

MEANINGFUL TRIBAL CONSULTATION AS PART OF NATIONAL FOREST PLANNING

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I. INTRODUCTION

In a joint-secretarial order on “Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters” (November 2021) the secretaries of the United States Department of Agriculture (USDA) and the Department of the Interior (DOI) affirm the Departments’ commitments to:

[M]anaging Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes including the Native Hawaiian Community; that such management is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States’ unique trust obligation to federally recognized Indian Tribes and their citizens.¹

The implications and effects of this recent order are not yet fully known, but its intent to “[m]ake agreements with Indian Tribes to collaborate in the co-stewardship of Federal lands and waters under the Departments’ jurisdiction”² may present opportunities to support greater Tribal self-determination and affirm continuous presence of Tribal interests and practices regarding federal lands and

1. U.S. DEP’T OF INTERIOR & U.S. DEP’T OF AGRIC, NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS 1 (2021) [hereinafter JSO No. 3403], <https://www.usda.gov/sites/default/files/documents/joint-so-3403-HstewarHdship-tribal-nations.pdf>.

2. *Id.* at 2.

waters. Conversely, these efforts may be limited if they rely on prior processes of Tribal engagement that have not effectively supported Tribal interests on federal lands.

Historically, federal policy has relied heavily upon “meaningful consultation and collaboration” (often abbreviated to “consultation”) between federal agencies and Tribal governments to uphold federal trust responsibilities and foster nation-to-nation relationship building.³ For example, consultation between federal agencies and Tribes was iterated in an executive order from the Clinton administration and affirmed in later administrations,⁴ and prior to these presidential directives, some federal agencies and policies had some form of Tribal consultation.⁵

Since “co-stewardship” is likely to build on existing processes and policies governing federal lands and waters—including approaches to “meaningful consultation and collaboration”—this article explores the widespread and varied implementation of Tribal consultation policy across federal agencies with a focus on National Forest planning. Next, it illustrates the interrelationships of Tribal consultation, National Forest planning, and National Environmental Policy Act (NEPA) processes. Lastly, the article argues that systematic siloing of Tribal perspectives in agency processes coupled with a lack of Tribal resource support has contributed to excluding Tribal concerns even when consultation and Tribal participation in NEPA and forest planning are occurring. These challenges will likely impede co-stewardship efforts and raise limitations for the collaborative process unless addressed.

II. BACKGROUND

The 2021 joint-secretarial order, and consultation more broadly, is rooted in agreements between the United States and Tribes codified in treaties and trust responsibilities.⁶ The United States entered into almost 400 treaties with Tribes

3. See Exec. Order 13175, 65 Fed. Reg. 218 (Nov. 6, 2000).

4. *Id.*; Barack Obama, *Presidential Memorandum on Tribal Consultation*, THE WHITE HOUSE (November 5, 2009) [hereinafter Obama Memorandum], <https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consultation-signed-president>; Joseph R. Biden, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, THE WHITE HOUSE (January 26, 2021) [hereinafter Biden Memorandum], <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

5. Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J. L. REFORM 417, 436 (2013).

6. See JSO No. 3403, *supra* note 1; see also 25 U.S.C. § 5601 (“Congress finds that . . . through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians . . . and; the foregoing historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been committed.”).

between 1787 and 1871 thus acknowledging Tribes as sovereign nations with reserved rights.⁷ Dating back to decisions in the 1800s, federal courts have come to articulate a doctrine of federal trust responsibility with Tribes, requiring the federal government to support self-government, economic prosperity, and Tribal sovereignty, based on treaty guarantees.⁸ Federal trust responsibilities are now a cornerstone of Native American law, and the modern trust responsibility includes protecting Tribal resources.⁹ Some form of Tribal collaboration, at a minimum, appears necessary for the United States to fulfill trust responsibilities and treaty terms; federal agencies do not possess the knowledge and expertise for identifying and protecting Tribal resources.¹⁰

While federal directives have recognized the importance of Tribal consultation, agency implementation has not been consistent, with noted problems related to specificity, enforceability, and uniformity.¹¹ Executive Order (EO) 13175 issued by former President Clinton on November 6, 2000, directs federal agencies to submit descriptions of their consultation processes with Tribes to the Office of Management and Budget.¹² Subsequent administrations have affirmed their commitment to the directives in the EO.¹³ Most recently, President Biden issued a memorandum on “Tribal Consultation and Strengthening Nation-to-Nation Relationships” on January 26, 2021.¹⁴ While EO 13175 provides a significant step towards instituting Tribal consultation as broad federal policy, agencies have varied widely on their consultation approaches, and relied on vague definitions and unclear processes, to the detriment of Tribes.¹⁵ For example, “A Detailed Plan for Improving Interior’s Implementation of EO 13175”—a DOI response to the Biden memorandum based on input from Tribal representatives from 160 of the 574

7. See 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[2] (2019).

8. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3] (2019).

9. See *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995) (noting that treaty rights, which include access to and harvestability of subsistence resources, impose a “corresponding duty on the part of the government to preserve those rights”).

10. Routel & Holth, *supra* note 5, at 430.

11. *Id.* at 448.

12. Exec. Order 13175, 65 Fed. Reg. 218 (Nov. 6, 2000).

13. See Obama Memorandum, *supra* note 4; Biden Memorandum, *supra* note 4.

14. JSO No. 3403, *supra* note 1.

15. See Routel & Holth, *supra* note 5, at 420; DEP’T OF THE INTERIOR, A DETAILED PLAN FOR IMPROVING INTERIOR’S IMPLEMENTATION OF E.O. 13175, at 5 [hereinafter A DETAILED PLAN], <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf> (last visited Dec. 1, 2022).

federally recognized Tribes—states, “[d]ifferent bureaus within Interior define ‘consultation’ and approach consultation differently” which poses many challenges for Tribes.¹⁶ The same is true across departments and agencies, not just within the DOI. For example, the Environmental Protection Agency (EPA) describes consultation as:

[A] process of meaningful communication and coordination between EPA and tribal officials prior to the EPA taking actions or implementing decisions that may affect tribes. As a process, consultation includes several methods of interaction that may occur at different levels.¹⁷

The U.S. Department of Agriculture (USDA) has an operational definition of consultation that states:

Tribal consultation is the timely, meaningful, and substantive dialogue between USDA officials who have delegated authority to consult, and the official leadership of Federally recognized Indian Tribes, or their designated representative(s), pertaining to USDA policies that may have tribal implications.¹⁸

Both the EPA and USDA descriptions, as examples, refer to “meaningful” communication and dialogue but are unclear about what consultation processes specifically require. Existing scholarship identifies similar ambiguities.¹⁹ While the more recent Biden memorandum (2021) affirms consultation as a broad federal policy, consultation remains vague and unenforceable:

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.²⁰

Given this language, and the lack of specificity in defining “consultation,” federal interpretation of consultation with Tribes is still left largely up to agencies.

Tribal representatives have offered recommendations for improving consultation so that it better serves Tribes. For example, in the DOI plan prompted by Biden’s (2021) memorandum, Tribal input suggested that agencies “[d]efine ‘meaningful consultation’ to be a dialogue” that “requires free, prior, and informed

16. A DETAILED PLAN, *supra* note 15, at 5.

17. ENV’T PROT. AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 1 (May 4, 2011), <https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

18. Off. of Tribal Relations, 1350-002 § 6.a., Tribal Consultation, Coordination, and Collaboration (U.S.D.A. 2013), <https://www.usda.gov/directives/dr-1350-002>.

19. See generally Routel & Holth, *supra* note 5.

20. Obama Memorandum, *supra* note 4; Biden Memorandum, *supra* note 4.

consent, or joint decision-making or consensus prior to any Federal action or decision” and to “[d]istinguish consultation from listening sessions.”²¹ While this, and similar input, appears to be driving greater specificity in the way consultation is portrayed,²² mechanisms for ensuring decision-making and management influence remain unclear.

As part of fulfilling treaty-based agreements and trust-responsibilities, the federal government has made commitments to meaningful consultation with Tribes to foster nation-to-nation relationship building and protect Tribal resources. However, consultation policies have generally lacked substantive commitment and enforceability resulting in “box-checking” agency processes.²³ The recent USDA and DOI joint-secretarial order offers an opportunity to shift towards respecting Tribes’ ongoing relationships with lands and waters now in the Departments’ jurisdictions and for implementing Tribal recommendations for improving “meaningful consultation,” particularly as it addresses consistency, enforceability, and other flaws noted by Tribes in existing consultation processes.

III. TRIBAL CONSULTATION WITHIN THE NATIONAL FOREST PLANNING PROCESS

The remainder of this paper examines consultation within National Forest planning processes to explore how the nuances of consultation may inform approaches to more effective co-stewardship. The USFS is part of the USDA and is tasked with managing large areas of Tribal lands and waters.²⁴ Forest plans are a dominant management framework for areas within the USFS’s jurisdiction.²⁵ Thus, Tribal influence over forest plans is an important avenue for implementing co-stewardship over lands and waters under the Departments’ jurisdiction within current management frameworks.

A. National Forest Planning

21. A DETAILED PLAN, *supra* note 15, at 5. “Free, prior, and informed consent” is a principal from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and incorporating it within Tribal consultation is a primary, concrete recommendation from the input received by the DOI. *Id.* at 7.

22. See JSO No. 3403, *supra* note 1, at § 3.

23. A DETAILED PLAN, *supra* note 15, at 5; see also UNITED STATES DEP’T OF AGRIC., FS/R6PNW/2015/0005, STRENGTHENING THE FEDERAL-TRIBAL RELATIONSHIP: A REPORT ON MONITORING CONSULTATION UNDER THE NORTHWEST FOREST PLAN (May 2015), <https://www.fs.usda.gov/r6/reo/monitoring/downloads/tribal/Nwfp20yrMonitoringReportTribal.pdf>.

24. *E.g.*, Forest Service Manual §§ 1563.01f, 1563.8b, Amend. No. 1500-2016-1, 81 Fed. Reg. 12,447 (Mar. 9, 2016).

25. See 16 U.S.C. § 1600.

The Forest Service oversees 193 million acres of forest and grasslands in the United States²⁶ and is required by Congress to create and revise land management plans for “units of the National Forest System” to guide individual management actions towards a long-term vision.²⁷ As such, specific project or activity plans must be consistent with relevant unit plans.²⁸ Unit plans, or forest plans, carry the force of federal law and are expected to reflect the unique attributes of the planning area and the Forest Service’s mission:

A plan reflects the unit’s expected distinctive roles and contributions to the local area, region, and Nation, and the roles for which the plan area is best suited, considering the Agency’s mission, the unit’s unique capabilities, and the resources and management of other lands in the vicinity.²⁹

In many instances, National Forest lands lie within Tribal reservation boundaries and Tribes hold unceded treaty rights on these lands.³⁰ Additionally, the National Forest System is comprised of Indigenous ancestral homelands.³¹ As such, National Forest planning has significant implications for Tribes and Indigenous peoples.

Compliance with EO 13175³² is part of National Forest planning regulations.³³ The regulations include a section on *Consultation with federally recognized Indian Tribes and Alaska Native Corporations*:

The Department recognizes the Federal Government has certain trust responsibilities and a unique legal relationship with federally recognized Indian Tribes. The responsible official shall honor the government-to-government relationship between federally recognized

26. *By the Numbers*, U.S. DEP’T OF AGRIC., (Nov. 2013), <https://www.fs.usda.gov/about-agency/newsroom/by-the-numbers>.

27. 16 U.S.C. § 1604(a); *see also* 36 C.F.R. § 219.1 (2022).

28. 36 C.F.R. § 219.2 (2022).

29. *Id.*

30. *See* U.S. Forest Service, Federal and Indian Lands and Land Cessions Viewer (interactive map), *in Tribal Connections*, USDA.GOV, <https://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32>.

31. *Id.*; *see also* Forest Service Manual § 1563.8b, Amend. No. 1500-2016-1, 81 Fed. Reg. 12447 (Mar. 9, 2016) (“Many treaties involve ceded lands that are within the boundaries of present day National Forest System lands. The Forest Service shall administer lands subject to off-reservation treaty rights in a manner that protects Indian tribes’ rights and interests in the resources reserved under treaty.”).

32. In Executive Order 13175, federal agencies will, “establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications.” Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

33. 36 C.F.R. § 219.1(d) (2022).

Indian Tribes and the Federal Government. The responsible official shall provide to federally recognized Indian Tribes and Alaska Corporations the opportunity to undertake consultation consistent with Executive Order 13175 of November 6, 2000, and 25 U.S.C. § 450 note.³⁴

While Tribal consultation is articulated as a specific requirement unique from other public engagement efforts in USFS regulations, in practice it is entangled with other USFS directives. Notably, Congress passed the National Environmental Policy Act (NEPA) in 1970.³⁵ In requiring that agencies take “a hard look” at the environmental impacts of proposed projects,³⁶ NEPA facilitated a paradigm shift at agencies like the USFS and remains a driving force in National Forest planning today; plan development, drafting, and completion all intersect with key phases of NEPA.³⁷ Notably, NEPA precedes significant executive branch commitments to Tribal consultation by 30 years, which suggests Tribal consultation was likely not a major consideration when drafting NEPA legislation.³⁸ Yet, NEPA is in a significant forest management planning role with respect to Tribal consultation and consultation outcomes.

B. National Environmental Policy Act

NEPA regulations encourage federal agencies to involve state, Tribal, and local governments in preparing NEPA analyses.³⁹ Likewise, USFS regulations encourage, “federally recognized Tribes to seek cooperating agency status in the NEPA process for development, amendment, or revision of a plan.”⁴⁰ Cooperating agencies are expected to participate in all stages of the NEPA process and help develop its environmental analysis.⁴¹ Tribes may engage with NEPA analyses whether or not

34. *Id.* § 219.4(a)(2).

35. National Environmental Policy Act of 1969, Pub. L. No. 91-190 (codified as amended at 42 U.S.C. § 4331). Notably, NEPA was signed into law in 1970.

36. *E.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

37. See F. Fleischman et al., *US Forest Service Implementation of the National Environmental Policy Act: Fast, Variable, Rarely Litigated, and Declining*, 118 J. OF FORESTRY 403, 405–06 (2020). Key phases in the NEPA process include—formation of the agency’s purpose and need, cooperating agency list, scoping/public participation, and environmental impact statement development and finalization. See 40 C.F.R. § 1502.1 (2022).

38. NEPA was signed by President Nixon on January 1, 1970. A commitment by the executive branch to tribal consultation did not occur until E.O. 13175 was signed on November 6, 2000.

39. 40 C.F.R. § 1503.1 (2022).

40. 36 C.F.R. § 219.4(a)(1)(v) (2022).

41. 40 C.F.R. § 1501.8(b) (2022).

they are a cooperating agency and regularly do so in a myriad of federal decision-making contexts, including National Forest planning.⁴² However, while Tribal consultation, forest planning, and NEPA have procedural connectivity, there is no assurance of Tribal decision-making with regard to a final forest plan. We offer the following example of the San Francisco Peaks—an area sacred to numerous Tribes—currently managed as part of the Coconino National Forest to illustrate how National Forest management can sideline and ignore Tribal input despite extensive “consultation” between the USFS and Tribes.

IV. TRIBAL CONSULTATION WITH THE COCONINO NATIONAL FOREST

In *Navajo Nation v. United States Forest Service*, the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai-Apache Nation, the White Mountain Apache Nation, and individual Tribal citizens, along with other plaintiffs, sought prohibition of the use of recycled waste-water for snowmaking within the San Francisco Peaks.⁴³ According to the Ninth Circuit, sitting *en banc*:

Plaintiff Indian tribes and their members consider the San Francisco Peaks in Northern Arizona to be sacred in their religion. They contend that the use of recycled wastewater to make artificial snow for skiing on the Snowbowl, a ski area that covers approximately one percent of the San Francisco Peaks, will spiritually contaminate the entire mountain and devalue their religious exercises. The district court found the Plaintiff’s beliefs to be sincere; there is no basis to challenge that finding.⁴⁴

The question of law in the case was whether this use of artificial snow would violate the Religious Freedom Restoration Act of 1993 (RFRA).⁴⁵ In holding that the use did not,⁴⁶ the Ninth Circuit adopted the lower court’s finding that:

[T]here are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural

42. 36 C.F.R. § 219.4(a) (2022) (directing the Forest Service to engage in government-to-government consultation with federally recognized Indian tribes during the forest planning process); Forest Service Manual § 1563.01d, Amend. No. 1500-2016-1, 81 Fed. Reg. 12447 (Mar. 9, 2016) (same); see also Kurt E. Dongoske, et al., *The National Environmental Policy Act (NEPA) and the Silencing of Native American Worldviews*, 17 ENV’T PRACTICE 36, 38 (2015).

43. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

44. *Id.* at 1063.

45. *Id.* at 1067.

46. *Id.* at 1080.

purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use. . . . Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience.⁴⁷

Snowbowl is one of the oldest ski areas in the U.S., and Tribes have been jointly fighting ski area expansion proposals since at least the 1970s.⁴⁸ The litigation that led to *Navajo Nation* was preempted by significant amounts of consultations with Tribes:

The Forest Service conducted an extensive review of the Snowbowl's proposal. As part of its review, the Forest Service made more than 500 contacts with Indian tribes, including between 40 and 50 meetings, to determine the potential impact of the proposal on the tribes. In a December 2004 Memorandum of Agreement, the Forest Service committed to, among other things: (1) continue to allow the tribes access to the Peaks, including the Snowbowl, for cultural and religious purposes; and (2) work with the tribes periodically to inspect the conditions of the religious and cultural sites on the Peaks and ensure the tribes' religious activities on the Peaks are uninterrupted.⁴⁹

To understand how a consultation process that included 500 contacts and 40 to 50 meetings with Tribes could still produce an outcome unacceptable to the Tribes, we examine three sets of documents: the Snowbowl NEPA analysis (draft EIS, 2004; final EIS, 2005; record of decision, 2005 (ROD)), the Coconino Forest Plan and a related amendment (1987 plan as amended in 2005), and the 2004 Memorandum of Agreement (MOA) required under the National Historic Preservation Act (NHPA).⁵⁰

A. Tribal Consultation in the Snowbowl Review Process

47. *Id.* at 1063.

48. Boone Cragun, *A Snowbowl Déjà Vu: The Battle Between Native American Tribes and the Arizona Snowbowl Continues*, 30 AM. INDIAN L. REV. 165, 167–68 (2006).

49. *Navajo Nation*, 535 F.3d at 1065–66.

50. "Section 106 of the NHPA requires federal agencies to consider the impact of their actions on historic properties and provide the ACHP [Advisory Council on Historic Preservation] with an opportunity to comment on projects before implementation." *National Historic Preservation Act*, ADVISORY COUNCIL ON HISTORIC PRESERVATION (Oct. 15, 1966), <https://www.achp.gov/digital-library-section-106-landing/national-historic-preservation-act>; see also 54 U.S.C. § 306108.

“Consultation” occurred at several stages of the development of these four documents: the draft EIS, the MOA, the final EIS, and the ROD.⁵¹ At least three aspects of USFS consultation with the Tribes in the development of these documents suggest these consultations were ineffective.

- 1.) Three alternatives were identified as part of the draft EIS for the Snowbowl Ski Area: a no-action alternative, the proposed alternative, and a no-snowmaking or snow-play alternative. The “proposed alternative” was the only alternative of the three to include snowmaking activities and was ultimately selected as the preferred alternative in the ROD. The Tribes explicitly opposed the “proposed alternative” and strongly preferred the “no action” alternative. The ROD notes, “Over the years, the tribes have continued to state their opposition to development at the Snowbowl.”⁵²

Significantly, the USFS claimed Tribal consultation under executive order—which in this case opposed the preferred alternative—did not apply to the Snowbowl NEPA process. The description of legal mandates for conducting cultural analysis in the Snowbowl Proposal’s final EIS specifically notes that EO 13175 requires federal agencies to “establish regular or meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications” but argues that the EO only pertains to “regulations, legislative comments or proposed legislation, and other policy statements...” The final EIS concludes that, “[i]n light of the content of this executive order, it does not appear to apply to the proposed projects at the Snowbowl, in that this is a site-specific project that does not result in legislation or regulation changes.”⁵³

Whether or not this claim is valid, it suggests the USFS did not seriously regard Tribal consultation as part of the Snowbowl proposal (despite the large number of meetings and “contacts” that occurred and the agency’s desire to highlight its “consultation” efforts).

- 2.) As of the 2005 FEIS, only a few Tribes had signed the MOA as “concurring parties” and no Tribes were included as “signatories” of the agreement.

51. U.S. FOREST SERV., RECORD OF DECISION: ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS FINAL EIS AND FOREST PLAN AMEND. #21, at 8 (Feb. 2005), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3831727.pdf.

52. *Id.* at 3.

53. U.S. FOREST SERV., FINAL ENV’T IMPACT STATEMENT: ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS PROPOSAL 3–5 (Feb. 2005), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3831728.pdf.

⁵⁴ The 2004 MOA was developed as part of required federal process implemented when a federal agency action will have an adverse effect on historic properties.⁵⁵ In such cases “the Federal agency usually executes a legally binding document . . . that stipulates the resolution of adverse effects agreed to by the signatories.”⁵⁶ The “signatories” of the MOA are the USDA/Forest Service, the Advisory Council on Historic Preservation (ACHP), and the Arizona State Historic Preservation Officer.⁵⁷ Twenty Tribes and Tribal entities are listed as potential “concurring parties” though only a handful appear to have actually joined the MOA as a concurring party.⁵⁸ Since no Tribes are listed as “signatories,” the MOA was not premised on Tribal agreement.⁵⁹ According to a federal handbook, an MOA under the NHPA:

[S]tipulates the resolution of adverse effects agreed to *by the signatories*. In those rare circumstances where there is a failure to reach an agreed-upon solution, the ACHP issues formal advisory comments to the head of the agency. The head of the agency must then take into account and respond to those comments.⁶⁰

While Tribes were invited to consult on the MOA, the MOA did not require their consent.

54. MEMORANDUM OF AGREEMENT BETWEEN THE U.S. DEPT. OF AGRIC. FOREST SERVICE, ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND THE ARIZONA STATE HISTORIC PRESERVATION OFFICER, 1, *as appended in* U.S. FOREST SERV., FINAL ENV’T IMPACT STATEMENT: ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS PROPOSAL, App’x. D (Feb. 2005) [hereinafter MEMORANDUM OF AGREEMENT], https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3831728.pdf.

55. *See* 36 C.F.R. § 800.6(c) (2022); *see also* 16 U.S.C. § 304108(a).

56. COUNCIL ON ENV’T QUALITY EXEC. OFF. OF THE PRESIDENT & ADVISORY COUNCIL ON HISTORIC PRESERVATION, NEPA AND NHPA SECTION 106 HANDBOOK: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106, at 12 https://ceq.doe.gov/docs/ceq-publications/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf.

57. MEMORANDUM OF AGREEMENT, *supra* note 54, at 7–12. The ACHP is an independent federal agency responsible for NHPA compliance. *See* 54 U.S.C. § 304102.

58. MEMORANDUM OF AGREEMENT, *supra* note 54, at 7–12. Not all Tribes who were contacted signed the MOA. According to the copy of the MOA included as an appendix in the FEIS, 20 Tribes and Tribal entities are listed as prospective concurring parties and 4 of those 20 had signed the MOA.

59. *Id.*

60. COUNCIL ON ENV’T QUALITY EXEC. OFF. OF THE PRESIDENT & ADVISORY COUNCIL ON HISTORIC PRESERVATION, *supra* note 56, at 12 (emphasis added).

- 3.) Provisions of the 2004 MOA appear incongruous with Tribal perspectives. The MOA commits the USFS to work with Tribes “to ensure that current traditional practices and ceremonies conducted in the project area are unimpeded” if a snowmaking alternative is selected.⁶¹ Yet, Tribal concerns expressed as part of consultation were clear that the proposed snowmaking activities would desecrate the entire mountain.⁶² Asserting traditional practices and ceremonies *can* be unimpeded by the use of snowmaking ignores Tribal perspectives on the impacts of snowmaking.

These three examples illustrate ways in which extensive consultation does not necessarily result in collaborative practices in federal land management.

B. The Snowbowl Decision and Coconino Forest Management

As the Snowbowl example illustrates, forest management is entangled in a variety of federal processes (e.g., NEPA and the MOA), which do not always align. The Coconino Forest Office asserts the primacy role of the Forest Plan in managing the Coconino National Forest:

The USDA Forest Service is the federal agency responsible for managing the public land and uses on the [San Francisco] Peaks. Management of these National Forest System (NFS) lands is guided by laws, regulations, and policies that have been created and influenced by Congress, the Executive Branch, and the Supreme Court over the last 100 years. More specifically, the Coconino National Forest is managed in accordance with the Coconino National Forest Land and Resource Management Plan approved in 1987.⁶³

As the overarching document outlining forest management, the 1987 Coconino National Forest Plan stipulates it will adopt the EIS on the Snow Bowl Ski Area Proposal and that, as amended, facility development for the Snowbowl area “is guided by the Ski Area Master Development Plan.”⁶⁴ The amending of the Forest Plan to include the Snowbowl decision and development plan thus places ski area activities within the dominant management framework. Notably, the MOA is not referenced in the 1987 Plan or its Amendment No. 21 adopted in February 2005.

61. MEMORANDUM OF AGREEMENT, *supra* note 54, at 4.

62. *See Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008); *see also* FINAL ENV'T IMPACT STATEMENT: ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS PROPOSAL, *supra* note 53, at 1–14.

63. RECORD OF DECISION: ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS FINAL EIS AND FOREST PLAN AMEND. #21, *supra* note 51, at 1.

64. U.S. FOREST SERV., COCONINO NAT'L FOREST PLAN 19 (Aug. 1987), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5420011.pdf; COCONINO NAT'L FOREST PLAN AMEND. NO. 21, at Replacement Page 188 (Feb. 2005), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5420016.pdf.

The most recent Snowbowl Master Development Plan also makes no reference to the MOA.⁶⁵

The Coconino Forest Plan was revised in 2018. The final EIS for the recent revision states:

Tribal relations have deteriorated since the 2005 “Record of Decision for the Arizona Snowbowl Facilities Improvement,” which approved the use of reclaimed water at the ski area that lies within the San Francisco Peaks Traditional Cultural Properties. Since then, numerous statements have been made by tribes that the forest holds no credibility with the tribes, and tribes lack faith in the forest’s stated desire to support tribal needs and values. Many tribes feel their trust in the forest has been broken because of the Snowbowl decision.⁶⁶

A variety of processes undoubtedly contribute to such sentiments, but the lack of connectivity between federal processes may play a significant role, most pointedly the failure of the MOA to ensure Tribal practices remain unimpeded.

C. Forest Management After the 2005 ROD

Increased visitation and development have continued at the Snowbowl ski area. In 2021 Hualapai Nation staff brought attention to the fact that the MOA had expired in 2015, six years prior, yet the Hualapai Nation, who had signed the MOA in 2004, was never notified nor were other Tribes who had signed as concurring parties.⁶⁷ By not upholding the terms of the MOA, the Forest Service was out of compliance with section 106 of the NHPA.

As of June 2022, Snowbowl development plans had been halted.⁶⁸ This both speaks to the diligence and savvy of Tribes in navigating U.S. bureaucracy and illustrates that the MOA was not a focal aspect of Coconino Forest management. Such processes exacerbate burdens on Tribes and place them in reactive positions

65. SE GROUP, ARIZONA SNOWBOWL 2020 MASTER DEVELOPMENT PLAN (Dec. 2020), <https://snowbowl-project-portal.org/project-library>.

66. U.S. FOREST SERV., MB-R3-04-32, COCONINO NAT’L FOREST LAND AND RESOURCE MGMT. PLAN: FINAL ENV’T IMPACT STATEMENT 412 (Mar. 2018), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd606740.pdf.

67. Annette McGivney, *Skiing on a Sacred Mountain: Indigenous Americans Stand Against a Resort’s Expansion*, THE GUARDIAN (June 21, 2022), <https://www.theguardian.com/world/2022/jun/19/indigenous-native-american-ski-resort-sewage-water-arizona>.

68. *Id.*

instead of as front-end decision makers. Cora Maxx-Phillips, a citizen of the Navajo Nation who serves on the Nation's human rights commission articulates, "[h]aving to fight against these laws that are designed to protect corporations and the federal government brings up a lot of generational trauma. It is very triggering."⁶⁹

Consider the statement from the ROD: "[a]lthough the Peaks have been administered for over 100 years by the Forest Service, the tribes that hold the Peaks sacred have long considered themselves stewards of the Peaks."⁷⁰ This statement acknowledges that Tribal concerns and knowledge regarding the peaks are relevant to the extent of Tribal beliefs, but such Tribal conceptions do not fit within Forest Service management.

The Snowbowl case is extremely problematic in the context of meaningful consultation and nation-to-nation relationship building and an egregious example of a federal agency continuing to sideline Tribal interests while checking consultation boxes. The Forest Service's actions were enabled in part by siloing Tribal consultation from dominant forest planning and NEPA processes and privileging colonial norms in assessing project effects.

V. OPPORTUNITIES FOR MEANINGFUL CONSULTATION IN USFS PLANNING AND NEPA PROCESSES

National Forest Plans do not, and cannot, detail every project that will occur within a National Forest, nor can they be used to compel agency action. However, as part of guiding the overall management of a National Forest, forest plans can prohibit certain actions or require that these actions follow specific criteria.⁷¹ If Tribal perspectives are incorporated into the foundations of forest planning—including NEPA processes—"meaningful consultation" has the potential to result in actions meaningful to Tribes.⁷² However, meaningful consultation and collaboration requires epistemological and financial commitments, not just procedural commitments.

We highlight three aspects of meaningful consultation necessary in ensuring effective co-stewardship practices between Tribes and federal agencies.

Systemic Commitment to Meaningful Consultation

69. *Id.*

70. RECORD OF DECISION: ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS FINAL EIS AND FOREST PLAN AMEND. #21, *supra* note 51, at 1.

71. See 36 C.F.R. § 219.15(d) (2022).

72. See Exec. Order 13175, 65 Fed. Reg. 218 (Nov. 6, 2000).

Tribal consultation is often treated as a specific process within public engagement requirements rather than a systemic aspect of how decisions are made. Kyle Powys Whyte argues:

The concept of TEK [traditional ecological knowledge] should be understood as a collaborative concept. It serves to invite diverse populations to continually learn from one another about how each approaches the very question of ‘knowledge’ in the first place, and how these different approaches can work together to better steward and manage the environment and natural resources. Therefore, any understanding of the meaning of TEK is acceptable only so long as it plays the role of bringing different people working for different institutions closer to a degree of mutual respect for one another’s sources of knowledge. The implication is that environmental scientists and policy professionals, indigenous and non-indigenous, should focus more on creating long-term processes that allow for the implications of different approaches to knowledge in relation to stewardship and management priorities to be responsibly thought through.⁷³

The structure of Forest Planning regulations makes this continuous process difficult because Indigenous knowledge is separated from “scientific” knowledge in management planning processes structurally. In the Forest Planning regulations, “information about native knowledge, land ethics, cultural issues, and sacred and culturally significant sites” is in a completely different section⁷⁴ from the “[r]ole of science in planning.”⁷⁵ Whyte further notes:

An implication of definitions based on the assumption that TEK is a body of knowledge is that TEK can be picked up and used by scientists or agency staff. Each of the policy documents just cited involves the idea that TEK can be gleaned from the communities who have it, either through historical research or working with actual communities, and can then be incorporated into the environmental governance of non-indigenous institutions like those of the United Nations or U.S. Department of Agriculture.⁷⁶

73. Kyle Powys Whyte, *On the Role of Traditional Ecological Knowledge as a Collaborative Concept*, 2 ECOLOGICAL PROCESSES 1 (2013).

74. 36 C.F.R. § 219.4(a)(3) (2022).

75. *Id.* § 219.3.

76. Whyte, *supra* note 73, at 6.

While Whyte cites policy documents from the Natural Resources Conservation Service and United Nations,⁷⁷ forest planning regulations follow Whyte's descriptions. Native knowledge is included under public participation and not science.⁷⁸ Additionally, regulations dictate that the responsible official (e.g., a Forest Supervisor) will request scientific information and incorporate 'relevant' knowledge into aspects of the Plan:

The responsible official shall use the best available scientific information to inform the planning process required by this subpart. . . . In doing so, the responsible official shall determine what information is the most accurate, reliable, and relevant to the issues being considered.⁷⁹

And with specific regards to Native knowledge:

The responsible official shall request information about native knowledge, land ethics, cultural issues, and sacred and culturally significant sites.⁸⁰

Through this forest management process, Tribes essentially submit information and knowledge to the Forest Service and the responsible official decides what is important (and what, in turn, is not).⁸¹ This process assumes epistemic supremacy on the part of the federal government. What may sound like a philosophical issue may result in harm to Tribes and an undermining of consultation processes intended to engage Tribal knowledge systems. Consider again the Snowbowl example. The Forest Service's decision to allow recycled wastewater for snowmaking in the San Francisco Peaks was informed by agency conceptions of water quality and geographic scope.⁸² The excerpt from *Navajo Nation v. United States Forest Service* demonstrates this perspective—there, the court asserts that no springs will be polluted, nor will any religious ceremonies be inhibited.⁸³ These subjective claims are based on state water quality standards for using recycled water and the percentage of land in the San Francisco Peaks lying within the Snowbowl ski area.⁸⁴ Meanwhile, the plaintiff Tribe's claims are attributed to "beliefs" and "subjective spiritual experience."⁸⁵ In short, through the eyes of the federal government, the Tribes have subjective perceptions of an action

77. *Id.* at 3; DOUGLAS NAKASHIMA ET AL., WEATHERING UNCERTAINTY: TRADITIONAL KNOWLEDGE FOR CLIMATE CHANGE ASSESSMENT AND ADAPTATION 30 (2012).

78. 36 C.F.R. § 219.4(a)(3) (2022).

79. *Id.* § 219.3.

80. *Id.* § 219.4(a)(3).

81. *See id.*

82. *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008).

83. *Id.*

84. *Id.* at 1112.

85. *Id.* at 1063.

that are disconnected from bodies of knowledge valued and dictated by the Forest Service.⁸⁶

Agency conceptions broadly manifest within forest planning and NEPA documents and processes. As part of the most recent revision of the Hells Canyon National Recreation Area (HCNRA) management plan (administered by the Wallowa-Whitman National Forest Office), for example, a NEPA alternative was jointly submitted by the Nez Perce Tribe, Umatilla Tribe, and conservation organizations.⁸⁷ As part of a goal for Native American sites and resources, the alternative states: “Native American cultural resources will be protected in their native wild and natural settings. This includes protection of a site’s visual, audible and atmospheric surrounding environment.”⁸⁸ In the NEPA final EIS for the HCNRA management plan, impacts on heritage resources (which included Native American sites as listed in the jointly submitted alternative) are measured by “potential surface disturbance, removal or alteration of structural elements, removal or alteration of mapped artifacts, modification or alteration of physical environment or setting.”⁸⁹ Such criteria run the risk of only focusing on specific physical disturbances and ignoring other aspects of a site’s environment. More to the point, they privilege Forest Service conceptions for site protection. In order for meaningful consultation to result in meaningful action, Tribal input must be incorporated structurally, procedurally, epistemologically, and continuously during planning processes.

Literature describing Tribal involvement with NEPA confirms the Coconino National Forest and HNCRA are not isolated examples.⁹⁰ While Tribes frequently engage with NEPA analyses, these experiences are often frustrating and unproductive for Tribes.⁹¹ Such frustration is in part due to NEPA’s reliance on scientific materialism which presumes necessity in quantification of resources and values, thus excluding or minimizing anything that cannot, or should not, be quantified.⁹²

86. *See id.*

87. U.S. FOREST SERV., HELLS CANYON NAT’L RECREATION AREA COMPREHENSIVE MGMT. PLAN FEIS, App. J (Jan. 8, 1999), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5362343.pdf.

88. *Id.* at J-24.

89. U.S. FOREST SERV., HELLS CANYON NAT’L RECREATION AREA COMPREHENSIVE MGMT. PLAN FEIS 3-213 (2003), <https://usfs-public.app.box.com/s/z7p7hnbwhwa777a8axrhmdk6hhentchn/file/982756442681>.

90. *See generally* Dongoske et al., *supra* note 42.

91. *Id.* at 43–44.

92. *Id.*

If NEPA is not structured to account for Tribal interests and concerns, co-stewardship and meaningful consultation within National Forest planning may be impossible, given the close relationship between the two processes. Additionally, given NEPA's wide-reaching application, failures of NEPA processes to meet Tribal needs create an impediment to consultation in contexts besides National Forest management (e.g., water quality management within the Environmental Protection Agency). As Harper and Harris note, the "ripple effects" among Tribal communities from a decision—caused by disregarding Tribal concerns in NEPA processes—are rarely acknowledged.⁹³

A. Supporting 'Ongoing Consultation'

The Forest Service's ongoing reliance on consultation demands significant pressure on Tribal capacities even in cases when Tribal interests are acknowledged or supported. For example, the 2018 Coconino Forest Plan revision ROD states, "Engagement with area tribes included 17 face-to-face meetings and numerous invitations for involvement in the forest plan revision process. The Forest held meetings with tribal elders, government representatives, and community members."⁹⁴ In the final plan, approaches and guidelines for Tribal Relations and Uses relies almost solely on continuing consultation processes with Tribes.⁹⁵ This approach requires significant capacity from Tribes in terms of money, time, personnel, and travel—often without much assurance that a Tribe's interests are actually being met.

The alternative for the HCNRA management plan provided by the Nez Perce Tribe, Umatilla Tribe, and conservation groups, suggests that Tribes should be compensated for these significant investments through contracted work in order for Native American Sites to be appropriately managed:

The HCNRA lies within the ceded lands of the Nez Perce Tribe. The Nez Perce may have particular knowledge of a site not held by a Forest Service archaeologist. Further, a Forest Service archaeologist may have particular allegiance to the Forest Service. Therefore, contracted work by the Nez Perce Tribe and other appropriate tribal representatives, as recommended by the Nez Perce Tribe, is important for corroborating and enhancing the work of the Forest Service archaeologist.

And

93. Barbara Harper & Stuart Harris, *Tribal Environmental Justice: Vulnerability, Trusteeship, and Equity Under NEPA*, 4 ENV'T JUSTICE 193, 195 (2011).

94. U.S. FOREST SERV., MB-R3-04-33, RECORD OF DECISION FOR THE COCONINO NAT'L FOREST LAND AND RESOURCE MGMT. PLAN 6 (Mar. 2018), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd606746.pdf.

95. U.S. FOREST SERV., MB-R3-04-31, LAND AND RESOURCE MGMT. PLAN FOR THE COCONINO NAT'L FOREST, at 96–97 (Mar. 2018), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd606737.pdf.

It is not reasonable to prepare a Cultural Resources Protection Plan on Nez Perce Tribe ceded lands without major, significant cooperation with the Nez Perce Tribe. However, it is also unreasonable to request that the Nez Perce Tribe research, review, comment on, or otherwise assist in the preparation of the Cultural Resources Protection Plan without contracting for Nez Perce tribal staff time to do so.⁹⁶

These comments underscore the importance of collaboration with a Tribe *and* the need to compensate the Tribe for its commitment of resources. Regardless of this recommendation by the Tribe, the final language in the HCNRA plan for Heritage Resources states, “[a]s part of the management of American Indian heritage sites, consult with the Nez Perce Tribe to ensure that tribal concerns are addressed.”⁹⁷ Such an approach leaves Tribes with an overwhelming number of consultation requests in addition to ambiguous agency commitments.

Rather than acknowledging or addressing Nez Perce Tribe recommendations to the Forest Service that it contract Tribal staff time, the final EIS asserts “[d]irect, noncompetitive contracting with the Nez Perce Tribe or approval of contracts by the Nez Perce Tribe . . . would constitute a violation of federal contracting requirements for competitive bidding (Part 6, Federal Acquisition Regulations).”⁹⁸ Yet this may not be the case. Section 6.3 of the Federal Acquisition Regulations provides for “circumstances permitting other than full and open competition”⁹⁹ and includes, “when the supplies or services required by the agency are available from only one responsible source . . . and no other type of supplies or services will satisfy agency requirements, full and open competition need not be provided for.”¹⁰⁰ It seems this exception may apply in instances of contracting Tribal staff on issues and knowledge specific to the Tribe.

Relationship building between Tribes and the federal government requires understanding and competency. In order for Tribal consultation to meet Tribal needs, the Forest Service must address the capacity constraints of Tribes and USFS employees. Tribal needs include resources for demands on staff time and related expenses. The increased capacity of Forest Service staff requires that, “agency staff are culturally competent and informed on treaty rights, other tribal rights, the

96. U.S. FOREST SERV., *supra* note 87, at J-26.

97. U.S. FOREST SERV., HELLS CANYON NAT’L RECREATION AREA COMPREHENSIVE MGMT. PLAN, at 51 (2018), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd584420.pdf.

98. U.S. FOREST SERV., HELLS CANYON NAT’L RECREATION AREA COMPREHENSIVE MGMT. PLAN FEIS, at 3-227 (2003), <https://usfs-public.app.box.com/s/z7p7hnbwhwa777a8axrhmdk6hhentchn/file/982756457081>.

99. 48 C.F.R. § 6.302 (2022).

100. *Id.* § 6.302-1(a)(2).

federal trust responsibility, and the history of federal-tribal relations.”¹⁰¹ Some forest plans already include training for their employees about Tribal relations and trust responsibilities.¹⁰² There may be an opportunity in these existing structures to evolve USFS ontologies towards being more equipped to engage in collaboration under the concept of TEK which includes shifting NEPA analysis away from only valuing knowledge rooted in scientific materialism.

NEPA processes offer additional opportunities to improve consultation resource capacities. NEPA regulations stipulate that while cooperating agencies are generally expected to use their own funds,

To the extent funds permit, the lead agency shall fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.¹⁰³

To the extent Tribes are interested in participating in NEPA as cooperating agencies, federal resources could both provide funding to Tribes and deepen the commitment of the USFS in collaborating with Tribes—starting with the scientific assessment that informs the final EIS and ROD. The timing for evaluating NEPA in the context of forest planning and co-stewardship between federal agencies and Tribes is ripe. The Council on Environmental Quality (CEQ), the primary agency responsible for NEPA implementation, issued final regulations effective May this year amending certain provisions and is slated to do a more comprehensive regulatory review in the near term.¹⁰⁴

B. Accountability and Connectivity in Process

The inclusion of specific goals, objectives, standards, and guidelines in forest plans *informed by consultation* may help integrate Tribal expertise and priorities into National Forest management and make consultation more meaningful.

While forest plans are not meant to detail every future decision in a forest, the National Forest Management Act (NFMA)—the source of National Forest planning—indicates that decisions and operations must comply with a forest’s plan and thus, that forest plans will contain a level of specificity that can guide “resource plans and permits, contracts, and other instruments.”¹⁰⁵ If forest plans only contain vague language to continue consulting with Tribes to ensure Tribal concerns are addressed—such as the cases with the HCNRA and Coconino National Forest plans—the lack of specificity and accountability for vetting plan implementation and permits undermines Tribal rights and needs.

101. STRENGTHENING THE FEDERAL-TRIBAL RELATIONSHIP, *supra* note 23, at 1.

102. See LAND AND RESOURCE MGMT. PLAN FOR THE COCONINO NAT’L FOREST, *supra* note 95, at 97.

103. 40 C.F.R. § 1501.8(b)(5) (2020).

104. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23453 (Apr. 20, 2022).

105. 16 U.S.C. § 1604(i).

Notably, NFMA is subject to “valid existing rights,”¹⁰⁶ meaning that Congress anticipated scenarios where the mission of the Forest Service should conform to certain existing rights. The joint-secretarial order states,

In managing Federal lands and waters, the Departments are charged with the highest trust responsibility to protect Tribal interests and further the nation-to-nation relationship with Tribes. The Departments recognize and affirm that the United States’ trust and treaty obligations are an integral part of each Department’s responsibilities in managing Federal lands. Tribal consultation and collaboration must be implemented as components of, or in addition to, Federal land management priorities¹⁰⁷

That forest plans should be informed by Tribal rights and responsibilities is clear in the intent of the joint-secretarial order and that forest planning should accommodate instances of valid existing rights is clear in the language of NFMA. Such high-level commitments must be woven into the minutiae of forest planning and NEPA analysis. Each decision, agreement, permit, and plan must be oriented with trust responsibilities and protecting Tribal interests as a whole. Finally, Tribal interests cannot be protected if they are restricted to non-Tribal conceptions—a failure to collaborate over conceptions of water quality and contamination positions meaningful consultation or co-stewardship as impossible.

VI. CONCLUSION

Meaningful consultation or co-stewardship cannot occur if Tribal concerns are siloed from overarching management frameworks. Forest Planning and NEPA are two important processes for guiding decisions on Tribal lands and waters currently managed as part of the National Forest System.¹⁰⁸ Changes in National Forest planning that strengthen meaningful consultation efforts and support co-stewardship include:

1. Approaching native knowledge as a collaborative concept requires the federal government and Tribes to work together continuously rather than the federal government incorporating a body of knowledge that can be incorporated into forest planning and NEPA processes.

106. *Id.*

107. JSO No. 3403, *supra* note 1, at § 1.

108. See 16 § U.S.C. 1604(g)(1).

2. Providing resources to compensate Tribal staff time.
3. Building federal agency capabilities.
4. Including specific recommendations and input from Tribes in forest plans so that future decisions and actions within a National Forest are held accountable to Tribal priorities.
5. Integrating Tribal collaboration into all aspects of forest planning rather than as a separate process. Specific opportunities for integration could include restructuring planning regulations, positioning Tribes as requisite parties in relevant agreements, and supporting Tribes as integral parties in shaping NEPA analyses.

The National Forest System is comprised of significant Indigenous homelands. In many instances, the United States entered Treaties agreeing to respect existing Tribal rights and uses of these lands. Such agreements are ongoing, and federal agencies cannot honor the United States' commitments to treaty obligations and trust responsibilities without meaningful Tribal collaborations in decision-making.