**Oral Argument Not Yet Scheduled**

**Case No. 19-1009**

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**In the United States Court of Appeals**
**for the District of Columbia Circuit**

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Narragansett Indian Tribal Historic Preservation Office,

*Petitioner,*

v.

Federal Energy Regulatory Commission,

*Respondent,*

Tennessee Gas Pipeline Company, LLC,

*Intervenor.*

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On Petition for Review of the Orders of the
Federal Energy Regulatory Commission,
Notice to Proceed with Tree Clearing and Construction (April 12, 2017);
*Tennessee Gas Pipeline Company, LLC*, 162 FERC ¶ 61,013 (Jan. 10, 2018); and
*Tennessee Gas Pipeline Company, LLC*, 165 FERC ¶ 61,170 (Nov. 28, 2018).

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# PETITIONER'S FINAL REPLY BRIEF

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* All other statutes, etc., are contained in the Add. to the Brief for Petitioner.

# TABLE OF AUTHORITIES

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## GLOSSARY

| | |
|---|---|
| Add. | Addendum to this brief |
| ACHP * | The Advisory Council on Historic Preservation |
| Br. | Tribal Office's Opening Brief |
| Advisory Council | The Advisory Council on Historic Preservation |
| Algonquin Project | Algonquin Incremental Market Project |
| Certificate Order | *Tennessee Gas Pipeline Co., LLC*, 154 FERC ¶ 61,191 (March 11, 2016) [J.A.108-171] |
| Commission | Federal Energy Regulatory Commission |
| Consultation Report | United States Government Accountability Office, TRIBAL CONSULTATION March 2019 (GAO-19-22) [Add. 3-7] https://www.gao.gov/assets/700/697694.pdf |
| FERC | The Federal Energy Regulatory Commission |
| Gas Act | Natural Gas Act |
| Handbook | Advisory Council, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (Dec. 2012), https://www.energy.gov/sites/prod/files/2016/02/f30/consultation-indian-tribe-handbook.pdf |
| J.A. | Joint Appendix |

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* Acronyms marked by a star appear in the record, statutes, and / or regulations.

| | |
|---|---|
| Limited Delegation | Advisory Council, *Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act* (July 1, 2011), https://www.achp.gov/sites/default/files/guidance/2018-09/Tribal%20Consultation%20Delegation%20Federal%20Limitations.pdf |
| Mass SHPO * | Massachusetts State Historic Preservation Office |
| Massachusetts | Massachusetts State Historic Preservation Office |
| MOA | Memorandum of Agreement, signed by FERC (Feb. 17. 2017), Advisory Council (Feb. 24, 2017), and Tennessee (Feb. 17, 2017). [J.A.263-278] |
| NHPA * | National Historic Preservation Act |
| NITHPO * | Narragansett Indian Tribal Historic Preservation Office |
| Notice of Adverse Effects | The Commission's notification to the Advisory Council, (Dec. 29, 2016), 36 C.F.R. § 800.6(a)(1). |
| P | Paragraph in FERC's orders. |
| Preservation Act | National Historic Preservation Act |
| Project | Connecticut Expansion Project |
| Rehearing Order I | *Tennessee Gas Pipeline Co., LLC*, 162 FERC ¶ 61,013 (Jan. 10, 2018) [J.A.5-26] |
| Rehearing Order II | *Tennessee Gas Pipeline Co., LLC*, 165 FERC ¶ 61,170 (Nov. 28, 2018) [J.A.27-39] |

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* Acronyms marked by a star appear in the record, statutes, and / or regulations.

| | |
|---|---|
| Rehearing Request I | Tribal Office's request for rehearing of the Staff Order (May 9, 2017) [J.A.320-345] |
| Rehearing Request II | Tribal Office's request for rehearing of Rehearing Order I (Feb. 2, 2018) [J.A.347-364] |
| Section 106 | 54 U.S.C. § 306108 and 36 C.F.R. part 800, "Protection of Historic Properties" |
| SHPO * | State Historic Preservation Office |
| Staff Order | Notice to Proceed with Tree Clearing and Construction (April 12, 2017) [J.A.3-4] |
| Tennessee | Tennessee Gas Pipeline Company, LLC |
| THPO * | Tribal Historic Preservation Office |
| Tribal Office | The Narragansett Indian Tribal Historic Preservation Office |
| Treatment Plan | Tennessee's Treatment Plan for the Massachusetts Loop: Avoidance, Minimization, and Mitigation [Sealed Appendix 9-32] |
| United Tribes | United South and Eastern Tribes |
| USET * | United South and Eastern Tribes |

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* Acronyms marked by a star appear in the record, statutes, or regulations.

## SUMMARY OF ARGUMENT

Under the Commission's regulation, Tribal Office could not intervene sooner because it was engaged in off-the-record consultations. Instead of addressing its curtailment of Tribal rights, FERC claims it can fulfill its government-to-government consultation requirements by accepting written comments from Tribes. To make this argument, FERC performs a sleight-of-hand, pretending off-the-record communications never took place because it failed to disclose them.

Respondents completely ignore precedent FERC has repeatedly used to grant retroactive party status. Instead they push to have the Petition dismissed or limited to a single procedural question. In case that fails, the Commission attempts to buttress its positions by applying the wrong regulations, making post hoc rationalizations, and misrepresenting the record. If the errors it knows exist are found, FERC asks they be decreed harmless, callously ignoring the consequence–destruction of ceremonial stone landscapes that may have been spiritually connected to the massacre of the Narragansett Tribe.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION

In *Georgia Pacific*, the Commission noted that it "can grant intervention status retroactively to facilitate the filing of a timely appeal." *Georgia Pacific*

*Corp*., 98 FERC ¶ 61,312, n.40 (2002). *See also Power Res. Dev. Corp*., 44 FERC ¶ 61,432, 62,367 (1988); *Mohawk Paper Mills Inc*., 33 FERC ¶ 61,291, 61,583 (1985) (same). Based on these precedents, Tribal Office requested party status *nunc pro tunc*. Br. 1, 16, 18, 50, 57. If granted, this equitable relief would satisfy the statutory requirement for party status for the substantive arguments. Since Tribal Office also described how its injuries were caused by the Commission and proposed remedies to redress them, it has standing. Br. 17-19, 57-58.

FERC argues this Court cannot do what it has repeatedly done – grant party status as of the date of the motion to intervene. Resp't's Br. 3, 15, 36-38. "If the government can move the calendar back...there is no reason why the appellants should not have...similar relief." *Weil v. Markowitz*, 829 F.2d 166, 174-75 (D.C. Cir. 1987). FERC ignores this possibility and instead cites cases that can be distinguished, as does Tennessee. Intervenor's Br. 18-22. In *Public Service Commission*, the State did not request rehearing of the order denying it party status, which is why the proceeding could not be reopened as of that date. *Pub. Serv. Comm'n of State of N.Y. v. Fed. Power Comm'n*, 284 F.2d 200, 203-4 (D.C. Cir. 1960). ASARCO failed to request rehearing on the substantive issues and was not allowed to use another party's rehearing request to establish standing. *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773 (D.C. Cir. 1985). There are no comparable procedural problems here as there are two orders, two timely requests for

rehearing, two rehearing orders, and a timely petition for review. Br. 1. California Trout's petition was not decided on the merits because the denial of its motion to intervene was upheld. *Cal. Trout v. FERC*, 572 F.3d 1003, 1007-8 (9th Cir. 2009). Br. 48, 53. In *North Colorado Water Conservancy District,* this Court rejected the Commission's arguments that it lacks jurisdiction to consider an untimely petition. *N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515, 1524 (D.C. Cir. 1984). To do so, it reviewed the facts and law. *Id*. at 1515-24. A similar analysis is required here to determine whether due process was violated and federal trust breached. Br. 1-5, 35-47, 50-52. These issues were raised in Rehearing Request II, 9-11,17-18 [J.A.355-357, 363-364], and are subject to de novo review, with no deference due to FERC. Br. 19-20. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415-17 (2019). If the Court reverses the Commission's denial of Petitioner's motion to intervene, the substantive issues may be decided.

To avoid this outcome, the Commission proposes the sole question it wants reviewed. Resp't's Br. 3. That way, "heads the government wins and tails [Tribal Office] loses." *United States v. Emor*, 785 F.3d 671, 673 (D.C. Cir. 2015). Native Americans are all too familiar with such tactics. Thus, Tribal Office prays party status is granted *nunc pro tunc*, as in other proceedings regarding inequitable agency actions. *Ethyl Corp. v. Browner*, 67 F.3d 941, 945 (D.C. Cir. 1995). Its use

is warranted here because of FERC's constitutional and statutory violations and the public interest in protecting Tribal historic resources.

### A. The Staff Order Is Subject to Judicial Review

Tribal Office does not dispute that Courts allow FERC to condition a certificate on the future acquisition of required federal permits. Br. 22, 54-56. However, the Commission cannot use that delay to reduce compliance with the Preservation Act. To avoid judicial review of the actions it takes after the Certificate Order is issued, it argues the Staff Order is a not a distinct final order that can be separately challenged. Resp't's Br. 26-28. Its regulations beg to differ. "Any staff action...taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing under Rule 713 (request for rehearing)." 18 C.F.R. § 385.1902(a). Here, staff has delegated authority. Rehearing Order I, PP 21-22, n.35-42, 25 [J.A.12-13; 15]. Unlike Delaware Riverkeeper, it is uncontested that Tribal Office requested rehearing. *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 397 (D.C. Cir. 2017) (declining to review the staff order because no rehearing request was made). Thus, the Staff Order is a final order subject to judicial review.

When issuing a notice to proceed, FERC staff confirms that other agencies have granted required licenses or permits. If an agency has acted improperly, it can be challenged in the proper forum. *See e.g. Sierra Club, Inc. v. United States*

*Forest Serv.*, 897 F.3d 582 (4th Cir. 2018). However, here FERC is the federal agency responsible for Section 106, Br. 21, and staff must confirm its employer and co-workers fulfilled the requirements of the Preservation Act. Therefore, the order asserting compliance must be subject to judicial review.

The Commission argues that the sole issue is whether the conditions in the Certificate Order were fulfilled. Resp't's Br. 27. If the Court agrees, FERC's actions under the Preservation Act would not be subject to judicial review if they occur after the Certificate Order is issued as long as there is a document alleging compliance. *See* Rehearing Order I, n.103 [J.A.25]. Tribal Office argues that if retroactive party status is granted, the issues are limited to *whether federal law* and environmental conditions 5, 9, and 26 were complied with after the Certificate Order was issued. [J.A.165, 167, 171].

**B. Tribal Office Requested Rehearing on All Issues**

Tribal Office raised all the issues that require resolution in its two requests for rehearing. 15 U.S.C. § 717r(b). Respondents concede that Tribal Office has the right to challenge the denial of its right to intervene. Resp't's Br. 37; Intervenor's Br. 18-19. In Rehearing Request II, Tribal Office argued that it had good cause to intervene late because FERC's regulations require Tribes to choose between consultation and intervention. Rehearing Request II, 7-11 [J.A.353-357]. The timing of events was discussed, so scheduling may be used as justification for late

intervention. *Id*. Tribal Office also argued FERC violated due process and breached its federal trust obligations by denying it party status. *Id*. at 17-18 [J.A.363-364]. Since a statutory violation is a per se breach of federal trust, Tribal Office has the right to prove FERC violated laws by failing to perform duties when required or as required. *Id*. at 17. If the Court finds FERC's actions contrary to law, it may grant party status as of April 9, 2017 and decide the issues on the merits.

Petitioner's Opening Brief integrates the facts and analysis needed to decide the procedural and substantive issues raised in the two requests for rehearing.[1] Respondents mischaracterize this intertwined approach, ignore the cross-references, and claim arguments were included to challenge the Certificate Order. Resp't's Br. 28-29, Intervenor's Br. 19-21. However, establishing good cause for late intervention requires discussion of events that occurred early in the regulatory review, and FERC acknowledged this in Rehearing Order I, P 16 [J.A.10]. Issues 4 and 5 will determine whether FERC's denial of Tribal Office's Motion to Intervene will be reversed. Br. 2-3. If retroactive party status is granted, Issues 1-3 will be decided on the merits, but, prior to that, can also be used to find good cause for late intervention through the breach of trust (violation of law) argument. They are framed to challenge the Staff Order, not the Certificate Order. Br. 2, 22.

[1] An analysis of the substantive law is required to determine if a breach of fiduciary duty occurred and is good cause for late intervention. Br. 51-52. As a result, Section III cross-references Sections I and II. Br. n.14.

Contrary to Respondents' claims, Resp't's Br. 46-47, Intervenor's Br. 22, Tribal Office raised the issue that a State *or* Tribal Preservation Office signature was required on the MOA. In Rehearing Request I, 11 [J.A.330], Tribal Office explained that section 800.7(a)(2) does not apply because there was no termination of consultation, as required by section 800.7(a). "Because...there was no written notice of termination,…the…two-party MOA...is null and void." *Id*. "[T]his MOA is without effect as it was not signed by a THPO or SHPO, as specifically required under NHPA's regulations." *Id*. at 13 [J.A.332]. "[S]ince neither SHPO nor NITHPO have signed the MOA, the Section 106 consultation is not complete." *Id*. at 14 [J.A.333]. FERC failed to respond in Rehearing Order I, P 48 [J.A.25], so it attempts to avoid review by misrepresenting the record. Br. 32-35.

Tennessee lists three more items. Intervenor's Br. 22. Tribal Office's discussion of the right to petition the government under the First Amendment is part of its due process claim, not a separate issue, so it did not have to be raised. Br. 40-43. The Gas Act violation is part of the argument meant to establish standing, and is valid because timing was discussed in Rehearing Request II, 7-11 [J.A.353-357]. Scheduling issues were also raised in Rehearing Request I, 4-8 [J.A.323-327], so they may be considered on the merits to support the issues under review. Remedies do not have to be raised in a request for rehearing. 15 U.S.C. § 717r(b).

### C. The Requested Relief Would Redress Injuries

Tennessee raises another red herring–redressability. Intervenor's Br. 23-24. If this Court finds that FERC's off-the-record rule violates due process and/or the federal trust doctrine, then it may alleviate the cause of Tribal Office's harms by granting party status. *See Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."). Such relief was not possible in *National Committee* because the standing affidavits were based on a case that had been litigated and lost. *National Committee for New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005). In addition, "courts relax the normal standards of redressability" for procedural harms. *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016). Since Tribal Office stated "[r]emand may be required for some of the procedural errors in this case[,]" it has standing. Br. 58.

## II. FERC'S OFF-THE-RECORD RULE VIOLATES DUE PROCESS AND THE FEDERAL TRUST DOCTRINE BY FORCING TRIBES TO CHOOSE BETWEEN GOVERNMENT-TO-GOVERNMENT CONSULTATION AND INTERVENTION, WHICH IS GOOD CAUSE FOR LATE INTERVENTION.

This issue was addressed in Rehearing Order I, P 15 [J.A.9-10], raised in Rehearing Request II, 8-11 [J.A.354-357], responded to in Rehearing Order II, PP 10-13, 26 [J.A.30-33, 38], and argued. Br. 1-5, 40-47, 50-51.

### A. Constitutional and Statutory Obligations for Government-to-Government Consultations Are Not Fulfilled by Providing Notice and Accepting Comments.

Respondents do not counter Tribal Office's claim that the loss of the right to petition for review is a deprivation of a property interest protected by the Due Process Clause. Instead, FERC argues that in-person meetings, phone calls, and teleconferences are not necessary to fulfill its obligations for Tribal consultations because notice and comment suffice. Resp't's Br. 16-17, 29-36. It asserts that allowing Tribes to intervene and comment like members of the public satisfies government-to-government consultations. Relying on its policy statement, 18 C.F.R. § 2.1c(d), FERC also claims it has the right to alter the terms of government-to-government consultation. However, its argument ignores the Constitution and the common meaning of words. It also misrepresents what occurred during the regulatory review and fails to explain why it created a rule exempting nonparty Tribes if off-the-record communications are not the norm in fulfilling Tribal consultations. Since "[i]nterpretations . . . contained in policy statements…lack the force of law – [they] do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

Contrary to FERC's claim, government-to-government Tribal consultations are required by law. Congressional authority for the passage of the Preservation and Gas Acts rests in the Commerce Clause, which establishes Tribes as distinct

from both foreign nations and states. U.S. CONST. art. 1, 8, cl. 3. Justice Marshall referred to them as "domestic dependent nations," which laid the foundation for the federal trust doctrine. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Br. 4-5. Thus, FERC's statutory mandate to consult with Tribes, 54 U.S.C. § 302706(b), is the result of "[t]he Federal Government['s] *unique legal relationship* with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions." 36 C.F.R. § 800.2(c)(2)(ii)(B) (emphasis added). "Consultation with an Indian tribe must recognize the *government-to-government* relationship between the Federal Government and Indian tribes." *Id*. § 800.2(c)(2)(ii)(C) (emphasis added). Thus, the Tribal right to government-to-government consultations is "set forth in the Constitution" and mandated under the Preservation Act.

Tribal consultations require off-the-record communications. The words "government-to-government" mean what they say – direct communications between Tribes and FERC, not written comments to the docket. If the phrase is ambiguous, "[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (internal citations omitted). "Consultation" implies meeting, and such a requirement can be inferred from its definition: "the process of seeking, discussing, and considering the views of other participants…" 36 C.F.R. § 800.16(f). "The process

of…discussing" requires a verbal exchange. The need for meetings is supported in the Handbook. Br., Add. 53-57. Thus, consultation requires direct verbal communications between FERC and Tribes. They are off-the-record because parties are not notified or asked to participate in them. 18 C.F.R. § 385.2201(c)(4).

FERC concurs. "[C]onsultation should involve direct contact between agencies and tribes." 18 C.F.R. § 2.1c(a). In fact, direct dialogue with Tribes is the norm across the agencies. *See* Government Accountability Office, Tribal Consultation, Appendix IV Definitions for Consultation in Agency Tribal Consultation Policies (March 2019) ("Consultation Report"). Add. 4-7. The words used to define consultations imply verbal exchanges: direct, two-way communication, discussion, meaningful dialogue, collaborative, and interactive. *Id*. EPA and FAA explicitly distinguish consulting from commenting. Add. 6. These definitions indicate the need for direct, off-the-record communications between Tribes and FERC. They also reveal the profound ramifications of the Commission's position. If the Court agrees that Tribal consultations can be fulfilled through notice and comment, the new standard could be applied to all federal agencies, undoing decades of effort to strengthen Tribal rights.

Tribal Office's position is supported by Advisory Council, which told the Commission that is misrepresenting its regulations.

> FERC has suggested that...a federal agency may use its existing procedures for coordinating with the public to fulfill its consultation

> requirements. This statement misrepresents the Section 106 regulations and the ACHP's guidance...

Advisory Council comment, Atlantic Coast Pipeline, CP15-544 (April 6, 2015), http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20170407-5107. Section 106 regulations on Tribal consultations are even stricter. "Consultation with Indian tribes...should be conducted in a manner sensitive to the concerns and needs of the Indian tribe…." 36 C.F.R. § 800.2(c)(2)(ii)(C). Tribes are oral cultures that historically lacked written language. They traditionally governed through meetings and relied on oral history, and many still do. This cultural heritage further supports the requirement for direct, off-the-record consultations. Finally, the failure to hold sufficient *meetings* has been deemed a violation of the need for meaningful consultations. Br. 40. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 720 (8th Cir. 1979).

### B. FERC Engaged in Off-the-Record Meetings and Communications With Tribal Office

In Rehearing Order I, P 13, [J.A.9], the Commission noted that Tribal Office had been engaged in *ex parte* communications, but now claims off-the-record communications did not occur. Resp't's Br. 33-36. It properly lays out the requirements, *id*. at 29-30, but fails to apply the facts to its regulation. The following chart provides details of some of the off-the-record meetings and correspondence.

| **Number, date, and medium** | **Oral: prior notice to parties and opportunity to participate?** | **Memo summarizing conversation promptly filed?** | **Written: copy promptly filed and served?** | **J.A. (*mentioned)** |
|---|---|---|---|---|
| | | | | |
| 1. 10/17/14 meeting | No Algonquin Project | Yes | | [J.A.65] |
| | | | | |
| 2. 12/8-10/15 meeting | No | Yes | | [J.A.106-107] |
| | | | | |
| 3-4. emails re: 10/13/16 meeting and 10/13/16 meeting | No | No | No | Br. Add. 66-70 [J.A.341]*<br><br>Intervenor's Br. 11-12.* |
| | | | | |
| 5. 12/5/16 meeting | No | No | | [J.A.216]* Intervenor's Br. 12.*, Resp't's Br. 24.* |
| | | | | |
| 6. 12/14-16/16 Letters | | | No | [J.A.338-339] [Sealed App. 21-32] |
| | | | | |
| 7. 1/3/17 phone call | No | No | | [J.A.220; J.A.341]* |
| | | | | |
| 8-10.[2] 1/19/17, 1/24/17 emails, 1/25/17 letter | | | No | [J.A.374-377] |
| | | | | |

[2] Massachusetts was not a cooperating agency, Certificate Order, P 30 [J.A.117], so these off-the-record communications should have been put in the docket.

| | | | | |
|---|---|---|---|---|
| 11. 2/3/17 email | | | No | [J.A.378] |
| | | | | |
| 12. 2/15/17 emails | | | No | [J.A.343-345] |

Respondents mention these meetings and calls, so there is no dispute that they occurred. Rehearing Order I, P 33 [J.A.18-19]; Tennessee's Opposition, Att. A [J.A.309-319]. They were off-the-record because there is no evidence that parties were provided prior notice or an opportunity to participate in them. 18 C.F.R. § 385.2201(c)(4). Nor was a copy of the written material provided to parties. Thus, every interaction between Tribal Office and FERC took place off-the-record.[3] Prompt disclosure of off-the-record communications is required, *id.* § 385.2201(g)(1), but FERC failed to disclose at least ten of them, making judicial review difficult. Some are in the record because they were filed as exhibits to Tribal Office's request for rehearing,[4] while others were obtained through freedom of information requests. Thus, there is proof of off-the-record communications in spite of FERC's attempt to hide their occurrence. If Tribal Office had intervened, it would have been excluded from participating in these off-the-record discussions with FERC and its partner Tribes. Rehearing Order II, P 26 [J.A.38].

[3] The sole exception is a document sent to FERC and Advisory Council that FERC entered into the docket. [J.A.217-218].

[4] FERC erroneously claims that many of these documents should be ignored. Resp't's Br., n.5. In fact, all but item #3 were filed in the docket.

### C. FERC Told Consulting Parties They Could Not Intervene and Intervening Parties They Could Not Consult

While FERC is correct that Mr. Harris' declaration (that he was told by FERC that he could not intervene while consulting) can only be used to establish standing, Resp't's Br. n.5, Harris Decl., ¶ 19, Add. 64, the Court may take judicial notice of official documents in its docket. FED. R. EVID. 201(c)(2). On November 24, 2015, FERC told an intervenor, by email, that she could no longer be a consulting party. *See Appalachian Voices v. FERC*, No. 17-1271, Doc. 1764834, Vol. III, JA 1256. Thus, FERC enforced its rule as an either/or proposition, just as Tribal Office argues.

## III. FERC BREACHED ITS FIDUCIARY DUTY BY VIOLATING LAWS, WHICH IS GOOD CAUSE FOR LATE INTERVENTION.

This issue was raised in Rehearing Request II, 17-18 [J.A.363-364], responded to in Rehearing Order II, P 25 [J.A.37-38], and briefed. Br. 1-5, 51-53 (cross-referencing 20-40); Resp't's Br. 39-49; Intervenor's Br. 36-37. If retroactive party status is granted, it may also be decided on the merits because it was raised in Rehearing Request I, 7-8 [J.A.326-327]. The timeframe to establish the right to intervene should begin with the start of the Project. However, if party status is granted, the issue is the validity of the Staff Order. See Section I.A.

Respondents do not contest FERC's fiduciary duty to Tribes, but claim no laws were violated. *See* Sections IV and V *infra*.

## IV. FERC'S DELAYS AND DELEGATION OF ITS DUTIES ARE GOOD CAUSE FOR LATE INTERVENTION.

### A. FERC Failed to Consult With Tribes Until December 2015 and Failed to Set a Schedule for Surveys.

Tribal Office argues that the extensive delays in consulting with Tribes and lack of a schedule for Tribal surveys were caused by FERC's lack of leadership and good cause for late intervention. Br. 20-28. In response, Respondents make much ado about nothing by noting how many times Tennessee tried to contact Tribal Office between 2013 and 2016. Resp't's Br. 21-25, 39-40; Intervenor's Br. 25-30, 33-35. According to the Advisory Council,

> Indian tribes are not obligated by statute or regulations implementing Section 106 to consult with applicants….Accordingly, it is not appropriate to assume that the lack of written or verbal response by a tribe to an applicant's outreach signifies a lack of interest in the project or waiver of its right to consultation during its review under Section 106.

Limited Delegation, Br., Add. 49. *See also*, Handbook, Br., Add. 50. This is equally true of the notice and letters mailed by FERC, which requested written comments, not government-to-government meetings. Rehearing Order I, P 30, n.60 [J.A.17]. "It is not enough the FERC gave notice of [Tennessee's] application to the…Indian tribes." *Confederated Tribes and Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir. 1999). Consultation is a "process of…discussing…" 36 C.F.R. § 800.16(f), that "should begin early in the planning process…." 36 C.F.R. § 800.2(c)(2)(ii)(A).

Respondents audaciously claim the letters from and consultations with the United South and Eastern Tribes ("United Tribes") fulfilled FERC's consultation requirement with Tribal Office. Resp't's Br. 16, Intervenor's Br. 27. United Tribes is a distinct organization that tried to develop "a pro-active CSL and cultural resource avoidance policy" with FERC. August 22, 2014 letter [J.A.56]. In its February 2015 status report, [J.A.69-71], FERC rejected United Tribes' request for a memorandum of understanding or new regulations. *Id*. at Items 6, 7. In terms of this Project, FERC acknowledged that United Tribes was concerned about the Algonquin (AIM) Project, not this one.[5] *Id*. at Item 3. United Tribes said certain terms had to be met before consultation could begin, and FERC responded that a letter was being drafted. *Id*. The MOA states the February 27, 2015 letter initiated consultation. [J.A.264]. However, it was not acceptable to the Tribes, which is why FERC sent another one on December 9, 2015. [J.A.105]. This was confirmed by Tennessee, Att. A, 2-4 [J.A.308-310].

Respondents repeatedly back-peddle and attempt to shift blame, thereby creating contradictory statements. For example, Tennessee admitted the December 8, 2015 meeting was a "formal consultation." Intervenor's Br. 28. Since there is no such thing as "informal consultation," this is the date consultation with Tribal

[5] FERC also acknowledged the misunderstanding in the EA, 91 [J.A.97] and Notice of Adverse Effects, 8-9 [J.A.215-216]. Tennessee says they were concerned about its Northeast Energy Direct Project. [J.A.308].

Office began. In October 2015, FERC admitted consultation had not begun. "[T]o date, a meeting regarding ceremonial stone landscape survey has not yet occurred." EA, 91 [J.A.97]. It also admitted that Tribal Office first participated in consultation in December 2015. Resp't's Br. 24, 35. Since timely interventions had to be made by November 23, 2015, it was already too late to intervene. Rehearing Order II, P 2 [J.A.27-28].

Tennessee relies on hearsay by repeatedly referring to its compilation of outreach efforts. Tennessee's Opposition, Att. A [J.A.307-319]. The information in these documents cannot be used as proof of the matters asserted. FED. R. EVID. 801(c), 802. Congress instructed the Commission to maintain the record for appeal, 15 U.S.C. § 717n(d), but FERC failed to follow this mandate even though it is required to disclose off-the-record communications. 18 C.F.R. § 385.2201(g)(1), *See* Section II.B, *supra*.

The two memos FERC did file are not favorable to its position. The meetings were held for two different projects with the same Tribal participants. The one major difference led to very different outcomes. For the Algonquin Project, FERC set a firm schedule. "To be timely, the proposal/scope of work [will] be filed by November 5, 2014." [J.A.65]. For this Project, no deadline was set by the Commission, [J.A.106-107], even though, in Rehearing Order I, P 30, [J.A.17], FERC stated they "prepared a schedule for the survey" at this meeting.

However, the memo says Tennessee would work it out with the Tribes. [J.A.107]. The Commission also claims the condition precedent in the Certificate Order fulfilled its scheduling requirements. Resp't's Br. 43-44. Not true. A schedule is a date by which something must be performed. Since the start date for construction was unknown, there was no deadline for performing surveys.

In sum, if FERC had held consultation meetings earlier and set a schedule, Tribal Office might have been able to complete its government-to-government consultations prior to November 23, 2015 and intervene on time.

### B. FERC's Delegation of Its Tribal Duties Is Contrary to Law

Tribal Office claims Tennessee acted as FERC's agent because that is what the Commission's regulations require. Rehearing Request II, 9, 11 [J.A.355, 357]; Br. 5, 21, 23-26. FERC did not address the conflict between its regulations and Section 106. Resp't's Br. 39-40. Tennessee argues the issue is improper and FERC's regulations and Section 106 work in tandem. Intervenor's Br. 33-35. As for propriety, judicial review is limited to circuit courts, so this is the only available forum. *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 195-97 (3d Cir. 2018). Tennessee ignored the explicit conflict of the two regulatory regimes, so Petitioner's Opening Brief rebuts it. Br. 24-26.

## V. THE STAFF ORDER VIOLATES THE PRESERVATION ACT AND CERTIFICATE ORDER.

This issue was raised in Rehearing Request I, 4-15 [J.A.323-334], responded to in Rehearing Order I, PP 6, 47-48 [J.A.6, 24-25], and briefed. Br. 20-40. The legal underpinnings are in Section I.A. *supra*.

### A. FERC Failed to Comply With Section 800.1(c).

Courts allow FERC to condition a certificate on the future acquisition of required federal permits. Br. 22, 54-56. According to Condition 5 of the Certificate Order, ¶ 58, [J.A.165], Tennessee was authorized to request route changes if cultural resources were found. Rehearing Order I, n.39. [J.A.13]. This open-ended right to adjust the route complies with Section 106, which allows nondestructive activities prior to licensing, "provided that such actions do not *restrict the subsequent consideration of alternatives* to avoid, minimize or mitigate the undertakings adverse effects on historic properties." 36 C.F.R. § 800.1(c) (emphasis added). Here, FERC issued a license prior to the identification of ceremonial stones, which is allowed, but compliance with Section 106 is still required. *City of Grapevine v. U.S. Dept of Transp*., 17 F.3d 1502, 1509 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994). FERC subsequently said it was too late to consider alternative routes because Tennessee had already acquired the land. Notice of Adverse Effects, 5-6 [J.A.212-213]. This restriction is reflected in the Treatment Plan, which limits avoidance to the existing construction area.

Treatment Plan, 5-7 [Sealed Appendix15-17]. Thus, based on admissions made by Respondents, the delay in identifying ceremonial stones "*restrict[ed] the subsequent consideration of alternatives*" to the already defined construction zone. There is no indication in the record that shifting the route was ever considered, even though Condition 5 of the Certificate Order authorized Tennessee to do so.

Attempting to obscure its admission, FERC now omits Condition 5 and this critical phrase from 800.1(c) from its arguments. Resp't's Br. 40-42. Instead, FERC discusses how it mitigated adverse impacts within the construction zone. This is not on point. The issue under review is whether FERC violated various laws, including the Preservation Act, by failing to schedule a survey of ceremonial stone landscapes until it was too late in the process to consider alternative routes or other means of avoidance. Br. 2 (Issue 1), 21-22, 27-28, 30-31.[6] Tennessee also discusses what it did to mitigate the ceremonial stones, not whether the delay in studying them restricted subsequent consideration of alternatives. Intervenor's Br. 31-33. Thus, for all of the reasons already argued, Br. 20-28, 30-31, FERC violated 800.1(c).

**B. FERC Failed to Comply With Section 800.6(a).**

"The agency official shall consult with...Indian tribes...to develop and evaluate alternatives or modifications to the undertaking that could avoid,

[6] Scheduling issues were fully argued. Br. 10-15, 20-28 and Section IV.A. *supra*.

minimize, or mitigate adverse effects." 36 C.F.R. § 800.6(a). Tribal Office was not given an opportunity to participate in this manner. Br. 28-31, 37-40. Instead, it was shown which ceremonial stones could not be avoided, told they would be removed and restored, and allowed to comment on a Treatment Plan developed by Tennessee. Rehearing Request I, 9-11, Ex. A, B [J.A.328-330, 338-341]. This does not fulfill the consultation requirements of 800.6(a), particularly since Tribal Office requested "a more in depth and total rethinking of Kinder Morgan's methods of avoidance." *Id*. [J.A.339].

Respondents counter by referring to 36 C.F.R. § 800.2(c)(2)(ii)(A), the section of the regulations that describes participants. This allows them to claim the Commission fulfilled its requirements by meeting and speaking with Tribal Office and giving it an opportunity to comment. Resp't's Br. 42-43, Intervenor's Br. 31-33. However, the question raised is what transpired in those off-the-record meetings and phone calls, and whether Tribal Office was consulted in accordance with the explicit requirements of 800.6(a). Br. 2. Being shown and told what will happen, and allowed to comment on a Treatment Plan that has already been developed, is not meaningful consultation. *Id*.

The record shows Tribal Office was never given an opportunity "to develop and evaluate alternatives or modifications to the undertaking[.]" Instead FERC allowed Tennessee to usurp that right. "Tennessee has developed 'alternatives or

modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.' 36 C.F.R. Section 800.6(a)." Treatment Plan, 8 [Sealed Appendix 18]. This occurred because FERC misapplied the regulations. In Rehearing Order I, P 32, [J.A.18], the Commission states that since the ceremonial stones are not located on Tribal land, Tribal Office's role is limited to "participating," as defined under 800.2(c)(2)(ii).[7] As a result, Tribal Office was relegated to commenting on plans Tennessee deemed affordable and feasible, based on the views of its construction contractor. Treatment Plan, 5, 7-9 [Sealed Appendix 15, 17-19]; MOA, 3-4, [J.A.265-266]. However, Tennessee's time and cost constraints are not valid grounds for restricting rights explicitly granted under 800.6(a). *See Grapevine*, 17 F.3d at 1509 (stating the applicant proceeded at its own risk).

FERC erroneously claims that Tribal Office wanted the alternative route selected. Resp't's Br. 41-42. However, the paragraph it cites, Rehearing Order I, P 45, [J.A.23-24], was written in response to MassPLAN's request for rehearing. Tribal Office never made that argument.

Tennessee cherry-picks quotes from comment letters that are eighty percent unfavorable to the Treatment Plan it developed. Intervenor's Br. 13, 33. The Narragansett, Mohegan, Mashantucket Pequot, and Aquinnah Wampanoag Tribes

[7] FERC now refers to the distinction *it made* a red herring. Resp't's Br. n.11.

did not support the destruction of the 20 ceremonial stones, and objected to classifying "removal and replacement" of spiritually intact ceremonial stones as an avoidance technique. Treatment Plan, Appendix E [Sealed Appendix 21-28, 31-32]. The Mashantucket Pequot Tribe criticized what took place, pointing out that poor planning and economic factors were the primary causes of the destruction of the ceremonial stones. [Sealed Appendix 27-28].

Respondents give unwarranted weight to the comments made by the Stockbridge-Munsee Tribe based on a 1737 deed in which they relinquished land. Rehearing Order I, n.18 [J.A.8-9]; Treatment Plan, 1, 3-4 [Sealed Appendix 11, 13-14]; Intervenor's Br. 13, 30. However, the Preservation Act authorizes Tribal consultation based on the "attach[ment of] religious and cultural significance to historic property[,]" not historic jurisdiction. 54 U.S.C. § 302706, 36 C.F.R. § 800.2(c)(2)(ii). In addition, as will be explained below, the Commission failed to consider Tribal Office's connection to the area and its belief in the prayers embedded in these stones. Thus, it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [and] offered an explanation for its decision that runs counter to the evidence before the agency[.]" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

If jurisdiction is a valid factor, the Commission ignored Tribal Office's historic connections to the area. In its December 15, 2016 letter and February 15, 2017 emails, Tribal Office explained that the predecessors of the Stockbridge-Munsee Tribe converted to Christianity and left the area, while the Narragansetts sought refuge in Western Massachusetts after the Tribe was massacred, welcomed by Umpachene, the Mahican Medicine Man.[8] Rehearing Request I, Ex. A, C [J.A.339; 344-345]. In spite of this, FERC stated, "NITHPO's filings lack discussion of any historical connection to the project site." Rehearing Order I, n.18 [J.A.8-9]. It now admits that Tribal Office discussed its historical connection in its Motion to Intervene, but repeats its error that it wasn't discussed before then. Resp't's Br. 16. In fact, Tribal Office's letter explaining its connection to the area was included in the Treatment Plan, [Sealed Appendix 23-24], which formed the basis of the MOA, 3, 4 [J.A.265, 266], and then the Staff Order, [J.A.3-4]. Thus, the Commission failed to take into account the Narragansett's traumatic past, which forced it to seek refuge in Mahican territory. It similarly failed to consider the religious significance of the ceremonial stones to the four Tribes, all of whom said the spiritual force would be destroyed once the stones were dismantled. Treatment Plan, Appendix E [Sealed Appendix 22, 24, 27, 31, 32]. Instead, FERC gave deference to the only Tribe that converted to Christianity, was asked to

[8] The Stockbridge-Munsee Tribe did not exist in the eighteenth century. *See* https://www.mohican.com/our-history/

intercede at the eleventh hour by Tennessee, and accepted funding for an educational component that it suggested be added to the mitigation plan. Treatment Plan, 3-4, 9 Appendix E, Stockbridge-Munsee comment and proposal for mitigation funding [Sealed Appendix 13-14, 19, 26, 29-30].

For all of these reasons, FERC's acceptance of the Treatment Plan and issuance of the Staff Order is arbitrary and capricious decision-making. *Genuine Parts Co. v. Env'l Prot. Agency*, 890 F.3d 304 , 313 (D.C. Cir. 2018) ("It was arbitrary and capricious for [FERC] to rely on portions of…the record that support its position, while ignoring…those…that do not."). In addition, the Commission's failure to read and consider what Tribal Office wrote proves its consultations lacked meaning and sensitivity. Therefore its actions were contrary to Section 106, 36 C.F.R. §§ 800.2(c)(ii)(A)-(C), and a breach of its fiduciary duty.

### C. FERC Failed to Comply With Sections 800.6(c) and 800.7(a).[9]

Contrary to FERC's claims, Resp't's Br. 46-47, Tribal Office raised the issue that the MOA was void because neither a State nor Tribal Historic Preservation Officer had signed it or terminated its consultation. Rehearing Request I, 11, 13-14 [J.A. 330, 332-333]. Tribal Office quoted 36 C.F.R. § 800.7(a) and discussed § 800.7(a)(2), concerning Massachusetts' lack of termination. *Id*. at 11. It then said, "Because the proper process was not followed

[9] See the Opening Brief for facts and arguments. Br. 13-15, 16, 32-35, 38-40.

under 800.6 and there was no written notice of termination, as required under 800.7(a), the so-called "two-party" MOA, signed under 800.7(a)(2), is null and void." *Id*. Tribal Office reiterated the point two more times. "This MOA is without effect as it was not signed by a THPO or SHPO, as specifically required under NHPA's regulations." *Id*. at 13 [J.A.332]. "[S]ince neither SHPO nor NITHPO have signed the MOA, the Section 106 consultation is not complete." *Id*. at 14 [J.A.333]. The Commission misrepresents the record because it chose not to address the issue in Rehearing Order I.

FERC also argues that Massachusetts was not required to terminate its consultation because it never participated as a consulting party. Resp't's Br. 48-49. This post hoc rationalization should be ignored. *Genuine Parts*, 890 F.3d at 313-14. If it is considered, it is factually incorrect. There is no statement in the record *made by Massachusetts* that it had declined or refused to participate. In fact, Massachusetts submitted three comment letters regarding historic resources, *which prove that it was participating* as a consulting party. Tennessee, Request to Construct Project, Attachment A [J.A.286], Tab A [J.A.288-294]. In addition, FERC noted its participation in its Environmental Assessment, 87-88 [J.A.93-94]. When Advisory Council and FERC emailed Massachusetts, on January 6 and 24, 2017, respectively, Massachusetts responded by re-submitting one of its prior

comment letters. [J.A.370-377]. Thus, Massachusetts did participate, was participating in January 2017, and never terminated its consultation.

Based on its fabricated premise that Massachusetts was not participating, FERC reaches an equally false conclusion–that the State's signature is irrelevant. This is contradicted by the Preservation Act, which says that a State Historic Preservation Officer shall "consult with appropriate Federal agencies…on Federal undertakings that may affect historic property; and [on] the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to that property[.]" 54 U.S.C. §§ 302303(b)(9)(A)-(B). *See also* 36 C.F.R. § 800.6(a). If it decides to terminate that consultation, it must "notify the other consulting parties and provide them the reasons for terminating in writing." *Id.* § 800.7(a). These are express requirements that require strict compliance.

The Commission next claims that the Gas Act gives them authority to override the Preservation Act. Resp't's Br. 49. However, its post hoc rationalization is contrary to Conditions 9 and 26 of the Certificate Order, which require compliance with federal laws, including the Preservation Act. [J.A.167, 171]. *Hoopa Valley* is inapposite because there the Court held the States violated the Clean Water Act. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019). Here, FERC is the violator. 54 U.S.C. § 306108. Thus, the Commission's issuance of an invalid "two-party" MOA and subsequent authorization to destroy

historic resources that were of religious and cultural significance to Tribal Office, without following proper procedure, was arbitrary, capricious, an abuse of discretion, and contrary to law. *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 266-67 (3d Cir. 2001). Since "the error here was neither a failure of precision nor a technicality[,]" it was not harmless. *Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 534 (D.C. Cir. 2018).

## CONCLUSION

For all of the foregoing reasons, Tribal Office respectfully asks this Court to grant it party status as of April 9, 2017, and grant additional relief after considering the issues on the merits. Br. 57-58.

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Respectfully submitted,

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# Addendum:

# Statutes, Regulations,

# and Government Report

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**18 C.F.R. § 385.1902**
**Appeals from action of staff (Rule 1902)**

(a) Any staff action (other than a decision or ruling of presiding officer, as defined in Rule 102(e)(1), made in a proceeding set for hearing under subpart E of this part) taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing under Rule 713 (request for rehearing).

## Advisory Council on Historic Preservation
## Section 106 Regulations

**36 C.F.R. § 800.16 Definitions**

(f) Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act provide further guidance on consultation.

United States Government Accountability Office
Report to Congressional Requesters

March 2019

# TRIBAL CONSULTATION

# Additional Federal Actions Needed for Infrastructure Projects

# Appendix IV: Definitions for Consultation in Agency Tribal Consultation Policies

Table 4 lists the definitions for consultation that the 21 selected federal agencies in our review included in their tribal consultation policies (see app. III for a list of agencies' tribal consultation policies we reviewed).[1]

**Table 4: Definitions of "Consultation" in Selected Federal Agencies' Tribal Consultation Policies**

| Agency | Definition (source) |
|---|---|
| Army Corps of Engineers | Consultation: 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 Army Corps of Engineers that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands. (*Tribal Consultation Policy*, 2012) |
| Bureau of Land Management | Consultation: The conduct of mutual, open, and direct two-way communication in good faith to secure meaningful and timely participation in the decision-making process, as allowed by law. (*Tribal Relations, Bureau of Land Management Manual 1780, 2016; Improving and Sustaining Bureau of Land Management Tribal Relations, Bureau of Land Management Handbook 1780-1*, 2016) |
| Bureau of Ocean Energy Management | Consultation is a deliberative process that aims to create effective collaboration and informed federal decision-making. (*Bureau of Ocean Energy Management Tribal Consultation Guidance*, 2018) |
| Bureau of Reclamation | Consultation means the process of seeking and considering the views of others. It involves establishing, conducting, and maintaining formal communication with Indian tribal governments and their members. (*Protocol Guidelines: Consulting With Indian Tribal Governments*, 2012) |
| Department of Agriculture[a] | Tribal consultation is the timely, meaningful, and substantive dialogue between Department of Agriculture officials who have delegated authority to consult, and the official leadership of federally recognized Indian tribes, or their designated representative(s), pertaining to agency policies that may have tribal implications. It is also important to distinguish between consultation and other actions. Notification – the distribution of information from a Department of Agriculture office or agency to one or more tribes - is not consultation. Neither are technical communications or outreach activities, however important or influential, between staffs without leadership involvement. While notification, technical communications and outreach are all essential, and are often used as part of consultation, they alone do not constitute government-to-government consultation. (*Tribal Consultation, Coordination and Collaboration, Regulation 1350-002*, 2013) |

[1]Executive Order 13175 on *Consultation and Coordination with Indian Tribal Governments,* describes consultation as an "accountable process to ensure meaningful and timely input by tribal officials." However, the order does not further define consultation or meaningful consultation. The regulation implementing section 106 of the National Historic Preservation Act defines consultation as the "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement," but does not define meaningful consultation. 36 C.F.R. § 800.16(f). The implementing regulations for the National Environmental Policy Act do not define consultation or meaningful consultation.

**Appendix IV: Definitions for Consultation in Agency Tribal Consultation Policies**

| Agency | Definition (source) |
|---|---|
| Department of Energy | Consultation: Prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural ways of life, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship. (*Department of Energy American Indian Tribal Government Interactions and Policy, Order 144.1*, 2009) |
| Department of Homeland Security[a] | "Consultation" involves the direct, timely, and interactive involvement of Indian tribes regarding proposed federal actions on matters that have tribal implications. *(Department of Homeland Security Tribal Consultation Policy*, 2011) |
| Department of Housing and Urban Development | "Consultation" means the direct and interactive (i.e., collaborative) involvement of tribes in the development of regulatory policies on matters that have tribal implications. Consultation is the proactive, affirmative process of: (1) identifying and seeking input from appropriate Native American governing bodies, community groups, and individuals; and (2) considering their interest as a necessary and integral part of HUD's decision-making process. This definition adds to statutorily mandated notification procedures. The goal of notification is to provide an opportunity for comment; however, with consultation procedures, the burden is on the federal agency to show that it has made a good faith effort to elicit feedback. (*Department of Housing and Urban Development Government-to-Government Tribal Consultation Policy*, 2016)<br><br>Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. (*Process for Tribal Consultation in Projects That Are Reviewed Under 24 C.F.R. Part 58, Notice: Community Planning and Development 12-006*, 2012) |
| Department of the Interior[a] | The basis of consultation is rooted in meaningful dialogue where the viewpoints of tribes and the Department of the Interior, including its bureaus and offices, are shared, discussed, and analyzed. A consultation session is, but is not limited to, in-person meetings, video-conferences, teleconferences, and correspondence to discuss a specific issue. In the case of in-person meetings, video-conferences, and teleconferences, the consultation may be expanded upon through subsequent correspondence after consultation is initiated. On a case-by-case basis, consultation may be held through a series of written correspondence with the tribal leadership, but this process of utilizing written correspondence should only be used when other methods of dialogue are not feasible. *(Procedures for Consultation with Indian Tribes, Departmental Manual, Part 512, Chapter 5*, 2015) |
| Department of Transportation[a] | Consultation: Refers to meaningful and timely discussion in an understandable language with tribal governments during the development of regulations, policies, programs, plans, or matters that significantly or uniquely affect federally recognized American Indian and Alaska Native tribes and their governments. (*Department of Transportation Programs, Policies, and Procedures Affecting American Indians, Alaska Natives and Tribes, Order 5301.1*, 1999) |

| Agency | Definition (source) |
|---|---|
| Environmental Protection Agency | Consultation is a process of meaningful communication and coordination between Environmental Protection Agency and tribal officials prior to the Environmental Protection Agency taking actions or implementing decisions that may affect tribes. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, adjustments made through this policy, the continuing dialogue between the Environmental Protection Agency and tribal governments, and program and regional office consultation procedures and plans. (*Environmental Protection Agency Policy on Consultation and Coordination with Indian Tribes*, 2011)<br><br>The consultation process is flexible and tailored to the specific needs of Environmental Protection Agency, tribes, and the issues involved. Some consultations may involve multiple communications between the Environmental Protection Agency and tribes, potentially including workshops, webinars, teleconferences, or face-to-face meetings. Multiple communications may be particularly appropriate for highly technical and complex agency actions. The policy recognizes that there is no "one-size-fits-all" approach to consultation. Environmental Protection Agency's tribal consultation differs from the public notice and comment period, and conducting public outreach, by the nature and timing of the interaction. Tribal consultation is between the Environmental Protection Agency and tribal governments. Tribes can, and do, participate in public comment processes, which are distinct from consultation under the policy. (*Environmental Protection Agency Tribal Consultation Implementation Frequently Asked Questions*, 2016) |
| Federal Aviation Administration | Consultation does not mean merely the right of American Indians and Alaska Natives, as members of the public, to be consulted or to provide comments under the Administrative Procedures Act or other federal law of general applicability. Consultation means a process of government-to-government dialogue between Federal Aviation Administration and tribes on proposed federal actions in a manner intended to secure meaningful and timely Tribal input. (*American Indian and Alaska Native Tribal Consultation Policy and Procedures, Order 1210.20*, 2004)<br><br>"Consultation" means not only soliciting and considering the views of consulting parties but also, where feasible, seeking agreement. (*Section 106 Handbook: How to Assess the Effects of Federal Aviation Administration Actions on Historic Properties under Section 106 of the National Historic Preservation Act*, 2015) |
| Federal Emergency Management Agency | "Consultation" involves the direct, timely, and interactive involvement of Indian tribes regarding proposed federal actions on matters that have direct tribal implications. At the Federal Emergency Management Agency, this means the process to communicate and collaborate with tribal officials and Indian tribes to exchange information and receive input on an action that has tribal implications. (*Federal Emergency Management Agency Tribal Consultation Policy, Policy No. 101-002.01*, 2014) |
| Federal Highway Administration | Consultation means the process of seeking, discussing, and considering the views of others, and where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information. (*Tribal Consultation Guidelines*, 2015) |
| Fish and Wildlife Service | Consultation is a mutual, open, and direct two-way communication, conducted in good faith, to secure meaningful participation in the decision-making process, as allowed by law. (*Fish and Wildlife Service Native American Policy, Fish and Wildlife Service Manual, Part 510*, 2016; *Fish and Wildlife Service Tribal Consultation Handbook*, 2011) |

| Agency | Definition (source) |
|---|---|
| Forest Service | Government-to-government consultation: The timely, meaningful, and substantive dialogue between Forest Service officials who have delegated authority to consult, and the official leadership of federally recognized Indian tribes, or their designated representative(s), pertaining to decisions or actions that may have tribal implications.<br>Meaningful consultation: In the context of government-to-government consultation as expressed in Executive Order 13175, the information and dialogue exchanged actually has the potential to affect a decision for which the Agency has discretion. If a tribe is part of a consultation and their views have no real potential to be used in the related decision, the consultation is not meaningful. (*External Relations, ch. 1560, State, Tribal, County, and Local Agencies; Public and Private Organizations, Forest Service Manual 1500*, 2016) |
| National Oceanic and Atmospheric Administration | Consultation: As defined in Section 5 of Executive Order 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on National Oceanic and Atmospheric Administration policies that have tribal implications. (*Policy on Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations, Administrative Order 218-8, 2014; National Oceanic and Atmospheric Administration Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations*, 2014) |
| National Park Service | Consultation—a discussion, conference, or forum in which advice or information is sought or given, or information or ideas are exchanged. Consultation generally takes place on an informal basis; formal consultation requirements for compliance with section 106 of National Historic Preservation Act are published in 36 C.F.R. Part 800. Consultation with recognized tribes is done on a government-to-government basis. (*National Park Service Management Policies*, 2006) |
| Nuclear Regulatory Commission | Consultation means efforts to conduct meaningful and timely discussions between the Nuclear Regulatory Commission and Tribal governments on the Commission's regulatory actions that have substantial direct effects on one or more Indian Tribes and those regulatory actions for which tribal consultation is required under federal statute. The Nuclear Regulatory Commission's tribal consultation allows Indian Tribes the opportunity to provide input on regulatory actions with Tribal implications and those where tribal consultation is required, and is different from the outreach and public comment periods. The consultation process may include, but is not limited to, providing for mutually-agreed protocols, timely communication, coordination, cooperation, and collaboration. The consultation process provides opportunities for appropriate tribal officials or representatives to meet with Commission management or staff to achieve a mutual understanding between the Commission and the tribes of their respective interests and perspectives. (*Tribal Policy Statement*, 2017; *Tribal Protocol Manual*, 2017) |
| Rural Development | The term consultation is a term of art in section 106 review that is defined in 36 C.F.R. § 800.16(f). (*Rural Development Instruction Part 1970—Environmental: Subpart H: Historic and Cultural Resources*, 2016) |

Source: GAO analysis of agency documents. | GAO-19-22

Notes: We reviewed agency regulations, policies, and guidance regarding consulting with Indian tribes and Alaska Native corporations (referred to collectively here as tribal consultation policies) that 21 selected agencies identified. The 21 agencies included in our analysis are: (1) the Army Corps of Engineers, (2) Bureau of Land Management, (3) Bureau of Ocean Energy Management, (4) Bureau of Reclamation, (5) Coast Guard, (6) Department of Energy, (7) Department of Housing and Urban Development, (8) Environmental Protection Agency, (9) Federal Aviation Administration, (10) Federal Communications Commission, (11) Federal Emergency Management Agency, (12) Federal Energy Regulatory Commission, (13) Federal Highway Administration, (14) Federal Railroad Administration, (15) Federal Transit Administration, (16) Fish and Wildlife Service, (17) Forest Service, (18) National Oceanic and Atmospheric Administration, (19) National Park Service, (20) Nuclear Regulatory Commission, and (21) Rural Development.

[a]We included in our review policies from the Departments of Agriculture, Homeland Security, the Interior, and Transportation in cases such as when officials from component agencies without tribal consultation policies indicated that they used the corresponding department-level policy. We did not review the tribal consultation policies of the Department of Commerce and Department of Defense.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that the foregoing Final Reply Brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) as this Brief contains 6,446 words, excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1). I further certify that this Brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) as this brief was prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

August 19, 2019

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## CERTIFICATE OF SERVICE

Pursuant to Circuit Rule 25(a), I hereby certify that on August 19, 2019, I electronically filed the foregoing Final Reply Brief with the Clerk of the Court by using the appellate CM/ECF System, which effected service on all ECF-registered counsel.

Respectfully submitted,

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