
Infrastructure Series: Tribes and Infrastructure

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This is the ninth issue of WilmerHale's 10-in-10 Infrastructure Series. In this series, our attorneys share insights on current and emerging issues affecting infrastructure project developers in the United States. Attorneys from various practice groups at the firm offer their take on issues ranging from permitting reform to financing to litigation, and share their insights from working with clients in a variety of infrastructure sectors, from water infrastructure to energy development to infrastructure development on tribal lands. This client alert was also published by [Law360](#).

Infrastructure needs are significant across the country, but it would be hard to find any locality or region where the needs are higher than in Indian Country. In recent years, both Congress and the Administration have taken steps to increase available funding for infrastructure servicing tribes. There has also been a renewed focus on ensuring that tribes have a voice in the development of private infrastructure projects that impact tribal lands or interests. In this issue of our Infrastructure Series, we offer our views on (1) a number of new and proposed funding sources for infrastructure development on tribal lands; and (2) effective engagement of tribes in private infrastructure projects, including a number of specific recommendations for developers of projects that cross tribal lands or may impact tribal interests.

Funding Infrastructure in Indian Country: Some Steps in the Right Direction

For Indian communities, decades of underinvestment have resulted in decaying or nonexistent infrastructure across every sector—from electricity to broadband to water to transportation. In 2009, during the congressional debate regarding the American Recovery and Reinvestment Act, the National Congress of American Indians presented a Tribal Recovery Plan requesting at least \$6.13 billion in federal investment to develop and maintain infrastructure in Indian Country's schools, homes, tribal government buildings, roads and bridges, water and waste water facilities, public safety buildings, health facilities, emergency and broadband networks, and energy and natural resource facilities. The need has only grown since then. For example, while 1% of the US general population lacks access to safe water supplies, 9% of Indian homes lack such access.¹ Also, 14.2% of tribal households lack access to the most basic electricity service.² And 35% of Americans living on tribal lands lack access to broadband at speeds deemed eligible for advanced telecommunications services, as compared with only about 2% of those living in urban centers.³

Recognizing these needs, Congress has taken recent action to increase the resources available for infrastructure development in Indian Country. The recently enacted omnibus appropriations bill includes approximately \$355 million for construction projects in Indian Country related to schools, public safety and law enforcement facilities, and natural resource development.⁴ This amount is over \$200 million above the amount requested in the Trump 2018 budget. Of particular note, it appears that with the increased construction appropriation, Congress is jump-starting the program it authorized in late 2016 through the Water Infrastructure Improvement for the Nation Act to increase investment in dam safety and maintenance, as well as irrigation system construction and rehabilitation in Indian Country.⁵ The disrepair of this infrastructure has been a long-standing issue. So has the lack of access to potable water, and the omnibus also contains over \$150 million for the implementation of Indian water rights settlements.

President Trump's [Infrastructure Plan](#) also highlights the needs for infrastructure improvement in Indian Country. While Indian tribes are not a primary focus of the funding initiatives set forth in the plan, there is one area specifically focused on tribal infrastructure needs. The plan would have Congress establish a Rural Infrastructure Program, proposed for \$50 billion over 10 years that would be used for capital investment in rural infrastructure. Of the total amount, \$40 billion would be distributed to state governors for infrastructure projects, and \$10 billion would be distributed as rural performance grants under a rural infrastructure investment plan. An undetermined amount would be set aside to provide “dedicated funding to the Secretary of Transportation for distribution through the Tribal Transportation Program and to the Secretary of the Interior for distribution through grants or awards to Tribes determined by a process created in consultation with Tribes.” At this point, it does not appear that legislation has been introduced to move the president's proposal forward.

Overall, while there is still a long way to go to address the large and diverse number of investment needs in Indian Country, ongoing support and some additional resources are available in the short term to continue to invest in key areas of infrastructure development.

Tribal Participation in Private Infrastructure Projects

Beyond the need for investment in basic infrastructure on tribal lands, there are also many privately funded infrastructure projects that involve or implicate tribal lands and interests. In furtherance of the policy of self-governance, many tribes have secured greater authority to act independent of their trustee, the federal government, in developing partnerships and business arrangements with private infrastructure developers. Accordingly, when a project implicates tribal interests, engaging with tribal governments directly to evaluate impacts and try to address them through negotiation always has its advantages. While tribes are sensitive to the devastating impacts of infrastructure projects that historically were developed without their participation, many also view infrastructure development as an important economic opportunity.

In the case of large or complex infrastructure projects, it is also likely that there will be a federal role in permitting or approving certain aspects of the project, and in these circumstances, the government has unique responsibilities to Indian tribes in carrying out its duties. As a threshold matter, there is a duty of government-to-government consultation arising out of Executive Order 13175 (Nov. 6, 2000), as reaffirmed by President Obama in a Presidential Memorandum issued on

November 9, 2009. E.O. 13175 and the Presidential Memorandum direct agencies to engage in tribal consultation regarding policy decisions “that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.” Early and repeated consultation is appropriate and necessary in those circumstances where significant tribal interests are at stake.

Two key statutes for addressing issues raised in the consultation process are the National Environmental Policy Act and the National Historic Preservation Act (NHPA). Both are procedural statutes, which require federal agencies to seek feedback from and consider the views of the public and federally recognized tribes, respectively. Section 106 of the NHPA requires each federally recognized tribe to be given “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.”⁶ These notification and consultation obligations must be satisfied even for projects that qualify for [streamlined federal review](#) under the FAST-41 Act and the new “[One Federal Decision](#)” Memorandum of Understanding.

In recent years, federal agencies have reviewed their practices for incorporating the views of tribes in federal decisions about infrastructure projects. In January 2017, following several months of extensive tribal consultation, the Departments of the Interior, Army and Justice issued a report with recommendations for improving tribal consultation and tribal involvement in federal decisions about proposed infrastructure projects.⁷ In May 2017, the Advisory Council on Historic Preservation also issued a report on improving tribal consultation for infrastructure projects.⁸

Advice for Project Developers

While these reports focus on actions the federal government can take to improve tribal consultation, project developers also play an important role in this process. Below are our recommendations for steps private developers can take to ensure effective engagement and consultation with tribes:

- *Engage Early and Directly.* Even as the federal government is carrying out its obligations to consult and address any relevant issues through the permitting and/or approval processes, there are still distinct advantages to continued direct engagement between private developers and tribal governments. Such engagement should start as early as possible in the project planning process. Any agreements to mitigate the impacts of projects, employ tribal expertise or share in certain benefits of the project will likely help facilitate a more efficient decision-making process by applicable federal agencies.
- *Consider Out-of-State Tribes.* Project developers should make efforts to identify all federally recognized tribes that, while not currently located along the proposed project's site, “attach religious and cultural significance to historic properties in the area of potential effects.”⁹ The Section 106 regulations require a reasonable and good faith effort to identify Indian tribes that may have an interest in the impacted lands, including those tribes located outside of the state. Federal permitting agencies would be required to invite all such tribes

to be consulting parties.

- *Reach Out to State-Recognized Tribes.* The federal government consultation obligation extends only to federally recognized tribes. However, project developers would benefit from outreach to state-recognized tribes. These tribes may be able to assert that they have a “demonstrated interest” in the project's effects (e.g., ancestral ties to the area), and in such a case, the federal permitting agencies could choose to include such tribes as “additional consulting parties” in the Section 106 consultation.¹⁰ In addition, non–federally recognized tribes may be influential over consulting parties in the Section 106 process. For example, some federally recognized tribes may rescind support for the project under pressure from groups that are not federally recognized tribes. Therefore, outreach that is conducted with cultural sensitivity and that builds goodwill may help mitigate opposition to the project.
- *Schedule Teleconferences and Meetings.* Consider supplementing written correspondence to tribes with scheduled teleconferences and regional meetings with tribal leadership. While not required under Section 106, efforts beyond written correspondence can result in more effective tribal consultation. ACHP guidance provides that “[c]onsultation constitutes more than simply notifying an Indian tribe about a planned undertaking. The ACHP views consultation as a process of communication that may include written correspondence, meetings, telephone conferences, site visits, and e-mails.”¹¹
- *Maintain Close Communication With Agencies.* The project proponent should meet regularly with the permitting agency to discuss the agency's approach to tribal consultation and discuss efforts to ensure that the consultation efforts completed to date are adequate, including any mitigation proposals or other responsive actions suggested during the consultation. While the project proponent can assist the formal consultation efforts with additional informal outreach to tribes, federal agencies are ultimately responsible for government-to-government consultation and Section 106 compliance, and the applicant's outreach cannot fulfill this obligation.

¹ National Indian Health Board, *Federal Indian Trust Responsibility: The Quest for Equitable Indian Healthcare* at p. 96 (June 2016).

² Department of Energy, Fiscal Year 2017 Budget Request, Vol. 3, p. 755 (Feb. 2016).

³ Remarks of FCC Commissioner Mignon L. Clyburn, Broadband Connectivity in Tribal and Rural Communities, Washington DC (Apr. 12, 2018)

⁴ Consolidated Appropriations Act, P.L. 115-141.

⁵ Water Infrastructure Improvement for the Nation Act, P.L. 114-322.

⁶ 36 C.F.R. § 800.2(c)(2)(ii)(A).

⁷ Department of the Interior, Department of Army, Department of Justice, “Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions” (January 2017).

⁸ Advisory Council on Historic Preservation, “Tribal Consultation in Infrastructure Projects” (May 2017).

⁹ 36 C.F.R. § 800.3(f)(2).

¹⁰ 36 C.F.R. §§ 800.2(c)(5) and 800.3(f)(3).

¹¹ ACHP Tribal Consultation Guidance at 5.