

Army Corps Projects and Tribal Consultation: Requirements, Policies, and Controversy

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Much of the current congressional and public interest in tribal consultation related to U.S. Army Corps of Engineers (Corps) water projects grew out of the [Dakota Access Pipeline \(DAPL\) controversy](#). The Corps builds and operates projects for navigation, flood control, and ecosystem restoration across the United States. The Corps may consult with tribes before deciding to construct a new project, modify an existing project, or allow a nonfederal alteration of a Corps project. Tribal consultation generally is triggered when there is the possibility that an action at a Corps project may affect tribal cultural properties or tribal natural resources. Some duties to consult with tribes are prescribed by law, whereas others are codified in regulations; still others are conducted in conformance with executive branch or agency policy.

Part of the DAPL controversy involves easements at Corps projects for a private oil pipeline and how those easements may affect properties with tribal significance and tribal resources—especially water supplies. In the 114th Congress, there are legislative proposals for the Corps to review and alter its tribal consultation policies and regulations (e.g., Section 185 of [H.R. 5303](#), the Water Resources Development Act of 2016). In October 2016, the Administration initiated a national consultation with tribes to get [their input into infrastructure-related reviews and decisions](#).

Primer on Tribal Consultation Requirements and Policy

The principal federal statutes that require federal agencies to engage in tribal consultations before deciding on certain undertakings are the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.); American Indian Religious Freedom Act (14 U.S.C. §§1996 et seq.); Archeological Resources Protection Act of 1979 (16 U.S.C. §470aa-mm); and Native American Graves Protection and Repatriation Act (25 U.S.C. §§3001 et seq.). None of these statutes, however, defines what constitutes consultation with the governments of the 567 federally recognized Indian tribes. Federal actions also are subject to review under the National Environmental Policy Act (NEPA). For proposed actions with potential impacts on tribes, [regulations implementing NEPA](#) require an agency to consult with tribes [early in the planning process](#). The agency also must invite tribes to participate in the [scoping of issues](#) and [request comments](#) from the affected tribes.

How consultation is performed is based largely on executive branch policy. Executive branch guidance (e.g., a 2009

[Presidential Memorandum](#) and [Executive Order 13175](#) from 2000 on tribal consultation) establishes broadly how federal agencies should approach tribal consultation. Individual departments and agencies determine the specific processes used for consultation. Tribe-related judicial decisions also shape consultation practices. Although an agency may be obligated to consult, the agency is not required to adopt suggestions made by tribal consultees.

Corps Tribal Consultation

The Corps' inventory of water projects includes 702 dams and reservoirs and almost 12 million acres of Corps-owned or -managed lands. Some Corps projects have complex histories with certain tribes that may influence how those tribes prefer for consultation to be conducted and scoped. For example, tribes may desire more extensive consultation before the agency approves an action at a Corps reservoir whose construction inundated previous tribal lands. Indian tribes may identify properties with cultural and religious significance on or off tribal lands, including at or near Corps projects.

The Corps adopted a [Tribal Consultation Policy](#) in 2012. The Corps varies the specific actions used to notify and engage tribes depending on the nature of its undertaking; it also adapts consultation efforts to reflect the consulting tribes' administrations and cultures. Certain timelines and procedural requirements, however, are specified in law or regulation and can affect the pace and nature of consultation.

A prominent statutory trigger for tribal consultation is in Section 106 of the NHPA (hereinafter NHPA Section 106). It requires a federal agency to consult with tribes when considering the effects of federal undertakings on historic properties that have tribal religious and cultural significance. For undertakings associated with its water projects (including the granting of easements at Corps projects), the Corps follows the NHPA Section 106 regulations that were promulgated by the Advisory Council for Historic Preservation ([36 C.F.R. Subpart 800](#)).

In addition to managing federal water projects, the Corps operates a regulatory program for the permitting of nonfederal actions affecting wetland and navigable waters. The Corps' regulatory program follows Corps-developed regulations ([33 C.F.R. Subpart 325 Appendix C](#)) for its NHPA Section 106 compliance. The Corps regulatory program and its NHPA compliance are beyond the scope of this CRS Insight.

Recent Tribal Controversy Related to Corps Projects

The Dakota Access Pipeline developer requested Corps easements for the pipeline to cross Corps-owned and Corps-managed lands. The most controversial easements are for the pipeline's construction and operation underneath the Corps-owned Lake Oahe on the Missouri River. At issue is the Corps decisionmaking process, including how the agency consulted with tribes and evaluated and addressed potential effects of the easements on tribal resources. The pipeline's route beneath the Missouri River in North Dakota upstream of and near to tribal lands has raised [environmental justice](#) concerns.

Tribes view consultation as a tribal right emanating from their sovereignty; they see protection of tribal resources as a federal trust responsibility. The DAPL controversy has touched on [concerns common to many tribes](#): whether federal agencies are engaging in meaningful consultation prior to making decisions or are doing the minimum to satisfy consultation requirements, for example, and how well the agencies are meeting the government's tribal trust responsibilities. Two other common tribal concerns with consultation include the consistency of consultation across federal agencies and the level of federal effort to avoid, minimize, or mitigate impacts to tribal resources. Critics of altering consultation and mitigation practices to address these tribal concerns argue that more extensive consultation requirements could further delay and add uncertainty to already complex federal decisionmaking processes, thereby discouraging private investment and infrastructure development. They argue that current consultation processes adequately provide for tribal input and resource protection while also allowing for agency decisions to be in the broader public interest.