

Infrastructure Projects Listening and Consultations Session Key Points

Updated October 28, 2016

Phoenix, AZ – October 11, 2016 – Listening Session

- Consultation is often just a letter or a teleconference; it must be in person
- Omaha Tribe example: sent a letter saying that Army Corps was going to flood the river in 2011, and the tribal liaison was based in Montana, so didn't have an in-person meeting regarding impacts; the flood destroyed homes and shutdown the casino; submitted a report to help the Corps in future projects and never heard back
- Three Affiliated Example: pipeline company lied to the tribal council regarding pipeline over their waters, the Tribe voted twice against it, but company began drilling under the lake anyway
- There are many rules, regulations, statutes, and operations in place already and we can see that this system has a huge failure as it should've gone through the process when the project started;
- We have to see where the system failed and why did it fail before we start making new laws, if we don't we're just going to over complicate the process. We need a database to see where the failures are so we can fix them; don't want to use a current process if it's not working.
- The Army Corps must not extend the permits/easements for older, failing pipelines like Enbridge Line 5; it was grandfathered in because it was built before NEPA; half of the pipelines in the U.S. predate NEPA
- NEPA must be required for all federal actions; tribes have to follow it, so must the federal government
- NEPA must be modified to include climate change impacts
- Need to fully adopt UNDRIP: free, prior, and informed consent; and Article 32
- Regulations need to be changed to take into consideration treaty and retained rights review
- Repeal Army Corps Appendix C; it narrows the scope of permit area review, we want that scope broadened; it protects economic interests more than places; it doesn't require consultation; courts say it is invalid; Army Corps doesn't have independent regulatory authority for Section 106, must follow ACHP
- Consultation means seeking advice or information from someone who is an expert in a field; consultations should follow this logic and seek advice from tribal leaders and tribes on projects
- We should be sitting at the table as equal representatives of our governments
- Concerns that no consultation is scheduled in California or Alaska despite the number of tribes in those states.
- At first, the federal government asked for consent to come on to our lands that policy has to come back.
- Tribes need to be part of the planning process.
- Amend E.O. 13604 because it does not include tribes nor take into account tribal concerns; tribes must be included for covered project reviews under the E.O.
- Companies should not be able to do Section 106 consultation, either the federal government or a third party
- Nation-wide Permits, and NWP 12, shouldn't be allowed to grant the building of an entire pipeline; NWP 12 is up for renewal and it should be re-evaluated
- Crude Oil Pipelines should be required to get permits for the full project and be subject to NEPA and an EIS
- Tribes must be notified early in the process

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- Must look at the FCC 106 Consultation process as a model
- BLM Landscape Management Sighting could also be a model to identify special areas and it is part of the new WRDA legislation
- Issue of the Department of the Interior being a trustee, yet also having opposing interests
- Other examples of stories: Snowbowl/San Francisco Peaks; Peabody Coal
- Example of consultation going poorly, power company Excell built a damn in the Great Lakes region, decades ago and it flooded and displaced families, and destroyed wild rice crops, they haven't been able to regain the crops ever 100 years afterwards
- Treaties and Trust Responsibility must be a true partnership
- Section 106 needs teeth, the Endanger Species Act has teeth and stops projects
- Consultation must occur before the decision is made
- Physically unable to handle every single one of the consultations the government sends out and buries tribes in paperwork, most of them are small, but then the big ones are presented the same way and it's hard to identify and respond in time.
- Tribes must be provided resources to respond to consultations
- E.O. 13175 had many agencies develop consultation policies, some are good, and some are just not followed, it could be staff at the regional levels training
- EIS must be done on the entirety of projects from start to finish, wherever it touches the resources
- Tribes must be involved and consulted during the pre-permitting phase, must protect culturally sensitive information and mitigate damages
- Tribes should have the first right to identify cultural and historic properties
- Consultation should not be delegated to corporations
- Language in statutes must hold the agencies accountable, even independent agencies
- The Army Corps shouldn't issue permits over the objections of the ACHP
- Should look at the negotiated rulemaking process for this

Asst. Sec. Larry Roberts Points

- Needs to be early, continued dialogue that gets to consent
- Money to support
- Properly educated workforce
- Need to protect resources

Seattle, WA – October 25, 2016 – Consultation

Federal Participants:

Mike Connor, Deputy Secretary of Interior

Scott Spellman, Brigadier General, Army Corps of Engineers

Larry Roberts, Assistant Secretary for Indian Affairs

Jody Cummings, Deputy Solicitor of Interior

Infrastructure Projects Listening and Consultations Session Key Points

Updated October 28, 2016

Dawn Baum, Office of Tribal Justice, Dept. of Justice

- The support for Standing Rock by all of Indian Country is because of the long history of federally approved development affecting tribal lands, waters, and sacred places. Every single Indian Nation has a story of federally approved destruction.
- All agencies issuing permits for infrastructure projects affecting tribal lands, waters, treaty rights or sacred places must demonstrate tribal trust compliance:
 - Fifty-seven million acres of tribal land are held in trust by the United States under binding legal obligations to protect the lands, waters, and Native communities residing thereon
 - The President and the Cabinet have an independent duty to fulfill the trust obligation to protect Indian lands, waters, treaty rights and sacred sites, including informed consent
 - Consultation requirements under Executive Order 13175
 - Statutory obligations applicable to the project: National Historic Preservation Act; National Environmental Policy Act; Clean Water Act; Native American Graves Protection and Repatriation Act; American Indian Religious Freedom Act; and other federal laws;
- A Tribal Trust Compliance Officer, who is knowledgeable about Indian tribes and tribal lands, should be appointed to the Federal Permitting Improvement Steering Council to make sure that the tribal trust compliance is integrated into all regulations and guidance implementing the FAST Act and any other federal infrastructure permitting in any agency;
- Tribal governments must be provided, in a manner similar to state governments, full and early participation in “purpose and need” infrastructure permitting discussions;
- Tribal governments must be provided, in a manner similar to state governments, funding for participation in federal permitting processes;
- The federal government must improve its communications with tribes. Federal agencies need to meet with tribes and develop methods of communication to ensure early tribal engagement;
- The federal government must promote tribal control over infrastructure development on Indian lands and lands where Indian tribes hold natural, cultural or spiritual resources;
- Army Corps regulations for compliance with NHPA Section 106 in permitting are fundamentally flawed. Appendix C was promulgated in 1990 and has not been revised to reflect 1992 NHPA Amendments which enacted a duty to consult with tribes. Appendix C states that the Corps “may consult” or “may coordinate” with tribes and ignores the statutory duty to consult. In addition, Appendix C has NOT been approved as an authorized alternative to the ACHP regulations.
- In its environmental review process, the Corps takes a limited view of its jurisdiction, analyzing only immediate permit areas, and ignoring anything else. This narrow approach allows the Corps to limit its role in adhering to the federal trust responsibility, and is especially problematic in the Nationwide Permit program, which often fails to consider impacts on tribal lands, waters and

Infrastructure Projects Listening and Consultations Session Key Points

Updated October 28, 2016

sacred places. This Corp program must be reformed to ensure tribal inclusion. The Corps should re-open the comment period on its proposed rule to reissue its nationwide permits, and specifically invite tribal comments.

- There are positive examples through the Federal Communications Commission of Section 106 working well. Tribes identify general areas where sacred places could be impacted, to ensure their protection. The Endanger Species Act uses a similar model to protect critical habitat. Land managing federal agencies should use their authority under section 110 of the NHPA (54 U.S.C. § 306102), in consultation with tribes, to manage historic properties on federal lands that hold religious and cultural importance for tribes to preserve the values of such places.
- The ACHP recommends and tribes support that federal agencies enter into Programmatic Agreements with tribes early in the consultation process for major infrastructure projects. These agreements set forth the steps to be taken by the agency to meet consultation requirements, and create accountability.
- Tribal leaders in their lifetimes have seen multiple attempts to develop sacred sites. Each time they disturb gravesites and cultural remains, and then the project fails. Don't want children to rebury their elders again and again.
- For sacred sites, Executive Order 13007 should be updated, or a new Executive Order Issued, to enhance informed consent protection.
- Congressional fix for NEPA and NAGPRA and long term action to implement it
- Northwest Tribes want a Regional Environmental Impact Statement on fossil fuel export plans to include cumulative impacts of all of the many projects under development.
- Rejection of the Johnson v. McIntosh domination of tribal lands.
- Standing Rock is a wake up call to everyone, not just the Indian Nations. The federal government has a responsibility to heed this call, and has a trust responsibility to protect the public as well as tribal lands. This is about all of our children.
- Larry Roberts, encourages a look at the Desert Renewable Energy Project. Landscape level planning, long-term planning, tribes involved very early and has been successful.
- Full and early consultation.
- Sites are often severely affected by the assessments even before the permitting. They bring in bulldozers and destroy sites, and then, whoops, we found a sacred site. Early consultation with tribes can prevent this.
- Direct negotiation with tribes and consent
- Training for Army Corps officials
- Cumulative impacts, including historical impacts, must be included.
- President Obama has set a good example. He has met with tribal leaders face-to-face eight times in eight years, and more than that in his visits to Indian country. If the President can do that, then the regional offices of the Army Corps or FERC or any federal agency should be able to schedule face-to-face meetings on local development projects that impact tribal lands.
- Local level consultation must be face-to-face.

Infrastructure Projects Listening and Consultations Session Key Points

Updated October 28, 2016

- We are familiar with permitting checklists. Too often the “tribal consultation” box gets checked when they send a letter, often to the wrong person or the wrong tribe. The letters don’t have much information; they are often so vague that we can’t figure out what it is about. Then we get hundreds of those every month. Staffing to respond to permitting inquiries is a big problem.
- The trust responsibility is more than a checklist.
- Nationwide Permits are a pitfall. This is what happened to Standing Rock.
- NW tribes don’t want the Columbia River to look like Prince William Sound after the Exxon Valdez
- Some tribes are trying to develop their own infrastructure. We need basic water, power, sewer. We don’t have bridges. Then we run into the federal and state bureaucracy.
- Jordan Cove LNG pipeline and export terminal. Coos, Lower Umpqua. Permits by FERC and Army Corps. Proposed site is the old village site, where tribal members still hunt and fish. Tribe was assured “small ground disturbance,” and assessments were performed. Now the application has changed to a massive ground disturbance, but the applicant still wants to use the old assessments. The Tribe intervened in the administrative proceeding, to protect their rights, and now FERC won’t consult because they cannot consult because it would be ex parte contact. Tribe is told to direct their concerns to the applicant. Ex parte rule: as soon as tribe disagrees with anything, then consultation ends.
- We need to rebuild the structure of consultation. There must be a lead agency who will consult with the tribe face-to-face. They use a FONSI, or Cat Ex, or Nationwide Permit, and suddenly there is no federal participation at all, and the project rolls forward with federal approval.
- Tribes need funding to participate in federal permitting. One Tribal Historic Preservation Officer managing 3 million acres and off-reservation sites with no staff and no funding.
- Port Angeles Dry Dock Project in 2003. They faxed one letter to a different tribe. Lower Elwha found out about it, but all their concerns were ignored. Dug up the ancient Klallam village of Tse-whit-zen. Three-hundred and thirty five human remains, 6000 cultural objects, then they stopped the project. This was such a huge waste. Consultation must be early, often, and ongoing.
- Swinomish. In 1894, the Army Corps dredged the river, and received complaints from tribal members about destruction of ancient fish traps and weirs, and their treaty fishing rights. Army Corps letter recommended that treaty rights must be abrogated. In 2016, some guy cut an illegal dike to park his boat. Private dike district wants to repair, but their proposal is essentially a new dike, not restoration. Tribe objects, treaty fishing habitat. Corps ignores tribe, no permit needed, it is just a repair.
- Section 106 consultation needs to consider not only construction, but also long term ongoing operations. We are constantly told that 106 can’t consider impacts after construction, and this is wrong.
- Archaeologists are always telling us our sacred sites are not “archeologically significant.” That isn’t the test. The sites have deep historical and cultural value to our people, long term ties to a place. That is the Section 106 test.

Infrastructure Projects Listening and Consultations Session Key Points

Updated October 28, 2016

- Know your projects better. Involve tribes in planning. Respect our abilities, we figure out lots of ways to work together, build infrastructure, and respect tribal culture.
- Puyallup, LNG Terminal in Tacoma. Notified only by a letter. Cultural site is also contaminated and disturbance will affect fish and wildlife. Army Corps refuses to share information, always forced to make FOIA requests. Then receive only 10 of 107 pages because the application is a decisional document. Then the tribe wanted a copy of the permit, and were forced to go through FOIA. Always a delay and withholding of information that prevents participation. They are making historical commitments of huge sites, without including tribes, no information to tribes. Tribe has historical experts and fisheries experts on the ground, and the federal studies are written by people who have never visited.
- Analogy to the U.S. Military overseas. If you have served overseas you have seen two things. 1) the water is often polluted and disgusting. We don't want that here. 2) We have all seen the American military cemeteries overseas, and we expect them to be respected. Tribal people expect the same for their gravesites.
- There is also a huge need for infrastructure on reservation. We don't have bridges. People drive 100 miles one-way to get to work in old cars. None of the infrastructure serves the reservation, it goes around, or cuts through. Water supply. Electricity. If we were at the table for infrastructure development, we also wouldn't always be last to get any infrastructure.
- Mike Connor. "Trust responsibility" is an unclear term to many in the federal government. President Obama gets it but you must continue to educate the next administration. Informed consent is real goal. Not just "check the box." Badger Two Medicine is an example where consultation can be a powerful tool for good. We need to develop a better process, so that all people can rely on process as a whole.
- Tribes need staffing and funding to keep up with permit reviews. Huge capacity problems.
- Every permit is separate. No study of cumulative impacts.
- The documents are inaccurate, incomplete, and are often short of garbage, they don't say anything. "Assessments will be completed in the future." Then the environmental assessment is considered an internal document, and tribe has to be really good at FOIA requests to find anything out. Absurd that Indian tribe has to play the FOIA game just to find out what is going on.
- One summary of NW tribes requests:
 - A regional environmental impact statement for fossil fuel export projects.
 - A strengthened executive order on protecting Indian sacred sites that includes language about informed consent.
 - Repealing part of the US Army Corps of Engineers' process that sidesteps other National Historic Preservation Act (NHPA) requirements.
 - A legislative update to the NHPA and National Environmental Policy Act that requires the tribes' informed consent on federally approved infrastructure projects.
 - Including "proper and meaningful tribal consultation" in President Obama's 2011 plan to fast-track infrastructure development.

Infrastructure Projects Listening and Consultations Session Key Points

Updated October 28, 2016

- If there were a theme for the consultation, it seems like “missed opportunities.” The story of the dock development at Lower Elwha is a prime example. In 2003, the Developer and state and Army Corps all ignored consultation with Lower Elwha S’Klallam.

Albuquerque, NM – October 28, 2016 – Consultation

- Sen. Tom Udall (D-NM): Congress needs to be a part of the solution and the Senate Committee on Indian Affairs (SCIA) needs to be involved in both questions posed by administration – this should be at the top of SCIA agenda and I will make sure it is.
- Rep. Michelle Lujan-Grisham (D-NM): must create a strong tribal consultation platform
- Col. D. Peter Helmlinger – Army Corps South Pacific Division: Looking to create a short plan of action for end of admin and a long term for one for the next admin
- Tribes needs have signatory authority for NHPA Section 106 and 110 agreements to protect sacred places; it allows informed consent and provides tribes to have legal avenues
- Tribes need to be treated as sovereign governments, not as the general public
- Tribes need equal authority with the federal government in these projects
- Appendix C needs to be repealed
- Issues with FERC and hydropower leasing, many levees go through tribal lands
- Tribes don’t want to stop these projects, but the federal government cannot have the unilateral authority to approve them; the federal government has liability or obligation to protect sacred sites after permits are issued
- Federal government must respect tribal identification of sacred sites and use non-Native architects that don’t understand tribal
- Need clear guidance for the confidentiality of sacred sites especially under Section 304 of the NHPA
- Check the box consultation is not acceptable, even if it satisfies a statute, it doesn’t meet trust responsibility
- Consultation should be face to face and between tribal and federal leadership; especially when there is a direct nexus between projects and tribal resources/land bases
- Tribal silence on an issue does not mean consent; the U.S. should take steps to make sure that a tribe that hasn’t engaged isn’t interested in the project
- More resources for tribes, like grants, for capacity building to help meet the consultation needs and help tribes with consultations
- The existing legal framework could be adequate, only if it commits to a more robust and early consultation
- Snow Bowl and San Francisco Peaks – another example of an infrastructure project that impacts a sacred place; we shouldn’t have to live there to have it protected
- If tribes fail to comply with NEPA, tribal funds are taken, but the federal government doesn’t have the same standards for its own agencies
- Working with Forest Service on uranium mining permits; tribes got Mt. Taylor designated as a sacred place
- Consultation varies region to region and agency to agency; need a standard set of procedures with specific steps

Infrastructure Projects Listening and Consultations Session Key Points

Updated October 28, 2016

- When consultation happens, it's usually after the federal government has made its mind up on a project and is just a checking the box exercise
- Federal government must oppose any project that harms our cultural and natural resources; NEPA also can consider cultural impacts; mitigation cannot occur after construction actions, it must happen before
- Tribal consent should be required for actions that will harm tribal resources
- Understand that tribes are unique; we are consider endanger communities like species, and the species get funding for protection, so why don't we as tribes get funding
- Need to consult and meet directly with tribal leaders and tribal communities for input (not border towns); meetings directly with tribal councils and elected and appointed leadership
- Right after Mt. Taylor was designated a Traditional Cultural Property, the energy company build wind turbines on it that are an eye sore and didn't consult the tribes because they were built on private land
- Good tribal, federal, and state working relationship on NM-DOT highway project because they're working with the tribes to address concerns and needs
- Tribes spend too much of their limited resources trying to get the federal government to follow the laws already in place.
- We need decision makers at the table; all information on projects should be provided before our meetings; when we submit comments there is no report back to us,
- A uniform process must be provided for all agencies and set a standard of procedures for them to follow.
- Must be consulted on all projects that happen in our treaty and ancestral homelands; and tribes must have authority like states do to oppose projects
- Requirement for free, prior, and informed consent on all projects that cross tribal homeland and impact tribal rights
- Work with congress to develop legal framework for trustee that will mirror the UNDRIP free, prior, and informed consent
- Update Executive Order 13175 to include free, prior, and informed consent.
- Many agency decisions without the knowledge of other agencies' actions and there is lack of ultimate tribal trust authority; tribes cannot track down the responsible people at every agency; interagency cooperation is a necessity when actions happen on trust lands; tribal governments need to know who is ultimately making the decision and is account to the tribe
- There should be a consultation in Oklahoma because of the number of tribes and the issues with fracking.
- Tribes need to be briefed on projects first and foremost; often we get a letter to the government that says that something is going to happen with a project, and we're left scrambling to address it; must be early and at the leadership level.
- Follow-up on our comments and input doesn't happen; our comments or concerns are sometimes addressed or ignored, but we don't know

Infrastructure Projects Listening and Consultations Session Key Points

Updated October 28, 2016

- Eliminate impersonal nature of dear tribal leader letters; address letters to the right tribal departments and the people
- Fund THPOs and THPO programs – there is some money but every new THPO takes away money from everyone
- The federal government goes out of its way to train people in foreign service and requires them to pass a test, yet here in united states civil service working with sovereign nations does not require training in culture, religions, or sacred sites; we must have a First Nations Service
- Hard to draw the line around what is sacred.
- Need to penalize the federal agencies for non-compliance; if there is no penalty then they won't consult
- If any agency isn't complying it should be suspended and another agency should be put in the lead of that project
- Nuclear Regulatory Commission is the worst at consultation – they're funded by the industry, not appropriations
- EAs and FONSI should not be used to get out of doing an EIS, especially on infrastructure projects
- National wide programmatic agreements shouldn't be allowed; regions are all different, you can't throw them into the same category
- Executive Orders need to be more binding so they do not change from administration to administration
- Army Corps Bulletin 38 is limited
- The 1872 mining act needs to be changed
- Since many state burial laws are all different, need a better understanding of tribal burial rights
- Tribes need to manage or co-manage lands near their reservations
- Col. D. Peter Helmlinger – Army Corps South Pacific Division, summary of themes: Better informed consent and signatory authority; Free, Prior, and Informed Consent as the standard; Clear guidance on confidential of sacred sites; Consultation must meet trust compliance; Stand procedures across the government; More face to face consultation with appropriate leaders; Accountability and assistance in enforcement