



# Tribal Consultation Policy Update

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# Tribal Consultation Policy – Overview



## Goals of this Webinar:

- (1) Provide a brief overview of the existing policy, dated November 1, 2012
- (2) Demonstrate how initial Tribal feedback was used in the update
- (3) Review updates made to policy and why
- (4) Ensure Tribal Nations have enough time to request Nation to Nation Consultation or provide written feedback by July 12, 2023



# How to Request Individual Tribal Consultations:

Please submit Tribal Consultation Requests and/or written input to Quana Higgins at: [quana.n.higgins.civ@army.mil](mailto:quana.n.higgins.civ@army.mil) by July 12, 2023.

For more information on Army Civil Works actions to improve consultation and relationships visit the [ASA\(CW\) Initiatives webpage](#).



# Modernize Civil Works Initiatives



## (1) Update to the USACE Civil Works Tribal Consultation Policy

- (2) Develop Comprehensive Guidance for the Tribal Partnership Program
- (3) Potential rulemaking on the Regulatory Program's implementation procedures for Section 106 of the National Historic Preservation Act found at 33 CFR Appendix C.
- (4) Potential rulemaking to develop implementing procedures for the Principles, Requirements and Guidelines
- (5) Finalize an environmental justice policy, including a definition for purposes of Section 160 of the Water Resources Development Act of 2020 for the “economically disadvantaged community.”



# Tribal Consultation Policy – The Why Behind the Update

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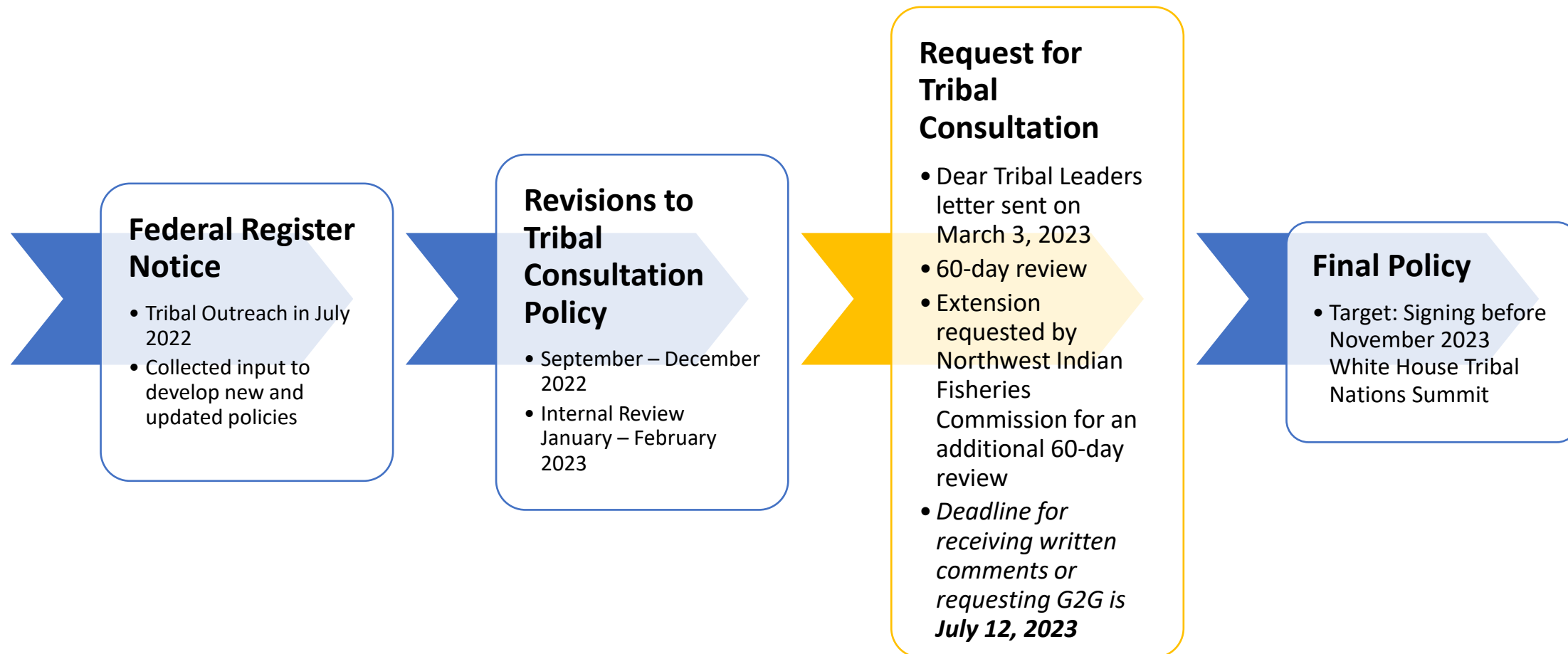


- On January 26, 2021, President Biden issued the Presidential Memorandum, *Tribal Consultation and Strengthening Nation-to-Nation Relationships*.
- The Memorandum called on each federal agency to engage in regular, meaningful, and robust consultation and to implement the policies directed in Executive Order 13175 of November 6, 2000, *Consultation and Coordination with Indian Tribal Governments*.
- In addition, President Biden issued Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, directing agencies to consider environmental and social justice in their mission areas.

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# Tribal Consultation Policy – Where We Are





# Tribal Consultation Policy – Initial Tribal Feedback & Incorporation

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- Overarching Comment: Implementation and Consistency
- Current Definition of “Consultation” – led to the updated definition:
  - Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility;
  - ***To the extent practicable and permitted by law***, consultation works toward ***mutual consensus*** and begins at the ***earliest planning stages***, before decisions are made and actions are taken;
  - An active and respectful dialogue ***concerning actions*** taken by the Corps that ***have Tribal implications to*** tribal resources, tribal rights (***including treaty rights***) or Indian lands.



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# Tribal Consultation Policy – Initial Tribal Feedback & Incorporation

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- “Mutual consensus” vs. United Nations Declaration on the Rights of Indigenous Peoples – “free, prior and informed consent”
- Timing, Notification, and Scope
  - Early and timely – updated to include a definition of “sufficiently early”
  - Public notices are not appropriate notifications – Policy includes an Appendix on protocols for Notice of Consultation (Presidential Memorandum)
  - Neither silence (nor Tribal Consultation) is consent or acceptance – included in update
  - Clarity of scope of federal action



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# Tribal Consultation Policy – Initial Tribal Feedback & Incorporation

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- Definition of “significance” and for Tribal consultation – thresholds identified in policy
- Consideration of Tribal Treaty Rights & Consultation triggered for Treaty Rights interpretations
  - Updated policy to include an Appendix on Best Practices for Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Actions and Federal Decision-Making
  - DoD Memorandum on Treaty Rights



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# Tribal Consultation Policy – Focused Updates



- Consistent with the Consolidated Appropriations Act of 2004 and 2005, as amended, the Corps will consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order 13175.
- USACE should consider conducting consultation even if a determination is made that a policy will not trigger consultation





# Tribal Consultation Policy – Focused Updates

- Address provisions on culturally-sensitive information consistent with DoD Instruction 4710.02, dated September 24, 2018. Army has an obligation to take into account confidentiality concerns raised by Tribes and recognizes that a Tribe may wish to keep confidential some of the culturally sensitive information it provides during consultation.





# Tribal Consultation Policy – Focused Updates



- Protocols section added to discuss handling of culturally sensitive or confidential information
  - USACE is subject to the Freedom of Information Act
  - Identify confidentiality concerns ASAP to develop a Consultation Protocol, if appropriate
  - Integrated Section 304 of NHPA and 36 CFR 800.11(c) to protect sensitive cultural resources.
  - Encourage the use of orally-provided information





# Tribal Consultation Policy – Focused Updates

- In March 2019, the Government Accountability Office (GAO) issued a Report, “Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects”, which included a recommendation to document in the agency’s Tribal Consultation Policy how agencies will communicate with Tribes regarding how Tribal input from consultation was considered in agency decisions on infrastructure projects.
- Proposed policy now includes a requirement to provide a written response to Tribes on how Tribal input was considered in the decision-making process for all consultations.





# Tribal Consultation Policy – Focused Updates



- USACE Regulatory Program
  - Clarified that the USACE Civil Works Tribal Consultation Policy applies to the Regulatory Program.
  - Consultation elements were expanded to include draft Approved Jurisdictional Determinations (AJDs), general permit developments, permit applications.





# Other New Additions

- Use of “Nation-to-Nation”
- Inclusion of co-management and Indigenous Knowledge in Tribal Policy Principles
- Accountability section added for reporting requirements
- Added encouragement for knowledge management at command changes
- Adding Appendix A: Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making
- Adding Appendix B: Notice of Consultation procedures from Presidential Memorandum on Uniform Standards for Tribal Consultation





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