EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights

Introduction

EPA recognizes the importance of respecting tribal treaty rights and its obligation to do so. The purpose of this Guidance is to enhance EPA's consultations under the *EPA Policy on Consultation and Coordination with Indian Tribes* in situations where tribal treaty rights may be affected by a proposed EPA action. Specifically, this Guidance provides assistance on consultation with respect to EPA decisions focused on specific geographic areas when tribal treaty rights relating to natural resources may exist in, or treaty-protected resources may rely upon, those areas.[1] In these instances, during consultation with federally recognized tribes (tribes), EPA will seek information and recommendations on tribal treaty rights in accordance with this Guidance. EPA will subsequently consider all relevant information obtained to help ensure that EPA's actions do not conflict with treaty rights, and to help ensure that EPA is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so.[2]

The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of long-standing principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian tribes.[3] As the Supreme Court has explained, treaties should be construed liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Only Congress may abrogate Indian treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent. We note that this Guidance does not create any new legal obligations for EPA or expand the authorities granted by EPA's underlying statutes, nor does it alter or diminish any existing EPA treaty responsibilities.

Determining When to Ask About Treaty Rights During Tribal Consultation

EPA consultation with tribes provides the opportunity to ask whether a proposed EPA action that is focused on a specific geographic location may affect treaty-protected rights. Because treaty rights analyses are complex, staff are expected to inquire early about treaty rights.

Certain types of EPA actions, namely those that are focused on a specific geographic area, are more likely than others to have potential implications for treaty-protected natural resources. For example, EPA review of tribal or state water quality standards as a basis for National Pollutant Discharge Elimination System permits typically focuses on a specific water body. If a treaty

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[1] This Guidance focuses on consultation in the context of treaties. EPA recognizes, however, that there are similar tribal rights in other sources of law such as federal statutes (e.g., congressionally enacted Indian land claim settlements).

[2] EPA Administrator, December 1, 2014 Memorandum, Commemorating the 30th Anniversary of the EPA Indian Policy.

[3] Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172 (1999).

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reserves to tribes a right to fish in the water body, then EPA should consult with tribes on treaty rights, since protecting fish may involve protection of water quality in the watershed.

Another example of an action in a specific geographic area is a site-specific decision made under the Comprehensive Environmental Response, Compensation, and Liability Act, such as a Record of Decision for a site, or the potential use of Applicable or Relevant and Appropriate Requirements for a cleanup. Other examples include a site-specific landfill exemption determination under the Resource Conservation and Recovery Act or other similar types of regulatory exemptions for specific geographic areas. In each case, employing the following questions in this Guidance during consultation may inform EPA of when treaty rights are present in the defined area and may be affected by the proposed decision.

For purposes of this Guidance, the treaty rights most likely to be relevant to an EPA action are rights related to the protection or use of natural resources, or related to an environmental condition necessary to support the natural resource, that are found in treaties that are in effect. Other treaty provisions, for example those concerning tribal jurisdiction or reservation boundaries, are outside the scope of this Guidance.

EPA actions that are national in scope, and thus not within a focused geographic area, fall outside the scope of this Guidance, because EPA actions focused on specific geographic areas are the ones we believe are most likely to potentially affect specific treaty rights. Examples of such activities outside the scope of this Guidance include the development of National Ambient Air Quality Standards under the Clean Air Act or the national registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act.

Where tribes raise treaty rights as a basis for consultation on issues that are national in scope, or treaty rights otherwise are raised during consultation on national actions, this Guidance can assist in the treaty rights consultation discussion.

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

Questions to Raise During Consultation

EPA should employ the following three questions during consultations when proposing an action that may affect tribal treaty rights within a specific geographic area. These questions may also be employed when treaty rights arise in other contexts. Collaboration between program and legal staff before and during consultation is an important aspect of ensuring both that these questions are

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asked and the answers are understood. For any treaty rights discussion raised during consultation, the tribe may identify particular tribal officials to consult with EPA about treaty rights. It is important that EPA work to ensure that consultation occurs with the appropriate tribally identified officials.

(1) Do treaties exist within a specific geographic area?
This question is designed to help EPA determine when a treaty and its related resources exist within the specific geographic area of the proposed action. This question is important because tribes may possess treaty rights both inside and outside the boundaries of reservations. In some cases, EPA may already be aware of existing, relevant resource-based treaty rights in a specific geographic area; for example, when a tribe has treaty rights within the boundaries of its reservation or near its reservation. In other cases, EPA may not be aware of the full effects of the treaty rights, or EPA may find it difficult to determine when a specific geographic area has an associated treaty right. For example, some tribes in the Great Lakes area retain hunting, fishing, and gathering rights both in areas within their reservations and in areas outside their reservation boundaries, commonly referred to as ceded territories. Similarly, some tribes in the Pacific Northwest retain the right to fish in their "usual and accustomed" fishing grounds and stations both within and outside their reservation boundaries, and retained the right to hunt and gather throughout their traditional territories.

(2) What treaty rights exist in, or what treaty-protected resources rely upon, the specific geographic area?
This question is designed to help EPA understand the type of treaty rights that a tribe may retain. By asking this question, EPA can better understand the complexities that are often involved in treaty rights and better understand whether the proposed EPA action could affect those rights. Some treaties explicitly state the protected rights and resources. For example, a treaty may reserve or protect the right to "hunt," "fish," or "gather" a particular animal or plant in specific areas. Treaties also may contain necessarily implied rights. For example, an explicit treaty right to fish in a specific area may include an implied right to sufficient water quantity or water quality to ensure that fishing is possible. Similarly, an explicit treaty right to hunt, fish, or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.

(3) How are treaty rights potentially affected by the proposed action?
This question is designed to help EPA understand how a treaty right may be affected by the proposed action. EPA should explain the proposed action, provide any appropriate technical information that is available, and solicit input about any resource-based treaty rights. It is also appropriate to ask the tribe for any recommendations for EPA to consider to ensure a treaty right is protected.

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EPA Actions That May Affect Treaty Rights

EPA's next steps typically will involve conducting legal and policy analyses in order to determine how to protect the rights. These analyses are often complex and depend upon the context and circumstances of the particular situation. Issues that may arise often involve precedent-setting questions or warrant coordination with other federal agencies. It is expected that the EPA lead office or region that engaged in the tribal consultation about the potentially affected treaty rights will coordinate with the Office of International and Tribal Affairs, the Office of General Counsel, and appropriate Offices of Regional Counsel to conduct these analyses. Although the details of how to conduct such legal and policy analyses are not addressed by this Guidance, the EPA process may warrant continued or additional consultation with tribes.

Conclusion

EPA is committed to both protecting treaty rights and improving our consultations with tribes on treaty rights. As part of its commitment, EPA will emphasize staff training and knowledge-sharing on the importance of respecting tribal treaty rights in order to better implement this Guidance. As EPA gains experience on tribal treaty rights and builds upon its prior knowledge, the Agency may modify this Guidance to meet this commitment.