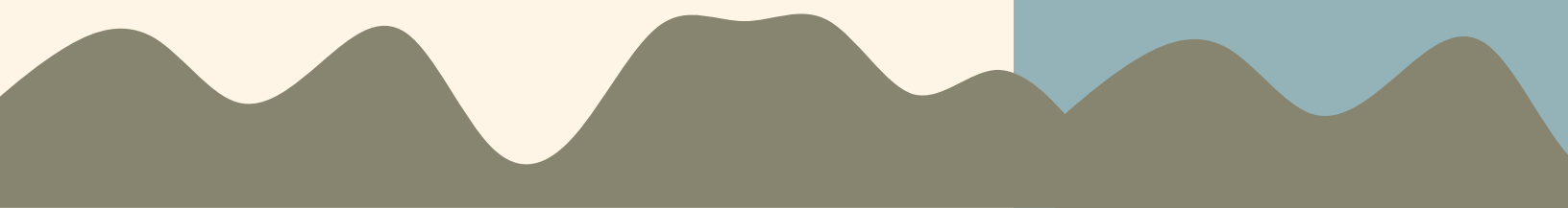
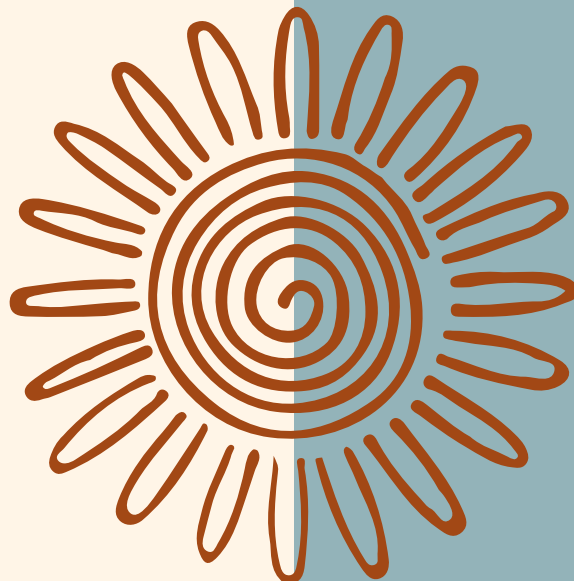


2025

Walter Echo-Hawk // Pawnee

A TRIBAL GOVERNMENT HANDBOOK FOR OPERATIONALIZING FPIC IN THE CONTEXT OF CONSERVATION AND DEVELOPMENT

*ENACTING TRIBAL CONSULTATION
LAWS, POLICIES, AND PROTOCOLS*



A Tribal Government Handbook for Operationalizing FPIC in the Context of Conservation and Development: Enacting Tribal Consultation Laws, Policies and Protocols

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This handbook has been prepared by Walter Echo-Hawk at the request of The Implementation Project, a joint initiative of the Native American Rights Fund (NARF) and the University of Colorado Law School formed to advance education and advocacy regarding the United Nations Declaration on the Rights of Indigenous Peoples. (<https://un-declaration.narf.org/>) The handbook supplements a capacity-building initiative entitled “Operationalizing FPIC in the Context of Conservation and Development: Indigenous Peoples’ Rights to Land, Water, and Territories”, that also includes The Implementation Project’s publication, “*The Tribal Guide to Implementing FPIC in the Context of Conservation and Development*”.

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FOREWORD

In no small part, The Implementation Project owes its very existence to the visionary thinking and leadership of former NARF Attorney Walter Echo-Hawk. Mr. Echo-Hawk is past President of the Pawnee Nation Business Council (2020-2023), an author, attorney, jurist, legal scholar, and international speaker. The author of the landmark treatise on the UN Declaration on the Rights of Indigenous Peoples, “*In The Light Of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples*,” Mr. Echo-Hawk has been at the forefront of the movement recognizing and embracing the Declaration as a tool for Indigenous advocacy in the United States. In addition to setting out a roadmap for implementation at the federal level – reforming the current federal Indian law system to comport with the human rights standards articulated in the Declaration – Mr. Echo-Hawk has also advocated for Tribal Nations’ own law-making to advance the Declaration’s implementation. During his term as President of the Pawnee Nation, he oversaw the adoption of the Pawnee Nation Declaration on the Rights of Indigenous Peoples Act.

With this handbook, Mr. Echo-Hawk once again provides Tribal Nations with concrete steps and tools to work toward implementation of the Declaration, this time with a focus on the Declaration’s

fundamental safeguard of Free, Prior and Informed Consent (“FPIC”). Through thorough research and insightful analysis Mr. Echo-Hawk has created a compelling case highlighting the critical need for Tribal law-making on this topic, and has provided a useful and essential resource for any Tribal Nation contemplating such action. This handbook was written in 2024. It provides the reader with a helpful context for enacting Tribal FPIC laws that is drawn from international law and domestic laws and policies in effect in 2024, including Biden Administration policies and directives that establish a sound baseline for good federal engagement with Tribal Nations whenever federal conservation, development, and management of public lands and water bodies affects vital Tribal rights and interests. Even though those policies and directives are subject to change by current and future administrations, they nevertheless remain a benchmark “floor” for measuring good federal practice. It has been our great honor and pleasure to be able to work with and learn from Mr. Echo-Hawk for many years in various capacities, and we are immensely grateful for his work with us on the present initiative in support of Tribal Nations operationalizing FPIC.

EXECUTIVE SUMMARY

This handbook is written for Tribal governments. It seeks to assist them in utilizing the self-determination and related Free, Prior, and Informed Consent (“FPIC”) provisions of the United Nations Declaration on the Rights of Indigenous Peoples (“Declaration”) in developing Tribal laws and policies to protect their rights and interests in (1) lands, waters, and territories owned by Tribal Nations within their jurisdictions and (2) ancestral Tribal lands, waters, and territories now managed by federal agencies.

Indigenous Peoples and their governments have close ties to their present and historical lands, water bodies and territories. To protect Tribal rights and interests in these areas, Tribal Nations must have the ability to shape decisions that affect them. Matters within a Tribe’s jurisdiction are dealt with directly by exercising self-determination and the Tribal government can require FPIC, absent which the Tribe will deny approval. However, when dealing with actions outside of a Tribe’s jurisdiction, adequate protection often hinges on effective engagement with the Federal Government. That can be achieved through meaningful government-to-government consultation aimed at achieving the FPIC of the Tribal government, and documented by a binding written agreement.

Historically, it has been hard for Indian Tribes to protect their rights and interests in ancestral lands, waters, and territories. But that situation is rapidly changing due to three factors:

1. The U.S. Indian-Self Determination Policy still guides Indian Affairs.
2. Recent Biden Administration initiatives strengthen Tribal engagement and participation through stronger Tribal consultation policies and best practices and encourage the widespread use of Tribal co-stewardship, co-management and Indigenous Knowledge agreements for managing federally owned lands, waters and territories.
3. The advent of FPIC principles and processes furnishes a “gold standard” for Tribal government engagement and participation in decisions that affect Tribal rights and interests even when actions take place outside of a Tribe’s jurisdiction and provides the impetus for

Tribes to enact Tribal law and policy to operationalize FPIC both within and outside of their jurisdictions.

These developments usher in a new era in the Nation-to-Nation relationship. Tribal lawmakers have an important role. Consistent with international norms and federal Indian policy, they can enact laws and policies that define Tribal government engagement, participation, and consultation standards and protocols in ways that take advantage of FPIC principles and processes. Those legislative actions can increase protection for vital Tribal interests and rights in lands, waters and territories.

Some Tribes have enacted laws and policies that incorporate FPIC, among nearly twenty Tribal consultation laws and policies that are in full force and effect. The UN, U.S. policy, scholars, and Tribes agree *such laws and policies are needed*. Since government-to-government consultation is a cornerstone for conducting Indian Affairs and a primary means for Tribal engagement with the Federal Government, it is important that the consultation process be workable for Tribal governments and that it gives them a meaningful ability to shape decisions that affect Tribal rights and interests in lands, waters and territories. That can be accomplished by Tribal consultation laws and policies that operationalize FPIC principles.

The handbook is organized in five sections:

Section I gives background information. It identifies for whom the handbook is written, the purposes of the handbook, and the methodology used to develop it. It defines “government-to-government consultation,” and discusses why this form of Tribal engagement is important. It summarizes Tribal concerns about inadequate consultation in the pre-Biden era and lists Tribal recommendations made for improvements. Finally, it underscores the vital importance of Indigenous rights and interests in lands, waters and territories.

Section II outlines a framework for enacting Tribal laws and policies. Current federal consultation laws, policies and practices establish a trend toward stronger Tribal engagement and that fosters a favorable climate for enacting Tribal law and policy.

Section III examines international instruments setting forth global standards for consultation with Indigenous Peoples. It defines the term “free, prior, and informed consent;” lays out elements for a successful FPIC process; and discusses how FPIC can be incorporated in Tribal laws and policies to protect Tribal rights and interests in lands, waters and territories.

Section IV explores considerations for Tribal legislators and policymakers in crafting consultation laws and it examines Model Tribal Legislation.

The **Conclusion** offers concluding thoughts for Tribal lawmakers and policymakers.

Appendices contain a Model Tribal Consultation Law, links to Federal and UN guidance for consulting with Tribal peoples, examples of Tribal consultation laws and policies, links to information on Tribal co-stewardship, co-management and Indigenous Knowledge agreements, and a bibliography of pertinent material.

I. INTRODUCTION

A. For whom is the handbook written?

The handbook is written for elected Tribal lawmakers and policymakers. It is also written for:

- Tribal staff normally involved in law and policy making or government-to-government consultation, such as executive and legal staff and program leaders; and
- Appointed officials, committees, spiritual leaders, and culture-bearers who assist the Tribal government in protecting Tribal interests in lands, waters and territories.

In short, the handbook is for everyone relied upon by Tribal governments to protect Tribal rights and interests in lands, waters and territories. It is intended to help them strengthen the self-determination of Tribal Nations when dealing with outside entities - like federal agencies, state and local governments, and other Tribes or outside public and private entities - any time proposed actions may affect a Tribe's lands, territories or resources.

B. What is the purpose of the handbook, and how was it developed?

The purpose of this handbook is to provide information to assist Tribal leaders and staff in empowering Tribal government engagement with outside entities. It will focus on:

- Protecting indigenous rights and interests in the conservation and development of Tribal lands, waters and territories through Tribal laws and policies that govern engagement, consultation, and negotiation with outside entities; and
- Operationalizing FPIC principles as tools for protecting Tribal interests and rights.

The methodology for developing the handbook entailed these steps:

- A team was assembled to develop the handbook. It consisted of Walter Echo-Hawk as the principal author, research assistants, and a project coordinator.
- The team developed the handbook under leadership of The Implementation Project's co-directors Sue Noe, Senior Staff Attorney, Native American Rights Fund and Professor Kristen Carpenter, University of Colorado Law School.
- Legal research was performed to identify and compile FPIC literature into a searchable database. It identified, gathered, organized, and analyzed relevant law review articles, UN publications and studies, federal and Tribal laws and policies, various FPIC handbooks and manuals, and other pertinent material.
- The team presented FPIC information to Tribal leaders and staff at the National Congress of American Indians' Annual Meeting in 2023. The workshop introduced the FPIC initiative to Indian Country and generated helpful feedback.
- More data was gathered in the winter of 2023-24 from surveys and online research.
- Writing took place in late 2023 through Spring, 2024. A draft was reviewed by a core group of legal experts from The Implementation Project. Their feedback was incorporated into the final product.

C. What is “government-to-government consultation” and why is it important?

In the modern era, the United States engages with Tribal Nations on a Nation-to-Nation basis. That relationship rests on a legally affirmed principle: Tribal Nations are self-governing sovereigns whose existence predates the formation of the United States. In that context, “government-to-government consultation” is a well-settled and evolving form of engagement. It is practiced consistent with the United States’ “Indian-Self Determination Policy” of 1970. That policy guides the conduct of Indian Affairs along these lines:

- It replaces earlier federal policies of termination, assimilation and paternalism.
- It encourages Tribal self-government, Tribal administration of federal Indian programs, and promotes the right of Tribal people to determine their own destiny.

The Indian Self-Determination policy ushered in a new era that fosters nation-building and America witnessed the rise of modern Tribal Nations. Government-to-government consultation played a role. That form of engagement stems from three sources:

1. The U.S. trust responsibility to Indian Tribes.
2. Laws requiring Tribal consultation in areas such as preservation of historic and religious sites, protecting Native American religious freedom, environmental protection, grave protection and repatriation;¹ and
3. The federal consultation framework established by policies, standards and procedures mandated by Executive Orders, Presidential Memoranda, departmental directives and interdepartmental agreements (discussed in Sec. II).

Those sources establish a duty to consult Tribal Nations in matters that may affect them.

For many agencies, consultation is a primary means of engagement with Tribal Nations. For Tribal governments, when done properly consultation can afford meaningful participation in federal decisions that may affect Tribal rights and interests. In consultations, Tribal governments can: (1) obtain and evaluate agency information about proposals affecting their rights and interests; (2) express concerns and make recommendations about those proposals; and (3) influence those proposals.²

In short, consultation is a “bridge” between federal and Tribal governments. It furnishes a pathway for sound intergovernmental relationships. Scholars describe consultation as the “cornerstone” or “lifeblood” of the federal trust relationship.

¹ Some examples are the Indian Self-Determination Act, American Indian Religious Freedom Act, National Historic Preservation Act, National Environmental Protection Act, and Native American Graves Protection and Repatriation Act.

² To be sure, in the pre-Biden era Tribes expressed legitimate concerns about consultation shortcomings to effectively foster these opportunities. See discussion in Section II, A.

D. Why are Tribal Rights and Interests in Lands, Waters and Territories Important?

There is a drive to extract, develop, and transport minerals, fossil fuels and other natural resources from lands, waters and territories in the United States. Much of those resources are found on Tribal lands or waters and former Tribal lands and waters now owned and managed by the Federal Government. This drive places pressure on Tribal Nations and peoples who can suffer negative, even life-altering consequences from these activities.³ In the face of these pressures, it is important to understand how the land and natural resources of Tribal people can be protected.

Each Tribal Nation has close ties to specific places and natural resources within its reservation and former homeland. Those lands, waters and territories are the well-spring for their cultures, indigenous religious beliefs and practices, economy, and identity. Before the coming of Europeans, these specific habitats gave rise to profound indigenous ways of life; and today they remain the *sine qua non* for cultural wellbeing and survival. Deep spiritual connections to sacred places, animals, plants, and marine life in these habitats were forged over millennia. Protection of these Tribal ties and interests rests on treaty rights, constitutional and statutory rights, and indigenous rights to self-determination, self-government, cultural integrity, religious freedom, and economic security. Sometimes bare survival hinges on those protections.

To appreciate the importance of land, territories and natural resources to Tribal Nations it is helpful to understand two concepts: “Indigenous Habitat” and “primal religion.”

1. Indigenous Habitat.

As used in this handbook *Indigenous Habitat* means:

“a functioning, healthy, and productive ecosystem comprised of the traditional lands, waters, and natural resources (including animals, plants and fish) in ancestral homelands currently or traditionally owned, occupied, or used by Indigenous Peoples to carry on their cultures and traditional ways of life.”⁴

It has been hard for Tribal Nations to protect their interests in Indigenous Habitat. Colonization of Tribal land was invariably accompanied by destruction of the habitat.⁵ After displacing natives, settlers and colonizers extracted natural resources, and remade the natural world for agriculturalists and manufacturers. When natives resisted, the law invariably supported destruction of their Indigenous Habitat, often with harsh, life-altering results.

Today, Tribal Nations own and control lands and associated natural resources within their reservation jurisdictions, but most of their Indigenous Habitat is no longer owned or controlled

³ See, e.g., S. James Anaya, (*Report of the Special Rapporteur on the Rights of Indigenous Peoples*), on *Extractive Industries and Indigenous Peoples*, 32 Ariz. J. Int'l L. 109 (2015) [hereinafter “Anaya Report”]. <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1033&context=faculty-articles>

⁴ WALTER ECHO-HAWK, IN THE LIGHT OF JUSTICE THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2013) at 166. See also, Echo-Hawk, IN THE COURTS OF THE CONQUEROR (2010) at 363-366.

⁵ See ECHO-HAWK, IN THE COURTS OF THE CONQUEROR, *supra* note 4 at 360-361.

by them. Many Tribes were removed from their homelands; and Indigenous Habitat in their former lands, waters and territories is now managed by federal agencies. For too long Tribes depended on agencies to recognize and protect their interests and rights. When agencies fail to fulfill these duties, redress is difficult because there is unreliable legal protection when federal land, waters and natural resources are concerned. But litigation can be avoided when Tribal rights and interests are successfully addressed by government-to-government consultation.

2. Primal Religion.

To understand Tribal ties to Indigenous Habitat we must enter the spiritual dimension and use the lens of *primal religion*.⁶ In his classic textbook, *The World's Religions*, (1991 ed.) the late Huston Smith, a venerated scholar in comparative world religions, classifies Tribal religions as “primal religions” because they came first and are the oldest human religious traditions. He explains that primal religions represent “human religiousness in its earliest mode” and they allow Tribal adherents to “retain insights and virtues that urbanized, industrialized civilizations have allowed to fall by the wayside.” *Id.* at 283.

According to Smith, primal religion has several defining features. Here are some tenets, which are evident in traditional Native American communities:

- *“Embeddedness” in nature is a predominant influence that infuses primal peoples.* This tie is the result of long human experience with the natural world by people who have interacted with a particular landscape for so long their identity is inseparable from the land. To them, Mother Earth is the foundation for human culture.
- *The sanctity of nature is taken seriously.* Attachment to place is venerated through ceremonies, belief systems, and origin stories. Gatherers hold plants in an honored place; hunting traditions evolved a spiritual reverence for animals; and some places on the land are holy.
- *There is widespread kinship with animals established through covenants, dreams, visions, and lore.* In primal religions, animals have their own spirit and are endowed with the power to communicate with humans and shape their cultures. That pervasive influence is seen in Native American cultures and spiritual beliefs. Many Tribes, bands, and clans are named after, and have special relationships with, animals that shaped their cultures, such as Salmon People, Buffalo Nations, the Snake and Crow Tribes, Pawnee Wolf-People, Crayfish Eaters, Whaling People, and Tlingit animal clans. In their world, the wall that separates humans from animals is thin.
- *There is human interdependence with all things endowed with a spirit of their own.* Ceremonies and belief systems revel in Mother Earth’s remarkable ability to support life. The primal worldview encourages natural processes so animals, fish, and plants can flourish and return to habitats shared with humans. Values, spiritual beliefs and

⁶ *Id.* at 366

practices, and lifeways are imbued with humankind's ancient conservation ethic. That ecological imperative is evident in Tribal habitats that *teemed* with animal, fish, and plant life, even after thousands of years of human occupation.

These spiritual understandings are based on close observations of the natural world over millennia, gleaned by Native peoples from living among, and interacting with, animals and plants. These relationships produced profound religious beliefs and practices. Tribal cultures hold a treasure trove of Indigenous Knowledge that is now being sought after by the Biden Administration to better manage public lands and waters and combat adverse climate changes that threaten human security.

Commentary: The importance of lands, waters, and territories is clear when viewed through the lens of *Indigenous Habitat* and *primal religion*. Associated Tribal rights are among the most important rights enshrined in the Declaration.⁷ Such rights are protected in the U.S. by laws like the American Indian Religious Freedom Act, by sacred sites policies, by the recognition of inherent sovereignty, and by Tribal consultation in an emerging consultation framework.

II. U.S. CONSULTATION LAWS AND POLICIES

A. The Need for Tribal Consultation Laws, Policies and Protocols.

There are compelling reasons for Tribal Nations to enact consultation laws, policies and protocols for engaging with the federal government and other outside entities.

- Critically, government-to-government consultation is a two-way street. It must be workable for both consulting parties. Federal agencies have consultation policies and processes that work for them, but their framework is not necessarily workable for Tribal governments. At present, relatively few Tribal governments have their own policies and protocols. Those Tribes without their own consultation systems must necessarily follow the federal framework, whether it works for them or not. To avoid that hardship, Tribal governments can enact their own consultation laws and policies.
- Reflecting this, the federal government, the United Nations, and legal scholars have all encouraged Tribes to enact their own consultation laws and policies. For example, E.O. 13175 encourages Tribes to develop their own consultation law and policy. When formulating policies that impact Tribes, agencies must “encourage Indian Tribes to develop their own policies to achieve program objectives” and “where possible defer to Indian Tribes to establish standards.” (§3(c) (1)-(2)).
- The UN “Expert Mechanism Advice No. 11” (2018) urges Tribal governments to establish robust representative mechanisms and laws, customs and protocols for free,

⁷ See, Echo-Hawk, IN THE LIGHT OF JUSTICE, *supra* n.4 at 203-204 [“Right to Indigenous Habitat”].

prior and informed consent.⁸ The related Study adds: “Indigenous Peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols,” and “have the power to determine how to consult and the course of the consultation process.” *Id.* The Study explains why:

- Indigenous Peoples establish their own protocols as a tool to prepare for consultation by defining when, how, and who to consult.
- Enacting protocols is empowerment closely linked to rights of self-determination, participation, and the exercise of indigenous decision-making mechanisms.
- If Indigenous Peoples choose to consent to a proposal following consultation, consent should be consistent with their own laws, protocols and best practices.

Legal scholars encourage Tribal consultation laws and policies.⁹ In the pre-Biden era, they raised deep concerns about agency consultation. Their findings included:

- Federal consultation laws and policies are *fundamentally inadequate* on major federal infrastructure projects and must be improved.
- Many agencies view Tribal consultation as burdensome; and their consultations were little more than a box-checking exercise.
- When agencies abuse or neglect E.O. 13175 responsibilities, there are no checks and balances or oversight. Laws requiring consultation do not define what constitutes adequate consultation. Policies are unenforceable, since they disclaim legally binding obligations to avoid judicial review.
- E.O. 13175 has limitations: it merely “encourages” compliance “to the extent practical” without defining what is practical; consultation is rather unilateral; and there is no language to guide what constitutes consent.¹⁰

Based on such concerns, scholars recommended consultation improvements that include developing Tribal laws and policies:

- Tribes can incorporate stronger FPIC principles and processes as a method for protecting indigenous rights and interests in their own laws and protocols.

⁸ Expert Mechanism on the Rights of Indigenous Peoples, “Free, prior and informed consent: a human rights-based approach,” (2018). (“EMRIP Study”) <https://un-declaration.narf.org/wp-content/uploads/Free-prior-and-informed-consent-a-human-rights-based-approach-1.pdf>

⁹ See, e.g., Alana K. Bevan, “*The Fundamental Inadequacy of Tribe-Agency Consultation on Major Federal Infrastructure Projects*,” U. PA. J.L. Public Affairs, Vol. 6, (2021). Available at: <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1082&context=jlpa>; Robert J. Miller, “*Consultation or Consent: The U.S. Duty to Confer with American Indian Governments*,” 91 N.D L. R. . 38 (2015). Available at: <https://commons.und.edu/cgi/viewcontent.cgi?article=1117&context=ndlr>; Carla F. Fredericks, “*Operationalizing Free, Prior, and Informed Consent*,” 80 ALB. L. REV. 429 (2016-17). Available at: <https://scholar.law.colorado.edu/articles/804>;

¹⁰ Fredericks (2016-17) at 469-71, *supra* note 9.

- Tribal laws and policies can: (1) assert civil jurisdiction over outside entities acting within Indian reservations when they seek consensual relationships or engage in activity that threatens Tribal integrity; (2) guide consultation with federal agencies; (3) let other outside entities know how to consult with Tribal governments; and (4) be models for asserting sovereignty and human rights.
- Tribal laws build capacity for consultation.
- Self-determination is achieved when Tribes establish their own frameworks for intergovernmental affairs.

Tribes themselves have requested agencies to respect their consultation laws and policies.¹¹ In response, the Best Practices Guide (2022) requires agencies to respect Tribal consultation laws, policies, or protocols and, as appropriate, develop mutually agreed protocols tailored to Tribal consultation standards.¹²

Commentary: In sum, all concerned agree that *Tribal laws and policies are needed* to strengthen Tribal engagement, ensure consultation is a two-way street, and address Tribal concerns experienced in the pre-Biden era.¹³ Prominent among those Tribal concerns was a lack of consent in federal consultation. The Department of Interior (“DOI”) found that a “primary concrete suggestion from Tribes was to incorporate the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) principles for free, prior and informed consent by Tribes to allow them to give or withhold consent for Federal actions or decisions that affect them.”¹⁴ Other Tribal concerns included:

- Consistency is needed to harmonize diverse consultation policies.
- Tribal consultation laws and policies must be respected by agencies.
- Agencies do not fully see their trust duties or Tribal interests in ceded lands.
- There is a lack of consent - consultation is solely information gathering.
- Tribes experience little input in actual decisions made by agencies.
- Real agency decisionmakers were not at the table.
- There is no accountability - consultation mandates are not legally enforceable.
- Best practices are rarely used.
- Often agencies already made decisions before consultation was initiated.
- More agency awareness and better protection are needed for culturally sensitive land and resources.

¹¹ See, e.g., “Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making” (2022) (“Best Practices Guide”) at 11. Available at: https://www.bia.gov/sites/default/files/dup/inline-files/best_practices_guide.pdf

¹² *Id.* § VII(A) Principle 14 at 14.

¹³ Many Tribal concerns are noted in the Secretary of Interior’s “Detailed Plan for Improving Interior’s Implementation of E.O. 13175 (2021) at 4-8. Available at: <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf>

¹⁴ *Id.* at 6.

- Tribes often lack resources to respond to numerous consultation requests and effectively consult.

B. Biden Administration Efforts to Strengthen Tribal Consultation.

The U.S. Tribal consultation framework is established by Executive Order 13175 (2000).¹⁵ It recognizes a duty to consult with Tribal Nations when formulating policies that affect them, which arises from the United States' unique legal relationship with Tribal governments and the trust relationship with them. It directs agencies to consult when formulating and implementing policies, regulations, legislative proposals, other policy statements, and actions that affect Indian Tribes. "Meaningful consultation" is required by §5 when developing such policies; and when proposals involve Tribal self-government, trust resources, Indian treaty or other rights, agencies "should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." Unfortunately, agency foot-dragging ensued in the following years, and that led to deep Tribal concerns.

Twenty years later, the Biden Administration began to address Tribal consultation concerns by developing better practices. New measures focus on achieving consensus or mutually desired outcomes. Other notable reforms are co-stewardship and co-management agreements that incorporate Tribal consultation, foster joint decision-making, and apply Indigenous Knowledge for managing federal lands, waters and natural resources. These initiatives are prompted by two key presidential directives:

- Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (2021).¹⁶ It reaffirms E.O. 13175, states that Tribal consultation is the cornerstone of Federal Indian policy, and directs agencies to submit action plans for implementing the E.O.
- Presidential Memorandum on Uniform Standards for Tribal Consultation (2022).¹⁷ The Memorandum acknowledges the duty to consult recognized by E.O. 13175 and announces new standards that build on it in five notable respects: (1) It establishes uniform minimum standards for Tribal consultation. (2) It responds to Tribal concerns, seeks to improve consultation processes, and ensure more consistency. (3) Its minimum standards are described as "baseline standards" and agencies are encouraged to build on them. (4) Section 2 prescribes consultation procedures, with a higher standard: "Consultation requires that information obtained from Tribes be given meaningful consideration, and (5) *Agencies should strive for consensus with Tribes or a mutually desired outcome.* "(emphasis supplied).

¹⁵ Available at: <https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments>

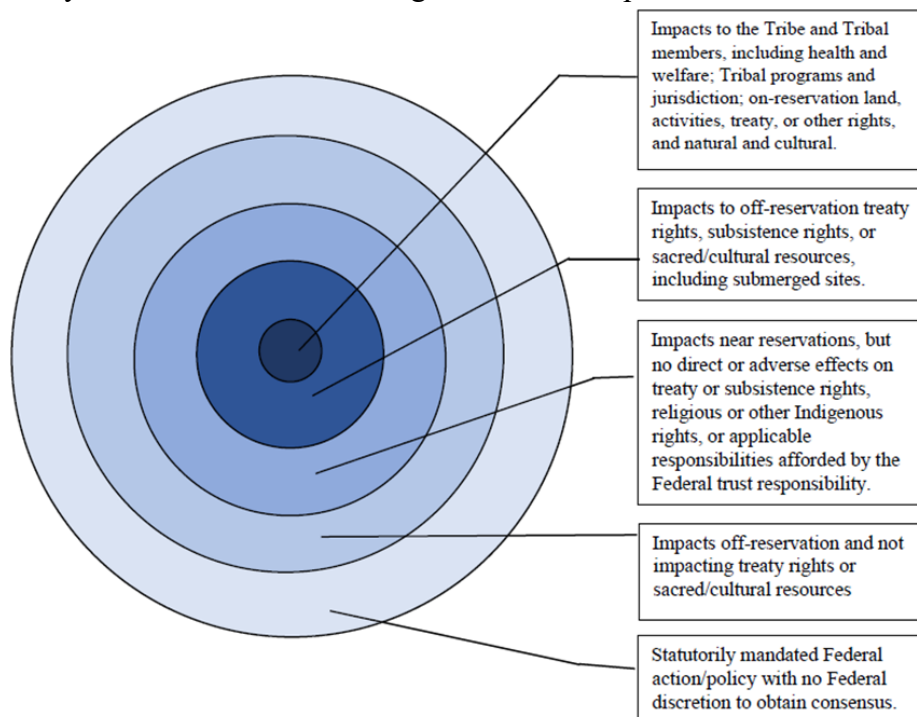
¹⁶ Available at: <https://www.federalregister.gov/documents/2021/01/29/2021-02075/tribal-consultation-and-strengthening-nation-to-nation-relationships>

¹⁷ Available at: <https://www.federalregister.gov/documents/2022/12/05/2022-26555/uniform-standards-for-tribal-consultation>

New agency policies implement the President’s directives, as seen in these four examples:

1. Detailed Plan for Improving Interior’s Implementation of E.O. 13175 (2021) and new consultation policies and procedures in the Departmental Manual (2022):

The Secretary of Interior’s Detailed Plan seeks to be a model for other agencies. It addresses Tribal consultation concerns and recommendations for improvement. It notes that Tribes urged incorporating FPIC principles into consultation and redefining “meaningful consultation” as a dialogue that requires FPIC, joint decision-making or consensus prior to DOI actions.¹⁸ Action Item 3 proposed to develop a “Model for Achieving Consensus” as a guide for obtaining Tribal consent in a consensus-based approach. The new policies are published in 512 DM 4-5 (2022). 512 DM 4 (available at: https://www.bia.gov/sites/default/files/dup/tcinfo/512-dm-4-final_508.pdf) states at §4.4 : *It is the policy of the Department to seek consensus with impacted Tribes in accordance with the Consensus-Seeking Model.* The Model applies to all departmental actions, with a goal to achieve consensus wherever possible. It has five levels for achieving consensus. At the top, where the highest level of consensus is needed, are impacts to on-reservation land, treaty or other rights, natural and cultural. Second highest, are impacts on off-reservation treaty and subsistence rights and impacts on sacred or cultural resources.



Consultation procedures in 512 DM 4-5 are notable in three respects:

- Consultation applies to Tribal rights and interests in public land.

¹⁸ See Detailed Plan *supra* note 13, at 6-7.

- Agencies should abide by the Consensus-Seeking Model; and for impacts at the top of the scale, officials should defer to Tribes where possible.
- Dispute resolution is required when consensus cannot be reached.

2. “Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making” (2022).¹⁹

This guide helps agencies enhance efforts to better protect Indian treaty, reserved, and other rights in agency decision-making and regulatory processes through best practices. It incorporates Tribal consultation standards from the Presidential Memorandum on Uniform Standards for Tribal Consultation and sets forth fundamental principles and “best practices” for Tribal consultation. Key takeaways include:

- When self-government, trust resources, treaty rights, and reserved rights are concerned, agencies should “explore, and where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.” (p.8)
- Principle 11 governs consultation involving vital Tribal interests: *Agencies should strive for consensus or a mutually desired outcome.* And it adopts an approach like DOI’s Model for Achieving Consensus.
- One framework listed for “best practices” is the UN Declaration on the Rights of Indigenous Peoples.
- Multiple Tribes want consensus and FPIC in consultation. They also urged a practice of seeking consent and recommended that sovereigns work in good faith towards consensus in federal decision-making and regulatory development when Tribal interests, treaty, and reserved rights are impacted.
- Best practices embrace the E.O. 13175 requirement that agencies “encourage Tribal Nations to develop their own policies to achieve program objectives;” and Best Practice #2 asks agencies to know about Tribal consultation policies, processes, and protocols and respect them when seeking consultation. (pp.7-8, 15)

3. Memorandum on “Implementation of Guidance of Federal Departments and Agencies on Indigenous Knowledge” (2022).²⁰

This agency guidance on Indigenous Knowledge (“IK”) was issued by the White House’s Council on Environmental Policy and Office of Science and Technology. It observes that agency use of IK can lead to better informed decision-making, and it calls on agencies to include IK for federal scientific and policy decisions. In stark contrast to past decades when IK was looked down upon, and even demonized, the 2022 guidance *seeks to elevate IK in federal decision-making.*

¹⁹ Working Group members who developed the guide are the Interior, Agriculture, Justice, Labor, State, Transportation, Commerce, Education, Energy, Labor, Veteran Affairs, Defense, HUD, Homeland Security Departments and the EPA, White House Council on Environmental Policy, ACHP, and Office of Personnel Management. The guide is available at: https://www.bia.gov/sites/default/files/dup/inline-files/best_practices_guide.pdf

²⁰ https://planning.erdc.dren.mil/toolbox/library/MemosandLetters/IKGuidance_30Nov2022.pdf

“Indigenous Knowledge” is defined as:

“The body of observations, oral and written knowledge, innovations, practices and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment. It is applied to phenomena across biological, physical, social, cultural, and spiritual systems . . . [it] is based in ethical foundations often grounded in social, spiritual, cultural, and natural systems . . . offering a holistic perspective.” (pp. 4-5)

In short, IK is deemed to be an important body of knowledge for federal policy, research and decision making. The guide explains how to obtain and use IK, and it calls on agencies to consult with Tribes on including IK in agency decision making and research.

4. Order No. 4303 (2021) – “Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters”.²¹

This Joint Secretarial Order lays a foundation for enhanced protection of Tribal interests in lands and waters managed by the Departments of Interior and Agriculture through consultation, co-management and co-stewardship agreements, and agency use of IK. The Order is also embraced by the Department of Commerce to include oceans and water bodies under National Oceanic and Atmospheric Administration stewardship.

By way of background, the federal government is the single largest landowner in the United States. Its departments manage millions of acres of federal public land and vast water bodies that were previously owned and managed by Tribal Nations. But for the dispossession and removal of the Tribes, federal public lands and water bodies would not exist; and those lands and water bodies still contain deep Tribal ancestral and cultural ties, as well as natural resources of significance to Tribes - including sacred sites, burial grounds, traditional foods, medicines and materials, and important wildlife and marine life. Many of those former areas are subject to treaty rights to hunt, fish, gather, and pray. Historically, federal managers erased those rights and interests. They ignored, excluded or marginalized Tribal ties, rights and interests pursuant to public land laws, which were viewed as being separate from Federal Indian Law and the government’s trust responsibilities for Indian Tribes.²² While states and private entities were provided privileged roles to exert influence over federal management of federal public lands, Tribes with deep ties and legal interests were excluded.

²¹ <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf>

²² See Monte Mills and Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 Pub. Land & Resources L. J., Art. 2 (June 2021) Available at: <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1852&context=faculty-articles>

For sound federal/Tribal relations, it is time to expand cooperative federalism in the management of those properties to include Indian Tribes, affirm their sovereignty, and safeguard their cultural resources and reserved rights found on federal public lands. This reform is needed to restore a more equitable balance between the mandates of Federal Indian Law and public land law. Joint Order 4303 takes a big step in that direction.

The Order's goal is to ensure that federal management is done in a manner "that seeks to protect treaty, religious, subsistence, and cultural interests" of Tribal Nations. *See*, §1, at 1. Among other things, the Order directs the departments to:

- Ensure that all decisions relating to federal lands and waters consider how to safeguard interests of affected Tribes.
- Make agreements with Tribal Nations to collaborate in co-stewardship of federal lands and waters, including wildlife and its habitat.

Implementation principles for fulfilling the Order's requirements include:

- Departments will collaborate with Tribal Nations to ensure their governments "play an integral role in decision making related to the management of Federal lands and waters through consultation, capacity building, and other means consistent with applicable authority." *See*, §1(b).
- Departments will engage in meaningful consultation prior to decision-making and planning to ensure Tribes can shape the direction of management and give due consideration of Tribal recommendations. *See*, §3(c).
- Departments will collaborate with Tribes to develop co-stewardship agreements, which include dispute resolution procedures. *See*, §3(e), (g).
- Departments will consider Tribal expertise and IK in decision-making for federal lands, particularly for managing resources subject to Tribal treaty and subsistence uses. *See*, §3(f).

These principles apply to management decisions for federal land, water, wildlife, and habitat that impact Indian treaty or religious rights. *See*, §4. Co-stewardship mandates cover federal areas and resources located: (1) within or adjacent to Indian reservations; (2) non-adjacent federal lands or waters that are subject to Tribal subsistence or other rights or interests; and (3) anywhere co-stewardship is requested by Tribes. *See*, §5.

"Co-stewardship" is defined in agency implementation policies. For example, the National Park Service ("NPS") defines it *as cooperative and collaborative engagement by NPS managers and Tribes on shared interests in managing, conserving, and preserving natural and cultural resources*.²³ According to NPS, co-stewardship takes various forms, including sharing expertise,

²³ §3.3, National Park Service Policy Memorandum 22-03 (2022). Available at: https://web.archive.org/web/20250202100932if_/https://www.nps.gov/subjects/policy/upload/PM_22-03.pdf

improving resource management, and incorporating IK; and it entails diverse relationships, including co-management agreements with Tribes.

By 2022, DOI/USDA agencies had entered into 24 co-stewardship agreements with 31 Tribes and 60 more were pending with 45 Tribes.²⁴ The Native American Rights Fund and other partners have developed a database on co-stewardship, co-management and IK agreements. See, <https://lib.law.uw.edu/cooperative>.²⁵

C. Summary of Current U.S. consultation standards and practices.

Today the U.S. Tribal consultation standard is: *Meaningful consultation, with the objective to achieve consensus or mutually agreed outcomes*. The standard emanates from the Presidential Memorandum on Uniform Tribal Consultation Standards, builds on “consensual mechanisms” in E.O. 13175, and focuses on “achieving consensus or mutually agreed outcomes.” The federal consultation system features co-stewardship and co-management agreements that entail sharing some degree of decision-making authority with Tribal governments. A couple observations about the Biden consultation standard are useful:

1. The Biden standard can fairly be described as an “Almost FPIC” standard, as discussed in Szablowski (2010).²⁶ Its emphasis on “achieving consensus or a mutually agreed outcome” necessarily requires efforts to reach agreement; and if consensus is reached, good practice dictates that it be documented in a written agreement. That process is akin to the negotiated form of justice that characterizes FPIC principles. *Id.*

2. A helpful context for understanding the Biden standard is to situate it in the various models for consulting with Tribal Nations. Szablowski (2010) identifies three models:²⁷

- The “consultation regime” is a two-way transfer of information in a process capable of shaping government decision-making but does not involve sharing or transferring decision-making authority.
- The “consent regime” involves sharing some measure of decision-making authority with Tribes for more inclusive, collaborative decision-making.
- The “hybrid regime” combines consent and consultation elements.

²⁴ DOI, “First Annual Report on Tribal Co-Stewardship” (2022) at 6-12. Available at:

https://www.bia.gov/sites/default/files/dup/inline-files/doi_annual_report_on_co-stewardship.pdf

USDA, “First Annual Report on Tribal Co-Stewardship” (2022) at 4. Available at:

<https://www.usda.gov/sites/default/files/documents/usda-jso-annual-report-11.29.2022-doi-signed.pdf>

²⁵ For extensive background, See Monte Miles and Martin Nie, “Bridges to a New Era A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands,” 44 Pub. Land and Resources L.R., Art. 2 (June 2021) Available at: <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1741&context=plrlr>

²⁶ David Szablowski, “Operationalizing Free, Prior and Informed Consent in the Extraction Industry Sector? Examining the Challenges of a Negotiated Model of Justice,” Canadian J. of Development Studies, 30, nos. 1-2 (2010): 111-130, at 118.

²⁷ *Id.* at 117-119.

The U.S. consultation system appears to be a “hybrid regime.”

Agency consultation practices in the United States are evolving, as agencies implement the President’s minimum Tribal consultation standards through a host of new policies, departmental directives, interdepartmental initiatives, and best practices. In that paradigm shift toward consensus, some agencies (like the Advisory Council on Historic Preservation and U.S. Agency for International Development) incorporate FPIC principles, while others reference FPIC when policymaking, but all embrace consultation aimed at achieving consensus or a mutually desired outcome.

III. DEFINING FPIC

A. What is FPIC?

The Declaration establishes a comprehensive framework for defining indigenous rights and identifying state obligations with respect to those rights.²⁸ The U.S. endorsed the Declaration in 2010; and in 2014 all 193 UN Member-States participated in a consensus resolution pledging to undertake measures to advance the aims of the Declaration. It is not a treaty eligible for adoption by signature and ratification. Nevertheless, the Declaration carries authoritative guidance, moral authority and political force, and can properly be consulted by agencies when making policies, as done in the Best Practices Guide (2022), DOI policymaking, and some agency policies.²⁹

The FPIC principles are an important part of the Declaration. Articles 19 and 32 require FPIC when governments make proposals that affect Tribal rights and interests in land, water and territories.

- **Article 19** reads: “States shall 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 affect them.”
- **Article 32** reads: “1. Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their representative institutions in order to obtain their free, prior 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.”

²⁸ The Declaration is available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

²⁹ See ECHO-HAWK, IN THE LIGHT OF JUSTICE, *supra* note 4, for an analysis of the legal status of the Declaration at 63-94. It concludes that agencies should pay serious heed to the provisions of the Declaration and give them appropriate weight when policymaking. *Id.* 93

As can be seen, the level of impact required to trigger consultation is substantially lower than the “substantial direct effects” standard of E.O. 13175.

FPIC principles in Articles 19 and 32 are interpreted by UN experts, studies, and reports. UN guidance brings into focus the contours and parameters of FPIC:

- FPIC is a *process* for safeguarding rights in the Declaration.³⁰ UN studies and reports refer to FPIC as a human rights principle and standard that embodies rights of Indigenous Peoples to their lands and to participate in decision-making,³¹ and FPIC is regarded as establishing consent as the objective of consultation.³²
- The State duty to consult consists of dialogue and negotiation with consent as the objective. There is a certain degree of flexibility at the national level to determine best practices for consultation, but in all cases the Declaration mandates FPIC as a normative component.
- Obtaining and documenting FPIC is required when proposed activity has impacts on the traditional way of life and lands under Tribal occupation, traditional ownership or customary use.³³
- FPIC is comprised of:
 - “a process of dialogue and negotiation over the course of a project, from planning to implementation and follow up. Use in the Declaration of the combined terms “consent and cooperate” denotes a right of Indigenous Peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard. It also suggests the possibility for Indigenous Peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.”³⁴
- The Declaration “suggests a heightened emphasis on consultations that are in the nature of negotiations towards mutually acceptable arrangements prior to decisions on proposed measures” and consultation is often a starting point for seeking FPIC. *Id.* ¶16.

³⁰ EMRIP Study, *supra* note 8, ¶¶13, 15.

³¹ UN Permanent Forum on Indigenous Issues, “Implementing free, prior and informed consent in the context of Indigenous Peoples (2023) (“PFII Study”) at 2, ¶3. Available at: <https://digitallibrary.un.org/record/4004458?ln=en&v=pdf>

³² James Anaya, “Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, Including the Right to Development” (2009), ¶ 46. Available at: <https://docs.un.org/en/A/HRC/12/34>

³³ PFII Study, *supra* note 31, ¶22.

³⁴ *Id.* EMRIP Study, *supra* note 8, ¶15

- The constituent elements of FPIC are:³⁵

Free, which refers to a consent given voluntarily without duress, intimidation or manipulation, e.g., under Tribal laws and policies that guide the process.

Prior, which means that consent is sought *before* decisions are made, and as early as possible, with adequate time for Tribes to analyze pertinent data.

Informed, which means providing necessary information prior to seeking consent, with Tribal technical capacity to analyze the data.

Consent, which refers to a decision made by Tribes through their own processes. It includes the ability to give or withhold agreement to a proposal, following an assessment of it and the best interests of the Tribe, including the ability to seek adjustments or alternatives to the proposal. It is required prior to approving actions, decisions or projects that may affect Tribal lands, waters or territories.

- If a Tribe consents to a proposal, that consent should be made consistent with its “laws, customs, protocols and best practices” and in most instances “consent must be recorded in a written instrument, negotiated by the parties and signed affirmatively by legitimate authority.” EMRIP Study at 9, ¶ 30.
- When natural resource development by extractive industries is within Tribal lands, waters and territories, the general rule is that the FPIC of affected Tribal Nations is *required*. This is because within Tribal jurisdiction, self-determination dictates the outcome of any negotiation—if the Tribe says “no,” that is generally the end of the matter. Moreover, impacts on Tribal rights are at the top of the UN’s required level of consent. The level depends on “the nature of and potential impacts of the proposed activities on their rights.” *Id.* at 9-10, ¶¶ 32-33. This “proportionality principle” approach is akin to the DOI’s Consensus-Seeking Model. *Id.*, ¶¶ 33-35.
- FPIC should be documented in written agreements that memorialize: (1) the process for achieving consent; (2) the agreement reached by the parties for expressing consent; (3) an agreed project or proposal description, including duration and potential impacts; and (4) agreed provisions for mitigation, monitoring, damages assessment, dispute

³⁵ *Id.* at 6-8, ¶¶ 20-23. See also FOOD AND AGRIC. ORG. (FAO), *FREE PRIOR AND INFORMED CONSENT: MANUAL FOR PROJECT PRACTITIONERS*, at 16-17 (2021) [hereinafter “FPIC Manual”] Available at: <https://www.fao.org/3/I6190E/i6190e.pdf> .

resolution, timetables, deliverables, and benefit-sharing arrangements. *Id.* at 12, ¶¶ 42-45.

Commentary: UN guidance clarifies that FPIC principles do not prescribe a specific outcome or impose a strict consultation template. Rather, FPIC establishes normative requirements for a good faith process culminating in an express agreement.

B. What is “consent” as used in the Declaration?

Legal scholars in the pre-Biden era examined the notion of “consent” in FPIC and explored effective ways for consultation to seek consent. It is notable that their recommendations are compatible with UN guidance, in several respects.

- For a successful FPIC process, Baker (2012) offers a model of consent that features a robust process of meaningful consultation *coupled with* an outcome memorialized by an agreement reached through good faith negotiations.³⁶ Baker’s recommendation comports with UN guidance that consent should be recorded by a written instrument³⁷ so well that it might be a precursor for the Biden Administration’s Tribal consultation standard.
- To determine the appropriate level of consent needed to satisfy FPIC, Kinnison (2011) recommended a “proportionality principle.”³⁸ Her sliding scale approach aligns with UN guidance and DOI’s Consensus-Seeking Model in 512 DM 4 (2022).

Commentary: There is marked compatibility between UN guidance, scholar recommendations, and current U.S. consultation policies. That alignment strengthens conclusions in Miller (2015).³⁹ Based on the history of Tribal consent practices in the U.S., Law Professor Robert Miller viewed FPIC from five vantage points:

“(1) through the lens of the United States fairly consistent practice of dealing with Indian nations via consensual, diplomatic, and political means; (2) with the understanding that American Indian nations and Indian peoples own lands and various property rights that properly raise FPIC issues; (3) with the backdrop that the United States has a fiduciary trust responsibility for Indian nations and Indian peoples; (4) from a practical angle, it appears easier and less expensive for the United States to deal with Indian nations in this

³⁶ Shalanda H. Baker, *Why FPIC’s Free, Prior and Informed Consent Policy Does Not Matter (Yet) To Indigenous Communities Affected by Development Projects*, 30 Wis. Int’l. L. J. 668 (Fall 2012). Available at: https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2014/04/Baker_print.pdf

³⁷ *Id.* at 705.

³⁸ Akilah Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the UN Declaration on the Rights of Indigenous Peoples*, 53 Ariz. L. Rev. 1301 (2011). Available at: <https://arizonalawreview.org/pdf/53-4/53arizlrev1301.pdf>

³⁹ Robert J. Miller, *Consultation or Consent: The United States’ Duty to Confer With American Indian Governments*, 91 N.D. L. Rev., No.1, Article 2 (2015) at 95. Available at: <https://commons.und.edu/cgi/viewcontent.cgi?article=1117&context=ndlr>

modern-day on an FPIC basis; and (5) that article 19 of the Declaration should never be read as an Indigenous veto over democratic principles.”

From those vantage points, he concluded “*FPIC is not such a new or alarming idea for the United States, and it is not that much of a change in the context of Indian nations and the United States.*” *Id.* (italics supplied)

C. Elements of a Successful FPIC Process.

UN guidance identifies eight elements for a successful FPIC process.

1. Prior to consultation, Tribal infrastructure must be in place. Tribal infrastructure is needed for consultation. First, is a governmental structure for engaging with outside entities, with workable internal protocols. Second, are Tribal laws and policies to guide how consultation is conducted. Third, are resources and capacity to enable consultation staff to effectively consult, negotiate, and develop agreements, such as trained staff, designated policy leaders, legal counsel, and technical expertise.

2. Prior to consultation, U.S. policies must be adequate. U.S. consultation must seek consent in a way that aligns with FPIC principles and processes. Agencies should respect Tribal consultation laws, policies and protocols. They should have a way to determine appropriate levels of consent when Tribal rights and interests in land, water, and territories are concerned. If consent is achieved, it should be documented by a written agreement reached by good faith negotiations.

3. Identify consulting parties. At the outset, the Tribal government should identify all consulting parties, such as the requesting agency and sometimes stakeholder extraction industry companies when their proposed projects are involved.⁴⁰ Even though states are the duty-bearers responsible for ensuring that government-to-government consultation is done adequately, companies have a role when their proposed projects are concerned, and this often entails agreements with Tribes.⁴¹

4. Clarify what the process will be. If Tribal consultation laws, policies, and protocols differ from those of the federal agency, the consulting parties should defer to the Tribal process and standards. Alternatively, the parties can develop mutually agreed protocols tailored to Tribal consultation law and standards.⁴² In all cases, the goal of consultation is to seek consent wherever possible.

⁴⁰ Companies in that sector, including lenders, are starting to develop FPIC standards and how-to-guides, because they recognize the risks inherent in their failure to obtain FPIC. *See* EMRIP Study, *supra* note 8 ¶¶49-53.

⁴¹ *See* Anaya Report, *supra* note 3; The UN has developed “guiding principles” for business enterprises to respect human rights. *See* OFF. OF THE HIGH COMM’R. FOR HUM. RTS., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS ‘PROTECT, RESPECT AND REMEDY’ FRAMEWORK, U.N. DOC. HR/PUB/11/04 (2011) [hereinafter “Guiding Principles”], https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. *See* S.

⁴² *See* Best Practices Guide *supra* note 11, Principle 14 at 14.

5. FPIC should be incorporated. The consultation process should be driven by the constituent components of FPIC as defined by the UN and embraced by Tribal law. FPIC is a process of dialogue and negotiation with consent as the objective. The constituent elements of FPIC are:

Free requires that consent is given voluntarily, without duress, intimidation or manipulation.

Prior means that consent is sought before decisions are made, as early as possible, and with adequate time for Tribes to analyze pertinent data.

Informed means providing Tribes with full, reliable and necessary information prior to seeking consent, with adequate time and technical capacity to understand and analyze the data. It includes an opportunity to discuss the data with agency decisionmakers, internally process information, and then make a decision on the proposal through established Tribal processes.

Consent is a decision made by Tribes through their own processes. It includes the ability to give or withhold agreement to a proposal following an assessment of the proposal and best interests of the Tribe, including the ability to seek adjustments or alternatives to the proposal. FPIC is required prior to approving actions or projects that may affect Tribal lands, waters or territories.

6. Role of federal minimum standards and best practices for Tribal consultation. Consultation is guided by FPIC components embodied in Tribal law, but could be supplemented with compatible federal procedures, standards and best practices outlined in the Presidential Memorandum on Uniform Standards for Tribal Consultation (2022) and Best Practice Guide (2022).

7. Written Consent Agreements reached by Good Faith Negotiations. Following consultation, if Tribal consent is granted on a proposal, it must be granted in accordance with Tribal law and the terms and conditions of Tribal consent must be documented in a written agreement reached through good faith negotiations.

8. If extraction company projects are concerned, extra FPIC measures are needed. Companies in the extraction industry can be stakeholders, interested parties or even possibly consulting parties in consultation when their proposed projects are concerned. As elaborated in the next section, FPIC dictates special measures for companies to obtain Tribal FPIC as a component in government-to-government consultation or through separate negotiations, processes, and direct agreements, with or without government involvement. Those requirements include:

- The consent process must start early in the project conception and planning phase to involve Tribal participation as early as possible.

- Information sharing includes full disclosure of project information in all its stages, proposed alternatives, potential risks and impacts, mitigation measures, and benefits.
- Good faith negotiations to reach a binding written consent agreement to: (1) document conditions for granting FPIC; (2) memorialize Tribal participation or partnership arrangements; and (3) spell out how harm and risk will be mitigated, monitored or compensated, any benefit-sharing arrangements, and dispute resolution mechanisms.

D. How FPIC can be applied to protect Tribal rights to land, water, and territories.

Government-to-government consultation strengthened by the above FPIC elements is a way to protect Tribal rights and interests. If operationalized by Tribes, the elements for a successful FPIC process can be applied to strengthen Tribal engagement with federal agencies. That is important since the Federal Government is the duty-bearer for protecting Tribal rights, ensuring consultation is done adequately, and it is the primary actor for making policies and decisions that affect Tribal rights and interests.⁴³

However, sometimes the Federal Government is not the only actor. In the context of development and conservation of land, water, territories and natural sources, federal agencies are often called upon by extraction industry companies to approve, license, lease, or otherwise authorize their proposed projects. In that circumstance, project proponents are interested stakeholders in the outcome of consultation involving their proposals. How can Tribal governments best deal with those companies?

UN guidance is helpful. It applies FPIC principles for addressing company interests. To address their issues, companies must seek and obtain FPIC for practical reasons (and sometimes to comply with industry or lender standards) to bolster requests for federal approval and avoid political, social and reputational risks of delay, litigation, increased cost, and failure. UN guidance shows them how to seek and obtain Tribal FPIC.⁴⁴

There are numerous publications outlining business involvement in FPIC consent processes and documenting a trend in that direction.⁴⁵ The UN is aware of Tribal human rights concerns relating to extraction companies. Under international standards that address those concerns, UN studies and reports provide recommendations and models for resource extraction that protect indigenous rights. When Tribal people and companies are open to discussion, it is possible to forge mutually agreed outcomes that protect Tribal rights. In many instances, companies have negotiated with Tribes directly about proposed extraction activities within their territories. Tribes are free to enter such negotiations if they wish, and that is sometimes the most efficient and desirable way to reach agreed-upon arrangements for extraction proposals that protect Tribal rights and interests.⁴⁶ Tribes control those negotiations and must ensure that they comport with the same standards that apply to states, including the FPIC

⁴³ UNPFII Study (2023), *supra* note 31, ¶6.

⁴⁴ See, UNPFII Study (2023), *supra* note 31; EMRIP Study (2018), *supra* note 8; and Anaya Report, *supra* note 3.

⁴⁵ EMRIP Study *supra* note 8, ¶¶49-56

⁴⁶ Anaya Report, *supra* note 3, at 128, ¶ 61.

principles. And since the activity is within their territories, there is no proportionality principle—if no agreement is reached that is the end of the matter.

The Anaya Report (2015) observes that the prevailing business model is one in which outside companies, with the backing of the state, control approval, operations and profits from their extractive operations, often running roughshod over indigenous rights or interests and they offer only minimal incidental benefits, such as jobs that pale in economic value in comparison to company profits.⁴⁷ This situation can be averted by following the elements for a successful FPIC process. That opens the door for a new business model, one based on agreements to protect Tribal rights and interests—in which Tribes control operations through their own initiatives, enterprises, and regulatory power or through strong partnerships; and where adequate protection is provided for health, the environment, and cultural/religious practices, along with equitable benefits for affected Tribes.⁴⁸

The UN studies and reports outline elements of a successful FPIC process for companies and affected Tribes.⁴⁹

- The general rule, with narrow exceptions, is Tribal consent is required for extractive projects within Tribal territories.
- The same elements for a successful FPIC process for Tribal/state consent agreements are generally applicable to companies, with certain additional elements.⁵⁰
- States should ensure good faith consultations with Tribal governments and engage in efforts to reach agreement or consent.
- Companies should adopt policies and practices to ensure all aspects of their operations are respectful of Tribal rights and interests.
- The FPIC consent process must be carried out well in advance of any project.
- The consent process must start early in the project conception and planning phase to involve Tribal participation as early as possible.
- Information sharing includes full disclosure of project information in all its stages, proposed alternatives, potential risks and impacts, mitigation measures, and benefits.
- Conditions for businesses to achieve and sustain agreements with Tribal governments include corporate due diligence, fair and adequate consultation, and just and equitable terms for the agreement.
- Necessary features of an adequate consultation or negotiation over extractive activities include mitigating of power imbalances, information gathering and sharing, provision for adequate timing for consultation that is free from pressure and assures Tribal participation.

⁴⁷ *Id.* at 110.

⁴⁸ *Id.* at 133-34, ¶¶ 79-92; *See also*, UNPFII Study, *supra* note 31, ¶ 49 (FPIC agreements reached in consent-based consultation are the future for business engagement with tribal nations.)

⁴⁹ *Id.* at 123-133, ¶¶ 41-78

⁵⁰ UNPFII Study (2023), *supra* note 31, ¶ 7 (Private entities should equally obtain consent of tribes and make agreements with them employing FPIC as a foundation for negotiations.)

- Rights-centered, equitable, and just agreements and partnerships can result from FPIC-based negotiations.
- Such agreements must be crafted based on (1) full respect and protection of Tribal rights in relation to affected land, water and resources; (2) equitable distribution of project benefits within a framework of genuine partnership; and (3) adequate grievance mechanisms.
- Following consultation, good faith negotiations to reach a binding written consent agreement are needed to (1) document Tribal conditions for granting FPIC; (2) memorialize Tribal participation or partnership arrangements; and (3) spell out how harm and risk will be mitigated, monitored or compensated, any benefit-sharing arrangements, and dispute resolution mechanisms.

IV. CONSIDERATIONS FOR TRIBAL LAW AND POLICY MAKING

A. Power of Tribal Nations to Make Consultation Laws and Policies.

There is ample legal authority for Tribal governments to enact consultation laws and policies to govern engagement with outside entities. Indian Tribes are self-governing political communities with an inherent right of sovereignty. Tribal governments exercise civil jurisdiction over their members, lands and activities within their reservations; and they are free to define how they will engage with outside entities.

Civil jurisdiction over nonmembers exists whenever they seek to enter consensual relationships with the Tribe or its members, or when they threaten or have some direct effect on the political integrity, economic security, or the health and welfare of the Tribe.⁵¹ For example, Tribal governments commonly exercise jurisdiction over corporations that seek to do business within their jurisdictions through corporation codes, licensing, registration, reporting and other requirements.⁵² Tribal laws governing engagement with outside entities are apropos when nonmember activity affects Tribally-owned land or resources. In that instance, the Tribe is a landowner or mineral owner, and its proprietary interest is at stake.

Outside of Tribal jurisdiction, whenever Tribal rights or interests on former Tribal lands or water bodies managed by federal agencies may be affected, federal government-to-government consultation directives encourage Tribes to enact Tribal consultation laws, policies and protocols; and agencies must respect those laws, policies, protocols and standards.⁵³ A Tribal consultation framework is especially important to protect off-reservation treaty rights, reserved rights, religious rights or other vital interests. Since federal consultation with Tribes occurs not only for land and resources within Tribal jurisdiction but also former Tribal land and waters under federal management, it is appropriate for Tribal law and policy

⁵¹ See *Montana v. United States*, 450 U.S. 545, 565-66 (1981) and its progeny, as analyzed by Fredericks, *supra* note 9 at 447-459.

⁵² Fredericks, *supra* note 9, at 447-452

⁵³ See, discussion *supra* at 11, 14-17 and regarding E.O. 13175 (2000), §3c (1)-(2) and Best Practices Guide, *supra* note 11, Principle 14 at 14.

to define how Tribal governments will engage with the agencies in both circumstances, whether consultation pertains to existing or former lands and waters.

The use of FPIC principles in Tribal consultation laws and policies is within the sound discretion of Tribal governments. Federal law does not prohibit a Tribe from conditioning the extraction of Tribal mineral resources on obtaining its FPIC.⁵⁴ Indeed, the Best Practices Guide (2022) specifically identifies the UN Declaration as one framework for developing best practices in government-to-government consultation.⁵⁵ And some agencies have embraced FPIC principles in their policies.

B. Rationale for Enacting Tribal Consultation Laws.

In routine instances, capable program staff (such as Tribal Historic Preservation Officers, NAGRPA staff, and Environmental Protection staff) adequately handle day-to-day consultation requests that come across their desks, as an ordinary part of their duties. In many of those instances, existing Tribal laws or policies specify how these ordinary consultations are to be done, as in the cases of environmental codes that spell out how rights-of-way applications, licenses, and oil and gas matters are handled or how consultation requests under Section 106 of the National Historic Preservation Act will be handled and processed by the THPO. But occasionally, non-routine issues of great import to the Native Nation are involved, and that triggers formidable challenges for the entire Tribal government. Whenever government-to-government consultation involves vital Tribal interests or core legal rights, Tribal governments are called upon to muster key political, technical, legal and program staff from across the government to adequately protect those rights and interests, and sometimes outside consultants are needed to assist the team.

Those extraordinary situations arise in many instances, including consultation on (1) proposed pipeline projects, (2) large-scale and extraction development proposals, and (3) proposed policies or proposals that impact Indigenous Habitat, primal religious beliefs and practices, or sacred sites. As mentioned earlier, there is a drive to extract, develop and transport minerals, fossil fuels, and other natural resources from lands, waters and territories in the United States, including existing Tribal lands and waters and former Tribal lands, waters and territories under federal management. This drive exerts pressure on Tribal Nations in protecting their rights and interests in the conservation and development of those places, habitats and resources. In addition, when large-scale extraction projects are proposed, Tribes often face a significant power imbalance when agencies and powerful extraction industry companies advocate for those projects with political support. In the face of these pressures, Tribal consultation laws, policies and protocols help level the playing field.

A robust Tribal consultation infrastructure, together with adequate capacity to consult, strengthens the opportunity of Tribal governments to meaningfully raise and address Tribal concerns through government-to-government consultation. Every Tribal government should

⁵⁴ Fredericks, *supra* note 9, at 452.

⁵⁵ See discussion *supra* at 13.

have a solid consultation infrastructure in place, together with the internal capacity to field a capable team to consult, negotiate, and advocate. Building that infrastructure starts with enacting Tribal consultation laws and policies to establish a workable engagement framework for consulting with outside entities and for protecting vital Tribal interests and core legal rights through consultation.

The legislative rationale for enacting such laws and policies can be simply put:

- Government-to-government consultation is a primary form of engagement between Tribal Nations, federal agencies and other outside entities. This is especially true when proposed activities affect Tribal rights and interests in land, water and territories. The well-being and security of Tribal Nations depends on effective engagement with outside entities. When consultation is properly done, it can afford Tribes meaningful participation in federal decisions that affect Tribal rights and interests.
- Government-to-government consultation is a two-way street that must be workable for all consulting parties. Federal agencies have consultation policies in place that lay out a process that is workable for them; however, their processes are not necessarily workable for Tribal governments. Unless Tribes establish their own processes, they are constrained to follow the federal framework whether it works for them or not. To avoid that hardship, Tribes can enact their own consultation laws, policies, protocols and standards.
- Tribes are encouraged to enact their own consultation laws, policies and protocols by E.O. 13175, the federal Best Practices Guidance (2022), by legal scholars, and by UN studies and reports. A growing number of Tribes have already enacted such laws and policies; and they have called upon agencies to respect their laws and policies. Federal policy requires agencies to respect and where possible defer to Tribal consultation policies and protocols and, when appropriate, to negotiate mutually agreed protocols around Tribal consultation frameworks.
- Tribes have legal authority to enact consultation laws and policies to govern engagement with outside entities.
- The FPIC principles, provisions and processes of the Declaration, as interpreted by UN expert reports and studies, provide a “gold standard” for government-to-government consultation. Tribes can harness those benefits by utilizing the constituent elements, processes and standards of the FPIC principle in developing their consultation framework to better ensure that their fundamental legal rights and vital interests in lands, waters and territories will be respected through government-to-government consultation.
- The enactment of Tribal consultation laws and policies is a self-determination measure that builds a workable Tribal infrastructure for successful government-to-government consultation on important matters by establishing a framework for engagement with outside entities.

C. Review of Existing Tribal Consultation Laws and Policies.

Nearly twenty Tribal governments have enacted consultation laws and policies. This is a growing area of Tribal law. Some selected samples are highlighted and summarized in Appendix 5.

One example is the Pawnee Nation's Government-to-Government Consultation Statute (2021).⁵⁶ This law prescribes a formal process for official consultation with federal agencies and other outside governmental entities that is workable for the Pawnee government. The purpose of the act is "to ensure that meaningful Government-to-Government consultation is made with free, prior, and informed consent of the Pawnee Nation through its appropriate officials." §1-8-1. The objectives of consultation include to "ensure free, prior, and informed consent before any Tribal interests covered by this statute are affected or the integrity of the Pawnee Nation's water, land or resources are threatened." §1-8-6(g).

The act applies only when "core rights and vital interests of the Pawnee Nation are affected." §1-8-2. When consultation involves non-covered rights or interests and can routinely be addressed by Tribal staff without invoking the process and protocols prescribed by the act, the President may waive the statutory requirements; and staff involved in non-covered consultations can invoke the statutory requirements, after consultation with their supervisors and the President, whenever it appears that the consultation may require the statutory process to protect core legal rights and vital Tribal interests. §1-8-9.

For agencies that fail to comply with the act, §1-8-10 states:

- (a) All purported consultations done in violation of this statute are invalid, void ab initio, and a nullity.
- (b) Any person or governmental entity violating this statute is prohibited from (i) relying upon invalid consultation attempts for any purpose, and (ii) asserting or representing to any person, entity or court that it conducted a meaningful government-to-government consultation with the Pawnee Nation or asserting that it obtained the Pawnee Nation's informed consent for any purpose.

D. Key Components of Tribal Consultation Laws.

The following are key components for consideration in crafting Tribal consultation laws in the context of conservation and development of Tribal lands, waters and territories:

- *To avoid mass confusion caused by trying to operate under multiple, diverse and varying federal, state, local agency and private company consultation policies, the law*

⁵⁶ Pawnee Nation of Okla., Government-to-Government Statute (PBC Approved June 5, 2021 by Resolution #21-0) <https://pawneenation.org/wp-content/uploads/2021/08/Pawnee-Nation-Government-to-Government-Consultation-Statute.pdf>

should provide clear and uniform guidance for all outside entities on how the Tribal government must be consulted. This requires clear definitions of key terms, purposes, goals, guiding principles, standards and procedures. The goal is for the Tribe to set the terms and control the process rather than being subjected to the diverse consultation policies of outside entities.

- *Consultation procedures should be tailored to meet the special needs and workability for each unique Tribal government when its vital Tribal interests and core legal rights in lands, waters and territories are involved.* That includes sufficient time to (1) assemble a team capable of understanding and addressing the technical, legal and other aspects and impacts of the proposal, advocating Tribal interests and rights affected by the proposal, and negotiating mutually desired outcomes memorialized by a written agreement; (2) to review and evaluate the details of the proposal; and (3) to make Tribal government decisions in accordance with Tribal law, protocols and best practices.
- *The law is one of general applicability when Tribal rights and interests in land, water and territories are at issue. But it should have a special “triggering mechanism” to ensure that it goes into effect only when covered vital Tribal interests or core legal rights of the Nation are affected.* The law should be interpreted as being supplemental to all existing Tribal consultation laws or policies that govern discrete and routine consultation by designated staff under laws such as the NHPA, NEPA, and NAGPRA, which will remain in full force and effect; and it should be made clear that the new law applies only when “triggered” by the presence of “vital Tribal interests” or “core legal rights” of the Nation that may be affected.
- *Seeking consent or a mutually agreed outcome should be the goal of consultation; and there should be a heightened emphasis on consultations in the nature of good faith negotiations toward mutually acceptable arrangements memorialized in a written agreement.* The agreement should memorialize (1) the process for achieving consent; (2) the agreement reached by the parties; (3) an agreed project description, including its duration and potential impacts; (4) agreed provisions for mitigation of adverse impacts, monitoring, damages assessment, dispute resolution, timetables, deliverables, and benefit-sharing arrangements.
- *The constituent elements of FPIC, as interpreted by UN studies and reports, should be incorporated into the law. See, §§III A, C (5), *supra*.*
- *As much as possible, the law should incorporate the elements of a successful FPIC process outlined in §III, *supra*, including: (1) prior to consultation, Tribal infrastructure must be in place and U.S. policies must be adequate; (2) ensure that all consulting parties are identified early on, including any stakeholder extraction industry companies or lenders; (3) clarify what process will be followed, which in some*

instances might include mutually agreed protocols tailored to the Tribal consultation law; (4) FPIC should be incorporated to drive the consultation process; (5) federal procedures, minimum standards and best practices that are compatible with FPIC components could supplement the consultation; (6) following consultation, if Tribal consent is granted, it must be granted in accordance with Tribal law and the terms and conditions of that consent must be documented in a written agreement reached through good faith negotiations; (7) if extraction industry companies are involved, extra FPIC measures may be needed (as discussed in §III); and those measures may include equitable consent agreements forged by the Tribe and company.

- *If the Tribe chooses to consent to a proposal following consultation, that consent should be made consistent with applicable Tribal laws, customs, protocols and best practices and, in most instances, that consent must be recorded in a written and enforceable agreement negotiated in good faith by the parties and signed by legitimate authority of the consulting parties.*
- *Two standards for the level of consent required are available, depending on the location of affected lands, waters and territories. First, when natural resource development proposals by extractive industries are within Tribal jurisdiction on Tribal lands, water and territories, the FPIC of the affected Tribal government is required and if the Tribe says “no” that is the end of the matter. Second, for proposals on former Tribal lands, waters and territory outside Tribal jurisdiction and managed by federal agencies, the impacts on associated Tribal rights and interests require the highest level of consent that must be sought by agencies under the proportionality principle applied by the UN and DOI’s “Consensus-Seeking Model.” *Id.*, §§IV A-B.*

E. Overview of a Model Tribal Consultation Law.

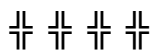
The appendices contain a model Tribal consultation law developed for this handbook. It uses the Pawnee Nation’s Government-to-Government Statute as its foundational format, then builds on that statute by incorporating ten additional elements:

1. Key components of Tribal consultation laws listed in § IV, D supra.
2. Constituent components of FPIC discussed in § III, A-B, supra.
3. Elements for a successful FPIC process discussed in § III, C-D supra.
4. An FPIC process for natural resource extraction companies, as discussed in §§III, C-D, supra.
5. Elaboration on the meaning of FPIC consent and the process for obtaining such consent, as described in § III, A-B supra.
6. Various provisions drawn from other Tribal consultation laws and policies.

7. An enlarged “definition” section.
8. Requirements for Tribal consent agreements with agencies and companies, including recommended content for such agreements.
9. Recommended levels of consent to satisfy FPIC for: (a) existing Tribally owned lands, water, habitat and natural resources, and other lands, water, habitat and natural resources within the reservation that are subject to Tribal jurisdiction; and (b) former Tribal lands, waters, habitat and natural resources traditionally occupied and used by the Tribe that are now managed by federal or state agencies, though some federal courts have cited it as authority.
10. Provisions to authorize negotiation of federal co-stewardship, co-management and Indigenous Knowledge agreements with federal or state land and water managers at the Tribal government’s discretion, as an additional means for strengthening and enhancing Tribal consultation, participation, and engagement with federal or state decision makers in the management of former Tribal lands, waters and territories that are subject to important Tribal rights and interests.

V. CONCLUSION

The federal policy climate in 2024, which establishes a baseline for sound engagement with Tribal Nations, for Tribal consultation and increased Tribal participation in agency decision-making invites the making of Tribal consultation laws and policies. Doing so will strengthen Tribes’ ability to protect crucial rights and interests in lands, waters and territories through government-to-government consultation. With the increasing acceptance of FPIC principles, the FPIC framework is an effective pathway for strengthened consultation, engagement, and participation with governments and other outside entities, such as extraction industry companies and conservation NGOs, to empower Tribes in protecting important rights and interests. The FPIC framework can be embraced and implemented by Tribal lawmakers when developing their own consultation laws and policies. We hope this handbook provides helpful information for interested Tribal governments to achieve those ends. Thank you.



APPENDICIES

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Appendix 1. MODEL TRIBAL CONSULTATION LAW

Appendix 2. FEDERAL TRIBAL CONSULTATION POLICIES & GUIDANCE

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Appendix 4. CO-MANAGEMENT/CO-STEWARDSHIP/INDIGENOUS KNOWLEDGE
POLICIES & GUIDANCE (selected samples)

Appendix 5. TRIBAL CONSULTATION LAWS & POLICIES (selected samples)

Appendix 6. SELECTED LAW REVIEW ARTICLES/WEBSITES/OTHER MATERIAL

Appendix 1. MODEL TRIBAL CONSULTATION LAW

An Act to Establish Government-to-Government Consultation Procedures and Standards when Tribal Rights and Interests in Land, Water and Territories are Concerned

1. *Purposes.*

- (a) This Act establishes the _____'s [name of Indian Tribe] government-to-government consultation processes and requirements for engaging with federal, state or local agencies, Indian Tribal governments, and private companies from the natural resource extraction industry (referred to jointly as "outside entities"), when they make proposals that may affect core legal rights or vital interests of the _____ [name of Indian Tribe] in land, water and territory. The Act applies when consultation is requested by an outside entity, or when the _____ [name of Indian Tribe] requests consultation with an outside entity.
- (b) The purposes of the Act are: (1) to provide outside entities with guidance on uniform procedures, protocols and standards for consulting with the _____ [name of Indian Tribe]; and (2) to ensure that meaningful government-to-government consultation seeks the free, prior, and informed consent of the _____ [name of Indian Tribe].

2. *Scope of consultation covered by this Act.*

This Act applies whenever proposals are made by outside entities for the use, management, conservation or development of existing Tribal land and water, former Tribal land and water bodies within the Tribe's traditional and ancestral territorial homeland currently managed by federal agencies, state and local agencies, other Indian Tribes, or other Indian or non-Indian land and water located within Tribal jurisdiction and lawfully subject to the regulatory jurisdiction of the _____ [name of

Indian Tribe] in instances that may affect core legal rights or vital interests of the _____ [name of Indian Tribe], including when:

- (a) the _____ [name of Indian Tribe] requests consultation with any outside entity on any matter covered by this Act.
- (b) major technical, legal and/or policy issues are at issue, or in complex consultations involving one or more outside entities.
- (c) proposed actions require National Environmental Policy Act review.
- (d) an undertaking requires a National Historic Preservation Act Section 106 review.
- (e) access to or protection of Tribal worship at traditional holy places is involved.
- (f) prior approval of the _____ [name of Indian Tribe] is required for excavation under the Archeological Resources Protection Act.
- (g) a proposal for, or undertaking pertaining to, land, water and territories may affect: (i) core Tribal legal rights or vital Tribal interests; (ii) a religious, historical or cultural site or landscape of significance to the Tribe; (iii) the sanctity of Tribal graves and burial grounds; or (iv) the treatment and disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony.
- (h) a proposal may adversely affect the sovereignty, jurisdiction, treaty or other reserved rights of the _____ [name of Indian Tribe], the human rights of its citizens, or other fundamental rights secured to the Tribe and its citizens by Tribal, federal, state or international law.

3. Definitions.

- (a) “Consent” means free, prior, and informed consent within the meaning of the United Nations Declaration on the Rights of Indigenous People, as interpreted by UN experts, reports and studies, that is granted or withheld by the _____ [name of Indian Tribe] as a result of government-to-government consultation covered by this Act.
- (b) “Consulting party” means the _____ [name of Indian Tribe] and any outside entity that seeks consultation with the _____ [name of Indian Tribe] or an outside entity that responds to a request for consultation made by the _____ [name of Indian Tribe].
- (c) “Core legal rights” of the _____ [name of Indian Tribe] means (i) Tribal proprietary property and ownership rights in land, water bodies and natural resources; (ii) Tribal rights of sovereignty, self-government or self-determination recognized by federal law or policy, Tribal law, or international law; (iii) Tribal regulatory laws and policies concerning environmental protection, land or water use, protecting the health, well-being or safety of Tribal citizens, and the rights of Tribal citizens; (iv) protection of Tribal graves and burial grounds, the disposition of human remains; (v) traditional Tribal

religious beliefs and practices, including worship at traditional Tribal holy places; (vi) traditional subsistence practices, including treaty protected hunting, fishing and gathering in Indigenous Habitat or usual and accustomed hunting, fishing and gathering places; (vii) reserved Tribal water rights or other reserved rights; and (viii) Tribal rights to clean water and air and sound land use necessary to protect the health, safety and welfare of Tribal citizens and their traditional relationships to the natural world.

(d) “Cultural or Historic Properties” means any place associated with the history, places of worship, cultural practices or spiritual beliefs of the _____ [name of Indian Tribe] which are rooted in the _____’s [name of Indian Tribe] history and are important in maintaining the cultural identity and the religious or cultural integrity of the _____ [name of Indian Tribe].

(e) “Declaration” means the United Nations Declaration on the Rights of Indigenous Peoples, approved by the UN General Assembly in 2006 and endorsed by the United States in 2010.

(f) “Government-to-Government Consultation” means the process established by this Act, under which the _____ [name of Indian Tribe], acting by and through its _____ [government of the Indian Tribe], will engage with outside entities in meaningful communication, engagement and good faith negotiations. The consultation process applies to proposals made by outside entities that may affect core legal rights or vital Tribal interests of the _____ [name of Indian Tribe] in land, water and territories. The process will be followed to: (i) protect said rights and interests through meaningful consultation; (ii) ensure that consulting parties seek to achieve the free, prior and informed consent of the _____ [name of Indian Tribe] to their proposals; and (iii) when and if such consent is granted by the Tribal government in the manner prescribed by this Act, said consent shall be documented by a Consent Agreement reached through good faith negotiations; and (iv) promote Tribal engagement with outside entities in ways that engender mutual trust, respect, and shared responsibility.

(g) “Federal agency” means any agency, department, independent agency, government corporation, or other agency in the executive branch of the Federal Government.

(h) “Free” in the context of government-to-government consultation means voluntarily and in the absence of coercion, outside pressure, intimidation, or manipulation.

(i) “FPIC process” means a robust and meaningful consent process done in conjunction with government-to-government consultation that incorporates the constituent elements of the free, prior and informed consent provisions of Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples, as those provisions are interpreted by UN guidance found in the work of UN experts, reports and studies, in a process that features:

- (i) information sharing and dialogue among the consulting parties to reach a common understanding of pertinent issues;
- (ii) good faith efforts that seek to achieve the free, prior and informed consent of the Tribal government, whether that consent is characterized as consensus or a mutually agreed outcome; and
- (iii) if that consent is granted pursuant to a legitimate Tribal government decision making process, the terms and conditions of that consent is documented by a written Consent Agreement between the consulting parties reached through good faith negotiations.

In short, FPIC principles and processes do not prescribe a specific outcome. Rather, they establish a framework for a normative process that features a robust process of meaningful consultation that seeks to achieve Tribal consent, coupled with an outcome memorialized by a written Consent Agreement reached through good faith negotiations.

(j) “Informed” in the context of government-to-government consultation covered by this Act means sharing, reviewing and analyzing relevant information reflecting all facts, views and positions in a timely manner. The information sharing process includes input by traditional elders, spiritual leaders, traditional subsistence practitioners and traditional Indigenous Knowledge holders, with adequate time and resources to find and consider all pertinent, impartial and balanced information.

(k) “Indigenous Habitat” means a functioning, healthy and productive ecosystem comprised of the traditional lands, waters and natural resources (including animals, plants and fish) in ancestral homelands currently owned or traditionally occupied and used by Tribal members and ancestors to carry on their subsistence, culture and traditional ways of life.

(l) “Indigenous Knowledge” means the body of Tribal observations, oral and written knowledge, innovations, practices and beliefs developed and handed down by the ancestors of the _____ [name of Indian Tribe] through their interaction and experience with the environment in their homelands over a great extended period of time, which can be or is applied to phenomena across biological, physical, social, cultural and spiritual systems of the _____ [name of Indian Tribe] and based in ethical foundations grounded in the social, spiritual and natural systems that teach humans how they should comport themselves with the natural world and all life in it. This body of knowledge is a Tribal legacy deemed important by federal land, water and resource managers for the management and environmental protection of federal public lands, waters and natural resources.

(m) “Outside entities” means federal, state, local, and other Tribal governments, together with their agencies and political subdivisions, and private sector extraction industry companies or corporations that are engaged in natural resource extraction, development,

exploration, exploitation, storage or transportation activities on land, water or territories covered by this Act.

(n) “Prior” means a consultation or consent process that takes place before a decision is made by outside entities that allows: (i) sufficient lead time for the information gathering, sharing, and evaluation to take place according to the decision-making processes of the _____ [name of Indian Tribe]; (ii) meaningful discussions between authorized representative(s) and decision maker(s) of the _____ [name of Indian Tribe] and the consulting party; and (iii) for the consultation processes prescribed in by this Act.

(o) “Proposed action” or “proposal” means an outside entity’s proposed project, action, policy or decision concerning land, water or territories that may impact core legal rights or vital interests, welfare, safety or security of the _____ [name of Indian Tribe] or its citizens.

(p) “Proportionality Principle” is a model endorsed by UN guidance to determine the appropriate level of efforts to obtain Tribal consent needed to satisfy FPIC requirements. UN guidance adopts the principle for use in the FPIC process and except where provided otherwise that principle is incorporated into this Act. To the extent it is compatible with UN guidance, the Department of Interior’s consensus-based approach for Tribal consultation on federal policies with Tribal implications in 512 DM 4-5 (Nov. 30, 2022) employs a similar approach. The proportionality principle requires increased efforts by outside entities for obtaining Tribal consent depending on the degree of impact by proposals on affected Tribes, such as: (i) the degree and severity a proposal’s impacts on Tribal rights and interests; and (ii) whether the affected land, water and territories are existing Tribal property located within Tribal jurisdiction, other property located within Tribal jurisdiction, or former Tribal land, water and territory in traditional Tribal homelands that are now federal public land and water managed by federal agencies. Under UN guidance, FPIC consent is normally required when severe impacts on crucial Tribal rights and interests are concerned, as is the case for large-scale natural resource extractive industry proposals that affect important Tribal rights and interests in Tribally owned land, water and resources within Tribal jurisdiction, as well as other property within Tribal jurisdiction. Moreover, efforts to obtain Tribal consent are at or near the top of the scale when Tribal rights and interests in former Tribal lands, water and territories are concerned.

(q) “Land, water and territories” means: (i) existing Tribal land, habitat, water and natural resources that are owned by the _____ [name of Indian Tribe] or other land, habitat, water body and natural resources located within its lawful jurisdiction and legally subject to Tribal regulation; or (ii) former Tribal land, water bodies, habitat, natural resources or territory located in traditional Tribal homelands located outside Tribal jurisdiction and managed by federal or state agencies as public lands and waters.

(r) “Vital Tribal interest” means important cultural, historical, religious, legal, economic, or subsistence ties, uses and interests in existing or former Tribal land, water, habitat, natural resources or ancestral territory in traditional Tribal homelands, whether located

within Tribal jurisdiction or on state or federal public land, water, habitat, natural resources or territory.

4. Findings, Background, and Intent.

(a) The best interests of the _____ [name of Indian Tribe] are served by instituting uniform government-to-government consultation procedures, protocols and standards in important matters that will strengthen the relationships between the _____ [name of Indian Tribe], other sovereigns and outside entities.

(b) Federal agencies, state agencies, and natural resource extraction industry companies have diverse consultation policies, protocols and standards. To avoid confusion, it is the intent of this Act to institute uniform, consistent and specific processes, procedures, protocols and standards for meaningful consultation, collaboration, and effective mutual decision-making in robust and meaningful consultation with the _____ [name of Indian Tribe]. It is in the public interest to put consulting parties and outside entities on notice of the process and protocols which must be followed under Tribal law to have meaningful government-to-government consultations with the _____ [name of Indian Tribe] on issues and interests covered by this Act.

(c) The consultation and consent processes, protocols and standards established by this Act incorporate, and are guided by, the FPIC process established by Articles 19 and 32 of the Declaration, as interpreted by UN guidance.

(d) Article 19 of the Declaration states: “States shall 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 affect them”

(e) Article 32 of the Declaration states: “1. Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their representative institutions in order to obtain their free, prior 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.”

(f) The consultation framework established by the Declaration is referenced in federal Tribal consultation policy documents as a framework that federal agencies can consult when developing best practices for Tribal consultation. Likewise, Indian Tribes are free to consult that same source when developing Tribal consultation laws, policies and protocols. The FPIC process of the Declaration has similar consultation goals as those sought by the federal government’s Best Practices Guide (2022), the Presidential Memorandum on Uniform Standards for Tribal Consultation (2021), and the Department of Interior’s Departmental Manual (512 DM 4-5)-in that those policy directives seek

meaningful consultation aimed at achieving consensus or a mutually desired outcome wherever possible, and that goal is compatible with FPIC process goals.

(g) This is a limited purpose statute. It only covers, and is triggered by, Tribal government consultation with outside entities that involve proposals on land, water and territories which may affect core Tribal legal rights or vital Tribal interests of the _____ (name of Indian Tribe). This statute is not intended to supersede non-covered and ordinary Tribal licensing or permitting laws or routine consultation on non-covered matters conducted by Tribal staff as part of their duties; provided however, said staff involved in such non-covered consultation, licensing or permitting activity may invoke the provisions of this Act, after consultation with their supervisors and _____ (chairman or president of the governing body), whenever it appears that non-covered consultations, licensing or permitting activity raise core legal rights or vital Tribal interests in lands, waters or territories covered by this Act. Otherwise, this Act shall be interpreted to supplement non-covered consultations or related licensing or permitting activities and supersede them only when triggered by the presence of covered rights and interests in land, water or territory.

5. Guiding Principles.

(a) Consultation under this Act operates at the policy, legal and technical levels, through which consulting parties can develop a common understanding of pertinent issues, obtain and analyze sufficient information to formulate an informed decision or mutually agreed outcome and ensure that those outcomes are based on meaningful consultation. When complex matters involving core legal rights and vital Tribal interests are concerned, a robust process is fully warranted for meaningful consultation with the goal of achieving consent or a mutually desired outcome.

(b) The goal of consultation is to obtain Tribal consent whenever possible. If Tribal consent is granted following consultation, it must be granted in accordance with Tribal law, custom, and processes and such consent must be documented by a written Consent Agreement reached by the consulting parties through good faith negotiations that sets forth the terms and conditions of that consent, details any agreements made by the consulting parties and is signed by legitimate authorized representatives.

(c) The FPIC process and principles, as interpreted by UN guidance, are incorporated into government-to-government consultation covered by this Act to drive the consent seeking process, and that includes all ingredients for a successful FPIC process, as well as the constituent elements of free, prior and informed consent.

(d) FPIC consent of the _____ [name of Indian Tribe] must be obtained when proposals made by outside entities adversely affect its core legal rights or vital Tribal interests in land, water and territories that are Tribally owned and located within its jurisdiction, as well as for other land or water bodies in the jurisdiction that are subject to Tribal regulatory authority. No proportionality principle applies in these instances; and if the Tribal government does not grant Tribal FPIC consent to the proposal following government-to-government consultation, the matter is settled and comes to an end.

(e) When proposals of outside entities affect core legal rights or vital Tribal interests in former land, water and territories of the _____ [name of Indian Tribe] that are now managed by federal and state agencies or other Tribes, the level of effort to achieve Tribal consent that is necessary to satisfy FPIC principles is determined by the “proportionality principle” defined by UN guidance and, to the extent that it is compatible, the Department of the Interior’s Consensus Seeking Model. In most instances, such Tribal rights and interests in former lands, waters and territories are situated at or near the top of the scale, which means that Tribal consent must be obtained or that the highest level of effort to achieve Tribal consent is required.

6. *Objectives of Consultation.* The objectives of consultation under this Act are to:

(a) Ensure that the _____ [governing body of the Indian Tribe] understands the technical, legal and policy issues necessary to make informed decisions when core Tribal legal rights and vital Tribal interests in land, water and territories are concerned.

(b) Ensure federal compliance with trust and treaty obligations and federal laws and policies affecting Tribal rights, resources, culture, religion and subsistence in land, water and territories of the _____ [name of Indian Tribe] as defined in this Act.

(c) Improve policy level decision-making of the _____ [governing body of the Indian Tribe] and federal agency decisions with implications affecting the _____ [name of Indian Tribe].

(d) Achieve bilateral decision-making, collaboration and partnership among sovereigns and private companies in the context of conservation, management, use and development of land, water and territories.

(e) Ensure protection for (i) Tribal natural resources, including Indigenous Habitat; (ii) cultural, historic and religious places; (iii) Tribal religious freedom; (iv) Tribal health, public safety, welfare and the economy; and (v) core legal rights and vital Tribal interests whenever land, water and territories are concerned.

(f) Ensure compliance with Tribal laws and policies by outside entities.

(g) Ensure that the free, prior, and informed consent of the _____ [name of Indian Tribe] is sought and, wherever possible, obtained before any proposal that affects important Tribal rights or interests covered by this Act is approved.

(h) Improve the integrity and reliability of federal-Tribal decisions and strengthen the government-to-government and nation-to-nation relationships between the United States and the _____ [name of Indian Tribe].

(i) Provide a uniform pathway, clear guidance and a meaningful opportunity for private companies to engage and consult with the _____ [name of Indian Tribe] to seek mutually desired outcomes for their proposed natural resource activities on lands, waters and territories that may affect core legal rights or vital Tribal interests of the _____ [name of Indian Tribe].

7. Establishment of Point-of-Contact.

(a) The _____ [designated Tribal government official] shall be the official Point-of- Contact for government-to-government consultation. The contact information for the Point-of- Contact is: _____ [phone, email, address] The _____ [designated Tribal government official] may delegate consultation duties to an alternate designated point-of-contact, department of the Tribal government, or to the leader of any Tribal consultation team that may be assembled and appointed by the Point-of-Contact.

(b) The Point-of-Contact is responsible for communicating with outside entities on consultation matters, coordinating the establishment and internal affairs of an appropriate Tribal consultation team, and ensuring that consultations are conducted in a smooth, efficient and timely manner. The Point-of-Contact may designate an alternate point-of-contact for various consultations and delegate those duties to that designee.

8. Consultation Process. [Note to Tribal lawmakers and policymakers:

The consultation process should be tailored to meet the unique needs of the Tribal government, ensure that the consultation process and all timelines are workable for the Tribe and that the process establishes an effective way to make important decisions and protect important Tribal rights and interests.]

The _____ [governing body of the Indian Tribe] hereby establishes the following process for government-to-government consultations covered by this Act:

(a) *Posting Requirement:* This Act shall be posted and maintained on the official Tribal government website in an appropriate public place so that it is readily accessible for all outside entities wishing to consult with the Tribe on covered issues to inform them about the prescribed Tribal consultation process and requirements.

(b) *Standing to Consult:* The _____ [name of Indian Tribe] shall only enter formal government-to-government consultation on covered rights and interests with (i) duly authorized governmental representatives and officials authorized to make decisions on the subject matter of the consultation, and (ii) in the case of private companies, with their legally authorized representatives and decision-makers.

(c) *Notice Requesting Consultation:* Before formally initiating consultation or scheduling any consultation meeting, the consulting party shall provide the Point-of-Contact a written thirty (30) days' Notice Requesting Consultation (to be calculated 30 days after receipt of

the notice by the Point-of-Contact). Upon receipt of the Notice Requesting Consultation, the Point-of-Contact will send the requesting party a copy of this Act to inform the party about the Tribe's requirements for covered consultation.

(d) *Required Content of the Notice Requesting Consultation:* The consulting party's Notice Requesting Consultation shall provide the Point-of-Contact the following information: (1) the name of party's point-of-contact, title, address, email address and phone number; (2) the scope and purposes of the consultation, including the proposed action and reasons for it; (3) the names and contact information of any other reasonably foreseeable interested parties, stakeholders or possible consulting parties in the requested consultation; (4) any anticipated decision or proposed action; and (5) identifying all issues that may impact the _____ [name of Indian Tribe].

(e) *Briefing Paper with supplemental information and background:* Within _____ days of the Notice Requesting Consultation, the consulting party shall submit to the Point-of-Contact a briefing paper that discusses: (i) the proposed action and the reasons for it; (ii) any proposed agreement; and (iii) background information such as any written statements, documents, maps, feasibility studies, the legal basis for the proposed decision or action, and the specific location, legal description and coordinates regarding the project.

(f) *Submission of Tribal information to the consulting party:* The Point-of-Contact shall have _____ days after receipt of the consulting party's briefing paper and documents to submit to the consulting party any initial Tribal information that the _____ [name of Indian Tribe] requests the party to consider.

(g) *Identifying and confirming consultation procedures to be followed and scheduling the initial formal consultation meeting:* Before scheduling a consultation meeting that addresses substantive issues, the consulting party shall send the Point-of-Contact a written communication acknowledging the requirements of this Act and its agreement to follow them. Otherwise, if said agreement is not forthcoming by the consulting party, the parties may meet to discuss and negotiate a mutually acceptable modified or alternative consultation framework, so long as it adheres to the minimum requirements and standards prescribed by this Act. Once the governing consultation procedures are identified and confirmed in accordance with this section, the parties can set a mutually agreed upon meeting date, time and place for an initial consultation meeting to begin discussing the substantive aspects of the consultation, to develop a common understanding of the issues, and to stride toward achieving the FPIC of the _____ [name of Indian Tribe], as set forth in this section.

(h) *Discussions:* At the election of the _____ [designated Tribal official], the consulting party and the _____ [name of Indian Tribe] shall have direct one-on-one meetings including face-to-face, telephone, and internet meetings with the duly authorized governmental representatives and officials authorized to make decisions to ensure both parties have an informed mutual understanding of the issues, proposed actions and their consequences. Additional consultation meetings may be set based upon mutual agreement of the consulting parties to seek to achieve consensus or a mutually desired outcome based on the free, prior and informed consent of the _____ [name

of Indian Tribe] and if that consent is achieved, to document it by a written Consent Agreement reached through good faith negotiations.

(i) *Tribal decision-making process and required written Consent Agreement to document the FPIC of the* [name of Indian Tribe]: Within ____ days after discussion is concluded, as determined by the _____ [designated Tribal official], the _____ [name of Indian Tribe] shall provide its decision and recommendations on the proposed project or action by and through its Tribal government. In the event that the Tribal government decides to grant the free, prior and informed consent of the _____ [name of Indian Tribe] to the proposed project or action following the consultation discussion, that Tribal consent must be (i) reached by the Tribal government in accordance with its constitution, laws, and standard protocols for making government decisions affecting core legal rights or vital Tribal interests of the _____ [name of Indian Tribe]; and (ii) documented by a written agreement reached by the consulting parties through good faith negotiations that spell out the terms and conditions of the Tribal consent, with specified contents of the agreement set forth in Section 10.

(j) *Scope and Application of these consultation and FPIC procedures*: The consultation procedures and consent processes prescribed in this section, including those for obtaining the FPIC of the _____ (name of Indian Tribe), shall apply to all outside entities, including private companies or corporations in the natural resource industry who may be stakeholders, interested parties or consulting parties. Such companies must also adhere to special procedures and measures prescribed in Section 9 when seeking meaningful consultation and/or the FPIC of the _____ [name of Indian Tribe] for their proposed project.

9. Additional requirements for Companies to consult and seek FPIC for proposed projects.

Companies that engage in consultation with the _____ [name of Indian Tribe] and seek to obtain the Tribe's free, prior and informed consent for their proposed projects, as stakeholders, interested parties or consulting parties, are subject to the same consultation processes, standards and other requirements of this Act as other outside entities. In addition, those companies are subject to the following special measures:

(a) The Tribal FPIC consent process must start early in the project conception and planning stages to involve Tribal participation as early as possible. That process must be carried out well in advance of any project, bearing in mind that Tribal consent is generally required for extractive projects within Tribal territories.

(b) Information sharing by the company requires full disclosure of project information in all stages of its development, including: (i) a thorough description of the project; (ii) accurate project location; (iii) project operations, including measures to ensure all aspects of operation are respectful of Tribal rights and interests; (iv) feasibility studies; (v) how the proposed project will be financed and by whom; (vi) project cost and profit estimates; (vii) proposed alternatives; (viii) potential risks and impacts; (ix) mitigation measures; and (x) project benefits.

(c) If the _____ [name of Indian Tribe] is open and willing to engage in FPIC discussions, the company may engage in good faith negotiations directly with the Tribe to obtain its FPIC, either as a component of the consultation or separately, and with or without government involvement, and seek to obtain the Tribe's FPIC agreement to the project documented by a binding written Consent Agreement reached by good faith negotiations. Tribal consent to the proposed project must be given and documented as prescribed in Section 10.

(d) Prior to consulting with the _____ [name of Indian Tribe] and seeking to obtain its FPIC for their proposed projects, companies must certify in writing that they acknowledge and will follow the requirements in Sections 8, 9 and 10 of this Act. If a company does not agree to comply with said requirements, it may suggest alternative approaches or procedures tailored to meeting those requirements and request a meeting to negotiate mutually acceptable alternatives.

10. Tribal Consent; Decision Making Process; and Documentation of Consent in Agreements.

(a) Seeking Tribal FPIC consent, consensus or a mutually desired outcome is the goal of government-to-government consultation under this Act. Tribal consent includes the power to grant or withhold agreement or to condition approval based on modifications of the proposal to protect Tribal rights and interests.

(b) Following consultation and its review of pertinent information, if the Tribal government determines that the granting of Tribal consent is in the best interests of the Tribe and elects to grant its free, prior and informed consent, that consent shall be given in accordance with the constitution, laws, best practices and established procedures for making decisions involving vital Tribal interests and core legal rights in land, water and territories.

(c) The Tribal decision-making procedures are as follows: _____
[specify how such decisions will be made and giving an adequate timeline].

(d) If the Tribal government elects to grant the FPIC of the _____ [name of Indian Tribe], that decision shall be documented by a binding written Consent Agreement reached by the consulting parties through good faith negotiations, signed by their authorized representatives, and approved by a resolution of the _____
[name of the Tribal council or other supreme governing body].

(e) The required contents of the Consent Agreement shall include: (i) a summary of the process followed by the parties for achieving consent; (ii) a detailed description of the project, including any mutually agreed modifications or alternatives to the project as originally proposed, including measures to protect important Tribal rights and interests; (iii) the terms and conditions for granting the Tribe's FPIC to the proposed project; (iv) documentation of any agreed Tribal participation in the project, including partnership agreements; (v) details as to how harm and risk will be mitigated, monitored or

compensated; (vi) a setting forth of any equitable benefit-sharing arrangements; (vii) an adequate mutually-agreed dispute resolution mechanism must be included; and (viii) any other pertinent matter.

11. Opt-in and Opt-out provision for non-covered interests and issues.

(a) This Act recognizes that duly authorized _____ [name of Indian Tribe] officials often receive numerous consultation requests on non-covered matters in the normal course of their work which can be routinely addressed by Tribal staff without invoking the process and protocols prescribed by this statute. In such instances, the _____ [designated Tribal official] may waive, in part or in whole, the processes and protocols required by this Act if done in writing.

(b) After consulting with their supervisors and the _____ [Point-of-Contact or other designated Tribal official], Tribal staff involved in non-covered consultation, licensing or permitting activity may invoke the consultation requirements prescribed by this Act whenever it appears that the non-covered matter may require this Act's statutory process to protect core issues and vital interest of the Tribe.

12. Authority to enter Co-stewardship, Co-management and Indigenous Knowledge agreements with federal agencies.

This Act authorizes the Tribal government, in its discretion, to enter into co-stewardship and co-management agreements with federal agencies for former Tribal land, water, habitat, natural resources and territories, as well as agreements that require those agencies to incorporate and use the Indigenous Knowledge of the _____ [name of Indian Tribe] into their planning and management decisions. The goals of said agreements are to increase Tribal participation in the management, planning and decision-making processes for those properties, and to enhance government-to-government consultation, participation and engagement of the _____ [name of Indian Tribe] in the management of former Tribal lands, waters and territories managed by federal agencies to protect Tribal rights and interests in land, water and territories.

13. Failure to Comply with this Act.

(a) All purported consultations done in violation of this Act are invalid, void ab initio, and a nullity.

(b) Any outside entity violating this Act is prohibited from (1) relying upon invalid consultation attempts for any purpose, and (2) asserting or representing to any person, entity, or court that it conducted a meaningful government-to-government consultation with the _____ [name of Indian Tribe] or asserting that it obtained the _____'s [name of Indian Tribe] free, prior and informed consent for any purpose.

(c) The _____ [name of Indian Tribe] reserves its right to pursue redress, including declaratory and injunctive relief, compensatory damages, attorney fees and

costs, against outside entities who violate this Act in available courts, including Tribal courts, or other avenues for harm caused by the violator’s failure to comply with this Act and to protect Tribal rights and interests in land, water and territory.

Appendix 2. FEDERAL CONSULTATION POLICIES & GUIDANCE (selected samples)

Executive Order 13175 (2000). <https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-Tribal-governments>

Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (2021). <https://www.federalregister.gov/documents/2021/01/29/2021-02075/tribal-consultation-and-strengthening-nation-to--nation-relationships>

Presidential Memorandum on Uniform Standards for Tribal Consultation (2022). <https://www.federalregister.gov/documents/2022/12/05/2022-26555/uniform-standards-for-tribal-consultation>

Interdepartmental Working Group, “Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making” (2022). https://www.bia.gov/sites/default/files/dup/inline-files/best_practices_guide.pdf

Secretary of Interior, “Detailed Plan for Improving Interior’s Implementation of E.O. 13175 (2021). <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf>

Secretary of the Interior, Departmental Manual (512 DM 4) (2022). https://www.bia.gov/sites/default/files/dup/tcinfo/512-dm-4-final_508.pdf

Secretary of the Interior, Departmental Manual (512 DM 5) (2022). <https://www.doi.gov/document-library/departamental-manual/512-dm-5-procedures-consultation-indian-tribes>

U.S. Agency for International Development, Guidance on Monitoring Free, Prior and Informed Consent (FPIC) (2021). https://web.archive.org/web/20250202100932if_/https://www.nps.gov/subjects/policy/upload/PM_22-03.pdf

MOU on Interagency Coordination for Protecting Sacred Sites (2021). <https://www.doi.gov/sites/doi.gov/files/mou-interagency-coordination-and-collaboration-for-the-protection-of-indigenous-sacred-sites-11-16-2021.pdf>

NOAA, “Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes” (2023). <https://www.doi.gov/sites/doi.gov/files/mou-interagency-coordination-and-collaboration-for-the-protection-of-indigenous-sacred-sites-11-16-2021.pdf>

Advisory Council on Historic Preservation, endorsement of the UN Declaration on the Rights of Indigenous Peoples (2013). <https://www.achp.gov/news/achp-endorses-united-nations-declaration-rights-indigenous-peoples>

Appendix 3. UNITED NATIONS GUIDANCE (selected samples)

UN Declaration on the Rights of Indigenous Peoples (2007). <https://un-declaration.narf.org/wp-content/uploads/tip-un-declaration-booklet.pdf> Human Rights Council, study of the Expert Mechanism on the Rights of Indigenous Peoples, “Free, prior and informed consent: a human rights-based approach,” (2018). (“EMRIP Study”) <https://un-declaration.narf.org/wp-content/uploads/Free-prior-and-informed-consent-a-human-rights-based-approach-1.pdf>

Permanent Forum on Indigenous Issues, “Implementing free, prior and informed consent in the context of Indigenous Peoples (2023) (“PFII Study”). <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0159/8797c5ec.dir/E.C19.2023.6-EN.pdf>

James Anaya, “Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, Including the Right to Development” (2009). Available at: <https://docs.un.org/en/A/HRC/12/34>

James Anaya, “Report of the Special Rapporteur on the Rights of Indigenous Peoples on Extractive Industries and Indigenous Peoples” (2015). <https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1033&context=faculty-articles>

Guiding Principles on Business and Human Rights” (endorsed by UN Human Rights Council, 2011). https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

UN et al., Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians” (2014). <https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf>

UN Food and Agriculture Organization, “Free, Prior and Informed Consent: An Indigenous Peoples’ right and a good practice for Local Communities” (2016) (a manual for project practitioners). <https://www.fao.org/3/i6190e/i6190e.pdf>

Appendix 4. CO-MANAGEMENT/CO-STEWARDSHIP/INDIGENOUS KNOWLEDGE POLICIES & GUIDANCE (selected samples)

Joint Secretarial Order No. 4303 (2021). <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf>

White House Office of Science and Technical Policy/Council on Environmental Policy, “Guidance for Federal Departments and Agencies on Indigenous Knowledge” (2022).

https://www.bia.gov/sites/default/files/dup/inline-files/ik_guidance_implementation_memo.pdf

Department of the Interior, “First Annual Report on Tribal Co-Stewardship” (2022).

https://www.bia.gov/sites/default/files/dup/inline-files/doi_annual_report_on_co-stewardship.pdf

Department of Agriculture, “First Annual Report on Tribal Co-Stewardship” (2022).

<https://www.usda.gov/sites/default/files/documents/usda-jso-annual-report-11.29.2022-doi-signed.pdf>

National Park Service, Policy Memorandum 22-03 (2022).

https://web.archive.org/web/20250202100932if_/https://www.nps.gov/subjects/policy/upload/PM_22-03.pdf

National Oceanic and Atmospheric Administration (NOAA), Guidance and Best Practices for Engaging and Incorporating Indigenous Knowledge in Decision-Making (2023).

https://www.noaa.gov/sites/default/files/2023-07/NOAA_IK_Guidance_FINAL_2023_1.pdf

Fish and Wildlife Service, Order No. 227 (2022).

<https://www.fws.gov/sites/default/files/documents/076566-USFWS-DO.pdf>

Bureau of Land Management, Permanent Instruction Memorandum No. 2022-011 (2022).

<https://www.blm.gov/sites/default/files/docs/2022-09/PIM2022-011%20+%20attachment.pdf>

Co-Stewardship Agreement for Reintroduction of Anadromous Salmonids in the Tribal Cultural Landscape of the Winnemem Wintu Tribe along the McCloud River (2023).

<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=212746&inline>

Inter-Governmental Cooperative Agreement among BLM and several Indian Tribes for the Cooperative Management of Federal Lands and Resources of the Bears Ears National Monument (2022). <https://www.blm.gov/sites/default/files/docs/2022-06/BearsEarsNationalMonumentInter-GovernmentalAgreement2022.pdf>

MOU Between US Forest Service and Leech Lake Band of Ojibwe of the Minnesota Chippewa Tribe for the management of Forest Service lands (2019).

https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd672397.pdf

MOU Between Dept. of Commerce’s National Oceanic and Atmospheric Administration (NOAA), four Indian tribes and the State of Washington for the management of the Olympic Coast National Marine Sanctuaries, a pristine marine ecosystem (2018).

<https://nmsolympiccoast.blob.core.windows.net/olympiccoast-prod/media/docs/moa-2017-136-11519.pdf>

Appendix 5. TRIBAL CONSULTATION LAWS & POLICIES (selected samples)

1. **Pawnee Nation’s Government-to-Government Consultation Statute (2021).**⁵⁷ This law is summarized in Section IV, C. Its purpose is “to ensure that meaningful Government-to-Government consultation is made with free, prior, and informed consent of the Pawnee Nation through its appropriate officials.” An objective of consultation is to “ensure free, prior, and informed consent before any Tribal interests covered by this statute are affected or the integrity of the Pawnee Nation’s water, land or resources are threatened.”

2. **The Ponca Tribe of Nebraska’s Consultation Policy (2020).**⁵⁸ This is a Tribal policy for engaging with outside entities, including federal and state agencies and private parties, who consult with the Ponca government. It ensures that consultations are “meaningful” and “seek the free, prior, and informed agreement or consent of the Tribe to any measure, decision or action.” It prescribes principles and protocols for consultations with the Tribe. FPIC principles are incorporated as guiding principles:

“The United Nations Declaration on the Rights of Indigenous Peoples also mandates that the federal government consult and cooperate in good faith with the Tribe through the Tribe’s own representative institutions in order to obtain the Tribe’s free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect it. It also mandates that the federal government must consult and cooperate in good faith with the Tribe through the Tribe’s own representative institutions in order to obtain the Tribe’s free and informed consent prior to the approval of any project affecting its land or territory and other resources. The principles of consultation, cooperation, good faith, and free, prior, and informed consent of the Tribe apply to all consultations with the Tribe regardless of the requirements of consultation and even when consultation is considered voluntary.”

3. **Government-to-Government Consultation Policy of the Colorado River Indian Tribes.**⁵⁹ Citing Articles 19 and 32 of the Declaration, this policy proclaims that a purpose of government-to-government consultation is to obtain the Tribes’ “free, prior, and informed consent.” The policy guides consultation with federal agencies and spells out the characteristics and key requirements for adequate consultation. Agencies must acknowledge the policy prior to scheduling a government-to-government meeting. If an agency fails to follow the prescribed process, the Tribes will not consider its communications to meet Tribal and federal law requirements and will seek recourse through legal, political and media channels.

⁵⁷ <https://pawneenation.org/wp-content/uploads/2021/08/Pawnee-Nation-Government-to-Government-Consultation-Statute.pdf>

⁵⁸ <https://poncatribene.gov/wp-content/uploads/2020/09/PTNConsultationPoliciesandProcedures2020.pdf>

⁵⁹ [https://www.crit-nsn.gov/crit_contents/ordinances/Government%20to%20Government%20Consultation%20Policy%20\(1\).pdf](https://www.crit-nsn.gov/crit_contents/ordinances/Government%20to%20Government%20Consultation%20Policy%20(1).pdf)

4. **Delaware Tribe’s Tribal Consultation Policy (2019).**⁶⁰ In enacting this policy, the Tribal Council states: (1) the “federal Indian trust doctrine and United Nations doctrine of Free Prior Informed Consent (FPIC) support the establishment of strong, consistent, and uniform Tribal consultation policies;” (2) establishment of this policy “is a legitimate exercise of its inherent cultural and political sovereignty; “and (3) the policy has “the full force and effect of Tribal law and shall inform and guide the Tribe’s government-to-government relationship with all state and federal agencies.”

5. **Hoopa Valley Tribal Consultation Policy for Use by Federal, State and Local Agencies (2022).**⁶¹ This policy creates expectations for government-to-government consultation with the Tribe for “‘meaningful consultation’ in a ‘free, informed, and prior consent forum’ while ensuring effective and efficient communication with the Tribal Council.” It seeks to reduce confusion and conflict by providing definitions, guiding principles, procedures, best practices, and objectives of consultation.

6. **Karuk Tribe Consultation Policy (2015).**⁶² Faced with a confusing consultation landscape of diverse state and federal policies, the Karuk policy clarifies how uniform consultation will be done. It defines “meaningful consultation” and prescribes processes for agencies to follow when consulting with the Tribe.

7. **Confederated Tribes of the Umatilla Indian Reservation Consultation: Government to Government (or otherwise).**⁶³ This policy defines consultation from the standpoint of the Tribal government.

8. **Osage Nation Historic Preservation Office: Telecommunication Consultation Procedure (2023).**⁶⁴ This limited scope policy prescribes consultation requirements for §106, NHPA telecommunication undertakings by the FCC. Other examples of limited scope Tribal consultation policies are Pueblo of San Ildefonso, Tribal Historic Preservation Office Government-to-Government Consultation Policy (2022);⁶⁵ United Auburn Indian Community, “Tribal Goals for AB52 Consultation” (2023).⁶⁶

9. **Rincon Band of Luiseno Mission Indians’ Tribal Consultation Ordinance (2020).**⁶⁷ To avoid confusion among multiple entities that seek consultation, the Ordinance provides guidance for outside agencies and corporations. All must adhere to consultation procedures

⁶⁰ <https://delawaretribe.org/wp-content/uploads/Res-2019-24.pdf>

⁶¹ <https://www.hoopa-nsn.gov/wp-content/uploads/2022/11/policy-consultation.pdf>

⁶² https://www.karuk.us/images/docs/hr-files/18-04-05_consultation_policy_FINAL_clean.pdf

⁶³ <https://dahp.wa.gov/sites/default/files/Confederated%20Tribes%20of%20the%20Umatilla%20Indian%20Reservation.pdf>

⁶⁴ <https://s3.amazonaws.com/osagenation-nsn.gov/files/departments/Historic-Preservation/2023-0308-Osage%20Nation%20FCC%20Procedures%20%283%29.pdf>

⁶⁵ <https://law.sanipueblo.org/us/nsn/san-ildefonso/council/resolutions/2022/007>

⁶⁶ <https://auburnrancheria.com/wp-content/uploads/2023/04/UAIC-AB52.pdf>

⁶⁷ <https://rincon-nsn.gov/wp-content/uploads/2020/11/2020.11.05-Tribal-Consultation-Ordinance-RTC-2.800-Final6241.pdf>

prescribed by the Ordinance within a workable Tribal government framework for what the Band considers to be adequate consultation.

10. Tribal Code of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians on Government-to-Government Consultation.⁶⁸ This act gives guidance for outside agencies that seek meaningful government-to-government consultation, including the legal framework, guiding principles, objectives, and procedures.

11. Tolowa Dee-ni' Nation Consultation Policy (2015).⁶⁹ This policy defines Tribal standards for meaningful consultation and prescribes protocols to be followed by federal, state, and local agencies when consulting with the Tribal government.

12. Protocols for Consultation with the Yankton Sioux Tribe (2017).⁷⁰ This policy prescribes protocols for agencies to follow to ensure meaningful government-to-government consultation with the Tribal government, including cultural, behavioral and procedural protocols.

Appendix 6. SELECTED LAW REVIEW ARTICLES/WEBSITES/OTHER MATERIAL

Akilah Jenga Kinnison, “Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the UN Declaration on the Rights of Indigenous Peoples,” 53 Ariz. L. Rev. 1301 (2011). <https://arizonalawreview.org/pdf/53-4/53arizlrev1301.pdf>

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