



Public Health Law

Office for State, Tribal, Local and Territorial Support
Centers for Disease Control and Prevention

Tribal Consultation: Selected Readings and Resources

American Indian and Alaska Native tribes are sovereign nations that maintain a government-to-government relationship with the United States.¹ There are currently 567 federally recognized tribes throughout the contiguous United States and Alaska.² In addition to exercising political sovereignty, tribes exercise cultural sovereignty through traditions and religious practices unique to each tribe's history and culture.³ Cultural sovereignty "encompasses the spiritual, emotional, mental, and physical aspects" of Native people's lives and is a foundation to tribal exercise of political sovereignty.⁴ Tribes have inherent authority as sovereign nations to protect the public health and welfare of their citizens, using methods most relevant for their communities.⁵

The United States maintains a moral and legal trust responsibility toward tribes.⁶ This trust responsibility includes a "fiduciary obligation . . . to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal Indian law."⁷ One major component of the trust responsibility is tribal consultation, which has been supported by both treaties⁸ and federal law.⁹ Consultation refers to formal process in which government agencies, "prior to taking actions that affect federally recognized tribal governments," consult with tribes to ensure that "all interested parties may evaluate for themselves the potential impact of relevant proposals."¹⁰

In 1994, President Bill Clinton issued a memorandum to the heads of executive departments, requiring executive departments and agencies to consult with tribes.¹¹ The principle of tribal consultation was reaffirmed by President Clinton through Executive Orders 13084 and 13175.¹² In 2009, President Barack Obama issued a memorandum requiring each executive department and agency to develop a tribal consultation plan to assist in the implementation of tribal consultation.¹³ Some federal laws, such as the Native American Graves Repatriation Act, also mandate consultation with tribes in certain instances.¹⁴ In addition to federal government consultation, some states mandate tribal consultation, under certain circumstances, through agreements and through state law and policy.¹⁵

The following readings and resources describe and offer commentary on tribal consultation. These resources were collected between October and December 2015, using online databases.¹⁶



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Background on Tribal Consultation

These resources offer an overview of consultation mandates under federal, state, and international law.

- [Consultation With Tribal Nations: An Update on Implementation of Executive Order 13175](#)
NATIONAL CONGRESS OF AMERICAN INDIANS (Jan. 2012).
Summarizes federal agency progress in implementing Executive Order 13175, as of January 2012.
- [Advancing the State-Tribal Consultation Mandate](#)
Gabriel S. Galanda, INDIAN COUNTRY TODAY (Oct. 17, 2012).
Provides examples of state-tribal consultation mandates.
- THE RIGHTS OF INDIANS AND TRIBES
Stephen L. Pevar, 40–1 (4th ed. 2012).
Provides an overview of the rights of American Indians, Alaska Natives, and tribes under federal Indian law, which includes background information on tribal consultation.
- [Federal Indian Consultation Right Extends to Tribal Members](#)
Gabriel S. Galanda, GALANDA BROADMAN (Jun. 6, 2011).
Highlights instances in which the federal consultation right can extend to tribal members when dealing with individual Indian-owned lands and trust assets.
- [The Federal Indian Consultation Right: No Paper Tiger \(Part Two\)](#)
Gabriel S. Galanda, INDIAN COUNTRY TODAY (Dec. 6, 2010).
Offers a short discussion on treaties establishing consultation mandates that were enforced by federal courts.
- [List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance](#)
White House—Indian Affairs Executive Working Group, Consultation and Coordination Advisory Group (Jan. 2009).
Lists federal tribal consultation laws and policies, as of January 2009.
- [Tribal Nations and the United States: An Introduction](#)
NATIONAL CONGRESS OF AMERICAN INDIANS.
Provides an introduction to tribal nations and their relationship with the United States; includes a brief summary of tribal consultation.
- [Tribal Consultation Web Site](#)
Indigenous Peoples Law & Policy Program, University of Arizona.
Lists relevant federal laws, including case law, related to tribal consultation; provides a sample model tribal law.

Consultation Support Resources

These resources highlight support available to tribes and agencies engaging in tribal consultation.

- [Current Tribal Consultations & Listening Sessions](#)
US DEPARTMENT OF INTERIOR (Last Update Oct. 23, 2015).
- [Assistant Secretary Washburn Announces Launch by DOI University of Interactive Tribal Consultation Training Course](#)
US DEPARTMENT OF INTERIOR (Aug. 18, 2015).
- [Consultation Support](#)
NATIONAL CONGRESS OF AMERICAN INDIANS.

Commentary on Tribal Consultation

The scholarship below offers commentary and tribal consultation and recommends alternatives to the current federal consultation framework.

- [Consultation or Consent: The United States Duty to Confer with American Indian Governments](#)
Robert J. Miller, NORTH DAKOTA LAW REVIEW (Forthcoming 2015).
Describes tribal consultation history and procedures in the United States and suggests that the federal consultation mandate should conform to the emerging international law standard of free, prior, and informed consent.
- [Toward Genuine Tribal Consultation in the 21st Century](#)
Colette Routel & Jeffrey Holth, 46 U. MICH. J.L. REFORM 417 (Winter 2013).
Argues that the federal government duty to consult with tribes should be viewed as a judicially enforceable procedural requirement of the trust responsibility.
- [Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns](#)
Michael Eitner, 85 U. COLO. L. REV. 867 (Summer 2014).
Recommends that Congress enacts a statute establishing a uniform standard for federal agency consultation with tribes that would be subject to judicial review for procedural and substantive aspects of the consultation.
- [The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion](#)
Gabriel S. Galanda, AMERICAN BAR ASSOCIATION (Jan. 2011).
Describes how the tribal consultation mandate, which is rooted in federal statutes and regulations, executive orders, case law, and international legal norms, can be used as a tool to protect tribal sovereignty.
- [Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples](#)
Akilah Jenga Kinnison, 53 ARIZ. L. REV. 1301 (2011).
Argues that the United States should more fully adopt the United Nations Declaration on the Rights of Indigenous Peoples framework for free, prior, and informed consent in the context of large-scale extractive industries on traditional lands.
- [The Federal Indian Consultation Right: No Paper Tiger \(Part Three\)](#)
Gabriel S. Galanda, INDIAN COUNTRY TODAY (Dec. 15, 2010).
Outlines the negative consequences for federal failure to consult with tribes and argues that tribal promotion of consultation supports tribal sovereignty.

Topical Resources on Tribal Consultation

These resources offer specific discussion of tribal consultation in the context of specific topic areas, such as historic preservation and resource development.

- [The Tribal Trust and Government-to-Government Consultation in a New Ecological Age](#)
Amanda Rogerson, 93 OR. L. REV. 771 (2015).
- [Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior, and Informed Consent](#)
Stuart R. Butzier & Sarah M. Stevenson, 32 No. 3 J. ENERGY & NAT. RESOURCES L. 297 (Aug. 2014).
- [Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples](#)
Dwight Newman, Michelle Biddulph & Lorelle Binnion, 32 B.U. Int'l L.J. 449 (Summer 2014).
- [Best Practices in State-Tribal Consultations: Findings from Oregon](#)
US CENTERS FOR MEDICARE AND MEDICAID SERVICES. (Aug. 20, 2013).
- [Successful Practices for Effective Tribal Consultation](#)
THE LOUIS BERGER GROUP, INC. FOR THE NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM (September 2013).
- [Consultation with Indian Tribes in the Section 106 Review Process: A Handbook](#)
US ADVISORY COUNCIL ON HISTORIC PRESERVATION (June 2012).
- [Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review](#)
S. Rheagan Alexander, 32 Pace L. Rev. 895 (Summer 2012).
- [First Americans & the Federal Government: Tribal Consultation, Agriculture, and a New Government-to-Government Relationship at the Start of the Twenty-First Century](#)
Jase Jensen, 17 Drake J. Agric. L. 473 (Summer 2012).
- [Tribal Consultation Best Practices in Historic Preservation](#)
NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS (May 2005).
- [In Their Own Light: A Study in Effective Tribal Consultation](#)
US DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION RESOURCE CENTER.

Acknowledgments and Disclaimers

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For further technical assistance with this inventory, please contact phlawprogram@cdc.gov. PHLP provides technical assistance and public health law resources to advance the use of law as a public health tool. PHLP cannot provide legal advice on any issue and cannot represent any individual or entity in any matter. PHLP recommends seeking the advice of an attorney or other qualified professional with questions regarding the application of law to a specific circumstance. The findings and conclusions in this summary are those of the author and do not necessarily represent the official views of CDC.

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¹ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 4.01[1][a] (Nell Jessup Newton et al. eds., 2012).

² [Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs](#), 78 Fed. Reg. 26384 (May 6, 2013); [Letter from R. Lee Fleming, Dir., Office of Fed. Acknowledgment, to Kevin Brown](#) (Jul. 2, 2015) (regarding final determination for federal acknowledgment of the Pamunkey Indian Tribe on behalf of the Bureau of Indian Affairs and the Department of Interior). See also [Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe](#), 80 Fed. Reg. 39144 (Jul. 8, 2015).

³ Wallace Coffey and Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001) (arguing that the concept of "cultural sovereignty" needs to be defined by Native communities and outside the construct of political sovereignty: "[W]e hope to open a dialogue about sovereignty and our collective future that is generated from *within* our tribal communities." *Id.* at 192.). Wallace Coffey is the chairman of the Comanche Nation Business Committee. Rebecca Tsosie is a law professor at the Indian Legal Program at Arizona State University. At the time of publication of this article, Chairman Coffey and Professor Tsosie both served on the board of the directors of the Native American Rights Fund, which they credited as providing the "impetus for this dialogue on cultural sovereignty." *Id.* at n.a1.
⁴ *Id.* at 210.

⁵ Tribes maintain "inherent powers of limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322–3 (1978) (quoting F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)). *Wheeler* further explains that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323.

⁶ [What is the federal Indian trust responsibility?](#), Bureau of Indian Affairs.

⁷ See, e.g., *id.*; [Indian 101 Questions and Answers](#), Centers for Disease Control and Prevention.

⁸ Gabriel S. Galanda, [The Federal Indian Consultation Right: No Paper Tiger \(Part Two\)](#), INDIAN COUNTRY TODAY (Dec. 6, 2010). Gabriel S. Galanda, [The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion](#), AMERICAN BAR ASSOCIATION (Jan. 2011).

⁹ Stephen L. Pevar, THE RIGHTS OF INDIANS AND TRIBES 40 (4th ed. 2012).

¹⁰ [Memorandum on Government-to-Government Relations With Native American Tribal Governments](#), Administration of William J. Clinton (Apr. 29, 1994).

¹¹ *Id.*

¹² [Consultation and Coordination With Indian Tribal Governments](#), Executive Order 13084 (May 14, 1998);

[Consultation and Coordination With Indian Tribal Governments](#), Executive Order 13175 (Nov. 6, 2000).

¹³ [Memorandum for the Heads of Executive Departments and Agencies](#), The White House (Nov. 5, 2009).

¹⁴ See, e.g., Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013.

¹⁵ Gabriel S. Galanda, [Advancing the State-Tribal Consultation Mandate](#), INDIAN COUNTRY TODAY (Oct. 17, 2012).

¹⁶ PHLP used WestlawNext, a subscription only legal research database, to conduct searches for legal publications and Google for additional resources. PHLP collected resources between October and December 2015. Individual agency or entity consultation plans or consultation session information were not within the scope of this research. Although the United States has endorsed the [United Nations Declaration on the Rights of Indigenous Peoples](#), which requires a standard for free, prior, and informed consent by indigenous peoples prior to government action impacting indigenous communities, the declaration has not been formally ratified by the United States and is therefore not legally binding. See Robert J. Miller [Consultation or Consent: The United States Duty to Confer with American Indian Governments](#), NORTH DAKOTA LAW REVIEW (Forthcoming 2015). Resources focusing exclusively on the declaration, independent of US law, were excluded, as were resources that focused on indigenous consultation laws in other nations.