

# **The Duty to Consult with Tribal Governments: Law, Practice and Best Practices**

*Thursday, Nov. 2, 2017*



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# Presenter Biographies

### **Presenter Biographies**

**Kurt F. Anschuetz** (MA, University of New Mexico 1985; PhD, University of Michigan 1998) is an anthropologist and archaeologist based in Albuquerque, New Mexico. Anschuetz's recent projects include assisting the Pueblo of Acoma in its preparing a Traditional Cultural Properties study of the San Juan Basin for the Navajo-Gallup Water Supply Project through the Bureau of Reclamation, completing the cultural resources inventory survey of 12 square miles on the Pueblo's Red Lake Ranch for Kinder Morgan's proposed Los Lobos CO2 Pipeline Project, and contributions to the Mount Taylor Traditional Cultural Property Nomination to the New Mexico State Register of Cultural Properties. He has worked with the USDA Forest Service Rocky Mountain Research Station over the past decade conducting multiyear ethnographic studies with Native American, Hispanic, and Anglo communities to document the many historical layers of the Valles Caldera cultural landscape and identify the relationships that the region's culturally diverse communities maintain with the Preserve and the surrounding Jemez Mountains. Anschuetz also contributes to the development of expert testimony in land and water cases in north-central and west-central New Mexico either directly for various Pueblos or on their behalf through their government-to-government relationships with the U.S. Department of Justice.

**Kathryn S. Becker** has practiced law for the New Mexico Environment Department since 2005. Her clients run the gamut of environmental media, including OHSA. Her practice generally comprises one of three aspects of administrative law: permitting, enforcement or rulemaking. Field inspections of any type are a bonus! As Tribal Liaison, Becker aids the Secretary of the Department in government-to-government communications and consultations. Prior to joining the Department, she worked as legal counsel to the State Parks Division of the NM Energy, Minerals and Natural Resources Department. Becker previously worked as a lawyer for the Navajo Nation Department of Justice in Tuba City, Arizona. Becker is a member of the New Mexico State Bar and Navajo Nation Bar Association. She is admitted to practice in the State of New Mexico, the United States District Court for the District of New Mexico and the Navajo Nation. She received her Juris Doctorate in 2000 from the University of North Dakota School of Law.

**Christie Billings**, M.S., M.A., J.D., Ph.D., is an Assistant General Counsel and Coordinator of indigenous Peoples Affairs at Kinder Morgan, Inc. Her work is focused across Kinder Morgan's business units, specifically in Large Project Management. In this capacity, she is currently responsible for legal and indigenous peoples issues associated with project management, land acquisition and permitting, equipment and material purchasing, and most third party contracts for Kinder Morgan projects across the United States. Prior to joining Kinder Morgan in January, 2005, Billings spent 15 years at another major energy company, serving as General Counsel for their Engineering & Construction Company for several years. She speaks and writes French, Spanish and Portuguese fluently, with significant conversational fluency in Chinese and Russian. She holds two Masters Degrees and a Ph. D. in Psychology and a Law degree from South Texas College of Law, all received with Highest Honors. She is a Violist, runner and avid fly-fisher, when not being entertained by her 10, 12, 14 and 16 year old children. She and her husband Ed reside in Houston.

**Milton Bluehouse, Jr.** is a Navajo tribal member from Ganado, Arizona. He specializes in tribal intergovernmental relations with federal and state governments with focus areas on the environment, natural resources and cultural/sacred sites, and tribal consultation facilitation and process design. Bluehouse has provided tribal intergovernmental and community relations training to over 5,000 state and federal employees. Bluehouse is a graduate of the University of Wisconsin – Madison Law School, and the University of Arizona. From 1991 to 1995, Bluehouse served honorably in the United States Marine Corps.

**James Burson** is an In-House attorney at the Pueblo of Laguna Government Affairs Office. He has performed legal services for 18 years, primarily on behalf of Indian tribes by providing counsel, conducting transactions and litigating on behalf of tribes, including their casinos, commission, and housing authorities. Burson earned his Juris Doctorate from the University of New Mexico in 1999, with certificates in natural resources law and Indian law. He has been a member of the State Bar of New Mexico Indian Law Section since 2000, and a member of the Board of Directors since 2015.

**Stephanie P. Kiger** is from Santa Clara Pueblo and grew up in Santa Fe. She earned a BA in International Studies from The American University in Washington, DC and an MA in American Indian Studies from the University of Arizona. Kiger attended the University of Washington School of Law and returned to New Mexico after graduation. She has concentrated her work in Indian law, having worked for the Eight Northern Indian Pueblos Council and a private firm representing Tribes in New Mexico and across the country. She was appointed by Governor Bill Richardson to serve as General Counsel for the New Mexico Indian Affairs Department. She subsequently worked in the Governor's Office of General Counsel first as Associate Counsel and then Deputy Counsel. Kiger currently works for the U.S. Department of the Interior, Office of the Solicitor. Her work with Interior focuses on realty matters, mineral development, and code review.

**Aaron Sims**, a member of the Pueblo of Acoma, is an associate attorney at the Chestnut Law Offices, P.A. in Albuquerque, New Mexico. Sims joined the Chestnut Law Offices, P.A. in August 2014 after receiving a J.D. with an Indian Law Certificate from the University of New Mexico – School of Law. Prior to attending law school, Sims graduated from Dartmouth College in 2009 with a B.A. in Government and Native American Studies. His practice at the Chestnut Law Offices focuses predominantly on general counsel representation for Pueblo tribal governments and organizations. At the Chestnut Law Offices, Sims has worked on a wide range of Indian legal issues including intergovernmental relations, water law, and tribal economic development. He has worked extensively, and is especially interested, in the protection of Pueblo cultural resources.

**John Taylor-Montoya**, Ph.D., R.P.A., is the Senior Project Manager for R. Christopher Goodwin & Associates, Inc. (RCG&A). A native of New Mexico, Taylor-Montoya has been practicing archeology throughout the greater Southwest U.S. for nearly 20 years. He has worked extensively in all phases of investigation within both the Cultural Resources Management and academic spheres. Since joining RCG&A in 2012, he has managed large-scale projects in New Mexico, Texas, and Arizona. Those projects include the 215-mile-long Kinder Morgan Lobos CO2 Pipeline Project. As part of the Lobos CO2 Pipeline Project, RCG&A had the opportunity to work directly with the Pueblo of Acoma and Dr. Kurt Anschuetz. Dr. Taylor-Montoya received the Bachelor of Science degree in Anthropology from the University of New Mexico in 2000, the Master of Arts in Anthropology from the University of Oklahoma in 2003, and the Ph.D. in Anthropology from Southern Methodist University in 2011. He is a Registered Professional Archaeologist in good standing; he holds permits to conduct archeological investigations from the State of New Mexico, the Bureau of Land Management (for Southeast New Mexico), and the State of Colorado. He has also held project specific permits from the Navajo Nation and BIA as a field supervisor and project director.



# The “Acoma Model” of Successful Consultation

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# The State and Federal Perspectives on Government- to-Government Consultation

# THE STATE AND FEDERAL PERSPECTIVES ON GOVERNMENT-TO-GOVERNMENT CONSULTATION

Stephanie P. Kiger  
Attorney-Advisor

United States Department of the Interior, Office of the Solicitor, Southwest Region

What is the Office of the Solicitor?

What Do they Do?

## Why Is Tribal Consultation Important?

## Why is Tribal Consultation Important?

Good Policy

Efficiency

Sometimes Mandated by statute

## Where did the Federal Consultation Policies Come From?

### Memorandum of April 29, 1994 Government-to-Government Relations With Native American Tribal Governments (W. Clinton)

59 Fed Reg. 22951 (May 4, 1994)

“As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.”

Does not create any legal duty to consult or right to insist on consultation

Executive Order 13007, Indian Sacred Sites,  
61 Fed. Reg. 26771 (May 29, 1996) (W.  
Clinton)

When practicable:

“accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners”

“avoid adversely affecting the physical integrity of such sacred sites”

Does not create any legal duty to consult or right to insist on consultation

Executive Order 13175, Consultation and  
Coordination with Indian Tribal Governments, 65  
Fed. Reg. 67249 (Nov. 6, 2000) (W. Clinton)

Reaffirms the Federal government's commitment to tribal sovereignty, self-determination, and self-government

Purpose is to ensure that all Executive departments and agencies consult with Indian tribes and respect tribal sovereignty as they develop policy on issues that impact Indian communities

All agencies in the Executive Branch were to develop Tribal consultation policies applicable to “policies that have tribal implications”



Executive Order 13175, Consultation and  
Coordination with Indian Tribal Governments, 65  
Fed. Reg. 67249 (Nov. 6, 2000) (W. Clinton)

What is a “Policy that has Tribal implications?”

Executive Order 13175, Consultation and  
Coordination with Indian Tribal Governments, 65  
Fed. Reg. 67249 (Nov. 6, 2000) (W. Clinton)

“Regulations, legislative comments, or proposed legislation and other policy  
statements or actions that have substantial direct effects on one or more  
Indian tribes or the relationship between Federal Government and Indian  
tribes, or on the distribution of power and responsibilities between the Federal  
Government and Indian tribes.”

Executive Order 13175, Consultation and  
Coordination with Indian Tribal Governments, 65  
Fed. Reg. 67249 (Nov. 6, 2000) (W. Clinton)

Requires Agencies to review internal processes applied when Tribes seek a waiver  
of regulatory requirements and streamline that process

Executive Order 13175, Consultation and  
Coordination with Indian Tribal Governments, 65  
Fed. Reg. 67249 (Nov. 6, 2000) (W. Clinton)

Does not create any legal duty to consult or right to insist on consultation

“This order is intended only to improve the internal management of the  
executive branch, and is not intended to create any right, benefit, or trust  
responsibility, substantive or procedural, enforceable at law by a party  
against the United States, its agencies, or any person.”

Executive Order 13336, "American Indian and Alaska Native Education" (April 30, 2004)  
(G.W. Bush)

69 Fed. Reg. 25295 (May 5, 2004)

Recognized "the unique educational and culturally related academic needs of American Indian and Alaska Native students consistent with the unique political and legal relationship of the Federal Government with tribal governments."

Does not create any legal duty to consult or right to insist on consultation

Memorandum of September 23, 2004  
Government-to-Government Relationship  
with Tribal Governments (G.W. Bush)

Acknowledged and reaffirmed "the existence and durability of our unique government-to-government relationship and these abiding principles"

## “Memorandum on Tribal Consultation” Nov. 5, 2009 (B. Obama)

“[M]eaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy towards Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.”

How does the Department of the Interior  
implement this policy?

## What is the Department of the Interior's Consultation Policy?

512 DM 4, American Indian and Alaska Native Programs Consultation Policy and Procedures

## What is the Department of the Interior's Consultation Policy?

"It is the policy of DOI to recognize and fulfill its legal obligations to identify, protect, and conserve tribal trust resources; carry out its trust relationship with federally recognized Indian tribes and tribal members; and consult with tribes on a government-to-government basis whenever DOI plans or actions have tribal implications. All bureaus and offices shall comply with and participate in the consultation process in a manner that demonstrates a meaningful commitment and ensures continuity in the process."

How does DOI implement that policy?

How does DOI implement that policy?

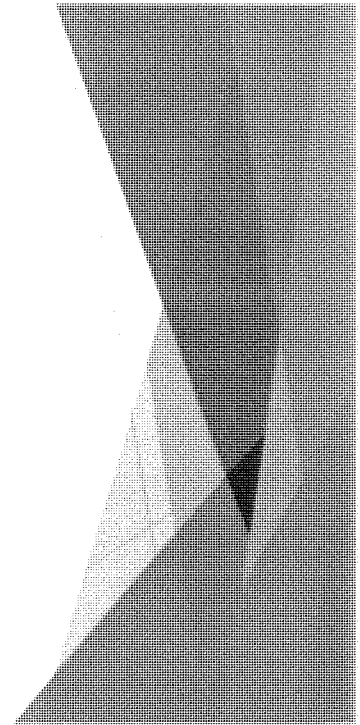
“Dear Tribal Leader” Letters

Tribal Listening and Consultation Sessions

Rule Making Process

Participation in Public Consultation Meetings, Work Groups, and Negotiations

When is Tribal Consultation mandated?



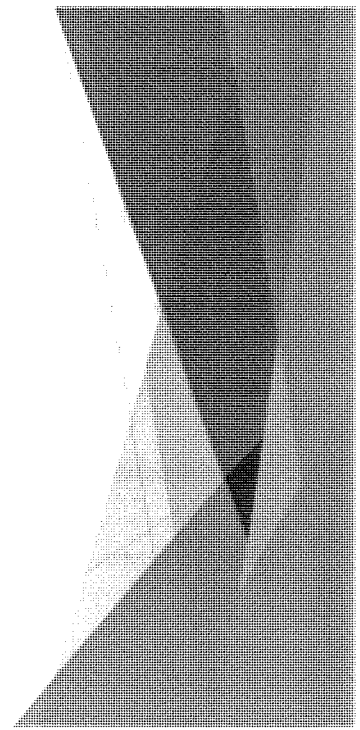
When is Tribal Consultation mandated?

National Historic Preservation Act of 1966

Native American Graves Protection and Repatriation Act

American Indian Religious Freedom Act of 1994

Various state laws, e.g. New Mexico Cultural Property Act



## Best Practices

## Best Practices

Encourage Tribal participation

Start early

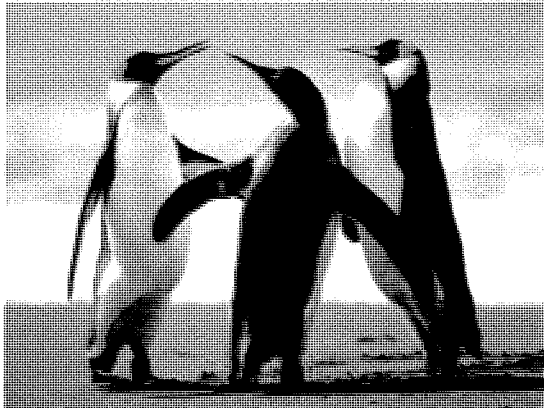
Make it meaningful

When mandated, make sure statutory and regulatory requirements are met

Where allowed, keep confidential information, confidential



Any Questions?



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Meaningful – and Ethical –  
Consultation

# Meaningful - and Ethical - Consultation

James Burson  
In-House Attorney  
Pueblo of Laguna



"IF I WANTED THIS DONE HONESTLY AND ABOVE  
REPROACH, I WOULDN'T NEED A LAWYER!"

## Highlighted Rules of Professional Conduct

- ▶ Rule 16-101 - Competence
- ▶ Rule 16-103 - Diligence
- ▶ Rule 16-309 - Advocate in Non-Adjudicative Proceedings
  - ▶ Rule 16-303 - Candor Toward the Tribunal
  - ▶ Rule 16-304 - Fairness to Opposing Party and Counsel
  - ▶ Rule 16-305 - Impartiality and Decorum of the Tribunal
- ▶ Rule 16-401 - Truthfulness in Statements to Others

### Rule 16-101 - Competence

- ▶ A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

## Rule 16-401 - Truthfulness in Statements to Others

- ▶ In the course of representing a client a lawyer shall not knowingly:
  - ▶ A. make a false statement of material fact or law to a third person . . . .

## Rule 16-103 - Diligence

- ▶ A lawyer shall act with reasonable diligence and promptness in representing a client.

## Rule 16-309 - Advocate in Non-Adjudicative Proceedings

- ▶ A lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Paragraphs A through C of Rule 16-303, Paragraphs A through C of Rule 16-304 and Rule 16-305 of the Rules of Professional Conduct.

## Rule 16-303 - Candor Toward the Tribunal

- ▶ A. Duties. A lawyer shall not knowingly
  - ▶ (1) make a false statement of fact or law or fail to correct a false statement of material fact or law previously made;
  - ▶ (2) fail to disclose controlling legal authority even if adverse to client; or
  - ▶ (3) offer evidence known to be false.
- ▶ B. Take reasonable remedial measures to avoid fraudulent conduct.
- ▶ C. Comply with rule even if it requires disclosure of protected information.



## Rule 16-304 Fairness to Opposing Party and Counsel

- ▶ A lawyer shall not:
  - ▶ A. Unlawfully obstruct access to evidence, or unlawfully alter, destroy, or conceal information;
  - ▶ B. Falsify evidence, or assist any witness to testify falsely; or
  - ▶ C. Knowingly disobey an obligation of the tribunal, except where no valid obligation exists.

## Rule 16-305 Impartiality and Decorum of the Tribunal

- ▶ A lawyer shall not:
  - ▶ A. seek to influence [an official] by means prohibited by law;
  - ▶ B. communicate ex parte with [an official] during the proceeding unless authorized to do so by law or court order;
  - ▶ C. communicate with [an official] . . . if:
    - ▶ (a) the communication is prohibited by law or court order;
    - ▶ (b) the [official] has made known to the lawyer a desire not to communicate; or
    - ▶ (c) the communication involves misrepresentation, coercion, duress or harassment;
  - ▶ D. engage in conduct intended to disrupt a tribunal.



*"This is so devious it will take them years to pass a law against it."*

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