

Tribal Nations Summit Update

by Michael Drysdale, Megan J. Houdeshel, and Kayla Weiser-Burton

The Biden Administration recently held a Tribal Nations Summit in Washington, D.C. At the Summit, the Administration announced a number of new actions, in particular, new initiatives relating to Tribal consultation. The stated objective of the Tribal Consultation Initiatives is to implement more consistent and robust Tribal consultation practices across all agencies of the federal government. The changes do not significantly change existing regulations regarding Tribal consultation processes but are intended to make them more robust. For example, Tribal consultation will begin earlier in the life of a project than had generally occurred previously. And throughout the consultation process, the Initiatives encourage more involvement from federal agency officials, who are likely to push to obtain consensus.

The new Tribal Consultation Initiatives were announced in a [Presidential Memorandum](#) on Uniform Standards for Tribal Consultation.

The overarching theme of the Memorandum is to direct agencies to more actively consider tribal issues and initiate consultation without waiting for Tribes to raise interest and concerns. Importantly, the Memorandum emphasizes an Administration preference for consensus and Tribal agreement. As a practical matter, this increases the leverage Tribes possess to delay, defeat, or demand changes to proposed projects. And the Memorandum encourages consultation even where there are no obvious Tribal implications, as long as either the Tribe asserts, or agencies perceive, that an issue is “of interest” to Tribes. This may expand the range of projects on which tribal consultation occurs.

Specifically, the Memorandum:

1. Explains that consultation requires information obtained from Tribes be given meaningful consideration and agencies *should strive to obtain consensus with Tribes or a mutually desired outcome*;
2. Requires agencies to designate an agency point of contact for Tribal consultation;
3. Requires the head of each agency to ensure that agency staff undertake an analysis

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as early as possible to determine whether Tribal consultation is required or appropriate, and this analysis must occur regardless of whether a Tribal government requests consultation;

4. States that “agencies may still engage in Tribal consultation even if they determine that a policy will not have Tribal implications, and should consider doing so if they determine that a policy is of interest to a Tribe or Tribes”;
5. Requires agencies to keep records of consultations, and report to the affected Tribe(s) how Tribal input influenced or was incorporated into the agency action (or reasoning for why not); and
6. Requires annual training for certain federal employees regarding tribal consultations.

At the Tribal Summit, the administration also announced the following:

1. New tribal consultation policies within various federal departments.
2. A new report on best practices to integrate tribal treaty and reserved rights into agency decisionmaking processes.
3. New guidance for federal agencies to elevate indigenous knowledge, and to recognize and include in federal research, policy, and decisionmaking.
4. Plans to further implement tribal co-management and co-stewardship of federal lands and waters.
5. New regulations and processes for fee to trust land acquisitions (25 CFR Part 151) to make the process more efficient and less expensive.
6. A new baseline water quality standards proposed rule (requiring states to account for Tribal-held rights to aquatic resources when establishing or revising a state’s water quality standards under the Clean Water Act, Section 303(c)).
7. A rulemaking effort in which the Army Corps of Engineers will propose rescinding Appendix C, which it has historically used for actions affecting historic properties under NHPA Section 106. It will propose to instead rely on guidance from the Advisory Council on Historic Preservation for implementation of Section 106.
8. Renewable Energy Accelerated Deployment Initiative (READI) for Indian Country, which is intended to: streamline and advance renewable energy development in departmental policies, procedures, and regulations, including leasing; solicit and receive Tribal government advice on renewable energy resource needs and priorities; and incentivize renewable energy development on Indian lands through technical assistance and consensus-based updates to regulations and other legal authorities.
9. Additional announcements regarding: climate change; economic development, energy, and infrastructure; tribal broadband and spectrum; public safety and justice; education and native languages; health; housing; international and border issues; and public-private partnership initiatives.

The Biden administration also announced some mining law reforms related to Tribal consultation. However, details of these reforms and recommendations have not yet been released and are anticipated to be included in the forthcoming Interagency Working Group report. The proposed mining law reforms include recommendations: 1) offering methods of ensuring Tribes are engaged earlier during the development of mining proposals on public lands; 2) providing Tribes a seat at the table in discussions regarding mining proposals; and 3) improving consideration and protection of tribal interests and resources as mining decisions are being made. The Federal Permitting Improvement Steering Council will set aside \$5 million for Federally recognized Tribes to enhance Tribal engagement in the permitting review and authorization process for FAST-41

covered projects. The Biden administration also announced that it will:

1. Begin informing all potentially impacted Tribal governments of exploration notices when those notices are received by the agency, and create a website to allow Tribal governments and the public to see what exploration notices have been submitted on BLM lands;
2. Begin the development of a system to allow Tribal governments to confidentially specify geographic areas of interest and receive notifications when mineral exploration or proposals occur within those areas;
3. Invite Tribal governments to participate in pre-exploration or mining plan submission meetings with mine developers;
4. Explore the formation of intergovernmental teams composed of federal, Tribal, state, and local government officials to facilitate information sharing and identification of issues of concern related to mining proposals;
5. Consult with Tribal governments on reclamation plans and appropriate financial assurance for mineral exploration and mining proposals, and engage Tribes in discussions about desired post-mining land uses; and
6. Make additional efforts to include Tribal governments who have a current or historical presence in a potentially-impacted area; or who would be impacted by mineral development, to participate in the NEPA process as cooperating agencies.

The administration issued this [Fact Sheet](#) summarizing administration initiatives at the Tribal Nations Summit. We will be closely following the Administration's development of these regulations and policies.

Companies should be prepared for more robust Tribal consultation opportunities and responsibilities. Dorsey's experienced Energy and Natural Resources teams advise on strategies and best practices for Tribal consultation and general project development.