

Standing Rock, Tribal Trust Compliance, and Federal Infrastructure Permitting October 20, 2016

The unprecedented showing of support for Standing Rock by all of Indian Country is because of the long history of federally approved development affecting tribal lands, waters, and sacred places. Every single Indian Nation has a story of federally approved destruction.

Because of this movement and these efforts, Indian Country has an important opportunity to address the nation-to-nation relationship. For any project affecting tribal lands, waters, or sacred places, at the outset the United States must consider its trust responsibility, treaty rights, all statutory duties, consultation, and tribal consent. Tribal sovereignty must be acknowledged, communication must be improved, and tribes must have the same opportunities as state and local governments to participate at the early planning stages.

The consultations hosted by Department of the Interior, Department of Justice, and the Department of the Army are an opportunity for Indian Country to move the nation-to-nation relationship further toward a true partnership, and ensure that tribal concerns are addressed in federal permitting and approval processes.

Tribal Inclusion in Federal Fast-Tracking of Infrastructure Permits

Since 2009, as part of the efforts to strengthen the economy and create new jobs, the Obama Administration has taken actions to expedite federal review of infrastructure projects, including:

- Development of the Federal Infrastructure Projects Permitting Dashboard
- Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects
- Establishment of a Steering Committee chaired by the Office of Management and Budget to set rapid and enforced schedules for approving federal permits
- Creation of an Implementation Plan for Modernizing Infrastructure Permitting
- The “Fixing America’s Surface Transportation Act” or “FAST Act,” signed into law in December 2015, will further streamline the federal permitting process for major projects including energy production, electricity transmission, transportation, aviation, ports and waterways, water resources, broadband, pipelines, manufacturing, and many other sectors.

The Implementation Plan processes fail to include Indian Nations or recognition of the federal trust responsibility to tribal lands, resources, and sacred places. Recommendations from NCAI Resolution PHX-16-067:

- All agencies issuing permits for infrastructure projects affecting tribal lands, waters, or sacred places must demonstrate tribal trust compliance:
 - Fifty-seven million acres of tribal land are held in trust by the United States under binding legal obligations to protect the lands, waters, and Native communities residing thereon
 - The President and the Cabinet have an independent duty to fulfill the trust obligation to protect Indian lands, waters and sacred sites, including informed consent
 - Treaty obligations to protect tribal lands, waters, sacred places, and hunting & fishing rights
 - Consultation requirements under Executive Order 13175
 - Statutory obligations applicable to the project: National Historic Preservation Act; National Environmental Policy Act; Clean Water Act; Native American Graves Protection and Repatriation Act; American Indian Religious Freedom Act; and other federal laws;

- A Tribal Trust Compliance Officer, who is knowledgeable about Indian tribes and tribal lands, should be appointed to the Federal Permitting Improvement Steering Council to make sure that the tribal trust compliance is integrated into all regulations and guidance implementing the FAST Act and any other federal infrastructure permitting in any agency;
- Tribal governments must be provided, in a manner similar to state governments, full and early participation in “purpose and need” infrastructure permitting discussions;
- Tribal governments must be provided, in a manner similar to state governments, funding for participation in federal permitting processes;
- The federal government must improve its communications with tribes. Federal agencies need to meet with tribes and develop methods of communication to ensure early tribal engagement;
- The federal government must promote tribal control over infrastructure development on Indian lands and lands where Indian tribes hold natural, cultural or spiritual resources;

Army Corps Tunnel Vision – Appendix C Must be Repealed

Army Corps regulations for compliance with NHPA Section 106 in permitting are fundamentally flawed. Appendix C was promulgated in 1990 and has not been revised to reflect 1992 NHPA Amendments which enacted a duty to consult with tribes. Appendix C states that the Corps “may consult” or “may coordinate” with tribes and ignores the statutory duty to consult. In addition, Appendix C has NOT been approved as an authorized alternative to the ACHP regulations.

In its environmental review process, the Corps takes a limited view of its jurisdiction, analyzing only immediate permit areas, and ignoring anything else. This narrow approach allows the Corps to limit its role in adhering to the federal trust responsibility, and is especially problematic in the Nationwide Permit program, which often fails to consider impacts on tribal lands, waters and sacred places. This Corp program must be reformed to ensure tribal inclusion. The Corps should re-open the comment period on its proposed rule to reissue its nationwide permits, and specifically invite tribal comments.

Mapping to Protect Tribal Sacred Places

There are positive examples through the Federal Communications Commission of Section 106 working well. Tribes identify general areas where sacred places could be impacted, to ensure their protection. The Endanger Species Act uses a similar model to protect critical habitat. Land managing federal agencies should use their authority under section 110 of the NHPA (54 U.S.C. § 306102), in consultation with tribes, to manage historic properties on federal lands that hold religious and cultural importance for tribes to preserve the values of such places.

Require Agencies to Enter into Programmatic Agreements with Tribes under NHPA

The ACHP recommends that federal agencies enter into Programmatic Agreements with tribes early in the consultation process for major infrastructure projects. These set forth the steps to be taken by the agency to meet consultation requirements, and create accountability.

Compliance with the Federal Trust Responsibility

This is an issue with a long history of broken trust. In 1970, towards the end of the dam building era, President Nixon’s Special Message to Congress acknowledged that “the Federal government is faced with an inherent conflict of interest” between national interests and its duties to protect tribal lands. Nixon took no action. Forty-six years later, the legal obligation to tribal lands must be acted upon. The President and the Cabinet have an independent duty to fulfill federal trust obligations, and must include Indian tribes in all processes for federal infrastructure permitting.