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## Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns

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# MEANINGFUL CONSULTATION WITH TRIBAL GOVERNMENTS: A UNIFORM STANDARD TO GUARANTEE THAT FEDERAL AGENCIES PROPERLY CONSIDER THEIR CONCERNS

MICHAEL EITNER\*

*“Mount Tenabo is the source of our creation stories and is a central part of our spiritual world view. . . . It holds the Puha, or life force, of the Creator. We pray to the Mountain for renewal, which comes from Mt. Tenabo’s special place in Western Shoshone religion.”<sup>1</sup> - Sandy Dann, Western Shoshone<sup>2</sup>*

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\* J.D. Candidate, University of Colorado Law School, 2014. I thank Professor Sarah Krakoff for introducing me to the field of American Indian law. Additionally, I thank Professors Kristen A. Carpenter and Roger Flynn for sharing their knowledge of the Mt. Tenabo litigation with me. Finally, I am grateful to the members of the *University of Colorado Law Review* for their guidance.

1. Brief of Amici Curiae American Indian Law Scholars in Support of Appellants at 35–36, *Te-Moak Tribe of W. Shoshone Indians of Nev. v. Dep’t of Interior*, CV 12-15412 (9th Cir. June 5, 2012) (quoting the declaration of tribal member Sandy Dann) [hereinafter *Amici Curiae*]. Sandy Dann, who is a member of the Western Shoshone and traditional religious practitioner, made this declaration during the Bureau of Land Management’s consultation with Indian tribes regarding the expansion of the Cortez Hills Mining project. *Id.* Mt. Tenabo is located in Eureka County, Nevada, in the northern part of the state. MOUNT TENABO (NV), <http://www.summitpost.org/mount-tenabo-nv/794847> (last visited Sept. 12, 2013).

2. Today, the Western Shoshone are not based in one geographic area. THE GALE ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES: GREAT BASIN, SOUTHWEST, MIDDLE AMERICA 32 (Sharon Malinowski et al. eds., 1998). Traditionally, the Western Shoshone territory included southern Idaho, central Nevada, part of northwestern Utah, and Death Valley in southern California. *History and Culture*, TE-MOAK TRIBE OF WESTERN SHOSHONE, <http://www.temoaktribe.com/history.shtml> (last visited Feb. 28, 2013). The following is a list of reservations and colonies where Shoshone people live: Battle Mountain, Big Pine, Bishop, Duck Valley, Duckwater, Elko Colony, Ely Shoshone, Fallon, Fort Hall, Goshute Confederated Tribes, Lone Pine, South Fork Band Colony, Stockbridge-Munsee, Te-Moak, Timbisha Shoshone, Washakie Northwestern Band of Shoshone People, Wells Band Colony, Winnemucca, and Yomba. See TILLER’S GUIDE TO INDIAN COUNTY: ECONOMIC PROFILES OF AMERICAN INDIAN RESERVATIONS 373–74, 378–89, 434–35, 491–92, 538–41, 683–84, 686–94, 704–05, 706–07, 711–12, 715, 949–50, 957–58, 1065–67 (Veronica E. Velarde Tiller ed., 2005).

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*The obligation that federal agencies consult with Indian tribes regarding undertakings that impact tribal interests is grounded in various statutes, implementing regulations, and Executive Order 13,175. Currently, tribes confront a variety of approaches to consultation because each agency develops its own standards for conducting consultation. Once an agency has reached a final decision on a proposed undertaking, any consultation that occurred to comply with Executive Order 13,175 will not be reviewed in court because Executive Order 13,175 and the consultation policy that an agency developed as required by Executive Order 13,175 do not provide tribal governments with a cause of action to challenge the adequacy of consultation. While courts will review tribal-agency consultation mandated by a federal statute or implementing regulation, judicial review tends to focus on the procedural aspects of consultation rather than examining the substantive decision made by an agency. Thus, Indian tribes are unable to challenge whether an agency's final determination adequately considered the concerns that tribal governments raised during the consultative process. In recognition of the federal government's general trust responsibility to protect the general welfare of tribes and the government-to-government relationship that exists with Indian tribes, Congress should enact a statute that creates a uniform standard for agency-tribal consultation. The statute will create one standard for conducting tribal consultation. Additionally, the consultation statute will permit judicial review of the procedural and substantive aspects of the interaction between tribal governments and federal agencies. To ensure agency decisions adequately consider tribal interests and concerns, agencies will have to overcome a rebuttable presumption that will be granted to tribal assertions raised during consultation. If an agency cannot produce sufficient evidence to support its determination, a federal court will have the power to overturn the decision. The statutory approach to agency-tribal consultation will ensure the federal government honors the unique relationship it has with Indian tribes.*

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INTRODUCTION

Mt. Tenabo’s land and the waters that flow within it are a sacred source of life-giving and healing energy for the Western Shoshone.<sup>3</sup> The mountain has a network of caves that are

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3. *Amici Curiae, supra* note 1, at 33.

associated with the Western Shoshone's creation story, world renewal, and other spiritual events.<sup>4</sup> Additionally, *puha*, the animating power of the universe, is concentrated at Mt. Tenabo and moves in "web-like currents linked to mountain peaks and water sources."<sup>5</sup> As Carrie Dann, a Western Shoshone, noted, "[t]he water flowing underneath the Mt. Tenabo area is especially important to maintaining the balance and power of life."<sup>6</sup> The 2010 Final Environmental Impact Statement<sup>7</sup> created for the expansion of gold mining on Mt. Tenabo included a comment from Joe Kennedy, Timibisha Shoshone Tribal Chairman, noting that the expanded project's significant drawdown of groundwater "will cause permanent loss of sacred springs, such as the Shoshone Well Spring."<sup>8</sup>

The same Environmental Impact Statement recognized that Indians used the pediment area for religious activities.<sup>9</sup> Additionally, the January 2004 Ethnographic Report, which the Bureau of Land Management (BLM) used to classify sites as traditional cultural properties, noted that Mt. Tenabo is eligible to be listed as such on the National Register.<sup>10</sup> Based

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4. *Id.* at 31.

5. *Id.* (quoting BUREAU OF LAND MGMT., CULTURAL RESOURCES REPORT, MOUNT TENABO PROPERTIES OF CULTURAL AND RELIGIOUS IMPORTANCE DETERMINATIONS OF ELIGIBILITY TO THE NATIONAL REGISTER OF HISTORIC PLACES 22 (2004)).

6. *Id.* at 33.

7. The National Environmental Policy Act (NEPA) process is an evaluation of the environmental impacts of a federal undertaking. National Environmental Policy Act, 42 U.S.C. § 4321 (2013), available at <http://www.epa.gov/compliance/basics/nepa.html>. There are three levels of analysis under NEPA: categorical exclusion, preparation of an environmental assessment, and preparation of an environmental impact statement. *Id.* If an environmental assessment finds that the impacts of a proposed federal undertaking may be significant, then an environmental impact statement is prepared. *Id.* The environmental impact statement is more detailed than the environmental assessment and may include input from the public, other federal agencies, and outside parties. *Id.*

8. *Amici Curiae*, *supra* note 1, at 33.

9. *Id.* at 32. The pediment area is the "flatter . . . area along the base" of Mt. Tenabo that the expanded mining project will largely destroy. Appellant's Opening Brief at 13, *Te-Moak Tribe of W. Shoshone Indians of Nev. v. Dep't of Interior*, CV 12-15412 (9th Cir. June 5, 2012) [hereinafter Appellant's Opening Brief].

10. *Amici Curiae*, *supra* note 1, at 30. Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires that Federal agencies take into account the effects of their undertakings on historic properties. *Section 106 Regulations Summary*, ADVISORY COUNCIL ON HISTORIC PRES., <http://www.achp.gov/106summary.html> (last visited Sept. 12, 2013). If a federal agency determines that an undertaking could impact historic properties, which includes those that

on consultation with the Western Shoshone, the authors of the January 2004 Ethnographic Report noted that the entire Mt. Tenabo area was a unified sacred site for the tribes and rejected any attempt to “segregat[e] the mountain into discrete” areas where some areas would be protected as sacred sites and others would not be so protected.<sup>11</sup>

Ultimately, the BLM approved the expansion of gold mining over the objections raised by the Te-Moak Tribe, the Elko Bank Council, the Shoshone-Paiute Tribe, and the Reno-Sparks Indian colony during the consultation process.<sup>12</sup> The BLM determined that only the summit of Mt. Tenabo and the sheer White Cliffs immediately below the summit warranted protection despite the January 2004 Ethnographic Report’s strong documentary evidence to the contrary and the agency’s recognition of the religious importance of Mt. Tenabo, including the sacred *puha* running through the mountain, in its Environmental Impact Statements.<sup>13</sup> After a district court

meet the criteria for inclusion on the National Register of Historic Places, the agency decides the appropriate scope to identify historic sites. *Id.* This may include conducting internal studies and commissioning external studies. *Id.* Part of the identification process also includes consultation with Indian tribes whether or not the property is on tribal land. 36 C.F.R. § 800.2 (c)(2)(ii) (2013). An agency “should seek the concurrence” of tribes that attach religious or cultural significance to a property eligible for inclusion on the National Register. *Id.* § 800.5(c)(2)(iii). If a tribe disagrees with an agency finding of no impact on a particular historic property, the tribe may request that the Advisory Council on Historic Preservation review the decision provided it does so within thirty days of learning of the agency’s no-impact decision. *Id.* When an agency finds that a historic property will suffer an adverse effect by the undertaking, the agency “shall consult further.” *Id.* § 800.5(d)(2). If the agency and tribe agree on how to resolve adverse effects, the parties shall execute a memorandum of agreement. *Id.* § 800.6(b)(iv). However, the agency or tribe may terminate consultation and request that the Advisory Council on Historic Preservation provide comments on the issue. *Id.* § 800.7(a). Importantly, the agency need only to “take into account the Council’s comments” when reaching a final decision after consultation has been terminated. *Id.* § 800.7(c)(4).

11. *Amici Curiae*, *supra* note 1, at 30 (internal quotation marks omitted).

12. *S. Fork Band Council of W. Shoshone of Nev. v. Dep’t of Interior*, No. 3:08-CV-00616-LRH-WGC, 2012 WL 13780, at \*2 (D. Nev. Jan. 4, 2012); *Amici Curiae*, *supra* note 1, at 27–28, 31–32. Private companies began gold mining on land not controlled by the federal government or Indian tribes in the 1960s. *Mount Tenabo, Nevada: Indigenous Religious Traditions*, COLORADO COLLEGE, <http://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/mount-tenabo-nevada/> (last visited Sept. 12, 2013). In 2005, the federal government authorized Barrick Gold to mine an additional 30,000 acres near Mt. Tenabo. *Id.* Three years later, Barrick Gold received permission from the federal government to “dig a mine directly on” Mt. Tenabo. *Id.*

13. *Amici Curiae*, *supra* note 1, at 23, 31.

judge upheld the BLM's decision<sup>14</sup>, the tribes appealed the decision to the Ninth Circuit Court of Appeals.<sup>15</sup>

Prior to the district court's decision approving the expanded mining project at Mt. Tenabo, President Obama directed agencies<sup>16</sup> in November 2009 to completely and consistently implement tribal consultation.<sup>17</sup> Nine years earlier, Executive Order 13,175 (the E.O.) mandated that agencies have "accountable process[es] to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."<sup>18</sup> Beyond the E.O., various statutes and regulations require agencies to consult with tribal governments about federal projects that impact tribal interests.<sup>19</sup> In some instances, tribal consultation has resulted in beneficial outcomes for all parties.<sup>20</sup> However, federal courts usually focus on procedural rather than substantive issues when a federal statute or regulation provides tribes with the ability to challenge an agency's consultation in court.<sup>21</sup>

The current framework for agency consultation with tribal governments is inadequate. Whether the obligation to consult comes from an executive order, statute, or regulation, there is

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14. *S. Fork Band Council of W. Shoshone of Nev.*, No. 3:08-CV-00616-LRH-WGC, at 13. The tribes brought suit under the Federal Land Policy and Management Act (FLPMA) and NEPA. *Id.* at 2.

15. See Appellant's Opening Brief, *supra* note 9. Oral arguments before the Ninth Circuit Court of Appeals were held on September 19, 2013. *Week of September 16, 2013*, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CALENDAR FOR SAN FRANCISCO, CALIFORNIA, 2, <http://cdn.ca9.uscourts.gov/dastore/calendaring/2013/09/15/sf09.18-20.13eb.pdf>

16. For purposes of this Note, the terms "agency" and "agencies" refer to both independent agencies and executive departments of the federal government.

17. Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

18. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000). This Executive Order rescinded Executive Order 13,084, which also dealt with tribal consultation. See Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

19. See WHITE HOUSE INDIAN AFFAIRS EXECUTIVE WORKING GROUP, LIST OF FEDERAL TRIBAL CONSULTATION STATUTES, ORDERS, REGULATIONS, RULES, POLICIES, MANUALS, PROTOCOLS, AND GUIDANCE at 1-4 (2009) [hereinafter EXECUTIVE WORKING GROUP], available at [http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version\\_6-09.pdf](http://www.achp.gov/docs/fed%20consultation%20authorities%202-09%20ACHP%20version_6-09.pdf). For a non-comprehensive list of statutes and regulations related to tribal consultation, see *infra* Part I.D.

20. See *Union Tel. Co., Inc.*, 173 Interior Dec. 313, 320, 330 (IBLA 2008). See also *Evans-Barton, Ltd.*, 175 IBLA 29, 29-31 (2008).

21. See *Ctr. for Biological Diversity v. Salazar*, 2011 WL 6000497 at \*12 (D. Ariz. Nov. 30, 2011); *Quechan Tribe of Fort Yuma Indian Reservation v. Dep't of Interior*, 755 F. Supp. 2d 1104, 1121-24 (S.D. Cal. 2010).

no guarantee that agencies will engage in meaningful consultation by honestly considering tribal concerns. The BLM's decision to expand the gold mining on Mt. Tenabo, despite strong and credible evidence from tribal and non-tribal sources that the project would forever alter a site sacred to the Western Shoshone, exemplifies the limitations of the current consultation framework. Congress should enact a statute that will provide a government-wide standard for meaningful consultation, including provisions that require agencies to justify decisions that run contrary to tribal assertions and judicial review of the substantive aspects of the consultation. As such, consultation between agencies and tribal governments will resemble the government-to-government relationship envisioned in the E.O.

In Part I, this Comment examines the sources from which the obligation to consult with Indian tribes derives, agency and departmental consultation policies, and recently proposed federal legislation related to tribal consultation. Part II asserts that the inefficiencies of consultation, coupled with the diminishing power of traditional tools employed by courts to check the power of the federal government, create an environment which inadequately protects tribal interests. Part III argues that a consultation statute should (1) require agencies to present sufficient evidence rebutting tribal assertions if final action runs contrary to tribal interests; and (2) provide Indian tribes with a cause of action to sue agencies for inadequate consultation that includes a substantive review of the process in federal court regardless of the source obligating agencies to consult—the E.O., statute, or implementing regulation.

#### I. ORIGINS OF TRIBAL CONSULTATION AND CONGRESSIONAL ATTEMPTS TO IMPROVE THE CONSULTATIVE PROCESS

In his Special Message to Congress on Indian Affairs, President Nixon outlined what is currently the relationship between the federal government and tribal governments.<sup>22</sup> Nixon's Special Message marked an end to Congressional efforts to terminate tribes as sovereign governments and began

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22. See Special Message to Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).



the self-determination era.<sup>23</sup> Nixon concluded by noting that “a new and balanced relationship between the United States government and the first Americans” had arrived.<sup>24</sup> This new relationship provided the genesis for the consultation currently taking place between tribal governments and agencies.

While the obligation of agencies to consult with tribes comes from multiple sources, agency-tribal consultation is neither universal nor uniform. Section A addresses executive orders and presidential memoranda mandating tribal consultation. Section B outlines compliance with President Obama’s memorandum requiring the creation of tribal consultation policies. Section C describes agency consultation policies. Section D describes major statutes and implementing regulations that require tribal consultation. To conclude, Section E describes recent Congressional attempts to pass a government-wide consultation statute.

#### *A. Presidential Memoranda and Executive Orders Relating to Tribal Consultation*

On April 29, 1994, President Clinton issued his Memorandum on Government-to-Government Relations with Native American Tribal Governments (the Memorandum).<sup>25</sup> The Memorandum opened with a statement about the “unique legal relationship” between the federal government and tribes.<sup>26</sup> The Memorandum directed agencies to build “more effective day-to-day working” relationships with tribal governments that reflect respect for tribes as sovereign nations.<sup>27</sup> Additionally, the Memorandum instructed agencies to conduct “open and candid” consultations.<sup>28</sup> Importantly, the

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23. *Id.* at 564–67 (noting that the federal government “must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support”). See CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2006) (documenting Congress’s successful efforts to terminate tribes as sovereign governments, the subsequent efforts of terminated tribes to restore their status, and the modern self-determination movement).

24. Special Message to Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).

25. Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936 (May 2, 1994).

26. *Id.*

27. *Id.*

28. *Id.* at 936–37.

Memorandum closed with a notice that it was issued only “to improve the internal management of the executive branch” and did not create a cause of action for tribes to enforce meaningful consultation.<sup>29</sup>

On November 6, 2000, President Clinton issued the E.O. to “establish regular and meaningful consultation” with tribal officials.<sup>30</sup> The E.O., which is still in effect today, notes that the federal government works with tribes on a government-to-government level to address “Indian self-government, tribal trust resources, and Indian treaty rights and other rights.”<sup>31</sup>

While the E.O. defines several terms, it fails to define “consultation.” However, the E.O. does provide a high-level outline for the consultation process. Agencies are to follow a process that ensures “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”<sup>32</sup> Further, agencies shall not issue regulations impacting tribes without first consulting tribal governments early in the development of the regulations.<sup>33</sup> When issuing regulations in the Federal Register, agencies must include in the preamble an impact statement that details the agency’s level of consultation with tribes, a summary of tribal concerns about the proposed regulation, whether the concerns of the tribe have been met, and a statement of the agency detailing the need for the regulation.<sup>34</sup> As with the Memorandum, the E.O. does not provide a cause of action to enforce meaningful consultation.<sup>35</sup>

On November 5, 2009, President Obama issued a Memorandum for the Heads of Executive Departments and

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29. *Id.* at 937.

30. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). The E.O. referred to here is E.O. 13,175. See discussion of the legal force of executive orders *infra* Part II.B. See also *supra* note 20.

31. 65 Fed. Reg. 67,249 (Nov. 6, 2000).

32. 65 Fed. Reg. 67,250 (Nov. 6, 2000). The E.O. refers to 44 U.S.C. § 3502(1) to define “agency.” 65 Fed. Reg. 67,249. This statutory provision defines an agency as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 44 U.S.C. § 3502(1) (2012). The Government Accountability Office and the Federal Election Commission are not agencies under this statutory provision. *Id.* § 3502(1)(A)–(B).

33. 65 Fed. Reg. 67,249.

34. 65 Fed. Reg. 67,250–51.

35. 65 Fed. Reg. 67,252.

Agencies (the Obama Memorandum).<sup>36</sup> The Obama Memorandum requires agencies to submit a plan detailing how they would “implement the policies and directives” of the Clinton-era E.O.<sup>37</sup> President Obama noted that “failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable, and, at times, devastating and tragic results.”<sup>38</sup> Moreover, the President called consultation a “critical ingredient” in the relationship between the federal government and Indian tribes.<sup>39</sup> Despite the President’s high-minded rhetoric, the Obama Memorandum does not provide tribes with the ability to enforce meaningful government-to-government consultation.<sup>40</sup>

### *B. Compliance with the E.O. and President Obama’s Memorandum*

In January 2012, the National Congress of American Indians issued a report on agency compliance with the E.O.<sup>41</sup> The organization examined thirty-six departments, agencies, and government corporations that affect the interests of tribal governments.<sup>42</sup> After having more than eleven years to implement a consultation policy,<sup>43</sup> eleven agencies did not have

36. Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. See NAT’L CONG. OF AM. INDIANS, CONSULTATION WITH TRIBAL NATIONS: AN UPDATE ON IMPLEMENTATION OF EXECUTIVE ORDER 13175 (Jan. 2012), available at [http://www.ncai.org/attachments/Consultation\\_hxjBLgmqyYDiGehEwgXDsRIUKvwZZKjJOjwUnKjSQeoVaGOMvfl\\_Consultation\\_Report\\_-\\_Jan\\_2012\\_Update.pdf](http://www.ncai.org/attachments/Consultation_hxjBLgmqyYDiGehEwgXDsRIUKvwZZKjJOjwUnKjSQeoVaGOMvfl_Consultation_Report_-_Jan_2012_Update.pdf). The National Congress of American Indians is a non-profit organization that advocates for tribal interests based on the consensus of its members. *About NCAI*, NAT’L CONG. OF AM. INDIANS, <http://www.ncai.org/about-ncai> (last visited Oct. 6, 2013). The organization’s purpose is to “serve as a forum for unified policy development among tribal governments” with the goal of protecting and advancing tribal governance, preserving treaty rights, promoting economic development, increasing the health and welfare of tribes, and educating the public about tribes. *Id.*

42. NAT’L CONG. OF AM. INDIANS, *supra* note 41, at 6–9.

43. Agencies had sixty days after the effective date of the E.O. to submit a description of their consultation process to the Office of Management and Budget. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000). The E.O. was issued on November 6, 2000 and became effective sixty days later. 65 Fed. Reg. 67,249, 67,251.

a final or draft consultation policy in place.<sup>44</sup> As discussed below, meaningful consultation cannot be protected where there is no redress and, thus, no real motive to follow the E.O.

*C. Agency Definitions of Consultation, Outlines of the Consultation Process, and Limitations on Enforcing Consultation*

Based on presidential directives, most agencies created or revised their tribal consultation policies and action plans.<sup>45</sup> The results include definitions of consultation, sketches of how consultation will be conducted, and disclaimers preventing enforcement of consultation in court based solely on the policies.

For example, the Department of Agriculture (USDA), does not define consultation, but in its Action Plan for Tribal Consultation and Collaboration notes that the “nature and design of consultation interaction will vary and be guided by the particulars of the issues at hand, the larger background situation, the number of tribes that could be affected, the difference in and complexities of the issues[, and] . . . time constraints.”<sup>46</sup> USDA also states that it prefers face-to-face consultation, but will conduct video conferencing and webinars when tribal leaders prefer the latter.<sup>47</sup>

In comparison, the Department of Health and Human Services (HHS) both defines consultation and outlines the consultation process in its policy.<sup>48</sup> HHS defines consultation

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44. See NAT'L CONG. OF AM. INDIANS, *supra* note 41, at 6–9. According to the National Congress of American Indians, the following departments did not have a draft or final consultation policy: the Department of Education, the National Institutes of Health, the Commission on Civil Rights, the Farm Credit Administration, the Federal Housing Finance Agency, the National Labor Relations Board, the National Science Foundation, the National Transportation Safety Board, the Securities and Exchange Commission, the Denali Commission, and the Marine Mammal Corporation. *Id.*

45. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

46. U.S. DEPT OF AGRIC., ACTION PLAN FOR TRIBAL CONSULTATION AND COLLABORATION 14, <http://www.usda.gov/documents/ConsultationPlan.pdf> (last visited Feb. 18, 2014).

47. *Id.*

48. U.S. DEPT OF HEALTH & HUMAN SERVS., TRIBAL CONSULTATION POLICY (Dec. 12, 2010), <http://www.hhs.gov/iea/tribal/tribalconsultation/hhs-consultation-policy.pdf>.

as:

[a]n enhanced form of communication, which emphasizes trust, respect and shared responsibility. It is an open and free exchange of information and opinion among parties, which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process, which results in effective collaboration and informed decision making with the ultimate goal of reaching consensus on issues.<sup>49</sup>

Similar to the USDA policy, HHS determines how it consults with tribal governments based on the agency's proposed undertaking.<sup>50</sup> Additionally, HHS will report on the outcome of a consultation within ninety calendar days of the final meeting.<sup>51</sup> While HHS asserts that the consultation process should "result in a meaningful outcome" for the tribes and the department,<sup>52</sup> and that tribes "may elevate an issue of importance to a higher . . . decision-making authority,"<sup>53</sup> HHS explicitly states that the policy does not create a cause of action for failure to comply with it.<sup>54</sup>

As with HHS, the Department of Homeland Security (DHS) defines important terms and outlines its tribal consultation process in a concise way.<sup>55</sup> For DHS, consultation is the "direct, timely, and interactive involvement of Indian tribes regarding proposed Federal actions on matters that have [t]ribal [i]mplications."<sup>56</sup> DHS also provides a clear definition of the type of action that will trigger consultation by defining tribal implication as follows:

Policy or action [that] causes a substantial direct effect on (1) the self-government, trust interests, or other rights of an Indian Tribe; (2) the relationship between the Federal Government and Indian Tribes; or (3) the distribution of rights

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49. *Id.* § 17(3).

50. *Id.* § 8(A).

51. *Id.* § 8(A)(5).

52. *Id.* § 13.

53. *Id.* § 14.

54. *Id.*

55. See DEPT OF HOMELAND SEC., TRIBAL CONSULTATION POLICY, [http://www.mtwytlc.org/images/stories/users/01559\\_01040.pdf](http://www.mtwytlc.org/images/stories/users/01559_01040.pdf) (last visited Jan. 19, 2013).

56. *Id.* § II(B).

and responsibilities between the Federal Government and Indian Tribes.<sup>57</sup>

Further, DHS notes that it will “incorporate the input received” from tribes into its decision-making process and notify tribes of DHS’s final decision.<sup>58</sup> As with HHS, DHS explicitly states that the policy does not create a right of action for tribes seeking redress for a failure to consult.<sup>59</sup>

Importantly, these disclaimers, in combination with provisions that absolve agencies from adopting the approach preferred by tribal governments, create an almost impenetrable presumption in favor of the agency decision. For example, the BLM states that the agency need only consider tribal concerns only when deciding the most appropriate use for public lands.<sup>60</sup> Similarly, the Federal Energy Regulatory Commission qualifies its consultation efforts by noting that the Commission will “seek to address the effects of proposed projects on tribal rights and resources.”<sup>61</sup> While these two provisions are inherently reasonable standing alone, a consultation policy taken as a whole becomes unreasonable when either provision is read with a disclaimer expressly preventing judicial review of agency actions initiated solely to comply with said policy. Although consultation policies may not provide tribes with a cause of action to review agency decisions, there are federal statutes and regulations that require some form of consultation with tribal governments.

#### *D. Major Statutes and Implementing Regulations Requiring Consultation With Tribal Governments*

According to the White House Indian Affairs Executive Working Group (Working Group), there are several statutes

57. *Id.* § II(F).

58. *Id.* § III(B)(iii)–(iv).

59. *Id.* § V(B).

60. BUREAU OF LAND MGMT., GUIDELINES FOR CONDUCTING TRIBAL CONSULTATION IV-2 (2004), available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_handbook.Par.38741.File.dat/H-8120-1.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.38741.File.dat/H-8120-1.pdf) (noting that “public-land decision making must consider – but not necessarily conform with – the tribe’s request”).

61. 18 C.F.R. § 2.1c(c). Policy Statement on Consultation With Indian Tribes in Commission Proceedings, 68 Fed. Reg. 46,452–01 (Aug. 6, 2003). The policy is codified at 18 C.F.R. § 2.1c.

that require all agencies to consult with tribal governments in particular circumstances.<sup>62</sup> The American Indian Religious Freedom Act creates a federal policy that requires consultation with tribes to ensure access to religious sites so American Indians may practice their traditional religions.<sup>63</sup> Similarly, the Archeological Resources Protection Act of 1979 requires any agency to consult with tribal governments before permitting excavations on tribal land.<sup>64</sup> The National Historic Preservation Act requires that all agencies consult with Indian tribes or Native Hawaiian organizations "that attach religious and cultural significance" to particular properties.<sup>65</sup> The Native American Graves Protection and Repatriation Act requires agency consultation not only with tribal governments, but also with traditional religious leaders and lineal descendants about the "treatment and disposition of specific kinds of human remains, funerary objects, sacred objects, and other items."<sup>66</sup> Finally, the Indian Self-Determination and Education Assistance Act mandates consultation for specific actions taken by the Department of the Interior (DOI) and the Indian Health Service, which is part of HHS.<sup>67</sup>

In addition to statutes, regulations also impose consultation requirements upon agencies. While many of the above statutes have implementing regulations that require consultation because the statutes specifically mention Indian tribes,<sup>68</sup> the Council on Environmental Quality mandates tribal consultation as part of the regulations it promulgated for the National Environmental Policy Act (NEPA), even though the statutory language does not mention tribal governments.<sup>69</sup> As part of regulatory compliance with NEPA, agencies must contact Indian tribes early in the development of environmental assessments or environmental impact statements for any projects that may impact tribal interests.<sup>70</sup>

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62. See EXECUTIVE WORKING GROUP, *supra* note 19, at 1-4.

63. *Id.* at 1. AIRFA is codified at 16 U.S.C. § 1996.

64. *Id.* at 1. ARPA is codified at 16 U.S.C. §§ 470aa-mm.

65. *Id.* at 1. NHPA is codified at 16 U.S.C. §§ 470-470a-2.

66. *Id.* at 2. NAGPRA is codified at 25 U.S.C. §§ 3001-3013.

67. *Id.* at 3. The ISDEA is codified at 25 U.S.C. § 450.

68. NAGPRA's implementing regulations are at 43 C.F.R. § 10; NHPA's regulations are at 36 C.F.R. Part 800; ISDEA's implementing regulations are at 25 C.F.R. Parts 900 and 1000. *Id.* at 2, 4.

69. *Id.* at 2. NEPA's implementing regulation are at 40 C.F.R. Part 1500.

70. *Id.*

Although these statutes and regulations address agency-tribal consultation in specific circumstances, a comprehensive consultation statute would ensure meaningful consultation regardless of the issue or project that provoked the government-to-government interaction.

*E. Recent Congressional Attempts to Pass Tribal Consultation Statutes*

Acknowledging the inadequacies of consultation with tribal governments, the House of Representatives has twice attempted in the last six years—but has not yet passed—a consultation statute.<sup>71</sup> This Section first examines the Consultation and Coordination with Indian Tribal Governments Act (H.R. 5608),<sup>72</sup> and concludes with an examination of the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes (RESPECT) Act.<sup>73</sup>

1. H.R. 5608

While notable for attempting to address the shortcomings of tribal consultation, H.R. 5608 would have had a limited impact if enacted by Congress. Rather than dealing with tribal consultation at a macro level, H.R. 5608 addressed tribal consultation with three governmental entities: the DOI, the Indian Health Service, and the National Indian Gaming Commission (NIGC).<sup>74</sup>

Although not applicable to all government agencies, H.R. 5608 attempted to define consultation in a way that was favorable to tribal interests. The proposed bill used the term “accountable consultation.”<sup>75</sup> H.R. 5608 defined accountable consultation as “a process of government-to-government dialogue . . . to ensure meaningful and timely input by tribal

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71. See Consultation and Coordination with Indian Tribal Governments Act, H.R. 5608, 110th Cong. (2008); Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act, H.R. 2380, 112th Cong. (2011).

72. H.R. 5608 § 1.

73. H.R. 2380 § 1(a).

74. H.R. 5608 § 2(2).

75. *Id.* § 2(1).



officials in the formulating, amending, implementing, or recinding [sic] . . . policies that have tribal implications.”<sup>76</sup>

H.R. 5608 also provided a general framework by which the three named entities were to conduct tribal consultation. First, the proposed legislation required that the agencies ensure tribal governments “have ample opportunity to provide input and recommendations.”<sup>77</sup> Second, after receiving information from tribes, the agencies had to “fully” consider such information before acting.<sup>78</sup> Third, the agencies were to provide tribal governments with a written notice detailing how the agency reached its policy decision.<sup>79</sup> Finally, no agency decision could be effective until at least sixty days after providing written notice to the tribal government.<sup>80</sup>

Although the E.O. and agency-written consultation policies expressly disclaimed the creation of a cause of action to enforce government-to-government consultation,<sup>81</sup> H.R. 5608 did not expressly state whether the law would provide a mechanism for tribal governments to enforce consultation. Because H.R. 5608 lacked a specific provision permitting tribal governments to seek judicial enforcement of accountable consultation, the bill failed to address the E.O.’s major shortcoming—lack of judicial enforceability and the inability of courts to review the substance of the consultation.<sup>82</sup>

On April 9, 2008, the House Committee on Natural Resources held a hearing on H.R. 5608.<sup>83</sup> The DOI, the NIGC, and the Indian Health Service opposed the bill.<sup>84</sup> Tribal officials supported the proposed legislation.<sup>85</sup> Ultimately, the Committee on Natural Resources decided not to forward H.R.

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76. *Id.*

77. *Id.* § 2(1)(A).

78. *Id.* § 2(1)(B).

79. *Id.* § 2(1)(C).

80. *Id.* § 2(1)(D).

81. *See supra* Part I.A; *supra* Part I.B.

82. *See supra* Part I.D; *see also infra* Part II.B.

83. The hearing most likely occurred because Representative Rahall, who introduced the bill, was Chairman of the Natural Resources Committee during the 110th Congress. *Hearing on H.R. 3490, H.R. 3522, H.R. 5608, H.R. 5680 and S. 2457 Before the H. Comm. on Natural Resources*, 110th Cong. 1 (2008) [hereinafter *Hearing*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg41818/html/CHRG-110hhrg41818.htm>.

84. *Id.*

85. *Id.*

5608 for consideration by the full House of Representatives.<sup>86</sup> Moreover, there is no evidence that the Committee even held a vote on the proposed legislation after the hearing concluded.<sup>87</sup>

## 2. The RESPECT Act

Two sessions later, the RESPECT Act, a more far-reaching consultation bill, was introduced on April 14, 2010.<sup>88</sup> The proposed statute would have corrected some of H.R. 5608's deficiencies if enacted. First, unlike H.R. 5608, the RESPECT Act would have applied to all agencies.<sup>89</sup> Second, the proposed legislation would have explicitly provided tribal governments with a cause of action in federal court if an agency failed to consult as outlined in the statute.<sup>90</sup>

In contrast to H.R. 5608, the RESPECT Act would have delineated the agency-tribal consultation process. The proposed legislation would have divided the consultation process into two phases: the scoping and decision stages.<sup>91</sup> During the scoping phase, agencies would have to create a draft scope of the project, identify all tribes that may be impacted by the proposed project, contact said tribes, and meet with members of tribal governments.<sup>92</sup> The scoping phase would end when the

86. See *H.R. 5608: Consultation and Coordination With Indian Tribal Governments Act*, CIVIC IMPULSE LLC, <https://www.govtrack.us/congress/bills/110/hr5608> (last visited Jan. 11, 2013).

87. See *id.*

88. *Grijalva Introduces Bill to Mandate Federal Consultation With Native American Tribes During Rulemaking Process*, CONGRESSMAN GRIJALVA, [hereinafter *Grijalva*], <http://grijalva.house.gov/news-and-press-releases/grijalva-introduces-bill-to-mandate-federal-consultation-with-native-american-tribes-during-rulemaking-process/> (last visited Mar. 20, 2014).

89. Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act, H.R. 2380, 112th Cong. § 1(e)(2) (2011) (citing 44 U.S.C. § 3502(1), which defines an "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency"). This is the same statutory provision that the E.O. used to define agency. See *Consultation and Coordination With Indian Tribal Governments*, 65 Fed. Reg. 218, 67,249 (Nov. 9, 2000).

90. H.R. 2380 § 501. The RESPECT Act also would allow tribes to seek an order restraining further agency action until the lawsuit is resolved and would permit tribes to sue for monetary damages resulting from insufficient consultation. *Id.*

91. *Id.* §§ 203, 204.

92. *Id.* § 203(a)–(e).

agency and tribal government signed agreements on the proposed undertaking.<sup>93</sup> The RESPECT Act also would have provided a mechanism for both agencies and tribal governments to terminate the scoping phase without a written agreement.<sup>94</sup>

Shifting to the decision stage, the agency would have to prepare a document that discussed the proposed federal action, any anticipated impact on tribes, a memorandum of agreement (if one exists), and any written statements by consulting parties.<sup>95</sup> Further, an agency would have to provide supporting documentation that is sufficient enough for “any reviewing parties to understand” the basis for the decisions contained in the proposal.<sup>96</sup> The agency would publish the proposal in the Federal Register and provide a public comment period of at least ninety days after publication.<sup>97</sup> After the close of the comment period, the agency would prepare a preliminary decision letter and include reasoning that explains why the agency’s decision conflicts with the “expressed requests” of tribal governments.<sup>98</sup>

After the bill’s sponsor reintroduced the RESPECT Act in the Second Session of the 112th Congress, the House Committee on Natural Resources received the proposed legislation on June 24, 2011.<sup>99</sup> Unlike H.R. 5608, the House Committee on Natural Resources neither held hearings nor voted on the RESPECT Act.<sup>100</sup> Even though both legislative proposals failed to move beyond the House Committee on Natural Resources, for the reasons discussed below,

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93. *Id.* § 203(f)(1).

94. An agency may terminate consultation “[i]f, after a good faith effort, the agency determines that further consultation will not be productive.” *Id.* § 203(g). When deciding to terminate consultation, the agency must provide all parties to the consultation with written notice explaining why it has decided to terminate the scoping phase. *Id.* Alternatively, a tribal government also may terminate consultation. If a tribe is the terminating party, the agency “shall provide [it] with the opportunity to submit a written statement” regarding its decision to cease consultation. *Id.*

95. *Id.* § 204(a).

96. *Id.*

97. *Id.* § 204(a)–(b).

98. *Id.* § 204(c).

99. *H.R. 2380: Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes Act*, CIVIC IMPULSE LLC, <http://www.govtrack.us/congress/bills/112/hr2380> (last visited Feb. 15, 2014).

100. *Id.*

congressional action similar to the RESPECT Act is essential to resolve the inadequacies of tribal consultation.

## II. THE LIMITATIONS OF TRIBAL CONSULTATION: BEFORE COURT AND ONCE IN COURT

The statute-by-statute and executive order approach to tribal consultation does not adequately ensure that agencies consider tribal concerns during the consultative process. As such, a statutory solution outlining a single, uniform process for meaningful consultation is necessary for a true government-to-government relationship between Indian tribes and the federal government. Section A argues that the current approach to consultation is inefficient and would benefit from a uniform approach. Section B asserts that the inability of executive orders to provide Indian tribes with a cause of action to force an agency to engage in meaningful consultation limits the efficacy of the consultative process. Section C argues that courts focus on procedural requirements rather than substantive issues when a statutory provision or regulation provides tribes with a cause of action to challenge the adequacy of agency consultation.

### A. *Tribal Consultation Now: Reality, Expectations, and Obligations*

According to the National Congress of American Indians, there are thirty-six federal departments, sub-agencies, and independent agencies that should engage in consultation with tribal governments because these entities impact tribal interests.<sup>101</sup> With such a large and varied number of agencies consulting with tribes, it is likely that some entities will honor their consultation obligations more robustly than others. As such, members of Congress and tribal leaders have expressed concern with agency consultation efforts.<sup>102</sup> This Section addresses the current shortcomings of the consultative process as expressed by tribal leaders and elected Congressional

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101. See NAT'L CONG. OF AM. INDIANS, *supra* note 41, at 6–9.

102. See Letter from Lisa Murkowski, United States Senator from Alaska, to Barack Obama, 44th President of the United States, (June 22, 2012) [hereinafter Murkowski Letter] (on file with the author); *Grijalva, supra* note 88.

representatives. Next, this Section argues that although meaningful consultation is arguably part of the federal government's general trust responsibility to tribes and falls under the Indian law canons of construction, there is growing doubt that these tools remain a viable check on federal power.

### 1. The Current Consultation Process: Inefficient, Cumbersome, and Inadequate

In a letter to President Obama, Alaska Senator Lisa Murkowski wrote that the federal government needs "one consistent policy that works across all agencies and departments" because the current consultation process is inadequate and inefficient.<sup>103</sup> Consultation is currently a "one way road of communication dissemination instead of discussion and dialogue."<sup>104</sup> Moreover, agencies do not adhere to their own consultation policies.<sup>105</sup> As such, tribal consultation policies and the E.O.—the foundation upon which the policies were built—are additional examples of promises made by the federal government to tribes that the federal government has "no intention of keeping."<sup>106</sup>

Supporting Senator Murkowski's contention that there needs to be one consultation policy, Representative Grijalva said that the federal government needs "an effective, uniform policy across the board" when he introduced the RESPECT Act.<sup>107</sup> Representative Grijalva also noted that Indian tribes cannot be "an afterthought in federal policymaking" and "[c]onsultation and discussion are a necessity, not a favor to be granted one day and denied the next."<sup>108</sup>

In addition to elected federal officials, tribal leaders believe the current framework for consultation is inadequate. For example, the leader of the Confederated Tribes of the Goshute Reservation said that the federal government was "making decisions on our behalf without consult[ation]."<sup>109</sup> Moreover,

103. Murkowski Letter, *supra* note 102.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Grijalva*, *supra* note 88 (quoting United States Congressman Raul M. Grijalva).

108. *Id.*

109. Henry Brean, *Tribes Say Feds Haven't Protected Them From Las Vegas Pipeline Project*, LAS VEGAS REV. J., May 23, 2012, <http://www.lvrj.com>.

representatives from five members of the Coalition of Large Tribes complained that the DOI did not follow its consultation policy in developing new rules for hydraulic fracturing.<sup>110</sup>

Beyond news reports about the lack of adequate consultation, three tribal leaders testified during hearings on H.R. 5608 about disappointing interactions with agencies.<sup>111</sup> President Shirley of the Navajo Nation lamented the arbitrary decisions of agency officials and testified that effective consultation means agency officials value tribal opinions and concerns in an accountable way.<sup>112</sup> President Shirley also testified that “consultation is more than sitting there and listening . . . [c]onsultation is acting on the information.”<sup>113</sup> Furthermore, Gerald Danforth, the Chairman of the Oneida Tribe of Wisconsin, said that a well-defined consultation process should achieve consistent results that are not foregone conclusions.<sup>114</sup> Thus, congressmen and tribal leaders alike have recognized the inefficiency and inadequacy of a consultation process that lacks a uniform standard.

## 2. The Federal Trust Responsibility and Indian Law Canons of Construction: Still Viable Checks on the Federal Government’s Authority?

Beyond the inadequacies and inefficiencies of the consultation process, the federal government has a general trust responsibility that it must honor when dealing with tribes. According to the Bureau of Indian Affairs (BIA), the trust responsibility “entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and federally recognized tribes.”<sup>115</sup> The E.O.,

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[com/news/tribes-say-feds-haven-t-protected-them-from-las-vegas-pipeline-project-153338895.html](http://www.bia.gov/news/tribes-say-feds-haven-t-protected-them-from-las-vegas-pipeline-project-153338895.html) (quoting Ed Naranjo).

110. *Tribal Coalition Says Feds Not Consulting With Tribes*, MINOT DAILY NEWS, May 10, 2012, <http://www.minotdailynews.com/page/content.detail/id/565484/Tribal-coalition-says-feds-not-consulting-with-tribes.html?nav=5010>.

111. *See Hearing*, *supra* note 83.

112. *Id.*

113. *Id.* President Shirley also testified that there have been situations where “tribal delegations are convened to inform us of a decision already made just so the agency can check off its tribal consultation box.” *Id.*

114. *Id.*

115. *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/index.htm> (last visited Jan. 31, 2013).

agency policies, regulations, and statutes that require consultation<sup>116</sup> have created an expectation that the relationship between the federal government and the Indian tribes will include consultation on federal actions that implicate tribal interests. This expectation is evident from the testimony of tribal leaders about H.R. 5608.<sup>117</sup> For example, Buford Rolin, Chairman of the Poarch Band of Creek Indians, testified that meaningful consultation between the United States and tribal governments is an “integral component” of the government-to-government relationship.<sup>118</sup> Therefore, “[c]onsultation is a means for actualizing” the general trust responsibility.<sup>119</sup>

In addition to the general trust responsibility, the Indian law canons of construction should have a role in determining the contours of effective tribal consultation. The Supreme Court has held that “the standard principles of [interpretation] do not have their usual force in cases involving Indian law.”<sup>120</sup> The Indian law canons of construction have developed through years of judicial opinions. The most succinct formulation comes from *Cohen’s Handbook of Federal Indian Law*, which states that “treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians;” in other words, how Indians “would have understood them.”<sup>121</sup> Returning to the congressional hearing about H.R. 5608, the testimony of tribal leaders demonstrates their understanding of the obligation to consult.<sup>122</sup> Tribes understand consultation to mean that an agency will come to the consultation without having reached a

116. See *supra* Part I.

117. See *Hearing, supra* note 83.

118. *Id.*

119. James Van Ness, *The Federal Trust Doctrine – Realizing Chief Justice Marshall’s Vision*, U.S. DEPT OF THE INTERIOR, <http://www.doi.gov/pmb/cadr/programs/native/gtghworkshop/The-Federal-Trust-Doctrine.cfm> (last visited Sept. 14, 2013).

120. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

121. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 113, 114 (Nell Jessup Newton et al. eds., 2012). The Indian law canons of construction “evolved judicially as a component of the federal fiduciary duty to protect Indian culture and resource rights.” Jill De La Hunt, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REFORM 681, 682 (1984). Due to language barriers and unequal bargaining power, “courts created unique constructions principles that ensured the fulfillment of federal promises while preserving the substance of agreements made under coercive conditions.” *Id.*

122. See *Hearing, supra* note 83.

final decision and will take action—not just listen—based on the information shared during the process.<sup>123</sup> Under the canons of construction, consultation should be liberally construed to incorporate tribal governments' expectations that agencies fully consider tribal interests before reaching a decision.

Currently, there is some doubt about the continued vitality of the general trust responsibility and the Indian law canons of construction as checks on the power of the government once tribes reach court. In *United States v. Jicarilla Apache Nation*, the Court failed to mention “the implicit contract between the tribes and federal government” based on the surrender of land and external sovereignty by tribes to the federal government that forms the basis for bringing suits against the federal government based on the general trust responsibility.<sup>124</sup> The omission may signal the end of the general trust responsibility as a cause of action to block federal actions.<sup>125</sup> Moreover, the Court appears to use the Indian law canons of construction to the benefit of tribes only “when doing so has a relatively minimal impact on non-Indian interests.”<sup>126</sup> Therefore, because the general trust responsibility and the Indian law canons of construction no longer provide certain checks on federal government action, a tribal consultation statute is necessary to ensure that the federal government will not fail to honor its commitments to tribes.

### *B. The E.O. Fails to Provide Tribes with a Cause of Action*

Adding to the uncertainty surrounding the general trust responsibility and the Indian law canons of construction as tools that benefit tribes when challenging federal actions, the E.O. fails to provide tribes with a cause of action. In general, courts are reluctant to find a cause of action derived exclusively from executive orders.<sup>127</sup> As such, without a regulation or

123. *Id.*

124. Elizabeth Ann Kronk, *United States v. Jicarilla Apache Nation: Its Importance and Potential Future Ramifications*, 59 FED. LAW. 4, 6 (2012) (discussing *United States v. Jicarilla Apache*, 131 S. Ct. 2313 (2011)).

125. *Id.* This is separate from a breach of trust case brought under a statute that directs the federal government to manage tribal resources. *Id.*

126. Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons*, 35 VT. L. REV. 623, 657 (2011).

127. *See Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995) (noting that Executive Orders are “intended primarily as a political tool”).



statute requiring consultation, tribal governments cannot guarantee meaningful consultation relying on the E.O. as the sole source of their lawsuit.<sup>128</sup>

In order to assert a judicially enforceable cause of action arising from an executive order, two steps are required.<sup>129</sup> First, the plaintiff must show that the "President issued the order pursuant to a statutory mandate or delegation of authority from Congress."<sup>130</sup> Second, the executive order's "terms and purpose" must indicate an intention "to create a private right of action."<sup>131</sup>

While it is possible to assert a cause of action under an executive order in other circumstances, the E.O. neither points to a specific statute or delegation of authority from Congress nor expresses an intent to create a private right of action. The source of the E.O.'s authority is the Constitution and "laws of the United States of America."<sup>132</sup> Even if a tribe were to get past the first step, the concluding language of the E.O. is fatal to any attempt to assert a cause of action because it explicitly denies the creation of a private right of action.<sup>133</sup>

Further demonstrating the E.O.'s inability to bind judicial proceedings, OHSA's lack of consultation with a tribe regarding gaming safety standards did not bar OHSA from enforcing its own standards.<sup>134</sup> In *Turning Stone Casino Resort*, an administrative law judge held that the E.O. does not provide a defense for tribes<sup>135</sup> even though the E.O. requires that agencies "have an accountable process to ensure meaningful and timely" consultation for policies having an impact on

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128. *See id.*

129. *Utah Ass'n of Cnty. v. Bush*, 316 F. Supp. 2d 1172, 1200 (D. Utah 2004).

130. *Id.* *See also In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (noting that "executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits").

131. *Utah Ass'n of Cnty.*, 316 F. Supp. 2d at 1200. *See also* *Facchiano Const. Co., Inc. v. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993) (stating that "generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders"); *Hecht v. Barnhart*, 217 F. Supp. 2d 356, 360 (E.D.N.Y. 2002).

132. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2006).

133. *Id.* at 67,252 (stating the order is "not intended to create any right . . . enforceable at law by any party against the United States").

134. *See* *Sec'y of Labor v. Turning Stone Casino Resort*, No. 04-1000, 2004 WL 2793868, at \*1 (O.S.H.R.C. Dec. 3, 2004).

135. *Id.* at \*6-7.

tribes.<sup>136</sup> The Oneida Nation challenged the ability of OHSA to issue a citation and complaint for a safety violation at the Oneida Nation's casino.<sup>137</sup> Among other arguments, the Oneida Nation alleged that the citation should be dismissed because OHSA failed to consult with the tribe on a government-to-government basis about safety regulations as the E.O. requires.<sup>138</sup> Citing the judicial review section of the E.O., the administrative law judge concluded that "OHSA's failure to follow the [E.O.] provides no basis for dismissing the . . . citation and complaint."<sup>139</sup> If the E.O. does not provide tribes with an affirmative defense for failure to consult, it is equally plausible to conclude that it does not provide tribes with the ability to seek administrative review of an agency decision when Indian tribes believe the agency failed to adequately consider their concerns during consultation.

### *C. Federal Courts: A Focus on the Procedural Aspects of Consultation*

Although courts have found in favor of tribal governments seeking to enforce an obligation to consult when a statute or regulation requires an agency to do so, the courts' reasoning in these cases leads to the conclusion that they are only willing to consider the basic mechanics of consultation (if, how, and when it occurred). They do not address whether agencies engaged in meaningful consultation by considering the issues raised by tribal governments.

For example, in *Quechan Tribe of Fort Yuma Indian Reservation v. Department of Interior*, the judge granted the Quechan Tribe's request for an injunction to stop a solar energy project on federally-owned land because BLM did not engage in proper consultation.<sup>140</sup> The court noted that tribal consultation "must begin early" before other parties "invest[ ] a great deal of time and money" and the "parties . . . become entrenched and

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136. Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000).

137. *Turning Stone Casino Resort*, 2004 WL 2793868, at \*1.

138. *Id.* at \*6.

139. *Id.* at \*7.

140. *Quechan Tribe of Fort Yuma Indian Reservation v. Dep't of Interior*, 755 F. Supp. 2d 1104, 1121-24 (S.D. Cal. 2010). The Quechan Tribe brought suit under NEPA, NHPA, and FLMPA. *Id.* at 1107-08.

inflexible” in their desire for the project to proceed.<sup>141</sup> Moreover, the court viewed BLM’s invitation for the Quechan Tribe to share its concerns about the solar project’s potential impact on historic and sacred sites as part of a public meeting insufficient to comply with the government-to-government consultation requirements in the National Historic Preservation Act regulations.<sup>142</sup>

The court’s focus in *Quechan Tribe* was on the procedural aspects of consultation rather than on whether the BLM properly considered the tribal government’s concerns. The court concluded that the BLM did not engage the tribe early enough in the process.<sup>143</sup> Also, such procedural victories do not necessarily translate into substantive victories once procedural defects have been corrected. As the judge correctly noted, the Quechan Tribe should not expect the BLM to “acquiesce to . . . [its] request[s]”<sup>144</sup> because there is nothing that will bind the agency to honestly consider tribal concerns when reaching a final decision on the project.

Similarly, in *Yankton Sioux Tribe v. Kempthorne*, a federal judge in South Dakota issued a preliminary injunction preventing the Office of Indian Education Programs, part of the BIA, from reorganizing and closing several Education Line Offices because it failed to properly consult with the tribes.<sup>145</sup> According to the court, the BIA failed to adequately inform the tribe of the “potential impact of the proposed federal action” because the agency did not disclose whether the reorganization would divert money away from Indian schools.<sup>146</sup> As such, the BIA violated both its government-to-government consultation policy and a federal statute mandating consultation in educational matters.<sup>147</sup> Further, the court observed that an agency’s “failure to comply with its own consultation policy violates general principles that govern administrative decision-

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141. *Id.* at 1121 (citing *Te-Moak Tribe of Western Shoshone of Nev. v. Dep’t of Interior*, 608 F.3d 592, 608–09 (9th Cir. 2010)).

142. *Id.* at 1118–19.

143. *Id.* at 1119.

144. *Id.*

145. *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 788–89 (D.S.D. 2006). The Yankton Sioux Tribe sued under 25 U.S.C. § 2011(b)(1) & (2), 25 C.F.R. § 32.2(g), 25 C.F.R. § 32.4(a)(1) & (2), and the BIA’s consultation policy. *Id.* at 783.

146. *Id.* at 785.

147. *Id.* at 784 (citing 25 U.S.C. § 2011(b)(2)(B) (2006)).

making.”<sup>148</sup> Finally, the court noted that consultation “must include a candid discussion” of the financial impact of the reorganization.<sup>149</sup>

As with *Quechan Tribe*, the court in *Yankton Sioux Tribe* focused on the procedural defects of the consultation when it granted the preliminary injunction.<sup>150</sup> The court granted the injunction because it believed the tribes did not have adequate information to meaningfully participate in the consultation process.<sup>151</sup> Importantly, the court also noted that it expressed “no opinion as to the propriety of the substantive aspects” of the proposed agency action.<sup>152</sup> Because the issue was not before the court, it is unknown if the agency would be barred from reaching the same conclusion in the face of fully informed tribes with whom the agency consulted.

In a 2011 decision from the District of Arizona, a federal judge stated that the political branches, and not courts, are the proper venue to impose consultation requirements on agencies.<sup>153</sup> In *Center for Biological Diversity v. Salazar*, the San Carlos Apache Tribe and the Salt River Pima-Maricopa Indian Community intervened as plaintiffs and requested that the court set aside the Fish and Wildlife Service’s (FWS) determination that the desert bald eagle is not a “distinct population segment” subject to protection under the Endangered Species Act.<sup>154</sup> The Tribes argued, inter alia, that the E.O. and presidential memoranda created a legal right enforceable against the FWS because the agency failed to engage in “meaningful government-to-government consultation.”<sup>155</sup> According to the court, the FWS does not have “the same statutory and regulatory obligations [under the Endangered Species Act] to consult with the Tribes . . . that the BIA has when making decisions directly related to . . . tribal services . . . on Indian Reservations.”<sup>156</sup>

The court ultimately held that because Congress and the

148. *Id.* at 785.

149. *Id.*

150. *Id.* at 784–85.

151. *Id.*

152. *Id.* at 785.

153. *Ctr. for Biological Diversity v. Salazar*, No. 10-2130-PHX-DGC, 2011 WL 6000497, at \*12 (D. Ariz. Nov. 30, 2011).

154. *Id.* at \*1.

155. *Id.* at \*10.

156. *Id.* at \*12.

DOI did not create specific consultation requirements in the context of the Endangered Species Act, it would “not impose such obligations on its own.”<sup>157</sup> In reaching its conclusion, the court not only failed to require the FWS to consult with tribes on Endangered Species Act issues,<sup>158</sup> but also failed to use another source to impose a similar duty upon the agency. Thus, the lack of statutory language mandating consultation was largely dispositive.<sup>159</sup>

By refusing to follow the reasoning of *Yankton Sioux Tribe* and require that agencies honor their consultation policies, the court in *Center for Biological Diversity* placed the burden for defining meaningful consultation on the political branches of the federal government.<sup>160</sup> Moreover, it would not be surprising if future courts extended the reasoning in *Center for Biological Diversity* to cases where the obligation to consult is general or vague because the court would be supplanting the will of the elected branches.

Additionally, the most common remedy to inadequate consultation is for a court to grant a preliminary injunction and remand the issue back to the agency. After issuing an injunction, there is nothing to prevent an agency from reaching the same decision after consultation that it reached with no or inadequate consultation. For example, in the Mt. Tenabo litigation, the Ninth Circuit Court of Appeals remanded the case to the district court so that it could issue an injunction halting the expanded mining operations until the BLM prepared an Environmental Impact Statement that “adequately considers” the tribal concerns.<sup>161</sup> The BLM’s post-injunction Environmental Impact Statement did not contain any new mitigation measures that addressed the concerns tribes raised during consultation.<sup>162</sup> Thus, the district court judge approved the same BLM conclusions that were in the pre-injunction Environmental Impact Statement.<sup>163</sup>

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157. *Id.*

158. *Id.*

159. *See id.*

160. *Id.* (noting that courts should not impose consultation obligations when Congress and executive departments have declined to do so).

161. *S. Fork Band Council of W. Shoshone of Nev. v. Dep’t of Interior*, 588 F.3d 718, 722 (9th Cir. 2009).

162. Opening Brief for Appellant at 9, *S. Fork Band Council of W. Shoshone*, 588 F.3d 718 (9th Cir. 2009) (No. 09-15230).

163. *Id.*

The preceding cases indicate that courts appear more interested in procedural concerns, such as whether consultation occurred, than in reaching the substantive issue of whether the agency actually considered the tribal issues during the consultative process. This is harmful to Indian tribes because it permits the federal government not to honor the government-to-government relationship that the federal government itself suggests is vital to tribal self-determination.<sup>164</sup> Moreover, as Senator Lisa Murkowski noted, the failure to consult signals another empty or broken promise made by the federal government to Indian tribes.<sup>165</sup>

As demonstrated above, agency consultation with Indian tribes suffers from many limitations. First, the current process is inefficient and inadequate. Second, the continued utility of judicial tools employed to protect tribal interests is in doubt. Third, the E.O. does not create an enforceable right for tribes to seek redress in court. Finally, even when a statute or regulation provides tribal governments with a cause of action to enforce consultation, courts tend to focus on the procedural aspects of consultation rather than the substantive issues discussed during consultation. Therefore, a statute providing for a uniform process is necessary to ensure that tribal interests are properly considered by agencies.

### III. A UNIFORM CONSULTATION STATUTE TO PROTECT TRIBAL INTERESTS

To ensure that agencies engage in meaningful consultation with tribes, Congress must pass a statute outlining the contours of effective consultation including viable redress in court when their voices are ignored.<sup>166</sup> Section A outlines the essential elements of a uniform consultation statute. Section B argues that past successful consultations and the perceived costs of compliance do not outweigh the benefits of a uniform statute.

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164. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,250 (Nov. 6, 2000).

165. See Murkowski Letter, *supra* note 102.

166. A statutory solution also has been proposed to resolve access to sacred sites by tribal members, which is one of the most frequently discussed and debated issues during the consultative process. See Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 288 (2012).

A. *Essential Elements of a Consultation Statute*

With the judiciary focusing on the procedural requirements of consultation,<sup>167</sup> Congress should enact substantive consultation requirements. As H.R. 5608 and the RESPECT Act indicate, some members of Congress are aware that the current consultative process has shortcomings.<sup>168</sup> This Section provides the fundamental elements that a consultation statute must contain to ensure agencies uniformly and adequately consider the concerns of tribal governments.

While H.R. 5608 and the RESPECT Act were important attempts at recognizing the need to codify uniform tribal consultation, neither became law and both failed to adequately address how agencies deal with information that tribal governments present during consultation. To remedy this situation, a consultation statute should require agencies to treat tribal assertions as true. This type of rebuttable presumption will demand that agencies present information in their final decision refuting tribal claims if agencies reject some or all of the information tribes present during consultation. Additionally, agencies should not be allowed to reject tribal concerns with minimal evidence. They should be required to present information sufficient to persuade a neutral third party that the agency properly rejected tribal assertions.<sup>169</sup> Finally, the burden of persuasion should also shift from the tribes to the agency when an agency decision is challenged in court.<sup>170</sup>

To illustrate how an agency might overcome the rebuttable presumption that tribal assertions are valid, it is helpful to return to the *Mt. Tenabo* case. During consultation, the tribes presented evidence that the entire mountain, including the underground water, were sacred.<sup>171</sup> If the January 2004 Ethnographic Report had concluded that only the peak and the sheer White Cliffs just below the peak were sacred, the BLM

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167. See *supra* Part II.C.

168. See *supra* Part I.E.

169. See generally FED. R. EVID. 301 (stating that “in a civil case . . . the party against whom a presumption is directed has the burden of producing the evidence to rebut the presumption”).

170. See 1 FEDERAL EVIDENCE § 3:6 (Christopher Mueller & Laird Kirkpatrick eds., 3d ed. 2007) (noting that generally presumptions do not affect the burden of persuasion, but many federal statutes create presumptions and courts “may give such presumptions greater effect than Fed. R. Evid. 301 would allow”).

171. See *Amici Curiae*, *supra* note 1, at 30–36.

could have used this information to successfully rebut the tribal assertion.<sup>172</sup> However, the January 2004 Ethnographic Report concluded that the entirety of Mt. Tenabo was a sacred site.<sup>173</sup> The BLM's unilateral determination that only the peak of Mt. Tenabo and the White Cliffs were sacred, despite strong evidence to the contrary, would fail to rebut the tribal assertion because it lacks sufficient support to make the determination credible to a neutral third party.<sup>174</sup>

Furthermore, a consultation statute must provide Indian tribes with a cause of action that includes judicial review of the substantive aspects of consultation. As previously mentioned, the E.O. does not provide a cause of action on its own,<sup>175</sup> and consultation policies expressly disclaim the document's ability to provide one.<sup>176</sup> Moreover, courts currently examine only the procedural aspects of consultation when a statute or regulation provides a cause of action.<sup>177</sup> Thus, the ability of tribes to enforce their right to government-to-government consultation through the judicial process must be made explicit. Once in federal court, it is vital that judges review the facts in the record to determine whether the agency met its burden of production and persuasion when tribes assert that an agency improperly considered issues raised during consultation. As such, the statute should direct judges to review agency final decisions under a *de novo* standard of review.<sup>178</sup> A less deferential standard of review is essential to guarantee that agency decisions are sufficiently based on facts contained in the administrative record.

As Section B discusses, some administrative decisions demonstrate that honest consultation between tribes and the federal government occurs. However, these successes do not reduce the need to ensure that agencies always adequately consider tribal issues during the consultative process.

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172. *Id.* 31–32.

173. *Id.* at 30.

174. *See id.* at 23, 30–31.

175. *See supra* Part II.B.

176. *See supra* Part I.C.

177. *See supra* Part II.C.

178. *See Hydro Conduit Corp. v. American-First Title & Trust Co.*, 808 F.2d 712, 714 (10th Cir. 1986) (noting that the court of appeals applies a *de novo* standard of review when the lower court grants summary judgment).



*B. Prior Success Does Not Warrant Maintaining the Status Quo*

Critics may argue that a statute forcing agencies to consult in a particular way is unnecessary because previous results demonstrate that the current process produces final determinations that adequately consider tribal interests. For example, the Interior Board of Land Appeals (IBLA) upheld a stipulation in a land-use contract forbidding Evans-Barton from going within one-half mile of Kyle Hot Springs during the development and production phase of a geothermal energy project because the BLM learned through consultation that the Lovelock Paiute and the Battle Mountain Band of Te-Moak Band of Western Shoshone use the area for medicinal and spiritual purposes.<sup>179</sup> In another case, the IBLA affirmed the BLM's rejection of Union Telephone Company's request to construct communication towers near Beaver Rim, Wyoming, in part because there were sacred sites within the project area.<sup>180</sup> As with the previous case, the BLM learned of the sacred site through tribal consultation.<sup>181</sup>

While it is reassuring that tribal consultation under the current system has produced some results that adequately considered tribal interests, these successes do not justify maintaining a process that favors agency conclusions based on insufficient or unconvincing documentation. Moreover, Congress will likely encounter strong opposition to any effort to codify a consultation statute that shifts the balance of power, even if slightly, between tribal governments and agencies. As an example of agency resistance, the Associate Deputy Secretary of the DOI testified that H.R. 5608 would limit the agency's ability to respond to emergency situations, remove agency discretion when undertaking a project with tribal impact, and require "vast amounts of time, funds, and staff resources" to meet the bill's consultation requirements.<sup>182</sup> The same official argued that the proposed bill would require an agency to consult with tribes before "respon[ding] to proposed legislation or . . . simple congressional inquiries."<sup>183</sup> Generally,

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179. *Evans-Barton, Ltd.*, 175 Interior Dec. 29, 29–31, 35 (IBLA 2008).

180. *Union Tel. Co., Inc.*, 173 Interior Dec. 313, 320, 330 (IBLA 2008).

181. *Id.* at 322.

182. *Hearing*, *supra* note 83.

183. *Id.*

it is beneficial to examine the furthest extent to which a proposed bill might impact an agency upon passage. However, the Associate Deputy Secretary's testimony goes beyond the plain text of the bill. Although those challenges may be real given a bill like that suggested here, because H.R. 5608 did not provide a cause of action for tribes to sue, the Associate Deputy Secretaries' worries were impossible given the bill he addressed.

More importantly, although a consultation statute would create some burden on an agency's final decision, the burden is not severe. First, the increased burden only exists when an agency and tribal government are unable to reach mutual agreement during the consultative process. Second, an agency should already have records of the concerns that Indian tribes raise during consultation, so there is no requirement to collect additional documentation. Third, a consultation statute would require an agency to provide convincing evidence only when rejecting tribal concerns. Importantly, the agency would retain the discretion to reject any assertion by tribal governments as long as the final decision provides adequate documentary evidence such that a neutral third party would believe the agency's conclusion.<sup>184</sup> As such, the agency has not lost its discretionary power to reach results contrary to the expressed desires of tribal governments. It simply has to justify its decision in a convincing way.

In addition to placing few additional burdens on agencies, a tribal consultation statute would require agencies to act in accordance with the federal government's rhetoric, describing its relationship with Indian tribes. Testifying before the House Committee on Natural Resources, the Chairman of the NIGC said that it "*attempt[s]* to adhere strictly to the executive order and [its] adopted consultation policy."<sup>185</sup> Further, the same official noted that the NIGC's consultation efforts are not "perfect," and it would attempt to improve.<sup>186</sup> Similarly, the Associate Deputy Secretary said that the DOI "welcome[s] the

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184. See 1 FEDERAL EVIDENCE § 3:10 (Christopher Mueller & Laird Kirkpatrick eds., 3d ed. 2007) (noting that the rebuttable "presumption is vanquished . . . if there is cogent and compelling evidence that the presumed fact is not so").

185. *Hearing, supra* note 83 (emphasis added).

186. *Id.*

opportunity” to improve the consultation process.<sup>187</sup> Finally, in a letter to President Obama, Senator Lisa Murkowski wrote that agencies do not follow their consultation policies and that this jeopardizes the government-to-government relationship.<sup>188</sup> Thus, a consultation statute will strengthen the “balanced relationship” between the federal government and Indian tribes that President Nixon envisioned in 1970, and build an effective relationship that respects the sovereignty of tribal governments.<sup>189</sup>

## CONCLUSION

The current framework for agency consultation with tribal governments is inadequate. Whether by executive order, statute, or regulation, the obligation to consult does not guarantee that agencies will engage in meaningful consultation by actually considering tribal concerns. A statute providing a government-wide standard for meaningful consultation and a mechanism by which agencies must justify decisions that run contrary to the views expressed by tribes would provide just such a guarantee. By doing so, the federal government would honor its general trust responsibility to Indian tribes and ensure that it will not revert to its past pattern of broken promises. As such, consultation based on the statute would reflect the government-to-government relationship envisioned in the E.O.

If a federal statute had been in place during tribal consultation on the expansion of the Cortez Mine, the BLM would have been required to produce sufficient evidence to rebut the tribal assertion that all of Mt. Tenabo, including the pediment area below the White Cliffs, was a sacred site for the Western Shoshone. Because the BLM did not have to do so, a portion of Mt. Tenabo’s *puha*, or life force, is lost forever.

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187. *Id.*

188. Murkowski Letter, *supra* note 102.

189. See President Nixon Special Message to Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).