

Presented by the Idaho State Bar
Environment & Natural Resources Law Section

The Intersection of Environmental Law and Tribal Nations

February 23, 2023
Perkins Coie, LLP, Boise
and
Live Webcast



*Approved by the Idaho State Bar for
4.0 CLE Credits*

Program Agenda

- 12:00 p.m.** **Hosted Lunch**
- 12:15 p.m.** **Protecting Tribal Reserved Rights:
The EPA's Proposed Revisions to Water Quality Standards**
Jennifer Brundage
Lauren Maher
U.S. Environmental Protection Agency
- 1:00 p.m.** **Tribal Specific NEPA Considerations**
Ted Boling
Perkins Coie LLP, Washington DC
- 1:45 p.m.** **The Myths and Triggers of Tribal Engagement**
Collette Brown-Rodriguez
Avantus
Maranda Compton
Lepwe Inc.
- 2:30 p.m.** **Break**
- 2:45 p.m.** **Tribal Equity and Transportation Planning in Idaho**
Cecilia Arritola
Idaho Department of Transportation
- 3:15 p.m.** **Trust Duties and Emerging Considerations Related to the
National Historic Preservation Act**
Stacey Bosshardt
Perkins Coie LLP, Washington DC
- 4:00 p.m.** **Coordinating with State Agencies, Tribes, and the Federal Government
On NEPA, a State Perspective**
George Lynch
Richard Stover
Idaho Governor's Office of Energy and Mineral Resources
- 4:30 p.m.** **Program Concludes**

This program was produced in 2023. Since the law is constantly changing, you are cautioned to use this information only as a starting point for your own research and are urged to consult applicable resources to determine the current state of the law. Similarly, since the application of law is dependent upon each particular fact pattern, you should always independently research the particular issues in any case.

- **CLE Credit:** The Idaho State Bar will automatically record your attendance today by your signing on to the webcast. You do not need submit your credit in your online account and your online account will not reflect your credit for CLE courses that are indicated as “LIVE EVENTS.”
- You will receive a Certificates of Attendance via email in 1 to 2 weeks.
- Your attendance will show on the ISB website’s [Attorney Attendance Records](#) approximately 2-3 weeks after you receive your certificate.
- The Course materials are available in your online classroom, in the upper left-hand corner of the screen under the materials tab.
- To ask questions, please use the Q & A tab at the top of your screen. Our speaker will answer the questions as s/he is able to.

About the Speakers

Jennifer Brundage **U.S. Environmental Protection Agency**

Jennifer Brundage is the rule manager for the U.S. EPA's Proposal to Revise the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights. She is a Regional Liaison with the Office of Science and Technology in EPA's Office of Water. Jennifer has worked at the intersection of tribal reserved rights and water quality standards since 2015. She holds a Bachelor of Science in Environmental Biology from McGill University and a Master of Science in Marine, Estuarine, and Environmental Science from the University of Maryland.

Lauren Maher **U.S. Environmental Protection Agency**

Lauren Maher is an attorney in the U.S. Environmental Protection Agency (EPA)'s Office of General Counsel. She provides legal advice on issues arising under the Clean Water Act, the Administrative Procedure Act, as well as the intersection between federal Indian law and the statutes that the EPA administers. Lauren assists the Agency in preparing and defending Clean Water Act actions and regulations and served as the lead attorney on a Clean Water Act Supreme Court case. Lauren has received numerous awards for her counseling work, including a Department of State Meritorious Honor Award and the Trudy A. Speciner Award for Environmental Protection. Lauren is a graduate of Georgetown University and American University Washington College of Law, where she received a three-year full-tuition public service scholarship.

Ted Boling **Perkins Coie LLP**

As an associate director at the President's Council on Environmental Quality (CEQ), **Edward (Ted) Boling** served as the country's top National Environmental Policy Act (NEPA) attorney. He currently advises clients on the development of renewable energy, resource development, transportation, and infrastructure, drawing on over 30 years of high-level public service. Ted served in the U.S. Department of the Interior (DOI), CEQ, and the U.S. Department of Justice (DOJ) in both Democratic and Republican administrations. His experience includes deep involvement in federal infrastructure issues, as well as leadership of the first comprehensive revision of CEQ's NEPA regulations in 40 years.

Collette Brown-Rodriguez
Avantus

Collette Brown-Rodriguez is a member of the Confederated Salish Kootenai Tribe and descendant of the Navajo Nation. Passionate about utilizing multidisciplinary expertise & public speaking background to influence tribal affairs while delivering optimal business results. Earned a Bachelor's in Environmental Science from Salish Kootenai College in Pablo, Montana and earned a Master's in Business Administration from the University of Arizona in Tucson, Arizona. With 20+ years of experience as a project management & program development leader focused on natural resource development and tribal affairs, she has been integral to executing complex problem solving, resource management, and establishing organizational cohesion to engage tribes across North America. She has experience in uranium mine reclamation, coal, oil & gas, and base metals mining operations and project development. Currently she is the Director, Community and Tribal Relations for Avantus (Formerly 8minute Solar) company. She also serves as one of the Independent Directors of Apollo Silver a silver exploration and resource development company based in Vancouver.

Maranda Compton
Lepwe Inc.

Maranda Compton is a nationally recognized expert and frequent speaker on issues of Native American law and policy. She is the Founder and President of Lepwe, a strategic consulting firm advising Tribal Nations and the non-tribal entities that seek to consult, engage, and partner with them. Prior to Lepwe, Maranda worked in private practice and pairs her extensive knowledge of Federal Indian Law and Tribal Law with practical, business-focused strategies that help clients navigate the various legal, investment, government relations, and public relations issues that arise when developing and operating projects within or impacting Indian Country. She consults on matters of environmental permitting and treaty rights, Tribal consultation and partnership, Tribal regulation, commercial financing for Trust assets, and equity metrics such as Environmental Justice, Justice 40, and ESG. In addition, Maranda is a thought-leader on Indigenous-focused education and regularly facilitates trainings for non-native organizations on the legal rights, histories, and contemporary cultures of Tribal Nations in the United States. Maranda is a citizen of the Delaware Tribe of Indians (one of three federally recognized Tribal Nations of Lenape people within the United States), as well as a mom of two, a resident of Missoula, Montana, and an adjunct professor at the University of Montana Alexander Blewett III School of Law.

Cecilia Arritola
Idaho Department of Transportation

In her current role, **Cecilia Arritola** is ITD's Program Lead for the NEVI Formula Program, Idaho's first Electric Vehicle program effort. She also works closely with the 5 Metropolitan Planning Organizations (MPO's) within Idaho. Cecilia is currently leading efforts to prioritize equity for all transportation funding and projects within Idaho. She has extensive experience partnering with local planning agencies, local citizens, relationship within all disadvantaged communities, and collaboration with economic development agencies across Idaho. Cecilia has two young sons, whom she spends much of her time with. You will find her exploring hot springs across Idaho, dancing, enjoying concerts, spending time with family, and loves to travel and explore new cities. She is very involved in her Boise community, cares deeply about creating safe community and thriving spaces that are inclusive for all Idahoans. She lives in Boise with her two boys, Nano and Luka.

Stacey Bosshardt
Perkins Coie LLP

Stacey Bosshardt litigates environmental and administrative law cases. She represents mining, energy, pipeline, and other business and governmental clients in environmental and natural resources litigation throughout the country. Stacey's substantial experience includes positions as assistant section chief and senior trial attorney in the Natural Resources Section of the U.S. Department of Justice (DOJ), Environment and Natural Resources Division, where she litigated and supervised dozens of cases brought in U.S. district courts. Her experience with cases involving public lands includes litigation under the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, Clean Water Act, Federal Lands Policy Management Act, Mineral Leasing Act, National Forest Management Act, and Administrative Procedure Act.

George Lynch
Idaho Governor's Office of Energy and Mineral Resources

George Lynch is Legal Counsel of the Idaho Governor's Office of Energy and Mineral Resources. Lynch previously served as Senior Policy Advisor at the Idaho Commerce Department. Before moving to Idaho, Lynch was Senior Legal Editor at Bloomberg and clerked in several federal agencies and served as a Fellow in the U.S. House of Representatives. Lynch has taught courses on international law at Boise State University and is the American Red Cross lead lecturer on International Humanitarian Law. Mr. Lynch has a JD and master's degree in foreign policy from American University and a LL.M. in international law from George Washington University Law School.

Richard Stover
Idaho Governor's Office of Energy and Mineral Resources

Richard Stover is the Administrator of the Idaho Governor's Office of Energy and Mineral Resources. Prior to his appointment to OEMR, Stover provided legal counsel to a broad range of Idaho citizens, businesses, and public entities, as a partner with Boise law firm Eberle, Berlin, Kading, Turnbow & McKlveen, Senior Counsel for Government Relations at Boise State University, and Assistant City Attorney for the City of Boise. Stover also served as natural resource policy staff for Idaho Governors Phil Batt and Dirk Kempthorne and a judicial extern for U.S. District Judge Edward J. Lodge. Stover holds a Juris Doctor degree from the University of Idaho and a Bachelor of Arts from the College of Idaho. Stover and his wife Sara are proudly raising their three children in the Gem State.



Proposed Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights

Idaho State Bar Association
Tuesday, February 23, 2023

Jennifer Brundage and Lauren Maher
U.S. Environmental Protection Agency



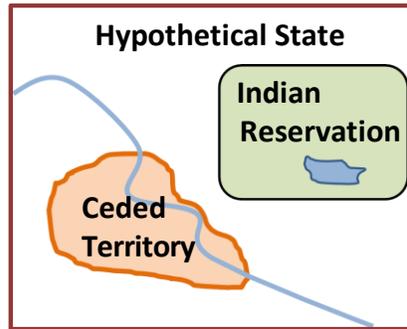
Overview

- EPA is proposing revisions to the federal water quality standards regulation (WQS) at 40 CFR Part 131.
- The proposed revisions describe how WQS must protect aquatic and aquatic-dependent resources – such as fish and wild rice - reserved to tribes through treaties, statutes, executive orders, or other sources of federal law, in waters of the United States.
- Once final, this proposal would create a regulatory framework to be applied case-specifically to ensure that WQS protect resources reserved to tribes.



Scope of Tribal Reserved Rights Rule

- Waters where states establish WQS (e.g., in ceded territory).
- This proposed rule is separate from EPA's work to propose baseline WQS for waters on Indian reservations that currently do not have CWA-effective WQS in place.



3



Background: What Are Water Quality Standards?

- Define the water quality goals for a waterbody
- 3 key components: designated uses, criteria, and antidegradation policy
- Basis for
 - [Listing waters as impaired](#)
 - [Total maximum daily loads \(TMDL\)](#)
 - [Water quality-based effluent limits](#)
 - [Certification under section 401 of the CWA](#)

4

4



Background: How Are Water Quality Standards Established?

- Adopted into state or authorized tribal law
- After a state or authorized tribe adopts new or revised WQS, the CWA requires the state or authorized tribe to submit them to EPA for approval or disapproval
- EPA reviews state and authorized tribal submissions for compliance with the federal WQS regulation at 40 CFR part 131
- Where the EPA Administrator determines new or revised WQS are necessary for a state or tribe, the CWA authorizes EPA to promulgate federal WQS.

5

5



Proposed Regulatory Revisions: New 40 CFR 131.9

- “(a) [WQS] must protect tribal reserved rights applicable to the waters subject to such standards.”
- “... [WQS] must, to the extent supported by available data and information, be established to protect:
- (1) The exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource; and,
 - (2) The health of the right holders to at least the same risk level as provided to the general population of the state.”

6

6



New 40 CFR 131.9(a)(1): Accounting for Suppression

- Intended to address situations where existing water quality is lower than necessary to allow for right holders to fully exercise their tribal reserved rights
- EPA is not proposing that WQS must always protect the waterbody condition that existed at the time a reserved right was established.
- This proposal, if finalized, would not establish any nationally applicable thresholds for unsuppressed levels or use of a resource.

7

7



New 40 CFR 131.9(a)(2): Protecting the Health of the Right Holder

- Intended to establish acceptable risk (e.g., cancer risk level) for tribal members whose exercise of reserved rights may put them at greater risk than the general population, e.g., due to higher rates of fish consumption.
- Specify that tribal members exercising applicable reserved rights should be exposed to no greater than a 1 in 100,000 cancer risk, per EPA's current guidance for the general population.

8

8



Implementing New 40 CFR 131.9(a)

- Where relevant reserved rights apply will be informed by several factors, including input from the right holders, and language of the treaties, statutes, or executive orders and relevant judicial precedent.
- To determine the WQS that protect those rights, EPA recommends that states request information from the right holders such as types of pollutants perceived to be impacting their rights, key aquatic species, and/or consumption rates.
- EPA encourages right holders to proactively share any such information with states and EPA.

9



New 131.9(b): Initiating Consultation

- If finalized, this rule would *require* EPA to initiate consultation with right holders, consistent with applicable EPA tribal consultation policies, in determining whether state WQS protect applicable reserved rights.
- EPA's policy and longstanding practice is to consult on a government-to-government basis with tribes when EPA actions such as WQS approval/disapproval decisions may affect tribal interests.
- The rule would not require tribes to consult with EPA if they did not wish to.

10

10



New 131.9(c): How To Incorporate Protection of Tribal Reserved Rights into WQS

“In order to meet the requirements in paragraph (a) of this section, States must:

- 1) Designate uses...that either explicitly incorporate protection of tribal reserved rights or encompass such rights; and
- 2) Establish water quality criteria...to protect tribal reserved rights; and/or
- 3) Use applicable antidegradation requirements to maintain and protect water quality that protects tribal reserved rights.”

States could also choose to combine these methods. 11



New §131.6(g): Minimum Requirements for Water Quality Standards Submission

Where tribal reserved rights apply, WQS submissions would need to include:

- “1. Information about the scope, nature, and current and past use of the tribal reserved rights, as informed by the right holders; and
2. Data and methods used to develop the [WQS].”

EPA is also proposing conforming revisions to 40 CFR §131.5 (“EPA Authority”)

12



Proposed Revision to §131.20 WQS Triennial Review

“The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards...This review shall include evaluating whether there are tribal reserved rights applicable to State waters and whether water quality standards need to be revised to protect those rights pursuant to §131.9.”

13

13



Potential Benefits

- By laying out how EPA would review state WQS that impact aquatic resources reserved to tribes, this proposed rule would improve protection of
 - resources reserved to tribes, and
 - the health of tribal members exercising their reserved rights.
- The proposed regulatory framework is also intended to provide transparency and predictability for tribes, states, regulated industries and municipalities, and the public.

14

14



Next Steps

- The public comment period is ongoing through March 6, 2023. Please submit written comments via the online docket at <https://www.regulations.gov/docket/EPA-HQ-OW-2021-0791>.
- Pending review of comments, EPA anticipates finalizing this rule in late 2023.



TRIBAL SPECIFIC NEPA CONSIDERATIONS

EDWARD (TED) BOLING | PARTNER

PERKINScoie
COUNSEL TO GREAT COMPANIES

Edward (Ted) Boling | Partner Perkins Coie

- Served as Associate Director for NEPA (2016-20), Senior Counsel (2009-10), General Counsel (2008-09), and Deputy General Counsel (2000-07) at the Council on Environmental Quality (CEQ) in the Executive Office of the President
- Served as a deputy solicitor (2012-16) and as counselor to assistant secretaries (1997-98, 2010-12) at U.S. Department of the Interior. Trial attorney at U.S. Department of Justice (1990-97, 1998-2000)
- Deep involvement in federal infrastructure permitting issues and the first comprehensive revision of CEQ's NEPA regulations in over 40 years
- Advises leaders on transportation and energy development projects, agencies that must hire outside counsel, and the environmental professionals that support them on the development of renewable energy, resource development, transportation, and infrastructure.
- Drafted NEPA guidance on mitigation and monitoring, cumulative impacts analysis, and the development of categorical exclusions
- Advised White House on the establishment of national monuments, including the first marine national monuments in the United States
- Washington University School of Law (J.D. 1990)



PERKINScoie

What is NEPA?

- A statement of national environmental policy:
 - “to promote efforts which will prevent or eliminate damage to the environment and the biosphere and stimulate health and welfare of man”
 - “to enrich the understanding of the ecological systems and natural resources important to the Nation”
 - “encourage productive and enjoyable harmony between man and his environment”
- Procedural requirements for federal agencies to implement that national environmental policy
- Authorizing legislation for a Council on Environmental Quality (“CEQ”) to implement that national environmental policy

3 | © 2020 Perkins Cole LLP

PERKINScoie

Where Do You Find It?

- The Statute
 - 42 U.S.C. §§ 4321 – 4347
- NEPA “streamlining” (e.g., FAST Act)
 - 42 U.S.C. § 4370m et seq.
- The Regulations – Many Different Sources
 - CEQ, 40 C.F.R. Parts 1500 – 1508
 - Federal agency NEPA procedures approved by CEQ
- Caselaw
 - Thousands of judicial decisions over the last 50 years.
 - Seventeen cases in the Supreme Court.

4 | © 2020 Perkins Cole LLP

PERKINScoie

Infrastructure Investment and Jobs Act

Public Law No: 117-58

NEPA-RELATED PROVISIONS

- SEC. 11301. CODIFICATION OF ONE FEDERAL DECISION
- SEC. 11311. EFFICIENT IMPLEMENTATION OF NEPA FOR FEDERAL LAND MANAGEMENT PROJECTS.
- SEC. 11318. CERTAIN GATHERING LINES LOCATED ON FEDERAL LAND AND INDIAN LAND.
- SEC. 14002. ENVIRONMENTAL REVIEWS FOR CERTAIN TRIBAL TRANSPORTATION FACILITIES.
- SEC. 14003. PROGRAMMATIC AGREEMENTS FOR TRIBAL CATEGORICAL EXCLUSIONS.

The Statute

- “Action Forcing” – 42 U.S.C. § 4331(a)
 - “it is the continuing policy of the Federal Government ... to use all practicable means and measures,...to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a)
- The Action Required – 42 U.S.C. § 4332(C)
 - For every “major Federal action[] significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
 - (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided...,
 - (iii) alternatives to the proposed action,...

The Regulations

- **CEQ Regulations**
 - Promulgated in 1978 to provide step-by-step instructions on the implementation of NEPA
 - Prior to 2020, only one regulation amended once – 40 C.F.R. § 1502.22 (1986) – incomplete or unavailable information
 - Entitled to “substantial deference.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989).
 - CEQ Regulations revised for the first time, 85 Fed. Reg. 43304-76 (July 16, 2020).
 - CEQ has finalized three amendments, 87 Fed. Reg. 23453 (April 20, 2022), with more to be proposed in 2023.

Agency Implementing Regulations

- Other Agencies Have CEQ-Approved NEPA Implementing Regulations:
 - Department of the Interior, 43 C.F.R. Part 46
 - [516 DM 10: Managing the NEPA Process - Bureau of Indian Affairs](#)
 - [59 IAM 3-H: Indian Affairs NEPA Guidebook](#)
 - [National Oceanic and Atmospheric Administration, Administrative Order \(NAO\) 216-6A](#)
 - Army Corps of Engineers, 33 C.F.R. Part 230
- No agency has updated regulations to incorporate the 2020 CEQ revisions

Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

Sec. 2. Immediate Review of Agency Actions Taken Between January 20, 2017, and January 20, 2021

- Agency actions subject to review are those “regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of this order.”
- Agencies are directed to “consider suspending, revising, or rescinding the agency actions.”
- Directs DOJ to notify courts with pending litigation on any action being reviewed to consider a stay

E.O. 13990 Sec. 7 Revocations

Executive actions revoked or suspended with direction to agency heads to consider whether to recommend a replacement order include:

- Executive Order 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects
“The Director of OMB and the Chair of the Council on Environmental Quality shall jointly consider whether to recommend that a replacement order be issued.”
- CEQ is directed to rescind its June 2019 draft guidance on GHG guidance. CEQ, as appropriate and consistent with applicable law, shall review, revise, and update its “Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews,” 81 Fed. Reg. 51866 (Aug. 5, 2016).

E.O. 14008: Tackling the Climate Crisis at Home and Abroad

- CEQ’s review of the 2020 NEPA rule will need to be coordinated with the Department of the Interior’s Section 207 review of:
 - “siting and permitting processes on public lands and in offshore waters to . . . increase renewable energy production on those lands and in those waters, with the goal of doubling offshore wind by 2030 while ensuring robust protection for our lands, waters, and biodiversity and creating good jobs.”
- CEQ’s NEPA review will need to include Section 213 provisions:
 - “to ensure that Federal infrastructure investment reduces climate pollution, and to require that Federal permitting decisions consider the effects of greenhouse gas emissions and climate change”; and
 - “to accelerate the deployment of clean energy and transmission projects in an environmentally stable manner.”

Conservation & Environmental Justice

Under E.O. 14008, development of renewable energy production and transmission will have to be harmonized with other goals:

- Section 216, of conserving at least 30 percent of our lands and waters by 2030; and
- Section 219, of securing environmental justice and spurring economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.

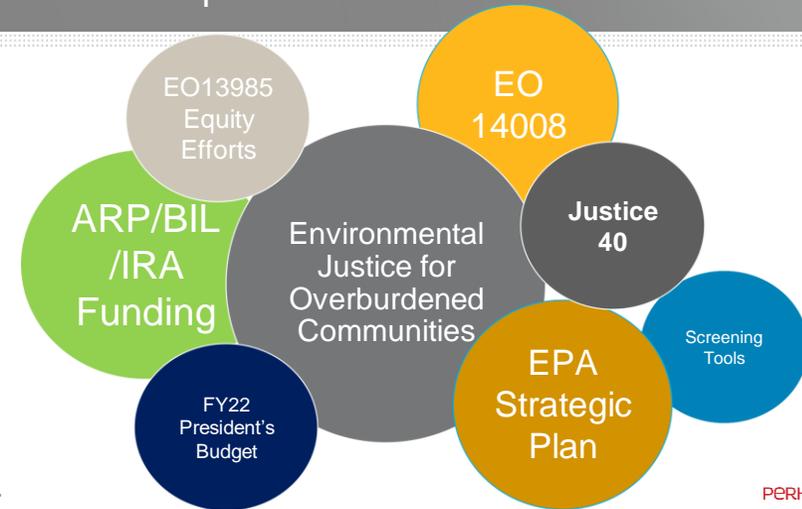
DOI Secretarial Order 3399

- S.O. 3399 instructs Interior bureaus/offices to implement 2020 CEQ NEPA regulations only:
 - Without changing the “application or level of NEPA” compliance that would have occurred under the prior CEQ regulations and,
 - consistent with Department’s own NEPA regulations, the Departmental Manual, and guidance from the Department’s Office of Environmental Policy and Compliance.
 - Departmental regulations found to “irreconcilably conflict” with the 2020 CEQ regulations must be referred for resolution by the Department and CEQ.
- Tribal Consultation and Environmental Justice Engagement in NEPA.
 “Historically, many Federal agencies have not consistently obtained Tribal input or coordinated with Tribes to integrate Tribal concerns into the decision-making process. Tribal consultation is a means to rectify this by recognizing the government-to-government relationship and considering Tribal interests in decision making.”

13 | © 2020 Perkins Coie LLP

PERKINScoie

The EJ Landscape at EPA



14 | © 2020 Perkins Coie LLP

PERKINScoie

Multiyear Strategic Plan EJ and CRC Commitments

Goal 2: Environmental Justice	Obj 2.1	All EPA programs that seek feedback and comment from the public will provide capacity-building resources to communities with environmental justice concerns to support their ability to meaningfully engage and provide useful feedback to those programs.
		Include commitments to address disproportionate impacts in all written agreements between EPA and Tribes and states (e.g., grant work plans) implementing delegated authorities.
		EPA programs with direct implementation authority will take at least 100 significant actions that will result in measurable improvements in Indian country.
		All state recipients of EPA financial assistance will have foundational civil rights programs in place.
		Increase by 40% the number of Office of Research and Development activities related to environmental justice that involve or are applicable to Tribes, states, territories, local governments, and communities.
	Obj 2.2	Reduce disparities in environmental and public health conditions represented by the indicators identified through the FY 2022-2023 Agency Priority Goal. 80% of significant EPA actions with environmental justice implications will clearly demonstrate how the action is responsive to environmental justice concerns and reduces or otherwise addresses disproportionate impacts.
		All EPA programs that work in and with communities will do so in ways that are community-driven, coordinated and collaborative, support equitable and resilient community development, and provide for meaningful involvement and fair treatment of communities with environmental justice concerns.
		All EPA programs and regions will identify and implement areas and opportunities to integrate environmental justice considerations and achieve civil rights compliance in their planning, guidance, policy directives, monitoring, and review activities.
		All EPA programs and regions will implement program and region-specific language assistance plans.
	Obj 2.3	All EPA programs and regions will implement program and region-specific disability access plans.
		Initiate 45 proactive post-award civil rights compliance reviews to address discrimination issues in environmentally overburdened and underserved communities.
		Complete 305 audits to ensure EPA financial assistance recipients are complying with nondiscrimination program procedural requirements.
		Complete 84 information sharing sessions and outreach and technical assistance events with overburdened and underserved communities and environmental justice advocacy groups on civil rights and environmental justice issues.

© 2020 Perkins Coie LLP

PERKINS COIE

Multiyear Strategic EJ/CRC Priority Goals

Phase down the production and consumption of hydrofluorocarbons (HFCs). By September 30, 2023, annual U.S. consumption of HFCs will be 10% below the baseline of 303.9 million metric tons of carbon dioxide equivalent (MMTCO₂e) consistent with the HFC phasedown schedule in the American Innovation and Manufacturing Act and codified in the implementing regulations. A 10% reduction would decrease the U.S. consumption from 303.9 to 273.5 MMTCO₂e in 2023.

Deliver tools and metrics for EPA and its Tribal, state, local, and community partners to advance environmental justice and external civil rights compliance. By September 30, 2023, EPA will develop and implement a cumulative impacts framework, issue guidance on external civil rights compliance, establish at least 10 indicators to assess EPA's performance in reducing disparities in environmental and public health conditions, and train staff and partners on how to use these resources.

Clean up contaminated sites and invest in water infrastructure to enhance the livability and economic vitality of overburdened and underserved communities. By September 30, 2023, EPA will provide technical assistance to at least 10 communities to help achieve clean and safe water and reduced exposures to hazardous substances.

© 2020 Perkins Coie LLP

PERKINS COIE





Myths and Triggers of Tribal Engagement
IDAHO ENVIRONMENTAL BAR SECTION CLE
FEBRUARY 23, 2022

 Lepwe 1

Presenters

COLLETTE BROWN-RODRIGUEZ
Director, Community & Tribal Relations, **AVANTUS**



MARANDA COMPTON
President & Founder, **Lepwe Inc.**



2

The Corporate Perspective

3

ESG – Why its “Here to Stay”

“...understanding ESG in a capitalist context is simple. It is the consideration of extra-financial information to enable better decisions that, if done properly, should lead to sustainable economic growth.”

World Economic Forum – 2023

It is imperative that businesses begin to focus on stakeholders rather than only shareholders and these 3 stakeholder groups are demanding more information.

Investors

- Want to invest in ways they feel lead to sustainable economic growth

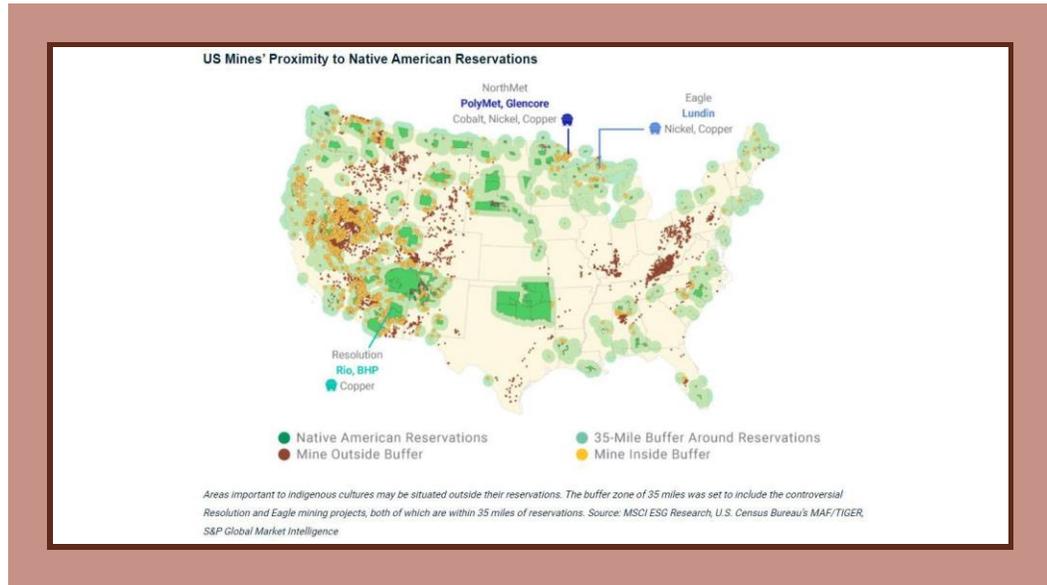
Customers

- Want to understand how their consumer decisions are impacting the world

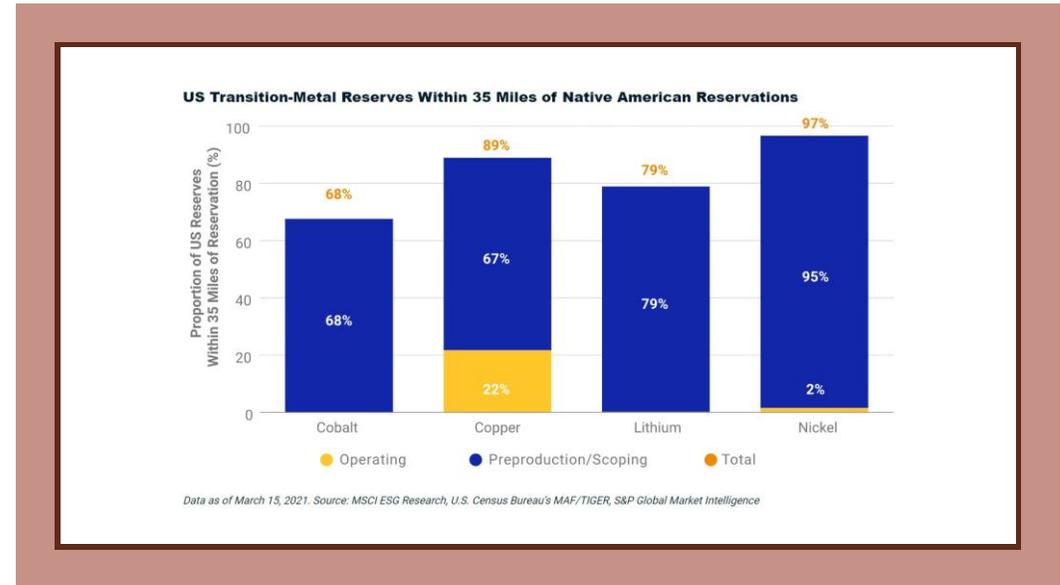
Employees

- Want to understand how their employers' decisions are impacting the world

4



5



6

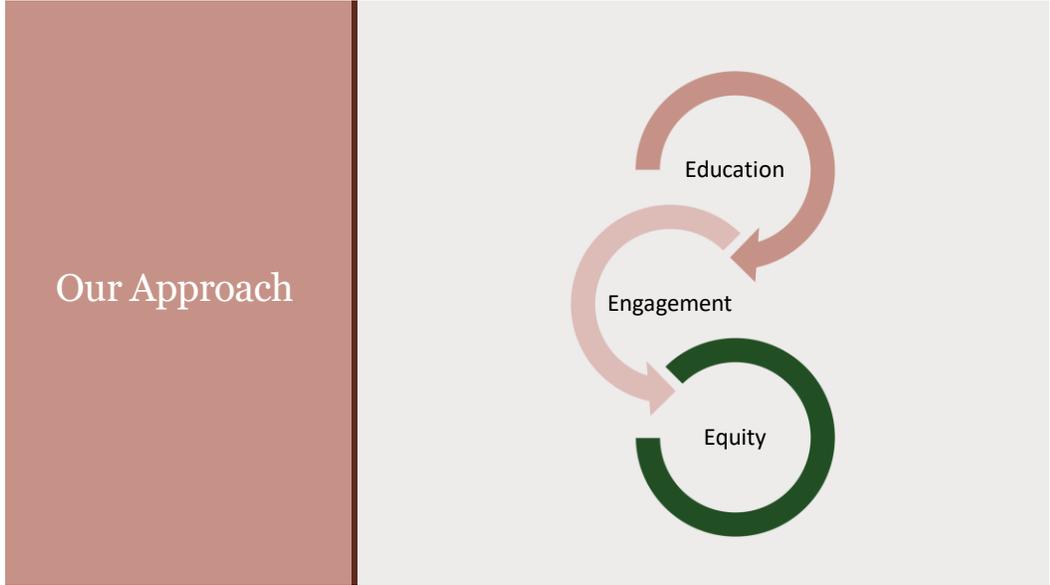
5 Myths of Tribal Engagement



7



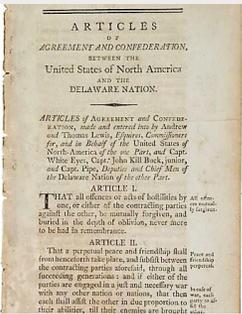
8



9

Myth 1 | The story starts with your project

10



ARTICLES
OF AN
AGREEMENT AND CONFEDERATION,
BETWEEN THE
United States of North America
AND THE
DELAWARE NATION.

ARTICLES of Agreement and Confederation, made and entered into by Andrew and Thomas Lewis, Esquires, Commissioners for and in Behalf of the United States of North America; the said Peter and Capps, White Eyes, Chief, John Kill Buck, Captain, and Capps, Pope, Deputy, and Chief Men of the Delaware Nation of the other Part.

ARTICLE I.
THAT all offences or acts of hostility by one party against the other, be mutually forgiven, and buried in the depth of oblivion, never more to be had in remembrance.

ARTICLE II.
That a perpetual peace and friendship shall forever subsist between the contracting parties aforesaid, through all succeeding generations; and if either of the parties are engaged in a just and necessary war against any other nation or nations, that then each and every of the other in due proportion to their abilities, all their enemies be brougth into...





DELAWARE TRIBE OF INDIANS
LENAPE

Presenter Notes
2023-02-22 15:00:43

Introduction of my Tribe and story to help the audience understand my personal perspective.

The Delaware Tribe of Indians has participated in several treaties with the United States. The Treaty of Lancaster, 1763, was a peace treaty between the Delaware Tribe of Indians, William Penn and the British, a chief of the Lenape (the Clan) Delaware. It was the first treaty with the United States. Treaty of Fort Pitt, 1778.

The Delaware Tribe of Indians

ARTICLE VI.

Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into. And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress. And it is also the intent and meaning of this article, that no protection or countenance shall be afforded to any who are at present our enemies, by which they might escape the punishment they deserve.

In witness whereof, the parties have hereunto interchangeably set their hands and seals, at Fort Pitt, September seventeenth, anno Domini one thousand seven hundred and seventy-eight.

Andrew Lewis,	[L. s.]
Thomas Lewis,	[L. s.]
White Eyes, his x mark,	[L. s.]
The Pipe, his x mark,	[L. s.]
John Kill Buck, his x mark,	[L. s.]

Presenter Notes
2023-02-22 15:00:43

Treaty of Fort Pitt was a novel and powerful government to government agreement. It granted the nation of Delawares, and their heirs, all the territorial rights in the fullest and most ample manner. It even said that the Delaware and other Indian tribes that were friends of the United States could "form a state whereof the Delaware nation shall be the head, and have a representation in Congress."

Treaty of Fort Pitt, 1778

Delaware Lands

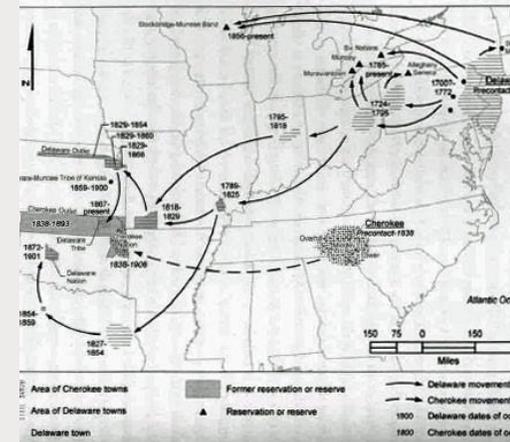


Original Lenni Lenape Land Base



Lenni Lenape Land Base 1778

Presenter Notes
2023-02-22 15:00:43
On the left is a map of the original (pre-contact) Lenape land base. On the right is the Lenape land base at the time of signing the Treaty of Ft. Pitt. And...



Presenter Notes
2023-02-22 15:00:43
This is the history of removal. The arrows represent walking – not cars or airplanes – i.e., the physical removal of entire communities over great distances to lands where these communities were promised they could live in peace. During these traumatic removals, many families (and my family members) were lost along the way.

The Delaware Tribe Today



Delaware Tribe of Indians Today
Bartlesville, OK



Presenter Notes
2023-02-22 15:00:43

Here is the Lenape land base now a small parcel of 20 acres in Bartlesville, Oklahoma that we've been unable to get into trust and another (not pictured) in Kansas for which we have petitioned for trust status. As you can see, our congressional delegation never panned out. The point, Tribal communities come to any negotiating table having already lost a lot. And that history of loss is import to any contemporary relationship.

15
© Lepwe

Busting Myth 1...

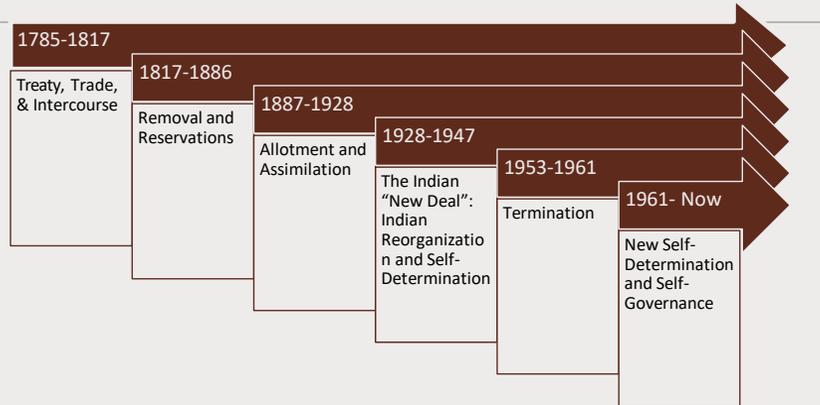
Before approaching any Tribal Nation, be sure to education your executive and project teams on the history of Federal Indian Policy and its impacts on each specific Tribal Nation.

Presenter Notes
2023-02-22 15:00:43

Identify history of, and how, VNF within Indian Country

16

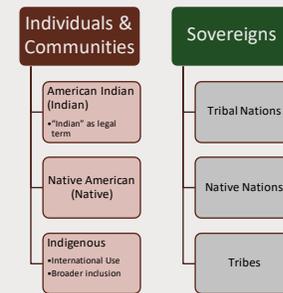
Address the Historical and Legal Knowledge Gap:



Understand Terminology and Semantics

Presenter Notes
2023-02-22 15:00:43
It is not just semantics.
Note that opinions differ – some generational differences – between preference for "Native American" versus "American Indian".

HOW TO REFER TO:



THINGS TO AVOID:

- | Never | Also Avoid |
|---|---|
| <ul style="list-style-type: none"> • R**skin • Chief • Savages • Injun • Sq**w • Pocahontas | <ul style="list-style-type: none"> • "That's savage" • Calling a meeting a "pow wow" • "Circle the wagons" • "Off the reservation" • "How much Native American are you?" |

Avoid Being Guided By Stereotypes



19

Myth 2

Tribes are stakeholders
akin to landholders and
environmental groups

20

What are Tribal Nations?

Political

Article 1, Section 8, Clause 3:

- "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial.... The very term 'nation,' so generally applied to them, means 'a people distinct from others.' *Worcester v. Georgia*

Cultural

A cultural Tribe is "a social group comprising numerous families, clans, or generations (often included servants, dependents, or adopted strangers); a group of persons having a common character, occupation, or interest." Definition of Tribe in Merriam Webster.

Religious practices, language, environmental relationships
(the way we are connected to land)

Relational and kinship based
(the way we are connected to each other)

Historical and Modern
(ancient roots but not static)

Racial

Blood quantum is a federal policy, as a standard for "Indianness"

21

© Lepwe

21

Tribal Nations are **Political** Entities

Political entities like other governments:

- Political entities ran by elected and appointed officials
 - "Tribal Leaders" (or more appropriately, Tribal elected officials) are subject to a political process and elected by constituents
 - Departmental Directors/Chairs are often appointed by the Council and serve at their pleasure
- Government affairs relationship
 - Different than a landowner for purposes of negotiation and regulation

Presenter Notes
2023-02-22 15:00:44
Common themes range from **hunting** and fishing practices with mutual usual and accustomed stands, to oppression, removal, and discrimination Governmental structures
Based on Indian Reorganization Act of 1934 Tribal Council Tribal Corporations/Business Card Attorney General's Office Environmental Agency/Department All of this provides a better **unity** of tribes' development

22

© Lepwe

22

Presenter Notes
2023-02-22 15:00-44

Common themes range from hunting and fishing practices with mutual usual and accustomed stands, to oppression, removal, and discrimination. Governmental structures based on federal recognition of 1934 Tribal Council, Tribal Corporations/Business, and Attorney General's Office Environmental Agency/Department. All of this provides a better understanding of tribes' development.

Each Tribal Nation is a Unique Political Entity

Tribes are not monolithic:

- There is no such thing as a "Tribal group"
- NO pan-Tribal identity
- There is no singular Tribal history
- In fact, a political Tribal entity is often comprised of various cultural Tribal entities

Each Tribal Nation possesses unique political structures, laws, and ethos:

- Each Tribe sets its own membership requirements, government structures, laws and regulations
- How you work with a particular Tribal Nation must be tailored
 - E.g., you would not permit a project in California the same way you would in North Dakota
- Analogy: Think of Tribal Nations as individual European Nations and Federal Indian Law as EU Law.

Many Tribes experience similar key issues:

- Economic isolation; lack of tax base
- Historical trauma
- Health and welfare concerns
- Cultural maintenance → environmental resilience

23
© Lepwe

23

Why is a Tribal Nation not a Stakeholder?

- Not Private Landowners or a "community"
 - Private Landowners can relocate
 - Geostatic political nations tied to the land
- Not Environmental groups/NGOs
 - Solely environmental concerns
 - Variation among Tribes
 - Environmental issues are cultural concerns
 - Not concerned with governmental revenue, economic development, cultural issues
- Not Tribal citizens groups
 - Not a representative of the sovereign
 - Hold different legal right

24
© Lepwe

24

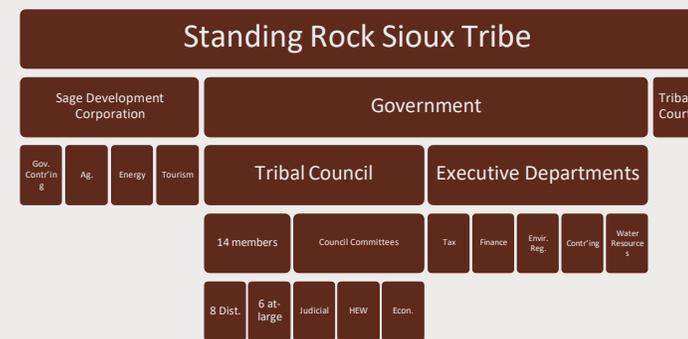
Busting Myth 2...

Presenter Notes
 2023-02-22 15:00:44
 Identify history of, and how, VNF
 within Indian Country

Build an internal framework and team that works with Tribal Nations as governments *(and don't forget to give that team a budget and some authority).*

Why Government Affairs Approach Fits...

Presenter Notes
 2023-02-22 15:00:44
 Indian Nations operate various types of entities and it is important to understand how one government could be so many things. However, this is not dissimilar from the US government.



Structure and Functions of Government

- Identify government departments and businesses
- Know that the Tribal Council passes legislation, makes budgets, approves of financial transactions, and makes major decisions affecting the Tribe.

Election Timelines

- Tribal Chairman serves a term of 4 years
- Janet Alkire elected in October 2021
- Other Council members are on staggered terms

Legislative Schedule

- Regular Tribal Council meetings are the first Tuesday, Wednesday and Thursday of the month
- Committee meetings are the second week of the month
- The last Monday of the month is for gaming and other tribal businesses

Build the Right Framework & Approach

1. Early assessment of Risk *and Opportunity*
2. Do not leave “Tribal” as subdivision of land team or your environmental engineering/archeology process
 - but do include Tribal experts in early survey and identification phases
3. Include a government affairs approach
 - similar to how you would with other (local, state, federal) governments
 - early coordination
 - Differentiate between governments

Presenter Notes
2023-02-22 15:00:44

Common themes range from hunting and fishing practices with mutual usual and accustomed stands, to oppression, removal, and discrimination. Governmental structures, such as the Board of Tribal Reorganization of 1934 Tribal Council, Tribal Corporations/Business, and Attorney General's Office, Environmental Agency/Department. All of this provides a better understanding of tribes' development.

27
© Lepwe

27

Myth 3

If you avoid Tribal lands
you avoid Tribal issues

Presenter Notes
2023-02-22 15:00:44

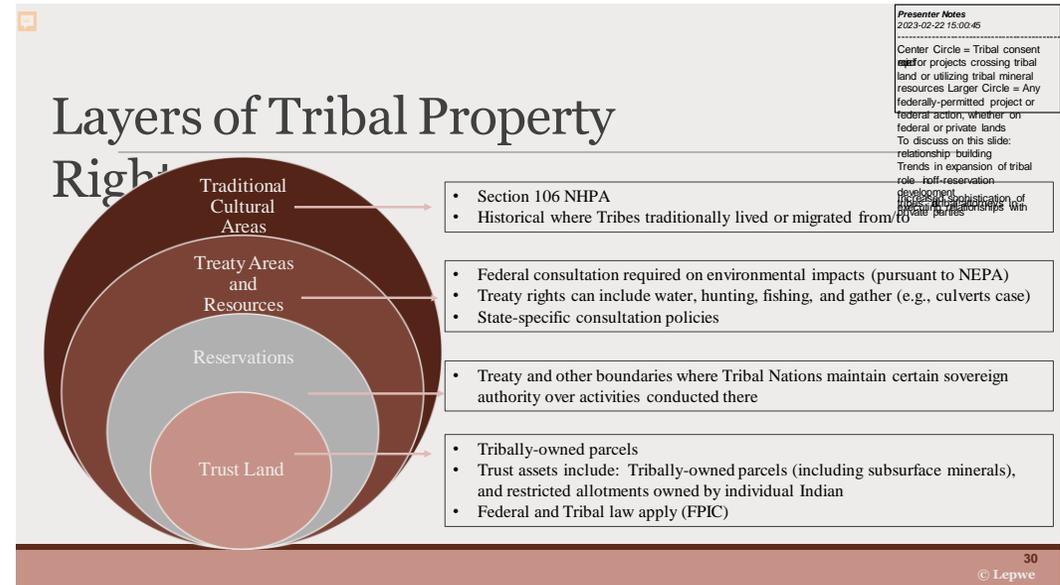
Identify history of, and how, VNF within Indian Country

28

28



29



30

Mapping Tribal Rights



Reservations:

- Areas, typically granted by Treaty, Congressional Act, or Executive Order, where a Tribal Nation maintains sovereign authority and jurisdiction



Fee vs. Trust Land:

- Fee Land: Lands not in trust held by individuals (Native or non-Native), which exists both within and outside of a reservation
- Trust Land: Lands held owned by the Federal government and held in Trust for Tribal Nations



Treaty Rights:

- Rights guaranteed by treaty to Tribal Nation and their citizens – typically rights to hunt, gather, and fish, as well as rights to water – that exist both within and outside of Reservations, and attach to federal and “open” lands



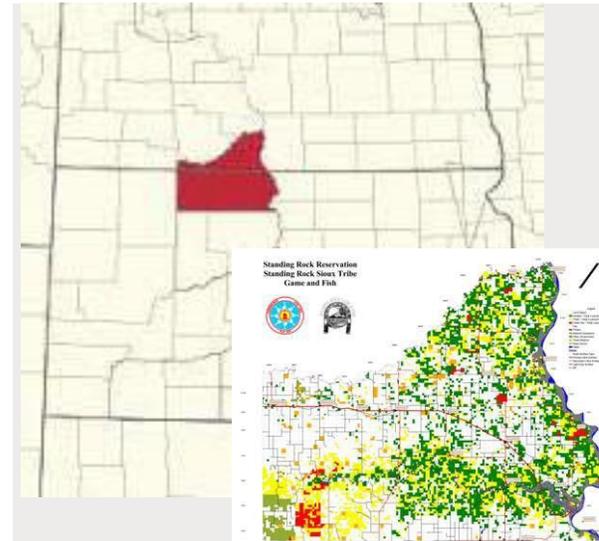
Ancestral Lands:

- Areas that historically occupied for various purposes, including homelands, traditional hunting and fishing areas, and areas of cultural and religious significance

31

© Lepwe

31



The Problem with the Maps

32

The Problem with the Maps

This map shows the geographical areas in South Dakota and Nebraska that were lost to tribal lands at different times: 1877 (diagonal lines), 1889 (cross-hatch), and 1910 (dotted). Current tribal lands are shown in solid dark red. Key locations labeled include Standing Rock, Cheyenne River, Black Hills, Pine Ridge, Rosebud, Lower Brule, Crow Creek, Pierre, Yankton, Santee, and Lake Traverse. The Missouri River is also shown.

33
© Lepwe

33

The Problem with the Maps

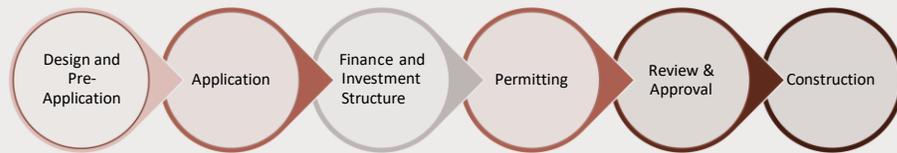
This map highlights the Lakota region in green, with the current Nez Perce Reservation in dark green. The original reservation under the 1855 Treaty is shown in light green. The map also shows the Columbia River basin and the Nez Perces' usual wintering area in dark tan. Surrounding states and territories are labeled: Montana, North Dakota, South Dakota, Wyoming, Nebraska, and Minnesota.

Presenter Notes
2023-02-22 15:00:45
The current Nez Perce Reservation as established under the 1863 Treaty is depicted in dark green. The light green shows the boundaries of the original reservation under the 1855 Treaty. The Columbia River basin, the Nez Perces' usual wintering area - is shown in dark tan.

34
© Lepwe

34

Tribal Should Be a Part of Design



37

Myth 4

Sending a letter to the Tribal Council is how you conduct Tribal Consultation

38

Triggers for Tribal Consultation

IMPACTS TO...



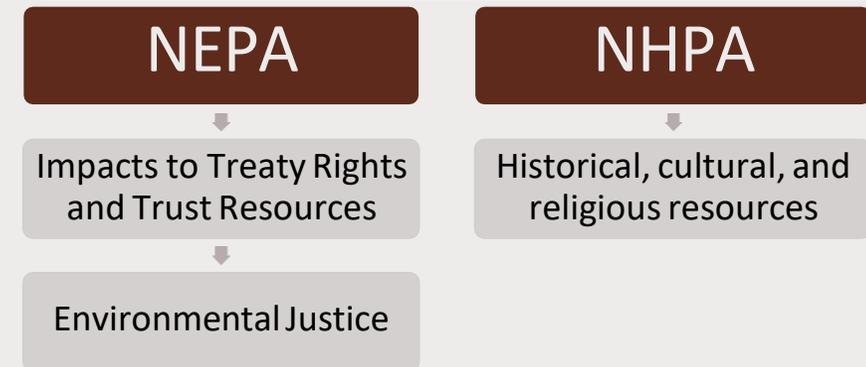
- Tribal consent and federal regulatory approval required (e.g., ROW)
- Tribal and federal permitting applies

- NEPA
 - Treaty Rights
 - Trust Resources
 - Environmental Justice
- NHPA Section 106
- Federal Trust Responsibility and Consultation
- Federal Licensing
- Justice 40

- Subject to State laws, which may include environmental review and water quality

39

Environmental Permitting



40
© Lepwe

40

Presenter Notes
 2023-02-22 15:00:46
 There is a framework of federal law that require consultation and engagement with federally-recognized tribes.

Legal Obligation for Tribal Consultation

Codified in Clinton's Executive Order 13175 (Nov. 6, 2000)

- Core principles and purpose:
 - Reiterates fundamental principles of U.S.-Tribal relations: that the United States maintains a unique trust relationship with Tribes and that Tribes maintain the right to self-government, sovereignty, and self-determination
 - Establishes standards of behavior for all federal agencies and departments when considering, developing, and implementing policies or actions that will have an impact on Tribal governments.
 - Require federal government to consult with Tribal Nations on any federal decision or rulemaking that could impact Tribal lands or resources (both natural resources and cultural resources) and requires each agency to develop a plan for how it will do so.
- Lacking in definitions or specific standards
 - "Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."
 - "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."
- The result: every federal agency has its own individual Tribal consultation policy, with slight variations.
 - U.S. Army Corps of Engineers
 - Federal Communications Commission
 - Department of Energy
 - Department of Interior
 - Federal Energy Regulatory Commission

41

Presenter Notes
 2023-02-22 15:00:46
 There is a framework of federal law that require consultation and engagement with federally-recognized tribes.

Biden's Focus on Tribal Consultation

Biden's Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021)

- Reinforces EO 13175 and states that "It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy."
- Within 90 days (April 26, 2021) the head of each agency must submit to the OMB Director a detailed plan of actions it will take to implement the policies and directives of EO 13175 and provide annual progress reports thereafter.
 - DOI has already released specific consultation questions to Tribal leaders
- In 1 year, the OMB Director will provide a report on the implementation of EO 13175

42

Evolving Consultation Policies at Interior

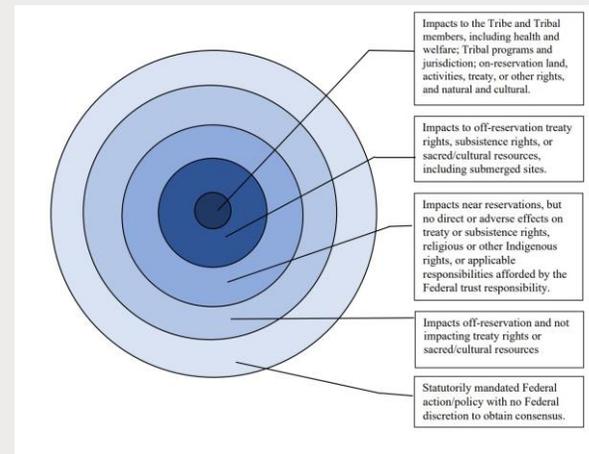
□ DOI Implements Department-Wide Consultation Policy

- Released November 30, 2022
- “Substantial direct effect on a Tribe” which may include:
 - 1) Tribal cultural practices; lands; treaty rights; resources; ancestral lands; sacred sites, including sites that are submerged; and lands Tribes were removed from, or access to traditional areas of cultural or religious importance on Federally managed lands and waters;
 - 2) The ability of a Tribe to govern or provide services to its members;
 - 3) A Tribe’s formal relationship with the Department, be it nation-to-nation or beneficiary-to-trustee; or
 - 4) Any action planned by a non-federal entity that involves funding, approval, or other final agency action provided by the Department, unless the Tribe is a party to the action. Substantial direct effects on Tribes may include, but are not limited to, effects as shown in the Consensus-Seeking Model (Figure 1).
- More Headquarter control of the process (TGO, TLO)
- Annual Reporting Requirements

43

© Lepwe

43



DOI Identified Areas of Consultation

44

© Lepwe

44

Tribal Consultation & Coordination

↔ Gov-to-Gov Consultation: Trust Obligation
↔ Coordination

Presenter Notes
2023-02-22 15:00:46

The only Government-to-Government Consultation occurs between Tribes and the Federal Government (remember: domestic dependent nations, wards, etc.) State/Local Governments and Tribes coordinate and consult as sister sovereigns (11th Amendment Immunity and Tribal Immunity). Often obligated as a matter of state law.

There are tensions between tribal perspectives and applicant perspectives on these roles. Also tensions between Federal Government and Tribes. What can FERC delegate? What happens before and after delegates day to day consultation?

Tribes often seek to reinforce trust obligation through refusal to coordinate with non-governmental entities.

45
© Lepwe

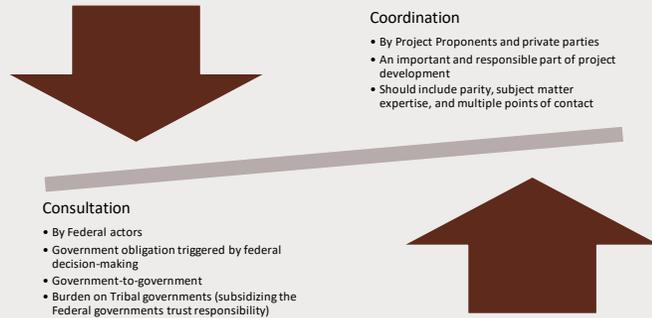
45

Busting Myth 4...

Differentiate engagement and coordination (private parties) from consultation (governmental entities) and build strong relationships with multiple points of contact and parity.

46

Consultation vs. Coordination



47
© Lepwe

47

Realize Consultation is a Burden

- Tribal Consultation is effectively Tribal Nations subsidizing the Federal government's trust responsibility
 - It is not an "opportunity"
 - It is not federally funded
- A significant demand on the resources (human and financial) of Tribal Nations
- Consultation occurs far too late in the process to create successful relationships between a project and a Tribal Nation

48
© Lepwe

48

Engagement To Ease the Burden: Work with the Tribal Structure

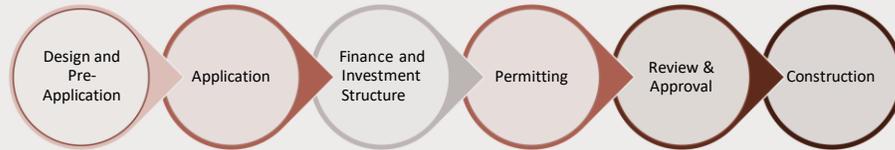


Engagement to Ease the Burden: Engage on multiple levels and with parity

Presenter Notes
2023-02-22 15:00:47
Indian Nations operate various types of entities and it is important to understand how one government could be so many things. However, this is not dissimilar from the US government.

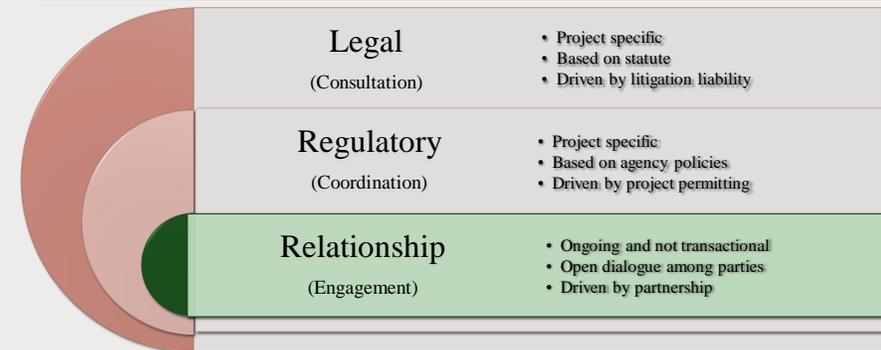


Engagement to Ease the Burden: Include Tribal early in your development process



51

Engagement and Relationships



52

Myth 5 | Tribal Issues are Environmental Issues

Presenter Notes
 2023-02-22 15:00:47
 Identify history of, and how, VNF
 within Indian Country

The Myth of the Crying Indian

Presenter Notes
 2023-02-22 15:00:47
 Tulalip
 Nisqually
 Yurok
 Quinault
 Northern Cheyenne
 Atlatik
 Nisqually
 Standing Rock Sioux
 Navajo Nation




© Maranda Compton

Sovereignty > Environmentalism

- Recognize the difference between Tribal lifeways and environmentalism
 - Environmental laws are simply the access point provided to Tribal Nations
 - Environments versus lifeways
- Sovereignty means different choices for different Tribes
 - Tribal economic self-determination in spite of lack of tax base
 - Compare California versus North Dakota
- Equity metrics in permitting can conflate the issue

55

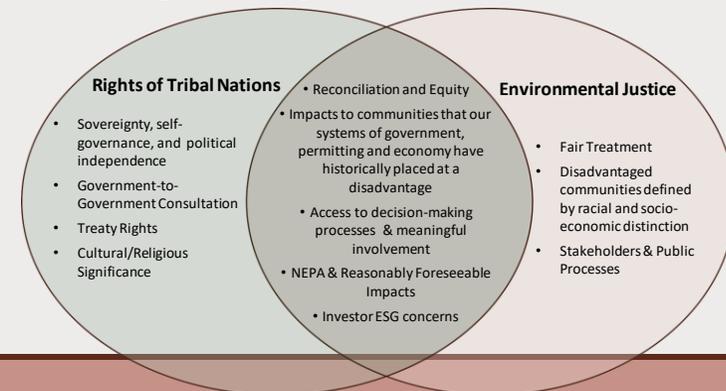
© Lepwe

55

Environmental Justice vs. Tribal Sovereignty

Presenter Notes
2023-02-22 15:00:48
There is a framework of federal law that require consultation and engagement with federally-recognized tribes.

- Substantial overlap but also significant differences



56

Where Tribal Rights Exceed EJ

Presenter Notes
2023-02-22 15:00:48

Tulalip
Nisqually
Yurok
Quinsault
Northern Cheyenne
Atlatik
Nisqually
Standing Rock Sioux
Navajo Nation

- Tribal Issues that go beyond Environmental Justice
- Tribal Nations...
 - ✓ Are independent political entities
 - Sovereign, self-governing entities that predate the U.S. Constitution (and are one of three sovereigns recognized therein)
 - ✓ Possess Treaty Rights
 - Tribes are political entities that are the signatories to and beneficiaries of the more than 368 ratified treaties with the United States – which permitted (through political agreement) the western expansion of the United States in exchange for a continuing obligation on the part of the U.S. Government to Tribal communities.
 - ✓ Maintain a Special Government-to-Government Relationship
 - Under US law, the Federal government took possession of Tribal lands and resources – creating a “Trust Status” that necessarily resulted in a “Trust Responsibility”.

© Maranda Compton

ESG

“If you’re the police, where are your badges?”
“Badges? We ain’t got no badges! We don’t need no badges.
I don’t have to show you any stinkin’ badges!”



**Federal and State
Permitting Req.s**

No current standards but potential federal regulation could come in the form of:

- Legislation by Congress
- EO’s and Agency Policies – e.g., Justice 40
- State Agencies & Legislatures

➤

Financing

General industry standards are starting to develop, through due diligence, asset valuation, and lender-specific risk assessments:

- Institutional Investors and Lenders – State Street “R” Quotient and BlackRock due diligence
- Third-party, voluntary disclosure and grading systems – e.g., CDP
- SEC Disclosure Requirements



**Company
Project
Development
& Operations
Protocols**

Corporate Shareholders and Boards are starting to demand that company policies reflect ESG and EJ:

- Corporate Policy
- Project Siting Strategy
- Operations
- Public and Government Relations

Presenter Notes
2023-02-22 15:00:48

Common themes range from **hunting** and fishing practices with mutual usual and accustomed stands, to oppression, removal, and discrimination. Governmental structures
Based on Indian Reorganization Act of 1934 Tribal Council
Tribal Corporations/Business Card
Attorney General’s Office
Environmental Agency/Department
All of this provides a better **quality** of tribes’ development

© Maranda Compton

Busting Myth 5...

Understand how Tribal Sovereignty can be part of, but also separate from, environmentally-focused processes, organizations, and metrics.

59

Two Ending Thoughts....

60

60

The Central Nature of Tribal Relations to the Future of Energy Development

- The Energy Transition is being spurred by Federal Action
 - Federal Permitting
 - Tribal Consultation and Consent
- Developments in Federal Permitting and Consultation are not providing answers or improved processes for Tribal Engagement
 - What's the FAST-41 Approach to Tribal?
 - New policies for consultation only highlight importance but do not provide better tools.
- Streamlining Process for Developers? Perhaps differentiation by project developers and operators who get smart and build their own better processes.
 - Takes time and resources
 - Strategic
 - Needs executive-level support

61

Offensive Irony of Current Fed Eenvt'l Policy

- Under U.S. Law Tribes cannot freely own land over which they have jurisdiction
 - Doctrine of Discovery & Marshall Trilogy
 - Indians could not hold land because they: (1) not Christian; (2) left the land as "wilderness" and limited use with conservation; and (3) communal ownership
 - The basis of superiority of U.S. government was Christianity, individual property interest, and subjugation
- U.S. Federal Indian Law was by and large an effort to invalidate this Tribal property interest
 - Restricting this communal, conservation approach to reservations and pursuant to a Trust status as a way to square the Tribes' property law with U.S. individual property law
 - Nature of the Indian title, as subordinate to the absolute ultimate title of the government.
 - Additional policies to invalidate Tribal communal, conservation property interest – e.g., allotment
- Now... conservation and communal ownership of public lands is the Federal policy
 - Public lands, 30 x 30, etc.

62

Wanishi!



Maranda Compton

mcompton@lepwe.com

www.lepwe.com

(406) 210-9673

Consultation with Tribal Communities: NEVI Formula Program

Cecilia Arritola
Idaho Transportation Department – Planning Services
NEVI/Equity Planning Program Lead

Idaho Environmental BarCLE
February 23, 2023



▸ PURPOSE

The Bipartisan Infrastructure Law (BIL) established the National Electric Vehicle Infrastructure Formula Program (NEVI)

Funding is available for states to strategically deploy electric vehicle (EV) charging infrastructure & to establish an interconnected network.

EQUITY ACTION PLAN

Advancing

- Advancing Equity through Grantmaking

Strengthening

- Strengthening Relationship State to State with Tribes

Improving

- Improving Public Engagement w all Tribal communities

Expanding

- Expanding Contracting Opportunities

Supporting

- Supporting Tribal Electricity Mobility Infrastructure

3

Justice40 Fact Sheet

US DOT is the principal of implementing the Justice40 initiative created by Executive Order 14028. Taking the Climate Crisis at Home and Abroad. Justice40 is an all-of-government approach that will address 40% of the benefits of certain federal investments flowing to disadvantaged communities. It is one of many initiatives US DOT is implementing to advance equity.

What Justice40 Means for US Department of Transportation (USDOT)

Through Justice40, US DOT will work to increase affordable transportation options that correct environmental inequities, improve air quality, and improve access to resources and quality of life in communities in every state and territory in the country.

PRIORITY INVESTMENTS	MEASURABLE IMPACTS AND EFFECTS	STRATEGIC EXPANDED CAPABILITIES
<ul style="list-style-type: none"> • Health: Communities with higher health outcomes, lower rates of chronic diseases, and lower rates of premature death. • Environmental: Improved air quality, reduced greenhouse gas emissions, and improved water quality. • Resilience: Communities with higher levels of resilience to natural and human-caused disasters. • Resilient: Communities resilient to health, economic, and environmental risks. • Equity: Communities with higher levels of equity and inclusion. 	<ul style="list-style-type: none"> • Transportation: Increased the quality of transportation infrastructure and services. • Health: Improved health outcomes and reduced health care costs. • Environmental: Reduced greenhouse gas emissions and improved air quality. • Resilience: Improved resilience to natural and human-caused disasters. • Equity: Improved equity and inclusion in transportation planning and investment. 	<ul style="list-style-type: none"> • Transportation: Increased the quality of transportation infrastructure and services. • Health: Improved health outcomes and reduced health care costs. • Environmental: Reduced greenhouse gas emissions and improved air quality. • Resilience: Improved resilience to natural and human-caused disasters. • Equity: Improved equity and inclusion in transportation planning and investment.

US DOT is implementing 40 across 39 Federal Programs.

On 7 areas of Federal investment covered by Justice40 and 39 Federal Programs:

- **Climate Change**
- **Transportation**
- **Energy & Power**
- **Water**
- **Resilience & Disaster Preparedness**
- **Health & Human Services**
- **Education**
- **Justice**
- **International Affairs**
- **Other**

Where do I direct people who have questions about Justice40?

Reach out to our Justice40 team: justice40@dot.gov

Presenter Notes
2023-02-22 15:02:25

Commitment : At Least 40% of the Expenditures with Environmental and Economic Benefits must flow to the vulnerable, disadvantaged and remote communities.

JUSTICE
40

4



EQUITY

- Engagement will focus within rural, underserved, and disadvantaged communities throughout Idaho, for diverse input.
- Deployment and use of EV charging infrastructure will aim to provide equitable and fair distribution of all services
- State Plan will continue to reflect this engagement process & input received

5



Presenter Notes
2/22/2023 10:11:20 AM
The State of Idaho's vision is to deploy universal and publicly available EV charging infrastructure along Idaho's major travel corridors at intervals that provide drivers the confidence to travel throughout the state while meeting community and economic needs.

INTERAGENCY WORKING GROUP

6

Presenter Notes
2023-02-22 15:02:29
Phase 1- May - August 2022

STAKEHOLDER GROUP ENGAGEMENT



7

- Utilities (Idaho Power, Avista, Idaho Falls Power)
- Idaho Consumer Owned Utilities Association
- Government Agencies (Visit Idaho, IDPR, OEMR, ITD, DEQ, Commerce)
- Idaho Automobile Dealers
- Environmental/Energy NGO's
- Electric Co-ops
- Idaho Commission on Hispanic Affairs
- Idaho Tribal Affairs Council
- Metropolitan Planning Organizations
- Idaho Businesses
- Refugee Resettlement Agencies
- Oasis Areas

8

SITING, ACCESS & FEASIBILITY





Successful infrastructure deployment will require the collection, analysis and review of EV charging infrastructure siting, access and feasibility data to be completed by October 2023.

Idaho's Year 1 Baseline NEVI Formula Program Plan has been approved by Joint Office.



Discussion topics will include:

- Access and availability
- Electrical service provision, access and cost
- Equity and access for underserved, disadvantaged and/or rural populations
- Service to public lands, such as National parks and other Federal land management agency units
- Public Health benefits for urban/rural areas
- Near/Long term

PROJECT ELIGIBILITY



Purchase and installation of EV Charging infrastructure



Operating assistance for costs of maintaining EV charging infrastructure installed under this program



Traffic Control devices and associated costs related to EV stations



Data sharing for long term success of investments



Acquisition of Traffic Control Devices located within ROW (Right of Way)



Mapping & Analysis Activities for specific area analysis



EV CHARGING CONSIDERATIONS

- Distance between chargers should be 50 miles and less than 1 mile from interstate
- Sufficient electrical power for 24/7/365 use
- Provide public restrooms, lighting, shelter, food and ADA access
- Available on rural corridors and in underserved communities
- Assure long-term operation and maintenance
- Consultation with interested stakeholders
- Foster public-private investment in EV infrastructure

Presenter Notes
2/22/23 10:02:32

NEVI Program Guidance issued by FHWA. NEVI Program Guidance issued by FHWA. 50 Mile Requirement is the standard as part of the Program Guidance from FHWA. There is no specific mention of rural requirement 100 miles or greater. We anticipate there will be additional guidance as the program develops. NEVI Formula funds can be used for Level 2 or Level 3 chargers. ITD has received input requesting us to install Level 2 and Level 3 at some locations. The cost of Level 2 Charging Stations is significantly less than Level 3.

11

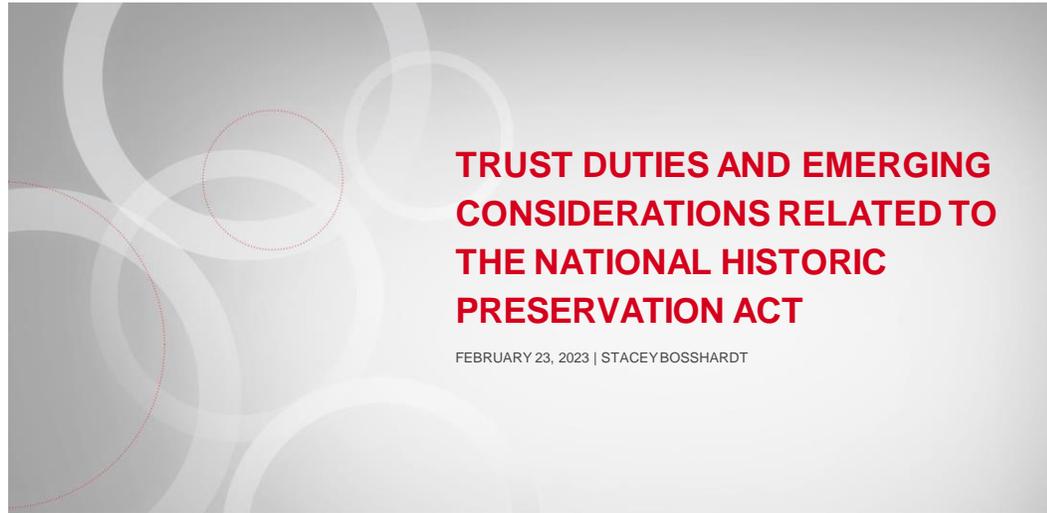
ANTICIPATED BARRIERS

- Affordability of EV's
- Existing Facilities
- Safety Concerns in Rural Communities
- Electric Utilization 24/7/365
- Agricultural Transport
- Spacing for Recreational Units

12



Cecilia Arritola
NEVI Planning Program Lead
ITD Planning Services
Cecilia.Arritola@itd.idaho.gov



**TRUST DUTIES AND EMERGING
CONSIDERATIONS RELATED TO
THE NATIONAL HISTORIC
PRESERVATION ACT**

FEBRUARY 23, 2023 | STACEYBOSSHARDT



**TRUST ISSUES AND NHPA
TRENDS**

Overview Trust Issues and NHPA Trends

OVERVIEW

- Background Principles and Caselaw on United States' Trust Duty to Indian Tribes
- *Navajo Nation v. United States* –
 - history
 - posture
 - implications
- National Historic Preservation Act Developments
 - Potential Corps of Engineers Rulemaking
 - Revisions to NPS Guidance on TCPs

TRUST RELATIONSHIP VS. TRUST DUTY

- There is a trust relationship between the federal government and Indian tribes. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).
- Unlike at common law, that relationship alone does not establish an enforceable trust duty. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 184 (2011).
- For a duty to exist, a statute or treaty must include rights-creating language.

How does an enforceable trust duty arise?

- A treaty or statute must create “specific rights-creating or duty-imposing statutory or regulatory prescriptions.” *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).
- Comprehensive control may support finding that the government is subject to enforceable fiduciary duties only if coupled with “specific rights-creating or duty-imposing statutory or regulatory prescriptions.” *Id.*
- Only if such statutory duties exist can “trust principles (including any . . . principles premised on ‘control’) . . . play a role in ‘inferring that the trust obligation [is] enforceable by damages.’” *Birdbear v. United States*, 162 Fed. Cl. 225, 241 (2022).

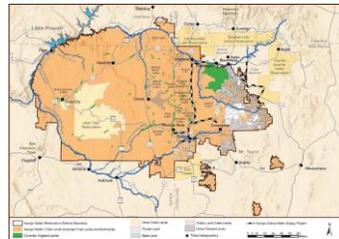
Treaty provisions that contemplate farming

- Anderson, Robert T., Indian Water Rights and the Federal Trust Responsibility. *Natural Resources Journal*, Vol. 46, No. 2, 2006, Available at SSRN: <https://ssrn.com/abstract=1138864>

Navajo Nation v. U.S., Nos. 21-1484 & 22-51

WHAT LEVEL OF SPECIFICITY IS REQUIRED FOR A TREATY OR STATUTE TO ESTABLISH A TRUST DUTY?

- **Question Presented:** Can two treaties between the United States and the Navajo (1849 & 1868) that provided for selection of plots of land by tribal members who “desire to commence farming,” and for provision of “seeds and agricultural implements”, along with DOI’s “pervasive control” of water in Col. River Basin, establish a duty to quantify rights owed a reservation?



Navajo Nation v. U.S., Nos. 21-1484 & 22-51

PROCEDURAL HISTORY

- Plaintiff sought declaration that Interior must determine amount of water needed for reservation’s purposes and devise plan to provide that amount of water
- *Navajo Nation v. United States Dep’t of the Interior*, No. CV-03-00507-PCT-GMS, 2019 WL 3997370 (D. Ariz. Aug. 23, 2019):
 - Case filed in 2003
 - Plaintiffs relied on pervasive control over mainstream and treaty language.
 - Court granted government’s motion to dismiss Tribe’s second amended complaint, finding that it failed to state a claim for breach of trust, and did not allow third amended complaint.
- *Navajo Nation v. U.S. Dep’t of the Interior*, 26 F.4th 794 (9th Cir. Feb. 17, 2022)
 - Reversed district court decision.
 - Petition for en banc review denied.



Navajo Nation v. U.S., Nos. 21-1484 & 22-51

NINTH CIRCUIT DECISION

- Navajo Nation sufficiently alleged the existence of implied fiduciary obligation to “protect and preserve the [Navajo] Nation’s right to water,” derived from:
 - (1) implied treaty rights (*Winters*);
 - (2) 1868 Treaty, which “recognizes the [Navajo] Nation’s right to farm Reservation lands” and “gives rise to an implied right to the water necessary to do so”;
 - (3) statutory authorities granting government “pervasive control over the Colorado River”; and
 - (4) agency “regulations and documents” in which the government has undertaken to protect Indian Trust Assets.

Navajo Nation v. U.S., Nos. 21-1484 & 22-51

SUPREME COURT REVIEW

- Intervenor-defendants sought cert. on two questions:
 - (1) Whether U.S. owes the Navajo Nation a fiduciary duty to assess and address the Navajo Nation’s need for water from particular sources; and
 - (2) Would the relief sought conflict with *Arizona v. California*, where the Court has issued a Consolidated Decree and has retained jurisdiction?
- Federal Defendants then sought certiorari, but argued that review should be confined to question (1) because consideration of (2) was premature.
- Cert granted on both questions
- Current status: Argument scheduled March 20, 2023

ASSERTED SOURCES OF TRUST DUTY

Source of Claimed Duty	Y/N?	Case
Indian Mineral Leasing Act	N	<i>United States v. Navajo Nation</i> , 537 U.S. 488 (2006)
Indian Agricultural Act, Indian Dump Cleanup Act	N	<i>El Paso Natural Gas Co. v. United States</i> , 750 F.3d 863, 898-99 (D.C. Cir. 2014)
Indian Health Care Act	N	<i>Id.</i>
1868 Treaty of Laramie, Snyder Act of 1921	Y	<i>Rosebud Sioux Tribe v. United States</i> , 9 F.4th 1018, 1024 (8th Cir. 2021)
1910 timber sales statute	Y	<i>United States v. Mitchell</i> , 463 U.S. 206 (1983)
Fort Berthold Mineral Leasing Act (FBMLA)	Y	<i>Birdbear v. United States</i> , 162 Fed. Cl. 225 (2022)

11 | © 2020 Perkins Coie LLP

PERKINS COIE

Breach of trust case filed by Ute Indian Tribe of the Uintah & Ouray Reservation

- Breach of trust claim by Ute Tribe, originally filed in DDC.
- District court dismissed claims -- examined three statutes relied upon by the Tribe—the 1899 Act, the 1906 Act, and the 1992 Central Utah Project Completion Act—and found none gave rise to specific trust duties.
- Remaining transferred to District of Utah.
- Tribes allowed to amend complaint to add “new allegations concerning the Federal Defendants’ pervasive, elaborate, and exclusive control over water management throughout the proposed pleading.” *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. United States Dep’t of the Interior*, No. 2:21-CV-00573, 2022 WL 3585771, at *6 (D. Utah Aug. 22, 2022)

12 | © 2020 Perkins Coie LLP

PERKINS COIE

Tribal trust cases in Court of Federal Claims



- “Between January 1, 2002, and September 30, 2014, the United States settled the claims of 86 tribes and paid about \$2.78 billion in compensation to the tribes.”
<https://www.justice.gov/enrd/tribal-trust-cases>

Corps of Engineers Seeks Input on its NHPA Regulations

Federal Register / Vol. 87, No. 107 / Friday, June 3, 2022 / Notices

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Notice of Virtual Public and Tribal Meetings Regarding the Modernization of Army Civil Works Policy Priorities; Establishment of a Public Docket; Request for Input

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice; announcement of virtual public and Tribal meeting dates and solicitation of input.

SUMMARY: The Department of the Army, Civil Works, to include the U.S. Army Corps of Engineers (Corps) (together, “Army”), are publishing this notice to announce an effort to modernize the

Civil Works program of the Corps through a number of related policy initiatives. This effort includes a series of public and Tribal virtual meetings, as well as a public docket, to gather oral and written input that will be used to inform future decision-making related to: Native American/Tribal Nation issues; potential rulemaking actions regarding the Corps’ Regulatory Program’s implementing regulations for the National Historic Preservation Act as well as Civil Works implementation of the Principles, Requirements, and Guidelines; and, environmental justice, including definitions of certain terms used in policy making.

National Historic Preservation Act of 1966

Procedural statute; doesn't mandate particular results.

“Stop, look, and listen.”



15

NHPA Section 106

- Section 106 requires agencies to “take into account the effect of [an] undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register.” 54 U.S.C.A. § 306108
- Secretary of the Interior to maintain “a National Register of Historic Places of buildings, structures, objects, sites, and districts significant in American history, architecture, archeology, engineering, and culture.”
- National Park Service has established the criteria for significance
- “Property of traditional religious and cultural importance to an Indian tribe” may be eligible for inclusion. Federal agencies “shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property.” 54 U.S.C.A. § 302706 (a) & (b).

16 | © 2020 Perkins Coie LLP

PERKINScoie

16

NHPA regulations

- Advisory Committee on Historic Preservation
 - NHPA established the ACHP. 54 U.S.C.A. § 304108
 - Independent federal agency that promulgates regulations to implement NHPA.
 - Many agencies also have their own NHPA regulations
 - Federal agencies “must” comply with those regulations in implementing the Section 106 consultation process. *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep’t of Interior*, 608 F.3d 592, 607 (9th Cir. 2010).
- U.S. Army Corps of Engineers
 - 33 CFR 325, Appendix C, promulgated in 1990 (55 FR 27003).
 - Governs regulatory program (permits to third parties), not Civil Works program
 - Interim guidance in 2005 and 2007 to update for changes to NHPA/keep pace with amendments to NHPA.

Appendix C vs. ACHP regulations

	Scope of Undertaking	Analysis Area	Ways to Resolve Effects
Corps regulations	<p>“The work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations”</p> <p>33 C.F.R. § Pt. 325, App. C ¶ 1(f)</p>	<p>Permit area – “those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures.”</p> <p>33 C.F.R. Pt. 325, App. C ¶ 1(g)</p>	<p>Memorandum of agreement or permitting conditions</p> <p>33 C.F.R. § Pt. 325, App. C, ¶ 8.</p>
ACHP regulations	<p>“a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval”</p> <p>36 C.F.R. § 800.16(y)</p>	<p>Area of potential effects – “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist”</p> <p>36 C.F.R. § 800.16(d)</p>	<p>Programmatic agreement or memorandum of agreement</p> <p>36 C.F.R. § 800.6(c)</p>

Dueling Regulations?

- In the notice, the Army “acknowledges there has been longstanding disagreement between the Corps and ACHP regarding differences between the Corps’ Regulatory Program Appendix C and” ACHP’s regulations’
- “Differences in the Corps Procedures for Implementing Section 106 of the National Historic Preservation Act Have Gone Unresolved for over Two Decades,” GAO 19-20 p. 52
- ACHP has never formally concurred in Corps’ regulations. *Id.*
- Commenters’ response: NHPA doesn’t give ACHP role of approving other agencies’ regs.

Updated Guidance on Traditional Cultural Properties

- To assist in the preparation of nominations, the National Register has issued guidance, usually “Bulletins”
- National Park Service has published a draft update of National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties (first published in 1998)
- Provides “guidance for identifying, evaluating, and documenting traditional cultural places (TCPs) that are significant in American history, architecture, engineering, archeology, and culture, at local, state, and national levels of significance.”
- Provides more examples
- Goal is to publish final in December 2023



Questions?



1

Executive Order 2020-17

- Idaho's energy and mineral planning and policy development agency
- Lead agency for NEPA involvement on energy and mining issues
- Idaho's clearinghouse for energy and mineral information
- Administer loan & financial assistance programs
- Administrative arm of the Idaho Strategic Energy Alliance (ISEA)



2

Mission

- Develop and utilize Idaho's energy and mineral resources in an efficient, effective, and responsible manner that serves to enhance the state's economy and sustain the quality of life for its citizens.

Our focus: **reliable**, **affordable**, and **sustainable** power in Idaho



3

OEMR's Role in NEPA

EO-2020-17 establishes OEMR as the state cooperating agency for energy and mineral projects subject to NEPA

In this role OEMR...

- Tracks projects subject to NEPA
- Serves as a Cooperating Agency representing the State of Idaho
- Coordinates comments and input among state agencies
- Meets regularly with federal agencies such as the BLM, BOR, USFS to discuss energy and mineral developments



4

Mining Projects



Itafos Conda Mine

- Itafos Conda will allow Idaho to maintain its position as a leader in the phosphate mining industry.
- The mine will supply Idaho's agriculture and food industries with high-quality fertilizer produced from locally-mined phosphate.



Jervois Cobalt Mine

- Jervois started production on the first American cobalt mine.
- Cobalt is a mineral that is critical to advanced battery production among many other high-value technologies.



5



Thank You



6