



Forest Service Planning Rule Tribal Comments

Responses to Tribal Comments on the Proposed Rule and Draft Environmental Impact Statement as reflected in the Final Programmatic Environmental Impact Statement

Introduction

Multiple Tribes and Alaska Native Corporations (ANCs) submitted comments during the public comment period for the proposed rule. In an effort to provide Tribes and ANCs with information on how their concerns are addressed in the preferred alternative (Modified Alternative A of the final programmatic environmental impact statement (PEIS)), this document summarizes those comments and provides a response for how they were considered during development of the preferred alternative.

Status of Tribes and Alaska Native Corporations

Comment: Some respondents commented that Alaska Native Corporations should not be given the same status as federally recognized Indian Tribes.

Response: The statutory provisions of 25 U.S.C. 450 note require that Federal agencies consult with ANCs on the same basis as Indian Tribes under Executive Order 13175. While the preferred alternative would require consultation and participation opportunities for ANCs, the Department engages in a government-to-government relationship only with federally recognized Indian Tribes, consistent with Executive Order 13175.

Youth Engagement

Comment: Some respondents commented that it is very important to engage Native American people and youth, and that youth are the ears, eyes, and voices of tribal leaders.

Response: The Department recognizes the need to engage a full range of interests and individuals, including Native Americans and youth, in the planning process. Section 219.4 of the preferred alternative includes requirements for encouraging participation from youth, low-income, and minority populations and also includes requirements for providing participation and consultation opportunities for federally recognized Indian Tribes and ANCs.

Comment: One respondent requested to meet with the Forest Service to develop a collaborative effort to engage Tribal youth.

Response: Please contact your local Forest Service office to inquire about existing and potential future opportunities for engaging Tribal youth in your local area.

Cultural Resources and Traditional Knowledge

Comment: One respondent suggested that a provision for sharing conservation knowledge be included in the final rule. One respondent stated that it should not be the responsibility of the Tribes to provide information on tribal knowledge, indigenous knowledge, or land ethics information to a Forest Supervisor or District Ranger seeking such information for consideration of a project or planning activity, just to be reassigned to another area and lose the institutional knowledge locally. It is burdensome for a Tribe to repeatedly have to supply this information for consideration.

Response: The preferred alternative includes a requirement for the responsible official to request information regarding native knowledge, indigenous ecological knowledge, and land ethics as part of the participation and consultation provisions provided in section 219.4. The Department realizes that it may be difficult for Tribes to work with the Forest Service when their points of contact and leadership representatives for their national forest frequently change. This is an issue that the Agency is aware of and is reviewing through performance standards in collaboration and additional tools such as handover memos that describe important issues and relationships to the incoming manager.

Coordination, Consultation, and Government-to-Government Relationship

Comment: Some respondents commented that the responsible official should actively engage in coordination with tribal land management programs for the purposes of development or revision regarding any consultation or collaboration endeavor with their specific Tribe. Some respondents requested specific coordination with tribal programs. Other respondents commented that the rule weakens the requirements to coordinate planning with Indian Tribes. One respondent requested that the Tribal coordination provisions from the Federal Land Policy and Management Act of 1976 (43 USC 1712(b)) be included in the final rule, while another suggested including the complete text of 43 USC 1712 in the rule.

Response: The preferred alternative would require the responsible official to provide participation, consultation, and coordination opportunities for Tribes during the land management planning process, under § 219.4. This section of the preferred alternative also states that the responsible official would coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes and ANCs. A citation to 43 USC 1712(b) has been added to the preferred alternative at § 219.4(b)(2). Participation in a collaborative process would be voluntary and would supplement, not replace, consultation. The preferred alternative explicitly requires that plans must comply with all applicable laws and regulations.

Comment: One respondent requested that further Tribal consultation occur to discuss and assist with drafting the type of agreement the responsible official would need to implement to support the language of protecting confidential information. This respondent also requested that the agreement not be an umbrella document that all regions must implement and that it should be flexible to each region and local unit because the issues and types of protection may vary from region to region.

Response: Development of agreements is outside the scope of a national planning rule. To request consultation on this specific issue or to discuss an agreement, please contact your local Forest Service unit. Agreements between Tribes and a local unit are currently entered into at the local level and we expect agreements to continue to be entered into at the local level in order to provide the flexibility for an agreement to be developed that best meets the needs of the local parties involved.

Comment: One respondent felt that the proposed rule does not go far enough in identifying the unique government-to-government relationship between Tribes and the Forest Service. One respondent requested that the final rule recognize and provide for direct consultation regarding forest plan amendments and revisions with affected ANCs and tribal organizations, in addition to federally recognized Indian Tribes.

Response: The Department recognizes the unique government-to-government relationship that the federal government has with Tribes, and has engaged Tribes throughout the rulemaking process. The preferred alternative contains modified wording regarding trust responsibilities in order to ensure accurate recognition of the relationship between the Federal Government and federally recognized Tribes. This modified language at § 219.4 says “the Department recognizes the Federal Government has certain trust responsibilities and a unique legal relationship with federally recognized Indian Tribes.” In addition to providing opportunities for engagement to both Tribes and ANCs, under § 219.4 of the preferred alternative, the responsible official would provide both federally recognized Indian Tribes and ANCs the opportunity to undertake consultation consistent with Executive Order 13175 and 25 U.S.C. 450 note. Section 219.4 of the preferred alternative also states that the responsible official would coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes and ANCs.

There are no requirements for the Department to provide direct consultation with tribal organizations. Federal agencies are required to consult with ANCs and federally recognized Indian Tribes per Executive Order 13175 and the statutory provisions of 25 U.S.C. 450 note. While there are no specific requirements to provide consultation to tribal organizations, under the preferred alternative, these organizations would be able to participate in the land management planning process through the public participation requirements of § 219.4.

Comment: A few respondents requested that the final rule specifically encourage tribal co-management with the Forest Service.

Response: The Agency may not delegate its decisionmaking authority to other entities. The preferred alternative does not address the concept of co-management. However, the preferred alternative would provide opportunities for Tribes to participate during the planning process and to discuss opportunities to meet shared objectives. The Department acknowledges the importance of Tribal participation in the land management planning process. The preferred alternative would provide opportunities for consultation and participation early and throughout the land management planning process at § 219.4.

Treaty Rights and Obligations

Comment: Several respondents commented that the final rule must recognize reserved rights and treaty rights. One respondent suggested that the rule should outline specifically how treaty obligations or other legally binding obligations to Indian Tribes will be addressed and assured in the planning rule and subsequent development of forest management plans. Some respondents disagreed with the language in the rule that the rule would not “affect” treaty rights.

Response: The preferred alternative recognizes and does not interfere with prior existing Tribal rights, including those involving hunting, fishing, gathering, and protecting cultural and spiritual sites. The preferred alternative would require the Agency to work with federally recognized Indian Tribes, government-to-government, as provided in treaties and laws and consistent with Executive Orders, when developing, amending, or revising plans. The Department does recognize that Tribes often have reserved rights and Tribes can discuss reserved rights during consultation and collaboration opportunities afforded by the rule. If reserved rights are an issue for Tribes, they would be able to discuss them during the participation and consultation opportunities provided by section 219.4 of the preferred alternative.

Section 219.1 of the preferred alternative states that it would not affect treaty rights or valid existing rights and that plans must comply with all applicable laws and regulations. The language in § 219.1 of the preferred alternative that “This part does not affect treaty rights or valid existing rights established by statute or legal instruments” does not imply that the Agency believes land management planning does not affect Tribes. Rather, this language means that the preferred alternative would not interfere with treaty rights or valid existing rights and that the land management planning process would comply with these rights.

Cooperating Agency Status

Comment: Some respondents requested clarification for why federally recognized Indian Tribes would be encouraged to seek cooperating agency status and what the benefit would be to Tribes. They emphasized that the federal government already has trust responsibilities to Tribal Nations and therefore they do not understand the purpose of requesting cooperating agency status. One respondent also requested a definition for cooperating agency status.

Response: The preferred alternative retains the provisions for encouraging federally recognized Indian Tribes to seek cooperating agency status in the NEPA process for development, amendment, or revisions of a plan, where appropriate. The opportunity for federally recognized Tribes to seek cooperating agency status provides an additional opportunity for Tribes to be engaged in the planning process and provides further avenues for Tribes to provide input during the planning process. Tribes would have the opportunity to seek cooperating agency status in addition to the other opportunities that would be provided to Tribes for participation and consultation during the planning process. Cooperating agency status would not replace or supersede the trust responsibilities already in place; rather, it would provide another opportunity for Tribes to be engaged in the planning process.

The Council on Environmental Quality regulations for implementing the National Environmental Policy Act define a cooperating agency as “any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in [40 CFR] § 1501.6. A state or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency” (40 CFR 1508.5).

Cultural/Spiritual Resources, Sacred Areas, and Confidentiality

Comment: One respondent requested that the final rule ensure protection of cultural resources. One respondent requested that the rule include acknowledgement of tribally-valued resources, access, and spiritual and cultural practices and locations and that these should be acknowledged during the development of land management plans, without disclosing any culturally and spiritually sensitive information.

Response: Under the preferred alternative at § 219.10, plan components for a new plan or plan provision would provide for protection of cultural and historic resources and management of areas of tribal importance. When developing plan components for integrated resource management, the responsible official would consider cultural and heritage resources and ecosystem services (§ 219.10). By definition, ecosystem services include cultural services such as educational, aesthetic, spiritual and cultural heritage values, recreational experiences and

tourism opportunities. Under § 219.4 of the preferred alternative, the responsible official would request information about native knowledge, land ethics, cultural issues, and sacred and culturally significant sites during the planning process.

Section 219.1(e) of the preferred alternative would require that, during the planning process, the responsible official comply with Section 8106 of the Food, Conservation, and Energy Act of 2008 (25 U.S.C. 3056), Executive Order 13007 of May 24, 1996, Executive Order 13175 of November 6, 2000, and other laws and requirements with respect to disclosing or withholding under the Freedom of Information Act (5 U.S.C. 552) certain information regarding reburial sites or other information that is culturally sensitive to an Indian Tribe or Tribes.

Comment: One respondent requested that the rule include a requirement to build an effective strategy for the management and sustainability of culturally-important resources and places, developed in cooperation with affected treaty Tribes.

Response: Strategies for the management and sustainability of resources and places on National Forest System lands will primarily be developed at the local level. During the land management planning process under the preferred alternative, Tribes would be provided opportunities for participation, consultation, and coordination. To address concerns regarding cultural sustainability, § 219.8 of the preferred alternative would require plan components to take into account social, cultural, and economic conditions relevant to the area influenced by the plan, as well as cultural and historic resources and uses. At the national level, a sacred sites policy review is currently ongoing, and Tribes have been provided with information on opportunities to participate in and consult on this initiative.

Comment: One respondent requested that the final rule outline a strategy for the protection and privacy, when needed, of sacred areas that the Tribes depend upon, and as outlined in treaties and federal laws.

Response: Section 219.1 (e) would require that, during the planning process, the responsible official would comply with “Section 8106 of the Food, Conservation, and Energy Act of 2008 (25 U.S.C. 3056), Executive Order 13007 of May 24, 1996, Executive Order 13175 of November 6, 2000, laws, and other requirements with respect to disclosing or withholding under the Freedom of Information Act (5 U.S.C. 552) certain information regarding reburial sites or other information that is culturally sensitive to an Indian Tribe or Tribes.”

Regarding sacred areas, policies and procedures relating to Forest Service management that may affect sacred sites are currently being reviewed in a separate USDA Office of Tribal Relations/Forest Service initiative. Tribes have been provided with information on opportunities to participate in and consult on this initiative.

Other Comments

Comment: Some respondents requested that funding be identified to conduct outreach processes with Tribes and develop deeper relationships with Tribes. One respondent requested that the Forest Service honor the respondent’s requests for resources and assistance to be able to participate in Forest Service projects and respond to Agency requests for coordination or other participation.

Response: A national planning rule does not allocate funding for specific uses and resources. Procedures for implementing the participation and consultation requirements of any final rule

will be developed as part of the Forest Service Directives System, and there will be additional opportunities for Tribes to provide input on the Directives.

Comment: One respondent requested that the rule include a requirement to consider roads and their development, maintenance, and decommissioning at a forest-wide level that addresses the needs for treaty rights access and fish and wildlife protection, along with other considerations.

Response: Decisions regarding the development, maintenance, and decommissioning of specific roads occur at the forest level during project planning. Under the preferred alternative, responsible officials would consider appropriate placement and sustainable management of infrastructure, such as recreational facilities and transportation and utility corridors.

Comment: One respondent requested that the rule consider integration of the evolving Special Forest Products Policy and take into consideration any treaty-protected Native American gathering rights when developing land management plans applicable to forest products and determining commercial harvest levels by non-treaty harvesters.

Response: Further clarification regarding gathering non-timber forest products is being developed in a new special forest products rule that is outside the scope of the planning rule. Under § 219.10 of the preferred alternative, the responsible official would consider, in collaboration with federally recognized Tribes; ANCs; other Federal agencies; and State and local governments, habitat conditions for wildlife, fish, and plants commonly enjoyed and used by the public for hunting, fishing, trapping, gathering, observing, subsistence, and other activities. The preferred alternative also includes requirements for coordination with the land management planning efforts of federally recognized Tribes and ANCs.

Comment: One respondent asked whether or not a specific site permit for activities on or uses of a national forest or grassland would be available to Native Americans.

Response: A planning rule and forest plans do not address permitting, as permitting requirements are addressed in other regulations. Issues regarding use and access on a specific forest or grassland will be considered at the local level. For information regarding permits on National Forest System lands in your area, please contact your local Forest Service office.

Comment: One respondent requested that the following standards be included in the final rule: 1) Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples; 2) Sites of special cultural, ecological, economic or religious significance to indigenous and other peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers; 3) If specific traditional knowledge is requested from indigenous peoples in the course of forest planning, those peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This respondent also stated that traditional practices associated with sites of special cultural, ecological, economic, or religious significance must be allowed.

Response: The preferred alternative would not affect treaty rights or valid existing rights. The Department acknowledges the importance of the land to indigenous peoples. A policy regarding sacred sites is being developed through a separate initiative from the planning rule, and Tribes have been provided the opportunity to consult in this initiative.

Section 219.1 of the preferred alternative recognizes that National Forest System lands provide spiritual and cultural benefits. Under § 219.10 of the preferred alternative, plan components would provide for the management of areas of tribal importance and protection of cultural and historic resources. The Department does not have the authority through a national planning rule to implement a policy for compensating the exchange of information. Tribes, as well as the general public, are not required to participate in the planning process or to share information; however, they would be encouraged to do so and would be provided opportunities to do so under § 219.4 of the preferred alternative.