



July 21, 2023

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U.S. Environmental Protection Agency  
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Submitted via email to: [ruge.zoe@epa.gov](mailto:ruge.zoe@epa.gov)

**RE: National Tribal Water Council's Comments on EPA's Proposed Revisions to its Policy on Consultation and Coordination with Indian Tribes; and Guidance for Discussing Tribal Treaty or Similar Rights**

Dear Ms. Ruge:

On behalf of the National Tribal Water Council (NTWC), I am pleased to submit the following comments on EPA's proposed revisions to its Tribal Consultation Policy and Treaty Rights Guidance.

### **Introduction**

Throughout the long tenuous history of the federal government's consultation with federally recognized tribes, the federal government's efforts have often fallen short of ensuring meaningful tribal engagement. Tribes have consistently called for meaningful consultation, which requires a collaborative process that truly recognizes tribal decision-making and respects tribal culture, rights, and sovereignty. Such meaningful consultation is required to fulfill the federal government's trust obligation to engage in a government-to-government relationship with tribes and "protect tribal rights to exist as self-governing entities."<sup>1</sup>

In 2021, NTWC provided comments for improving EPA's 2011 Tribal Consultation Policy.<sup>2</sup> NTWC suggested three core elements for meaningful consultation: (1) early and consistent tribal engagement; (2) face-to-face interactions; and (3) a deep understanding by federal officials of tribal

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<sup>1</sup> See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1505-06 (1994) ("[T]he trust doctrine is an important legal tool to protect native rights against adverse action... The trust doctrine transcends specific treaty promises and embodies a clear duty to protect the native land base and the ability of tribes to continue their way of life.").

<sup>2</sup> In March 2021, the NTWC submitted comments to EPA on improving its implementation of Executive Order 13175: Consultation and Coordination with Indian Tribal Governments, following President Biden's January 26, 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships ("2021 Presidential Memorandum").

cultures, federal Indian law, and federal land management practices. NTWC explained that implementing these elements will lead to meaningful consultation by assuring active tribal participation in environmental management, which makes it more likely that tribes will substantively influence management decisions. Through meaningful consultation, the federal government can begin to fulfil its trust obligation to honor its government-to-government relations with tribes. Decision-making that incorporates tribal perspectives and knowledge of the environment, as well culturally significant resources, will result in better federal protection of our tribal nations' land, air, and water.

Federal agencies must also treat tribes as distinct from members of the public or stakeholders commenting on proposed actions. Tribes are sovereign nations with unique expertise and sovereignty – not merely interest groups.<sup>3</sup> Meaningful consultation requires that federal government officials regard tribal governments and tribal officials as environmental management partners. The Indian Policy's explicit goal was the eventual full assumption of delegable environmental programs by tribes in the same manner as state partners. Congress supported that vision with treatment-as-a-state and primary enforcement authority (primacy) provisions in multiple statutes.

The Policy, though, acknowledged that during the journey to full partnership tribes may play lesser or partial roles while EPA directly implemented programs in Indian country. That kind of engagement in both formal and informal partnerships, like genuine consultation, helps ensure EPA is aware of tribal interests that may be affected and builds tribal capacity, which in turn makes consultation even more productive.

In addition to these general comments, NTWC offers the following comments and proposed revisions to specific sections of the draft revised Tribal Consultation Policy and draft revised Treaty Rights Guidance, using those documents' section titles.

## **Proposed Revisions to EPA Policy on Consultation and Coordination with Indian Tribes**

### **I. Policy Statement**

In the current Consultation Policy, "Coordination" is defined as a separate process from "Consultation," which NTWC agrees with. That distinction means that coordination should be referenced separately from consultation in this section.

### **II. Background**

EPA should ensure this section sets adequate context for these revisions. A major constant in Indian country is frequent turnover in technical staff and government officials. The same holds true with EPA staff, who need to understand the long history of EPA's Indian program. EPA was the first federal agency to adopt an Indian policy, embracing tribal sovereignty, environmental self-determination, and the federal trust responsibility. The Indian Policy and Tribal Consultation Policy are outgrowths of the Agency's trust responsibility and in recognition of tribal sovereignty and self-determination.

NTWC recommends that EPA incorporate by reference the following principles from the EPA's 1984 Indian Policy into its Tribal Consultation Policy:

- Principle 1's commitment to government-to-government relationships;
- Principles 2's recognition of tribes as the primary parties for environmental policy-setting and program implementation;

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<sup>3</sup> 2021 Presidential Memorandum.

- Principle 3’s commitment to assist tribes in developing capacity to assume program responsibility and encourage lesser or partial roles for tribes during EPA direct implementation; and
- Principle 4’s intention to remove impediments to working directly with tribes, which is directly relevant to improving EPA’s current Tribal Consultation Policy.

In our 2021 comments, we asked EPA to explain its federal trust obligation to tribes and how it relates to EPA’s work. We noted “*that the National Environmental Justice Advisory Committee’s Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making*” (2000) **provides some helpful explanation on key trust concepts** endorsed by the United States Supreme Court, like “moral obligations of the highest responsibility and trust,” “the strictest fiduciary standards,” and “good faith and fairness.” [NEJAC Guide p.8 (2000)] *The Guide correctly says “the trust obligation imposes an additional duty with which agencies must comply when exercising discretion in carrying out their statutory duties.”* We suggest EPA consider supplementing the Tribal Consultation Policy with a similar explanation of the trust responsibility.

### III. Definitions

Consultation versus Coordination: NTWC highly recommends having separate definitions for consultation and coordination. Too often mere coordination is substituted for true consultation. EPA should revise the definition of consultation to require true consultation based on respectful, in-person dialogue aimed at reaching consensus.

Coordination is not the same as consultation. For example, EPA staff providing a PowerPoint presentation of the proposed agency action at issue is not the same as EPA leader(s) meeting with tribal leader(s) to discuss the tribe’s view of and concerns with that action. NTWC recommends that coordination take place at the staff level. This stage is where the PowerPoint presentations or detailed information sharing from the agency can occur. The tribal staff can then ask technical questions of the agency, consider the issues, and inform the tribal government. The tribal government will then be prepared for consultation.

EPA must recognize that consultation and coordination should be a continuous part of EPA’s outreach to tribes. EPA’s Indian Policy committed the agency to assisting tribes in developing institutional capacity leading to environmental self-determination. However, by the time EPA is ready to propose an action, there may not be time to perform genuine coordination and consultation. Therefore, EPA should begin these processes while the action is still in the discussion stage. The Indian Policy explicitly embraced the option of tribes playing partial roles during EPA direct implementation as a means of both conveying tribal interests in particular actions to EPA and building tribal capacity. Working with tribes in both formal and informal partnerships has been a longstanding hallmark of EPA’s Indian program, and can easily be incorporated here with earlier involvement.

Furthermore, EPA states, “as a process, consultation includes several methods of interaction that may occur at different levels.” (Proposed Revisions III.A.) EPA should clarify that whatever other processes occur, consultation requires a true, informed, in-person dialogue between the highest level of decision-makers at EPA and tribal leadership. Ideally, it should occur in person; many tribes do not think virtual meetings constitute a true government-to-government consultation.

NTWC generally agrees with the definition of “coordination,” but EPA should revise the definition to state that coordination “**should**” (not “can”) support the consultation process. EPA staff should not only inform tribal staff of possible EPA actions warranting consultation, but also **ensure** that the tribe has the necessary background and information to fully participate in the consultation process.

This goal can be achieved through the coordination process, either in person or virtually, with the provision of documents, participation in phone calls, and virtual and in-person meetings.

In the NTWC 2021 comments, we observed that “tribes have not received the historical support from EPA that states have. Tribes thus often lack the institutional capacity necessary for effectively engaging in technical consultations. It is incumbent upon a fiduciary discharging its moral obligation of engaging in good faith to assist the tribe in understanding the statutory, regulatory and technical context as it applies to the proposed action. At the very least, that requires EPA to provide written materials in advance [of any government-to-government consultation]. It may also require a pre-meeting to explain the legal and technical aspects of the question and give the tribe time to formulate its input.”

The current Policy revision defines consultation as a two-way, government-to-government sharing of information between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes. That definition is correct, but it does not fully explain what constitutes “meaningful consideration of tribal input.” As NTWC noted in its 2021 comments to EPA, in practice, tribal consultation with EPA is not much different from early notice-and-comment public participation:

*“[N]owhere does the revised policy attempt to explain what constitutes meaningful consultation and little has changed from being different from than a typical public participation: the agency gives tribes notice of a proposed action, and a time frame for comment; tribes send written comments; the agency considers the comments, and makes a decision; occasionally, the decision is communicated directly to those tribes who commented, although more commonly any discussion of the tribal comments occurs in the generic Response to Comments document issued with the final decision. The only consistent differences from typical public participation processes are timing—tribal consultation occurs first—and sometimes EPA provides opportunities for in-person communication. In the experience of our member tribes, those in-person opportunities typically consist of an informational presentation by EPA, followed by tribal reactions. Rarely if ever is their actual dialogue as there would be between parties in a negotiation or even a conversation.”*

A positive example of coordination between tribes and federal agencies that led to meaningful federal-tribal consultation is the 1997 Joint Secretarial Order on Tribal Rights and the Endangered Species Act (ESA). Through the Secretarial Order, agency officials provided the necessary scientific, technical, and informative assistance for the tribal development of conservation and management plans for ecosystems on which ESA-listed species depend. This result was achievable because federal agency officials took the time to understand tribes’ positions and ensured that the tribes had the appropriate information to meaningfully participate in the federal-tribal consultation process.

#### IV. Guiding Principles

- A. The principle of tribal self-determination should be added here, not just sovereignty and the trust responsibility (see the discussion under Background, *supra*).

The NTWC recommends that EPA revise its Tribal Consultation Policy and Treaty Rights Guidance to fully reflect these elements in its procedures for tribal engagement, as well as incorporating principles stated in the 2007 U.N. Declaration on the Rights of Indigenous Peoples.

EPA must come to the table and try to reach consensus, as President Biden stated in his 2021 Presidential Memorandum:

*“Consultation requires that information obtained from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome.*

See 2021 Presidential Mem. § 2. Consultation Principles.

In EPA's revised policy, it changed "agencies" to EPA and added to the end of this statement, "to the extent practicable and permitted by law."

EPA should not weaken its preexisting commitment to consensus. NTWC recommended in its 2021 comments, *"the best way to clearly distinguish tribal consultation from public participation processes is to design substantive standards ensuring that consultation is not simply another administrative process. Appendix V of the GAO Consultation Report indicates 11 federal agencies have consultation policies that seek consensus or agreement with their tribal partners. Some agencies qualify that goal. Phrases like where possible, or where feasible are not uncommon or in this case strive for consensus. And policies are not law. But the significance of there being 11 federal agencies with an express consultation goal of seeking tribal agreement with proposed federal actions cannot be overstated. EPA has demonstrated its leadership among federal agencies in its Indian programs and commitment to tribal environmental self-determination. Adopting consensus as a tribal consultation goal would place the Agency again at the forefront of those actively assisting tribes in achieving self-determination. (EPA's Consultation FAQs (#13) comments that consensus is not always achieved, implying that it is an unstated goal. EPA should make it an official goal."*

EPA should therefore remove the vague caveat "to the extent practicable," from the Tribal Consultation Policy. This vague caveat suggests that EPA can stop short of a consensus solution whenever a tribe's proposed decision may be significantly more time-consuming or more complicated to execute than EPA's proposal. The phrase "permitted by law," on the other hand, captures situations when a tribe's proposal is truly unworkable. In fact, in some regulatory programs, "to the maximum extent practicable" means to the extent possible, unless "prohibited by existing law." See, e.g., 15 C.F.R. § 930.32(a)(1). Given that definition, "to the extent practicable," is surplusage and adds confusion.

- B. The Policy should include the principle of minimizing adverse impacts on the tribe(s) from the proposed action. The consultation could explore ways to achieve that goal.

NTWC pointed out in its 2021 comments, *"a different substantive standard that could be used in conjunction with consensus, or separately as a step short of consensus, is a commitment to minimize or mitigate adverse impacts on tribal interests. Where EPA decides to act despite tribal concerns, it could and should use its discretion to protect tribal interests. Consultation then would focus on specific tribal interests and ways to minimize adverse impacts on them."*

Likewise, in our 2021 comments, we pointed out that in Canada, such mitigation is a constitutional duty referred to as **accommodation**. *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage), 3 S.C.R. 388 (2005). *Accommodation means "taking steps to avoid irreparable harm or to minimize the effects of infringement of aboriginal rights."* *Haida Nation v. British Columbia* (Minister of Forests), 2004 SCC 73, 3 S.C.R. 511, at para. 18 (citing *Roberts v. R.*, 4 S.C.R. 245 (2002), paras. 79, 81). *The National Environmental Policy Act requires consideration of mitigation measures as part of environmental assessment and analysis. Identification and consideration of mitigation measures often leads to improvements in proposed actions. Similarly, consultation that identifies ways to minimize the adverse impacts of proposed actions on tribal interests offers potential opportunities both to have the benefits of the proposed action and to avoid or minimize its negative consequences on tribal rights and values.*

As NTWC explained in its 2021 comments, EPA should revise its Tribal Consultation Policy and go beyond the Policy on Environmental Justice for Working with Federally Recognized Tribes and

Indigenous Peoples (2014). In addition to the idea of free, prior, and informed consent discussed above, there are several principles from the 2007 U.N. Declaration on the Rights of Indigenous Peoples that are of relevance to EPA's programs, including: Article 3 self-determination right to pursue cultural development; Article 4 right to self-government; Article 11 right to practice cultural traditions and customs; Article 25 right to maintain their distinctive spiritual relationship with lands and resources; and Article 29 right to conservation and protection of the environment, and national programs assisting indigenous peoples in environmental conservation and protection.

- C. The NTWC recommends that in the third principle, the use of the word "provides" should be revised to "requires" because the trust responsibility does not specifically provide for consultation. Rather, consultation is an outgrowth of the trust responsibility. NTWC proposes that the Tribal Consultation Policy be edited as follows: "The federal trust responsibility **requires** that the federal government consult with and consider...."

## V. Consultation

### A. The Consultation Process

- 1. The "Identification Phase" must occur early enough in the process to enable sufficient coordination prior to consultation, as noted above.

Consulting with tribes early in the process is essential and allows EPA to incorporate tribal perspectives meaningfully. NTWC pointed out in its 2021 comments that ideally consultation should occur before the agency has determined it will take a particular action. However, tribes have become accustomed to "check the box" procedures, especially when tribes make extensive comments raising substantive concerns on proposed actions, and then learn that the final decision is exactly what was proposed. The only way to assure tribes that the agency's intention in consulting is genuine is for the agency to consult during the planning phases and to modify its proposals by incorporating tribal comments.

- 2. Notification Phase: If possible, the tribal environmental program should be copied on the notification, to ensure the information reaches them in a timely manner.

Background information should be provided earlier as part of the coordination process. If EPA proposes that the consultation be virtual rather than in-person, it shall provide good reason for doing so (e.g., the consultation is about a nationwide action and too many tribes are seeking consultations for it to be feasible to conduct them in person).

- 3. Input Phase: Consultation requires more than EPA simply receiving input from the tribe, which is simply akin to an early public comment opportunity.

EPA should engage in a true discussion of the tribe's concerns, with an effort to reach consensus. If consensus cannot be reached, the Consultation Process described in Section VI.B of the proposed revised draft Consultation Policy should be triggered. We agree that the highest levels of EPA leadership should participate in the discussions.

- 4. Follow-up Phase:

EPA's feedback should be provided in writing.

### B. What Activities May Involve Consultation?

## 2. EPA's Mechanisms for Identifying Matters for Consultation

EPA should state it will do its utmost to honor a tribal request for consultation, not just that it will attempt to do so considering various factors. Determinations as to the need for consultation should include seeking the opinion of the tribe(s) likely to be concerned, not just tribal consortia.

### C. When Consultation Occurs

NTWC agrees that this section does not need revising, but see comments above as to timing of coordination under the Definitions section.

### E. Exemptions

If EPA provides for early enough tribal involvement in discussions about the proposed action, as commented on under the Definitions section, there is less chance that deadlines will limit consultation with tribes, and EPA would be invoking exemptions only in very rare circumstances, namely, when there is a true, unforeseen emergency or an unanticipated mandatory deadline.

## VI. Managing the Consultation Process

### B. Consultation Process Review

NTWC agrees with the insertion of this dispute resolution process. However, the resolution process must address not only procedural but substantive concerns with the consultation process. A consultation cannot be "meaningful" unless both the process and substance comply with the principles discussed above.

## Revisions to Text of Consultation and Coordination Policy, Section I (Policy Statement)

To implement the comments above, NTWC offers the following proposed revisions to the following section of the draft revised Tribal Consultation Policy.

### I. Policy Statement

The U.S. Environmental Protection Agency's (EPA or Agency) policy is to **coordinate and** consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribes. Consultation comprises meaningful communication between EPA and tribal governments and requires the Agency to give meaningful **consideration** to tribal input prior to EPA taking actions or implementing decisions that may affect tribes. **The coordination and consultation** process includes several methods of interaction that may occur at different levels **within EPA and the tribal government**. The appropriate level of interaction is determined by this Policy, the continuing dialogue between EPA and tribal governments, and program and regional office **coordination** and consultation procedures and plans.

This Policy establishes national guidelines for **coordination and** consultation across EPA. EPA program and regional offices have the responsibility for consulting with tribes. Any and all program and regional office **coordination and** consultation plans and practices must be consistent with this Policy. This Policy seeks to strike a balance between providing sufficient guidance for purposes of achieving

consistency and predictability and allowing for, and encouraging, the tailoring of [approaches to reflect the circumstances of each situation](#) and to accommodate the preferences of tribal governments.

### **Proposed Revisions to Guidance for Discussing Tribal Treaty and Similar Rights**

In the attached Appendix A, NTWC offers proposed redline revisions to the draft proposed revisions to the Tribal Treaty Rights Guidance.

### **Conclusion**

On behalf of the NTWC, we thank you for the opportunity to comment on the proposed revisions to the EPA's Tribal Consultation Policy and Treaty Rights Guidance. Should you or your staff have questions or comments regarding our letter, please contact me at [KenPNorton@gmail.com](mailto:KenPNorton@gmail.com), or you may contact Elaine Wilson, NTWC Project Manager, at [Elaine.Wilson@nau.edu](mailto:Elaine.Wilson@nau.edu) for any questions.

Sincerely,



Ken Norton, Chair  
National Tribal Water Council

Cc: Karen Gude, USEPA Office of Water

Appendix A: Revisions to Proposed Tribal Treaty Rights Guidance



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## National Tribal Water Council

### Appendix A: Revisions to Guidance for Discussing Tribal Treaty or Similar Rights

#### Revisions to Guidance for Discussing Tribal Treaty and Similar Rights

In addition to NTWC's proposed revisions to the text of the proposed revised Treaty Rights Guidance, in redline format below, NTWC asks that as EPA continues to revise this Guidance it implement the principles discussed in the Introduction to this comment letter regarding respect for tribal self-determination and sovereignty as well as these general suggestions:

- The introduction needs to be stronger to make clear that EPA will protect tribal treaty and similar rights and act consistently with them. This commitment is conveyed in the conclusion but it is not expressed strongly enough in the introduction.
- Many of the questions identified in the guidance should be asked before the consultation, that is, during the coordination process. The distinction between the two processes was made in the revised Tribal Consultation Policy, but seems to have been ignored in this document. Many of the edits below attempt to address this issue.
- The guidance should make clear that the treaty and similar rights discussions may arise during the coordination and consultation process that is described in the draft Tribal Consultation Policy, and that the procedures in that document, including the dispute resolution procedures, will apply.
- The third question should be revised as follows: "What are the treaty or other tribal rights with which EPA must comply and how is EPA's proposed action likely to be affected by these existing obligations?" The federal government has an affirmative obligation to protect these tribal rights and resources.
- EPA should be aware that specific geographical areas may involve more than one tribe and more than one treaty or similar rights, and the exact limits of these rights are sometimes unclear. Where a proposed action may affect multiple tribes, EPA must be prepared to coordinate and consult both individually and collectively with the affected tribes.
- Specific steps should be outlined for the training referenced in the conclusion in order to make it more likely to occur.

#### Revisions to Text of the Guidance for Discussing Tribal Treaty or Similar Rights

The following are suggested **redline edits** to the revised text of the Guidance:

##### Introduction

From 1778 to 1871, the U.S.' relations with tribes were defined and conducted largely through treaty-making. In 1871, Congress stopped making treaties with tribes, and subsequent agreements between tribes and the Federal government were instead **generally** memorialized through Executive orders, statutes, and other agreements, such as congressionally enacted Indian land claim settlements. Instruments other than treaties may also reserve tribal rights, with equally binding effect. As one court explained, **generally**, "it makes no difference whether...[tribal] rights derive from treaty, statute or executive order, unless Congress has provided otherwise."

**Commented [JG1]:** Elaine, you'll need to leave these as redlines rather than accepting these revisions.

**Commented [EHW2R1]:** Got it! Keep track changes from this point to the conclusion section.

## Determining When to Ask About Tribal Rights During Tribal Consultation

EPA coordination and consultation with tribes provides the opportunity to ask whether an EPA action or decision may affect tribal rights. Because tribal rights analyses are complex, staff are expected to inquire early about tribal rights, i.e., during the coordination process prior to the formal consultation.

Certain types of EPA actions are more likely than others to have potential implications for ~~treaty-protected~~ tribal rights to natural resources. For example, EPA review of tribal or state water quality standards may implicate tribal ~~treaty-reserved~~ fishing rights. If a treaty or other instrument reserves to tribe's a right to fish in waters impacted by new or revised water quality standards, then EPA should coordinate and consult with tribes on ~~treaty-those~~ fishing rights, since protecting fish may involve protection of water quality in the watershed.

.....  
Previously, this Guidance applied solely to EPA actions in specific geographic areas, such as the examples described above. . . . Based upon this knowledge, 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* (2021), EPA revised this Guidance to apply to any action or decision which may affect tribal rights.

In each case, ~~employing-asking~~ the following questions in this Guidance during ~~consultation~~ the coordination process may inform EPA of when tribal rights are present in the defined area and may be affected by the action or decision.

.....  
In addition, EPA staff should be aware that tribal rights issues in the context of compliance monitoring and enforcement actions should be considered when coordinating and consulting with tribes pursuant to the *Guidance on the Enforcement Principles of the 1984 Indian Policy* and the *Restrictions on Communications with Outside Parties Regarding Enforcement Actions*. EPA should also act consistent with the *EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*.

## Questions to Raise During the Coordination and Consultation Process

EPA should ~~employ-ask~~ the following three questions during coordination and consultations on an action or decision that may affect tribal rights. Collaboration between program and legal staff ~~before and~~ during ~~consultation-the coordination process~~ is an important aspect of ensuring both that these questions are asked and the answers are understood. For any tribal rights discussion raised during ~~consultation~~ this coordination, the tribe may identify particular tribal officials to consult with EPA about tribal rights. It is important that EPA works to ensure that coordination and consultation occurs with the appropriate tribally identified officials.

(1) Do tribal treaty or similar rights ~~apply-exist~~ in the area likely to be affected by the action ~~area~~?

.....  
(2) What are the specific tribal treaty or similar rights that exist in, or the protected resources that rely upon, the affected area?

This question is designed to help EPA understand the ~~type-precise nature~~ of the tribal rights that ~~a tribe may retain are at issue~~. By asking this question, EPA can better understand the complexities that ~~are often involved in surround the~~ tribal rights at issue and better understand whether the EPA action or decision could affect those rights. Some treaties, ~~or~~ statutes, or other instruments explicitly ~~state-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

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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 action or decision?

~~This question is designed to help EPA understand how a tribal right may be affected by the action or decision.~~ EPA should explain the action or decision, provide any appropriate technical information that is available, and solicit input about any resources-based ~~or other relevant~~ tribal rights. It is also appropriate to ask the tribe for any recommendations for EPA to consider to ensure a tribal right is protected.