

# EPA Policy on Consultation with Indian Tribes: Guidance for Discussing Tribal Treaty or Similar Rights

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## Introduction

The U.S. Environmental Protection Agency recognizes the importance of respecting Tribal treaty or similar rights and its obligation to do so. From 1778 to 1871, the U.S.’ relations with Tribes were defined and conducted largely through treaty-making. Instruments other than treaties may also reserve Tribal rights, with equally binding effect. As one court explained, “it makes no difference whether...[Tribal] rights derive from treaty, statute or executive order, unless Congress has provided otherwise.”<sup>1</sup> This Guidance uses the term “Tribal treaty or similar rights” to mean rights reserved or held by Tribes, either expressly or implicitly, through federal laws, such as treaties, statutes, or executive orders.<sup>2</sup>

The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties, statutes, and executive orders enacted for the benefit of Indian Tribes are to be interpreted in accordance with the federal Indian canons of construction, a set of long-standing principles developed by courts to guide the interpretation of these instruments between the U.S. government and Indian Tribes.<sup>3</sup> These canons provide that treaties, statutes, and executive orders enacted for the benefit of Indian Tribes should be construed liberally in favor of Tribes, giving effect to the terms as Tribes would have understood them, with ambiguous provisions interpreted for their benefit.<sup>4</sup> Only Congress may abrogate Tribal treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent. This Guidance does not create any new legal obligations for EPA or expand the authorities granted by EPA’s underlying statutes, nor does it alter or diminish any existing EPA responsibilities.

The purpose of this Guidance is to enhance EPA’s consultations under the *EPA Policy on Consultation with Indian Tribes*<sup>5</sup> in situations where Tribal treaty or similar rights may be affected

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<sup>1</sup> *Parravano v. Masten*, 70 F.3d 539, 545 (9th Cir. 1995), cert. denied, *Parravano v. Babbitt*, 518 U.S. 1016 (1996); see also *United States v. Dion*, 476 U.S. 734, 745, n.8 (“Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty.”)

<sup>2</sup> In the 2016 Guidance, EPA referred to “Tribal treaty rights.” Since EPA intends for this Guidance to also incorporate similar rights reserved by Tribes and reflected in federal law, this version uses the term “Tribal treaty or similar rights” as a shorthand to represent Tribal reserved rights held by Tribes through treaties, statutes, or executive orders. For purposes of this Guidance, the Tribal rights most likely to be relevant to an EPA action or decision are rights to natural resources. Implementing this Guidance will aid the agency in assessing how the EPA action or decision may affect the environment that supports the relevant right or the human health of Tribal members exercising the right.

<sup>3</sup> *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172 (1999).

<sup>4</sup> *Hagen v. Utah*, 510 U.S. 399, 423–24 (1994) (“For more than 150 years, we have applied this canon in all areas of Indian law to construe congressional ambiguity or silence, in treaties, statutes, executive orders, and agreements, to the Indians’ benefit.”); *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 268–69 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)) (“statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit”); *Alaska Pacific Fisheries Co. v. U.S.*, 248 U.S. 78, 89 (1918) (“statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians”).

<sup>5</sup> This Guidance is intended to supplement the *EPA Policy on Consultation with Indian Tribes* (Policy) for situations where Tribal treaty or similar rights may be affected by an EPA action or decision. Definitions, procedures, and other provisions described in the Policy apply to discussions about Tribal treaty or similar rights that may arise during the consultation process. The Policy can be accessed at: <https://www.epa.gov/tribal/consultation-tribes>.

by an EPA action or decision. In these instances, during the consultation process, EPA seeks input regarding Tribal treaty or similar rights from federally recognized Tribal governments in accordance with this Guidance. EPA subsequently considers all relevant information obtained to help ensure that EPA's actions and decisions do not conflict with Tribal treaty or similar rights, and to help ensure that EPA is fully informed when it seeks to implement its programs and to further protect Tribal treaty or similar rights and resources when it has discretion to do so.<sup>6</sup>

### **Inquiring About Tribal Treaty or Similar Rights During the Consultation Process**

EPA consultation with Tribes provides the opportunity to discuss whether an EPA action or decision may affect Tribal treaty or similar rights. Because Tribal treaty or similar rights analyses are complex, EPA staff are expected to inquire about such rights early in the consultation process.

Certain types of EPA actions are more likely than others to have potential implications for Tribal treaty or similar rights, including implications for the environment that supports the relevant right or the human health of Tribal members exercising the right. For example, EPA review of Tribal or state water quality standards may implicate Tribal fishing rights. If a treaty or other instrument reserves to Tribes a right to fish in waters impacted by new or revised water quality standards, then EPA should seek input from Tribes regarding those fishing rights, since protecting fish may involve protection of water quality in the watershed.

Another example of an action that may affect Tribal treaty or similar rights is a site-specific decision made under the Comprehensive Environmental Response, Compensation, and Liability Act, such as a Record of Decision for a site, or the potential use of Applicable or Relevant and Appropriate Requirements for a cleanup. Other examples include a landfill exemption determination under the Resource Conservation and Recovery Act or other similar types of regulatory exemptions for specific geographic areas.

Previously, this Guidance applied solely to EPA actions in specific geographic areas, such as the examples described above. In the 2016 version of this Guidance, the agency explained that EPA actions focused on specific geographic areas were the ones more likely to potentially affect treaty-protected rights. However, informed by experience, many of EPA's most significant actions and decisions are national in scope and certain national actions and decisions may affect Tribal treaty or similar rights. Based upon this experience, and a commitment made by signing the *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights*<sup>7</sup> (2021), this Guidance applies to any EPA action or decision which may affect Tribal treaty or similar rights.

In each case, employing the following questions in this Guidance during the consultation process may inform EPA of when Tribal treaty or similar rights are present in the defined area and may be affected by the agency action or decision. The three questions included in this Guidance should be viewed as a starting point, not an exhaustive list, to initiate engagement with federally recognized Tribes regarding Tribal treaty or similar rights.

In addition, EPA staff should be aware that Tribal treaty or similar rights issues may arise in the context of civil administrative enforcement actions, and engagement with Tribes should occur

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<sup>6</sup> EPA Administrator, December 1, 2014 Memorandum, Commemorating the 30<sup>th</sup> Anniversary of the EPA Indian Policy.

<sup>7</sup> <https://www.epa.gov/tribal/memorandum-understanding-regarding-interagency-coordination-and-collaboration-protection>

consistent with the *Guidance on the Enforcement Principles of the 1984 Indian Policy*<sup>8</sup> and the *Restrictions on Communications with Outside Parties Regarding Enforcement Actions*.<sup>9</sup> EPA should also act consistently with the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*.<sup>10</sup>

### **Questions to Raise About Tribal Treaty or Similar Rights During the Consultation Process**

EPA should employ the following three questions during the consultation process for an action or decision that may affect Tribal treaty or similar rights. Collaboration between EPA program offices or regions and legal staff before and during consultation is an important aspect of ensuring both that these questions are asked and the answers are understood. For any Tribal treaty or similar rights discussion raised during the consultation process, the Tribe may identify particular Tribal officials to consult with EPA about Tribal treaty or similar rights.

(1) *Do Tribal treaty or similar rights apply in the area likely to be affected by the action?*

This question is designed to help EPA determine when Tribal treaty or similar rights, and the resources that support those rights, apply within the area of the agency action or decision. This question is important because Tribes may possess relevant rights both inside and outside the boundaries of reservations. For example, some Tribes in the Great Lakes area retain hunting, fishing, and gathering rights both in areas within their reservations and in areas outside their reservation boundaries, commonly referred to as ceded territories. Similarly, some Tribes in the Pacific Northwest retain the right to fish in their “usual and accustomed” fishing grounds and stations both within and outside their reservation boundaries, and retain the right to hunt and gather throughout their traditional territories.

(2) *What are the specific Tribal treaty or similar rights that apply in, or the protected resources that rely upon, the affected area?*

This question is designed to help EPA understand the precise nature of the Tribal treaty or similar rights that may be at issue. By asking this question, EPA can better understand the complexities that surround the Tribal treaty or similar rights at issue and better understand whether the EPA action or decision could affect those rights. Some treaties, statutes, or other instruments explicitly define the protected rights and resources. For example, a treaty may reserve or protect the right to “hunt,” “fish,” or “gather” a particular animal or plant in specific areas. Treaties also may contain necessarily implied rights. For example, an explicit treaty right to hunt, fish, or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.

(3) *How may Tribal treaty or similar rights be affected by the agency action or decision?*

This question is designed to help EPA understand how a Tribal treaty or similar right may be affected by the agency action or decision, which will inform whether and how the action may need to be modified to ensure that it does not conflict with relevant rights. EPA should explain the action or decision, provide any appropriate technical information that is available, and solicit input about any relevant Tribal treaty or similar rights. It is also appropriate to ask the Tribe for any recommendations for EPA to consider to ensure a relevant right is protected.

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<sup>8</sup> <https://www.epa.gov/sites/default/files/documents/finaltribalguidance011701.pdf>

<sup>9</sup> <https://www.epa.gov/enforcement/restrictions-communicating-outside-parties-regarding-enforcement-actions>

<sup>10</sup> <https://www.epa.gov/sites/default/files/2017-10/documents/ej-indigenous-policy.pdf>

## **EPA Actions That May Affect Tribal Treaty or Similar Rights**

EPA's next steps typically will involve conducting legal and policy analyses in order to determine how to protect the relevant rights in the context of the EPA action or decision that is the subject of the consultation. These analyses are often complex and necessarily depend upon the circumstances of the particular situation. Issues that may arise often involve precedent-setting questions or warrant coordination with other federal agencies. It is expected that the EPA lead office or region that engaged in the Tribal consultation about the potentially affected Tribal treaty or similar rights will coordinate with the Office of International and Tribal Affairs, the Office of General Counsel, and appropriate Offices of Regional Counsel to conduct these analyses. Although the details of how to conduct such legal and policy analyses are not addressed by this Guidance, the EPA process may warrant continued or additional coordination and/or consultation with Tribes.