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A VOICE IN THE STORM: TRIBAL CONSULTATION IN THE WAKE OF THE SANDY RECOVERY IMPROVEMENT ACT OF 2013

Elizabeth S. Leemon*

INTRODUCTION

From January 14th-17th, 2013, the Eastern Band of Cherokee Indians experienced severe storms, flooding, landslides, and mudslides on their lands in western North Carolina.¹ As a result, on March 1, 2013, the United States Department of Homeland Security's Federal Emergency Management Agency (FEMA) announced that federal disaster aid had been made available for the tribe.² Part of the funding went towards replacement of facilities damaged by the disaster, while another share was set aside on a cost-sharing basis for future hazard mitigation.³ On May 22, 2013, President Barack Obama amended his disaster declaration for the Cherokee Nation by authorizing an increase in federal funding for Public Assistance Projects to ninety percent of the total eligible costs.⁴

This was the first time the Cherokee Nation was able to directly submit a request for the President to make an emergency declaration so

*Elizabeth Leemon is a 2014 Seattle University School of Law graduate. The author would like to thank Cliff Villa for his support in writing this article and Eric Eberhard for his inspiration on the topic.

¹ *President Declares Major Disaster for Eastern Band of Cherokee Indians*, FEMA (Mar. 1, 2013), <http://www.fema.gov/news-release/2013/03/01/president-declares-major-disaster-eastern-band-choerokee-indians> (last visited May 19, 2014).

² *Id.* (Note: "Indian tribe or tribe" means an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §479a (2006)).

³ *Id.*

⁴ *President Obama Amends Disaster Declaration for the Eastern Band of Cherokee Indians*, THE WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2013/05/22/president-obama-amends-disaster-declaration-eastern-band-choerokee-indian> (last visited May 19, 2014).

that the tribe could receive federal assistance in response to the disaster.⁵ Previously, Indian tribes had been unable to ask the President directly for assistance, but rather had to first make a request to the governor of the state, who in turn would ask the President to make an emergency declaration.⁶ An amendment to the Robert T. Stafford Disaster and Emergency Relief Assistance Act (Stafford Act)⁷—the foremost piece of legislation on national disaster response, especially in regards to FEMA’s work—made this process possible.⁸ This amendment, the Sandy Recovery Improvement Act of 2013 (Sandy Recovery Act)⁹ allowed the Eastern Band of Cherokee Indians to petition the President and receive unprecedented federal funding.

The Sandy Act—although substantially directed at providing relief to Hurricane Sandy victims—gave tribes back sovereignty, allowing them to interact with the federal government according to their status as sovereign, dependent nations¹⁰ in times of disasters. The Sandy Recovery Act amended a critical component to the Stafford Act by removing tribes from the Act’s definition of “local governments” and listing them as separate entities.¹¹ As a result, the “Chief Executive”¹² of an

⁵Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5121–5207 (2006)), *available at* <https://www.govtrack.us/congress/bills/113/hr219/text> (last visited May 19, 2014).

⁶ 42 U.S.C. §§ 5121–5207 (2006).

⁷ *Id.*

⁸ The Act is also known as the “Sandy Relief Act,” the “Hurricane Sandy Relief Bill,” and the “Disaster Relief Appropriations Act of 2013.” Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5121–5207 (2006)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf> (last visited May 19, 2014).

⁹ *Id.*

¹⁰ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

¹¹ Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, 127 Stat. 48 (2013), (codified as amended at 42 U.S.C. §§ 5123 (2006)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf> (last visited May 19, 2014).

¹² *Frequently Asked Questions*, U.S. DEP’T OF THE INTERIOR AFFAIRS, <http://www.bia.gov/FAQs/> (last visited May 19, 2014) The chief executive of a tribe is usually called a chairman, chairwoman or chairperson, but may also be called a principal chief, governor, president, mayor, spokesperson, or representative. The chief executive presides over the tribe’s legislative body and executive branch. In modern tribal

affected Indian tribal government can now directly submit a request for a declaration by the President that a major disaster exists that necessitates additional government relief funding.¹³

Now that tribes have the authority to make direct requests to the President for federal assistance in disaster situations, the relationship between the federal government, FEMA, and the tribes has changed. FEMA will now be interacting with the tribes on an equal level, which will create new and pressing issues involving consultation¹⁴ between the government and tribes. Although consultation between the federal government and the tribes has not been statutorily mandated for disaster situations, consultation between the two governments is necessary to effectively manage disasters in a way that is sensitive to the concerns and needs of Indian tribes. With the passage of the Sandy Recovery Act, FEMA has begun the process of drafting a proposal for a new consultation policy that tribes can use during disaster situations.

This article begins with an overview of the Stafford and Sandy Recovery Improvement Acts and a brief history of consultation between the federal government and the tribes. Part II describes the different types of consultation and enforcement and the applicable laws that recognize consultation rights. Finally, Part III offers a description and analysis of the proposed consultation policy drafted by FEMA, and sets forth possible solutions to address implementation problems.

I. OVERVIEW AND BACKGROUND

A. *The Stafford Act Prior to 2013*

The Stafford Act, signed into law in 1988¹⁵ allows the federal government to use resources to provide disaster aid when the “severity

government, the chief executive and members of the tribal council or business committee are almost always elected.

¹³ *Id.*

¹⁴ Under 36 C.F.R. § 800.16(f)(2013), consultation is defined as “the process of seeking, discussing, and considering the views of other participants, and where feasible seeking agreement with them regarding matters....” 36 C.F.R. § 800.16(f)(2013).

¹⁵ 42 U.S.C. §§ 5121–5207 (2006).

and magnitude . . . [of the disaster] overwhelms state and local capacity to respond.”¹⁶ The process for states to obtain aid can begin before the disaster occurs, as federal resources may be deployed in advance of the incident.¹⁷ If this approach is taken, trained responders will arrive on the scene after the disaster occurs, notify an elected or appointed official who activates the local Emergency Operations Center (EOC),¹⁸ which then requests aid and state assistance from the governor.¹⁹ Next, the governor sets into motion the state EOC to assess the damage and, if necessary, request a Presidential declaration, either for an emergency, or a major disaster.²⁰ The governor furnishes the federal government with information on the amount of state and local resources that will be committed to the disaster.²¹ The federal government, in turn, can either take emergency measures itself by directing federal agencies to help by distributing essential assistance, such as providing medical care or food, or the federal government can reimburse states and localities for debris removal

¹⁶ JIM CHEN ET AL., DISASTER LAW AND POLICY 90 (2010).

¹⁷ *Id.* at 91.

¹⁸ *Id.* The central command and control facility responsible for carrying out emergency operations.

¹⁹ *Id.*

²⁰ *Id.* Under 42 U.S.C. § 5122(1)(2006) of the Stafford Act, an emergency is defined as “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” Under 42 U.S.C. § 5122(2)(2006) of the Stafford Act, a major disaster is defined as,

any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought), or, regardless of cause, any fire, flood or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship or suffering caused thereby.

Needless to say, the requirements for an emergency declaration are much broader than for major disaster declarations.

²¹ CHEN *supra* note 16, at 91.

and other protective measures, including sheltering and search and rescue.²²

Federal reimbursement for state and local emergencies falls under FEMA's Public Assistance Grant Program, which—as outlined in Section 406 of the Stafford Act²³—authorizes the President to make contributions regarding the, “repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster.”²⁴ The federal government can also provide similar grants to private nonprofit facilities where it will bear at least seventy-five percent of eligible costs.²⁵ If the owner decides not to repair or replace the facility, then the owner is eligible to receive a grant of ninety percent of the federal share of eligible costs for public entities, and seventy-five percent for private nonprofits.²⁶

The difference between what is considered an emergency versus major disaster is still a significant area of study. However, it seems that emergency declarations can be made before the actual disaster strikes, while major disaster declarations are made after the disaster and have a greater breadth of authority in helping state and local governments, as well as individuals.²⁷ If the president makes a declaration, the FEMA administrator will assess the situation and deploy response teams and resources.²⁸ At that point, the FEMA field office will provide unified coordination of response resources to necessary areas.²⁹

²² CHEN *supra* note 16, at 97.

²³ 42 U.S.C. §§ 5121–5207(2006).

²⁴ *Id.*

²⁵ *Id.* at § 5172.

²⁶ *Id.*

²⁷ FRANCIS X. MCCARTHY, FEMA'S DISASTER DECLARATION PROCESS: A PRIMER, IN CONGRESSIONAL RESEARCH SERVICE (2011) *available at*, <http://www.fas.org/sgp/crs/homesecc/RL34146.pdf> (last visited May 19, 2014) Emergency declarations are often made when a threat is recognized... and have usually not occurred yet. Resources are intended to supplement and coordinate local and state efforts prior to the event such as evacuations and protection of public assets. In contrast, a major disaster declaration is made as a result of the disaster or catastrophic event and constitutes a broader authority that helps states and local communities, as well as families and individuals, recover from the damage caused by the event. *Id.*

²⁸ CHEN *supra* note 16, at 91.

²⁹ *Id.*

The Sandy Recovery Act has changed the relationship between the Indian tribes and the federal government by elevating the status of tribes and allowing them to interact more closely with FEMA officials. Prior to the Sandy Recovery Act, tribes had to appeal to their state governor for funds, because the Stafford Act classified them as “local governments,”³⁰ and they did not have the legal authority to consult directly with FEMA officials.³¹ As a result, the response time for providing funding to tribes slowed,³² the special trust relationship³³ between tribes and the federal government, although acknowledged, was not implemented, and tribes were put in an inferior position, dependent upon local and state officials.³⁴

B. History of Consultation between Tribes and the United States Government

After the passage of the Sandy Recovery Act, attention was directed to the implementation of a consultation policy where the federal government and the Indian tribes would have an open dialogue on how to tackle aspects of a disaster situation directly affecting the tribes. The federal government and Indian tribes have a long history of consultation, manifested in many different configurations, including legislation, declarations made on behalf of tribal members, and executive orders that support and provide a historical basis for the application of consultation in disaster situations.

1. Legislation

The Administrative Procedures Act (APA) governs the process by which federal agencies develop and issue regulations.³⁵ Consequently,

³⁰ 42 U.S.C. §§ 5122(7)(B)(2006).

³¹ *Id.*

³² *Tribes Applaud Sandy Recovery Improvement Act*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 4, 2013), <http://indiancountrytodaymedianetwork.com/2013/02/04/tribes-applaud-sandy-recovery-improvement-act-147453> (last visited May 19, 2014).

³³ The federal Indian trust relationship or responsibility is a legal obligation which, according to *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

³⁴ Heidi Adams, *Sovereignty, Safety, and Security: Tribal Governments Under the Stafford and Homeland Security Acts*, 1 AM. INDIAN L. J. 127, 127 (2012).

³⁵ 5 U.S.C. §§ 551 (2006).

any regulation FEMA would implement regarding tribal consultation must comply with APA standards. Section 706 of the APA prevents the federal government and its agencies from acting in an arbitrary or capricious manner, abusing its discretion, or acting in a way not in accordance with the law.³⁶ In *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, the court stated that “an agency [action] would be arbitrary and capricious if the agency had relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem”³⁷ Because the federal government has issued specific rules and regulations that insist on tribal consultation,³⁸ failure to consult with tribes on emergency disaster issues affecting the tribes would be likely be arbitrary and capricious.

Section 106 of the National Historic Preservation Act (NHPA) provides another example of a piece of legislation requiring consultation between tribes and the government.³⁹ The pertinent section of the NHPA referring to consultation mandates that consultation occur early in the planning process to help determine any relevant preservation issues.⁴⁰ Additionally, NHPA requests that consultation with Indian tribes be conducted in a sensitive manner that is respectful of tribal sovereignty.⁴¹ This means that the federal government and its agencies should recognize the sovereign status of the Indian tribes and interact with the tribes on a government-to-government basis.⁴²

³⁶ 5 U.S.C. § 706 (2006).

³⁷ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

³⁸ *Los Coyotes Band of Cahuilla v. Salazar*, 2011 WL 5118733 (S.D. Cal. Oct. 28 (2011)).

³⁹ National Historic Preservation Act, Pub. L. No. 89-665, 106, 80 Stat. 515 (codified as amended at 16 U.S.C. §§ 470(2006)).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Other bodies, such the United Nations, have also agreed that consultation rights for indigenous peoples should be required, if not explicitly then implicitly, through the act of treaty-making. See U.N. High Comm. Human Rights, *Strengthening Partnership between States and Indigenous Peoples: Treaties, Agreements and other Constructive Arrangements*, U.N. Doc. HR/Geneva/Sem/Expert/2012/BP.2, available at <https://turtletalk.files.wordpress.com/2012/07/american-indian-treaties-the-consultation-mandate.pdf> (last visited May 19, 2014) (discussing how Art. 37 of the UN Dec. on the

2. NCAI Declaration

In 1954, the National Congress of American Indians (NCAI) began a campaign that addressed the problems of forced assimilation and diminishing tribal numbers.⁴³ As part of this approach, the NCAI wrote a “Declaration of Indian Rights” that stated that Indian tribes should be informed of, and consulted about, federal policies that affect their rights.⁴⁴ It took the federal government another eighteen years to draft and implement a consultation policy for federally recognized Indian tribes, entitled “Guidelines for Consultation with Tribal Groups on Personnel Management within the Bureau of Indian Affairs.”⁴⁵ The 1972 Guidelines defined consultation as “providing pertinent information to and obtaining the views of tribal governing bodies.”⁴⁶ It indicated that the scope of consultation would differ between tribes, be dependent on the particular circumstances, and suggested that the possible negotiating of individual agreements with tribes to set clear boundaries for future consultation.⁴⁷ Though the 1972 Guidelines began a move in the right direction, further action had to be taken in order for implementation to be actualized.

3. Executive Orders

The next big step towards implementation of a consultation policy occurred in 1994, when President Bill Clinton issued Executive Order 12875 entitled, “Enhancing the Intergovernmental Partnership.” This Order, among other things, encouraged State, local, and tribal governments to develop a process which would provide meaningful and

Rights of Ind. Peoples details these rights through the “recognition, observance, and enforcement of treaties, agreements, and other constructive arrangements.”).

⁴³ Colette Routel & Jeffrey Holth, *Tribal Consultation In The 21st Century*, 46 U. MICH. J.L. REFORM 417, 429 (2013).

⁴⁴ *Id.* at 436.

⁴⁵ This policy is discussed in *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717-721 (8th Cir, 1979).

⁴⁶ *Id.* at 717.

⁴⁷ *Id.*

timely input concerning the development of regulatory proposals.⁴⁸ The Order also required that agencies establish “regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities.”⁴⁹ The following year, President Clinton more specifically acknowledged that consultation with Indian tribes was required by the trust responsibility held by the United States.⁵⁰ In accordance with President Clinton’s stance on consultation, he invited leaders from all of the federally recognized tribes to meet with him to discuss policy.⁵¹

Four years later, in 1998, President Clinton issued Executive Order 13084, and in 2000, Executive Order 13175, which further specified and strengthened the mandate for consultation with the Indian tribes. Executive Order 13175 helped to sharpen the language from the 1994 Executive Order by giving deadlines for agency implementation of consultation where regulatory policies had tribal implications.⁵² The

⁴⁸ Exec. Order No. 12875, Enhancing the Intergovernmental Partnership, 58 Fed. Reg. 207, at § 1(2)(b)(Oct. 26, 1993), *available at* <http://www.archives.gov/federal-register/executive-orders/pdf/12875.pdf> (last visited May 19, 2014).

⁴⁹ *Id.*

⁵⁰ Memorandum from President Clinton on Government-to-Government Relations with Native American Tribal Governments (Apr. 29, 1994), http://www.cr.nps.gov/nagpra/agencies/Clinton_Memorandum.htm (last visited May 19, 2014). On April 29, 1994, President Clinton issued a memorandum that stated the “unique legal relationship with Native American tribal governments’ required that all executive agencies consult with Indian tribes.” *Id.* That each agency should consult to the greatest extent possible and permitted by the law with tribal governments before taking actions that would subsequently affect federally recognized tribal governments. *Id.*

⁵¹ Douglas Jehl, *Clinton Meets Indians, Citing a New Respect*, N.Y. TIMES (Apr. 30, 1994), www.nytimes.com/1994/04/30/us/clinton-meets-indians-citing-a-new-respect.html (last visited May 19, 2014).

⁵² The language of the 2000 Memorandum gives specific deadlines for the creation of an inner consultation process:

Each agency shall have an accountable process to ensure the meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implication. Within 30 days...the head of the agency shall designate an official with the principal responsibility for the agency’s implementation of this order. Within 60 days...the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency’s consultation process.

executive branch made no further attempts to solidify such a policy until November 5, 2009.⁵³ On November 5, President Obama signed a Presidential Memorandum that directed the head of each agency to develop a detailed plan for implementing the 2000 Executive Order.⁵⁴

The failure to realize the 2000 Executive Order could have come from a lack of specific guidelines directing agency heads in the process of consultation, or a gap in enforcement if agencies chose to ignore the directive. There may have been no negative repercussions for failure to consult with the tribes, or the tribes may not have been aware of their rights to express opinions and concerns regarding regulatory decisions that had a direct and substantial impact on their livelihoods. Regardless, Executive Orders, statutes, and treaties that affirm Indian tribal rights to consultation promote diplomacy and inter-governmental communications that help facilitate positive interactions between agencies and tribal governments.

II. TYPES OF CONSULTATION

Consultation can take place either before, during, or after a disaster occurs. Preemptive consultation happens before decision are made and implemented, while enforced, or after the fact, consultation is when actions are taken before consultation begins.

A. *Preemptive vs. Enforced (after-the-fact) Consultation*

1. *Preemptive Consultation*

Preemptive consultation means that tribes are given meaningful consultation in advance with the decision maker or with another intermediary who has authority to present tribal views.⁵⁵ After

Exec.Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,250 (Nov. 6, 2000), *available at*

<http://www.state.gov/documents/organization/136740.pdf> (last visited May 19, 2014).

⁵³ U.S. Department of State, TRIBAL CONSULTATION (2009),

<http://www.state.gov/s/tribalconsultation/index.htm> (last visited May 19, 2014).

⁵⁴ *Id.*

⁵⁵ Lower Brule Sioux Tribe v. Deer, 911 F.Supp. 395, 399 (D.S.D.1995).

consultation, the tribe then has the opportunity to issue a motion of support for the decision, or reject the decision, pursuant to tribal law and procedure.⁵⁶ In theory, this route seems to provide procedural justice for the tribes, but in actuality, studies have shown that agencies have used consultation as a way to inform tribes of decisions that they have already made, thereby belying the spirit of preemptive consultation.⁵⁷ Although this option technically provides tribes with legal recourse, in disaster situations this process might be unrealistic or impractical when considering time restraints of a disaster situation.

For example, the Navajo Nation experienced a severe freeze from December 15, 2012 to January 21, 2013, where more than 3,000 homes were without water due to frozen and bursting water pipes.⁵⁸ The low temperature during the freeze fell twenty degrees below zero, with a high below freezing. One Navajo tribal member, Lydia A. Lee, an elder living in the eastern Navajo community of Red Gap, waited for two weeks for workmen to come and fix a broken pipe outside her home.⁵⁹ Lee had to drive thirty miles to buy bottled water and received a donation of wash water from her church during those couple weeks.⁶⁰ Even if consultation had been an option, the first step under the Sandy Recovery Act would have been for the Navajo Nation to request the President to make an emergency declaration, then consultation between tribal officials and FEMA agents could have occurred, and finally relief would have been provided for victims of the storm, such as Lee. The time required to provide assistance might be lengthy and is an issue that must be addressed for the consultation process to be successful.

⁵⁶ *Id.* at 402.

⁵⁷ SHERRY HUTT & JAIME LAVALLEE, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 7, 28 (2005), *available at* www.nathpo.org/PDF/Tribal_Consultation.pdf (last visited May 19, 2014).

⁵⁸ Brian Daffron, *6 Tribes that Took Advantage of Amendment for FEMA Relief in 2013*, INDIAN COUNTRY TODAY MEDIA NETWORK, (Dec. 6, 2013), <http://indiancountrytodaymedianetwork.com/2013/12/06/6-tribes-took-advantage-amendment-fema-relief-2013-152597> (last visited May 19, 2014).

⁵⁹ *Id.*

⁶⁰ *Id.*

2. *Enforced (after-the-fact) Consultation*

Enforced, or after-the-fact, consultation refers to a process where agencies implement actions before consulting with tribes.⁶¹ An extreme example of enforced consultation happened to the Confederated Tribes and Bands of the Yakama Nation on February 16, 2011, when a federal task force raided a Yakama member-owned business on trust lands without providing any prior notice to Yakama authorities, and barred tribal policemen from involvement at the scene of the crime.⁶² Their actions were in direct violation of Article II of the Yakama Treaty of 1855, which clearly states that no “white man” shall be permitted to reside on Yakama Indian Country without permission from the Yakama Nation,⁶³ where the term *reside* can be interpreted as being in Yakama Indian Country, and therefore should require preemptive consultation. Furthermore, in Article VIII of the Yakama Treaty, the United States and the Yakama Nation established a process for delivering Yakama criminals or suspects who are in Yakama Indian Country to federal authorities.⁶⁴ The federal authorities did not consult with tribal representatives, and instead informed tribal authorities of the situation after taking action.

In the resulting settlement agreement between the Yakama and the Department of Justice (DOJ), one recital identifies that coordinating and communicating effectively would be in the best interest of both governments.⁶⁵ Although the raid on the Yakama Nation was in violation

⁶¹ *Tribal Consultative Listening Session*, CA. EPA (July 2013), available at www.calepa.ca.gov/tribal/Documents/2013/ListSessions.pdf (last visited May 19, 2014).

⁶² Press Release, Chairman Harry Smiskin (Yakima Nation), Yakima Nation Strikes Historic Agreement With DOJ, FBI to Settle Litigation Over 2011 Reservation Raid (Aug. 26, 2013), available at <http://turtletalk.files.wordpress.com/2013/08/fbi-recitals-agreement-press-release.pdf>, (last visited Apr. 14, 2014) [hereinafter *Press Release*]. Since the summer of 2012, the Yakama Nation, United States Department of Justice (DOJ), and the Federal Bureau of Investigation (FBI) have engaged in settlement discussions and negotiations. In June 2013, the Yakama reached an out-of-court settlement with Yakima County, Benton County, and the other local governments involved. *Id.*

⁶³ Treaty with the Yakima, art II, 1855, 12 Stat. 951, available at <http://www.fws.gov/pacific/ea/tribal/treaties/Yakima.pdf> (last visited May 19, 2014).

⁶⁴ *Id.* at art. viii.

⁶⁵ *Press Release*, *supra* note 62.

of established treaty and precedent for consultation, the result of the settlement agreement affirmed the importance of preemptive consultation for both parties. Similarly, preemptive consultation should be the preferred method of interaction between FEMA and tribal representatives in disaster emergency situations on tribal land. Although FEMA agents are trained and proficient in handling disasters, they still must remember the unique position that tribes hold as dependent, sovereign nations, and understand that tribes will have different considerations than FEMA officials, such as cultural, political, or economic factors that could influence tribal decision-making.

III. DEVELOPING POLICY FOR IMPLEMENTATION UNDER THE SANDY RECOVERY ACT

A. *Proposed FEMA Tribal Consultation Policy*

In response to the growing concern regarding consultation enforcement after the implementation of the Sandy Recovery Act, FEMA is currently in the process of creating a consultation policy, citing Executive Order 13175, Memorandum of November 5, 2009, and FEMA tribal policy (June 29, 2010) for statutory and regulatory support.⁶⁶ The purpose of the policy, as FEMA describes in its overview section, is to strengthen the government-to-government relationship between the United States and the Indian tribes, and to support Indian tribes in their “preparation for, mitigation of, response to, and recovery from all hazards and disasters.”⁶⁷ The policy applies to all FEMA officials who interact and engage in consultation and coordination with tribal officials and tribal members,⁶⁸ and encourages regular review and update of the policy to reflect changes in collaboration with tribal partners.⁶⁹

⁶⁶ *Proposed Tribal Consultation Policy*, FEMA (2013), available at http://www.fema.gov/media-library-data/1383225335115-4e575cfa26562d1575b389784d236e47/Proposed_Tribal_Consultation_Policy.pdf (last visited May 19, 2014) [hereinafter *Consultation Policy*].

⁶⁷ *Id.* at 5.

⁶⁸ *Id.* at 1.

⁶⁹ *Id.*

Although this section gives a broader, sweeping description of the goals sought in the proposed policy, it might benefit from a specific time frame when reviews and updates should occur. Though consultation with tribes may come at sporadic times because of the nature of disaster management, having a scheduled yearly date to review the policy, for example, may help deter possible derailment. A potential benefit could be a more streamlined response to a disaster based on a tribe-specific plan developed following the requisite consultation.

1. Identification

The first phase of the proposed consultation policy begins with identification. This phase is triggered when (1) FEMA identifies an action that might be appropriate for consultation; or (2) an Indian tribe or tribal official makes a request to FEMA to consider an action appropriate for consultation.⁷⁰ Note that not all actions will necessarily go through the consultation policy.⁷¹ Realistically, this exception to consultation is appropriate when time is limited. Additionally, the Senior Agency Official, or any official, who reports directly to the Administrator,⁷² will determine if consultation is required by law, according to pertinent statutes or regulations, like the NHPA.⁷³

If the Administrator determines that the law does not require consultation, the Senior Agency Official should decide if the agency actions will have tribal implications.⁷⁴ A “tribal implication” occurs when the action has a substantial direct effect on: (1) one or more Indian tribes; (2) the relationship between the federal government and the Indian tribes; or (3) on the distribution of power and responsibilities between the Federal

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 6-7.

⁷² *Id.* at 4. The Administrator is the official designated to certify to the Office of Management and Budget (OMB) that FEMA has complied with E.O. 13175 in a meaningful and timely manner in any draft final regulation that has tribal implications. The Administrator is the official designated to certify to OMB that FEMA has complied with all relevant requirements of E.O. 13175 in any proposed legislation that has tribal implications. *Id.* at 3.

⁷³ *Id.* at 6.

⁷⁴ *Id.*

Government and Indian tribes.”⁷⁵ A substantial direct effect refers to an action taken by the agency that has either a beneficial or an adverse impact that is significant in comparison to the effect or impact on non-tribal members.

For example, from July 29-August 2, 2013, the Karuk Tribe of California experienced wildfire damage affecting thirty-two tribal residents and eighty-five acres of tribal land.⁷⁶ The Karuk Tribe was the only tribe in 2013 to request the President to make a declaration under the Sandy Recovery Act.⁷⁷ Because the wildfire has a direct, substantial effect on tribal members, consultation would be required. Consultation would potentially not be necessary if damage that occurred to land and property, like debris blown from the fire, did not have a direct, substantial effect on tribal members. It is unclear whether consultation of any kind occurred between the Karuk Tribe and FEMA.

The proposed policy continues by addressing what type of consultation is appropriate. The policy, like many answers to questions of law, says that it depends on the situation and circumstances. Interestingly, the policy also says that it may be necessary to “forgo, limit, or postpone consultation if the action is essential to saving lives and protecting and preserving property or public health and safety.”⁷⁸ This language seems somewhat broad and could potentially derail talks if the agency officials felt that consultation would be an inappropriate use of time. One possible alternative to this approach would be for FEMA officials and tribal officers to conduct a shortened consultation that only addressed immediate concerns, with an additional agreement to set a time in the future to talk more at length about issues that are less immediate. It is especially important to allow tribes this initial opportunity to consult because, as described below, appealing a FEMA decision could be non-existent if the current proposed policy is enacted.⁷⁹

⁷⁵ *Id.* at 2.

⁷⁶ Daffron, *supra* note 58.

⁷⁷ *Id.*

⁷⁸ *Consultation Policy*, *supra* note 66, at 7.

⁷⁹ *See Consultation Policy*, *supra* note 66.

2. Notification

The second phase of the consultation policy concerns the logistics behind notifying tribal officials that consultation will occur.⁸⁰ Notification should happen at an early stage so that tribes have the opportunity to contribute input, and FEMA has time to consider the tribes perspective.⁸¹ For some disaster emergencies, which begin and end quickly—like the Karuk Tribe wildfire—notification for consultation may take place right in the middle of the emergency. Other situations, such as the severe storm and flooding on the Spirit Lake reservation in North Dakota, which lasted three weeks, might have a larger window to notify the tribe of possible consultation if the tribe requested the President to declare an emergency and not a major disaster.⁸²

Notification should include enough information for tribal officials to decide whether or not to participate in consultation and instructions on how to provide informed input.⁸³ The policy notification should include an overview of the consultation process, topics to be discussed, and a description of how FEMA will review tribal input to determine possible outcomes. Additionally, contact information for FEMA officials should also be included in any notification for tribes.⁸⁴ Though not part of the policy, tribes should be encouraged to provide their preliminary thoughts on disaster management to FEMA officials in the notification process so that FEMA agents will have a clearer understanding of tribal positions before consultation begins. Notification can occur by a few different methods depending on the situation, including: in person, by phone, through mass mailing, and publication in appropriate and agreed upon media.⁸⁵

⁸⁰ *Id.* at 2.

⁸¹ *Id.* at 9.

⁸² Daffron, *supra* note 58.

⁸³ *Consultation Policy*, *supra* note 66, at 9-10.

⁸⁴ *Id.*

⁸⁵ *Id.* at 10.

3. *Input*

The next phase, input, happens when FEMA receives thoughts and ideas from tribal officials and members on which plan of action should be discussed during the actual consultation.⁸⁶ Multiple rounds of input may be necessary, which could take a significant amount of time. The process of input and the actual consultation can occur written or orally, by phone call or face-to-face.⁸⁷ An important issue the policy highlights is that the FEMA official performing the consultation should not only have an awareness of the unique circumstances that affect tribes, but also understand cultural sensitivities that impact tribal consultation, and have general knowledge about the relationship between tribes and the federal government.⁸⁸ The most important person assisting in this role seems to be the Regional Tribal Liaison (RTL), based out of a FEMA regional office, and the individual with presumably the closest working relationship with the tribal governments in their region.⁸⁹

4. *Follow-up*

The last step in the proposed consultation policy is when FEMA officials consider the input received from the consultation. Once FEMA comes to a decision, it “make(s) a good effort to inform the Tribal Officials and Indian tribes that are impacted by the action and, if appropriate, provide feedback.”⁹⁰ Though the preceding steps of the policy seemingly lead to a better result for the tribes, in the end FEMA ultimately makes the final decisions. Although FEMA must not act in an arbitrary or capricious manner according to Section 706,⁹¹ there are no further provisions on the proposed policy that address appealing FEMA’s decision. In fact, there is an additional disclaimer that states “the policy is not intended to and does

⁸⁶ *Id.*

⁸⁷ *Id.* at 11.

⁸⁸ *Id.* at 11.

⁸⁹ *Id.* at 4. RTL’s are the first FEMA contact point persons for tribal governments and also provide technical assistance on FEMA programs. RTL’s help FEMA officials identify appropriate Tribal Officials to contact for consultation, which methods are best for notification and consultation.

⁹⁰ *Id.* at 13.

⁹¹ See Adams, *supra* note 34.

not create any right to administrative or judicial review or any other right or benefit or trust responsibility . . . enforceable by a party against the United States [or] its agencies”⁹² An alternative solution to the shortcomings of this last phase might be for FEMA officials to make a decision, if possible, in coordination with the tribal officials. This will encourage communication and help strengthen relations between the tribes and the federal government, which was a main focal point of the policy.

CONCLUSION

The process of consultation between Indian tribes and the federal government has a long-established history in the United States. The rationale behind the theory of consultation seems to be that Indian tribes should be involved in decisions made by the federal government that will have a direct and substantial impact on their lives. Indian tribes have a unique, political position in our country that provides sovereign rights of consultation, especially when the consultation concerns something as important as disaster management.

Although the FEMA consultation policy appears to be a step in the right direction, some questions have yet to be raised or answered: Should there be trainings on consultation between FEMA agents and tribal officials before an actual consultation takes place? Are there disaster specific trainings that could be used for differently affected tribes? If tribal officials do not agree with the final decisions made by FEMA, is there some sort of recourse that can be taken? Some of these issues will be solved through experiences in the field and others might need to be solved in the legislative process. Whatever the final result may entail, consultation between the federal government and Indian tribes is an important and beneficial process that provides a unique opportunity for both parties to learn more about working with each other in disaster situations.

⁹² *Id.* at 15.