cultural resources.³²

Once the agency concludes its consultation process and identifies a plan to proceed with the undertaking, it signs a programmatic agreement that resolves any adverse effect on property of historic, religious, or cultural significance.³³ “Compliance with the procedures established by an approved programmatic agreement satisfies the agency’s [S]ection 106 responsibilities for all individual undertakings of the program covered by the agreement”³⁴ Signing of the programmatic agreement “clos[es] the record for purposes of NHPA § 106.”³⁵

Complicating this regulatory landscape in the infrastructure context are inconsistencies in U.S. Army Corps of Engineers (“Corps”) Section 106 procedures. The Corps Civil Works Division is responsible for water resource development and management; private pipeline projects must get permission from Civil Works for a pipeline to cross federal land or to impact Corps

²⁷ *Id.* §§ 800.1–800.2. When an impacted tribe has no THPO, the tribal government may designate a representative to consult with the federal agency. ADVISORY COUNCIL ON HIST. PRES., CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK 7 (2012), <https://www.energy.gov/sites/prod/files/2016/02/f30/consultation-indian-tribe-handbook.pdf> [<https://perma.cc/X5NC-BHC8>] (“The tribe retains the same consultation rights regarding agency findings and determinations, and to execute a Memorandum of Agreement (MOA) or Programmatic Agreement (PA), as it would if it had a THPO.”).

²⁸ 36 C.F.R. § 800.2(c)(3)(i) (2019).

²⁹ *Id.* § 800.2(c)(3)(ii).

³⁰ *Id.*

³¹ *Id.* § 800.2(c)(3)(iii).

³² *Id.* § 800.8(a)(1); *see infra* Section I.B.

³³ 36 C.F.R. §§ 800.13–800.14 (2019).

³⁴ *Id.* § 800.14(b)(2)(iii).

³⁵ *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1216 (9th Cir. 2008).

projects.³⁶ The Corps Regulatory Program, a subdivision of Civil Works, is the division that actually reviews permit applications and issues permits for any construction or other infrastructure project impacting U.S. navigable waters.³⁷ Although Civil Works generally follows ACHP regulations governing procedures for engaging in NHPA Section 106 review, the Regulatory Program does not.³⁸ Instead, the Regulatory Program follows its own procedures for implementing Section 106.³⁹ Agencies may use their own alternative Section 106 regulations but ACHP must approve those alternatives and the alternatives must employ standards consistent with the ACHP regulations; the Corps' Regulatory Program's alternate regulations have never been approved.⁴⁰ A 2019 U.S. Government Accountability Office Report on tribal consultation during the infrastructure development process highlighted this regulatory bifurcation as a violation of the NHPA that should be resolved through congressional action.⁴¹

The ACHP also produces guidance on improving the consultation relationship between agencies and tribes. The latest report, issued in September 2015, identified staffing and resource scarcity, diversity, and the role of permit applicants—who often apply for permits at a time when they already bear substantial sunk costs in planning and historic preservation

³⁶ *Civil Works*, U.S. ARMY CORPS OF ENGR'S, <https://www.usace.army.mil/Missions/Civil-Works/> [<https://perma.cc/C7RC-BEGZ>] (last visited Jan. 10, 2021); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 51 n.86.

³⁷ *Civil Works: Regulatory Program Links*, U.S. ARMY CORPS OF ENGR'S, <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/> [<https://perma.cc/K2DD-D94Q>] (last visited Jan. 10, 2021); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 51 n.86.

³⁸ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 51.

³⁹ The Regulatory Program's Section 106 procedures come from a 1990 Corps regulation, a 2005 Corps guidance document, and a 2007 Corps memorandum. 33 C.F.R. pt. 325, app. C (2019); Memorandum from Michael B. White, Chief, Operations, Directorate of Civil Works, U.S. Army Corps of Eng'rs, on Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800 (April 25, 2005) (on file with the U.S. Army); Memorandum from Lawrence A. Lang, Acting Chief, Operations, Directorate of Civil Works, U.S. Army Corps of Eng'rs, on Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005 (Jan. 31, 2007) (on file with the U.S. Army).

⁴⁰ 36 C.F.R. § 800.14 (2019); 54 U.S.C. § 306102(b)(5)(A); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 52–54 (describing alternative USACE regulations and the ACHP approval process and noting that the ACHP has never approved USACE alternative regulations).

⁴¹ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 55 (“The long-standing nature of the differences between the Corps procedures and the ACHP regulations, as well as the agencies’ inability to resolve these differences over almost two decades despite numerous attempts to do so, suggests that legislative action may be needed to resolve this issue.”).

analysis—as challenges to the consultative process.⁴² Suggested solutions included regular scheduled meetings, consultation agreements, documented consultation standards, better training for agency staff on tribal needs, and better use of tribal expertise during planning processes.⁴³

B. National Environmental Policy Act

The second statutory prong governing tribe-agency consultation on major infrastructure is the NEPA, which requires preparation of an environmental assessment or environmental impact statement for proposed projects. Congress enacted the NEPA to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.”⁴⁴ As such, NEPA requires that all “major Federal actions significantly affecting the quality of the human environment” trigger an environmental review.⁴⁵ As with the NHPA, the NEPA established a body to create and oversee implementing regulations.⁴⁶ Regulations promulgated by the Council on Environmental Quality (CEQ), housed within the Executive Office of the President, define “major Federal action” broadly, including any activity or project “entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies.”⁴⁷ CEQ regulations require initiation of NEPA environmental assessment requirements early in the planning process.⁴⁸ The NEPA environmental review process constitutes preparation of either an Environmental Assessment or an Environmental Impact Statement, depending on the project’s degree of likely environmental impact.⁴⁹ CEQ regulations require that federal agencies undertaking major

⁴² ADVISORY COUNCIL ON HIST. PRES., RECOMMENDATIONS FOR IMPROVING TRIBAL-FEDERAL CONSULTATION 1–2 (2015), <https://www.achp.gov/sites/default/files/guidance/2018-06/RecommendationsforImprovingTribal-FederalConsultation14Sep2015.pdf> [perma.cc/4N92-P2JH].

⁴³ *Id.* at 3–4.

⁴⁴ 42 U.S.C. § 4321.

⁴⁵ *Id.* § 4332(C).

⁴⁶ *Id.* § 4342.

⁴⁷ 40 C.F.R. § 1508.18 (2019).

⁴⁸ *Id.* § 1500.1(b).

⁴⁹ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,321 (July 16, 2020) (to be codified at 40 C.F.R. § 1501.3(a)). The Environmental Assessment (EA) is a relatively brief review of the project’s environmental impact with either a Finding of No Significant Impact (FONSI) or a finding of likely significant impact, which then triggers the more in-depth review required by an Environmental Impact Statement (EIS). An EIS has significantly more elaborate requirements, starting with publication of a Notice of Intent in the Federal Register, a scoping process identifying interested stakeholders, a full analysis of the environmental effects of a proposed plan and of alternative plans (including no action), publication of the draft EIS, a public comment period, publication of the final EIS with responses to substantive comments

actions requiring NEPA review assess the impact of those actions on cultural resources.⁵⁰ This assessment requires agencies to consult “early with appropriate State, Tribal, and local governments . . . when their involvement is reasonably foreseeable.”⁵¹ This regulatory requirement to consult impacted tribes as part of the environmental assessment process does not define what constitutes adequate consultation.⁵²

The Federal Permitting Improvement Steering Council (FPISC) also impacts implementation of NEPA. Created in 2015 to make the permitting processes for large infrastructure projects more centralized and efficient, FPISC is made up of 16 federal agencies, departments, councils, and commissions involved in these large federal projects.⁵³ FPISC identifies and advises member agencies and departments on best practices for permitting and environmental review, including for improving stakeholder engagement.⁵⁴ In its latest report on recommended best practices, FPISC issued several recommendations related to tribal consultation. FPISC recommended that lead agencies engaging in NEPA review collaborate with tribes to develop standards for identifying resources potentially impacted by proposed infrastructure projects and, when project ideas are identified, to consult with tribes before rather than after initiating review processes.⁵⁵

C. Executive Directives

Although not legally binding, multiple executive directives issued over the last 20 years emphasize presidential concern for the importance of tribal voices during infrastructure planning processes.

received, and issuance of the Record of Decision, stating the agency’s final conclusion on environmental impact. *Id.* at 43,323–26, 43,328, 43,333.

⁵⁰ 40 C.F.R. § 1508.8 (2019).

⁵¹ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43,360.

⁵² *Id.* at 43,367.

⁵³ Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) (codified as amended in scattered sections of 12, 16, 22, 23, 26, 40, 42, and 49 U.S.C.). Current members of FPISC are the Advisory Council on Historic Preservation, Council on Environmental Quality, Department of Agriculture, Department of the Army, Department of Commerce, Department of Defense, Department of Energy, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Transportation, Environmental Protection Agency, Federal Energy Regulatory Commission, General Services Administration, Nuclear Regulatory Commission, and Office of Management and Budget.

⁵⁴ 42 U.S.C. § 4370m-1(c)(2)(B).

⁵⁵ FED. PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR INFRASTRUCTURE PROJECTS FOR FISCAL YEAR 2019, at 3–4 (2019), <https://www.permits.performance.gov/sites/permits.dot.gov/files/2019-10/fast-41fy2019-best-practices-report.pdf> [<https://perma.cc/N63Q-HPZ9>].

1. Executive order 13,175

On November 6, 2000, President Bill Clinton issued Executive Order 13,175, directing federal agencies to consult with recognized tribes on federally funded or directed activities with the potential to impact tribes.⁵⁶ The order recognized that the federal government has a unique trust relationship with tribal governments and, as such, ordered federal agencies making policy or engaging in other administrative action with tribal implications to engage in accountable, meaningful, and timely consultation with tribal officials.⁵⁷ Agencies were directed to create and document consultation processes in conformity with the order.⁵⁸ Finally, the order noted its issuance in conjunction with Executive Order 13,132, establishing parallel requirements for federal agencies to consult with states and localities when engaging in policymaking with federalism implications.⁵⁹

2. Presidential memoranda on tribal consultation

In September 2004, President George W. Bush issued a memorandum affirming his administration's support for Executive Order 13,175 and requesting that agency heads ensure compliance with the order's directions.⁶⁰ President Barack Obama issued a subsequent memorandum to heads of executive departments and agencies in November 2009, requiring each body to develop a plan of action for "regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications," in compliance with the Clinton order.⁶¹ Although President Obama noted in his memorandum that "[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results," he indicated that "meaningful dialogue" and specifically consultation, "is a critical ingredient of a sound and productive Federal-tribal relationship."⁶²

⁵⁶ Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

⁵⁷ *Id.* at 67,249–50. Note that independent agencies such as the Federal Communications Commission and Federal Energy Regulatory Commission are "encouraged" to comply with EO 13,175 though they are not subject to it. *Id.* at 67,251.

⁵⁸ *Id.* at 67,250.

⁵⁹ *Id.* at 67,251; *see* Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,257 (Aug. 10, 1999) ("Each agency shall have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.").

⁶⁰ Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004).

⁶¹ Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009).

⁶² *Id.*

3. Increased presidential commitment to consultation

President Obama increased Executive Branch investment in consultation when he issued Executive Order 13,647, establishing the White House Council on Native American Affairs.⁶³ Vowing “[g]reater engagement and meaningful consultation with tribes,” President Obama directed the new Council to coordinate consultation across agencies and departments.⁶⁴

The Obama Administration subsequently issued annual reports from the Executive Office of the President providing updates on executive-tribal coordination. The 2016 report emphasized agency progress in formalizing and improving the consultation process, highlighting efforts from the Environmental Protection Agency (EPA), the Department of the Treasury, the Federal Emergency Management Agency (FEMA), the Department of Energy, and the Social Security Administration.⁶⁵ The 2017 report included reports on similar policy improvements by the Department of Health and Human Services (HHS), the Department of Agriculture (USDA), the Department of the Interior, and the Department of Education.⁶⁶

D. International Standards: United Nations Declaration on the Rights of Indigenous People

Finally, the United Nations Declaration on the Rights of Indigenous People provides member nations with nonbinding guidance on recognizing and affirming indigenous political, economic, cultural, and property rights.⁶⁷ The Declaration advises member states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may

⁶³ Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (July 1, 2013).

⁶⁴ *Id.*

⁶⁵ EXEC. OFF. OF THE PRESIDENT, 2015 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: BUILDING PROSPEROUS AND RESILIENT TRIBAL NATIONS 16, 26, 46, 52 (2016), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/2015%20Tribal%20Nations%20Conference%20Report.pdf> [<https://perma.cc/4B47-PYBV>].

⁶⁶ EXEC. OFF. OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS 9–11, 16 (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf [<https://perma.cc/E4DE-44HF>]. This report also highlighted the inter-agency review of consultation on infrastructure projects initiated by the Departments of the Interior, Justice, and the Army in 2016. *Id.* at 14.

⁶⁷ G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).

affect them.”⁶⁸ The Declaration also advises member states to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.⁶⁹

The United States voted against the United Nations Declaration in 2007 but changed its position to support the Declaration in January 2011.⁷⁰ The State Department’s 2011 announcement recognized the “moral and political force” of the Declaration, but also interpreted the Declaration’s advice as aligning squarely with preexisting federal statutory and regulatory consultation requirements.⁷¹ Referencing Executive Order 13,175 and President Obama’s 2009 memorandum as evidence of the federal tradition of consultation, the State Department recognized “the significance of the Declaration’s provisions on free, prior and informed consent” but noted that the federal government understood those provisions “to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”⁷² Recognition and endorsement of the United Nations Declaration effected no change on federal law or policy.⁷³

II. CONSULTATION’S FAILURE

Despite guidance from diverse legal authorities—including statutes, regulations, guidance, executive directives, and international declaration—conflict among federal agencies and departments, private infrastructure developers, and tribal governments and communities persists. If the degree of visibility and intensity of litigation over the Dakota Access pipeline are

⁶⁸ *Id.* art. 19. For a full analysis of the free, prior, and informed consent model, see generally Carla F. Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80 ALB. L. REV. 429 (2017).

⁶⁹ G.A. Res. 61/295, *supra* note 67, art. 32.

⁷⁰ U.S. DEP’T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Jan. 12, 2011), <https://2009-2017.state.gov/documents/organization/154782.pdf> [<https://perma.cc/Q2AH-DCC8>]; see also Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 1076 (Dec. 16, 2010) (indicating President Barack Obama’s support for the United Nations Declaration).

⁷¹ ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 70.

⁷² *Id.*

⁷³ *Id.*

any marker, tribe-developer-agency conflict is, in fact, on the rise. Is there any hope for tribal consultation as a legal mechanism for ensuring meaningful intergovernmental respect and consensus?

Failing to confront the fundamental, inherent internal contradictions in consultation requirements, several scholars of administrative and tribal law insist consultation can work. The general consensus among these scholars is that the “regular and meaningful consultation” promised in Executive Order 13,175 and reaffirmed in subsequent presidential memoranda has not—or has rarely—come to pass,⁷⁴ but that adherence to best practices or to an articulated uniform standard would transform current consultation practices into the meaningful consultation theoretically intended by past presidents and policymakers.⁷⁵ Existing protections and obligations to honor tribal

⁷⁴ Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 900 (2014); see also Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 344 (2018) (“Congress should affirm tribes’ status as key stakeholders in environmental, homeland security, public safety, energy, education, health, and other national concerns and enact requirements for meaningful consultation with tribes.”); Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENV’T L. REV. 1, 50 (2012) (“Consultation policies should be established within every federal agency as well as at the state-level. While the policies need to have some flexibility to account for the individual differences between tribes, sound principles should be followed”); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 474–75 (2013) (“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.”); Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 PUB. LAND & RES. L. REV. 205, 243 (2017) (“[C]onflicts demonstrate the importance of establishing common understandings of meaningful consultation, as well as the need to carefully explore and apply the lessons of circumstances, like the Badger-Two Medicine, where despite initial upsets meaningful consultation organically occurred.”); Dwight Newman et. al., *Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples*, 32 B.U. INT’L L.J. 449, 454 (2014) (“Taking the general need for Indigenous consultation—and potentially participation—in Arctic energy development, this Article discusses the appropriate forms for that consultation and participation, taking into account the special context of the Arctic.”); Christy McCann, *Dammed if You Do, Damned if You Don’t: FERC’s Tribal Consultation Requirement and the Hydropower Re-Licensing at Post Falls Dam*, 41 GONZ. L. REV. 411, 454 (2006) (“While consultation may not be the solution to getting all tribal issues resolved favorably, it does offer an opportunity for progress. This opportunity justifies the investment of the time and resources necessary to make that consultation meaningful.”).

⁷⁵ See Eitner, *supra* note 74, at 900 (“A statute providing a government-wide standard for meaningful consultation and a mechanism by which agencies must justify decisions that run contrary to the views expressed by tribes would provide just such a guarantee. By doing so, the federal government would honor its general trust responsibility to Indian tribes and ensure that it will not revert to its past pattern of broken promises.”)

sovereignty offered by NHPA and NEPA, they suggest, are adequate “when agencies undertake these obligations in good faith.”⁷⁶ Better mechanisms to hold agencies to good faith efforts to consult would address these flaws.⁷⁷

Even scholars highly critical of consultation suggest that forcing consultation in practice to cohere with the spirit of statutory and regulatory consultation requirements could be a plausible solution to current failures to meaningfully engage tribes impacted by infrastructure development. Derek Haskew recognizes the inadequacy of consultation with tribes yet seems resigned to its use as a legal mechanism, writing that “the recent popularity of consultation requirements suggests they may be here for some time.”⁷⁸ Haskew suggests that, given the ubiquity of statutory and regulatory consultation requirements, one “course of progress . . . would be to begin the process of raising consultations to their optimal expression as a legal device.”⁷⁹

Consultation is a fundamentally flawed engagement device. These calls to action for meaningful consultation through improved standards simply fail to grapple with the fact that, not only has consultation failed historically, it is a conceptually inadequate device. Consultation is inadequate because its chief benefit—its inherent flexibility that allows stakeholders to engage on terms that are individually and situationally significant—is also its weakness, in that its broad and discretionary model is ripe for agency inaction and abuse. This negative quality cannot be excised from the consultation model so as to make it a viable engagement device. I suggest here that triplicate failures of inadequate administrative procedure, judicial review, and legislative oversight make consultation inherently inadequate to serve its stated purpose of government-to-government engagement on large infrastructure projects. Scholars suggesting otherwise are not only incorrect; they implicitly support federal reliance on consultation and thus fail to hold political and executive actors accountable for their continued use of a device of engagement so flawed and obviously dismissive of tribal sovereignty.

A. Administrative Procedure and Self-Regulation

First, consultation fails because it is inherently subject to administrative failure. Consultation policies take the form of advisory action with no legally binding effect; unmanageable and vague guidance interprets equally unmanageable and vague statutory mandates. As such, consultation relies primarily on agencies to provide their own internal oversight and create their own legitimacy. Because consultation necessarily rests on values of

⁷⁶ Rowe, Finley & Baldwin, *supra* note 19, at 46.

⁷⁷ *Id.* at 47.

⁷⁸ 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, 74 (2000).

⁷⁹ *Id.*

agency discretion, reasonable action, and good faith, it also lacks an administrative backstop to protect stakeholder interests.

Administrative procedure makes consultation ineffective because agencies' consultation policies are informal guidance rather than binding rulemaking or adjudication. The statutory mandates in NHPA and NEPA require federal agencies to make reasonable, good faith efforts to consult with tribes, but provide no benchmark for measuring adequacy of consultation, and do not require that consultation procedures be formalized through notice-and-comment rulemaking.⁸⁰ Requirements for consultation to be meaningful and respectful of tribal sovereignty and the government-to-government interaction come instead from executive orders and memoranda that lack legal binding force.⁸¹ Consultation must occur in some form to comply with law, but any requirements for timing and quality of consultation, and for consideration of tribal views, are merely advisory and not legally required.⁸²

As nonbinding guidance documents, agency policies on tribal consultation explicitly disclaim the creation of any legal rights. The Army Corps of Engineers' Regulatory Program Tribal Consultation Policy contains the disclaimer that it "is not intended to, and does not grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law."⁸³ Other agencies playing a role in regulating and permitting infrastructure development, including the Department of Energy, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of the Interior, and the Environmental Protection Agency, adhere to tribal consultation policies containing a

⁸⁰ 54 U.S.C. § 302706; Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,360 (July 16, 2020) (to be codified at 40 C.F.R. § 1501.2).

⁸¹ *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (describing consultation requirements without discussing legal consequences from the failure to comply); *see also* Memorandum on Government-to-Government Relationship With Tribal Governments, *supra* note 60 ("[T]he head of each executive department and agency . . . shall continue to ensure to the greatest extent practicable and as permitted by United States law that the agency's working relationship with federally recognized tribal governments respects the rights of self-government and self-determination . . ."); Memorandum on Tribal Relations, *supra* note 61 (directing agency heads to submit plans of action and progress reports to the Director of the Office of Management and Budget "to the extent permitted by law and consistent with [agencies'] statutory and regulatory authorities.").

⁸² *See* McCann, *supra* note 74, at 438 ("Agencies do not have to actually implement tribes' recommendations; they are just required to listen to what tribes have to say. Agencies have the discretion to ignore, as long as they can show a meaningful consultation occurred.")

⁸³ Memorandum from Thomas P. Bostick, Lieutenant General, U.S. Army Corps of Engineers on Tribal Consultation Policy 6 (2012) (on file with the U.S. Army). The Corps Policy also refers to broader Department of Defense consultation policies which offer the same disclaimer.

functionally identical disclaimer, marking those policies as not legally binding guidance documents.⁸⁴

Given the nonbinding nature of consultation policies and agreements, enforcement of meaningful and substantive consultation—at least in the administrative context—falls to the consulting agency. Consultation cannot work because agencies have no incentive to self-regulate or to limit their own discretion to consult only perfunctorily. Characterization of tribal consultation as a “box-checking exercise” is rooted in reality.⁸⁵ Any hope of successful consultation rests upon agency “sincerity”; “[d]oes the agency or project proponent truly want to know what Indians think about a particular project or issue? Or are they simply checking the box ‘Have you consulted?’.”⁸⁶ There is no reliable agency self-regulation mechanism to guarantee sincerity and good faith.

The absence of administrative checks on consultation failures may be part of a broader trend of agency practice that departs from “the series of assumptions” codified in the Administrative Procedure Act.⁸⁷ Daniel Farber and Anne Joseph O’Connell contrast these traditional administrative law assumptions with the current status of the federal administrative state:

[Traditional] assumptions call for statutory directives to be implemented by an agency led by Senate-confirmed presidential appointees with decision-making authority. The implementation is presumed to be through statutorily

⁸⁴ U.S. DEP’T OF ENERGY, DOE O 144.1, AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY 6 (2009), <https://www.energy.gov/sites/prod/files/DOE%20O%20144.1.pdf> [<https://perma.cc/2RUH-RG5S>]; U.S. DEP’T OF HOMELAND SEC., TRIBAL CONSULTATION POLICY § V(B) (2011) https://www.dhs.gov/sites/default/files/publications/DHS%20Tribal%20Consulation%20Policy%20Final%20PDF_0.pdf [<https://perma.cc/C6Q3-VNHL>]; Tribal Government-to-Government Consultation Policy, 81 Fed. Reg. 40,893, 40,897 (Jun. 23, 2016); U.S. DEP’T OF THE INTERIOR, POLICY ON CONSULTATION WITH INDIAN TRIBES 14 (2011), <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf> [<https://perma.cc/ZAN9-CSY4>]; U.S. ENV’T PROTECTION AGENCY, POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES: GUIDANCE FOR DISCUSSING TRIBAL TREATY RIGHTS 1 (2016), https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf [<https://perma.cc/5GWP-5QLT>]. Interestingly, the Department of the Interior undertook a nonbinding quasi-notice-and-comment process in developing its policy, soliciting and allegedly considering comments from over twenty tribal governments prior to issuing its 2011 policy as a response to the 2009 memorandum from President Obama. For a list of comments by section, see *Tribal and Public Comments*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/tribes/Tribal-and-Public-Comments> [<https://perma.cc/Y6HS-5WP9>] (last visited Feb. 3, 2021).

⁸⁵ Rowe, Finley & Baldwin, *supra* note 19, at 17.

⁸⁶ DARBY C. STAPP & MICHAEL S. BURNEY, TRIBAL CULTURAL RESOURCE MANAGEMENT: THE FULL CIRCLE TO STEWARDSHIP 119 (2002).

⁸⁷ Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1154 (2014).

mandated procedures and criteria, where the final result can then be reviewed by the courts to see if the reasons given by the agency at the time of action match the delegated directions. Yet, there are often statutory and executive directives to be implemented by multiple agencies, frequently missing confirmed leaders, where practical decision-making authority may rest outside of those agencies. The process of implementation also follows mandates in both statutes and executive orders, where the final result faces limited, if any, oversight by the courts.⁸⁸

Farber and O’Connell later list the costs that this shift inflicts on administrative law. Although written from a general administrative law perspective, this list could easily be read as an enumeration of the negative consequences of cursory and meaningless consultation: “loss of transparency for the regulated parties and the public; greater difficulty of congressional oversight . . . ; decreasing influence of the agency’s unique expertise and knowledge of the record; and blurring or undermining delegation as the agency’s statutory mandate is diluted by other policy and political goals.”⁸⁹ Agencies’ failure to adequately engage tribes as governments impacted by major infrastructure projects may be part of a broader trend of agency action largely beyond the reach of the APA, leaving impacted parties without substantial recourse when agencies fail to adequately self-regulate.

Emily Hammond and David Markell identify three metrics for assessing the legitimacy of agency procedure (largely) absent judicial review.⁹⁰ In other words, in the substantial discretionary space of agency action unlikely to face judicial review, how can we evaluate whether an agency is adequately self-regulating? Hammond and Markell’s three metrics are [1] how the procedure is used; [2] agency responsiveness to concerns and reason-giving for decisions; and [3] substantive outcomes of the procedure.⁹¹ Application of all three metrics suggest legitimacy problems with consultation. Metric [1] involves consideration of the frequency with which citizens use the procedure and the substantive nature of that use; although tribal interest in engagement with agencies on the impact of infrastructure projects is high—and rising—that interest persists in spite of barriers to engagement that agencies are in the best position to mitigate, and the frequency of quality consultation is far lower than it could and should be.⁹² Metric [2] evaluates agency responsiveness to expressed concerns and the

⁸⁸ *Id.* at 1154–55.

⁸⁹ *Id.* at 1175.

⁹⁰ Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENV’T L. REV. 313, 327–330 (2013).

⁹¹ *Id.* at 328.

⁹² *Id.* at 328–29; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 16, at 20–27.

degree of reason-giving for its decisions; tribes routinely point to poor agency communication, agency failure to consider tribal perspectives, and lack of agency accountability as significant barriers to the consultation process.⁹³ Metric [3] evaluates the degree to which the process meets substantive statutory goals and whether results are distributive and non-arbitrary; in this aspect, consultation presents its most extreme failures, given that results depend on agency attitude and willingness to consult early in the process and that agencies face increasing numbers of challenges for failure to consult.⁹⁴

Agency attempts to improve accountability to tribes during the infrastructure project consultation process, including attempts at collective oversight, have yet to pay dividends. The purpose of creating FPISC was to coordinate interagency permitting and environmental review for large infrastructure projects, and in December 2017 the FPISC Best Practices Report for fiscal year 2018 recommended creating a central database and notification system of areas of tribal interest and tribal consultation contacts.⁹⁵ Despite President Donald Trump's 2017 Executive Order directing agencies to implement FPISC's annual best practices, there has been no decision or movement made on creating this central database.⁹⁶

B. Judicial Review

Second, consultation fails because there is no meaningful judicial review acting as a check on agencies failing to engage tribes in a meaningful capacity.

⁹³ Hammond & Markell, *supra* note 90, at 329; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 22–23.

⁹⁴ Hammond & Markell, *supra* note 90, at 329–30; STAPP & BURNEY, *supra* note 86, at 119–20; Eid, *supra* note 14, at 600; *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 2 (“According to the National Congress of American Indians, federal approval of certain infrastructure projects historically had negative effects on tribal communities, and tribes’ knowledge and expertise can help ensure that infrastructure projects are completed in a timely manner to avoid negative impacts on tribal resources and reduce the risk of subsequent disagreement or litigation.”).

⁹⁵ 42 U.S.C. § 4370m-1(c)(2)(B); FED. PERMITTING IMPROVEMENT STEERING COUNCIL, RECOMMENDED BEST PRACTICES FOR ENVIRONMENTAL REVIEWS AND AUTHORIZATIONS FOR INFRASTRUCTURE PROJECTS FOR FISCAL YEAR 2018, at 4 (2017), <https://cms8.permits.performance.gov/sites/permits.dot.gov/files/2019-10/fast-41fy-2018best-practices-report.pdf> [<https://perma.cc/SH54-2UFC>]; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 35.

⁹⁶ Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,464–65 (Aug. 24, 2017). FPISC's inaction persists despite agencies' alleged support for such a central information and notification system and suggestions that individual agency systems could be scaled up to create a central system for all agencies participating in the large infrastructure permitting and planning process. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 35–37.

1. Arbitrary and capricious review under the APA

Judicial review is rarely adequate to the task of enforcing the tribal right to meaningful engagement. Before seeking judicial review, tribes—like any party hoping to challenge agency action—generally need to exhaust any available administrative remedies.⁹⁷ When a tribe wishes to bring a failure-to-consult claim under NHPA or NEPA, the exact requirements for exhaustion are not clear, but relevant case law suggests tribes must explicitly attempt to initiate consultation.⁹⁸ Agency publication of notices of project approval or environmental assessments under NHPA or NEPA are adequate notice to interested tribes for purposes of the exhaustion requirement.⁹⁹

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Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section ... unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704; *see also* 2 CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES § 6:24 (2003), Westlaw (database updated Aug. 2020) (“When review is sought under the general review provisions of the Administrative Procedure Act, the ‘agency action’ must be ‘final agency action.’”). NHPA and NEPA do not statutorily require that administrative remedies be exhausted, and thus courts have discretion to hear claims on the merits without exhaustion of such remedies, but often do not. *See, e.g.,* Winnemem Wintu Tribe v. U.S. Dep’t of the Interior, 725 F. Supp. 2d 1119, 1139 (E.D. Cal. 2010) (“[T]o bring a claim under the APA for a violation of the NEPA, plaintiffs must show that they have exhausted available administrative remedies prior to bringing an action in federal court.”). *But see* Yankton Sioux Tribe v. U.S. Army Corps of Eng’rs, 194 F. Supp. 2d 977, 992 (D.S.D. 2002) (“The NHPA does not *require* the Tribe to exhaust its administrative remedies prior to seeking judicial review Thus, it is within the Court’s discretion whether this action should be dismissed for failure to exhaust administrative remedies.” (citations omitted)).

⁹⁸ *See* Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs, No. CV 14-1667 PSG, 2015 WL 12659937, at *19 (C.D. Cal. June 30, 2015) (“[P]laintiffs were required to exhaust their administrative remedies by bringing the Santa Ynez Band’s interest in the Project before the Corps prior to filing this lawsuit under the APA.”).

⁹⁹ *Id.*; *see also* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384–85 (1947) (“Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.”); Hendrick Med. Ctr. v. Azar, 950 F.3d 323, 327 (5th Cir. 2020) (“Hendrick received notice via the Federal Register but failed to request correction of its wage data by the published deadline in accordance with the established process under the statute. Thus, the Board’s determination that it did not have jurisdiction over Hendrick’s appeal for failure to exhaust administrative remedies was correct.”); Shiny Rock Mining Corp. v. United States, 906 F.2d 1362, 1364–65 (9th Cir. 1990) (“Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.” (citations omitted)).

Even if tribes prove exhaustion of administrative remedies through appeal to consulting agencies, judicial review has limited effect. Most legal challenges for failure to consult fall under the Administrative Procedures Act.¹⁰⁰ NEPA provides no private right of action, and therefore claims for failure to consult during the NEPA environmental review process must be brought under the APA.¹⁰¹ Courts are split on whether NHPA provides a private right of action; in more recent cases, the Ninth and D.C. Circuits have held that NHPA provides no private right of action and that claims for failure to consult during the Section 106 review process must be brought under the APA.¹⁰² Though beyond the scope of this Comment, tribal claims for failure to consult during large infrastructure project planning and permitting have also been brought under both the Religious Freedom Restoration Act and a 2017 Federal Communications Commission order.¹⁰³

Under the APA, a reviewing court considering tribal claims of inadequate consultation under NEPA and—in most circuits—NHPA will limit review to whether agency consultation was arbitrary and capricious.¹⁰⁴ This

¹⁰⁰ See Rowe, Finley & Baldwin, *supra* note 19, at 42–3 (describing habitual practice of tribal challenges to agency decisions under the APA).

¹⁰¹ Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882–83 (1990).

¹⁰² See Shanks v. Dressel, 540 F.3d 1082, 1092 (9th Cir. 2008) (“Section 106 of the NHPA does not create a private right of action against the federal government.”); Karst Env't. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1295 (D.C. Cir. 2007) (“NHPA, like NEPA, contains no private right of action, [so] we agree with the Ninth Circuit that NHPA actions must also be brought pursuant to the APA.”); Sisseton-Wahpeton Oyate v. U.S. Dep't of State, 659 F. Supp. 2d 1071, 1080 (D.S.D. 2009) (“I find that no private right of action was created by the NHPA, and therefore, this court can consider a violation of NHPA, like NEPA, only within the confines of the APA.”). *But see* Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991) (“This Court, along with other courts of appeals, has recognized that federal question jurisdiction and a private right of action generally exists in actions arising under the Preservation Act.”); Bywater Neighborhood Ass'n v. Tricarico, 879 F.2d 165, 167 (5th Cir. 1989) (“Bywater correctly observes that the NHPA expressly permits private suits outside the APA review process”); Brewery Dist. Soc'y v. Fed. Highway Admin., 996 F. Supp. 750, 756 (S.D. Ohio 1998) (“Plaintiffs have a private right of action in this case against Defendant FHA under the NHPA to ensure compliance with the provisions of that statute.”).

¹⁰³ See Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1048 (9th Cir. 2007), *rev'd en banc*, 535 F.3d 1058 (9th Cir. 2008) (upholding Navajo, Hopi, Havasupai, and Hualapai Nation claim under the Religious Freedom Restoration Act); Nat'l Lifeline Ass'n v. FCC, 921 F.3d 1102, 1107, 1110, 1118 (D.C. Cir. 2019) (considering though failing to reach Oceti Sakowin claim that FCC failed to consult as required by its own guidance document).

¹⁰⁴ See 5 U.S.C. § 706 (stating that a reviewing court should “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

standard of review is highly deferential to agencies in interpretation of both authorizing statutes and the agency's own regulations.¹⁰⁵

2. NHPA

NHPA's Section 16 review process requires federal agencies to "consult with any Indian tribe . . . that attaches religious and cultural significance to property" potentially impacted by an undertaking under the meaning of the statute.¹⁰⁶ Agencies must make a "reasonable and good faith effort" to identify potentially impacted tribes, and so long as some demonstrable effort was made, courts have determined that the agency is not at fault for failing to identify a tribe and to consult with tribe leaders.¹⁰⁷ Consultation requires that a potentially impacted tribe have "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."¹⁰⁸ If the agency attempts to initiate consultation through direct contact—even through a form letter—and the tribe declines to respond, the agency has discharged its statutory and regulatory obligation to consult.¹⁰⁹

¹⁰⁵ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 845 (1984) ("Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'").

¹⁰⁶ 54 U.S.C. §§ 302706, 300308.

¹⁰⁷ See, e.g., *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, No. CV 14-1667 PSG, 2015 WL 12659937, at *20 (C.D. Cal. June 30, 2015) ("[R]egardless of Plaintiffs' failure to properly raise this issue before the Corps during the administrative process, the Corps satisfied its obligations under NHPA because it made a 'reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects' and did not identify the Santa Ynez Band; therefore, the applicable regulation did not require consultation with the Santa Ynez Band." (citation omitted)).

¹⁰⁸ 36 C.F.R. § 800.2(c)(3)(i) (2019).

¹⁰⁹ See, e.g., *United Keetoowah Band of Cherokee Indians v. FCC*, 933 F.3d 728, 749 (D.C. Cir. 2019) ("[I]f a Tribe refuses to respond when the Commission requests its views on an application, the Commission has discharged its obligation of direct Commission-to-Tribe consultation."); *San Juan Citizens All. v. Norton*, 586 F. Supp. 2d 1270, 1292 (D.N.M. 2008) ("BLM sent letters to 51 different tribal governments and 29 other tribal officials to inform them of the project and to seek their input on concerns and issues BLM should consider during the planning process BLM sent copies of the draft RMP and EIS as well as the proposed RMP and Final EIS to all tribal entities that requested copies.").

Though it should be noted that mere contact between agency and tribe is not sufficient for Section 106 consultation, reviewing courts generally require only that consultation constitute some form of individualized discussion between the tribe and the agency.¹¹⁰ This discussion may take many forms, including listening sessions, conference calls, or remote or in-person meetings.¹¹¹ Consultation may be generalized and need not involve discussion of every installation or site.¹¹² Likewise, consultation need not involve every chapter of large tribes.¹¹³ Despite the regulatory directive to begin consulting early in the Section 106 process, delayed consultation just prior to project approval has not been found to be arbitrary and capricious.¹¹⁴ In *Walsh*

¹¹⁰ See, e.g., *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104, 1118–19 (S.D. Cal. 2010) (“BLM's invitation to ‘consult,’ then, amounted to little more than a general request for the Tribe to gather its own information about all sites within the area and disclose it at public meetings. Because of the lack of information, it was impossible for the Tribe to have been consulted meaningful as required in applicable regulations.”). But see, e.g., *United Keetoowah Band of Cherokee Indians*, 933 F.3d at 746 (“[I]nitial contact will lead to voluntary direct discussions through which applicants and tribes . . . will resolve questions involving the presence of relevant historic properties and effects on such properties . . .” (citation omitted)).

¹¹¹ *United Keetoowah Band of Cherokee Indians*, 933 F.3d at 750–51.

¹¹² See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 33 (D.D.C. 2016) (“The Tribe . . . did not have an absolute right to participate in cultural surveying at every permitted undertaking, as it seems to argue. The Advisory Council regulations direct the agency to ‘take into account past planning, research, and studies’ in making these types of determinations, and that is just what the Corps did here. It gave the Tribe a reasonable and good-faith opportunity to identify sites of importance to it.” (citation omitted)).

¹¹³ See, e.g., *San Juan Citizens All.*, 586 F. Supp. 2d at 1293 (“Simply because BLM chose to consult with individual Navajo Chapters in other cases does not demonstrate that it was legally obligated to consult all Chapters in all situations.”).

¹¹⁴ See, e.g., *Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921, 933 (S.D. Cal. 2013) (“[N]o request for meetings by the Tribe was made or initiated until December 2011. Once the first meeting was held on January 31, 2012, subsequent monthly meetings were held [over the three months until permit approval Therefore, the Court concludes that the BLM did not fail to adequately conduct Section 106 consultations.”). Note that any delay in tribal communication of concerns until after approval of a federal undertaking has not prompted a finding of inadequate consultation:

[W]e think it would undermine the policies behind the laches doctrine, as well as the justifications for requiring an agency to conduct additional NHPA review when previously undiscovered cultural resources are identified, to treat the asserted violation of this “ongoing” duty in this case as distinct from the claim that the original section 106 process was defective for the purposes of determining inexcusable delay. Had the Tribe participated in the process, the Coalition could not now claim that the information that it subsequently brought to the Forest Service's attention was “new.” Indeed, a contrary result would give parties that an agency seeks to consult under NHPA incentives *not* to participate in the process: even if the agency would, after appropriate consideration of the

v. *U.S. Army Corps of Engineers*, the court found that the Bureau of Land Management satisfied its Section 106 consultation requirement even though it issued the development permit before concluding its meetings with Plaintiffs.¹¹⁵

Failure of agencies to consult beyond an initial discussion has not been considered arbitrary and capricious by reviewing courts. Should the parties disagree on the potential adverse impact an undertaking will have on a property of historic, religious, or cultural significance, the agency is nonetheless free to follow its own conclusions and proceed with project approval and construction.¹¹⁶ NHPA “only requires that an agency take procedural steps to identify cultural resources; it does not impose a substantive mandate on the agency to protect the resources.”¹¹⁷ After the programmatic agreement is signed for a given project, the drafting agency has discharged its Section 106 obligations, even to a tribe that does not sign the agreement.¹¹⁸

3. NEPA

NEPA environmental review requires consideration of environmental impact on cultural resources which, at least in part, must involve consultation with potentially adversely impacted tribes.¹¹⁹ Consultation in the process of environmental assessment must involve a “full and fair discussion” of the potential effects of the project on impacted resources.¹²⁰ This is part of the broader requirement that, to comply with NEPA, federal agencies take a “hard look” at the environmental impacts of any planned action.¹²¹ This “hard

information, go forward with the project, an entity such as the Tribe could hold back some evidence of the existence of cultural resources until after the project had been approved, and then receive a second bite at the apple

Apache Survival Coal. v. United States, 21 F.3d 895, 912 (9th Cir. 1994).

¹¹⁵ 757 F. Supp. 781, 786–89 (W.D. Tex. 1990).

¹¹⁶ See, e.g., *United Keetoowah Band of Cherokee Indians*, 933 F.3d at 746 (“[I]f an applicant and an Indian tribe . . . disagree regarding whether an undertaking will have an adverse effect on a historic property of religious and cultural significance, or if the tribe . . . does not respond to the applicant’s inquiries, the Commission steps in to consult and ultimately ‘make a decision regarding the proposed undertaking.’” (citation omitted)).

¹¹⁷ *San Juan Citizens All.*, 586 F. Supp. 2d at 1294.

¹¹⁸ See generally *Battle Mountain Band v. U.S. Bureau of Land Mgmt.*, No. 3:16-cv-0268-LRH-WGC, 2016 WL 4497756 (D. Nev. Aug. 26, 2016).

¹¹⁹ 36 C.F.R. § 800.8 (2019).

¹²⁰ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,363, 43,366 (July 16, 2020) (to be codified at 40 C.F.R. §§ 1502.1, 1502.16).

¹²¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation omitted).

look” does not impose a duty to reach particular results or to follow outside—including tribal—recommendations.¹²²

Courts reviewing tribe-agency consultation on the environmental impacts on cultural resources require consideration of all identified resources but no particular quality of consultation or level of deference to tribal concerns.¹²³ Consultation may be generalized and need not involve discussion of every installation or site.¹²⁴ An agency’s environmental assessment may consider impacts on specific historic sites identified by tribes but not on surrounding areas. This is exemplified in *South Fork Band Council v. U.S. Department of the Interior*, where the Bureau of Land Management claimed its environmental impact statement satisfied Plaintiffs’ concerns in arranging for access to specific sacred sites but not to the entire mountain on which those sites were located, despite reference to the entire mountain’s significance in consultation records.¹²⁵ As with tribe-agency engagement under NHPA, timely consultation may involve agency contact as little as one month before publishing its environmental assessment or environmental impact statement.¹²⁶

C. Legislative Oversight

Third, consultation fails because Congress defers to agencies in creating their own nonbinding policies and Congressional oversight neglects to protect tribal interests. Congress has oversight mechanisms at its disposal for conducting inquiry into agency action and policy, but so long as authorizing statutes direct agencies to engage in consultation—fundamentally a discretionary, nonbinding form of tribe-agency engagement—there is no incentive for agency change.

¹²² *Id.*; see also *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1158 (9th Cir. 2017) (“The Department does not believe this proposed action would preclude the Tribes or any entitlement holder from using their Colorado River entitlement. The interim surplus criteria will not alter the quantity or priority of Tribal entitlements.”).

¹²³ See, e.g., *Indigenous Env’t Network v. U.S. Dep’t of State*, 347 F. Supp. 3d 561, 590 (D. Mont. 2018) (holding that the Department of State’s environmental impact statement needed to include a survey of potential cultural resources impacted, but not requiring any additional action or specifying the means of tribal consultation).

¹²⁴ See, e.g., *Diné Citizens Against Ruining Our Env’t v. Jewell*, 312 F. Supp. 3d 1031, 1107–08 (D.N.M. 2018) (“A SHPO consultation is thus not mandatory for every well, but only for wells that the BLM Field Manager is considering expanding the APE. Accordingly, the BLM’s failure to consult the SHPO for every well does not, by itself, demonstrate that the BLM acted contrary to law or arbitrarily and capriciously.”).

¹²⁵ 588 F.3d 718, 724 (9th Cir. 2009).

¹²⁶ See, e.g., *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 608 F.3d 592, 608–09 (9th Cir. 2010) (finding that the BLM met its NEPA consultation requirement despite waiting a full year after the developer applied for an amendment to mining plans to contact the tribe).

1. Oversight through the Government Accountability Office

After tensions between the Standing Rock Sioux Tribe, Dakota Access, and authorizing federal agencies spilled over into physical confrontation and extensive litigation in the federal courts, 26 members of Congress asked the GAO to produce a report on federal agencies' procedures for consulting with tribes about major infrastructure projects.¹²⁷ An "arm of Congress . . . totally independent of the executive," GAO acts as a mechanism for congressional oversight.¹²⁸ GAO is charged by statute with "evaluat[ing] the results of a program or activity the Government carries out under existing law" when asked to do so by a congressional committee.¹²⁹ In this case, twenty-two members of the House of Representatives, and leaders of the House Subcommittee for Indigenous Peoples of the United States, House Committee on Natural Resources, Senate Committee on Indian Affairs, and Senate Committee on the Budget commissioned the GAO in September 2016 to inquire into the consultation policies of twenty-one agencies.¹³⁰ Following their investigation, the GAO identified a series of barriers to consultation identified by agency officials and tribal governments, and subsequently made twenty recommendations to seventeen agencies, two recommendations to the FPISC, and one request for congressional consideration.¹³¹ Agencies that responded to GAO recommendations generally agreed with the Office's suggestions and expressed commitment to revisiting consultation policies.¹³² The GAO Report serves as a useful tool for identifying problems with tribe-agency consultation but lacks teeth as an enforcement mechanism. Unfortunately, GAO findings are not binding upon agencies or upon Congress, and their opinions are only persuasive authority in federal courts.¹³³

2. Oversight through congressional hearings

Congress also exercises oversight over tribe-agency consultation in holding committee hearings. Since 2016, Congress has held countless hearings referencing both the Standing Rock conflict and the need for effective tribe-agency consultation in general.

First, the House Subcommittee on Energy held a hearing on Standing Rock to provide an information-sharing platform for both Standing Rock

¹²⁷ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 2, 67–68.

¹²⁸ 7 CHARLES H. KOCH, WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 7909 (1999), Westlaw (database updated July 2020).

¹²⁹ 31 U.S.C. § 717.

¹³⁰ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 2, 67–68.

¹³¹ *Id.* at 57–59.

¹³² *Id.* at 60–65.

¹³³ KOCH, *supra* note 128, § 7909.

Sioux Tribe council and Energy Transfer Partners to share their thoughts on the breakdown in consultation.¹³⁴ More recently, the House Subcommittee on Indigenous Peoples held a hearing on the role of tribal consultation under NHPA and other federal laws for protection of tribal resources impacted by construction of the border wall between the United States and Mexico; committee members heard testimony from a representative of the Department of the Interior, a construction consultant, a representative from the Tohono O'odham Nation in Arizona, and two scholars with expertise on tribal resources and the consultation process.¹³⁵

Second, in the wake of this increased publicity on agency consultation failures, agencies have also been called before congressional committees to give testimony on consultation policies. In February 2017 Alex Amparo, then Assistant Administrator for the Department of Homeland Security, appeared before the Senate Committee on Indian Affairs to provide testimony on consultation policy improvements adopted by FEMA, the Federal Emergency Management Agency.¹³⁶

Third, consultation is regularly raised in the course of appropriations hearings. For fiscal years 2018, 2019, and 2020, House appropriations hearings for Energy, Water Development, Agriculture, Rural Development, the FDA, Interior, and Environment all involved discussion of tribe-agency consultation.¹³⁷

¹³⁴ *Modernizing Energy and Electricity Delivery Systems: Challenges and Opportunities to Promote Infrastructure Improvement and Expansion: Hearing Before the Subcomm. on Energy of the H. Comm. on Energy & Com.*, 115th Cong. 142–46, 167–72 (2017) (statements of Chad Harrison, Councilman At-Large, Standing Rock Sioux Tribe, and Joey Mahmoud, Executive Vice President and Project Executive, Dakota Access Pipeline, Energy Transfer Partners).

¹³⁵ *Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall: Hearing Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res.*, 116th Cong. (2020) (statements of Scott Cameron, Principal Deputy Assistant Secretary for Policy, Management, & Budget, U.S. Dep't of the Interior, Steve Hodapp, Independent Contractor & Environmental Specialist, Ned Norris, Jr., Chairman, the Tohono O'odham Nation, Sarah Krakoff, Moses Lasky Professor of Law, University of Colorado Law School, and Shannon Keller O'Loughlin, Executive Director, Association on American Indian Affairs).

¹³⁶ *Emergency Management in Indian Country: Improving FEMA's Federal Tribal Relationship with Indian Tribes: Hearing Before the S. Comm. on Indian Affs.*, 115th Cong. 5–11 (2017) (statement of Alex Amparo, Assistant Administrator for Recovery, Office of Response and Recovery, Federal Emergency Management Agency, U.S. Department of Homeland Security).

¹³⁷ *Energy and Water Development Appropriations for 2018, Part 1B: Hearing Before the Subcomm. on Energy, Water Dev. and Related Agencies Appropriation of the H. Comm. on Appropriations*, 115th Cong. 251 (2017); *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for 2018, Part 1C: Hearing Before the Subcomm. on Agriculture, Rural Development, FDA and Related Agencies Appropriations of the H. Comm. on Appropriations*, 115th Cong. 223 (2017); *Interior, Environment, and*

Consideration of the tribe-agency consultation relationship in committee hearings is—at least facially—encouraging. Committee hearings may play an “information-forcing agency oversight” role in shining a light on inadequate agency procedure.¹³⁸ The problem with expecting this information-forcing to result in change is that, in the face of vague statutes and the understanding that consultation policy is nonbinding, hearing oversight lacks the force to change agency priorities. As Christopher Walker writes in his article on legislative impact on the administrative state,

Congress often uses hearings, information requests, investigations, audits, and so forth to compete with the other branches of government in the public sphere. But if Congress does not also use these oversight tools to regularly pass laws, I fear the legitimacy of the toolbox is called into question. Without the threat of legislative action, moreover, the efficacy of this toolbox in influencing agency action is severely diminished. These fears are heightened when members of Congress, or congressional committees, use these oversight tools to extract policy outcomes from federal agencies that are contrary to the wishes of the collective Congress.¹³⁹

Providing a platform for sharing insights and experiences about tribe-agency consultation is inadequate to the task of making consultation work.

Related Agencies Appropriations for 2018, Part 3A: Hearing Before the Subcomm. on Interior, Environment, and Related Agencies Appropriations of the H. Comm. on Appropriations, 115th Cong. 11, 36 (2017); *Interior, Environment, and Related Agencies Appropriations for 2019, Part 7: Hearing Before the Subcomm. on Interior, Environment, and Related Agencies Appropriations of the H. Comm. on Appropriations*, 115th Cong. 34, 158–59, 171, 198, 207, 281, 292, 317, 375, 424 (2018); *Interior, Environment, and Related Agencies Appropriations for 2020, Part 7: Hearing Before the Subcomm. on Interior, Environment, and Related Agencies Appropriations of the H. Comm. on Appropriations*, 116th Cong. 124–25 (2019); *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for 2020, Part 1C: Hearing Before the Subcomm. on Agriculture, Rural Development, FDA and Related Agencies Appropriations of the H. Comm. on Appropriations*, 116th Cong. 192 (2019); *Energy and Water Development Appropriations for 2020, Part 1B: Hearing Before the Subcomm. on Energy, Water Development, and Related Agencies Appropriation of the H. Comm. on Appropriations*, 116th Cong. 71, 280 (2019).

¹³⁸ See Catherine M. Sharkey, *State Farm “With Teeth”*: Heightened Judicial Review in the Absence of Executive Oversight, 89 NYU L. REV. 1589, 1657–59 (2014) (describing the information forcing role of congressional hearings, inspector general audits, and GAO investigations in the SEC context).

¹³⁹ Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1120 (2018).

3. Continued use of the consultation device

Despite Congress' inadequacy to police tribe-agency consultation and widespread dissatisfaction with consultation as an engagement device, Congress continues to draft statutes with consultation requirements. During the four years from April 2016 through March 2020, Congress enacted twenty-eight public laws creating new tribal consultation requirements.¹⁴⁰

¹⁴⁰ The twenty-eight public laws enacted between April 2016 and March 2020 are as follows:

1. Integrated Public Alert and Warning System Modernization Act of 2015, Pub. L. No. 114-143, § 526, 130 Stat. 327 (codified as amended at 6 U.S.C. § 3210).
2. Native American Children's Safety Act, Pub. L. No. 114-165, § 2, 130 Stat. 415 (2016) (codified as amended at 25 U.S.C. §§ 3201, 3207).
3. Native American Tourism and Improving Visitor Experience Act, Pub. L. No. 114-221, § 4, 133 Stat. 847 (2016) (codified as amended at 25 U.S.C. § 4353).
4. 21st Century Cures Act, Pub. L. No. 114-255, § 6002, 133 Stat. 1033 (2016) (codified as amended at 42 U.S.C. § 290aa).
5. Federal Property Management Reform Act of 2016, Pub. L. No. 114-318, § 623, 130 Stat. 1608 (codified at 40 U.S.C. § 623).
6. Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, §§ 1120, 3225, 4004, 130 Stat. 1628 (2016) (codified as amended in scattered sections of 16, 25, and 33 U.S.C.).
7. Weather Research and Forecasting Innovation Act of 2017, Pub. L. No. 115-25, §§ 201, 412, 131 Stat. 91 (codified as amended at 15 U.S.C. §§ 313, 8548).
8. Indian Employment, Training and Related Services Consolidation Act of 2017, Pub. L. No. 115-93, §§ 7, 15, 131 Stat. 2026 (codified as amended at 25 U.S.C. § 3406).
9. Law Enforcement Mental Health and Wellness Act of 2017, Pub. L. No. 115-113, §§ 2, 4, 131 Stat. 2276 (codified as amended at 34 U.S.C. §§ 10101, 10381, 50101).
10. John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018; VA MISSION Act of 2018, Pub. L. No. 115-182, § 209, 132 Stat. 1393 (codified as amended at 38 U.S.C. § 8122).
11. Strengthening Career and Technical Education for the 21st Century Act, Pub. L. No. 115-224, §§ 112, 122, 133, 219, 132 Stat. 1563 (2018) (codified as amended at 20 U.S.C. §§ 2323, 2342, 2354, 2399).
12. America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, §§ 1129, 1214, 132 Stat. 3765 (codified as amended at 33 U.S.C. §§ 7020, 2232).
13. Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. No. 115-271, § 7031, 132 Stat. 3894 (2018) (codified as amended at 42 U.S.C. § 290ee-5).
14. Cybersecurity and Infrastructure Security Agency Act of 2018, Pub. L. No. 115-278, § 2202, 132 Stat. 4168 (2018) (codified at 6 U.S.C. § 652).
15. Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, Pub. L. No. 115-325, §§ 101-03, 132 Stat. 4445 (codified as amended at 25 U.S.C. §§ 3502-04).
16. Endangered Salmon Predation Prevention Act, Pub. L. No. 115-329, § 3, 132 Stat. 4475 (2018) (codified as amended at 16 U.S.C. § 1389).
17. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 4003, 132 Stat. 4624 (codified as amended at 7 U.S.C. §§ 2012-13).

Though infrastructure-impacting legislation is somewhat disproportionately represented, consultation requirements were also codified in legislation related to health care, criminal justice, agriculture, and education. Codification of consultation as a means of engagement between federal agencies and tribes explicitly sanctions current policies and implicitly denies that consultation as a device is at the root of conflict between agencies and tribes in and out of court. Congressional action creating consultation obligations undermines any positive effects flowing from congressional oversight through GAO investigations and congressional hearings. In fact, continued use of consultation in federal statutes actively privileges a model of tribe-agency engagement that cannot work and that directly contravenes the spirit of executive orders and memoranda requiring respect for sovereignty of tribes potentially impacted by large infrastructure projects.

III. RADICAL NONCOMPLIANCE DICTATES THE NEED FOR NEW ENGAGEMENT DEVICES

In the face of consultation's inadequacy, Congress must employ different engagement devices to facilitate tribe-agency engagement in a manner respectful of tribal sovereignty. The frequency with which Congress uses consultation requirements suggests that the device has been successful, but the historical record tells a different story. Below, I suggest possible paths forward by exploring alternative engagement mechanisms with the potential

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18. Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, § 201, 132 Stat. 5123 (codified as amended at 34 U.S.C. § 11114).
 19. Ashanti Alert Act of 2018, Pub. L. No. 115-401, §§ 203–04, 132 Stat. 5336 (codified at 34 U.S.C. § 21903–04).
 20. Johnson-O'Malley Supplemental Indian Education Program Modernization Act, Pub. L. No. 115-404, § 7, 132 Stat. 5349 (2018) (codified as amended at 25 U.S.C. § 5348).
 21. Museum and Library Services Act of 2018, Pub. L. No. 115-410, § 210, 132 Stat. 5412 (codified as amended at 20 U.S.C. § 9108).
 22. Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. No. 115-435, § 312, 132 Stat. 5529 (codified at 5 U.S.C. § 312).
 23. John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, § 1111, 133 Stat. 580 (2019) (codified at 54 U.S.C. § 320301).
 24. Pandemic and All-Hazards Preparedness and Advancing Information Act of 2019, Pub. L. No. 116-22, § 210, 133 Stat. 905 (codified as amended at 42 U.S.C. § 234).
 25. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 2802, 133 Stat. 1198 (codified as amended at 10 U.S.C. § 2802).
 26. Columbia River In-Lieu and Treaty Fishing Access Sites Improvement Act, Pub. L. No. 116-99, §§ 2–3, 133 Stat. 3254 (2019).
 27. Grant Reporting Efficiency and Agreements Transparency Act of 2019, Pub. L. No. 116-103, § 6402–03, 133 Stat. 3266 (codified at 31 U.S.C. §§ 6402–03).
 28. Coronavirus Aid, Relief, and Economic Security Act, 2020, Pub. L. No. 116-136, § 601, 134 Stat. 281 (codified at 42 U.S.C. § 801).

to succeed where consultation has failed. First, a better engagement device should require agencies to make binding policy with attendant administrative protections to impacted tribes. Second, a better device should promote more rigorous judicial review while decreasing litigation.¹⁴¹ Third, it should permit greater congressional scrutiny.¹⁴²

Existing federal Indian law provides a spectrum of alternative engagement devices that better satisfy the above criteria: [1] negotiated rulemaking; [2] formal adjudication; [3] negotiation and compact; and [4] consent. Each of these is preferable to the current system of “box-checking” consultation in providing more robust oversight and protection for tribes. No single alternative device is appropriate in the universal way Congress insists consultation can work; each alternative operates well in some circumstances but not in others. There are also likely many more alternatives available. In creating law, Congress must intentionally evaluate the needs of engagement in

¹⁴¹ Legally binding policies with clear imposition of rights owed regulated parties and duties owed by agencies would allow reviewing courts to consider APA procedural requirements (thus tying the requirement of more rigorous judicial review to the requirement of additional administrative procedure). More explicit statutes directing agencies to engage in rulemaking or adjudication would also ground more engaged arbitrary and capricious review, if for no other reason than that the court would have a detailed record of agency action to consider. William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1339–40, 1343–44 (2001).

Alternatively, reframing the tribe-agency engagement process as an adjudication—or as having sufficient adjudicatory qualities—would allow reviewing courts to consider due process requirements. *Compare* *Londoner v. Denver*, 210 U.S. 373 (1908) (holding that due process protections are only applicable to government agency activities that are adjudicative in nature) *with* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (holding that due process protections are applicable to administrative activities where a small number of people is exceptionally impacted, while rule-making activities impacting many people do not trigger due process protections). *See also* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 886 (2007) (“[T]he procedural due process protections we associate with adjudicatory hearings do not apply to agency rulemakings any more than they apply to actions of legislators; that has been the understood import of *Bi-Metallic Investment Co. v. State Board of Equalization* for nearly a century.”).

A superior engagement device would also spur less litigation initiated by tribes, not because of any limitation in access to courts, but because of increased satisfaction in the tribe-agency engagement process. The more equitable the balance of power between tribe and agency, the less likely it is that tribes will need to seek recourse in the federal courts.

¹⁴² Nonbinding policymaking more easily evades congressional review; for example, guidance documents and other forms of nonbinding rules are routinely subject to less congressional oversight than are binding rules. Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 508 (2012); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 381 (2009). If Congress passed laws requiring agencies to engage in binding rulemaking or adjudication, it would be more feasible for traditional methods of congressional oversight to evaluate the adequacy of agency fulfillment of their statutory duties. For example, the Congressional Review Act allows Congress to issue a joint resolution of disapproval for binding rules it wishes to overturn. 5 U.S.C. § 801.

each statute and evaluate which device will best maximize benefits and decrease harms.

A. Negotiated Rulemaking

Negotiated rulemaking incorporates a consultation model but requires by statute that agencies develop binding consultation rules through negotiation with tribal representatives. Executive Order 13,175 specifically named negotiated rulemaking as one possible device for promulgating binding consultation policies.¹⁴³ Agencies adopted negotiated rulemaking in the 1980s as an alternative to the fundamentally adversarial formal rulemaking process.¹⁴⁴ Congress passed the Negotiated Rulemaking Act in 1990, providing a framework for negotiated rulemaking that would still conform with APA Section 553.¹⁴⁵ In negotiated rulemaking, the promulgating agency creates a committee of representatives from impacted organizations and agencies; in this case, representatives from tribal governments would be important committee members.¹⁴⁶ The committee meets, with discussion on the record, to negotiate a proposed rule; consensus on the proposal means that proposed rule then goes on to be subject to the APA's notice-and-comment rulemaking procedures.¹⁴⁷ Theoretically, this would permit tribes to specify the consultation practices that would be most meaningful to them. "If the committee does not reach a consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus."¹⁴⁸ The agency then may use the report in writing the proposed rule itself.¹⁴⁹ In most cases, agencies engaging in negotiated rulemaking do so by choice and out of statutory obligation.¹⁵⁰

¹⁴³ Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 9, 2000).

¹⁴⁴ Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1263–64 (1997).

¹⁴⁵ 5 U.S.C. §§ 561–70.

¹⁴⁶ Coglianese, *supra* note 144, at 1256–57.

¹⁴⁷ *Id.* at 1257; 5 U.S.C. § 553(c).

¹⁴⁸ 5 U.S.C. § 566.

¹⁴⁹ 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 4:36 (3d ed. 2010), Westlaw (database updated Feb. 2020).

¹⁵⁰ David Thaw, *Enlightened Regulatory Capture*, 29 WASH. L. REV. 329, 341 (2014). Here, Congress would need to require negotiated rulemaking. The Department of the Interior has a consultation policy that leaves the decision as to whether to employ consultation, negotiated rulemaking, or "other collaborative approach" to agency officials. That there is little evidence that DOI employs negotiated rulemaking in formulating policy with tribes is perhaps not surprising given this discretion. U.S. DEP'T OF THE INTERIOR, POLICY ON CONSULTATION WITH INDIAN TRIBES, *supra* note 84, at 10, 12.

Negotiated rulemaking with tribal committee members is already in place in some agencies. Congress currently requires that the Department of Housing and Urban Development (HUD), the Department of Transportation, the Department of the Interior, the Department of Health and Human Services, and the Department of Education engage in negotiated rulemaking procedures for specific regulations under a series of Native American Self-Determination Acts impacting funding allocation and distribution.¹⁵¹

Scholars' evaluations of negotiated rulemaking suggest it may be a viable alternative to nonbinding consultation policy. While several commentators are of the opinion that negotiated rulemaking is largely unsuccessful,¹⁵² some of these concerns are rooted in the theory that negotiated rulemaking prioritizes private interests of the parties involved over public needs.¹⁵³ But if tribes are both the participating parties and the impacted parties, this criticism suggests that negotiated rulemaking may be particularly well-suited for tribe-agency consultation. In fact, David Thaw cites implementation of the No Child Left Behind Act for schools funded by the Bureau of Indian Affairs as one of three noted successes of negotiated rulemaking, though there is no evidence of "success" beyond the fact that the process did yield regulations.¹⁵⁴

With negotiated rulemaking's success defined as any process resulting in a rule, it is best suited to tribe-agency engagement over projects with relatively low impact on the general public. In the absence of consensus, the backstop procedure is the typical notice-and-comment rulemaking process, meaning that tribal priorities and concerns may not be considered if overwhelmed by a large volume of public comments. It should be noted, however, that even notice-and-comment rulemaking without consensus would offer administrative procedural protections that exceed those offered by a consultation model.

B. Adversarial Administrative Adjudication

Unlike the implementation of negotiated rulemaking, a second alternative engagement device would completely eliminate consultation in favor of an administrative adjudication between the agency and the potentially impacted tribe. The process by which an agency seeking to approve a large infrastructure project approaches a tribe potentially impacted

¹⁵¹ 25 U.S.C. §§ 4116, 5328, 5367, 5397; 23 U.S.C. § 207.

¹⁵² See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1334–35 (1997) (suggesting that negotiated rulemaking produces neither better rules nor less post hoc litigation).

¹⁵³ William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1386 (1997).

¹⁵⁴ Thaw, *supra* note 150, at 345–47.

under NHPA and NEPA is an assessment of tribal and agency rights and duties, suggesting it may be considered an inherently adversarial and adjudicatory process.¹⁵⁵ In adjudication, administrative decision-making involves the application of preexisting standards to individualized facts, leading to the resolution of an individualized controversy or complaint.¹⁵⁶ Significantly, adjudications can still involve declarations of policy, while rulemaking may also have a quasi-adjudicative or “quasi-judicial” component; there is no bright line rule between the two categories as the APA might suggest.¹⁵⁷ Licensing and permitting are two common administrative proceedings that have a somewhat hybrid nature but are nevertheless considered adjudications for APA purposes.¹⁵⁸ The rulemaking-adjudication distinction is still significant, as different APA procedural protections accompany adjudications and rulemakings, with further differentiation based on whether the proceedings are formal or informal as defined by the APA.¹⁵⁹

Whether an adjudication is formal or informal will impact several factors, including whether the adjudication must be on the record, the impartiality required of the factfinder, the required statement of findings and conclusions, the evidence considered, and whether there is a requirement of right to cross-examination.¹⁶⁰ Equally significant is the requirement that, in adjudications or other “quasi-judicial” proceedings, agencies must accord due process protections to the complaining party.¹⁶¹ “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”¹⁶² Due process protections are not fixed in nature but are a function of the private and government interests at stake and the “risk of erroneous deprivation” of the private interest in a given dispute.¹⁶³

It would not be unreasonable to classify tribe-agency engagement over a proposed large infrastructure project as an adversarial administrative adjudication. An agency decisionmaker would apply NHPA and NEPA statutory and regulatory guidelines to the particular concerns of potentially impacted tribes in light of a particular proposed infrastructure project. The

¹⁵⁵ KOCH, *supra* note 128, at § 7305.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 5 U.S.C. § 551.

¹⁵⁹ *See* 5 U.S.C. § 553 (codifying procedural requirements for rulemaking, including requirement that the rulemaking be “on the record after opportunity for an agency hearing”); 5 U.S.C. § 554, 556–57 (codifying procedural requirements for adjudications, including requirements for formal adjudications “on the record after opportunity for an agency hearing”).

¹⁶⁰ *Id.* §§ 554–57.

¹⁶¹ *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 542 (1978); *United States v. Fla. E. Coast Ry. Co.* 410 U.S. 224, 244–45 (1973).

¹⁶² *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

¹⁶³ *Id.*

decisionmaker would evaluate and determine prospective tribal rights and agency duties that must be guaranteed for the project to go forward. Derek Haskew makes a persuasive argument for classifying the tribe-agency engagement process as an administrative adjudication.¹⁶⁴ Haskew points out that both consultations and adjudications involve specific parties with adverse interests and can substantially impact use of tribal assets.¹⁶⁵ That tribes and federal agencies meet to consult as historic adversaries is undeniable.¹⁶⁶

Would additional APA and constitutional procedural protections offered by formal (or informal) adjudication make for a superior process? In a formal adjudication, the APA would provide tribes with a hearing on the record, including the timely notice of that hearing, the opportunity to submit facts and arguments and to call witnesses, relative guarantees of the impartiality of the presiding official, and the ability to rebut agency evidence and to conduct cross-examination as needed. Even if Congress determined via statute that these adjudications would be informal, judge-made determinations on the requirements of due process—given tribal property interests and the high deprivation risks of approving infrastructure projects without engagement with impacted tribes—may provide just as much process, including an in-person hearing.¹⁶⁷

Adjudication would be best suited to tribe-agency engagement between relatively few parties. When several tribes' interests are at stake, the fundamentally bi-polar administrative process would struggle to account for the priorities of all sovereigns. But when a small number of tribes must engage with federal agencies on a major project, adjudication provides clear benefits. The opportunity to engage in a procedurally complex adversarial proceeding against the agency, for proper determination of the steps that would be required to protect tribal interests before and during infrastructure development, would clearly provide better procedural protections. The role of Congress in statutorily recognizing tribal interests and in creating specific requirements for implementing agencies would likewise make true congressional oversight more feasible. And an adjudicative process would provide both more meaningful judicial review of the adjudicative decision and less litigation in the form of appeals to the federal courts (or at least less litigation than the current system engenders, given the lack of a forum for presentation of evidence and challenge of agency witnesses).

¹⁶⁴ Haskew, *supra* note 78, at 69–70, 73–74.

¹⁶⁵ *Id.* at 69.

¹⁶⁶ Tanana & Ruple, *supra* note 74, at 47.

¹⁶⁷ 5 U.S.C. §§ 554, 556–57.

C. Negotiation and Compact

The negotiation and compact model required by the Indian Gaming Regulatory Act (IGRA) provides a third alternative engagement device. IGRA requires that Class III gaming on tribal lands within a state must be “conducted in conformance with a Tribal-state compact entered into by the Indian Tribe and the State.”¹⁶⁸ If a tribe wishing to open a gaming facility on its lands requests that the state enter into a negotiation and compact process, the state must do so, and negotiate in good faith.¹⁶⁹ A tribal-state compact takes effect once approved by the Secretary of the Department of the Interior.¹⁷⁰ If the state fails to negotiate in good faith, the tribe may file suit against the state in federal court and ask the court to make a finding as to the state’s good faith effort.¹⁷¹ A finding of bad faith forces the parties to create a proposal within 60 days or, failing that, to submit to mediation to attempt to reconcile and create a compact.¹⁷² If the state refuses to waive sovereign immunity and consent to the suit, the tribe may alone submit a gaming proposal to the Secretary, giving the state sixty days to accept or to submit its own counter-proposal.¹⁷³ If the state does advance its own proposal, the Secretary sends the parties to mediation to reconcile the two proposals.¹⁷⁴ The Secretary then either accepts the mediator’s consolidated proposal or advances an alternate proposal within another sixty day period.¹⁷⁵

Compacts place a great deal of discretion in the hands of the Secretary of the Interior, making the negotiation and compact process an effective alternative device for Congress in situations where the Secretary can be a good arbiter of competing interests. In circumstances where there is, for example, a conflict of interest, federal courts act as the backstop for resolving tribe-agency disputes, and a judicial finding of bad faith triggers a mediation process that parallels the mediation following from a good faith negotiation that fails to reach consensus.¹⁷⁶ Use of negotiated compacts as an engagement device

¹⁶⁸ 25 U.S.C. § 2710(d)(1). Class III gaming includes slot machines, table casino games, and lotteries. *Id.* § 2703(8).

¹⁶⁹ *Id.* § 2710(d)(3)(A).

¹⁷⁰ *Id.* § 2710(d)(3)(B).

¹⁷¹ *Id.* § 2710(d)(7).

¹⁷² *Id.* § 2710(d)(7)(B)(iii-iv). Note that failure to reach a compact does not imply necessary bad faith by the state, though courts have often found that there cannot be bad faith when the parties did enter into a compact. *Texas v. United States*, 497 F.3d 491, 511 (5th Cir. 2007); *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Rsrv. v. California*, 813 F.3d 1155, 1172 (9th Cir. 2015).

¹⁷³ 25 C.F.R. §§ 291.1(b), 291.3, 291.7 (2019).

¹⁷⁴ *Id.* §§ 291.9, 291.10.

¹⁷⁵ *Id.* § 291.11.

¹⁷⁶ *Id.*

would be inappropriate in circumstances where, in the past, tribes have been dissatisfied with the Secretary's balancing of tribe and agency interests.¹⁷⁷

IGRA's mechanism was specifically implemented with an eye to respecting "the basic principle that the states and tribes negotiate as sovereigns."¹⁷⁸ The Senate Committee Report accompanying the original Senate bill stated that "the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises"¹⁷⁹ Compacts offer further benefits: a statute providing for negotiation and compact must necessarily also provide relatively robust procedures as to initiation of negotiation and for solutions in the event that negotiations break down, and mediation is a helpful backstop to protect tribal interests. When the Secretary of the Interior can and does balance federal and tribal interests, the negotiation and compact model may be the best device for considering competing concerns from multiple sovereigns.

D. Consent

A final alternative engagement device is the requirement of tribal consent.

Substantial secondary literature exists urging Congress to adopt the "free, prior, and informed consent" model incorporated in the United Nations Declaration on the Rights of Indigenous Peoples.¹⁸⁰ The UN Declaration emphasis on good faith engagement and on securing consent prior to taking state action that may impact tribes is more in line with the spirit of Executive

¹⁷⁷ See Kevin Gover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal-State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185, 216 (2010) (arguing that the negotiation and compact model "has forced an uneasy and often litigious relationship between states and tribes with mixed results, skewed incentives, and often unfavorable consequences"); *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) ("Given that class III gaming can be 'a source of substantial revenue for the Indian tribes and a significant rival for traditional private sector gaming facilities,' its regulation 'has been the most controversial part of IGRA and the subject of considerable litigation between various Indian tribes and the states.'").

¹⁷⁸ *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 481 (W.D. Wis. 1991).

¹⁷⁹ S. REP. NO. 100-446, at 13 (1988).

¹⁸⁰ For examples of literature urging adoption of the UN model, see Fredericks, *supra* note 68; Stuart R. Butzier & Sarah M. Stevenson, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior, and Informed Consent*, 32 J. ENERGY & NAT. RES. L. 297 (2014); Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D.L. REV. 37 (2015); Tarah Bailey, *Consultation with American Indian Tribes: Resolving Ambiguity and Inconsistency in Government-to-Government Relations*, 29 COLO. NAT. RES. ENERGY & ENV'T L. REV. 195 (2018).

Order 13,175 and its emphasis on sovereign-to-sovereign interaction. Complicating any recommendation that Congress adopt the UN's standard, however, is that it is not binding on the United States, and much more significantly, that when the United States finally voted in favor of the declaration three years after it was passed by the UN General Assembly, it was with the clear caveat that the executive branch saw no conflict between the declaration and current federal agency consultation policies.¹⁸¹ It is infeasible to recommend that Congress adopt a standard of international customary law with an eye to effecting change in the processes and safeguards in the tribe-agency engagement process when the executive branch has already decided the standard effects no change at all.

Notwithstanding these concerns, consent is a viable alternative engagement device already grounded in federal Indian law. Both the Indian Right-of-Way Act and the Native American Graves Protection and Repatriation Act (NAGPRA) contain consent provisions.¹⁸²

Under the Indian Right-of-Way Act, there is no grant of a right-of-way across land held in trust for a tribe, owned by a tribe, or owned by an individual tribe member "without the consent of the proper tribal officials . . . [or] of the individual Indian owners."¹⁸³ Consent must be given in written form and may include restrictions or conditions.¹⁸⁴ Although the Secretary of the Interior formally grants the right-of-way, the grant is improper without consent.¹⁸⁵ The grant does not change or transfer ownership of the land, leaving the tribal property interest intact.¹⁸⁶ This requirement is also applied in multiple infrastructure contexts, including construction of railway and telephone lines,¹⁸⁷ power and communication facilities,¹⁸⁸ and pipelines.¹⁸⁹

¹⁸¹ ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 70.

¹⁸² 25 U.S.C. §§ 324, 3001–02.

¹⁸³ *Id.* § 324.

¹⁸⁴ *See* 25 C.F.R. § 169.107 (2019) (providing that applicant for right-of-way across tribal land must secure tribal authorization and written agreement with tribe to grant a right-of-way, noting that "[t]he consent document may impose restrictions or conditions; any restrictions or conditions automatically become conditions and restrictions in the grant.").

¹⁸⁵ 25 U.S.C. § 324.

¹⁸⁶ *Id.*; *see, e.g.*, *Murphy v. State*, 124 P.3d 1198, 1203 (Okla. Crim. App. 2005) ("The Act thus creates an easement or right-of-way for public highways, with title to the underlying lands remaining in the Creek Nation and its subsequent allottees, who took their allotment subject to the right-of-way.").

¹⁸⁷ 25 U.S.C. §§ 312, 319.

¹⁸⁸ 43 U.S.C. § 961; *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1096 (S.D. Cal. 2008) ("[T]he Court finds this section mandates Quechan must hold equitable title to the lands adjoining the right-of-way.").

¹⁸⁹ 25 U.S.C. § 321; *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1057 (9th Cir. 1988) ("Pursuant to the authority granted by the 1948 Act . . . the Secretary promulgated a regulation in 1960 which allowed rights-of-way for oil and gas pipelines . . .").

In the pipeline context, recent litigation centers large on oil and gas companies' reliance on expired easements and failure to get tribal owners' consent to renew the right-of-way.¹⁹⁰

Under NAGPRA, "intentional removal from or excavation of Native American [remains and] cultural items" from tribal lands is only permitted after obtaining consent from the appropriate tribe.¹⁹¹ Proof of consent must be given to the federal agency official who issues the required permit for excavation.¹⁹² When Native American remains or cultural items are on federal land, NAGPRA requires consultation with the appropriate tribe but **not** the tribe's consent.¹⁹³ On both tribal and federal lands, accidental discovery of remains or cultural items is subject to a reporting requirement.¹⁹⁴ In requiring tribal consent for excavation, the federal government treats tribal governments as guardians of both their people's burial grounds and of the cultural items they may contain.¹⁹⁵ The Senate Committee Report accompanying NAGPRA noted that "[t]he Committee does not intend this section to operate as a bar to development of Federal or tribal lands on which human remains or objects are found . . . [nor] to significantly interrupt or impair development activities on Federal or tribal lands."¹⁹⁶ Notwithstanding this promise, courts have provided remedies against agencies that failed to protect remains and cultural items inadvertently discovered on infrastructure construction sites, suggesting that prospective injunctive relief may be available to tribes contesting intentional excavation without tribal consent.¹⁹⁷ A private right of action exists under NAGPRA.¹⁹⁸ Even if that were not the

¹⁹⁰ See, e.g., *Davilla v. Enable Midstream Partners L.P.*, 913 F.3d 959, 968 (10th Cir. 2019) ("The undisputed facts—expiration of the easement, specifically—show that Enable lacks a legal right to keep the pipeline in the ground. The consent forms would not allow a reasonable jury to find otherwise."); *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1107 (10th Cir. 2017) ("In January 2015, the BIA notified PNM that it could not approve the renewal application without that consent."); *W. Ref. S.W., Inc. v. U.S. Dep't of the Interior*, 450 F. Supp. 3d 1214, 1230 (D.N.M. 2020) ("[T]he Court cannot say that the IBIA's decision to require remainderman consent is based on an impermissible construction of the 1948 Right-of-Way Act or an unreasonable decision to look to the common law.").

¹⁹¹ 25 U.S.C. § 3002.

¹⁹² 43 C.F.R. § 10.3(b)(4) (2019).

¹⁹³ 25 U.S.C. § 3002.

¹⁹⁴ *Id.*

¹⁹⁵ Alix Rogers, *Owning Geronimo but Not Elmer McCurdy: The Unique Property Status of Native American Remains*, 60 B.C. L. REV. 2347, 2384 (2019).

¹⁹⁶ S. REP. NO. 101-473, at 7 (1990).

¹⁹⁷ See, e.g., *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 209 F. Supp. 2d 1008, 1027 (D.S.D. 2002) (granting preliminary injunction requiring Army Corps of Engineers to cease construction of a recreation area following Plaintiff's showing that the agency was aware of inadvertent discovery of indigenous remains).

¹⁹⁸ 25 U.S.C. § 3013; *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886 (D. Ariz. 2003).

case, grievances against a federal agency may be brought in federal court under the APA.¹⁹⁹

Though these statutes and accompanying regulations are short on detail as to the procedures for obtaining tribal consent and consequences for violation of duties to obtain the same, consent could be a viable engagement device in the context of large infrastructure project planning and permitting. Procedure both from authorizing statutes and from the APA would provide better protection for tribes. A clear requirement of written consent would lay a path for judicial and congressional enforcement (and ideally for less litigation given agencies' knowledge of the statutory requirement for clear tribal consent). Consent would be used only when infrastructure projects have the potential to impact tribal lands; the issue of indirect impacts on tribal lands based on adjacent or upstream construction, for example, is not covered under NAGPRA.²⁰⁰

CONCLUSION

Consultation between tribes and federal agencies on large infrastructure projects has failed and will continue to fail. The statutory and regulatory protections offered under NHPA and NEPA are inadequate, providing for neither meaningful administrative and judicial review nor effective congressional oversight. Litigation brought by tribes alleging failure to consult, while seldom rewarding Plaintiffs due to the deferential arbitrary and capricious standard and the nonbinding nature of consultation policy, is frequent and will likely become more so without a shift in engagement strategy. The spirit of Executive Order 13,175 and subsequent executive memoranda suggests that, at some level, there is a desire from the federal government to engage tribes as fellow sovereigns and to recognize tribal rights and the impact, potential or realized, that major infrastructure projects have on tribal interests.

Agencies will not adequately engage sovereign tribes impacted by major infrastructure projects so long as Congress continues to lean on consultation, a fundamentally inadequate engagement device. Scholars persisting in advocating for improvements to consultation policies only legitimize this flawed approach to tribe-agency engagement. At best, consultation doesn't work, and at worst, it creates administrative cover for bad actions by agencies and private parties. Four other engagement devices—

¹⁹⁹ See *Bonnichsen v. United States*, 367 F.3d 864, 874–75 (9th Cir. 2004) (finding that review of Interior Secretary's action under NAGPRA is "governed by the APA, which instructs courts to 'hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'").

²⁰⁰ With NAGPRA, intentional excavation of tribal remains or cultural artifacts on federal land puts tribes back in the problematic role of consultant with no tangible rights.

negotiated rulemaking, adversarial adjudication, negotiated compact with mediation, and consent—already exist in federal Indian law and provide potential alternatives to consultation. Congress must be intentional in evaluating and codifying these alternatives where they best mitigate harms and maximize benefits to engaging parties. To honor the policies behind executive directives to engage tribes as fellow sovereigns, Congress must adopt and codify engagement mechanisms that provide better oversight and legal protections for tribes.