

# Federal Infrastructure Permitting and the FAST Act Effects on Tribal Nations

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National  
Congress of  
American  
Indians

*NCAI Annual Convention*  
*Phoenix, AZ*  
October 10, 2016



## GREAT RECESSION OF 2008-2011

- President wants to create jobs, build infrastructure, revive economy, and wants to move quickly
- Federal permits and approvals are slow



# **EXECUTIVE ORDER 13604**

## **Improving Performance of Federal Permitting and Review of Infrastructure Projects**

- Issued on March 22, 2012
- Maximum efficiency for Federal infrastructure permitting
- Surface transportation, aviation, ports, waterways, water resource projects, energy generation, electricity transmission, broadband, pipelines, and other such sectors
- Created Interagency Steering Committee on Federal Infrastructure Permitting and Review Process Improvement



## **STEERING COMMITTEE**

- Goal: Quick Federal Permitting
- Chaired by the OMB and co-managed by CEQ
- 12 Deputy Secretaries (includes Interior)
- June 2012 Report:
  - The Committee has jurisdiction over authorization of projects through permits, licenses, and certificates
- May 2014 – Releases Implementation Plan
  - Includes recommendations on how to improve the quality of applications, and the technique for decisions regarding adverse impacts.

# PERMITTING DASHBOARD

FEDERAL INFRASTRUCTURE PROJECTS

 

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- Projects
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- Map



## The Permitting Dashboard

An effort to modernize the Federal permitting and review process for better projects, improved environmental and community outcomes, and quicker decisions

### FEATURED PROJECTS



**San Francisco Downtown Ferry Terminal Expansion**



**Pensacola Bay Bridge**  
The Florida Department of

### ANNOUNCEMENT

The Dashboard is undergoing updates to meet the requirements of the Fixing America's Surface Transportation (FAST) Act. The **Notice of Initiation** form for project sponsors described in the FAST Act is under development in

### NEWS

**Executive Director Announces FAST-41 Covered Projects**

**September 22, 2016**  
On September 22<sup>nd</sup>, in his first official act as Executive Director of the Federal...



## **PERMITTING DASHBOARD**

- Database of all federal permitting for infrastructure projects
- Includes deadlines to keep agencies track
- Creates “Covered Projects”
- Covered Projects get special attention from the Steering Council



## 2014 IMPLEMENTATION PLAN

- Agreements with State and Local Governments
  - Steering Committee agencies will identify opportunities to develop additional mutual agreements with state or local governments for:
    - Early participation and coordination activities
    - Share relevant environmental, scientific, cultural, and historical data related to the planning, siting, and review of proposed major infrastructure projects
    - Support the development of mitigation alternatives on a landscape- or watershed- scale.
  - Tribes are *not* included



# OLD PERMT SYSTEM

- Developer figures out permits needed
- Applies to five different federal agencies
- For nine different permits
- No deadlines
- Waits to see what happens





# **NEW PERMIT SYSTEM**

- Developer submits project to Steering Council
- Steering Council figures out permits and approvals needed
- Sets schedule and deadlines for each agency
- Deputy Secretaries enforce schedule



## **FAST ACT – TITLE 61**

- Builds off the Framework of the E.O. 13604
- Establishes Federal Permitting Improvement Steering Council
- Requires federal agencies to maintain a Permitting Dashboard.
- Judicial Review
  - Only have 2 years to file a challenge (Usually 6 years)
  - Pre-Notice of Legal Challenge: Cannot challenge in court unless “sufficiently detailed” comments during the environmental review process
- Preliminary Injunctions More Difficult
  - Courts **MUST NOT** presume that the economic harms are reparable



## **KEY POINTS OF NEW PERMIT SYSTEM**

- Covered Project: Renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resources projects, broadband, pipelines, manufacturing, or any other sector
- Council surveys key federal development agencies and sets schedule for project
- When all Environmental Reviews done, lead agency has 180 days to make a decision
- Existing laws are to be followed
- But, aggressive timetables, extensions limited
- Tribes Not Included



## **NEED TO INCLUDE TRIBAL NATIONS**

- Guidance mentions Tribal Trust Compliance, but not defined, nor is process for working with tribes
- There's no tribal trust compliance official
- Threat: tribal rights and lands are ignored
- Opportunity: tribal rights built into comprehensive system for federally approved projects



# TRIBAL TRUST COMPLIANCE

- Trust & Treaty obligations to lands, waters, and sacred places
- E.O. 13175 duty to consult
- UNDRIP duty to seek free, prior, informed consent
- **Statutory obligations under National Historic Preservation Act; National Environmental Policy Act; Clean Water Act; the Native American Graves Protection and Repatriation Act, etc.**
- President and the Secretary of Interior have authority to regulate matters affecting Indian lands under 25 U.S.C. §2 under “such regulations as the President may prescribe....”



## SOLUTION: TRIBAL TRUST COMPLIANCE

- Integrated into Steering Council guidance, timelines, etc
- Steering Council develop a Tribal Trust Compliance Officer
- Tribal governments provided full and early participation in “purpose and need” infrastructure permitting discussions
- Funding for participation
- Tribe’s direct involvement or consent is evidence that tribal concerns over lands, waters, and sacred places have been addressed



# TRIBAL INFRASTRUCTURE PROJECTS

- Tribal projects also subject to federal approvals
- Bureau of Indian Affairs slow with leases, rights-of-way, and many other projects
- General policy should support greater tribal control
- Where federal approval is needed, tribe's direct involvement or consent is evidence that tribal concerns over lands, waters, and sacred places have been addressed
- NCAI Resolution 067 has been drafted to support



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# Thank You!

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