

**Comments of the Shoshone-Bannock Tribes
Regarding Consultation by the Federal Government on Infrastructure
Projects
November 27, 2016**

I. Introduction

The Shoshone-Bannock Tribes of the Fort Hall Reservation submit these written comments in response to the September 23, 2016 letter of the Department of Interior, Department of Justice, Department of Army and other Federal agencies regarding two questions:

(1) How can Federal agencies better ensure meaningful tribal input into infrastructure related reviews and decisions, to protect tribal lands, resources and treaty rights within the existing statutory framework?

(2) Should federal agencies propose new legislation altering the statutory framework to promote these goals?

We support the National Congress of American Indians Comments on Tribal Trust Compliance and Federal Infrastructure Decision-making. In addition, we offer our comments as they relate to the Shoshone-Bannock Tribes.

A. The Shoshone-Bannock Tribes

The Shoshone-Bannock Tribes (“Tribes”) have a Tribal membership of about 5,000 persons, and a land base of over 544,000 acres of land. The overwhelming majority of land, 97%, is held in trust or owned by the Tribes and individual members. The Second Treaty of Fort Bridger was one of several treaties concluded by the Indian Peace Commission established by the Act of June 20, 1867 by Congress.¹ On July 3, 1868, the Eastern Shoshone and Bannock Tribes concluded the Second Treaty of Fort Bridger (“Treaty”).² By Article 2 of the Treaty (15 Stat. 674), the United States guaranteed the creation of separate reservations for the exclusive use and occupancy of the signatory tribes. In return the Tribes ceded millions of acres of their original lands. Article 2 defined a tract of land, known as the Wind River Reservation in Wyoming, as a reservation for the Eastern Band of Shoshone. Article 2 also provided that a separate reservation would be established for the Bannock Tribe (also known as the “Mixed Bands of Shoshones and Bannocks”).

Pursuant to this guarantee, and the Executive Order of 1869³, the Fort Hall Reservation was established as a “permanent home” for the Shoshone and Bannock Tribes’ exclusive use and

¹ *Proceedings of the Great Peace Commission of 1867-1868, With an Introduction by Vine Deloria, Jr, and Raymond DeMallie* (Washington: The Institute for the Development of Indian Law 6 (1975).

² Treaty with the Eastern Shoshoni and Bannock, July 3, 1868, 15 Stat. 673, 2 Kappler 1020.

³ Executive Order by President Ulysses S. Grant, 1 Kappler 76 (July 30, 1869). President Grant’s 1869 Executive Order designated the same lands set aside for the Boise-Bruneau Bands under the 1867 Executive Order as the reservation secured to the Bannocks and Mixed Bands by Article 2 of the 1868 Treaty.

benefit. The Shoshone-Bannock Tribes are successors in interest to the signatories of the Treaty. Article 2 of the Treaty set apart the approximately 1.8 million acre Reservation “for the absolute and undisturbed use and occupation of the Shoshone Indians.” Article 4 of the Fort Bridger treaty reserved the Reservation as a “permanent home” to the signatory tribes.⁴ One of the United States’ purposes in setting aside the Fort Hall Reservation was “to protect . . . [the Tribes] rights and to preserve for . . . [them] a home where . . . [their] tribal relations might be enjoyed under shelter of authority of the United States.”⁵ However, when the Reservation was initially surveyed in 1873, the federal surveyor erroneously cut off from the Reservation an area “thirty by fifty miles in extent along its eastern border” thus reducing the Reservation to about 1.2 million acres instead of the 1.8 million acres contemplated in the 1867 Order.⁶

There are numerous types of energy rights-of-way crossing the Fort Hall Reservation, and our aboriginal lands, including natural gas transmission pipelines, electricity transmission line, electricity distribution lines, transit lines, access roads and lanes amounting to hundreds of miles of land encumbered by the energy industry. There are 22 energy rights-of-way – 19 electric transmission lines and 3 natural gas pipelines. We have consistently reached agreement on the terms for rights-of-way across tribal lands through bilateral negotiations with the energy companies. The negotiations have been successful from the Tribes’ perspective. We provide this information because if tribes are recognized, respected and given the opportunity to participate in the decision making for infrastructure projects, they can and will do so as sovereign governments. This is true even if the negotiations are protracted and the method for determining the value of the energy rights-of-way results in compensation that sometimes greatly exceeds the market value of the tribal lands involved.⁷ Since 1994, the Tribes have successfully concluded rights-of-way agreements with several energy companies. These agreements provide certainty and stability to the energy companies over the time periods (20-23 years) they exist. All of these negotiations involved renewal of existing lines on the Reservation. The negotiation time periods for each rights-of-way varied ranging from six months to eight years. At times the negotiations were difficult but the parties worked in good faith to resolve their differences. Each proposed energy right-of-way over Tribal lands had unique characteristics such as whether the particular right-of-way transporting energy: traversed large compact contiguous tracts of land; impacted lands of cultural or religious significance; impacted agricultural lands; provided utility services to reservation residents; involved a large number of individual landowners; and required an environmental assessment.

The end result of these bilateral negotiations has been a reversal of the paternalistic practices of the Bureau of Indian Affairs in negotiating rights-of-way on the Reservation and enabled the Tribes and individual Tribal members to achieve a level of economic self-sufficiency

⁴ 15 Stat. 673.

⁵ Ward v. Racehorse, 163 U.S. 504, 509 (1896).

⁶ B. Madsen, *The Northern Shoshoni* 77, 107 (2000).

⁷ Report at 23.

unheard of even a generation ago. Today, the Tribes are able to engage in negotiations with the energy industry, secure better deals and more revenues for Tribal governmental services for residents of the Reservation, and provide stability and certainty to the energy industry.

Tribes are not merely another “stakeholder” or “special interest” in infrastructure permitting processes. Rather, Tribal Nations exercise jurisdiction over their retained lands and resources, both on and off the reservation. Federal permitting agencies nonetheless tend to treat Tribal Nations as members of the public, entitled to only limited information and the ability to submit comments rather than incorporating them into decision-making processes as non-Federal governmental entities. This is inappropriate and contrary to long-recognized Tribal sovereign rights. Additional policy guidance should emphasize the United States’ substantive legal responsibilities to Tribal Nations and the process of meaningful and effective consultation as a required activity to ensure consideration and accommodation of these substantive rights.

II. Tribal Sovereignty and Consent Required

To the Shoshone-Bannock Tribes, land is a fundamental attribute of sovereignty, it is a source of family ties and existence, and links the Shoshone and Bannock peoples to the past. The Tribes’ land base is the linchpin to other attributes of sovereignty. The Tribal territory forms the geographical limits of the Tribes’ jurisdiction, supports a residing population, is the basis of the Tribal economy, and provides an irreplaceable forum for religious practices and cultural traditions premises on the sacredness of land. This unique quality of Tribal lands and self-government has been clearly recognized by the Fort Bridger Treaty with the United States government.

Based on tribal sovereignty and the inherent authority of tribes, we must consent to energy rights-of-way across our lands. This principle is consistent with the current law requiring tribal consent to rights-of-way across tribal lands, and Energy Policy Act.⁸ It is also well supported by the treaties and agreements with tribes which recognize the land ownership and sovereign powers over tribal lands, and the legal fiduciary obligation of the United States to preserve and protect tribal property. By these treaties and agreements, the tribes reserved their governmental authority and ownership of part of their aboriginal land base. The title to this reserved land remains held in trust by the United States for the benefit of Indians. Under the federal trust responsibility it is the duty of the United States to protect the Indians’ rights to the lands they reserved. The long standing federal policy of tribal self-determination also requires tribal consent for use of tribal lands. Beginning in 1934 with the passage of the Indian Reorganization Act, the Congress recognized the loss of tribal lands and enacted a statute which affirmed tribal power “to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other assets without the consent of the tribe.”⁹

⁸ 25 U.S.C. § 324; 25 C.F.R. § 169.3(a).

⁹ Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (e).

Moreover, the Shoshone-Bannock Tribes have a treaty with the United States that must be honored. Federal responsibilities under treaties are significant, as explained by the Supreme Court, “[i]n carrying out its treaty obligations with the Indian Tribes the Government is something more than a mere contracting party . . . it has charged itself with moral obligations of the highest responsibility and trust.” *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). Further, treaties may not be disregarded for convenience or by implication; treaties can only be abrogated by Congress when it shows an express intent to do so. *See, e.g., United States v. Dion*, 476 U.S. 734, 738 (1986) (“We have required that Congress’ intention to abrogate Indian treaty rights be clear and plain.”).¹⁰ Federal agencies, therefore, have no authority to take unilateral action that would abrogate treaty rights.¹¹ Accordingly, treaties have been construed by Federal courts to reserve and protect a number of rights, both on and off reservation, such as water rights to support on-reservation activities;¹² off-reservation hunting and fishing rights;¹³ and off-reservation rights to travel on public highways.¹⁴

III. Consultation is an Indian Trust Obligation

A. The Executive’s Trust Responsibility

There is absolutely no question that the United States and its agencies, acts as a fiduciary to Indian tribes. The principles of the trust responsibility were expounded in early Supreme Court decisions and remain foundational today. As Justice Marshall recognized in *Worcester v. Georgia*, the treaty with the Cherokee “explicitly recognize[ed] the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection; and of course pledging the faith of the United States for that protection.” 31 U.S. at 556. The federal government has a duty of care and responsibility with respect to lands and other assets held in trust for Indian tribes and its members. This means that the federal government as fiduciary is obligated to exercise its responsibilities to the Tribes in a manner that protects the treaty reserved lands of the Fort Hall Reservation and the Tribes’ best interests. The federal courts have held that the United States, in

¹⁰ *See also, Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (refusing to imply that a Federal statute terminated a Tribe’s hunting and fishing rights); *United States v. Santa Fe Pac., R.R.*, 314 U.S. 339, 346 (1941) (congressional intent to abrogate Tribal property rights must be “plain and unambiguous”).

¹¹ *See, e.g., Confederated Tribes of Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553, 556 (D. Or. 1977) (declaring that the Army Corps of Engineers had no authority to construct a dam when it “would take treaty rights without proper authorization”). To the contrary, Federal agencies have a duty to consider and protect treaty rights when making discretionary decisions. *E.g., Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1519–20 (W.D. Wash. 1996).

¹² *E.g., U.S. v. Adair*, 723 F.2d 1394, 1410 (9th Cir. 1983)

¹³ *e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *see also Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253 (8th Cir. 1995).

¹⁴ *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) (treaty right to travel not subject to state licensing and fees); *U.S. v. Smiskin*, 487 F.3d 1260 (treaty right to travel precluded prosecution under Contraband Cigarette Trafficking Act, 18 U.S.C. § 2342).

assuming the role or trustee, is subject to the highest fiduciary standards that are applied to other trustees.

The trust doctrine is an important doctrine in Indian law. The doctrine is a creature of the judiciary and is used to harness actions taken by the Congress and Executive branch of the federal government, and as a basis for compensating wrongs committed by those branches against Indian people. Its central point recognizes a federal duty to protect tribal lands, resources and the native way of life from intrusions of the majority society. As a doctrine which evolved judicially, the trust responsibility stands independent of treaties and benefits all tribes, treaty and nontreaty alike.

This trusteeship idea was supported by early acts of Congress aimed at upholding treaty promises by restraining white settlers and local governments from intruding upon Indian territories and sovereignty. Between 1790 and 1834, Congress passed a number of Trade and Intercourse Acts which prohibited non-Indians from entering into Indian territories, regulated white traders, and denied non-Indians and governments the right to purchase Indian lands.

The duty of protection so central to the sovereign trust two centuries ago is just as important today. Long ago, federal protection was needed to secure reservation lands against encroaching white settlers, today, federal protection is increasingly need to shield Indian lands from environmental threats to land bases and resources, protect the general health and welfare of tribal people, education, health, etc., and the development of energy corridors across or near reservation lands.

The laws passed by Congress and the standards developed serve the interests of a majority society which often do not address tribal needs. Nor do the treaties address many modern issues that arise with respect to environmental conflicts, furthermore, not all tribes have treaties. The trust doctrine transcends specific treaty provisions and has clear duties to protect the native land base and the ability of tribes to continue their ways of life.

The trust responsibility gained renewed attention in the Clinton and Obama Administrations. In an historic meeting on April 29, 1994, with over 300 tribal leaders, the President made a pledge to fulfill his trust responsibility to tribes. President Clinton signed a directive at the April 29 ceremony requiring all federal agencies and departments to implement their programs in a “sensitive manner respectful of tribal sovereignty”¹⁵ The directive also calls for agencies to deal with tribes on a government-to-government basis and to consult the affected tribes when federal actions impact tribal lands or resources. *Id.* President Obama has made consultation with Indian tribes an integral part of his Administration’s approach to federal Indian policy.¹⁶

¹⁵ William J. Clinton, Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994).

¹⁶ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009).

B. Consultation by the Executive Branches

The fiduciary duty to tribes includes consultation. This duty is triggered when an agency decision impacts the “value, use, or enjoyment” of Indian trust assets.¹⁷ Though most the agencies’ policies expressly recognize the duty of protection stemming from the trust responsibility, many call for merely procedural steps to safeguard tribal interests by requiring for example, consultation with tribal governments. Many lack a firm substantive requirement reflecting prioritization of tribal interests. For example, the USDA’s Indian Policy promises only that USDA officials “will consult” with tribal governments regarding the impact of the agency’s activities on tribal property and resources and will “seek to reconcile [tribal] needs with the principles of good resource management and multiple uses.” Similarly, the Department of Energy policy states: “In keeping with the trust relationship, the DOE will consult with Tribal governments regarding the impact of DOE activities on the energy, environmental and natural resources of American Indian Tribes when carrying out its responsibilities.”

The learning curve for federal bureaucrats to implement the trust obligation in their decision making has been very steep. Agency officials are generally not versed in the principles of Indian law, much less the trust responsibility, and most are accustomed to making decisions without regard to their special trust obligations to tribes. By failing to fully meeting the government’s sovereign trust obligations to tribes, true self-determination and tribal sovereignty will remain illusive.

IV. Recommendations and Practical Considerations on How the U.S. Can Do Better to Ensure Meaningful Tribal Input into Infrastructure Related Review and Decisions

A. Consultation in General

In our view, consultation means more than publishing a notice of a hearing to receive comments. We view consultation as an engagement process that has two major components. One component is procedural and the other is substantive. These two components guide the consultation process and insure that consultation is conducted in a manner that meets all due process requirements. Although there is no standard definition of “consultation”, it generally should mean more than simply providing information about what a federal agency is planning to do and allowing concerned tribes to comment. Consultation should mean two-way communication, a collaborative process between governments -- a true government-to-government relationship. The goal of consultation should be consensus, full agreement between the parties involved in the consultation.

¹⁷ See *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979).

The federal government's time schedules, meeting dates, federal register notices, hearings, and deadlines are all part of the procedural process. Certainly, we would agree the procedural process is important. We, however, believe that the critical consultation component is the substantive factor. In our opinion, the substantive area is often overlooked and disregarded by federal agencies in working with tribal governments, as the Interior has done in this process.

Federal officials are so concerned with meeting their procedural time deadlines and checklists that they never hear, or never fully communicate with the affected tribal governments. In short, the procedural process overrides the substance. Tribal leaders often express their view of consultation at hearings, by simply stating, "this is not consultation." Unfortunately, federal representatives do not take the time to understand what tribal officials mean. Instead the consultation hearing becomes merely part of the checklist of procedural requirements.

Consultation means more than simply recording testimony at a public hearing. Consultation means taking the steps and initiative to fully inform, engage and involve tribal decisions makers from the conceptual, planning, and drafting stages to the completion and comment period. It means fully communicating with tribal governments throughout the whole process not merely at the end when the document or plan has been completed and tribal comment is sought. Consultation means cooperating with tribal governments, and treating tribes as governments who have critical interests in the outcome.

The goal of consultation can only be satisfied if there is an open, candid sharing of information between the parties; communicating in a direct, two-way dialogue; acknowledging tribal interests and concerns; and fully considering the interests of tribes. Ultimately, the overriding objective of the federal government's consultation must be to protect the lands, rights and concerns consistent with the trust responsibility owed to the Indian nations by the United States. Meaningful consultation can only be accomplished if both the procedural and substantive aspects are met.

B. General Observations and Recommendations

We offer some general observations and recommendation about the federal – tribal trust policies and consultation process.

1. The consultation principles stop short of offering specific principles defining the agency's fiduciary obligations. The principles fail to elaborate how the trust duty should operate in conflict situations in which the agency is called upon to consider a federal agency's interests directly adverse to tribes, or in the case of the Department of Justice to represent a federal agency with interests directly adverse to tribes.

2. Most of the federal agency policies make sweeping promises without providing detailed guidance on how to implement the promises on a procedural and substantive level within the scope of the agency programs.

3. The consultation process must be implemented based upon the trust doctrine. Procedurally, the trust doctrine requires federal agencies to consider the effects of its actions on tribal property and interests and assess its trust obligations to tribes. There must be a firm substantive mandate in the consultation process reflecting a prioritization of tribal interest. The federal agency should not merely go through the procedural motions of consultation such as notice, comment deadlines, etc.

4. Tribes wish to see results from participating in the consultation process, and must be able to see that the federal agencies actions or decisions reflect their concerns. The trust doctrine provides a substantive duty requiring agencies to affirmatively protect a tribe's interest when it undertakes action, not simply to hold the hearing.

5. Consultation raises a variety of difficult confidentiality issues regarding tribal spiritual and cultural traditions. Some laws permit the tribes to withhold certain kinds of information in certain circumstances, but this approach does not fully address the issues.

6. No matter how consultation works as a process, conflicts may arise. Resolving these conflicts should be accomplished without destroying the government-to-government process.

7. Federal agencies must recognize that Tribal governments are often heavily burdened with other pressing community issues and day-to-day governmental activities, which means there may not always be a timely response to requests for consultation.

8. Tribal resources are often stretched thin with little opportunity to send a tribal representative to meetings off-reservation. Meetings affecting specific tribes and lands should be held on reservation.

C. Practical Considerations for Consultation

There are also a host of practical considerations that can make consultation better and effective with tribes, including –

1. Seeking an understanding of how each tribe wishes to be consulted.
2. Viewing consultation with tribes as an essential element of the government-to-government relationship and not simply as a procedural requirement.
3. Entering consultation with a good heart. In other words, federal agency representatives should enter without assumptions and a sincerity to learn and discuss the issues. Agency staff should resist thinking of Indians as a group of people with the same attitudes, ideas, cultures and responses.
4. Federal agencies should know the particular tribe, their governmental structure and resources. Federal agencies must recognize and understand that tribal people hold sincere

beliefs and values toward the land, its relationship to all things in the world and the tribes relationship and dependency on the land and resources.

5. Federal agencies should recognize that tribal cultures are not dead and they are not static. Traditional religious beliefs and practices are still exercised by tribal people on and off-reservation.

6. Federal agencies must conduct consultation with official tribal governing leadership; one councilmember contact is not consultation. Tribal staff do not speak on behalf of the tribes about tribal policies, decisions and actions. Groups, intertribal councils and commissions do not speak or represent the tribes.

7. Notification is not consultation nor is a phone call or email to tribe.

8. Federal agencies should visit, listen and communicate in person. Be respectful, do not interrupt when a tribal person is speaking. Do not take offense during consultation.

9. Be open and maintain honesty and integrity about the federal agency's purpose and needs, and throughout the consultation process. Documents and statements should clearly describe the proposed agency action or policy to the tribes. Explain in plain and simple terms what the agency wants to accomplish, where the agency is in its decision making process, and the nature of the decision to be made. Limit acronyms when consulting with the tribes, or in the alternative, if they must be used, include a clear definition of their meaning.

10. Federal and tribal officials should identify the preferred communication for consultation, develop protocols or memoranda of agreement on how consultation should be conducted.

11. Develop points of contact with the tribes for day to day activities.

12. Contact the tribes early and allow sufficient time for the consultation process. Many tribes have an established governmental review process and protocols that must be followed by tribal staff. Be flexible with deadlines and decisions.

13. Allow ample time for the tribe to receive, process and respond to requests for consultation.

14. Agencies should not be driven by their own agendas. Most agencies know well in advance of what rules, policies or regulations they may seek comments on and should give tribes a schedule of rulemaking at the beginning of each fiscal year, and an advanced copy of the rules for comments.

15. If the tribe does not respond to an initial request to engage in consultation, the agency should not assume the tribe has no interest in the matter. The more information the tribe receives about the consultation the better prepared the tribe can be to comment.

16. Conduct field trips with tribal staff and leadership of the impacted or affected area. Involve the tribal cultural representatives, not only hired archeologists for cultural site identification.

17. Answer questions directly and honestly, and be willing to seek out an answer. Be reliable. Do not say the easy answer or commitment. Be certain you can deliver. If you cannot say so.

18. Understand that questions posed to tribes may not be answered immediately as tribal leaders may need to discuss issues with tribal membership.

19. Do not rely on consultants or experts about what will be the position of the tribe.

20. Understand that some kinds of information is sensitive and confidential. Many tribes have established privacy acts that require the approval of leadership to release tribal documents.

In summary, consultation must be driven by mutual trust and respect. There should be transparency in consultation, and the application of ongoing meaningful cross-cultural training and discourse. Federal agencies must adhere to confidentiality. Demonstrating both knowledge of and respect for the government-to-government relationship between tribes and U.S. government is key. The federal consultation is quite clear. However, the federal agencies caught up in their own deadlines and priorities, which are often at odds with tribal ways and interests, neglect their duty to consult meaningfully with tribal governments.

V. Legislation to Fully Protect Tribal Lands, Resources and Treaty Rights in Infrastructure Related Projects

It is important to note that federal statutory protections are often woefully inadequate to protect tribal interests. There are often competing and conflicting non-Indian interests that exert overwhelming pressure on federal agencies to render decisions favorable for them. Therefore, a strong and enforceable trust duty of protection through the consultation process is particularly critical. Moreover, tribal sovereignty is thwarted when federal agencies and departments seek to treat tribes in the same manner as any other interested member of the public, in a conventional public participation process like NEPA. The overwhelming challenge faced by the Executive Branch is to blend the statutory duties of federal agencies with the trust obligations owed to tribes at the level of program implementation. Federal agencies should have broad latitude to protect tribal interests based on the trust responsibility.

The existing legal frameworks set out in the many federal laws, regulations and executive orders are not enough especially if the federal agency takes the position or approach of doing only what is required and when it is required. Many of the agency trust policies fail to include the prioritization of tribal interests necessary to affirmatively and fully protect their interests,

treaty rights, lands and resources. It is critical to develop prioritization schemes that fit within the various agencies' management programs.

When proposing interstate pipelines and other infrastructure projects, the federal agencies primarily utilize section 106 of the National Historic Preservation Act (NHPA) to meet their government-to-government consultation requirements. Section 106 requires federal agencies to take into account the effect that a federal undertaking may have on historic properties. The section 106 process mandates that the agency: (1) identify historic properties potentially affected by the project, (2) assess the project's effects of those properties, (3) develop methods to minimize or mitigate adverse effects, and (4) consult with appropriate parties to resolve the adverse effects.

Under section 106 it is imperative that tribes be involved with any infrastructure projects at the conceptual stage. The federal government plans projects many years in advance, long before it initiates the section 106 process. It is critical that tribes be engaged early in the process before any federal register notice is published. Such engagement with tribal governments can identify any concerns, objections, or agreements that may be appropriate.

The NHPA fails to prioritize tribal interests necessary to protect our unique homelands, treaty rights and resources. Instead, federal agencies balance their goals and policies multiple uses and the public against the tribes. A revision of the NHPA should ensure that tribal resources, land bases and resources do not take second seat to private interests.

Federal agencies may consider authorizing energy project applicants to initiate tribal consultation if a tribe grants approval to do so. Project applicants can provide tribes with the best project information and can respond better to questions. The federal government ultimately has responsibility to comply with its consultation duties under the applicable Executive Orders and the NHPA, and permitting a project applicant to initiate the section 106 process with not affect those responsibilities.

Acknowledging that the NHPA is a procedural law, we believe that there is a critical need to make the NHPA process work better, a need that should be seen against the background of the lack of substantive protection for American Indian religious freedom in U.S. law. Religious freedom is a fundamental right enshrined in the First Amendment to the U.S. Constitution and in international human rights law, yet U.S. law does not protect American Indian religious practices that are tied to particular places, including places on federal lands.¹⁸ During a period of about half a century, from the 1880s until 1934, federal policy sought to suppress traditional tribal religions, and, although quite some time has passed since that policy was abandoned, the legacy

¹⁸ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[2][c] (2012 ed.).

of that era is still with us today. Since the enactment of the American Indian Religious Freedom Act (AIRFA) of 1978,¹⁹ federal law has proclaimed that it is:

the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

This statutory language is reinforced, with respect to federal lands by Executive Order 13007.²⁰ Neither AIRFA nor Executive Order 13007, however, provides for a right of action in federal court to seek judicial enforcement. The lack of judicially enforceable rights relating to tribal sacred places is a problem that cries out for a remedy. A real remedy must be more than a procedural right to be consulted. In the absence of such a remedy, however, we need to make the procedural rights that tribes have pursuant to the NHPA work better. Not just better consultation – better outcomes as a result of better consultation. We urge that the NHPA be revised to provide a judicial remedy. In the alternative, an initiative to revise guidance documents regarding consultation to actually make the process work better, including the achievement of better outcomes is critically needed.

The failure of some federal agencies to fulfill their duty to consult with tribes is one of the biggest problems with the section 106 process. Although the NHPA regulations require federal agencies to consult with tribes at the outset and throughout the section 106 process, in our experience, the record is mixed. Some agencies tend to frequently make a good faith effort and some frequently do not. Ultimately, we need to change the culture of the section 106 process and make early and meaningful consultation the standard practice.

Any legislation for infrastructure projects should begin with the premise that tribes should consent to such projects and not merely be consulted. The federal laws protecting tribal interests in reservation lands from private energy companies and requiring informed consent with bilateral negotiations resulting in agreements seems to be lost when the federal government initiates an action affecting tribal lands or off-reservation ceded or aboriginal lands. Instead, the United States only seeks comments from tribal governments despite the potential adverse impacts to tribal interests, lands, natural and cultural resources, and seeks to mitigate or minimize impacts. In the situation where major energy pipelines are considered, rather than only mitigate impacts, the federal government should avoid reservation lands, ceded and aboriginal lands.

¹⁹ (Pub. L. No. 95-341; 92 Stat. 469; codified in part at 42 U.S.C. § 1996).

²⁰ Indian Sacred Sites (May 24, 1996, 61 Fed. Reg. 26771; reprinted at 42 U.S.C. § 1996).

In conclusion, the Shoshone-Bannock Tribes urge the federal government to meet its procedural and substantive due process requirements of consultation. The United States must take several steps back and begin anew a consultation process that fully communicates, coordinates, and cooperates with tribes, and engages tribes in an open and candid dialogue when considering major infrastructure projects. The Obama Administration needs to fully uphold the federal trust responsibility to tribes through the consultation process, and make it a better process that truly provides a meaningful opportunity for tribal governments to participate.

Thank you for consideration of our comments and recommendations.