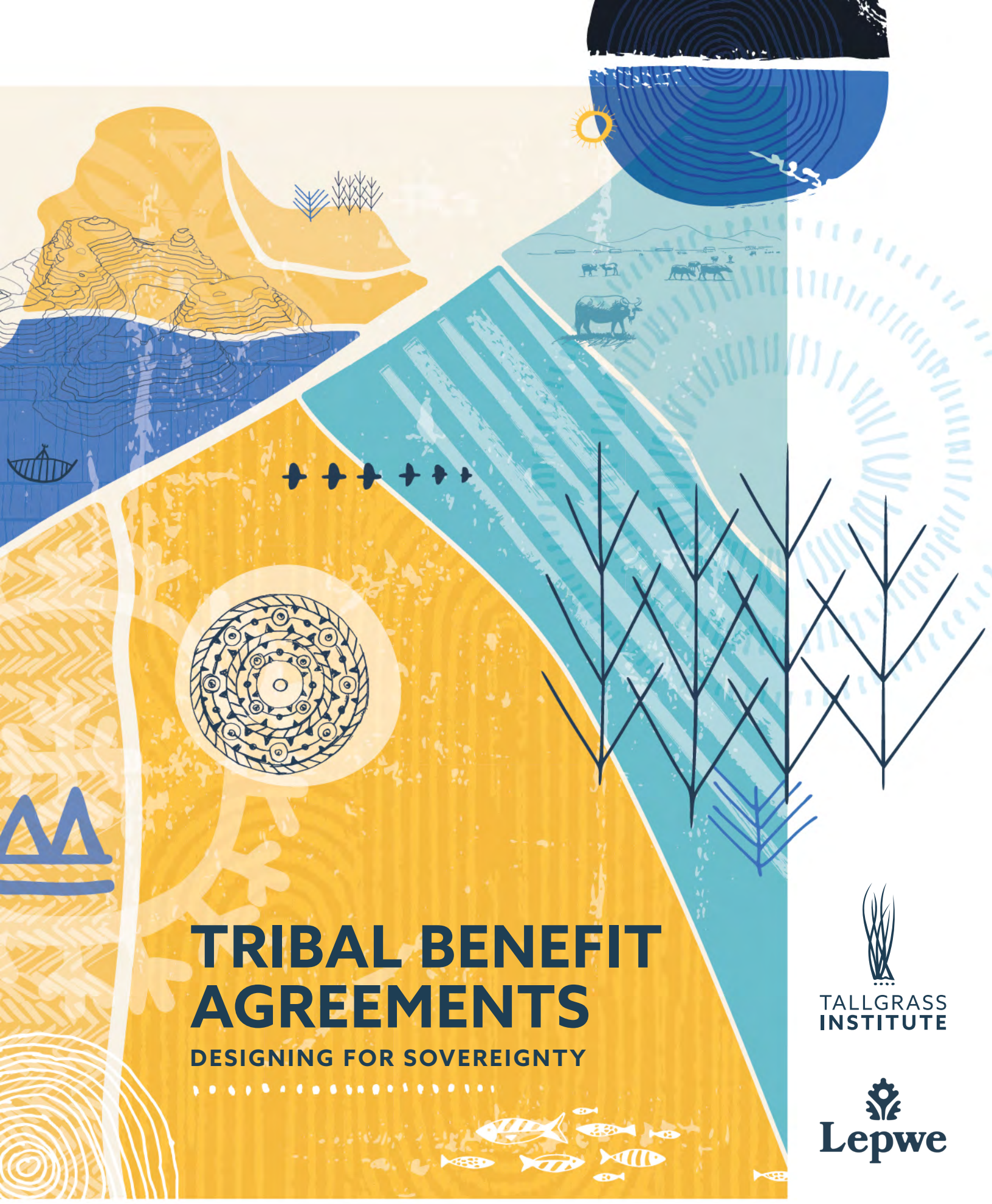

TRIBAL BENEFIT AGREEMENTS

DESIGNING FOR SOVEREIGNTY

TALLGRASS INSTITUTE

Lepwe

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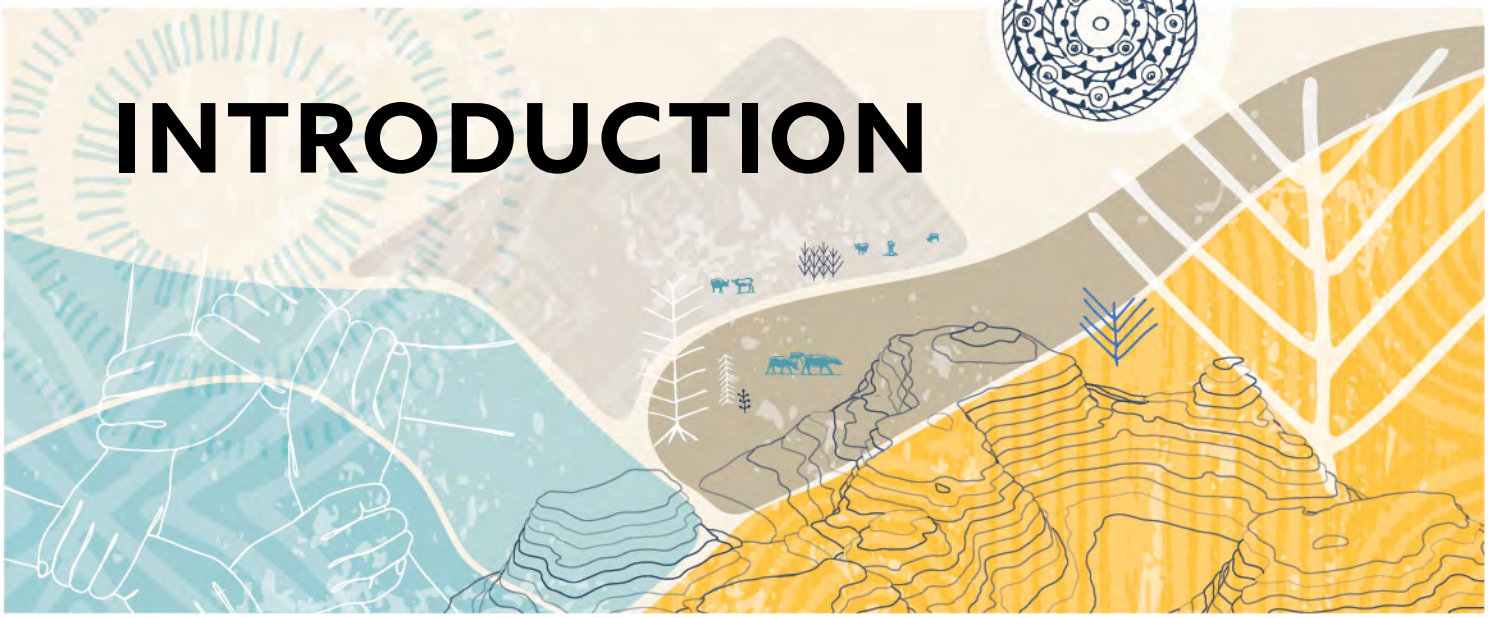


This report illuminates the complex legal and historical landscape surrounding Tribal Benefit Agreements (TBAs) and shares best practices for companies and Tribes to support positive outcomes in accordance with Native Peoples' own goals.

If the question is how to develop projects faster and with greater efficiency, then Community Benefit Agreements (CBAs) have been part of the answer for more than two decades. Since the early 2000s,[1] project developers have been engaging directly with potentially impacted communities to minimize challenges and strengthen project permitting. CBAs have played a key role in this strategy.

A CBA is typically a private agreement between a developer and community representatives–i.e., community-based organizations, public officials, or local government agencies. In general, CBAs seek to address potentially negative impacts to a community by providing project benefits. These benefits vary greatly and may be directly or indirectly connected to the project. There has been a recent surge of interest in CBAs as a tool to ensure fair and equitable distribution of project benefits between developers and communities. For example, research has found that CBAs are "overwhelmingly popular" among voters, across partisan lines.[2] However, this surge has not come without detraction–with some people growing pessimistic of their purpose and effect, sometimes using the pejorative reference "Community Bribery Agreements."[3]

Whether supportive or skeptical of their use, these types of agreements have a long history in Indian Country. Developers have been negotiating agreements to address impacts to Tribal nations for centuries.[4] Historically, and as discussed in the Background section below, U.S. Federal Indian Policy largely left negotiating functions in the hands of the federal government, as trustee of Tribal rights and resources. However, since the renaissance of Tribal self-determination in the 1970s and 80s, private parties have increasingly recognized the benefits of negotiating directly with Tribal nations–largely to decrease risks in the federal permitting processes for projects that impacted Tribal lands, territories, communities, and resources. And now, companies negotiating directly with Tribal nations is a common practice.

1 Federal Reserve Bank of Minneapolis, *Community benefits agreements: a tool for more equitable development* (Nov. 1, 2007), available at https://www.minneapolisfed.org/article/2007/community-benefits-agreements-a-tool-for-more-equitable-development.

2 Catherine Fraser, *Community Benefits Agreements Offer Meaningful Opportunities to Include Voters' Voices in Development*, Data for Progress (July 6, 2022), https://www.dataforprogress.org/blog/2022/7/5/community-benefits-agreements-offer-meaningful-opportunities-to-include-voters-voices-in-development.

3 Walker, Russel, and Kurz, *Community Benefits or Community Bribes? An Experimental Analysis of Strategies for Managing Community Perceptions of Broberty Surrounding the Siting of Renewable Energy Projects. Environment and Behavior*, 49 (1), 59-83 (2015).

4 For example, the Osage Nation's Foster Lease in 1896, *see Lease Agreements for Land in the Osage Reservation, Indian Territory and Related Correspondence*, Kenneth Spencer Research Library Archival Collections, https://archives.lib.ku.edu/repositories/3/resources/1307; Did You Know?, The Osage Nation, https://www.osagenation-nsn.gov/news-events/news/did-you-know, last visited May 30, 2025.

In many ways, agreements made with Tribal nations have similarities to CBAs, and those interested in CBAs can learn valuable lessons from understanding agreements made with Tribal nations, as well. Like CBAs, companies in a variety of sectors negotiate agreements with Tribal nations–including extractive industries, mining, renewable energy, forestry, utilities such as transmission lines, and transportation. Also like CBAs, the purpose of the agreements can be to delineate the terms under which the Tribe will not oppose a project, including to set out expectations regarding the relationship between the Tribe and the company, to determine how the company will mitigate the impacts their project will have on the Tribe, and/or to ensure that the Tribe receives a share of the financial and infrastructure benefits created by the project.

In fact, agreements made with Tribes are occasionally called "CBAs." However, this is a misnomer. Agreements with Tribal nations differ in key ways from typical CBAs. First, the name. Tribes are not communities, but rather are sovereign nations. Therefore, instead of *community* benefit agreements, agreements with Tribal nations are frequently called by a number of different names, including impact benefit agreements, mitigation agreements, consent agreements, cooperation agreements, coordination agreements, negotiated agreements, and right-of-way agreements. Most commonly, they are simply called "agreements." Throughout this report, we use the terms "Tribal Benefit Agreements" (TBAs) or "agreements" to recognize the fundamental difference from CBAs, while drawing out provisions that are essentially similar.

Second, TBAs differ from CBAs in their context. TBAs require an acknowledgment of the history of how Tribal sovereigns have existed vis-à-vis the United States. A unique framework of federal and state laws have developed over time to address and define this unique relationship. TBAs necessarily exist within that context.

Third, the modern sovereign authority of Tribal nations necessitates a broader scope of negotiation for TBAs. For example, TBAs must include consideration of Tribal laws and regulatory interests, including issues like taxation and land use; the rights of Tribal nations beyond reservation boundaries, including impacts to areas encompassing treaty rights or historical cultural resources; and perhaps most importantly, the right of Tribal nations to oppose, which can create significant challenges for projects, particularly those involving federal permitting nexus. This swath of rights and impacts can often mean a broader canvas for negotiation in TBAs vs. CBAs.

This report illuminates the complex legal and historical landscape surrounding TBAs in the U.S.; provides key context regarding the history of U.S. Federal Indian Policy and the history of project development in the U.S.; and describes patterns and practices in the current use of TBAs. We highlight the types of provisions contained in TBAs, explore case studies of successful and unsuccessful agreements, and share best practices for companies and Tribes to support positive outcomes in negotiations and in agreements. Above all, this report focuses on how to create TBAs that respect Tribal sovereignty, self-determination, and consent; and provide benefits in accordance with Native Peoples' own goals. TBAs that center Tribal nations' priorities in this manner also provide maximum benefits to companies in terms of operational stability and long-term project success.

THE ROLE OF TRIBAL CONSENT

TBAs function as a tool to provide clarity regarding how a project will move forward, mitigate risks both to the company and to the Tribe, and support positive outcomes for the Tribe, the company, and the project. But to be effective, TBAs must consider the role of free, prior and informed consent (FPIC) as an essential part of the negotiation process.

Consent of the Tribal nation is paramount to any development project. As enumerated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Indigenous Peoples have the right to FPIC, which flows from their right to self-determination, and includes the right to give or withhold consent to any activities that affect their lands, territories, or resources. In the U.S., TBAs are negotiated within a complex legal context where Tribal consent is legally required in some situations, but in other situations, Tribal consultation is required instead of consent.[5] For many Tribal nations, TBAs can have a negative connotation because they carry the weight of a harmful history of extractive engagement between developers and Tribes, often enabled by the U.S. federal government–including a history of agreements being made directly between developers and the U.S. without respect for consent. Developers should be mindful of this history when entering into engagements with a Tribal nation.

Whether in the U.S. or internationally, FPIC is a crucial safeguard for Indigenous Peoples' rights–a safeguard which ensures equity in participation and decision-making. At the same time, the presence of FPIC provides certainty for companies by greatly reducing project risks. By respecting FPIC, developers shift the paradigm towards Tribal sovereignty and self-determination–allowing TBAs to fully achieve their function as tools which provide clarity, stability, and equity.

5 United Nations Declaration on the Rights of Indigenous Peoples, United Nations (Sep 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

THE TBA INFORMATION GAP

Literature on benefit agreements with Tribal nations in the U.S. is limited. We conducted a literature review of academic research and white papers and reports focused on benefit agreements and Native Peoples. In this review, we identified 62 papers discussing Indigenous Peoples and benefit agreements, but of those, only 5 discussed the U.S. context, while 57 focused on other locations such as Canada, Australia, New Zealand, Greenland, Norway, Russia, and numerous countries in South America, Asia, and Africa. While this review was not comprehensive, it demonstrates the extent to which available literature does not address the U.S. context.

We also conducted extensive desk research to identify examples of benefit agreements made with Tribes in the U.S., and to search for publicly available information on these agreements. We searched individually for each federally recognized Tribe, combining the Tribe's name with 10 different search terms pertaining to agreements, and completed this process twice using two different search engines for a total of 11,480 discrete searches.

From these searches, we found a total of 1 community benefit agreement and 17 right-of-way agreements. This demonstrates the significant lack of publicly available information on benefit agreements made with Tribes in the U.S., as the research team and interviewees were aware of *many* more agreements which did not show up in the searches. Interviewees stated that in their experience, almost all engagements between a company and a Tribe resulted in one or more agreements–however, this is not reflected in publicly available data, likely due to the confidentiality clauses which are common in TBAs. Interviewees agreed there is a significant lack of accessible information about agreements in the U.S., and stated that in their experience, it is rare for agreements to be announced publicly, and even when agreements are announced, their contents are not published. This stands in contrast to Australia and Canada, where there is a stronger interest in sharing information about agreements. This paper aims to address the information gap regarding Tribal Benefit Agreements in the U.S.

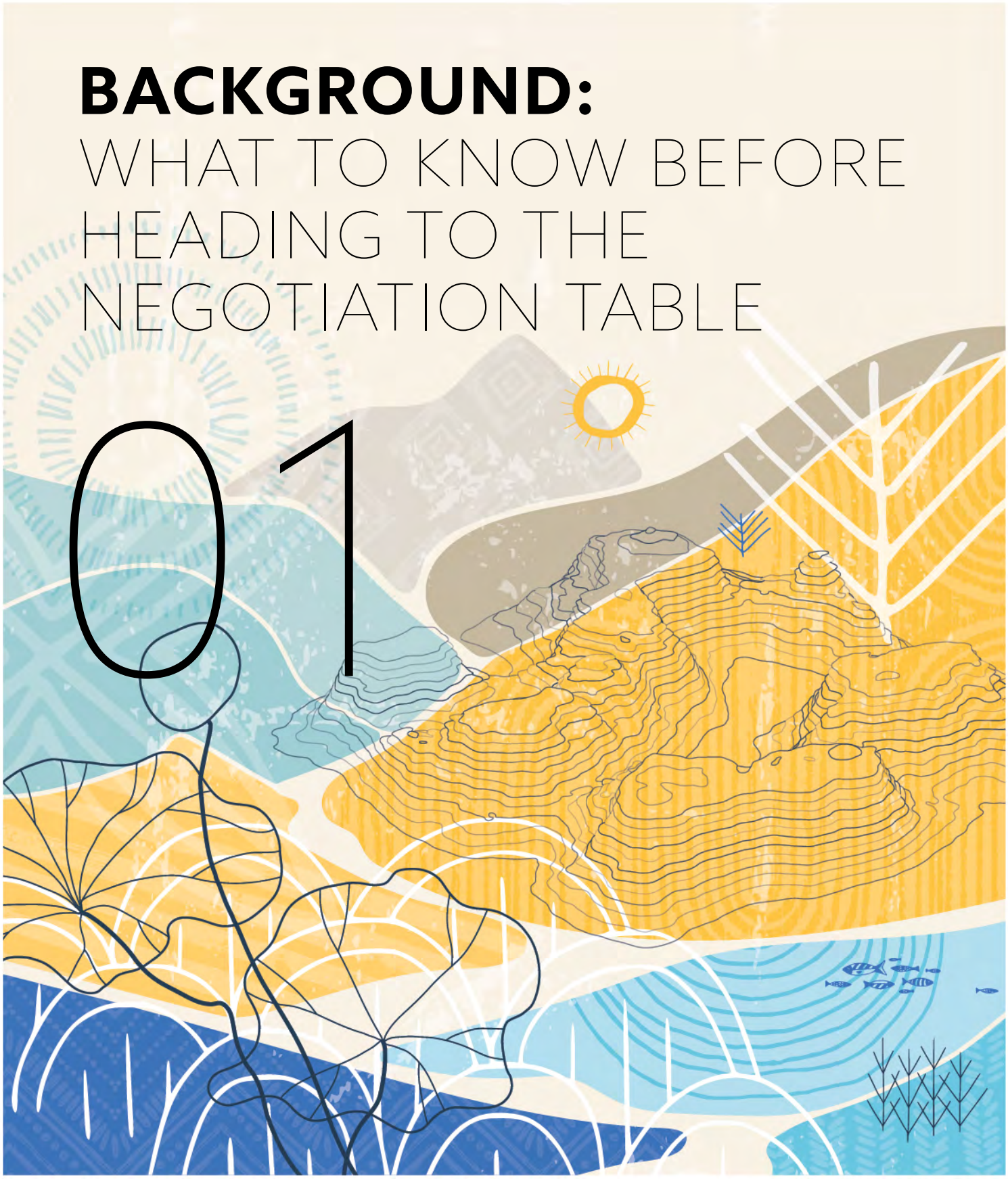
TERMINOLOGY

Terminology is evolving and nuanced. The best practice for any entity working with a Tribal nation is to use the preferred terminology of that particular nation. For the purposes of this report, we use the following generally-accepted terminology:

- **TRIBAL NATIONS** are the sovereign Indigenous entities that exist on and prior to the formation of the United States.
- **TRIBAL CITIZENS** are the citizens of a Tribal nation. **NATIVE AMERICANS** is a general, broader term that encompasses Tribal citizens and descendants of all Tribal nations.
- **INDIAN COUNTRY** is a legal reference to Tribal lands and jurisdiction but is also used as a collective term for all Tribal nations and communities.

BACKGROUND: WHAT TO KNOW BEFORE HEADING TO THE NEGOTIATION TABLE

01



3 KEY CONCEPTS THAT UNDERLIE ALL TRIBAL ENGAGEMENT

Central to developing strong relationships and agreements with Tribal nations is understanding the key legal concepts that underlie those relationships. Those key concepts include:

TRIBAL SOVEREIGNTY: *The inherent authority of Tribal nations to self-govern, which has never been ceded or ceased.* Pursuant to their inherent sovereignty, Tribal nations maintain a separate and independent political authority that the U.S. has long recognized under its own laws. From the Constitution to treaties to modern laws and regulations, a nation-to-nation, government-to-government relationship endures. Tribal sovereignty and its corollary, self-determination, are the reason that Tribal nations can pass their own laws and regulations to manage their own lands, resources, and citizens. For private entities seeking to engage and negotiate with Tribal nations, understanding and acknowledging Tribal sovereignty is fundamental.

TREATY RIGHTS AND RESOURCES: *The rights and resources reserved by Tribal nations in treaties with the United States.* Between 1776 and 1871, the U.S. entered more than 400 treaties with Tribal nations. In these nation-to-nation agreements, the U.S. promised resources–typically food, weapons, annuities, healthcare, education, and infrastructure, for example mills and protected trade routes–in exchange for land for peaceful settlement. Tribal nations also reserved rights to land and resources in treaties–typically an area for their exclusive use and occupation, often referred to as a reservation, and an area of shared use with the U.S. where Tribal citizens maintained the right to hunt, fish, and gather resources. Importantly, these treaties do not expire. Although Congress halted the practice of treaty-making in 1871,[6] it left in place the rights and obligations of existing treaties; and their conditions and provisions remain in force today as federal law. Because of this, when considering impacts of energy development and the scope of TBAs, it is important to not only recognize Tribal rights to reservation lands but also to treaty areas and resources.

THE FEDERAL TRUST RESPONSIBILITY: *The collective commitments of the U.S. to Tribal nations as made in Tribal treaties, agreements, and under various federal laws.* A key commitment of the U.S. is its role as self-appointed trustee of all Tribal lands and resources–a legal relationship based upon the European concept of the Doctrine of Discovery.[7] In a triptych of cases in the 1820s and 30s often called the "Marshall Trilogy,"[8] the Supreme Court held the U.S. received superior title to the land from the British and European powers and Tribal nations could only maintain a subordinate use right. The Marshall Trilogy established that under federal law, Tribal nations would be "domestic dependent nations," subject to the oversight of the U.S. government like a "ward to its guardian." Today the U.S. still holds legal title to all Tribal lands and resources "in trust" for the benefit of Tribal nations and their citizens.[9] This restrictive ownership model requires federal approval for almost all activities impacting or using Tribal resources and is the basis for Federal-Tribal Consultation requirements, wherein federal agencies must engage Tribal nations to identify and assess effects of federal actions on Tribal trust assets.[10]

THE HISTORY & IMPACTS OF U.S. FEDERAL INDIAN POLICY

The United States and Tribal nations maintain a nation-to-nation relationship–defined by treaties, legislation, regulations, policies, and judicial opinions. Since its inception, the U.S. has always recognized the pre-existing sovereignty of Tribal nations but the terms, scope, and support of that recognition have vacillated dramatically. In some policy eras the U.S. has relied on Tribal nations as self-governing allies while at other times it actively undermined Tribal sovereignty, challenging the political existence of Tribal nations and seeking to assimilate Tribal lands and citizens into the U.S. legal system.

Companies seeking to engage Tribal nations must first learn the relevant policy history to understand how the policy shifts impact contemporary relationships (see Appendix A).

6 In 1871, the House of Representatives added a rider to an appropriations bill ceasing to recognize Tribal nations as entities "with whom the United States may contract by treaty." Indian Appropriations Act, 1871. This dramatic shift in Federal Indian Policy stemmed from a power struggle over control of Indian affairs–between the Senate, which ratified treaties, and the House, which was frustrated with treaty demands on appropriations.

7 The "Doctrine of Discovery" is a 15th century Papal decree that provided legal justification for European colonization by finding that only European Christian sovereigns were capable of possessing title to land because the governance and property systems of savage, non-Christian inhabitants were unrecognized by a Christian god and thus invalid.

8 The Marshall Trilogy consists of Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Three cases penned by then Chief Justice Marshall and the foundation for all U.S. Federal Indian Policy.

9 A trust is a fiduciary relationship with respect to specific property, to which the trustee holds the legal title for the benefit of a beneficiary. However, U.S.-Tribal trust relationship is unique in that it was mandated by the U.S. without Tribal consent and does not follow typical trust standards or obligations–e.g., the trustee not possessing an interest in the corpus of the trust.

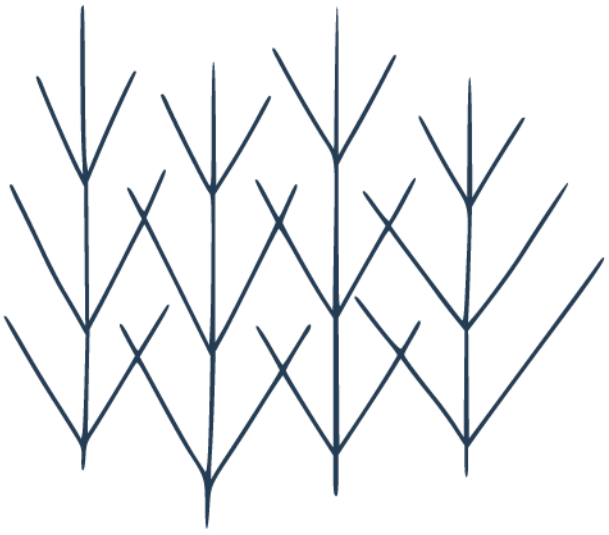
10 EO 13175 "Consultation and Coordination with Indian Tribal Governments" (November 6, 2000).

ERAS OF U.S FEDERAL INDIAN POLICY

1775-1817: **Treaty Trade and Intercourse**	Tribal nations are recognized as separate sovereigns and the U.S.–as a new country seeking land, resources, and legitimacy–signs treaties with individual Tribal nations to acquire land for settlement and validate its own independence. However, the U.S.'s nascent government generally lacks the resources to fulfill most of its treaty obligations to Tribes and many settlers and state and local governments encroach on reserved Tribal rights, in violation of treaties and federal laws.
	KEY POLICIES ACTIONS: Treaty of Ft. Pitt (1787); Nonintercourse Acts (1790); the Louisiana Purchase (1803).
1817-1886: **Reservations and Removal**	As the U.S. pursues geopolitical expansion, Federal Indian Policy seeks to erode Tribal sovereignty, including in the courts where Tribal nations are specially classified as "domestic dependent nations," subject to the guardianship of the U.S. Treaties continue to be used with individual Tribal nations as a means of acquiring westward land and circumscribing Tribal authority to progressively smaller areas, but where treaties fail the U.S. (as "trustee") assumes the authority to forcibly relocate Tribal nations. After facing a civil war, Congress asserts greater policy dominance in Indian Country by ceasing treaty making, withholding funds owed under treaties, and purposely depleting or contaminating Tribal food sources.
	KEY POLICIES ACTIONS: Indian Removal Act (1832); Indians Appropriation Act (1871); Black Hills Act (1898).
1887-1933: **Allotment and Assimilation**	European immigrants flood the U.S. and move west on new rail and trail systems. Needing more land for settlement, the U.S. seeks to undermine Tribal sovereignty and assimilate Tribal lands and people. Congress passes the Allotment Act, which forcibly divides Tribally-held reservations into parcels, passing ownership of "allotments" to individual Tribal citizens and selling remaining parcels to non-Native settlers. The policy devastates Tribal nations: taking more than two-thirds of all Tribal lands, breaking up communal ways of living, and "checkerboarding" reservations. To further assimilate Native people, Congress funds the equally devastating policy of "boarding schools," which removes Native children from their homes and detain them in camps where the goal is to "save the man; kill the Indian."
	KEY POLICIES ACTIONS: General Allotment Act (1887); Major Crimes Act (1885); Boarding School Policy (1870).
1934-1947: **The Indian "New Deal"**	Digging out of the Great Depression, the U.S. approach to Tribal nations swings back to support with the creation of uniform, self-sufficient Tribal governments. Under the Indian Reorganization Act, the U.S. ends the policy of allotment and recognizes Tribal governance, encouraging the creation of Tribal constitutions approved by the Secretary of the Interior. Additionally, the U.S. undertakes its first accounting and education on the history of its relationship with Tribal nations and the obligations owed under treaties and the trust doctrine. However, this era of support is relatively brief.
	KEY POLICIES ACTIONS: The Indian Reorganization Act (1932); Handbook of Federal Indian Law (1941).
1948-1969: **Political Termination**	Spurred by concern over the "natural socialist environments" created by Tribal nations, the U.S. seeks to terminate Tribal political sovereignty so as to "emancipate the Indians" from the "ward status required by their affiliation with Tribal nations." Congress passes numerous laws with the sole purpose of dissolving Tribal governments and their assets. In all, the political status of 109 Tribal nations is terminated and 1,362,155 acres of Tribal land are taken from Tribal ownership and redistributed to individuals, states, and private entities. For the remaining Tribal nations, federal policies seek to minimize the authority of Tribal governments over Tribal land and transfer federal guardianship to state control.
	KEY POLICIES ACTIONS: House Resolution 108 (195e) and related termination acts; Public Law 280 (1953).

ERAS OF U.S FEDERAL INDIAN POLICY - CONTINUED

1969-2000: **New Self-Determination and Self-Governance**	Native activism, such as the American Indian Movement and Pacific Northwest Fish Wars, and broader civil and environmental rights movements call for Tribal sovereignty to be re-recognized by federal policy. President Nixon's Special Message on Indian Affairs marks the end of termination and the refocus on self-determination. Congress follows suit enacting a variety of legislation focused on Tribal cultural protection and a respect for Tribal authority. Despite broad executive and legislative support, the judiciary's positions on Tribal sovereignty are far more varied. Some cases strongly support Tribal authority and the enforcement of treaty rights–e.g., *California v. Cabazon* (1987) and *U.S. v. Washington* (the Boldt Decision) (1974)–while others significantly limit Tribal jurisdiction over lands and resources in favor of broader control and influence for states–e.g., *Oliphant v. Suquamish* 1978) and *Montana v .U.S.* (1981).
	KEY POLICIES ACTIONS: Indian Self-Determination and Education Assistance Act (1975); American Indian Religious Freedom Act (1978, amended 1994); Indian Child Welfare Act (1978); Indian Gaming Regulatory Act (1988); Native American Graves Protection Act (1990).
2000-Present: **Nation-to-Nation**	Since 2000, the U.S. has approached a recognition of Tribal sovereignty closer to the era of treaty-making–i.e., working with Tribal nations as sovereign allies to support U.S. policy goals. Additionally, federal agencies have focused on establishing and improving government-to-government consultation with Tribal governments in permitting and rule-making. And while Tribal nations have realized nearly 50 years of continual support from U.S. policy, there is no guarantee of when the next era might start or where U.S. sentiment may swing.
	KEY POLICIES ACTIONS: EO 13175 (2000); Cobell Litigation and Settlement (2009); *McGirt v. Oklahoma (2020); Inflation Reduction Act (2022).*



HISTORY OF ENERGY PROJECT DEVELOPMENT IN THE U.S.

The history of energy resource development and permitting in Indian Country closely follows the history of Federal Indian Law. Entering into a TBA today necessarily means understanding that Tribal nations have not always been respected as key rights holders, regulators, and developers.

A HISTORY OF IMPACTS WITHOUT CONSENT

As demand for resources for U.S. settlers and the opportunity for land wealth increased in the 19th century, the federal government began to encourage the dispossession of Tribal ownership through outright takings, like the taking of the Black Hills from the Lakota people for gold resources.[11] The federal government also used more insidious methods such as allotment and the leasing of Tribal citizen oil and gas resources, like the nefarious parceling and selling of oil and gas resources "on behalf of" Osage Nation citizens in Oklahoma.[12] Tellingly, none of the laws passed during the removal and reservation or allotment and assimilation eras encouraged or focused on Tribal development–only on how Tribal consent and/or federal approval could be garnered or coerced by third parties coming into Indian Country to develop. And come in they did. From coal, to gold, to uranium, to timber, extraction of resources from Tribal lands was encouraged and overseen by the federal government–many times to the benefit of U.S. citizens and to the detriment of Tribal nations–for more than 100 years.

A brief period of self-determination during the 1930s included some improvements in Tribal considerations, but the hydroelectric boom during the middle of the 20th century brought the return of disregard for Tribal rights in the U.S.'s pursuit of energy resources. During the termination era, Congress passed several acts–like the Flood Control Acts of 1944 (which included the Pick-Sloan Plan)[13] and 1950–which called for construction of hydroelectric projects on the Columbia and Missouri River basins. Tribal nations had existed within those river basins since time immemorial and, through treaties with the U.S., had ceded some lands but maintained significant land holdings in both river basins, including reservation lands and fishing and hunting areas. However, Congress forced the major dam projects through without Tribal consent and many Tribes were only notified of them mere weeks or days before their lands and traditional hunting and fishing areas were to be flooded. These infrastructure projects created significant electrification and agricultural benefits for the non-Native people of the Great Plains and Pacific Northwest but they did so on the backs of–without consent or input from–Tribal nations and their citizens.

In later years, even where Tribal consent was gained, Tribal nations often had limited control over the terms of development. For example, in 1964 the Navajo Nation consented for the U.S. to enter into a lease agreement with Peabody Western Coal Co to develop coal resources on Navajo land. The U.S., in its capacity as trustee and pursuant to the Indian Mineral Leasing Act of 1938, negotiated royalty rates on behalf of the Navajo Nation. The rates negotiated by the U.S. were substantially lower than market rates, causing significant financial losses for the Navajo Nation. The Navajo Nation brought a case against the U.S. alleging that the Secretary of the Interior had been improperly influenced by the coal company and breached his fiduciary duty to the Nation when he negotiated for below-market rates for the Nation's coal.[14] This claim was long litigated but eventually denied by the Supreme Court in 2009, which held that neither the U.S. government's general trust obligation nor the express terms of the Indian Mineral Leasing Act of 1938 included an express obligation to negotiate market rates, so the Nation could not sue for money damages. The case exemplified how the federal government often restricted Tribal involvement in energy development agreements but then also restricted federal obligations–leaving Tribal nations without autonomy or recourse.

11 *See* United States v Sioux Nation, 448 U.S. 371 (!980), which held that the U.S. took the treaty-guaranteed Black Hills from the Lakota people without compensation stating that "a more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history."

12 *See, e.g.*, Rachel Adams-Heard. *In Trust*. Bloomberg Podcast, available at https://www.bloomberg.com/features/2022-in-trust-podcast/.

13 58 Stat. 887 (Pub. L. 78-564).

14 U.S. v. Navajo Nation, 556 U.S. 287 (2009).

MODERN SELF-DETERMINATION IN ENERGY DEVELOPMENT

Beginning in the 1970s, efforts of the American Indian Movement and the Tribal citizens in the Pacific Northwest asserting fishing rights brought attention to many long-ignored Tribal treaty and land rights. Federal policy also shifted from termination to self-determination, reversing course from vehemently discrediting Tribal nation governments to recognizing and supporting them. In the 70s, 80s, and 90s, Tribal nations saw the U.S. Congress pass a series of laws that formally recognized Tribal rights, including: the National Environmental Policy Act of 1970 (NEPA); the American Indian Religious Freedom Act of 1978 (AIRFA); the Indian Mineral Development Act of 1982 (IMDA); the Native American Graves Protection Act of 1990 (NAGPRA); and the 1992 amendments to the National Historic Preservation Act (NHPA), which for the first time recognized Tribal historic and cultural sites.

More recent federal efforts underscore the importance of Tribal participation and control in infrastructure development, including energy development. These laws and regulations include Executive Order 13175 "Consultation with Indian Tribal Governments" (2000); the Indian Tribal Energy Development and Self Determination Act of 2005; the HEARTH Act (2012); and revisions to the Department of Interior regulations for leasing rights-of-way over Indian Lands. See Appendix B for a list of all Relevant Federal Regulations.

TRIBAL NATIONS TODAY ARE DEVELOPERS AND DEVELOPMENT PARTNERS

With more control and authority, Tribal nations began to shift their approach in the 2000s from providing consent for others to develop resources, to regulating that development under Tribal law and developing the resources themselves. The federal government has increasingly recognized this expanded role in its own legislation–identifying Tribal nations as regulators on Tribal lands, and also as key developers and development partners in the renewable energy transition. The Infrastructure Investment and Jobs Act of 2021, aka the Bipartisan Infrastructure Law, included more than $2 billion for Tribal nations themselves to develop solar, wind, and battery storage projects and modernize their electric grids. Similarly and subsequently, the Inflation Reduction Act of 2022 included $75 million to the Tribal Energy Loan Guarantee Program to help Tribal nations finance their development of renewable energy projects and provided an avenue for Tribal nations, as non-taxable entities, to receive tax credits for wind, solar, and other renewable energy projects.

While this legislation continued the federal paternalism of choosing what kind of development Tribal nations should engage in–namely renewable energy under the Biden-Harris administration–the acts importantly identify Tribal nations as not just the *impacted communities* of the past but as *implementing governments and developers* in the contemporary energy space.

CASE STUDY:
BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER (BAD RIVER BAND) AND ENBRIDGE INC.

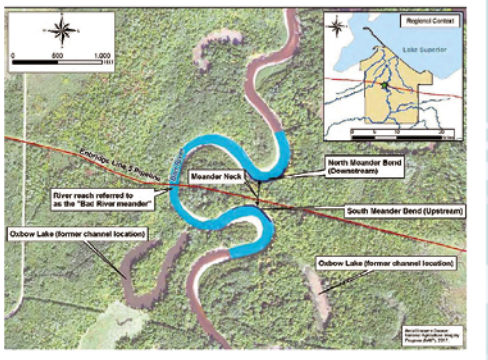
Projects that fail to acknowledge the history of policies or find mutual benefit for contemporary Tribal nations can experience long-term instability, permitting barriers, and litigation. Enbridge Inc. (Enbridge) Line 5 is one of these projects.

In 1953, the Bureau of Indian Affairs (BIA) granted Enbridge a 20-year easement to build and operate their Line 5 oil pipeline across the Bad River Reservation.[15] The 20-year easement covered 13 parcels of land held in trust by the U.S. for the Bad River Band, as well as 15 allotment parcels of land owned by individual Bad River Tribal members.[16] The Bad River Band did not consent to the easement granted on their lands, as the BIA signed the agreement, not the Tribal council.[17] In 1973 the BIA renewed the easement for another 20 years.[18]

With the easement set to expire in 1993, in the early 1990s Enbridge began negotiating with the Bad River Band and the BIA to renew the easement.[19] This was the first time the BIA asked the Bad River Band for their input.[20] The BIA refused to grant easements longer than 20 years for the 15 allotment parcels,[21] however, they stated that the Bad River Band could grant longer easements on its 13 wholly-owned parcels if it wished to do so, and advised Enbridge to negotiate directly with the Band for those new easements.[22] The Band was experiencing severe economic constraints and the Tribal government agreed to renew the easements so they could invest the compensation into their community.[23] Enbridge paid the Band $800,000 for a 50-year easement, and the BIA approved the agreement.[24] Separately, the BIA granted 20-year easements for the 15 allotment parcels, with a clause stating that Enbridge would remove the pipeline within six months of termination and restore the land to its prior condition."[25]

Due to the Indian Land Consolidation Act, passed in 1982, between 1994 and 2013 the BIA assisted the Bad River Band in acquiring an ownership interest in 12 of the 15 allotment parcels,[26] and the Band's consent would now be required to renew the easements on these parcels after they expired in 2013.[27] In 2013 Enbridge asked to renew the easements, and the Band requested that Enbridge provide "detailed environmental, pipeline safety, and emergency response information [...] pertaining to its operation of the pipeline, including records of spills and regulatory violations."[28] The Band was particularly concerned because in 2010 another pipeline operated by Enbridge spilled more than a million gallons of crude oil into the Kalamazoo River,[29] and federal investigators determined Enbridge was responsible for the spill.[30] Enbridge provided the Band with some of the information requested, but the Band responded that the information was not sufficient.[31] In 2013, Enbridge submitted applications to the BIA to renew the easements, however, Enbridge failed to submit documentation showing that the owners of the allotment parcels, including the Bad River Band, consented to the renewal of the easements, so the BIA did not approve the applications.[32]

In 2015 and 2016, Enbridge and the Bad River Band continued conversations about the potential renewal, but the Band remained unconvinced.[33] Then, in 2016 a 500-year flood event occurred, changing the course of the Bad River, washing out roads and bridges, and obstructing access to many areas where the Enbridge pipeline is buried.[34] A particular area of concern has been "the Meander," a horseshoe-shaped meander in the river which has been shifting–when Enbridge built Line 5 in the 1950s the pipeline was located 310 feet from the River; the pipeline is now 28 feet from the water's edge.[35] If no action is taken, at some point the pipeline will be exposed to river forces it wasn't designed for–the soil will be carved away from under it and the pipeline will be exposed, hanging in the air or water with no support, and it could rupture.[36] In 2016 Enbridge also examined several other points of potential failure in the pipeline.[37]



Bad River Meander Overview Map. WWE Reg. (dkt. #268) 29, Fig. ES-2.

The Band asked Enbridge for additional safety measures, and received vague responses which failed to identify what Enbridge planned to do if there were a pipeline leak.[38] Enbridge also didn't have data on the pipeline's current condition, which was concerning given the pipeline's age.[39] The Band hosted community listening sessions, and heard from their Tribal members that they didn't feel safe with the pipeline and they didn't want it there,[40] demonstrating the importance of community engagement in shaping the consent process. At the same time, Enbridge engaged in divisive tactics aimed at dividing the community.[41] In response to the growing concerns of Tribal leadership and the wishes of their Tribal members, in 2017, the Bad River Band enacted a resolution stating that they would not consent to renew the easements,[42] and that "the lands, rivers and wetlands in the Bad River and Lake Superior watersheds [are] sacred to the Band; an oil spill on the Reservation 'would be catastrophic' and would 'nullify our long years of effort to preserve our health, subsistence, culture and ecosystems'."[43] In making the resolution, the Band asserted their rights as a sovereign nation.

Enbridge refused to remove the pipeline from the Band's lands, and has continued to transport petroleum and natural gas liquid products across the reservation.[44] In 2019, the Band filed a lawsuit against Enbridge, arguing that Enbridge has been trespassing on the 12 allotment parcels since the easements expired in 2013, and that Enbridge has been unjustly enriched by continuing to operate the pipeline. The Band also claimed both state and federal nuisance, ejectment, and violation of the Tribe's regulatory authority, and further, that there is an imminent risk of a pipeline rupture at the Meander.[45] The Band requested a permanent injunction requiring Enbridge to cease operation of the pipeline and to safely decommission and remove it.[46]

Shortly after the lawsuit was filed, the Bad River Natural Resources Department discovered an over 40 foot section of the pipeline was exposed and hanging in mid-air.[47] They contacted Enbridge for an emergency response, and while the company didn't respond for several hours, Enbridge later arranged for a repair. After multiple attempts, Enbridge still has not successfully reached a fully functioning remediation.[48] This damaged the Band's trust, and when Enbridge proposed a set of major projects to address the problem at the Meander, the Band did not feel confident that Enbridge could complete these projects without mishap.[49]

In 2020 Enbridge offered the Band $30 million dollars to settle their lawsuit, but the deal hinged on a reroute of Line 5, which the company plans to move just outside of the reservation, but still within the Bad River watershed, crossing 139 waterways and a glacial aquifer.[50] Adding to the Band's concerns, in 2022 Wisconsin announced the investigation of a spill from Line 5 less than a mile from the Bad River Reservation, where oil-contaminated soil was found near the pipeline.[51] The band did not accept Enbridge's offer and they went to trial in 2022.[52] On June 29th, 2023, Judge Conley ruled that Enbridge is in a state of trespass, and noted Enbridge's delay in leaving the reservation. During the trial, an Enbridge employee admitted staying on the reservation was an intentional strategy to protect $600 million in Enbridge's cash flow each year.[53] Judge Conley ruled that Enbridge must shut down the pipeline, but not until 2026.[54] Enbridge appealed the decision, and in June 2024 the appeal was sent back to Michigan state court.[55]

This case illustrates the sometimes stark differences between the company's priorities and the Tribe's priorities, and how a failure to recognize those differences can cause long-term conflict. It may be aspects outside of monetary compensation, such as environmental protection; risk mitigation and safety protocols; and ongoing project maintenance, that make the greatest difference in a Tribe's decision about whether to continue a business relationship with a company. Further, Enbridge's actions continually eroded trust given by the Bad River Band, undermining any possibility of an agreement moving forward. When Enbridge only went through the BIA and did not obtain consent from the Bad River Band for the 1953 and 1973 easements, they created a costly and difficult situation. This could have been avoided had they gone beyond the bare minimum legal standard at the time, and instead obtained consent and cultivated a strong relationship with the Tribe. Failing to address Tribal concerns or maintain good relationships can cause consent to be revoked or not granted in the future, creating significant project risks.

15 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

16 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

17 Bad River, 50 Eggs Films (Mar. 15, 2024), https://www.badriverfilm.com/.

18 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

19 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

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28 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

29 Bad River, 50 Eggs Films (Mar. 15, 2024), https://www.badriverfilm.com/.

30 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

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33 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

34 Bad River, 50 Eggs Films (Mar. 15, 2024), https://www.badriverfilm.com/.

35 Bad River, 50 Eggs Films (Mar. 15, 2024), https://www.badriverfilm.com/.

36 Bad River, 50 Eggs Films (Mar. 15, 2024), https://www.badriverfilm.com/.

37 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

38 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co., 626 F. Supp. 3d 1030 (W.D. Wis. 2022).

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47 Bad River, 50 Eggs Films (Mar. 15, 2024), https://www.badriverfilm.com/.

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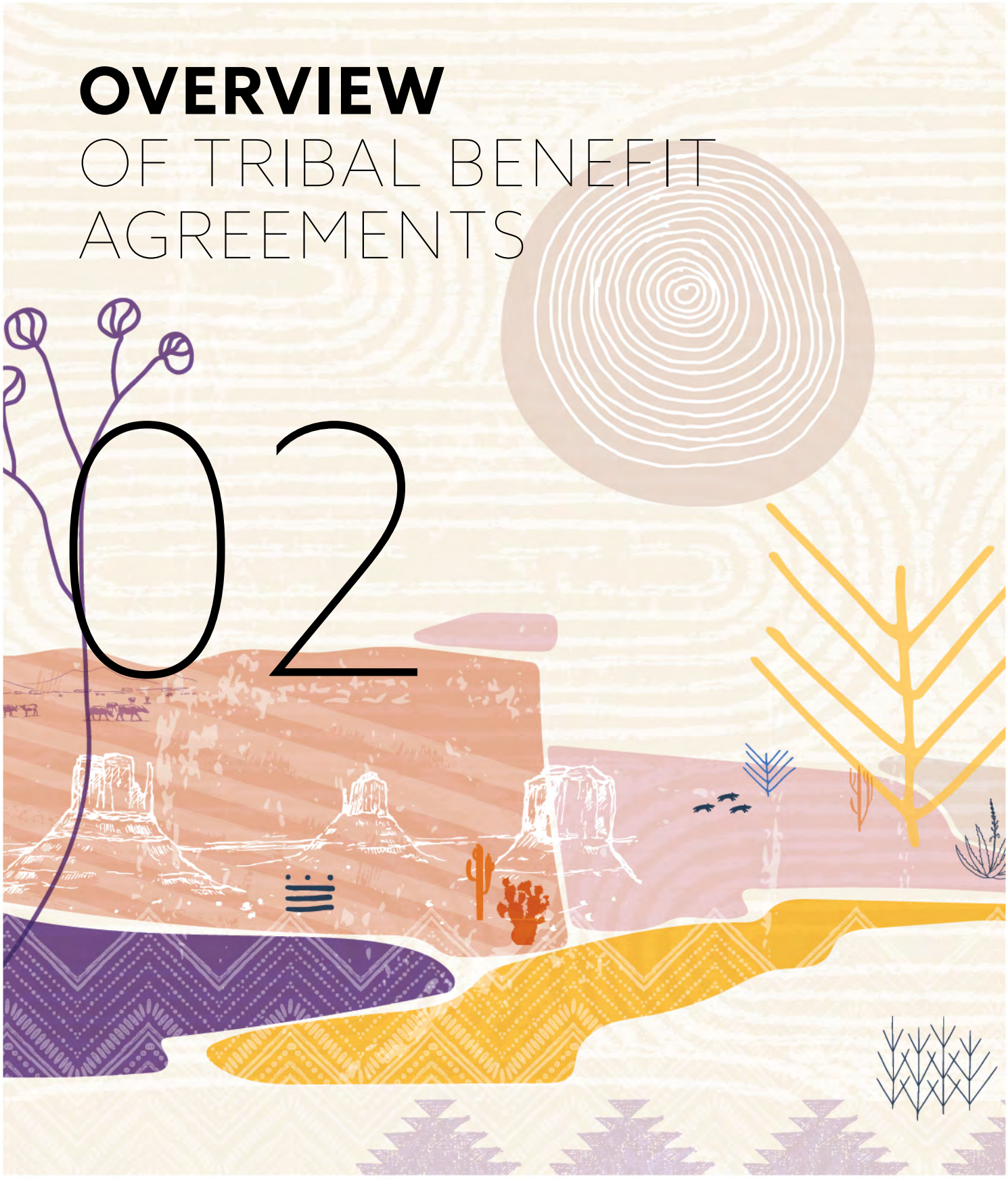
53 Bad River, 50 Eggs Films (Mar. 15, 2024), https://www.badriverfilm.com/.

54 Bad River, 50 Eggs Films (Mar. 15, 2024), https://www.badriverfilm.com/.

55 Rick Pluta, *Federal Appeal Court Returns Enbridge Line 5 Case to Michigan*, Michigan Public, (June 17, 2024), https://www.michiganpublic.org/environment-climate-change/2024-06-17/federal-appeal-court-returns-enbridge-line-5-case-to-michigan.

02

OVERVIEW OF TRIBAL BENEFIT AGREEMENTS



THE UNIQUE NATURE OF AGREEMENTS WITH U.S. TRIBAL NATIONS

When entering into an agreement with a Tribal nation, it is important to recognize the key ways in which TBAs differ from CBAs:

U.S. TRIBAL NATIONS ARE GOVERNMENTS, NOT COMMUNITIES

Tribal nations are frequently confused as a disadvantaged community, environmental justice (EJ) community, or a racial group–which makes some sense given that Tribal nations have been on the receiving end of environmental injustice policies for hundreds of years and Tribal citizenship requirements frequently include the racially adjacent concept of blood quantum.[56] However, Tribal nations are not racial groups nor are they solely a disadvantaged or EJ community; Tribal nations are governments. Working with and relating to Tribal nations does not fall into the modern category of "Diversity, Equity, and Inclusion" any more than working with local or rural governments does. It is the sovereignty of Tribal nations that is key, and their fundamentally political existence and discrete self-governance that must be centered in any TBA negotiation.

Characterizing a Tribal nation as a racial group or EJ or DEI community can lead to significant errors in TBA negotiation strategy and process. For example, a developer will miss key Tribal election dates and potential policy shifts, failing to recognize that, just like when negotiating agreements with federal, state, and local authorities, Tribal elections can lead to new elected officials with mandates for entirely different policy approaches. Additionally, developers can miscalculate or fail to recognize Tribal regulatory authority, resulting in agreements that are negotiated with Tribal community groups or limited branches of the Tribal government and fail to address or fulfill Tribal taxing or regulatory demands.

EACH U.S. TRIBAL GOVERNMENT IS UNIQUE

Tribal nations are unique governments–both when compared to each other and to other governmental entities, like state and local governments. Similar to how European nations share a land base and are collectively subject to certain laws but remain distinct nations with widely different governmental structures, histories, and cultures, each Tribal nation may be subject to the collective Indian policies of the U.S. but remains a nation unto itself–with its own legal rights, political processes, recognized authority, and laws. And when it comes to project development and permitting, each Tribal nation differs in its approach, similar to how pursuing a renewable energy or mining project will be entirely different in California than it will in North Dakota. So it goes with Tribal nations, and relatedly with their openness, needs, and legal processes for negotiating TBAs.

Also important are distinctions between Tribal sovereigns and other potentially analogous entities, like state and local governments. For example, public-private partnerships (P3s) are increasingly popular in the U.S.–agreements between private project developers and state or local governments. When comparing TBAs and P3s, some concepts translate easily–e.g., governmental immunity, referred to as Tribal sovereign immunity with it comes to Tribal nations; or the governmental ability to waive or alter applicable laws, like tax waivers. However, key differences exist–largely when it comes to applicable law and available governmental revenues. For example, a freedom of information (FOIA) process does not necessarily make TBAs public.[57] Nor are Tribal nations bound by the contracts clause of the U.S. Constitution which prohibits states from passing laws that violate the contractual benefits of a party.[58] Also Tribal nations do not enjoy similar taxing authority–they are prevented from assessing property taxes due to the U.S. ownership of Tribal lands[59] and are subject to a variety of state taxes as decided by federal courts.[60] The unique existence and authorities of Tribal nations play a key role in TBA negotiation.

56 Blood quantum is the idea that you can measure an individual's amount of "Indian blood"–a concept usually reserved for animals but included in Federal Indian Policy by the federal government for the express purpose of limiting Tribal citizenship. Blood quantum was adopted into Tribal constitutions during the Indian Reorganization Act as part of the model constitution and constitution outlines drafted by the Bureau of Indian Affairs. See 25 U.S.C. § 5123 and Cohens §4.04[3][a][1].

57 Although some Tribal laws do include a Tribal FOIA citation.

58 *Artl.S10.C1.6.2 Historical Background on Contract Clause*, Constitution Annotated, https://constitution.congress.gov/browse/essay/artl-S10-C1-6-2/ALDE_00013038/ (last visited May 19, 2025); *Obligation of Contracts*, Justia U.S. Law, https://law.justia.com/constitution/us/article-1/71-obligation-of-contracts.html (last visited May 19, 2025).

59 In U.S. law Tribal land must be owned by the U.S. and held in trust for Tribal nations (and the U.S. does not allow itself to be taxed).

60 White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Brendale v. Confederated Tribes, 492 U.S. 408 (1989).

U.S. TRIBAL GOVERNMENTS DIFFER FROM CANADIAN FIRST NATIONS

While Tribal nations predate the U.S./Canadian political boundary, nevertheless these boundaries create significant differences for how TBAs are negotiated with Tribal nations and First Nations on either side. The legal framework for project permitting in Canada differs significantly from the U.S. For example, treaty areas create clear areas of First Nation resource interests; the Crown delegates significant authority to project developers creating more direct negotiations between the developer and First Nations; and the Truth and Reconciliation Commission, active from 2008 to 2015, created calls to action that align the interests of other parties in energy development negotiations, such as banks and financiers.

Beyond Canada, in Latin America or Australia, even more divergent legal and social systems create vastly different TBAs. Ultimately, TBAs from other locations and jurisdictions may be helpful guides but the terms will not directly transfer.

HOW THE CONTEMPORARY U.S. REGULATORY LANDSCAPE SHAPES TBAs

TBAs in the U.S. are frequently dictated by the federal and state regulatory requirements associated with permitting. In the project permitting processes, Tribal nations typically play one of two roles: as a consenting or consulting party. The role of each Tribal nation in a specific project is central to the type of TBA to be negotiated with that Tribal nation.

CONSENT VS. CONSULTATION VS. COORDINATION

CONSENT

The requirement that a tribal nation must affirmatively agree to a proposed action.

KEY FEATURES

- Required by certain federal laws (e.g., NAGPRA)
- Supported by the UN Declaration on the Rights of Indigenous Peoples
- Recognizes tribal sovereignty and self-determination
- Stronger standard than consultation
- Binding

Example: A right-of-way across Tribal lands requires Tribal consent.

CONSULTATION

A formal government-to-government process in which a federal (or state) governmental entity engages with a tribal government before making decisions that could affect the Tribe's interests.

KEY FEATURES

- Required by various federal laws and agency policies
- Communication and dialogue, not necessarily an agreement
- Agencies must seek out and consider Tribal input but are not obligated to follow it
- Part of the Federal governments obligations as self-appointed trustee of Tribal rights
- Non-Binding

Example: The U.S. Forest Service sends a letter and holds meetings with Tribal elected officials or staff prior to permitting a right-of-way through the forest, which sits on a Tribe's ancestral lands.

COORDINATION

Communication and relationship-building between a project-proponent and a tribal nation.

KEY FEATURES

- Not defined by law
- Does not fulfill government-to-government obligations
- Respects tribal sovereignty and legal rights
- Additive to (and a potential to de-risk) federal consultation requirements and processes
- Can occur based on any interaction or project

Example: A renewable energy developer may engage in coordination before the consultation process to seek tribal input on potential siting.

FEDERAL LAWS AND REGULATIONS REQUIRING TRIBAL CONSENT

Projects developed on Tribal lands or directly using Tribal resources generally require Tribal consent.[61] In most instances Tribal consent is accompanied by a subsequent federal approval process. Importantly, TBAs do not automatically grant Tribal consent but may do so if it is in the express terms of the agreement. Examples of laws requiring Tribal consent for energy development include:[62]

- **Rights-of-Way over Indian Lands:** requires Tribal consent for rights-of-way for infrastructure projects on Tribal lands, for example roads, pipelines, transmission lines.
- **Indian Mineral Leasing Act (IMLA):** requires Tribal consent for the leasing of Tribal lands for mining and energy development, for example oil, gas, coal, and mining.
- **The Archeological Resources Protection Act (ARPA):** requires Tribal consent before any archeological excavation or removal of artifacts from Tribal lands.
- **The Native American Graves Protection and Repatriation Act (NAGPRA):** requires Tribal consent for excavation or removal from Tribal lands of human remains, funerary objects, or cultural artifacts.[63]
- **The Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act:** Tribal nations may independently approve individual leases, including for business and renewable energy development purposes, after general federal approval of Tribal authority.
- **Tribal Energy Resource Agreements (TERAs), Title V of the Energy Policy Act of 2005, 25 USC 3501-04:** similar to the HEARTH Act, Tribal nations may gain federal approval to independently permit, develop, and manage energy projects without requiring federal approval of each individual lease, agreement or action. This includes oil, gas, and renewable energy leases; related business agreements; and rights-of-way.

FEDERAL LAWS AND REGULATIONS REQUIRING TRIBAL CONSULTATION

Tribal Consultation is required for all Federal actions, including the issuance of federal permits. However, Tribal Consultation differs from Tribal consent in that consultation only provides a process for Tribal input into federal decision-making, rather than requiring respect for a Tribe's decision as to outcome.

Nevertheless, Tribal consultation requirements have become increasingly important in project permitting and approval, playing a significant role in the opposition and challenges of major projects like the Dakota Access Pipeline and Enbridge's Line 3 and Line 5. Examples of laws requiring Tribal consultation for project development:

- **EO 13175:** As discussed above, Executive Order 13175 "Consultation with Indian Tribal Governments" (2000), generally requires federal departments and agencies to consult with Tribal nations for all federal actions that may impact Tribal lands, resources, or citizens. The exact method and procedures for that consultation are subject to the policy of each individual agency. However, the Biden Administration issued additional Memoranda and Executive Orders that strengthen and further define this obligation, including the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (January 26, 2021); and the Memorandum on Uniform Standards for Tribal Consultation (November 30, 2022).
- **NHPA:** Sections 106 and 101 require federal agencies to consult with impacted Tribal nations to identify impacts to Tribal historical and cultural resources both on- and off-Tribal lands. Specifically, Section 106 requires a federal permitting agency to consult with any Tribal nation potentially impacted by a project so that the Tribal nation may identify and advise on the evaluation of historic properties (including those of traditional religious and cultural importance); articulate its views on the project's effects on such properties; and participate in the resolution of adverse effects."[64] As a result of such consultation, the federal agency may enter into an agreement (typically titled a Programmatic Agreement) with impacted Tribal nations to specify how the project will resolve adverse effects to Tribal resources through prescribed avoidance, minimization, or mitigation.[65]

61 In this way, U.S. laws in their recognition of Tribal sovereignty and self-determination, already implement the international human rights concept of Free Prior and Informed Consent (FPIC).Consultation and free, prior and informed consent (FPIC)" United Nations, available at: https://www.ohchr.org/en/indigenous-peoples/consultation-and-free-prior-and-informed-consent-fpic; see also "Securing Indigenous Peoples' Right to Self-Determination: A Guide on Free, Prior, and Informed Consent."

62 Notably, Federal laws requiring Tribal consent also exist outside of the energy and infrastructure development context, including: the Violence Against Women Act, the Indian Child Welfare Act, the Tribal Law and Order Act, and the Indian Self-Determination and Education Assistance Act, which each require consent for various federal and private actions occurring on Tribal lands or impacting Tribal citizens.

63 NAGPRA and ARPA were both passed to address the significant looting of Tribal artifacts and human remains from Tribal and Federal lands. The application of consent requirements for excavation on Tribal lands is necessary to provide a hook for enforcement against non-Tribal citizens coming onto Tribal lands to conduct such activities as, due the many Federal laws severely restricting Tribal jurisdiction over non-members.

64 36 CFR § 800.2(c)(ii)(A)-(D).

65 36 CFR §§ 800.2-800.6.

- **NAGPRA and ARPA:** Both require Tribal consultation for excavation activity on federal lands, as opposed to the Tribal consent required on Tribal lands.

A NOTE FROM THE AUTHORS IN MAY 2025

The start of Donald Trump's second term as President has brought uncertainty regarding federal governance and permitting. Various Executive Orders (EOs) signed during the first 100 days of the Trump-Vance administration have invoked emergency permitting for certain types of energy projects (see EOs 14154 "Unleashing American Energy and 14156 "Declaring a National Energy Emergency"); ceased all permitting and federal funding for others ("Temporary Withdrawal of All Areas of the Outer Continental Shelf from Offshore Wind Leasing and Review of the Federal Government's Leasing and Permitting Practices for Wind Projects"), and rescinded key Biden-Harris EOs that supported Tribal Self-Determination (EO 14236, which rescinds EO 14112 "Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination").

During times of volatility in federal permitting, and unpredictability in terms of how and whether federal obligations to Tribal nations will be carried out, respect for the importance of direct Tribal relationships may fall. However, TBAs and coordination with Tribal nations are critically important at this time–particularly as tools for project developers to de-risk a multi-year development process that can span administrations, states, and wide swings in policy. This report is intended to support those entities and efforts.

STATE LAWS REQUIRING TRIBAL CONSULTATION

While no federal law mandates that U.S. states consult with Tribal nations, several states have proactively established their own Tribal Consultation policies to foster collaboration and respect for Tribal sovereignty. TBAs should always consider state laws regarding Tribal consent and consultation. For example:

- **California:** AB-52(2014) requires state agencies to consult with Tribal nations as part of the project permitting process under the California Environmental Quality Act (CEQA).
- **Washington:** Various laws, including the State/Tribal Relations Act and the Centennial Accord and Millenium Agreement, require state agencies to consult with Tribal nations on a project, regulatory, and annual basis.
- **Oregon:** State agencies are required to consult with Tribal nations, and the governor recently established a Tribal Consultation Task Force.
- **Minnesota:** Legislation requires state agencies to consult with Tribal nations and appoint a Tribal-state liaison, and Executive Order 19-24 requires state agencies to create and implement formal Tribal consultation policies.
- **New Mexico:** SB0196 (the "State-Tribal Collaboration Act") requires all state agencies to consult with Tribal nations and designate Tribal liaisons.
- **Nevada:** NRS 233A.260 requires the state's Department of Native American Affairs to consult with Tribal nations, and requires each state agency that communicates with Tribal nations on a regular basis to designate a Tribal liaison.

TRIBAL LAWS

Tribal laws also dictate how and when Tribal consent and consultation are required. Many Tribal nations have passed their own laws for leasing of Tribal lands and the appropriate process for NHPA Section 106 consultation. Additionally, Tribal laws may require additional consideration in the form of taxation and regulation. TBAs should always identify and address relevant Tribal law.

CASE STUDY:
PUEBLO OF TESUQUE, PUEBLO OF POJOAQUE, PUEBLO OF NAMBÉ, AND PUEBLO OF SAN ILDEFONSO AND SANTA FE COUNTY

Understanding the role of Tribal consent under certain federal and state regulatory regimes and the unique rights of each Tribal nation is central to executing successful TBAs. This is particularly true when it comes to right-of-way (ROW) agreements. From 2013 to 2018, Santa Fe County negotiated a suite of ROW agreements for various country roads with Pueblo of San Ildefonso, Pueblo of Tesuque, Pueblo of Pojoaque and Nambé Pueblo.[66] The ROW agreements demonstrate how an overarching federal process impacts negotiation and how each sovereign government can be negotiated with on their own terms.

The County and the four Pueblos made a set of individual agreements tailored to each Pueblo.[67] Each agreement established ROW for two consecutive 99-year terms,[68] the maximum allowed under ROW regulations, but the Pojoaque and Tesque agreements granted ROW directly to the County, while the San Ildefonso and Nambé agreements granted ROW to the U.S. Bureau of Indian Affairs (BIA), making the roads part of the federal Tribal Transportation Program and allowing public access.[69] As compensation, San Ildefonso's agreement required the County to construct several new roads on the Pueblo, while the other Pueblos received monetary compensation with varying payment structures.[70] The County will maintain the roads, while the Pueblos retain their right to temporarily close the roads for cultural purposes.[71] Additionally, each Pueblo designed their own process to allow lawful access to parcels of non-Pueblo land across Pueblo land–providing clarity for the County, non-Pueblo citizen landowners, and the Pueblos.[72]

66 *Homeowners Say Issue is Clouding Titles, Affecting Values*, Albuquerque Journal (Aug. 21,2015), accessed via EBSCO; *SF County, Pueblos Settle Rights of Way Issues*, Albuquerque Journal (Jan. 31, 2018), accessed via EBSCO.

67 *SF County, Pueblos Settle Rights of Way Issues*, Albuquerque Journal (Jan. 31, 2018), accessed via EBSCO.

68 *SF County, Pueblos Settle Rights of Way Issues*, Albuquerque Journal (Jan. 31, 2018), accessed via EBSCO.

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NEGOTIATING TRIBAL BENEFIT AGREEMENTS

THE PURPOSE AND CONTEXT OF BENEFIT AGREEMENTS WITH TRIBAL NATIONS

When negotiating with Tribal nations, the type of agreement will depend on the project's location, required permits, and potential impacts. In some circumstances, Tribal consent is required by U.S. law, but generally Tribal consultation suffices and federal processes identify and assess Tribal impacts rather than cede decision-making authority. This section covers when consent or consultation apply according to federal law, and how these requirements shape the type of agreement a developer will negotiate.

For projects on Tribal trust land, a developer must execute a right-of-way and/or surface or mining lease, all of which require Tribal consent. These agreements are subject to various federal laws and BIA regulations[73] and generally necessitate that a developer receive Tribal consent and subsequent approval from the federal government, unless the Tribal nation has independent permitting approval for the specific type of lease.[74] In the process of seeking the consent of a Tribal nation, developers must often negotiate terms that go beyond simple real estate payments and–similar to development agreements with other governmental entities like cities, counties and states–include various modes of consideration such as workforce development, education, regulation of project activities, and Tribal ownership or revenue interests. This is not only expressly contemplated by many of the applicable federal regulations[75] but has also become common practice as Tribal nations seek to expand capacity, create more on-reservation opportunities, and take equity stakes in projects on their lands.

For projects that are outside of Tribal lands but require a federal permit, the consent of the Tribal nation is not required by U.S. law. Instead, the U.S. must consult with potentially impacted Tribal nations to identify effects to Tribal treaty and ancestral resources. Identification of effects occurs through government-to-government consultation, which is conducted by the lead agency during the environmental permitting process pursuant to the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).

Agreements with Tribal nations are not required when project development and permitting only necessitate Tribal consultation. However TBAs still often prove useful in these instances, as they provide an opportunity for project developers to negotiate directly with Tribal nations, which is often more beneficial than negotiating indirectly through the post-permit application Tribal consultation process and with the United States as trustee. These private benefit agreements can be secured in advance of or in parallel with other permitting activities and can include consideration and benefits outside of those prescribed by regulations, which are typically limited to site mitigation or avoidance. By negotiating directly with Tribal nations and executing TBAs, a project can abate the issues and limitations of Tribal consultation and achieve more durable Tribal support in the permitting process.

73 25 CFR Part 162 Leases and Permits; 25 CFR Part 169 Rights-of-Way over Indian Land.

74 Under the HEARTH Act, a Tribal nation can petition the Department of Interior for independent permitting authority by gaining federal approval of the Tribal leasing regulations are submitted and approved by the Secretary of the Interior, the Tribal nation is authorized to negotiate and enter into surface leases under their approved HEARTH Act regulations without further approval from Interior or the BIA. Independent HEARTH Act authority only applies to business leases, agricultural leases, wind and solar leases (WSR), wind energy evaluation leases (WEEL), residential leases, and leases for religious, educational, recreational, cultural, or other public purposes. Notably, oil and gas leasing is subject to the Indian Mineral Leasing Act and related regulations. Additionally, Tribal authority is limited to Tribal trust and/or restricted land, not to lands held in trust for individual Indian landowners, or fee lands or fractionated interests on the Reservation.

75 Regulations applying to rights-of-way over Indian lands expressly state that a right-of-way may provide for non-monetary or varying types of compensation including throughput fees, a percentage of profits, or other payments and consideration that a Tribe deems to be in its best interest. 25 CFR § 169.118.

ON-THE-GROUND PATTERNS IN THE USE AND DEPLOYMENT OF TRIBAL BENEFIT AGREEMENTS

Direct agreements between private companies and Tribal nations have been common in the U.S. for 25 years or more. Many Tribes are experienced with negotiating agreements and have procedures and protocols in place for project proponents to follow throughout the negotiation process. The negotiation process varies a great deal from Tribe to Tribe, and companies can look to the Tribal nation's governing documents to see who will need to approve an agreement–for example, if they have a Tribal Council or General Council form of government, and whether the Council has delegated authority to any committees to act on their behalf.

METHODOLOGY NOTE

The information in this section and most of the subsequent sections,[76] as well as some of the information in the introduction to this report, was drawn from Zoom interviews conducted in May and June 2024 with eight experts who have direct experience with agreements made between Tribes and companies. Three interviewees chose to be kept anonymous, two chose to be named only in the acknowledgments, and three chose to be named and cited for their contributions. Interviewees who chose to be cited are cited where we reference information specific to only their interview. We do not cite interviewees where multiple interviewees agreed on a point (as was most common), or where discussing a point shared by a single interviewee who chose not to be cited. Where information came from only one interviewee who chose not to be cited, we note that with "an interviewee stated…" to indicate that the information came from a single source.

Further, the number and form of agreements depends on the preference of Tribes and companies. Some will negotiate an overarching agreement for an entire project, while others will negotiate separate agreements for different categories of benefits or for different aspects of impact management. Agreements are often tied to the phase of project development; there may be separate agreements for the exploration phase, pre-construction phase, and operational phase, and over the lifetime of a project agreements will involve different companies as projects are sold and change ownership.

In our research, interviewees emphasized that agreements are extremely varied and diverse in their contents. There is a wide spectrum of agreement quality and outcomes–ranging from agreements providing minimal benefits, often focused primarily on employment or infrastructure, to agreements providing substantive benefits including the ability for Tribal nations to shape projects and control what happens on their lands.

Most interviewees agreed that the use of agreements has been expanding, both in the U.S. and internationally. In the U.S. the use of agreements has increased in the past few years as companies have recognized that they need to engage meaningfully with Tribes not only about projects on Tribal lands, but also those within treaty areas and within significant cultural areas. Additionally, agreements are spreading into new sectors–until recently, agreements were overwhelmingly used in extractive industries, but now they are increasingly being used in renewable energy projects, forestry, etc.

One interviewee noted that they have experienced a few instances where a Tribe negotiated an agreement with a developer for a project off-reservation, but then found that their internal political realities made it untenable for them to sign an agreement with a mining company. Where the Tribe had negotiated beneficial provisions, sometimes those terms were incorporated into permit requirements, and some were voluntarily implemented by the company. While informal arrangements are not at all a best practice, this example highlights how on-the-ground realities can be complex. For the company, the relationship with the Tribe may be worth the investment of providing benefits even without a formal agreement.

76 The subsequent sections "Interest in and Drivers for Signing TBAs," "Tribal Benefit Agreement Provisions Common Across Projects," "Shifting Trends Over Time," "Poor Practices and Past Patterns," and "Best Practices" are all based on interview data.

INTEREST IN AND DRIVERS FOR SIGNING TBAs

Interest in agreements varies widely across, and within, Tribes. Interest in agreements also varies widely across companies, though interviewees noted that company interest in agreements is increasing as awareness has grown of the benefits for companies in terms of risk management and risk mitigation. This table highlights some examples of reasons Tribes and companies may or may not be interested in TBAs.

REASONS TRIBES AREN'T INTERESTED IN TBAs	REASONS COMPANIES AREN'T INTERESTED IN TBAs

• Don't want to forgo the ability to influence a project by entering into an agreement, if the terms require them to support the project
  • *Concerned about the adverse effects a project would have on what they value or on their priorities, goals, and interests*
  • *Proposed project site is of particular significance to the Tribe*
• Previous bad experiences with negative impacts of projects
	• The priority companies place on keeping project costs low may disincentivize spending time and money on an engagement and negotiation process, or disincentivize benefit sharing
	• Project is in a context where an agreement is not legally required
	• Do not want to be held accountable to commitments when future profits or the economy are uncertain

REASONS TRIBES ARE INTERESTED IN TBAs	**REASONS COMPANIES ARE INTERESTED IN TBAs**

• Can be an opportunity to receive a share of project benefits, to participate in defining these benefits, and for effective protective mechanisms to be put in place
• Can provide security, leverage, and the ability to control what happens on their lands, if the TBA includes provisions regarding Tribal input into and oversight of aspects of the project's business decisions and operations
• Agreements can provide certainty and clarity regarding:
  • *How a project will be operated*
  • *The amount of money received from the project, in the case of fixed payment structures*
  • *How cultural and environmental impacts will be managed*
• The Tribe has experience engaging with a particular type of industry
  • *This could be a positive prior experience, or the Tribe may have built up supplier businesses and workforce capabilities in that industry and is keen to ensure they get to participate meaningfully in those economic opportunities*
  • *Alternatively, the tribe's previous experience may have been negative, but they might pursue a TBA to address a trust deficit and provide assurance that the same experience won't happen again*
	• Project is in a context where an agreement is legally required
	• Negotiating agreements has been increasingly acknowledged as a best practice
	• Reputation
	  • *Meaningful engagement and respectful negotiation of agreements supports social license to operate*
	  • *Mitigates reputational risk by insulating against local, national, or global allegations of ignoring or violating Indigenous Peoples' rights*
	• Supports access to capital through investors who use metrics and ratings tied to sustainability as determining investment factors, and emerging sustainability bonds that can be tied to FPIC and Indigenous relationships
	• Operational stability
	  • *Federal requirements for Tribal engagement are triggered very late in the project timeline–during permitting, after developers have already invested a lot of money into project design. Instead, engaging with Tribes as sovereigns at the outset of a project de-risks the project–the company can deepen their understanding of Tribal priorities and include this information in project decisions, including project siting. This way, by the time the company applies for permits they will already know that the project site will work*
	  • *This stability is also appealing to investors*
	• A positive relationship with a Tribal nation, built on the foundation of an agreement, means the nation will likely be more supportive of the company and the project in the long-term, which supports smooth operations

CASE STUDY:
ANAHOLA SOLAR PROJECT

Genuine partnerships with Native communities can provide projects with increased chance for success and mutual benefit. The Anahola Solar Project is the largest solar array in Hawaii.[77] The 12 megawatt solar farm sits on 60 acres of Native Hawaiian land on the island of Kauai[78] and generates 20% of the island's electricity during daylight hours.[79] The project has reduced carbon emissions by 18,000 tons annually,[80] and it generates electricity at nearly half the cost of electricity generated by imported fossil fuels.[81]

The project was developed within a unique legal context–Hawaii is the only location in the U.S. where both the state and federal government are involved in the administration of Tribal lands. The Hawaiian Homes Commission Act of 1920 (HHCA) is a federal law which established a land trust for native Hawaiians to receive allotments of land.[82] In the Hawaii Statehood Act of 1959, the federal government required the new state government of Hawaii to take on the day-to-day administration of the HCCA, and the State of Hawaii adopted the HHCA as state law through its constitution.[83] The state agency responsible for the administration of the HHCA is the Department of Hawaiian Homelands (DHHL).[84] In Hawaii, Homestead Beneficiary Associations are self-governing Tribal entities which represent the interests of, and provide services to, HCCA enrolled Hawaiians.[85] Both the state DHHL and the U.S. Department of the Interior partner and consult directly with HBAs on issues concerning the HHCA,[86] which creates an added layer of complexity for projects on Hawaiian Home Lands.

The Anahola Solar project was co-developed via a partnership between the Anahola Hawaiian Homestead Association (AHHA) as the Tribal entity; the 501(c)(3) Homestead Community Development Corporation (HCDC), which is the designated Tribal nonprofit of the AHHA and of a number of other homestead associations, and which effectuated the project's homestead benefit agreement; the Kauai Island Utility Cooperative (KIUC) as the project developer; and the Department of Hawaiian Homelands (DHHL). Native Hawaiian homesteaders were a significant part of the project development team,[87] and the project demonstrates how centering Native priorities and self-determination throughout the development process creates successful projects and good relationships between partners in the long-term.

In May 2012, KIUC (the project developer) and HCDC (the designated Tribal nonprofit representing the Tribal entity) executed a homestead benefits agreement for the Anahola Solar Project.[88] The agreement encompassed economic and educational benefits including local hire and local subcontracting; market value land revenues paid to the Hawaiian Home Land Trust; annual lectures about renewable energy at the local public charter school; annual payments made to the Anahola homestead to fund cultural and educational community based programs; and community oversight over the lifetime of the project via a solar project advisory committee.[89] In addition to creating jobs in the region through economic development, the agreement included workforce development education and capacity building in solar projects.[90] The terms of the agreement allow AHHA and HCDC to have control over how the benefits are implemented, as well. The agreement required KIUC to provide HCDC with a share in the developer fee at the front end of the project, which HCDC used to fund staff time, consultation sessions, etc.[91] HCDC conducted all consultation sessions for the project, and was also responsible for all of the job fairs, which allowed them to recruit as many Hawaiians and local people as possible to work on the construction portion of the project.[92] The agreement requires that HCDC receive a 1% share of the value of the energy produced from the project for the life of the project–HCDC deploys these funds in Anahola for youth programming and economic development.[93] The agreement also calls for the project's executive leadership to meet annually, and includes a decommissioning requirement at the end of the project.[94]

Significantly, the homestead benefit agreement required that there be signage displayed on site at the Anahola Solar Project stating that it is located on Hawaiian Home Lands.[95] This was important to AHHA and HCDC because over the last century, the State of Hawaii and the territory before the state would issue native Hawaiian lands to their own connections, and over time, people would forget that these lands are indeed native Hawaiian trust lands.[96] The signage on site serves as an important reminder.

The project also includes a separate lease agreement between the project developer and the State. The Hawaiian Homes Commission (HHC) originally issued KIUC a 25-year license, but KIUC requested the license be replaced by a general lease agreement to leverage for financing.[97] DHHL and KIUC negotiated for 5 months, including a community engagement process, before HHC approved the new 25-year general lease. The lease includes rent payments to be adjusted over time based on fair market value, and an option for DHHL to withdraw the lands at the end of Year 25 and have KIUC transfer the solar farm to DHHL.[98] Additional terms included adjusting the planned solar panel locations to leave 2 acres of land fronting the highway open and an option for DHHL to withdraw that land from the lease at any time.[99] KIUC agreed to construct a service road improvement; to pay DHHL for a roadwork and facility fund for the Anahola region; to pay to restore the site to its original condition at the end of the lease term; and to provide grants to reduce energy and utility costs for the Anahola community.[100] Lastly, the lease agreement requires KIUC to provide publicly available annual reports to DHHL on their separate homestead benefits agreement with HCDC, disclosing the amounts paid and activities undertaken to benefit the Anahola community.[101]

The unique legal context of Hawaii introduced challenges and complexity to the agreement process. The original approach to the project was for the State (DHHL/HHC) to issue the land to the Tribal entity (AHHA/HCDC), which would then sublease the land to the project developer (KIUC).[102] However, the State refused, leased the land directly to KIUC, and further, attempted to void the homestead benefits agreement that HCDC and KIUC had negotiated. To their credit, KIUC refused to renege on the terms they had agreed on with HCDC and honored the agreement anyways, maintaining a strong relationship with AHHA/HCDC. This is a powerful example of how project proponents can engage directly with Tribal governments to negotiate and uphold agreements, outside of the state or federal process.

The solar array began operating in 2015,[103] and in 2023, KIUC completed the Anahola Service Center on the project site. In 2024, KIUC was selected to receive funding from the U.S. Department of Agriculture's Powering Affordable Clean Energy program to install battery energy storage systems at the Anahola Solar Project.[104] The addition of battery energy storage systems will allow the facility to provide renewable electricity to the grid during evening hours when electricity use peaks, further reducing reliance on fossil fuel-generated electricity in the community. Anahola Solar is an example of a co-designed, mutually beneficial project which simultaneously addresses native Hawaiian priorities, provides benefits to the Anahola community, supports KIUC's goal of expanding their renewable energy footprint, and contributes a significant amount of renewable energy to the island of Kauai.

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90 Personal Correspondence from Robin Danner, former Chairwoman, Sovereign Council of Hawaiian Homestead Associations; former Vice President, Anahola Hawaiian Homestead Association; and current Policy Director, Sovereign Council of Hawaiian Homestead Associations, to Melanie Matteliano, Research Manager, Tallgrass Institute (Apr. 27, 2024) (on file with Tallgrass Institute).

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TYPES OF PROVISIONS IN BENEFIT AGREEMENTS WITH TRIBAL NATIONS

Understanding the reasons for a TBA with a Tribal nation is the first step; the second is to identify its scope–i.e., the terms of use, benefit, and impact management. Some provisions are common across all types of projects. Other features of TBAs are particular to the specific type of project, project geography, and particular Tribal nation.

The biggest takeaway from our interview research was that every agreement is different. Interviewees stated that there is a wide spectrum of variation in the kinds of provisions and in the overall quality and strength of the provisions included in agreements. As noted above, there may be separate agreements for the exploration phase, pre-construction phase, and operational phase of a project, and these agreements usually include different benefits–exploration-phase agreements may offer more minimal benefits, while pre-construction and operational phase agreements include more substantive benefits.

TRIBAL BENEFIT AGREEMENT PROVISIONS COMMON ACROSS PROJECTS:

Interviewees reported that TBAs commonly include some of the following types of provisions. This is not an all-inclusive list. Rather, these are some examples shared by interviewees to provide a sense of the scope of agreements and the kinds of provisions used to provide benefits and manage impacts:

HIRING/WORKFORCE DEVELOPMENT PROVISIONS: This includes Native employment targets or hiring quotas, often using a tiered system that first prioritizes members of the specific Tribal nation, followed by prioritizing Native Peoples more broadly. This also includes supportive provisions such as free job training, skill-building, and workforce development, for example skill-building on how to navigate a career in that industry, financial literacy, job safety, and specific role skills. Provisions may include career fairs and outreach to Tribal members about industry careers–including outreach to youth, returning military veterans, adults coming out of the justice system, etc. Workforce provisions may also include culturally-relevant accommodations for employee retention–for example by providing Native employees with cultural heritage leave to participate in ceremony or in traditional seasonal activities.

SUPPLY CHAIN/CONTRACTING PROVISIONS: Economic participation in a project goes beyond careers with the company and includes procurement and indirect business opportunities. TBAs can include preferential purchasing from Native businesses, service providers, or contractors, and potentially investment into these businesses. These may be businesses owned by individual Tribal members, or by the Tribal nation itself. Companies might also hire the Tribal nation to conduct studies related to the project, or to do cultural resource monitoring.

Further, TBAs can also include provisions to support entrepreneurial ecosystems and encourage business development for suppliers to the project and other businesses that indirectly benefit from the presence of the project (e.g., restaurants, local mechanics, etc.). TBAs can include provisions to build business capability to effectively bid and safely deliver on jobs for the project, making businesses competitive and therefore less reliant on the one project for long-term sustainability. Provisions addressing access to capital, whether through a direct loan or by partnering with a third party financial institution with specifically crafted lending requirements, can support Tribal businesses to grow and expand.

FINANCIAL COMPENSATION: Financial compensation can take a wide variety of forms, including one time direct payments; annual payments; payments tied to the project's production; a share in revenue; or payments tied to specific project activities, such as drill-hole fees in exploration-phase agreements.

FUNDING TO SUPPORT TRIBAL PARTICIPATION IN NEGOTIATIONS AND/OR PERMITTING PROCESSES: Many Tribes, particularly those whose lands are rich in development opportunities, are overwhelmed with a large number of companies calling for their time–attending meetings, reviewing thousands of pages of reports, dealing with permit timelines, and participating in negotiations all take time and can put strain on Tribal capacity, particularly as company engagements happen alongside and in addition to all of the other work Tribal nations do to fulfill their responsibilities to their citizens.

As such, companies may provide financial support for the Tribe to be able to fully participate in negotiation of the agreement. This might include funding for the time Tribal employees spend engaging with the company and the time they spend evaluating project documents, such as environmental impact assessments and cultural heritage or ethnographic reports produced by the company; funding to cover costs related to participation in project permitting; or funding for the Tribe to conduct engagement with their citizens in order to make decisions about whether to consent to the project.

TRAINING FOR TRIBAL LEADERS: Prior to or during the negotiation process, companies may offer to pay to send Tribal leaders to conferences or trainings related to the specific industry or to the type of technology the project is using, so that Tribal leaders are more informed when making decisions in negotiations.

TRAINING AND EDUCATION FOR PROJECT DEVELOPERS, CONTRACTORS, AND COMPANY EMPLOYEES: TBAs may include provisions requiring the company to provide education for their employees to prepare them to work well in partnership with the Tribe. This may include training on how to work with Tribes, education for non-Native employees about Native culture, and training to reduce or prevent discrimination against or harassment of Native employees in the workplace.

Internationally, an interviewee stated that there are agreements that contain provisions regarding control of the workers in construction camps, for example by requiring workers to be flown in and out for their shifts, in order to minimize impacts on the Indigenous community by limiting the time workers from outside the community spend at the project site.[105]

RELATIONSHIP-BUILDING PROVISIONS: An interviewee shared that some TBAs contain language stating the intent of the company and the Tribe to build and maintain relationships based on trust, respect, transparency and partnership.

SUPPORT FOR TRIBAL COMMUNITY INFRASTRUCTURE PROJECTS: Another common provision is companies providing funding for, or sharing costs in, community infrastructure projects. Companies might also support projects by providing technical assistance. Sometimes infrastructure projects are related to the company's expertise, for example, a solar company helping a Tribe develop solar projects on their reservation, or a power company helping a Tribe tap into a transmission line project. In other cases, infrastructure projects may not be related to the company's expertise, but are simply projects that the Tribe wants. A third category is projects related to mitigating impacts, such as the company completing projects to mitigate infrastructure impacts on local roads via traffic management and road maintenance.

Further, interviewees noted that Tribes often leverage money from companies as matching funds to unlock federal funding for infrastructure projects. The company will also support with technical assistance applying for that funding, or may partner to build another portion of the project. Lastly, in many cases companies will already be planning to build infrastructure related to their proposed project, such as roads or cell phone towers. Agreements can include provisions allowing Tribal citizens to also use this infrastructure.

FUNDING FOR TRIBAL PROGRAMS: Agreements will often include provisions for companies to provide funds to the Tribal government's programs for their citizens, for example education and skills development, elder assistance, winter heating assistance, food security, research into Native foods, justice center programs, justice to jobs programs, early childhood development, funding for the Tribe's schools, or scholarships for their students.

PROVISIONS FOR CELEBRATING, PROTECTING, AND PRESERVING CULTURAL HERITAGE: These provisions address the celebration and preservation of both the tangible and intangible cultural assets of the Tribe, and may specify how the company will engage with the Tribe around cultural heritage, and how cultural heritage will be preserved. Some Tribes have specific protocols around management of cultural heritage impacts for the company to follow. In an example shared by an interviewee, a company provided funds for the rematriation of cultural property and human remains that might be unearthed during project construction. When not all of the funds were used during construction, the company transitioned the funds for the Tribe to rematriate any of their cultural property more broadly, so the Tribe used the funds to buy back stolen items that were on sale publicly.

Agreements can also outline the inclusion of Indigenous knowledge and Tribal guidance in project siting and design so that cultural practices are respected. This includes ensuring sacred sites are protected, and enabling continual use of land for traditional hunting and harvesting practices. Agreements often also include provisions regarding the hiring and payment of cultural monitors. Cultural heritage provisions may also include funding for infrastructure projects such as cultural centers or museums, or funding for programs to maintain the Tribe's native language, for an oral history program, or for cultural programs for youth.

105 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024).

PROVISIONS ADDRESSING ENVIRONMENTAL IMPACTS: This can include provisions regarding mitigation of environmental impacts during project construction and operations; provisions requiring land reclamation and remediation during the project or after the project concludes; and provisions requiring the company to work with the Tribe to use Indigenous knowledge in these processes. Some Tribes will require companies to share with them all of the information and written materials that the company provides to the EPA or other regulatory agencies. Agreements may also require the company to pay for Tribal-selected technical support to review environmental regulatory reports; project plans, etc.

An interviewee noted that while this may not always appear as a provision in the agreement itself, it is common for the Tribe and company to co-develop an environmental participatory monitoring program that can include air, water, dust, flora, and fauna. In an example shared by another interviewee, an agreement included Tribal environmental monitoring provisions, and the company worked with the Tribe to set up a certificate program at a local Tribal college so the Tribal monitors could also be certified as archaeological technicians, so that they could serve two roles, get paid higher wages, and be certified to work on other projects (as monitoring a single project isn't a full-time job).

REPORTING PROVISIONS: Agreements may set out requirements for the company to provide specific kinds of information in update reports to the Tribe, and also for the Tribe to provide reports on some or all of the requirements of the Tribe as laid out in the agreement.

TRIBAL INPUT PROVISIONS: Agreements may require the Tribe to provide timely input throughout the project permitting process to support the company's project timeline. And, related to the project permitting process, agreements may sometimes require the Tribe to bring issues to the company first to work through together, before giving that feedback to regulators. Often agreements will include provisions stating the intent of the company to provide sufficient, accurate, and transparent information to the Tribe in a timely manner such that they can evaluate and consider responses in time to notify the company of any concerns ahead of regulator timelines.

MECHANISMS FOR DISPUTE RESOLUTION AND COMPLAINT/GRIEVANCE MANAGEMENT: Agreements typically include provisions addressing how complaints, grievances, and disputes will be handled. One interviewee noted that it is most effective for companies to design a complaint and grievance mechanism that is well known, trusted, and accessible to everyone–including their own workforce, Indigenous stakeholders, and non-Indigenous stakeholders. Mechanisms for dispute resolution are often formalized in agreements, including an escalation process delineating what happens when the parties cannot resolve an issue between themselves–most often this is a mediation arbitration provision. However, an interviewee noted that generally, companies and Tribes will try to resolve issues outside of that escalation process if possible. Interviewees stated that most often agreements are binding and can be enforced by the Tribe against the company and by the company against the Tribe, but in some cases, when the agreement does not contain a waiver of sovereign immunity, agreements are only enforceable by the Tribe against the company. Interviewees reported that most agreements do contain a limited waiver of sovereign immunity, dictating certain conditions that must be met for the waiver to be invoked, and specifying which jurisdictions are available for dispute resolution, typically allowing for enforcement in federal court. Importantly, an interviewee noted that a Tribe choosing to limit their sovereignty in this way is, in itself, an exercise of sovereignty.

CREATION OF COMMITTEES: One interviewee shared that agreements often create committees which focus on implementing particular areas of the agreement, generally dictated by the priorities of the Tribe. For example, an agreement may create an environmental committee, an employment committee, and a cultural heritage committee, each of which have both community representatives and company representatives on them to ensure agreement implementation and opportunities in those areas are maximized.

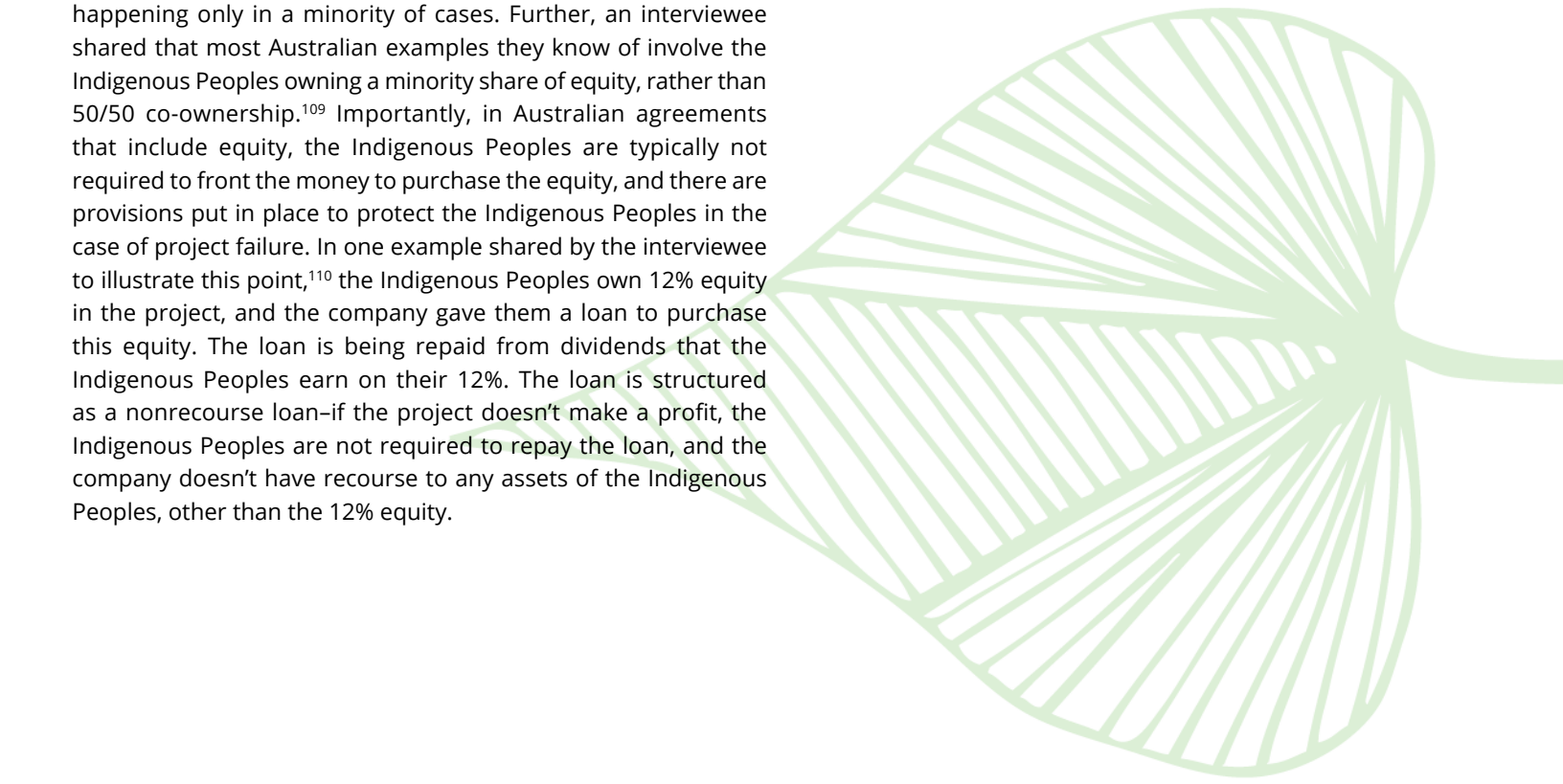
EQUITY PARTICIPATION IN OR CO-OWNERSHIP OF THE PROJECT: Interviewees reported that they are not seeing many agreements in the U.S. that include Tribes having equity in or co-ownership of projects. One interviewee suggested that perhaps this is because many projects involve activities which yield a relatively low monetary return on investment.

Interviewees stated that equity participation is becoming more common in Canada, though one interviewee shared that it is still not as common as many people think it is. Further, an interviewee stated that in Canada equity participation is more common in projects on First Nations' reserves compared to off-reserve projects, because of the perspective that in on-reserve projects First Nations are contributing their land to the project. The Government of Canada,[106] as well as the provinces of Alberta, Saskatchewan, and Ontario,[107] have each set up Indigenous loan guarantee programs to support Indigenous equity participation in projects, and British Columbia is also developing an equity financing framework for First Nations.[108]

Interest in equity is also growing in Australia, and equity provisions are appearing in some agreements there, but currently this is happening only in a minority of cases. Further, an interviewee shared that most Australian examples they know of involve the Indigenous Peoples owning a minority share of equity, rather than 50/50 co-ownership.[109] Importantly, in Australian agreements that include equity, the Indigenous Peoples are typically not required to front the money to purchase the equity, and there are provisions put in place to protect the Indigenous Peoples in the case of project failure. In one example shared by the interviewee to illustrate this point,[110] the Indigenous Peoples own 12% equity in the project, and the company gave them a loan to purchase this equity. The loan is being repaid from dividends that the Indigenous Peoples earn on their 12%. The loan is structured as a nonrecourse loan–if the project doesn't make a profit, the Indigenous Peoples are not required to repay the loan, and the company doesn't have recourse to any assets of the Indigenous Peoples, other than the 12% equity.

Interviewees stated that while there is strong interest in equity right now, Tribes and companies are still figuring out how best to structure these deals. Interviewees said it can be complicated to figure out the legal structure for equity, what equity actually means, and what the implications are for the Tribe's responsibility in the project. An interviewee stated that equity can also be challenging for projects owned by publicly held companies, as these companies cannot give equity in a specific project, but can only offer shares in the company as whole or in a subsidiary company.

Interviewees also pointed out that equity can create risks for Tribes which Tribes should carefully consider, and recommended that Tribes require safeguards to be put into place when taking on equity, such as nonrecourse loans as described in the example above. Ultimately, while interviewees considered equity an important option for Tribes, they also felt that the current rhetoric which assumes that equity is the only approach worth pursuing doesn't seem accurate, as equity may not be a fit for every Tribe or every project, depending on the Tribe's goals and priorities.



106 *Government of Canada Celebrates Launch of the $5-Billion Indigenous Loan Guarantee Program*, Natural Resources Canada (Feb. 21, 2025), https://www.canada.ca/en/natural-resources-canada/news/2025/02/government-of-canada-celebrates-launch-of-the-5-billion-indigenous-loan-guarantee-program.html.

107 *Current and Announced Funding Programs for Indigenous Equity in Canada*, Fasken (Apr. 2, 2024), https://www.fasken.com/en/knowledge/2024/04/current-and-announced-funding-programs-for-indigenous-equity-in-canada.

108 *Establishment of BC First Nations Equity Financing Framework in Budget 2024:* A Strong Step Toward Economic Reconciliation, First Nations Major Projects Coalition (Feb. 22, 2024), https://fnmpc.ca/blog/establishment-of-bc-first-nations-equity-financing-framework-in-budget-2024-a-strong-step-toward-economic-reconciliation/.

109 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024).

110 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024).

CASE STUDY:
HYDRO ONE EQUITY MODEL

There is growing interest in models that include Indigenous co-ownership of or equity in development projects. The Waasigan Transmission Line project[111] is an equity model that centers First Nations partnerships. In May 2022 Hydro One made an agreement with Gwayakocchigewin Limited Partnership (GLP), a consortium of eight First Nations comprising Eagle Lake First Nation, Fort William First Nation, Gakijiwanong Anishinaabe Nation, Lac Seul First Nation, Nigigoonsiminikaaning First Nation, Seine River First Nation, Wabigoon Lake Ojibway Nation, and Ojibway Nation of Saugeen.[112] In November 2022, Lac de Mille Lacs First Nation also signed an equity agreement with Hydro One.[113]

The agreements allow the First Nations to invest in a 50% equity stake, so the project is jointly owned by the nine First Nations and Hydro One. With the support of its First Nation partners, in June 2023 Hydro One filed an application with the Ontario Energy Board (OEB) to build and operate the transmission line,[114] and in April 2024 the OEB granted approval for Hydro One to construct the project.[115] The partners broke ground on the project in November 2024.[116]

The Waasigan Transmission Line project illustrates how equity models can advance reconciliation by rectifying previous extractive models widely implemented in development projects on Tribal nations' lands and territories. The project also shows the value of First Nations partnership and advocacy in shaping project design and meaningful project benefits. The GLP focuses on eight guiding principles: 1) ownership and control over development in their homelands; 2) meaningful consultation and accommodation for impacted lands; 3) sharing of benefits; 4) employment, training, and business opportunities; 5) environmental protection and monitoring; 6) traditional knowledge, land use, and cultural awareness; 7) trust and relationship-building with Hydro One; and 8) reconciliation.[117] For the GLP, while equity ownership is an important aspect of the Waasigan project, it is also crucial that the partnership has allowed them to give meaningful input into the project and how it is developed, to ensure that it is carried out in a way that includes and respects their traditional knowledge and cultural values.[118]

Hydro One plans to apply their Equity Partnership Model to all their future transmission line projects with a value over $100 million,[119] and is already employing it in five new lines they are developing.[120]

111 *Waasigan Transmission Line Project*, Hydro One, https://www.hydroone.com/about/corporate-information/major-projects/waasigan.

112 *Gwayakocchigewin Limited Partnership and Hydro One Enter into an Agreement to Advance the Waasigan Transmission Line Project*, Hydro One Inc., (May 4, 2022), https://www.newswire.ca/news-releases/gwayakocchigewin-limited-partnership-and-hydro-one-enter-into-an-agreement-to-advance-the-waasigan-transmission-line-project-840034449.html.

113 *Hydro One and Lac des Mille Lacs First Nation Sign Equity Agreement for the Waasigan Transmission Line Project*, Hydro One Limited, (Nov. 18, 2022), https://www.newswire.ca/news-releases/hydro-one-and-lac-des-mille-lacs-first-nation-sign-equity-agreement-for-the-waasigan-transmission-line-project-897897550.html.

114 Hydro One with the Support of Nine First Nations Partners Seeks Approval to Construct the Waasigan Transmission Line Project from the Ontario Energy Board, Hydro One Inc., (Jul. 31, 2023), https://www.prnewswire.com/news-releases/hydro-one-with-the-support-of-nine-first-nations-partners-seeks-approval-to-construct-the-waasigan-transmission-line-project-from-the-ontario-energy-board-301889689.html.

115 *OEB Grants Hydro One Leave to Construct a New Transmission Line in the Regions of Thunder Bay, Rainy River and Kenora*, Ontario Energy Board, (Apr. 18, 2024), https://www.oeb.ca/sites/default/files/HONI-Waasigan-EB-2023-0198-Backgrounder-FINAL.pdf.

116 Sean Wolfe, *Hydro One, First Nation Partners Break Ground on $1.2B Waasigan Transmission Line Project*, Factor This, (Nov. 27, 2024), https://www.renewableenergyworld.com/power-grid/transmission/hydro-one-first-nation-partners-break-ground-on-1-2b-waasigan-transmission-line-project.

117 Welcome, Gwayakocchigewin, https://glp-fn.ca/.

118 Personal Correspondence from Daniel Morriseau, President, Gwayakocchigewin Limited Partnership, to Melanie Matteliano, Research Manager, Tallgrass Institute (Apr. 27, 2024) (on file with Tallgrass Institute).

119 *Hydro One Launches Industry-Leading 50-50 Equity Model with First Nations on New Large-Scale Transmission Line Projects*, Hydro One, (Sep. 22, 2022), https://hydroone.mediaroom.com/2022-09-22-Hydro-One-launches-industry-leading-50-50-equity-model-with-First-Nations-on-new-large-scale-transmission-line-projects.

120 Hydro One Indigenous Partnerships, Hydro One, https://www.hydroone.com/about/regulatory/hydro-one-indigenous-partnerships.

PROVISIONS SPECIFIC TO TYPE OF PROJECTS:

Different projects create different kinds of impacts on Tribal lands, resources, and citizens. Given this, TBAs may seek to account for the particular impacts of a certain type of project, and to meaningfully include the Tribe's Indigenous knowledge in impact management plans.

UTILITY-SCALE WIND AND SOLAR: These land intensive, singular location projects often include provisions regarding access to private lands for cultural survey or the development of project infrastructure that may be mutually beneficial for Tribal use and development, such as road improvements, fencing, and microgrid development and access.

OFFSHORE WIND: Development of offshore wind will often result in TBAs focusing on historical fishing and aquatic rights, including fishing and monitoring of shoreline ecosystems.

PUMPED STORAGE AND HYDROELECTRIC: Similar to offshore wind, pumped storage and hydroelectric projects create significant impacts to water resources. In this vein, TBAs for these projects often include components related to fish passage, fish and water monitoring, and the operation of Tribal fishery operations.

TRANSMISSION INFRASTRUCTURE AND OTHER LINEAR PROJECTS: Siting and access are often central to TBAs related to transmission and linear infrastructure, with provisions addressing or providing Tribal access to infrastructure and strong support for Tribal participation in survey and construction monitoring.

MINING: Mining project benefit agreements often focus on siting of not only the mine but the significant related infrastructure, such as tailing ponds, as well as workforce development, Native procurement, and royalties.

AIR QUALITY AND WATER QUALITY/DISCHARGE PERMITS: While not a specific type of project, this specific permitting activity often promotes TBAs that address Tribal regulation of air and water, independent of and as part of EPA's Treatment as a State (TAS) program for Tribal nations, as well as Tribal monitoring and community impact support.

PROVISIONS PARTICULAR TO PROJECT GEOGRAPHY:

Generally, geographies provide some commonalities among projects and TBA considerations.

EAST COAST: While a few Tribal nations remain on the east coast, many with ancestral connections to the area were removed (frequently to Oklahoma) so TBAs for projects in the area often include funding for travel to the project area by those removed Tribal nations or the repurchasing of lands within a Tribal nation's ancestral areas.

PLAINS: Many Tribal nations in the Plains area maintain larger land bases that lack fundamental infrastructure due to historical inequities. TBAs for projects in the Plains often involve direct funding for the development of physical and economic infrastructure.

OKLAHOMA: Oklahoma is home to 39 Tribal nations, most of which were removed to their present-day locations based on promises of land and self-determination, promises that the U.S. frequently failed to uphold and whose status has been a matter of contention. As the recent Supreme Court case, *McGirt v. Oklahoma*, clarified, Tribal reservations in Oklahoma that were promised during the removal period remain today.[121] Since the case in 2020, many TBAs seek to provide some regulatory certainty by addressing these recognized reservations and Tribal authority over projects within their boundaries.

CALIFORNIA: California is home to 109 Tribal nations, nearly one-fifth of all Tribal nations in the U.S, and more than 100 reservations. Additionally, California state permitting and environmental laws recognize powerful Tribal rights. With this geopolitical and regulatory backdrop, many TBAs for projects in California seek to marry federal and state permitting requirements to address the differing cultural and natural resource connections of various Tribal nations.

PACIFIC NORTHWEST: Treaty rights for fishing and harvesting shellfish are of premium importance to many Tribal nations in the Pacific Northwest. TBAs for projects developed in this area tend to reflect this importance, as well as addressing the advancements Tribal nations in the area are making to address climate change and its impacts.

121 McGirt v. Oklahoma, U.S. (2020), "On the far end of the Trail of Tears was a promise. . . . Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word."

ALASKA: Alaska is home to more than 250 Tribal nations, all of whom share a unique structure and relationship to the United States uniquely governed by the Alaska Native Claims Settlement Act (ANCSA).[122] ANCSA created a corporate structure for holding Tribal resource rights, extinguishing aboriginal title and transferring rights to 12 regional corporations in which Alaska Native villages and their citizens were shareholders. This legal landscape differs significantly from lower 48 developments and TBAs for projects in the area must consider this–often involving both the village (a.k.a. Tribal) government and the village and regional corporations for various purposes and as recipients for differing benefits.

HAWAI'I: The United States fails to recognize the sovereignty of the Kingdom of Hawai'i, and therefore U.S. laws applying to federally-recognized Tribal nations do not apply in Hawai'i. Nevertheless Native Hawaiians have fought for and received certain rights and protections under U.S. law. Agreements for projects in Hawai'i tend to follow the homestead benefit approach, and are made with Homestead Beneficiary Associations as the self-governing Tribal entities which represent native Hawaiians enrolled in the Hawaiian Homes Commission Act (HCCA).

PROVISIONS UNIQUE TO THE PARTICULAR TRIBAL NATION SIGNATORY:

It is also important to recognize the key differences between benefit agreements with differing Tribal nations. Just like permitting a project in North Dakota will differ from permitting a project in California, so do the policies and political ethos of a Tribal nation impact the types of provisions in a TBA. Considerations for these differences include:

TRIBAL OPENNESS TO TYPE OF PROJECT: For example, some Tribal nations have passed bans on oil and gas development, while others have economies centered around it.[123]

CONNECTION TO LOCATION: The Tribal nation's connection to the project area will often play a significant role in the style and scope of a benefit agreement–differing for projects that are on Tribal lands or within reservation boundaries, versus within treaty areas, versus impacting ancestral and cultural resources.

TRIBAL ORGANIZATION AND AUTHORITIES: Tribal laws and authorities should be central to any TBA–from Tribal regulation and taxation to signatory authority. For example, how a Tribal nation is organized and who has authority to make decisions will often differ based upon the particular impacts of a project, so that CBAs could be entered into with, for example, the Tribal Council or with the Tribal Historic Preservation Office (THPO) or the natural resources or realty department–or some combination thereof. CBAs should always follow and, importantly, expressly reference relevant Tribal law.

TRIBAL NATION NEEDS AND PRIORITIES: The priorities of each Tribal nation are specific and unique. For example, some will be more interested in partnering with a company on workforce development and education, but have other partners or funding support for health and community facilities, or the reverse will be true.

ECONOMY AND AVAILABILITY OF FUNDING: Some Tribal nations already possess robust economies and financial assets, for those Tribal nations equity and ownership options are often part of benefit agreements.[124] Other Tribal nations can participate as partners based upon the availability of federal and philanthropic funding.[125] And still others will require significant financial investment by project developers for any kind of participation in the project design, permitting, and construction.

122 Alaska Native Claims Settlement Act, Pub. L. 92-203, 43 USC § 33 (1971).

123 *See* Long Range Energy Planning Report, Bad River Band of Lake Superior Ojibway (2020), available at https://www.badriver-nsn.gov/wp-content/uploads/2020/12/Long-Range-Planning-Report-FINAL.pdf. *See also*, MHA Nation Energy, available at https://mhanation.com/mha-energy.

124 Ulrich "Morongo tribe partners with Southern California Edison on upgrade to transmission line" *Desert Sun* (July 20, 2021).

125 Portland General Electric. Press Release. *U.S. DOE grants $250M to Confederated Tribes of Warm Springs, in partnership with PGE, for critical transmission upgrades.* (Oct. 18, 2023).

SHIFTING TRENDS OVER TIME

TRENDS IN TBAs OVER TIME

Agreements made within the permitting regime	**Agreements made directly with Tribes**
Employment and procurement targets	**Workforce development and careers**
Primarily impact mitigation and employment-related benefits	**Direct payments and community development partnerships as additional benefits**
Fixed payments	**Royalties based on revenue or volume of production**
A more limited array of project-related benefits	**Benefits that support the Tribal nation's broader goals**
Companies seeing Tribal engagement as risk mitigation	**Companies seeing Tribal *partnership* as a real benefit to their project**
Companies taking a transactional or extractive approach	**Meaningful partnerships**
Subjective, difficult-to-enforce agreements	**Objective, enforceable agreements**
Less focus on implementation	**More focus on implementation**
Evaluating projects individually	**Tribal nations evaluating projects cumulatively and holistically**

Interviewees highlighted several trends in agreements over time. These include:

A SHIFT FROM AGREEMENTS WITHIN THE PERMITTING REGIME TO AGREEMENTS DIRECTLY WITH TRIBES. In the U.S., the impetus for agreements was under the National Historic Preservation Act, which requires mitigation for cultural impacts. This meant that benefit provisions were often included as conditions in permitting agreements, and focused on funding for things that would mitigate cultural impacts, such as cultural centers, oral history projects, language programs to maintain Native languages, and youth education programs. Over time, agreements have migrated from being tied to the regulatory sphere into private agreements directly with Tribes–not mediated by the federal government within the permitting regime–and provisions turned more towards employment of Tribal members and contracting with Tribal businesses. However, regulations can still provide a "hook" for Tribal engagement and for an agreement.

A SHIFT FROM EMPLOYMENT QUOTAS TOWARDS WORKFORCE DEVELOPMENT AND CAREERS. Employment provisions in agreements initially focused on employment and procurement targets, as these approaches were imported to the U.S. from Canada. In the U.S. context many companies weren't meeting these targets; this led to a shift towards including workforce development provisions to get Tribal employees trained, licensed, and ready. Over time, employment provisions have also become more rigorous, detailed, and enforceable.

Further, there has been a shift where Tribes are leaning away from provisions that simply require companies to hire a certain percentage of Tribal members, to focusing instead on careers. Tribes want to make sure Native employees aren't just in low paid jobs, but that they move up into higher paying positions. To facilitate this, Tribes are focusing on job training and on ensuring that workplace culture is free of discrimination and harassment.

A SHIFT TOWARDS DIRECT PAYMENTS, AND CHANGES IN THE STRUCTURE OF PAYMENTS. In the U.S., direct payments and revenue sharing began happening more recently, spurred in part by a 2015 change in right-of-way (ROW) laws. Originally ROW laws limited Tribes to asking "fair market value" for the lease of their lands, which may not reflect the true value of those lands to the Tribe. The new ROW laws allow Tribes to value their lands in any way they see fit. For example, in the case of a ROW for a road or a transmission line, a Tribe might value their lands at a price equal to the amount it would cost to build a longer line or road going around the reservation, rather than going through it. Because companies often don't have the funds to pay what Tribes are asking for ROW up front, companies are looking at other ways to compensate Tribes, such as profit-sharing and throughput fees.

Internationally, very broadly speaking, there has been a move towards payments that are based on the value of minerals rather than fixed payments. Fixed payments were common 20 years ago, but there has been a move towards royalties based on revenue or volume of production.

In addition to including direct payments, agreements have also shifted to include community development partnerships as another important benefit.

A SHIFT TOWARDS TERMS THAT SUPPORT THE BROADER INITIATIVES OF TRIBES, AND A SHIFT TOWARDS PARTNERSHIP. Companies are recognizing that Tribes are sovereigns with their own goals, and provisions in agreements are increasingly aimed at supporting those goals. This has resulted in an industry-wide shift in how companies consider Tribes in projects, where Tribes are increasingly gaining capacity to negotiate for and secure benefits that meaningfully contribute to the tribe's goals.

Companies have also shifted from approaching Tribal engagement as risk mitigation, to seeing Tribal partnership as bringing real and meaningful benefits to their project. For example, the recent increase in federal funds for development projects has made Tribes more attractive as partners because they can bring those funds in as equity into the project. Further, Tribal partners contribute knowledge and insights to project design which can support long-term success, and positive relationships between companies and Tribal partners can help projects operate smoothly. As such, agreements are increasingly aimed at establishing meaningful partnerships between companies and Tribes.

However, while interviewees noted that partnership is an important trend, one interviewee stated that sometimes the word "partnership" is being used, particularly in Canada, in projects which actually do not contain objective commitments, allow for substantive participation from the Tribe, or share decision-making control with the Tribe.[126] Given the variation in how the word is being used, it is important to note that the term "partnership" may not be meaningful in some circumstances.

126 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

A SHIFT TOWARDS OBJECTIVE, ENFORCEABLE AGREEMENTS, AND INCREASED FOCUS ON IMPLEMENTATION. Internationally, there has been a move towards making company commitments stronger, more objective, and more measurable. For example, in the 1990s and 2000s there was language in Impact Benefit Agreements stating that the company will make their "best endeavors" on Indigenous employment.[127] In contrast, now agreements include targets and time frames that make benefits measurable. Agreements also include the building blocks required to achieve those targets, such as putting substantial resources into education and training.

In addition to making provisions objective and measurable, there is now a stronger focus on the implementation of agreements. There has been a trend towards requiring substantial reporting from the company back to Tribal nations, and towards requiring regular review of the TBA. TBAs may also contain provisions stating how feedback from reviews will be addressed. Regular reviews allow all parties to validate that all accountable parties are compliant with the agreement, and provide an opportunity to evaluate whether any committees formed through the TBA are functioning effectively. While the company funds the agreement review process, the design and execution of the review can be done collaboratively, depending on the terms in the TBA. When done collaboratively, reviews also provide opportunities for relationship strengthening, capacity building and deepening of cultural awareness.

Still, there is more work to be done on enforcement and implementation of TBAs. One interviewee stated that in their experience agreements in the U.S. do contain provisions regarding enforcement broadly, but they generally do not contain specific performance enforcement of the benefits,[128] leaving some gaps in accountability. Another interviewee shared that while all parties put a great deal of energy into negotiating agreements, sometimes less attention and energy goes into implementation–for example, each party may focus on ensuring that the provisions that matter most to them are implemented, while other provisions which are deemed less pressing or have less immediate impact may fall by the wayside. And, an interviewee experienced in the Canadian context stated that there is a need for further accountability mechanisms in Canadian IBAs too[129] Indigenous-led organizations like Pehta[130] are establishing systems, frameworks, and metrics for accountability.

A SHIFT TOWARDS TRIBAL NATIONS EVALUATING PROJECTS CUMULATIVELY AND HOLISTICALLY. There has been a trend towards Tribes looking at cumulative impacts–environmentally, economically, and socially–on their nation, across all projects on their lands, rather than thinking about each project individually. This can be challenging for companies, as each company is generally concerned with only its own project, timelines, permitting, etc. It is an important shift in Tribes exercising their right to self-determination as they consider how the total set of projects on their lands supports, or doesn't support, their goals.

127 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024).

128 *See* Christy Brown, Specific Performance Enforcement Clause, Brown Law PLLC (Jan 2025), https://brownfirm.law/glossary/specific-performance-enforcement-clause/.

129 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

130 Pehta Foundation, https://www.pehta.org/ (last visited Apr. 10, 2025); Pehta LP, https://www.pehta.com/ (last visited Apr. 10, 2025).

CASE STUDY:
CONFEDERATED TRIBES OF THE WARM SPRINGS AND PORTLAND GENERAL ELECTRIC

In many cases, partnering with a Tribe creates commercial and financial benefits. An example is Portland General Electric's (PGE) partnership with the Confederated Tribes of the Warm Springs (CTWS) on the Bethel-Round Butte transmission line upgrade. The transmission line was originally built in the 1960s as part of the Pelton Round Butte hydroelectric project,[131] which has been co-owned by PGE and CTWS since 2001.[132] Over the next eight to ten years, the new upgrade project will more than double the amount of electricity the line can transmit.[133]

The upgrade provides significant benefit to PGE and CTWS by providing increased capacity for the delivery of renewable energy in the region, and was made commercially feasible through partnership between the two entities. The upgrade will allow PGE to meet state renewable energy standards and increasing demand from customers in their service area, which includes about half of Oregon's population and two thirds of Oregon's commercial and industrial activity.[134] For CTWS, the expanded line will activate the utility-scale renewable energy generation potential of the Warm Springs Reservation by allowing the Tribe to interconnect to the grid and sell power. The reservation holds approximately 1,800 MW of solar generation potential and CTWS has long been interested in developing solar generation on their lands, in addition to possible geothermal development.[135] CTWS will participate in ownership of the new transmission capacity,[136] as the current capacity is fully owned by PGE.[137]

The project design included numerous reviews by Tribal members to ensure that the project will protect sacred lands and create jobs for community members.[138] Project benefits include opportunity for increased Tribal revenues via clean energy development; the creation and funding of a Minority Serving Institution/Minority Business Enterprise program; workforce development and training for Tribal members; Tribal member hiring preference; creation of an energy mentorship program for high school students to gain hands-on experience in energy careers; and an agreement that IBEW Local 125 will execute work off-reservation and all line work for the project under Collective Bargaining Agreements.[139]

As a project partner, CTWS was able to access federal funding available only to governmental entities. CTWS served as the lead applicant to the Department of Energy's (DOE) Grid Resilience and Innovation Partnership (GRIP) Program, and the project was awarded a $250 million grant.[140] Tribal participation and decision-making were key in the application's success–the DOE selected the project "because it commits to clean energy development with the integration of indigenous knowledge and traditional ecological wisdom into the project design," and "it includes tribal leadership in stakeholder decision-making discussions [...]"[141] The grant will cover roughly 40% of the project's costs,[142] making the project more commercially viable and illustrating the value of Tribal nations as unique partners who may be able to unlock substantial funding.

131 *PGE, Warm Springs Tribe to Upgrade Bethel-Round Butte Line to 500 kV*, News Data (Dec. 8, 2023), https://www.newsdata.com/clearing_up/supply_and_demand/pge-warm-springs-Tribe-to-upgrade-bethel-round-butte-line-to-500-kv/article_635249dc-95e9-11ee-9e81-275f74b86b52.html.

132 *Projects*, Warm Springs Power and Water, https://wspwe.net/projects/ (last visited June 15, 2024).

133 *PGE, Warm Springs Tribe to Upgrade Bethel-Round Butte Line to 500 kV*, News Data (Dec. 8, 2023), https://www.newsdata.com/clearing_up/supply_and_demand/pge-warm-springs-Tribe-to-upgrade-bethel-round-butte-line-to-500-kv/article_635249dc-95e9-11ee-9e81-275f74b86b52.html.

134 *Tribal, Utility, National and State Leaders Gather in Central Oregon to Celebrate Launch of Major Energy Infrastructure Project*, Portland General Electric (Dec. 1, 2023), https://portlandgeneral.com/news/2023-12-01-tribal-utility-national-and-state-leaders-gather-in-oregon.

135 *Projects*, Warm Springs Power and Water, https://wspwe.net/projects/ (last visited June 15, 2024); and *Upgrading Transmission Capacity by Bridging Renewables in Oregon*, Grid Resilience and Innovation Partnerships Program (Oct. 2023), https://www.energy.gov/sites/default/files/2023-11/DOE_GRIP_3022_Confederated%20Tribes%20of%20Warm%20Springs%20OR_v5_RELEASE_508.pdf.

136 *BBK Assists Firm Client Confederated Tribes of Warm Springs Reservation of Oregon Secure Funding From GRIP as Part of Biden-Harris Administration's $3.5B Investment in America's Electric Grid*, Best Best and Krieger LLP (Oct. 25, 2023), https://bbklaw.com/resources/fn-102523-bbk-assists-firm-client-confederated-Tribes-of-warm-springs-reservation-of-oregon; and Upgrading Transmission Capacity by Bridging Renewables in Oregon, Grid Resilience and Innovation Partnerships Program (Oct. 2023), https://www.energy.gov/sites/default/files/2023-11/DOE_GRIP_3022_Confederated%20Tribes%20of%20Warm%20Springs%20OR_v5_RELEASE_508.pdf.

137 *Projects*, Warm Springs Power and Water, https://wspwe.net/projects/ (last visited June 15, 2024).

138 *New Partnership Brings $250 Million for Electric Transmission Expansion*, KTVZ News Channel 21 (Dec. 7, 2023), https://www.youtube.com/watch?v=FpGc1EZlXic.

139 *Upgrading Transmission Capacity by Bridging Renewables in Oregon*, Grid Resilience and Innovation Partnerships Program (Oct. 2023), https://www.energy.gov/sites/default/files/2023-11/DOE_GRIP_3022_Confederated%20Tribes%20of%20Warm%20Springs%20OR_v5_RELEASE_508.pdf; see also Colin Meehan and Elizabeth O'Connell, *Grid Resilience and Innovation Partnerships (GRIP) Community Benefit Plan Requirements and Best Practices*, Grid Deployment Office (Mar. 5 2024), https://www.energy.gov/sites/default/files/2024-03/2024-03-05%20GRIP%20Program%20Community%20Benefits%20Plan%20Webinar%20Presentation%20Slides.pdf.

140 *Tribal, Utility, National and State Leaders Gather in Central Oregon to Celebrate Launch of Major Energy Infrastructure Project*, Portland General Electric (Dec. 1, 2023), https://portlandgeneral.com/news/2023-12-01-tribal-utility-national-and-state-leaders-gather-in-oregon.

141 *Tribal, Utility, National and State Leaders Gather in Central Oregon to Celebrate Launch of Major Energy Infrastructure Project*, Portland General Electric (Dec. 1, 2023), https://portlandgeneral.com/news/2023-12-01-tribal-utility-national-and-state-leaders-gather-in-oregon.

142 *Upgrading Transmission Capacity by Bridging Renewables in Oregon*, Grid Resilience and Innovation Partnerships Program (Oct. 2023), https://www.energy.gov/sites/default/files/2023-11/DOE_GRIP_3022_Confederated%20Tribes%20of%20Warm%20Springs%20OR_v5_RELEASE_508.pdf.

BEST PRACTICES

POOR PRACTICES AND PAST PATTERNS

Interviewees described a number of poor practices companies engage in that result in negative interactions, unsuccessful negotiations, or agreements with poor outcomes. The history of companies engaging in these kinds of poor practices has also contributed to the negative connotation that TBAs carry from the perspective of many Tribal nations.

Companies often fail to understand key concepts such as Tribal sovereignty; Tribal land statues and political processes; and the fact that Tribes, and the citizens of any single Tribe, have varied viewpoints. Companies may also make incorrect assumptions about Tribes, or hold biased views against Tribal citizens. Another common mistake is not allowing enough time and resources to effectively engage with a Tribal nation and their citizens. Common mistakes include companies coming in with a transactional mindset, failing to recognize the importance of relationship, engaging only with Tribal government officials without engaging Tribal members, and planning meetings at times or locations where it is difficult for people to attend.

Companies also exemplify extractive patterns when they aim to provide the Tribe as few benefits as possible; insist on using their own draft agreement as the starting point for negotiations; or attempt to copy/paste an agreement from one context to another. Another negative pattern is creating agreements with provisions that are subjective, inconcrete, not measurable, or not enforceable. There has also been a history of companies overpromising benefits they cannot deliver, setting unrealistic targets, or failing to plan and implement necessary supports which would help them to meet their commitments.

In the context of this history of extractive patterns, many companies are taking the opportunity to embrace newer models of engagement that center Tribal priorities in order to build real partnerships that create significantly better results.

BEST PRACTICES

Interviewees described numerous best practices that support successful relationships and agreements with positive outcomes:

BEST PRACTICES FOR TRIBAL NATIONS

BUILDING INTERNAL CONSENSUS AND POLITICAL MOBILIZATION.

- In addition to companies respecting FPIC, the Tribal nation building consensus around their strategic position and having strong political mobilization may be *the other most important factor* in determining the outcomes of a negotiation and an agreement.[143]
- Within any Tribal nation citizens will have a wide variety of views, so building consensus is important to being able to effectively politically mobilize. Internal disputes can become a setback in negotiations with companies, so Tribes obtain more successful outcomes when they have an internal community negotiation *first* to build internal cohesion, and then articulate their internal consensus into broader political arenas.[144]
- Some companies will try to undermine consensus and divide the community, so it is important for Tribes to allot time to both gathering and maintaining consensus.
- Mobilization can include working strategically in coalition with other Tribal nations–when Tribal nations come together, there is strength in numbers.

TRIBES CREATING SAFEGUARDS WHEN TAKING ON EQUITY IN PROJECTS.

- When taking on equity, safeguards should be put in place to ensure that if the project fails, their other assets cannot be seized to settle the debt. For example, the company can provide a loan to the Tribe to purchase equity, which the Tribe can repay via dividends earned on that equity. The loan can be a nonrecourse loan, so if the project makes no profits the Tribe isn't responsible for paying back the loan, and the company does not have recourse to the Tribe's other assets.
- Tribes should also consider the specific company they are working with, whether or not their values align with the values of the company, and what the long-term implications of becoming a business partner with that company might be.[145]

143 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024); Ciaran O'Faircheallaigh, *Explaining Outcomes from Negotiated Agreements in Australia and Canada*, Resources Policy (70) (Mar. 2021), https://www.sciencedirect.com/science/article/abs/pii/S0301420720309533.

144 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024).

145 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

BEST PRACTICES FOR COMPANIES

PREPARING WITH RESEARCH AND SEEKING EDUCATION.

- It is absolutely imperative and demonstrates respect when companies take time to learn and seek education *before* initiating engagement. The company should not expect the Tribe to educate them, but rather should seek educational resources on their own.
- Companies should thoroughly research the Tribe before meeting with them, to develop a clear understanding of the Tribe's history, values, current context, political landscape, prior experiences with development projects, and how they make decisions.
- Companies need to have a strong understanding of Tribal sovereignty.
- Companies should learn about the broader history of Tribal nations in the U.S. to understand why Tribal nations may have a reasonable distrust of the federal government and of industry.

QUESTIONS FOR COMPANIES TO RESEARCH BEFORE MEETING WITH A TRIBAL NATION

- △ What is the history of the Tribe?
- △ Does The tribe have treaties?
- △ Do they have off reservation or on reservation treaty rights?
- △ Is their reservation located on their homelands or were they forcefully relocated by the U.S. government?
- △ What have the impacts of federal policy been for that Tribe?
- △ Were the lands on their reservation allotted?
- △ Was their recognition status ever terminated and reinstated?
- △ What is the structure of their Tribal government?
- △ Do they have relevant statutes; protocols or laws the company should know about?
- △ How do they make decisions?
- △ Who is their chair-person?
- △ How many people are on their council?
- △ Who are the council members?
- △ When is their next election?
- △ Is their chair-person up for re-election?
- △ Are their council members at large?
- △ Do they have districts?
- △ What district is your project in?
- △ Who will need to approve the TBA?
- △ Does the TBA have to be taken to a citizen vote?
- △ Does the Tribe have companies?
- △ Does it have a section 17 Corporation?
- △ What does that section 17 Corporation do?
- △ Where does most of their employment come from?
- △ What is their tax base revenue?
- △ What administrative departments/functions do they have? i.e., Natural Resource Department; Lands and Resources; Workforce Development Department.
- △ What are the Tribe's development priorities?
- △ What are the Tribe's biggest challenges?
- △ Are there other projects on their reservation, on their treaty lands, or on lands they use for traditional, cultural, or ceremonial purposes?
- △ What are the best ways or platforms to engage with the Chairman and Council?
- △ What are the best ways or platforms to engage with the wider community?

BEING TRANSPARENT, CLEAR, AND HONEST.

- Honesty and transparency are essential–always.
- While approaching things transactionally is not a best practice, if the company wants to be solely transactional, that expectation should be made clear early in the process.

ALLOWING ENOUGH TIME AND RESOURCES FOR SUBSTANTIVE ENGAGEMENT.

- Companies should start the engagement process very early in the project development timeline–and engage meaningfully, often, and ongoing.
- Respect the protocol, procedure, or timeline requested by the Tribal nation.
- Companies should send representatives with decision-making power to participate in negotiations. Consider parity in engagements–for example, don't send a junior-level community relations team member to negotiate with a Tribal Chairperson.
- Some Tribes have many project proponents requesting their time and energy, and are experiencing engagement fatigue. Companies should be humble and mindful of this and find ways to make participation easier.[146]
    - When planning community engagement meetings, companies should provide child care, transportation, and a meal to make it easier for people to attend.[147]
    - Alternatively, instead of asking Tribal members to set aside their regular activities to attend a meeting, companies can send representatives to engage with Tribal members in locations they already frequent–for example the farmers market, senior center, library, recreation center, etc.[148]
- It may take two or three years before a Tribe is ready to partner on a project. Companies can spend that time setting themselves up to be available to partner if or when the Tribe is ready.
- Companies need to understand federal and state requirements and plan time for these processes. Where approval is needed via the Bureau of Indian Affairs, companies should plan ample time for this to be completed.

BEGINNING WITH COMMUNITY ENGAGEMENT, CENTERED ON LEARNING ABOUT THE TRIBE'S GOALS, PRIORITIES, AND INTERESTS.

- The process of negotiating a TBA should always *begin* with community engagement.
- Don't go in with a transactional mindset or approach engagement as a "check the box" exercise.
- The company should share comprehensive, detailed information about the project with the Tribal nation during this process.
- Companies should seek to garner the support of Tribal members and the Tribal government.
- Get to know the community and find out what is important to them. The only way to achieve this is to have conversations with people and to listen deeply–both at the Tribal citizen level and the Tribal council level. Ask people about what they want and need. What is their vision for their community and their family? How is their broadband, their water infrastructure, their energy bills?
- While the Tribe's priorities must drive the design of benefits, the company should not expect the Tribe to do all of the work to define the benefits. Companies should identify benefits they could provide that could support the Tribe's goals, and actively engage the Tribe to develop the specific provisions that are of interest to them.

OBTAINING FPIC AT THE BEGINNING AND THROUGHOUT THE LIFETIME OF THE PROJECT.

- Some interviewees identified FPIC as *the most important factor* to make agreements successful. To respect the rights of Indigenous Peoples as enumerated in the UNDRIP,[149] it is essential that companies obtain FPIC from the Tribal nation, and that companies respect the Tribe's right to say "no" to a project. Further, FPIC mitigates project risks and provides a foundation for partnership and a strong relationship with the Tribal nation.
- Agreements should include a clear expression of whether or not the Tribe has granted consent. If a Tribe chooses to enter into an agreement regarding a project they have not consented to, the lack of consent should be made clear in the language of the agreement.

146 Zoom Interview with Chris Gunn, former Director of Equity, Labor, and Economic Prosperity, U.S. Department of Energy, current Director of Technical Assistance, Federal Energy Regulatory Commission (June 6, 2024).

147 Zoom Interview with Chris Gunn, former Director of Equity, Labor, and Economic Prosperity, U.S. Department of Energy, current Director of Technical Assistance, Federal Energy Regulatory Commission (June 6, 2024).

148 Zoom Interview with Chris Gunn, former Director of Equity, Labor, and Economic Prosperity, U.S. Department of Energy, current Director of Technical Assistance, Federal Energy Regulatory Commission (June 6, 2024).

149 United Nations Declaration on the Rights of Indigenous Peoples, United Nations (Sep 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

- Consent is an ongoing process, not "one and done." Companies should revisit consent over time, and obtain new consent for proposed changes or expansions to the project, as they may impact the Tribe's rights differently. Agreements can also include triggers for renegotiation at certain milestones or after a certain amount of time.

BUILDING AND MAINTAINING GOOD RELATIONSHIPS.

- Companies should *not* assume that an agreement with excellent terms, from the company perspective, will be enough to get the Tribe's attention or get them to engage. There's still a lot of work that has to take place to develop good relationships, which are essential to creating a successful TBA.
- Relationships built on trust, respect, transparency, and consistency allow the company and Tribal nation to make an agreement that will actually have meaning on the ground. And, when challenging times or mistakes happen, a solid relationship and established trust will support both parties to work through the situation together.
- Be intentional in selecting who is on the negotiating team for the company. Ensure team members have cultural competence training and understand the importance of relationships in Native communities, that the negotiation process should strengthen those relationships, and to proceed accordingly.
- Project proponents at all phases of the project should engage and build relationships with the Tribal nation, regardless of whether that company has transitory involvement. The Tribal nation should be engaged respectfully by all parties involved in the project at all phases, including contractors.
- Companies should recognize the value and importance of spending ample time in the community, connecting with Tribal members in person–attending, participating in, or helping with community events is a necessary part of building meaningful relationships.
- Take the time necessary to build trust. Recognize that Native Peoples have a multi-generational history of not being treated fairly or with respect, and that there may be a trust deficit. At the same time, recognize that some Tribes may feel urgency to get to an agreement quickly because of this history.
- Meeting the spirit of the agreement is essential to maintaining a good relationship.[150] Relationships are strengthened when companies demonstrate good behavior, honor their commitments, and deliver outcomes that benefit the community.[151]
- The strongest relationships are closer to partnerships. Companies should think broadly and keep an open mind, because partnerships can encompass many different commitments that go beyond the project itself. Be flexible and open to the types of interactions, connections, or provisions a Tribe may want to include in a TBA–on the surface they might not have anything to do with the type of project being developed, but can build very strong ties between the Tribe and the company.

BUILDING MULTIFACETED RELATIONSHIPS WHICH INCLUDE MULTIPLE POINTS OF CONTACT WITH PARITY.

- Similar to working with a state government, companies should build relationships with the Tribe which include multiple points of contact with parity.
  - For example, the CEO and company executives should be in contact with the Tribal council. But additionally, the company's employees in different departments should build relationships with their counterparts in the appropriate Tribal departments. Appropriate company employees should be in contact with, for example, the Tribe's Tribal Historic Preservation Officer(s) regarding cultural impacts, their environmental department regarding environmental impacts, their Tribal college regarding workforce development opportunities, their public works or construction department regarding construction, their transportation committee regarding roads, their Tribal police force regarding public safety, etc.
  - This is important because the Tribal council's time is limited. Further, a project will impact all of the Tribal departments, and those departments have more detailed knowledge of their work than the Tribal council does.
  - Companies should meet regularly with the Tribal council to share project updates.

150 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

151 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

ALWAYS RESPECTING THE OPTION OF NOT NEGOTIATING AT ALL.

- Companies must recognize that Tribal engagement is not a process to *make a project happen*, but rather is about *exploring whether or not it should happen*–testing to see if the project makes sense for the Tribe, and whether the impact management and benefits are sufficient.[152] The Tribe should consider whether or not the project aligns with their priorities. If the answer is "no," the Tribe may choose not to negotiate, and the company must respect that decision.

MAKING THE TRIBAL NATION'S POSITION THE STARTING POINT FOR NEGOTIATIONS.

- If the Tribe decides to negotiate, their position should be the starting point.[156] While agreements should serve both the Tribe and the company, when the *starting* point is driven by the priorities and interests of the community, this leads to better outcomes from the agreement.

INDIGENOUS-LED IMPACT ASSESSMENTS

Indigenous-led Impact Assessments[153] are a process Indigenous Peoples can use when choosing whether to negotiate with a company. It can be a best practice for companies to fund an Indigenous-led Impact Assessment as a part of engagement. In an example shared by an interviewee, a company provided funds for the Indigenous Peoples to carry out a 12 month Indigenous-led impact assessment.[154] The process includes:

1) Multiple rounds of small group community meetings held by the Indigenous Peoples in different locations, to provide community members with information about the project and about other agreements for similar projects. The community questions the project proponent intensively during these meetings.

2) A meeting with the entire community, on the land at the proposed project site, to share what the smaller groups have discussed, to discuss whether or not they want to enter negotiations, and to provide feedback on a draft report that's been compiled based on the small group meetings.

3) After taking time to consider the discussions from the prior meeting, a second full-community meeting is held on the land. Only at that point do the Indigenous Peoples decide whether they want to negotiate with the company. If they want to negotiate, they approve a negotiating position drawing on all of the dialogue from the impact assessment process.

4) The Indigenous Peoples put forward their negotiating position, and the company must respond to that position.[155]

Indigenous-led Impact Assessments are one important component of the engagement process, but they do not take the place of other forms of industry-standard impact assessments such as an Environmental Impact Assessment (EIA), Social Impact Assessment (SIA), or Human Rights Impact Assessment (HRIA), rather, they should be implemented as a component of a comprehensive impact assessment process to ensure that companies and Tribal nations are identifying all potential project impacts. There are a growing number of Indigenous consulting firms who are leading EIAs and SIAs, and working with an Indigenous firm for these components of the impact assessment process is another best practice.

152 Zoom Interview with Chris Gunn, former Director of Equity, Labor, and Economic Prosperity, U.S. Department of Energy, current Director of Technical Assistance, Federal Energy Regulatory Commission (June 6, 2024). (Noting that while this language came from Chris Gunn, other interviewees shared similar points.)

153 Ciaran O'Faircheallaigh and Alistair MacDonald, *Indigenous Impact Assessment: A quiet revolution in EIA?*, Routledge Handbook of Environmental Impact Assessment (2022) https://research-repository.griffith.edu.au/server/api/core/bitstreams/8fa49c0b-0c0b-4665-b44f-969d8d5ce228/content.

154 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024).

155 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024).

WORKING WITH AN INTERMEDIARY WHERE USEFUL.

- Where helpful, an intermediary can assist with negotiations. This person could be Native, non-Native, a citizen of the specific Tribal nation, or someone who has worked with the Tribal nation previously, but regardless they should be familiar working with both non-Native and Native entities and be able to bring both parties to the table well.

MAKING SURE THE TRIBE HAS ACCESS TO GOOD TECHNICAL INFORMATION AND TECHNICAL ADVICE.

- It is a common practice for the company to pay for the Tribe to hire consultants to interpret technical information about the project.
- The Tribe may also choose to seek technical advice from relevant experts regarding the mechanisms they can use in an agreement, options for structuring revenue from the project, political strategies to maximize their leverage in negotiations, etc.

ADDRESSING ACCOUNTABILITY AND MAKING AGREEMENTS THAT ARE OBJECTIVE, MEASURABLE, AND *ENFORCEABLE.*

- Make sure that commitments are objective. The company should not offer subjective commitments in exchange for objective concessions from the Tribal nation–agreements must be objective on both sides.[157]
- Be as specific and concrete about defining benefits as with the technical plans for a project.[158] Be very clear about the structure of the metrics for meeting commitments–make sure metrics are meaningful and that they're measuring what they are intended to measure.[159]
    - For example, the Pehta Framework[160]–an Indigenous Community Benefit Disclosure Standard developed by and for Indigenous Peoples–does not use the headcount method for Indigenous employment, but instead calculates Indigenous employment as the total dollars in payroll paid to Indigenous workers divided into the company's total payroll for the year.[161] To improve on this metric, companies must either hire more Indigenous workers, or offer existing Indigenous workers higher-paying positions.[162] In both cases, the structure of this metric drives the desired outcomes.
- Clearly identify which parties are accountable to each commitment, include accountability mechanisms in the agreement itself, identify and include a cadence and process for regular review and evaluation of the agreement, include conflict resolution processes, and make legally enforceable agreements that are set in contract.

MEETING COMMITMENTS THROUGH EFFECTIVE DESIGN AND IMPLEMENTATION.

- Companies should be thoughtful about the commitments they make, to ensure they don't overpromise benefits they cannot deliver.
- Create processes for enabling success. The company should work with the Tribal nation to co-design and implement supports to make commitments attainable. For example, workforce development programs can allow companies to successfully meet their employment targets by ensuring that Native employees are trained and licensed. Honesty from both the company and the Tribe is important in these conversations.
- The company should then ensure that they meet their commitments by carefully monitoring implementation. If they realize they aren't going to be able to meet a commitment, they should proactively work with the Tribal nation to make a plan to address this. For example, if the Tribe can't provide the agreed upon number of people to go through a welding program on an annual basis, perhaps the company can conduct additional outreach to Tribal youth regarding the program,or can recruit from other Native communities but will continue to prioritize the partner Tribal community, etc.

156 Zoom Interview with Ciaran O'Faircheallaigh, Professor of Politics and Public Policy, Griffith University (May 21, 2024).

157 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

158 Zoom Interview with Chris Gunn, former Director of Equity, Labor, and Economic Prosperity, U.S. Department of Energy, current Director of Technical Assistance, Federal Energy Regulatory Commission (June 6, 2024).

159 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

160 Pehta Foundation, https://www.pehta.org/ (last visited Apr. 10, 2025); Pehta LP, https://www.pehta.com/ (last visited Apr. 10, 2025).

161 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

162 Zoom Interview with Aaron Lambie, Executive Director, Pehta Foundation, and CEO/President, Nisto (June 5, 2024).

IN SUMMARY: A BEST PRACTICE TBA NEGOTIATION PROCESS

When conducted in a best practice way, negotiating a TBA is a process which includes the following steps:

1) The company deepens their knowledge and understanding prior to engaging.

2) The company engages with the Tribe to share information, listen, learn about the Tribe's priorities, and build relationships based on trust, transparency and respect.

3) The company and Tribe conduct comprehensive impact assessments to identify all potential project impacts. The company allows ample time for the Tribe to conduct their internal decision-making processes to decide if they want to negotiate, and respects the Tribe's option to not negotiate.

4) If the Tribe chooses to move forward, the company and the Tribe identify and agree upon the process for negotiations.

5) Conduct negotiations in a way that is collaborative and strengthens relationships, and includes the key step of the company ensuring the Tribe's FPIC before proceeding. The company respects the Tribe's right to say "no."

6) Create an agreement that is centered on Tribal priorities and on project impacts, has measurable requirements, includes cadence and process for review, and includes processes for conflict resolution and enforcement.

7) Recognize that signing a TBA is not the end of the process, but rather is a milestone on the path.

8) Collaboratively implement the agreement.

Note that this process will be unique with each Tribal nation, and cannot be rushed–respect and relationship-building are paramount. It is essential for companies to start early and have regular internal updates so the project team is aware of the status of engagement and how it may impact project timelines and financing.

CONCLUSION

Tribal Benefit Agreements are extremely varied and diverse, and this variation is what gives them such potential to support positive outcomes for both Tribes and companies.

In the context of the long history of engagement between developers and Tribes, TBAs have taken many different forms, shaped by changes in Federal Indian Policy and by increases in awareness in the private sector. TBAs have shifted from being mediated by the federal government within the permitting regime, to companies making agreements directly with Tribal nations. These direct agreements have been common in the U.S. for decades, and the use of agreements has increased further in the past few years as companies have realized the importance of engaging meaningfully with Tribes not only about projects on Tribal lands, but also those within treaty lands and culturally significant areas.

Many Tribes are experienced with negotiating TBAs, but TBAs still carry the weight of a history of extractive engagement. The driving factor underlying the shifts in TBA terms over time is the respect for Tribal sovereignty, allowing the economic, energy, and cultural priorities of Native nations to surface. This trend presents new opportunity now for durable partnership.

In this new era, Tribal nations are negotiating for and receiving benefits that support their self-determined goals, and are evaluating project opportunities cumulatively and holistically to choose economic development opportunities that are a best fit for their communities, or to decline projects that are not aligned. Companies are increasingly seeing the value that fulsome Tribal partnership brings to projects, shifting the TBA paradigm away from risk mitigation and towards real and meaningful collaboration. And, as Tribes and companies grow in their focus on creating objective, measurable, enforceable agreements and on effective implementation, TBAs are better able to deliver on their promises.

What our research shows is that TBAs are extremely varied and diverse, and this variation is what gives them such potential to support positive outcomes for both Tribes and companies. They are tools that can be fitted to time and place in ways that support Tribal priorities. However, to achieve this, nothing is as important as ensuring that the Tribe has full and free decision-making and participatory power at every stage. As such, forward-looking TBAs recognize FPIC as a best practice and start engagement from that point. Consent and a strong TBA go hand in hand to uplift Tribal sovereignty.

APPENDIX A: ADDITIONAL INFORMATION ON ERAS OF FEDERAL INDIAN POLICY

THE TREATY, TRADE, AND INTERCOURSE ERA (1775-1817)

As the U.S. transitioned from British colonies to its own independent country, it leveraged relationships with Tribal nations to support and validate its own nascent sovereignty. These nation-to-nation relationships created international validation of the U.S. as owning a distinct sovereign authority, separate from the British throne. To this end, while the British throne had previously taken the approach of issuing a general land base for Tribal nations in the Royal Proclamation of 1763–establishing one continuous boundary line along the western border of the colonies past which non-Native settlement was prohibited–after independence the U.S. eradicated this general boundary and entered into treaties with individual Tribal nations to provide for non-Native settlement further west and the sale of land by the U.S. to individual, non-Native settlers. Each treaty was unique, as was the relationship between the U.S. and each specific Tribal nation, but treaties generally provided for a negotiated agreement of peace between the sovereigns through the exchange of lands and resources.[163]

THE RESERVATIONS AND REMOVAL ERA (1817-1886)

As the U.S. entered into and came out of the Civil War, the federal government leaned into a second phase of treaty making wherein the U.S. sought to continue the westward expansion of its European-based system of individual property rights under U.S. law, and Tribal nations sought to maintain their communal property rights and cultures.[164] During this era, U.S. Federal Policy was to contain Tribal nations' sovereignty and self-determination through agreements that restricted Tribal residence and self-governance to delineated Reservations while recognizing broader Tribal rights to resources–e.g., rights to hunt, gather, fish, trade and transit–in broader geographic areas ("Treaty areas").

When agreements could not be reached, Congress began assuming authority to forcibly relocate Tribal nations without their consent. In the Indian Removal Act, signed into law by President Andrew Jackson on May 28, 1830, Congress assumed such authority and authorized the President to grant unsettled lands west of the Mississippi in exchange for Tribal lands within existing state borders. President Jackson relied on this authority to forcibly relocate Tribal nations from his home state of South Carolina and the other Southeastern states of Tennessee, Georgia, Florida, Alabama, and Mississippi. This became known as the "Trail of Tears."

In 1871, due to an internal power struggle between the House of Representatives, which controls budgeting and appropriation authority, and the Senate, which possesses the authority to ratify treaties, a provision was tacked on to a House appropriations bill in 1871 that prohibited further treaties with Tribal nations. After the U.S. ceased treaty-making, U.S. Federal Indian Policy shifted from diplomacy, focused on mutual consent, to an assumed superiority of Congress over Tribal nations bound only by a moral mandate to act in the "best interest" of Native Americans, a standard that Congress defined at will.[165]

THE ASSIMILATION ERA (1887-1934)

In this post-Civil War era, the U.S. was eager to establish a strong, overarching federal power. For U.S. Indian Policy this meant the creation of a seamless federal oversight authority: Congressional legislation. Federal laws passed by the U.S. Congress were deemed to have the ability to unilaterally dictate the activity of Tribal nations.[166] This "plenary power doctrine," as it became known, was created by the SCOTUS to justify Congress's authorization of forcible assimilation measures. Congress passed laws focused on conforming the activities of individual Native Americans to U.S. culture, as a means of diminishing the relevance and efficacy of Tribal nations. Three key assimilation policies passed by Congress during this period were:

- **The Major Crimes Act (1885):** authorized, for the first time, federal jurisdiction over "Indians" within "Indian Country," by applying federal laws to "major crimes" committed by Native Americans and replacing Tribal criminal and community care laws with the U.S. criminal legal system. This brought individual Native Americans under the jurisdiction of the U.S. Notably, this law made "assault against a minor under the age of 16 years" a federal crime, even if committed by a Native American, displacing Tribal laws that sought to address protection of its children. Related to education, the Act solidified that only the

163 Miller, "The International Law of Colonialism: A Comparative Analysis" in Symposium: The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, the United Nations, and the Organization of American States [Symposium: Lewis & Clark Law Rev. 2011].

164 *Cohen's Handbook of Federal Indian Law*, § 1.04, pp 75-77 (2005 Edition)

165 *Cohen's Handbook of Federal Indian Law*, § 1.04, pp 75-77 (2005 Edition)

166 U.S. v. Kagama, 118 U.S. 375, 1883. "But this power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much form the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property in the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else."

federal government could prosecute such crimes–a fact and authority very relevant to boarding schools and other education facilities where Native children were mandated to attend.

- **The General Allotment Act (beginning in 1887):** mandated the individual parceling of communally-held Tribal reservations lands–providing set acreage allotments to each citizen of more than one-half "Indian blood" and selling the remaining Tribal lands (which the U.S. deemed "surplus") to non-Native settlers. This was a unilateral revision by the U.S. of Treaty agreements with Tribal nations and an unprecedented thwarting of Tribal self-governance, whereby Tribal property law and land management systems, typically focused on communal ownership and conservation of resources, were replaced by European-based systems of individual property ownership focused on individual property rights and subjugation of natural resources.

  This policy succeeded in reducing the land base of Tribal nations from 140 million acres to approximately 50 million acres of the least desirable land.[167] This policy was identified by the U.S. Senate as "[g]reed for Indian land and intolerance of Indian cultures combined in one act to drive the American Indian into the depths of poverty from which he has never recovered."[168] Today, the policy of allotment and the resulting fractionated ownership of Tribal land creates significant barriers for the cohesive and effective application of Tribal governance and regulation for issues ranging from roads to taxation to economic development and education.

- **Federal Indian Boarding School Policy (1870-1969):** used education, in addition to assumption of control over land and policing authority, as a key control and assimilative tool to disable Tribal nations. As the 1880 Annual Report to the Secretary of the Interior stated: "Past experience goes far to prove that it is cheaper to educate our wards than make war on them."[169] The BIA started building its boarding school system in the 1870's but it was during the assimilation period, and particularly post-1887 Allotment Act, that it was fully pursued.[170]

  Under the federal government's Indian Boarding School policy, Native American children were mandated to attend schools funded and organized by the U.S. government. The schools were often operated by Christian religious institutions and children were often forcibly removed from their homes, many times without parental consent. For example, under the Act of March 3, 1893 (Ch. 209, § 1, 27 Stat. 628, 635), Congress authorized the Secretary of the Interior to withhold rations, including those guaranteed by treaties, to Tribal nations and families whose children did not attend a boarding school. The goal was to ensure the children "divorced from [traditional] camp life, and with a plain English education instructed well in farm or mechanical labor." This effort was often summarized as "Save the man. Kill the Indian."[171]

  Boarding schools removed Native children from their families as a means to dissolve their social, political, and cultural connection from their communities and Tribal nations. A key component of the curriculum was that Native children were forbidden from speaking or learning their own Native language–which was decimating for the continuation of Tribal laws and histories that were largely transmitted orally. Native children were not only physically separated from their families and Nations, but they also lost the very ability to describe how they were previously connected to them.

Each of these Congressionally mandated assimilation measures were initiated by Congress with the intent of dissolving the authority of Tribal nations through the assimilation and forced naturalization of Tribal citizens.[172]

THE INDIAN "NEW DEAL" ERA (1934-1947)

As the U.S. entered the Great Depression, it became apparent that the policies of the Assimilation Era were not only ineffective but were costly to operate and maintain. A change in the federal approach to working with Tribal nations and Native Americans was spurred by a first-ever investigation into U.S. Indian Policy, titled "The Meriam Report: the Problem of Indian Administration." The Meriam Report sought to review the scope of U.S. Federal Indian Policy and its effect on the social and economic conditions of Native Americans. The Report's two major findings were that (1) Indians were excluded from management of their own affairs, and (2) Indians were receiving a poor quality of services, especially health and education. Following the Meriam Report, and in line with the other Roosevelt-Era New Deal programs initiated by the federal government, the U.S. introduced a series of new approaches to completely overhaul Federal Indian Policy.

167 *Cohen's Handbook of Federal Indian Law*, § 1.05, p. 84 (2005 Edition)

168 As identified in the Senate's 1969 Kennedy report: The land policy of allotment was directly related to the Government's Indian education policy because proceeds from the destruction of the Indian land base were to be used to pay the costs of taking Indian children from their homes and placing them in Federal boarding schools–a system designed to dissolve the Indian social structure. U.S. Senate, Committee on Labor and Public Welfare, Special Subcommittee on Indian Education. *Indian Education: A National Tragedy–A National Challenge*, United States Senate, 91st Cong., 1st sess. Washington, DC:1969.

169 Secretary of the Interior, Annual Report, Vol. II (1880).

170 To this day it is not known how many Native children were taken from their families and forced into U.S. Indian boarding schools. We do know that by 1900 20,000 Native children were in boarding schools and then by 1925 that figure was approximately 61,000 children, meaning nearly 83% of Indian school-age children were attending boarding schools at that time (The National Native American Boarding School Healing Coalition n.d.).

171 This phrase was first used by Brigadier General Richard Henry Pratt, who founded and was the longtime superintendent of Carlisle Indian Industrial School in Carlisle, Pennsylvania, the largest federal Indian boarding school. The term is cited in a speech delivered in 1892 during the National Conference of Charities and Correction, held in Denver, Colorado. (Pratt 1892).

172 Quite literally, Tribal citizens were naturalized as American citizens without their consent on June 2, 1924, when Congress enacted the Indian Citizenship Act, which granted citizenship to all Native Americans and made them subject to U.S. law. One benefit of the citizenship act is that Native Americans gained the right to vote in U.S. elections, at least until 1957 when many states passed laws barring Native voting (U.S. Congress 1924)

The centerpiece of the U.S. government's new approach was the Indian Reorganization Act of 1934 (IRA), which officially ended the highly damaging policy of allotment and, instead, sought to reinstate support for Tribal nation governments–with the hope that those Tribal nation governments could engage in sufficient governance and economic development to self-sustain their lands and peoples. The Act also provided Tribal nations with technical assistance to adopt constitutions and organize as central, western-style governments; an opportunity for Tribal governments to charter federal corporations to address the inability of Tribal nations to assess taxes on their lands, which under U.S. law must be owned by the U.S. government and held in trust for the Tribal nations; and the first-ever initial internal education effort at the DOI with the publishing of the first edition of Felix S. Cohen's Handbook of Federal Indian Law in 1941.[173] However, this period of support for Tribal sovereignty was relatively brief and followed by a period of extreme anti-Tribal policies.[174]

THE TERMINATION ERA (1948-1961)

Just as Tribal governments were starting to operate the funding and programming promised by the New Deal, U.S. Indian policy abruptly reversed course. During the 1950's the U.S. was fighting the "Cold War"–heavily focused on the combatting the alleged evils of communism and simultaneously extolling the virtues of capitalism–and in this battle the communal ownership of land and vast natural resources held by Tribal nations was perceived as an affront to American goals. As Nevada Senator George Malone argued, the country was "spending billions of dollars fighting Communism [but] perpetuating the systems of Indian reservations and Tribal governments, which are natural Socialist environments."[174] As a result, the U.S. resolved to end political recognition of Tribal nations, once again focusing on the forced assimilation of individual Native Americans into mainstream, English-speaking, Christian American society.

A 1949 Hoover Commission report called for the "complete integration of Indians into the mass of the population as full tax-paying citizens." The following year Dillon Myer, the director of the World War II Japanese relocation and internment program, was appointed Indian Commissioner and he enthusiastically set about liquidating Tribal property and rights. Along with Chair of the Senate Committee on Indian Affairs, Arthur V. Watkins of Utah, Myer worked to "emancipate the Indians" from the "ward status required by their affiliation with Tribal nations."[175] Although the language of the policy was centered on "freeing" individual Native Americans from "arbitrary Tribal control," the liberation actually stripped Tribal nations and their citizens of their sovereignty by requiring stronger federal controls–e.g. requiring BIA approval for almost all actions of Tribal governments, including the hiring of their own attorneys or using their own funds, including for travel to Washington to air grievances and lobby U.S. political officials.

To accomplish this, the U.S. Congress passed numerous laws with the purpose of dissolving reservations, abandoning all treaty obligations, ceasing all federal programs and funding that supported Tribal nations, and transferring federal oversight functions to states. In 1953, Congress passed House Resolution 108, approved by both the U.S. House of Representatives and the U.S. Senate without debate and moving forward with the policy of Termination. Subsequently Congress passed specific Termination Acts on a Tribe-by-Tribe and region-by-region basis.[176] In all, 109 Tribal nations' political status was terminated, and 1,362,155 acres of Tribal land were taken from Tribal ownership by the U.S. and redistributed to individuals, states, or private entities.

In addition to the termination, Congress enacted various other policies to diminish Tribal political sovereignty and the connection of Tribal citizens, including: Public Law 280, which extended state criminal and civil jurisdiction over most reservations in California, Minnesota, Nebraska, Oregon, and Wisconsin without Tribal consent; removal of Native children through a partnership between the BIA and the Child Welfare League of America that sought to place Native children in non-Native homes outside of reservations; and the Urban Relocation Program, which provided transportation and financial and educational incentives for Native adults and families living on reservations to relocate to urban centers outside of reservations. The total effect of these policies was the decimation of reservation society and Tribal sovereignty.

THE NEW SELF-DETERMINATION AND SELF-GOVERNANCE ERA (1969-2000)

The civil rights movements of the 1960's and 1970's included a strong resistance to the U.S. Tribal termination policies. Under President Kennedy, Congress did not terminate another Tribe after 1962 and began to move back toward a policy of collaboration with and support of Tribal governments. The Johnson Presidency's War on Poverty also furthered the return toward Tribal self-determination–emphasizing community control and effort and providing the first federal funding for a reservation-based legal services program.

The Self-Determination Era was formally introduced in a speech by Richard Nixon on July 8, 1970. In his "Special Message on Indian Affairs", President Nixon addressed Congress and in no uncertain

173 Tribal constitutions adopted under the Indian Reorganization Act were based on a "model constitution" provided by the BIA and required approval by the Department of Interior–affirming U.S. paternalism over the affairs of Tribal governments. Additionally, this new U.S. modeled form of government rarely meshed with the traditional Tribal government, failing to respect the extensive experience Tribal governments held in self-government, the nature of land ownership, the solidarity of the community, and the extent of the contests with non-Indians. Nevertheless, by 1940 105 Tribes chose to adopt constitutions under Section 16 of the Indian Reorganization Act.

174 *Stephen Cornell, The Return of the Native: American Indian Political Resurgence*, Oxford University Press (1988).

175 Paul C. Rosier, *The Association on American Indian Affairs and the Struggle for Native American Rights, 1948–1955*, The Princeton University Library Chronicle, 67 (2), https://www.jstor.org/stable/10.25290/prinunivlibrchro.67.2.0366.

176 E.g., Menominee Termination Act, 68 Stat. 250 (1954) and Klamath Termination Act, 68 Stat. 718 (1955).

terms stated that "this policy of forced termination is wrong." He encouraged Congress to reject Termination in favor of the Tribal right to control and operate Federal programs, programs which he noted were "the solemn obligations which have been entered into by the United States Government" and specific commitments made in "written treaties and through formal and informal agreements."

Following Nixon's speech, the Federal government embraced the approach of self-determination, passing the Indian Self-Determination and Education Assistance Act in 1975, which created federal appropriations and contracting process to support Tribal self-governance.[177] From there, Congress has generally continued to support the economic and political rebuilding being conducted by Tribal nations. Tribal nations also set about developing and rebuilding functional government and economic systems, most of which were destroyed by Termination policies. Many Tribal nations also amended their IRA constitutions to make them better fit their own Tribal laws, cultures, and customs.

However, this era is also pocked with social backlash to Tribal rights and rulings from Federal courts that work to limit the ability of Tribal governments to successfully manage their lands, resources, and communities. In Washington and Wisconsin, non-Native citizen groups protested at the sites of Tribal treaty fishing activities and filed lawsuits challenging Tribal rights. Additionally, during this era the Federal courts have created laws limiting the jurisdiction of Tribal governments over non-member individuals and businesses who chose to enter, live, and work within reservations, when they commit crimes,[178] seek to build, construct or operate businesses that violate Tribal zoning laws, and of Tribal courts to adjudicate civil matters they are involved in.[179] Nevertheless, Tribal nations and their governments had a period with only minor Federal headwinds operating against self-determination.

THE NATION-TO-NATION ERA (2001-PRESENT)

In the 30 years following Termination, many Tribal nations made significant progress in developing strong, robust governments. This led to a revitalization of the nation-to-nation relationship between the federal government and the U.S. This era has been marked with a renewed focus on and ability for self-governance and self-determination, including enforcement of treaty rights, a demand to uphold the Federal Trust obligation, and a strong federal policy of recognizing Tribal governments.

Three key acts that summarize this era so far:

- **The Federal Tribal Consultation Policy:** In 2000, President Clinton issued Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments." This EO strengthened the government-to-government relationship with Tribal nations by requiring Federal agencies to consult with Tribal nations on the potential impacts of Federal policy on Tribal lands, resources, and citizens. This process was supported by Presidents George W. Bush and Obama and was a significant focus in the Biden-Harris administration, with new executive orders seeking to hold Federal agencies accountable for their Consultation processes and standards.

- **The Cobell Litigation and Settlement:** The Cobell litigation was a class-action lawsuit filed against the U.S. by the Native American Rights Fund on behalf of Elouise Cobell and over 500,000 individual Indian trust beneficiaries. The lawsuit claimed that the government had failed to properly manage Native trust assets, including failing to maintain a basic accounting of income generated by leases on Indian lands. The case was settled by the federal government in 2009 for $3.4 billion, which was less than a third of the amount identified by the plaintiffs experts as owed to the Tribal citizens. The settlement included $1.4 billion paid to the plaintiffs, $2 billion to repurchase fractionated land interests and return them to Tribal ownership through the "Land Buy Back" program, and the creation of the Cobell Educational Scholarship Fund, which is funded from the purchase of fractionated lands. The litigation and related settlements was one of the few times that the Federal government recognized its failure to meet its basic trust obligations to Tribal nations and Native Americans.

- **Federal Legislation Recognizing Tribal nations on par with States and other domestic sovereign governments:** Increasingly during the 2010s and 2020s, federal legislation began to recognize Tribal nations and implementing domestic governments for the purpose of federal funding and program implementation. Tribal nations and their governments are included as governmental entities able to receive and distribute–according to their own laws and policy goals–federal funding for a variety of COVID, infrastructure development, and tax programs under the American Rescue Plan, the Bipartisan Infrastructure Law, and the Inflation Reduction Act.

Many, but certainly not all, of the federal actions during this era have reinforced the nation-to-nation relationship and the sovereignty of Tribal nations. However, as students of the history of U.S. Federal Indian Policy know: that could change at any moment.

177 Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 25 U.S.C. § 450 et seq. (1975).

178 *Oliphant v. Suquamish Indian Tribe*, 43 U.S. 191 (1978).

179 *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S 408 (1989) and Nevada v. Hicks, 463 U.S. 110 (2001).

APPENDIX B: TIMELINE OF RELEVANT FEDERAL LAWS AND REGULATIONS

- **Indian Mineral Leasing Act of 1938 (IMLA),** 25 USC § 396a-g: Supplanted diverse Tribal leasing laws with a mandatory, standard federal lease entered into by the Secretary of the Interior on behalf of a Tribal nation. While the law mandates the payment of "fair" royalties it does not require fair market value and allows the Secretary to negotiate terms of payments and compliance, including setting a maximum lease duration.
- **National Environmental Policy Act of 1970 (NEPA),** 42 USC § 4321 et seq.: creates a uniform environmental review and federal permitting process for all projects with a federal action–i.e., any project that is on or crosses federal lands (including waters of the United States), requires federal approval, or uses federal financial or natural resources.[180] The federal action requiring NEPA also implicates the federal trust responsibility and consideration of impacts to Tribal lands and treaty resources.
- **American Indian Religious Freedom Act of 1978 (AIRFA),** 42 USC §§ 1996 & 1996a: protects the rights of Tribal citizens to practice traditional religions, including the use of sacred sites and ceremonial objects. Prior to the passing of AIRFA, many federal and state laws prohibited and/or made criminal the practice of Tribal ceremonies.
- **Archeological Resources Protection Act of 1979 (ARPA),** 16 USC §§ 470aa-mm: requires Tribal consent for archeological excavation or artifact removal on Tribal lands.[181]
- **Indian Mineral Development Act of 1982 (IMDA),** 25 USC §§ 2101-2108: expands Tribal authority to directly negotiate mineral leasing agreements with third parties (including joint ventures, production sharing and other agreements) but still requires Secretarial approval.
- **Native American Graves Protection and Repatriation Act of 1990 (NAGPRA),** 25 USC § 3001 *et seq*. and NAGPRA requires Tribal consent for the excavation or removal of Native American human remains or funerary objects, or sacred items from Tribal lands and further demands federal agencies and museums to catalog and return to Tribal nations any previously obtained and held Tribal human remains and artifacts.
- **National Historic Preservation Act (NHPA), 1992 amendments,** 16 USC § 470a: formally recognizes Tribal historic and cultural sites as protected historical sites and requires the involvement of Tribal nations in historic preservation and permitting. Subsequently, the Advisory Council on Historic Preservation (ACHP) promulgated regulations pursuant to their authority under Sections 101 and 106 of the 1992 NHPA Amendments, that establish a formal process by which federal agencies must engage in consultation with potentially impacted Tribal nations to identify potentially eligible sites of Tribal importance and consider the impacts of any federal action on those sites.
- **Executive Order 13175 "Consultation with Indian Tribal Governments," 2000:** requires federal departments and agencies to consult with Tribal nation governments when considering policies and projects that could impact Tribal lands, resources, or citizens. The exact method and procedures for that consultation are subject to each agency's Tribal consultation policy–which can differ dramatically from agency to agency. However, more recently the Biden Administration issued additional presidential memoranda and executive orders to strengthen and standardize this obligation, including the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (January 26, 2021) and the Memorandum on Uniform Standards for Tribal Consultation (November 30, 2022).[182]
- **Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSA)** (Title V of the Energy Policy Act of 2005), 25 USC §§ 2101, 3501: creates Tribal-specific federal energy offices, including the Office of Indian Energy Policy and Programs within the Department of Energy and establishes Tribal Energy Resource Agreements (TERAs), wherein Tribal nations can petition to independently develop and manage energy projects on their lands without federal approval of each individual lease, agreement, or action.[183] This includes oil, gas, and renewable energy leases; business agreements; and rights-of-way.
- **HEARTH Act of 2012,** 42 USC § 11381: amends the Indian Long-Term Leasing Act of 1955 to allow Tribal nations to petition for independent leasing authority, for certain business and renewable energy leases, without requiring federal approval for each individual lease.

180 Notably, although presidential administrations and courts have recently demanded significant changes to NEPA's implementing regulatory structure–e.g., the authority of Council for Environmental Quality (CEQ)–the statutory requirements remain and were recently reinforced by legislation in the Fiscal Responsibility Act of 2023.

181 ARPA and NAGPRA were both passed to address the significant looting of Tribal artifacts and human remains from Tribal and Federal lands. The application of consent requirements for excavation on Tribal lands is necessary to provide a hook for enforcement against non-Tribal citizens coming onto Tribal lands to conduct such activities as, due to the severe restriction of Tribal jurisdiction over non-members under federal law.

182 Biden also signed EO 14112 "Reforming Federal Funding and Support for Tribal nations" (December 2023), which preserved protections for Tribal data and operations in federal funding programs. However, Trump recently rescinded this order along with 77 orders. See "Additional Rescissions of Harmful Executive Orders and Actions" (March 14, 2025).

183 Although TERAs were established in 2005, to date not a single Tribal nation has entered into one. In response, in 2017 Congress passed amendments to ITEDSA, which included the creation of an alternative process for a Tribal nation to create a self-implementing Tribal Energy Development Organization (TEDO). Subsequently, the BIA passed revised TERA and TEDO regulations, 25 CFR Part 224, and since that time several Tribal nations have certified TEDOs.

- **Rights-of-Way over Indian Lands regulations,** 25 CFR Part 169 (revised in 2016): creates broader Tribal nation control in granting or denying ROWs on their lands, requiring Tribal consent before BIA approval and making Tribal jurisdiction and authority over enforcement and termination of a ROW obligatory unless specifically negotiated.
- **Infrastructure Investment and Jobs Act (IIJA)** aka the **Bipartisian Infrastructure Law (BIL),** 25 USC § 101 *et seq.*: provides funding for Tribal energy-related projects like roads, water systems infrastructure, climate and weather resilience, and legacy pollution clean-up.
- **The Inflation Reduction Act of 2022:** broadly supports Tribal-led energy development in Indian Country by creating several new grant and loan programs to implement energy projects for electrification, climate resiliency, and energy generation; offering direct payment rebates in lieu of tax credits to tax exempt Tribal nations for clean energy development, including solar, wind, geothermal, and storage projects, electric vehicle infrastructure, and energy efficiency.

APPENDIX C: RESEARCH METHODS

We used a mixed-methods approach combining desk research and interviews with experts in the field. We completed a literature review of relevant academic research focused on CBAs and IBAs made with Indigenous Peoples. We completed a regulatory review looking at relevant regulations in the U.S. We conducted extensive desk research to search for publicly available information on benefit agreements made with Tribes in the U.S. We used two methods to search for agreements–Google searches and searches in an academic database search engine which covers both academic publications and news articles. We searched for every federally recognized Tribe individually, and used 10 different search terms pertaining to community benefit agreements, community benefit plans, and right-of-way agreements, in combination with each Tribe's name, totaling 11,480 searches.

At this point in the research, we had not yet learned from interview data that agreements with Tribes typically go by a wide variety of other names, so we did not include those other names as search terms. However, because half of our search terms did not include quotation marks and did include the word "agreements," and because the searches occasionally provided results regarding other types of agreements with Tribes (such as a patent agreement, a settlement agreement, a forbearance agreement, etc.) we believe these searches should have still provided relevant results, if public information regarding a benefit agreement with the Tribe existed. Our choice to search only for agreements made with federally recognized Tribes was based on time constraints; future research could address agreements made with state recognized Tribes or unrecognized Tribes, and could incorporate a broader set of search terms encompassing different names for Tribal Benefit Agreements.

In May and June 2024, we interviewed eight experts who have direct experience with agreements made between Tribes and companies. The interviewees included lawyers and consultants involved in negotiating and writing agreements between Tribes and companies in the U.S.; a person who works in social and Tribal relations for a mining company with experience both in the U.S. and internationally; a person who was involved in designing and implementing the U.S. Department of Energy's guidance for Community Benefit Plans (CBPs) required in their funding opportunities; a consultant who has helped companies write CBPs in the U.S.; a scholar who has worked on the ground negotiating agreements in Australia, Canada, and internationally, and who has published research on agreements in those regions; and a person who has worked in Indigenous-led monitoring and evaluation of IBAs in Canada. We recorded, transcribed, and analyzed these interviews to pull out themes and relevant insights. Finally, we conducted case studies on 5 different agreements between Tribes and companies, based on publicly available information. Representatives from two of the projects covered in the case studies provided review and feedback on their respective case studies.

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All errors are ours alone.

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Through targeted research, training, investor networks, and corporate and international engagement, Tallgrass Institute forwards Indigenous solutions to market challenges and macro-economic issues by leading with Indigenous Peoples' self-determination and fostering equitable partnerships and practices. We aim to redefine the private sector's role as one that respects Indigenous Peoples' rights, lands, and economic priorities.