



Federal Permitting Improvement Steering Council – Office of the Executive Director

Tribal Consultation Summary Report for Permitting Council Members

October 2021

Introduction

The Federal Permitting Improvement Steering Council (Permitting Council), Office of the Executive Director (OED) held four Tribal consultations in September 2021:

- September 20, 2021 (10:00-11:30 a.m. ET): Eastern, Eastern Oklahoma, and Southern Plains Regions
- September 21, 2021 (3:30-5:00 p.m. ET): Pacific, Northwest, and Alaska Regions
- September 27, 2021 (11:00-12:30 p.m. ET): Great Plains, Midwest, and Rocky Mountain Regions
- September 28, 2021 (2:30-4:00 p.m. ET): Navajo, Southwest, and Western Regions

The purpose of the consultations was to introduce the Permitting Council and the statute it administers (Title 41 of the Fixing America's Surface Transportation Act (FAST-41)), provide an overview of OED's Tribal Initiative, and receive input from Federally recognized Tribes on key priorities and challenges in the Federal environmental review and permitting process for infrastructure projects to be used in formulating and updating best practices for Tribal engagement in the Federal environmental review and authorization for FAST-41 covered projects. OED summarized input received from Tribes and incorporated these considerations into the most recent Draft Best Practices on Enhancing Early Tribal Engagement for Fiscal Year 2022.

Key Themes and Take-Aways

This section summarizes the feedback received from Tribal representatives during the Tribal consultation sessions.

Timing of Engagement

Some Tribal representatives emphasized that the timing of Federal agency engagement with Tribes is critical for meaningful consultation on infrastructure projects, and some representatives encouraged agencies to engage with them as early as possible in the project review and permitting process (e.g., during scoping for National Environmental Policy Act (NEPA) analyses). Some Tribal representatives explained that early, meaningful engagement is beneficial to the government and the Tribes. For example, Tribes' unique knowledge and expertise about

natural and Tribal resources and potential project benefits and impacts often is not reflected in existing off-the-shelf scholarship due to lack of historical engagement and other factors. Some Tribal representatives expressed that the government's direct and early engagement with Tribes on project proposals would allow Federal agencies to begin incorporating Tribes' unique knowledge at the outset of the Federal environmental review and authorization process rather than too late in the process for the information to be actionable. Some Tribal representatives expressed the belief that, because Tribes are not consulted early or meaningfully, Tribes must as a last resort pursue legal action against the Federal government to enforce their rights.

Some Tribal representatives expressed the view that timeframes for Tribal review of project-related proposals and analyses are frequently too short or do not align with time periods in which resources of cultural or religious significance to Tribes are present. One Tribal representative offered the example that some plants of cultural significance are seasonal and therefore may not be present for identification in a given 30- or 60-day timeframe. Tribes emphasized that meaningful and effective engagement should account for these considerations.

Some Tribal representatives explained that the pandemic has placed increased stress on Tribes and Tribal resources, and that extended review times, especially for large, complex infrastructure projects, are critical for Tribes to be able to meaningfully engage in the review process.

Coordinating Engagement and Considering Cumulative Impacts

Some Tribal representatives asserted a general lack of Federal agency coordination with external parties and other Federal and state agencies on cross-cutting issues in the environmental review and authorization process. Some Tribal representatives requested greater interagency and external agency coordination in circumstances where there are cross-jurisdictional issues, such as those that implicate Tribes, states, and/or other Federal agencies. Some Tribal representatives additionally recommended a modified Federal environmental review and permitting structure that clearly accounts for Tribal engagement, clearly delineates the scope of each agency's jurisdiction, and consolidates opportunities for Tribal review of proposed agency actions to avoid over-taxing Tribal resources to engage on a given project.

Some Tribal representatives emphasized the importance of examining the cumulative impact of government actions on Tribes and Tribal interests, rather than only considering impacts on a project-by-project basis. Some Tribal representatives specifically referenced the Bureau of Ocean Energy Management's offshore wind projects as examples of the need to examine the cumulative impacts of multiple projects. Relatedly, some Tribal representatives requested that the U.S. government consult Tribes on project-related effects that may extend beyond the boundaries of reservations, because projects may impact important Tribal resources outside reservation borders.

Sequencing of Project Review and Permitting

Tribal representatives expressed that analysis and consultation conducted pursuant to NEPA and Section 106 of the National Historic Preservation Act (NHPA) are often not well aligned or sequenced. For example, NEPA Records of Decision (RODs) sometimes are issued *before* the NHPA Section 106 process is complete, which, according to some Tribal representatives, suggests that the permitting decisions were made without full consideration of impacts on Tribal or historic resources. Some Tribal representatives indicated an unwillingness to sign NHPA Section 106 programmatic agreements that post-date a ROD or other project decision making.

Methods of Engagement

Some Tribal representatives highlighted that Federal agencies often engage with Tribes through third-party consultants, which, in their view, does not fulfill the United States' government-to-government consultation responsibility, undermines continuity of communication and policy, and frustrates the sharing of confidential Tribal information with the U.S. government. Tribal representatives emphasized that the government-to-government relationship between Tribes and the United States is unique and does not implicate the general public, contractors, or project sponsors.

Some Tribal representatives highlighted the importance of agency engagement with Tribal representatives who are empowered to share comments and questions on behalf of the Tribe, particularly the Tribal Historic Preservation Officer and other cultural resource staff. Tribal representatives requested that Federal agency outreach to Tribes include more than one Tribal contact, if possible, to ensure that the outreach messages reach the correct Tribal member(s).

Mitigation and Financial Resources

Some Tribal representatives asserted that the financial burden of monitoring project-related activities and impacts frequently falls on affected Tribes, and they requested that agencies consider funding Tribal monitoring so that Tribes are not burdened with monitoring costs. A Tribal representative suggested that processing fees are expensive, and exempting Tribes from processing fees required under Federal regulations or policy would be welcome.

Some Tribal representatives expressed a need for compensation for impacts through mitigation efforts. Tribal representatives expressed that, frequently, agencies do not allocate sufficient funding for mitigation to compensate for impacts to Tribes. Tribal representatives noted that early Tribal engagement would better enable agencies to identify effects that require mitigation planning.

FAST-41 Awareness and Applicability

One Tribal representative asked if and when the annual meeting of the Permitting Council with “groups or individuals representing State, Tribal, and local governments that are engaged in the

infrastructure permitting process” would take place (42 U.S.C. § 4370m–1(c)(2)(C)). The Tribal representative further requested additional information related to the inclusion of “any coordination plan between the facilitating or lead agency, as applicable, and any State, local, or tribal agency” in a memorandum of understanding, to the maximum extent practicable (42 U.S.C. § 4370m–2(c)(3)(C)).

Some Tribal representatives indicated a general lack of awareness of which projects are FAST-41 covered projects. Some Tribal representatives expressed that increasing awareness of project coverage could aid in clarifying for Tribes the steps and authorities in the environmental review and authorization process.

Some Tribal participants indicated interest in broadband deployment on Tribal lands and noted that individual Tribal broadband projects likely will not reach the \$200 million threshold to qualify for the FAST-41 covered project “objective” criteria (42 U.S.C. § 4370m(6)(a)(i)). One Tribal member recommended that the Permitting Council consider aggregating multiple projects to meet the \$200 million threshold. OED explained that individual projects potentially could be “covered” pursuant to the FAST-41 “discretionary” criteria (42 U.S.C. § 4370m(6)(a)(iii)), and that, under the then-proposed FAST-41 reauthorization bill (subsequently enacted as the Infrastructure Investment and Jobs Act on November 15, 2021), Tribal-sponsored projects on Tribal lands could become FAST-41 covered projects without meeting the \$200 million threshold contained in the “objective” criteria.

Tribal Directory Assessment Tool (TDAT) Improvements

Some Tribal representatives were interested in the timeline for TDAT enhancements and expressed that the Tribal contacts provided through TDAT are often inaccurate and are not updated regularly, and that there is not a well-known mechanism for regular updates. These representatives also questioned why TDAT is operated by HUD and stated that the Department of the Interior’s annual list is more accurate and reliable.