

# Pipeline agency starts consultation with Alaska Natives

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This month, a small team of federal officials will visit a handful of Alaska villages to discuss with local tribal leaders the proposed multibillion-dollar gas pipeline project – one government to another.

The meetings – or consultations, as they're called – stem from an 18-year-old presidential mandate for federal agencies to engage Native American tribes, and to listen and consider their concerns before taking actions that affect the tribes.

## U.S. Indian policy 1776 to today

**Treaty Era. 1776-1871:** U.S.-Indian relations largely governed by treaties. Congress bans new treaties in 1871.

**Assimilation Era. 1871-1933:** New laws and Supreme Court rulings erode tribal land holdings and Native American sovereignty while repressing Indian religious and cultural rights.

**New Deal Era. 1933-1953:** U.S. effort shifts to establishing tribal governments and strengthening Native American sovereignty and Indian rights.

**Termination Era. 1953-1970:** U.S. moves to end its trustee relationship and the separate legal existence of tribes as governments in effort to assimilate Native Americans into mainstream society. Many tribes abolished.

**Self-Determination Era. 1970-present:** U.S. supports limited tribal sovereignty and Native control over health, education and other services the federal government provides.

*Source: "Native American Sovereignty on Trial" by Bryan H. Wildenthal.*

That mandate grew out of a new federal approach to Native relations that repudiated two centuries of policies that marginalized Native Americans, their culture and their relations with the land.

The government-to-government consultations must occur for many federal actions, such as issuing certain permits; proposing laws and regulations; and developing policy statements. "As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner

respectful of tribal sovereignty," says a 1994 memo from President Bill Clinton to federal agency heads.

The federal government must operate "within a government-to-government relationship" with Native tribes, Clinton wrote, and he ordered the agencies to start doing so before they take actions that affect the tribes.

These consultations take on different forms depending on the federal activity. For longer duration or ongoing activities, the federal agencies might have regular meetings with nearby tribes to discuss changes in policies, procedures or facilities that could affect the tribes in some way. A similar approach might be taken for permanent federal property, such as military installations or dams.

For permits involving concrete-and-steel developments, such as TransCanada/ExxonMobil's proposed \$32 billion to \$41 billion gas pipeline that would cross 803 miles of Alaska before entering Canada, the consultations are project specific.

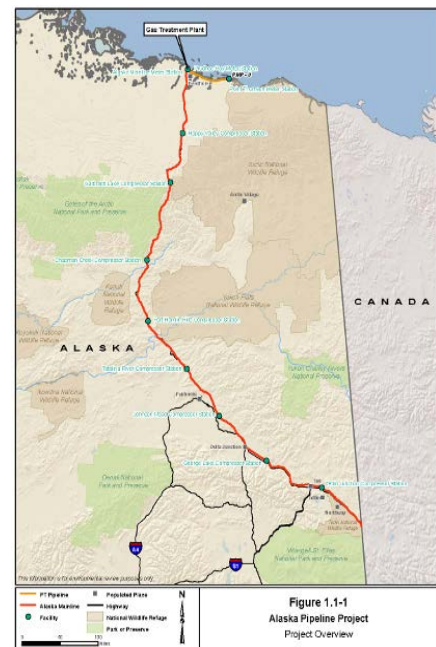
The [Federal Energy Regulatory Commission](#), which is leading the gas pipeline government-to-government consultations on behalf of itself and other federal agencies, can trace its effort back to about 10 years ago, when a different Alaska gas line project was being discussed. FERC officials started meeting with Alaska Native officials to learn about and understand their concerns. Over the ensuing years, FERC officials continued their outreach and roughly three years ago began drafting and redrafting a detailed plan of engagement leading to the formal consultations.

Out of that preparatory work came the decision to hold the consultation meetings themselves during winter, when tribal leaders and other community members are less engaged in subsistence food gathering and other activities.

FERC intends to meet in coming weeks with tribal leaders in 10 to 15 Native villages strung along the pipeline route from the North Slope to Fairbanks, then southeast roughly along the Alaska Highway to the Canada border.

The tribal consultations are confidential, occurring between representatives of two sovereign bodies.

FERC is leading a separate public process to listen to the concerns of all Alaskans, including Natives, as the agency [prepares an environmental impact statement](#) for the pipeline project.



## RADICAL SHIFT IN U.S. POLICY

The Clinton administration in 1994 first called for formal government-to-government consultations on actions affecting tribes.

But the idea evolved out of a radical shift in federal Indian policy by President Richard Nixon 24 years earlier. Nixon launched an effort to start repairing damage from the tortured history of U.S. relations with Native Americans.

From colonial days through the 1960s, the government's approach to Indians was as erratic and scarring as a Tennessee tornado, ranging from coerced assimilation to paternalism, isolation and neglect, not necessarily in that order and sometimes overlapping.

The U.S. Constitution recognizes a distinct legal status for tribes, listing them with states and foreign nations as the entities with which Congress can regulate commerce.

A mix of laws, treaties and court rulings have sharpened the official relationship between the U.S. government and Native American tribal governments. The U.S. government acknowledges it has legal duties and moral obligations to tribes, although opinions differ about degree. In a narrow sense the relationship resembles that of a trustee and beneficiary.

Tribes are considered "domestic dependent nations" with authority over their land somewhat similar to the authority of states over what happens within their boundaries. (Alaska has only one Indian reservation, so this works differently. Native corporations, not tribes, typically own the land in Alaska, and they do not have the same authority over the land that a tribe would on a reservation.) Although federal actions over 235 years have whittled away tribal land holdings, this separate legal status is a key basis for today's government-to-government consultations.

The official U.S. policy when Nixon became president bore the eerie label of "termination."

Termination arose from a [1953 act of Congress](#) that fell into the assimilation school of thought about Indian affairs. The goal of termination was to end the trust relationship and subject Native Americans to the same laws, privileges and responsibilities of other citizens. In all, the U.S. [terminated over 100 tribes](#) encompassing about 12,000 Native Americans and over 1 million acres.

## THE END OF TERMINATION

On July 8, 1970, Nixon sent to Congress [a blunt new message](#): Termination is wrong.

"The first Americans – the Indians – are the most deprived and most isolated minority group in our nation. ... This condition is the heritage of centuries of injustice," Nixon's message started.

"The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."

Native Americans should choose their own paths, rather than have it dictated to them by Washington. Native leaders, not federal bureaucrats, should guide the affairs of their communities. "We must make it clear that Indians can become independent of federal control without being cut off from federal concern and federal support," Nixon said.

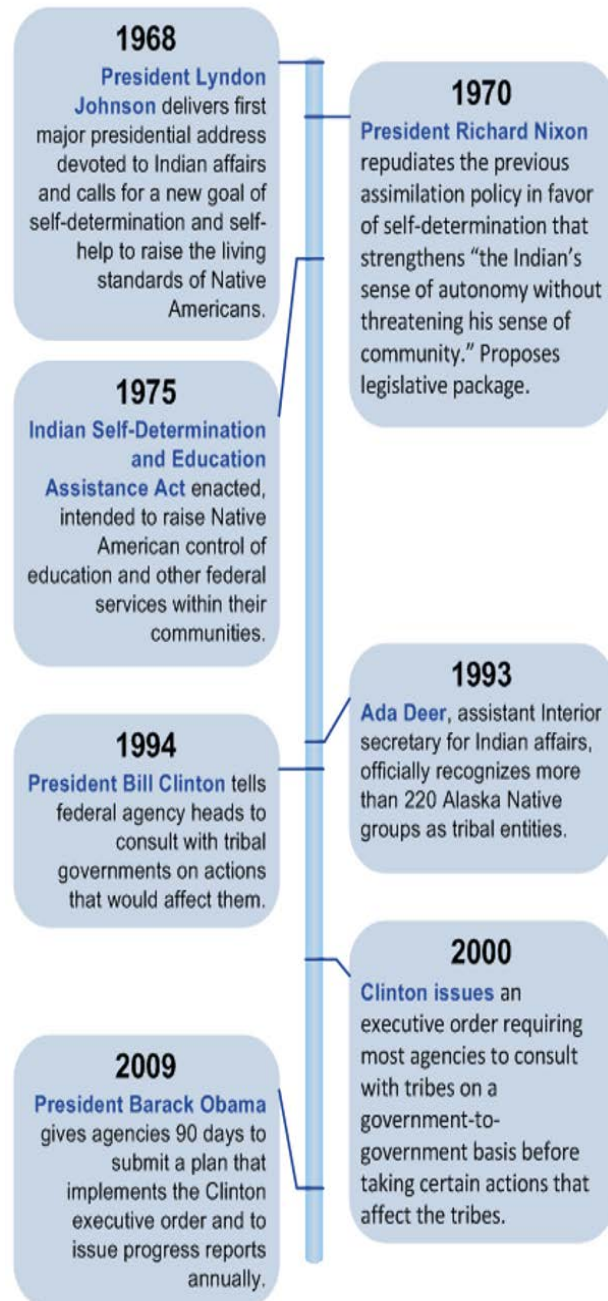
"Self-determination among the Indian people can and must be encouraged without the threat of eventual termination."

Self-determination was the new rallying cry. It has been the U.S. policy since. Successive presidents from Gerald Ford to Barack Obama endorsed it. Self-determination allows tribes – when *they* say they're ready – to take control of federally funded programs, including law enforcement, social services, health care and resource management. Alaska's Native health care system shifted to the control of Native nonprofit groups in the 1990s under self-determination.

The concept of self-determination didn't originate with Nixon. The idea percolated in the Johnson administration. In fact, President Lyndon Johnson used the term in his own [special message to Congress in 1968](#). But within a month Johnson had announced he wouldn't seek re-election and his lame-duck administration never pushed the new approach.

Unlike Johnson, Nixon backed up his message with a passel of proposed laws that culminated with the Indian Self-Determination and Education Assistance Act of 1975.

## Key dates in Native American self-determination



Nixon's message arose as civil rights activism erupted across many minority groups, including Native Americans. A group of empathetic White House aides crafted the message with the blessings of Nixon and his top domestic policy adviser John Ehrlichman. Interestingly, for his Watergate conviction, Ehrlichman asked to be sentenced to provide free legal help to Pueblo Indians in New Mexico; the judge sent him to prison instead. (Nixon's Interior secretary, former Alaska Gov. Wally Hickel, had little to do with crafting the new policy. Hickel sympathized with the plight of Indians, however, and he placed Native Americans in top roles within his Bureau of Indian Affairs.)

## TRIBAL RECOGNITION IN ALASKA

Federal agencies carried out the self-determination goal in fits and starts for some years.

For example, the Alaska Native Claims Settlement Act of 1971, which created regional and village corporations, deeding them land and seeding them with cash, is about both self-determination and assimilation. President Ronald Reagan squeezed funding for Native and other programs in the 1980s, although Reagan himself embraced self-determination.

When Clinton became president in 1993, self-determination got new momentum. Clinton's assistant Interior secretary for Indian affairs, Ada Deer, greatly expanded tribal self-governance and funding and helped tribes expand casinos and other gaming on Indian land. In 1993, at a speech to the Alaska Federation of Natives in Anchorage, [Deer officially recognized](#) more than 220 Alaska Native groups as tribal entities entitled to Bureau of Indian Affairs services and many privileges available to federally recognized Lower 48 tribes.

Government-to-government consultations stemmed from a [memo Clinton sent in April 1994](#) to the heads of federal agencies.

"I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments," Clinton wrote. "The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes."



President Barack Obama meets with tribal leaders Dec. 15, 2010. Official White House Photo by Pete Souza

Clinton instructed the agencies to:

- Consult with tribal governments before taking actions that affect them.
- Assess the impact of federal activities on tribal resources and consider the rights and concerns of tribal governments when developing the projects and other activities.

Six years later, Clinton made clearer what he wanted by issuing an executive order on consultations. [Executive orders](#) date to George Washington's presidency, and they explicitly direct agencies and officials on how to carry out federal law and policies.

President Lincoln's Emancipation Proclamation was an executive order. President Truman desegregated the armed forces via an executive order.

Clinton issued [Executive Order 13175](#) on Nov. 6, 2000, just 11 weeks before leaving office. This order and the 1994 memo drive government-to-government consultations today.

The 2000 order mandates that affected tribal officials be consulted early in the process when federal agencies are taking certain actions that affect the tribes. It explicitly lists Alaska Natives as among those that must be consulted.

Presidents George W. Bush and Barack Obama reaffirmed the order during their tenures.

Clinton's order applied to all executive branch agencies except independent regulators such as the Federal Energy Regulatory Commission that are set up to be outside of direct presidential control.

However, in 2003 [FERC adopted its own policy](#) embracing government-to-government consultations before it makes decisions on gas pipelines and other projects.

## HOW IT WORKS

The big picture is that government-to-government consultations are part of an ongoing effort by federal agencies to build relationships with tribal leaders.

Every year in Alaska, multiple federal actions require consultations with tribal leaders in one or more villages.

Some might be the briefings for villages near military bases about activities there. Some involve policies, such as subsistence rules. Some involve projects such as oil development, mining projects and subdivision building.

No single rigid approach is prescribed for how federal agencies must fulfill their government-to-government responsibilities. So while agencies share the goal of engaging, listening to and considering tribal concerns, the details of how they get there can differ somewhat.

"It is important to remember that U.S. government activities may have a significant and direct impact on the Tribes," one federal agency's manual instructs. "The evaluation of these actions should be determined by the Tribes, not the agency. Some actions or rules that may seem innocent to the agency may be interpreted as culturally onerous or extraordinary to the Tribes."

For the Alaska pipeline government-to-government consultations, FERC asked tribal governments for their preferences on meeting logistics, format, locations and dates, as well as on which federal agencies should be present, how the consultation should be documented and whether a translator is needed.

The federal team arriving in the village likely will involve three or four people. Leading the team will be either Mike Boyle, FERC's manager for the project's environmental impact statement, or Ellen Saint Onge, FERC's government-to-government director for this project. Also attending will be a consultant FERC is using and a federal Bureau of Land Management official helping FERC; the BLM official also will be fulfilling that agency's government-to-government responsibilities.

FERC intends to present a summary of what the commission does and its role in vetting the proposed pipeline, and an overview of the project design. FERC plans to bring the most detailed maps available showing the pipeline route near village lands. And it will describe other ways the public can get involved, such as during drafting of the environmental impact statement.

However, the team's main activity will be to listen.

Among the hundreds or thousands of government-to-government consultations across the country over the past decade, no one pattern describes the rhythm of the face-to-face meetings. Sometimes meetings are relatively short. Sometimes they last for hours, especially when storytelling and speech making are central to a tribe's culture.

Tribal leaders determine what ultimately gets discussed. Sometimes they take the opportunity to air other issues, such as state or federal subsistence policies in Alaska or grazing rights in the West. For a recent Lower 48 gas pipeline, well over half the discussion concerned issues other than the project, said one participant not involved in the Alaska consultations.

Listening and patience are critical to successful consultations.

The federal team rarely records the consultations. FERC doesn't plan to do so in Alaska. Consultations are private conversations.

Someone on the federal team might take notes, which typically later get circulated back and forth between the tribal leaders and the federal team to ensure what the tribal leaders say gets heard and understood. But the notes do not become part of the public record unless the tribe requests it.

One federal agency is preparing new government-to-government procedures that say, "These interactions may include discussions relating to issues of unique sensitivity to tribes such as cultural practices, uses of environmental resources, and locations of cultural resources. There may also be sensitivity regarding tribal relationships with surrounding states and jurisdictional issues. In preparing any records memorializing consultations with tribes, you should consider these potential sensitivities in determining the level of detail to include."

For the Alaska pipeline project, FERC does not intend that the village meeting will end the consultation or the relationship.

"As necessary, consultation will continue until construction is complete," FERC's government-to-government plan for the pipeline project says.