



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

November 30, 2016

Sent via email to: consultation@bia.gov

Mr. Lawrence S. Roberts
Principal Deputy Assistant Secretary Indian Affairs
Office of the Assistant Secretary – Indian Affairs
1849 C Street, N.W., MS-3642-MIB
Washington, DC 20240

Re: Request for Comments on Federal Infrastructure Project Decision Making

Dear Principal Deputy Assistant Secretary Roberts:

The Nez Perce Tribe (Tribe) appreciates the opportunity to provide the Department of Interior (DOI), the Department of Justice (DOJ), and the United States Army its comments and insights into how the consultation and decision making process on infrastructure projects currently works and how it can be improved. The Tribe understands that part of the reason for this request for consultation on infrastructure projects is based on the conflict over the construction of the Dakota Access Pipeline and its impact on the resources of the Standing Rock Sioux Tribe. The Nez Perce Tribe acknowledged its support for the Standing Rock Sioux Tribe's position through a resolution passed by the Tribe. A copy of the Nez Perce Tribe's resolution is attached to these comments.

The Tribe understands the challenges and difficulties being faced by the Standing Rock Sioux Tribe because the Nez Perce Tribe, similar to tribes all across the United States, has faced its own particular difficulties with infrastructure projects—hydropower development in the Northwest resulted in Dworshak Dam being built on the Nez Perce Reservation, the Federal Columbia River Power System of eight dams being built along the Columbia and Snake Rivers, and the Hells Canyon complex being built on the Snake River as well. These dams have had adverse impacts on many tribal treaty-reserved resources. The Tribe has also had to deal with efforts to transform the roads and highways through the Nez Perce Reservation from wild and scenic pathways into industrial corridors. These are just a few of the examples of the need for the United States to conduct meaningful consultation with tribes on infrastructure projects.

Your requested focus is on how federal agencies can best conduct timely and meaningful consultation with Native American tribes by identifying deficiencies in current consultation efforts and recommending best practices for agency consultation. Although the Nez Perce Tribe will provide specific comments and recommendations on ways to improve consultation, it is important to note that each agency currently has consultation policies in place pursuant to Presidential Executive Orders. Those policies vary greatly, but if these policies are followed in both the letter and spirit of the document, consultation efforts and outcomes would be dramatically improved. However, with any policy, it is incumbent upon the persons and personalities in positions of authority to make the words on the document come to life instead of remaining dormant within a closed document. Consultation is only effective when the persons conducting the consultation are truly invested in the effort and interact with tribes as the true sovereigns they are. Tribes have a vested interest in the product of the consultation and rely on the United States to uphold its trust responsibility during a consultation.

With regard to consultation on infrastructure, there are several unique issues that need to be addressed to make consultation more effective and meaningful. First, many infrastructure projects are cross-jurisdictional and span multiple territories. This means that different political entities are implicated or impacted by the decisions being made by the federal agency. Unfortunately, agencies tend to segment these projects when analyzing the impact. This segmentation limits the ability of an agency to actually assess the true cumulative impact of a project during the consultation process. If an agency is only consulting on a portion of a project, the product of such consultation will be incomplete and its validity will be questionable. Agencies should incorporate consultation methods that are broader in scope and embrace an approach that looks at the project as a whole. This narrow focus is illustrated in the Nationwide Permit process that does not necessarily look at the impact of an entire infrastructure project. There needs to be a larger and more connected focus on infrastructure projects including projects that are being permitted under the Nationwide Permit program.

In addition, consultation policies on infrastructure projects need to be assessed to make sure they are in better alignment with responsibilities under federal laws such as the National Historic Preservation Act, the National Environmental Policy Act, and the Native American Graves Protection and Repatriation Act. Consultation policies do not have an enforcement mechanism, which makes their use and effectiveness arbitrary at times. If consultation triggers are better aligned with such federal laws and adhered to in a similar manner, consultation will be more productive. Also, it would be helpful if federal agencies were more consistent and uniform in their approach to consultation.

How information is shared and treated within a consultation should also be addressed with regard to any matter, but consultation on infrastructure projects magnify this need. Agencies need to determine methods or avenues to treat information that a tribe shares with an agency to be confidential and exempt from a Freedom of Information Act request. Such assurances that sensitive tribal information will not be shared or disseminated to the public at large will provide more candid and productive consultation sessions. If a tribe believes that there will be a sharing

or disclosure of tribal historical places or knowledge that are discussed during a consultation, such information will be withheld and an agency may ultimately take action or make a decision based on incomplete information. Confidentiality of such information must be provided to tribes.

Agencies also need to work with tribes to make sure that an area identified as an “area of potential effect” (APE) under federal law aligns with how a tribe would define such an area when consulting on an infrastructure project. If the APE is narrowly defined by an agency in contrast to how a tribe would define an APE, the results of such consultation will not be accurate as the agency decision would not be taking into account impacts that a tribe may be identifying. It can also result in an agency misapplying a regulation that would otherwise be applicable.

From a general standpoint, the Tribe has several recommendations that it believes would be useful in helping an agency conduct meaningful and timely consultation. Those recommendations include:

1. Having a dedicated tribal liaison that is connected directly with agency leadership;
2. Formulating a training program for employees regarding tribes, sovereignty of tribal governments, and the unique government-to-government relationship between tribes and the federal government; and
3. Having regularly scheduled or annual consultations with tribes.

The first step in consultation is the need for proper notice. The amount of time needed to give notice to a tribe of intent for consultation will depend on the number of tribes that are being affected by a federal action. If a federal action affects all or a majority of Indian Country, then agencies need to provide as much notice as possible for travel arrangements. If the federal action will affect a smaller area, the notice can be shorter as long as the consultation comes prior to any decision making. The elected officials for the tribes should be involved with the consultation. However, the Nez Perce Tribe has also found it very beneficial to have tribal staff work with corresponding federal employees to further define the issues that need to be addressed under a federal action. In addition, the most effective consultation efforts in which the Nez Perce Tribe has been involved are when the tribal elected officials are able to meet one-on-one with the appropriate federal staff and have a two-way dialogue.

An important element of this success can also be attributed to the federal agencies having an established tribal liaison position. This role is important in helping both parties navigate through the bureaucratic maze that makes up the federal government as well as understanding the tribal government process. The work of liaisons with the Nez Perce Tribe has been instrumental in effectuating effective consultation on complicated and intricate issues that arise frequently for the Tribe. However, the effectiveness of the position is directly related to where the position sits within the organizational structure of an agency. If such position is not within the direct line of authority within an agency, the effectiveness of the work of that position is greatly diminished.

The Tribe also strongly supports any efforts by an agency to formulate and implement a training program for employees that will help educate and inform employees about tribal governments, treaty rights, and the federal trust responsibility of the United States to tribes. Such education efforts will be beneficial and help strengthen the working relationship with tribes. It is important to note that regional employees should also take the time to learn specific information about the tribes that are in a particular area. The nature and structure of a tribal government can vary greatly from tribe to tribe. It is also important for an employee to be aware of the culture and history (both political and chronological history) of a tribe. Ultimately, agencies should be able to evaluate and identify impacts to treaty rights when conducting consultation. A treaty rights approach to discussion and decision making is imperative to meaningful consultation.

In addition, it is important that an agency properly implement consultation anytime any federal action will or could affect a single tribe or Indian Country in general. Given the vast nature of treaty-reserved rights and the increasing work and responsibilities that have been assumed by tribal governments, a presumption that a federal action will affect a tribe is the most prudent measure an agency can take. Such a presumption will force a person making a decision to take the analytical steps necessary to build a case that either supports or rebuts that presumption. In doing this analysis, it is important that more than just federal statutes are considered. A working knowledge of tribal treaty rights, the Indian Trust Doctrine and Public Trust Doctrine, and case law interpreting those rights is imperative.

If the presumption is supported, it is then prudent to begin to directly involve the tribe or tribes affected by the action at the earliest stage possible and prior to any decisions being made. Involvement at this stage will allow most tribes to begin to utilize staff to further assess and evaluate what responses and/or actions are required from a tribal perspective. It is at this stage that most obstacles or barriers can be identified that would likely affect the proposed federal action. It also begins the collaborative process at the formation stage of the action before any decisions have been made.

In contacting tribes for large consultations on issues or in requesting comments, some preliminary attention should be made to the manner in which the tribes are contacted about consultation. It is important that any information that is being transmitted to tribes arrive to the correct persons in a timely manner. Maintaining a current database of tribal leaders, the primary contact information, and the meeting procedures for each tribal government is important so that information is not lost in the massive amounts of notices and mail received by tribes each day.

Finally, it would be helpful to develop with tribes alternative methods of hosting consultation meetings to alleviate some of the cost and travel burden. Some resources should be provided to help tribes shoulder the consultation burden as well as aide in establishing or promoting the technology of video, computer, or audio conferencing.

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Although many of these comments are specific to the Nez Perce Tribe, the Tribe believes there is a universal applicability to many of the concepts. In addition, the Nez Perce Tribe fully supports the comprehensive comments submitted by the National Congress of American Indians (NCAI) on this issue. In addition to the foundational ideas of respect for tribal sovereignty, treaty rights, and the trust responsibility, NCAI also encouraged better adherence to statutory obligations by agencies and agency adoption of environmental justice policies. NCAI also outlined several best practices that should be adopted by the United States. These include use of regional mapping and tribal impact evaluation, creation of tribal impact statements, and funding for tribal participation in processes.

Thank you again for the opportunity to provide comments.

Sincerely,



Mary Jane Miles
Chairman

RESOLUTION

WHEREAS, The Nez Perce Tribal Executive Committee has been empowered to act for and on behalf of the Nez Perce Tribe, pursuant to the Revised Constitution and By-Laws, adopted by the General Council of the Nez Perce Tribe, on May 6, 1961, and approved by the Acting Commissioner of Indian Affairs on July 27, 1961; and

WHEREAS, under Article VIII Section 1 of the Revised Constitution and Bylaws of the Nez Perce Tribe, the Nez Perce Tribal Executive Committee (NPTEC) has the power and responsibility to promote and protect the health education and welfare of the Nez Perce Tribe; and

WHEREAS, the NPTEC works to preserve, protect and advance Nez Perce sovereignty and treaty rights; and

WHEREAS, the NPTEC actively opposes actions that interfere with the exercise of Nez Perce treaty rights or damage or harm to sacred sites; and

WHEREAS, the NPTEC respects and supports the protection and advancement of the rights of other sovereign tribal nations; and

WHEREAS, the proposed Dakota Access Pipeline is a 1,172 miles long pipeline that would carry up to 570,000 barrels of oil per day across North Dakota, South Dakota, Iowa and Illinois; and

WHEREAS, the Dakota Access Pipeline will cross the Missouri River immediately above the mouth of the Cannonball River on the Standing Rock Sioux Reservation; and

WHEREAS, the Standing Rock Sioux Tribe is actively opposing the construction and operation of the Dakota Access Pipeline because it threatens the lands, sacred sites, water and general health and welfare of the Standing Rock Sioux and other tribal nations; and

WHEREAS, the potential damage and harm to the cultural and natural resources of the Standing Rock Sioux would be immeasurable and most likely irreversible; and

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WHEREAS, the Nez Perce Tribe has a longstanding and historic relationship with the tribes of the plains including the Standing Rock Sioux.

NOW, THEREFORE, BE IT RESOLVED, that the NPTEC declares the Nez Perce Tribe's support of the Standing Rock Sioux's opposition to the construction of the Dakota Access Pipeline.

CERTIFICATION

The foregoing resolution was duly adopted by the Nez Perce Tribal Executive Committee meeting in Special Session, August 23, 2016, in the Richard A. Halfmoon Council Chambers, Lapwai, Idaho, a quorum of its members being present and voting.

BY: 
Daniel Kane, Secretary

ATTEST:


Mary Jane Miles, Chairman