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This legal review is an overview of legal authorities and is not intended to provide any legal opinions or advice regarding the authorities or programs set forth herein. This review briefly describes dozens of legal authorities and is not an exhaustive description of those authorities. Moreover, the laws, regulations, policies, and programs referenced are frequently amended. Please contact the USDA Office of the General Counsel for further assistance.

I. INTRODUCTION

On November 15, 2021, the Secretary of the Interior and the Secretary of Agriculture jointly issued Order No. 3403 (JSO 3403) on fulfilling the trust responsibility to Tribes in the stewardship of federal lands and waters.¹ The JSO 3403 Section 1(d) directs the U.S. Department of Agriculture (USDA) and the U.S. Department of the Interior (DOI) to complete a legal review of their “current land, water, and wildlife treaty responsibilities and authorities that can support co-stewardship and Tribal stewardship.”² This report constitutes USDA’s response.

II. JSO 3403 AND STEWARDSHIP

This section explains the various stewardship arrangements discussed in JSO 3403 and reviews USDA authority applicable to the establishment of co-stewardship arrangements between USDA agencies and Tribes related to the management of federal lands, waters, wildlife, and habitats under a USDA agency’s jurisdiction.

A. JSO 3403

USDA, like DOI, manages federal lands and waters once owned and stewarded by Indian tribes. Many of these lands and waters hold natural and cultural resources of continuing significance to Tribes, some within areas reserved by ratified treaties for Tribal subsistence, religious, and cultural uses. Given the United States’ government-to-government relationship with and trust obligations to Tribes, JSO 3403 sets forth policy that USDA will seek to ensure management of federal lands, waters, wildlife, and habitats under its jurisdiction in a manner that protects the treaty, religious, subsistence, and cultural interests of Tribes.³ To achieve that goal, JSO 3403 enumerates the steps USDA agencies should take when undertaking stewardship activities.

¹ U.S. DEP’T OF THE INTERIOR AND U.S. DEP’T OF AGRIC., J. SECRETARIAL ORDER NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2021).

² *Id.* § 1(d).

³ For purposes of JSO 3403, the term “Tribe” refers to entities having a government-to-government relationship with the United States, *i.e.*, federally recognized Indian tribes and the Native Hawaiian Community, which relies on Native Hawaiian organizations as its informal representatives. *See id.* § 3.

1. Federal Stewardship

JSO 3403 directs each agency to ensure that its decisions relating to Federal stewardship of lands, waters, wildlife and habitat under its jurisdiction include consideration of how to safeguard the interests of any Tribe those decisions may affect.⁴ JSO 3403 further directs that, whenever an agency makes a federal land management decision affecting the treaty or religious rights of a Tribe,⁵ the agency will incorporate the principles of implementation set out in JSO 3403⁶ to ensure the agency considers ways to safeguard Tribal interests that may be affected by the decision.⁷

2. Tribal Stewardship

In JSO 3403, the Departments recognized that it is the policy of the United States to promote Tribal stewardship. For purposes of promoting Tribal stewardship of lands, JSO 3403 directs the Departments to “support consolidation of [T]ribal landholdings within reservations, including Tribal acquisition of Federal lands and private inholdings, in furtherance of this Order and consistent with applicable law.”⁸

3. Co-Stewardship

With respect to co-stewardship, JSO 3403 directs agencies to make agreements with Tribes to collaborate in the co-stewardship of federal lands, waters, wildlife, and habitat under an agency’s jurisdiction.⁹ JSO 3403 further directs agencies to take steps to engage in co-stewardship activities:

⁴ *Id.* § 1(a).

⁵ *Id.*

⁶ *Id.* § 3 contains the following direction: (1) recognize that Tribes can directly engage with the Department to address matters of mutual interest concerning federal lands management; (2) work with Tribes to give them an integral role in management decisions affecting federal lands and waters through consultation, capacity building, and other means consistent with applicable authority; (3) engage affected Tribes in meaningful consultation on federal land management, including giving due consideration to Tribal recommendations; (4) incorporate Tribal management plans to the maximum extent possible with respect to certain restoration and conservation planning; (5) collaborate with Tribes to promote education about the role Tribal governments play in the stewardship of federal lands, waters, and wildlife; (6) duly consider Tribal expertise and Indigenous knowledge in federal land management decisions, especially for resources subject to reserved treaty rights; (7) include dispute resolution procedures in collaborative agreements with Tribes; and (8) incorporate non-recognized tribes in implementation of JSO 3403 where authorized.

⁷ *Id.* § 1(a).

⁸ *Id.* § 6.

⁹ *Id.* § 1(b).

- Whenever federal lands or waters subject to an agency’s activities are within or adjacent to a Tribe’s reservation;¹⁰
- Whenever a Tribe has subsistence or other rights or interests in non-adjacent federal lands; or
- Whenever a Tribe requests an agency to do so.¹¹

If co-stewardship activities are not permitted under applicable law, the USDA agencies should give consideration and deference to Tribal proposals, recommendations, and knowledge that affect management decisions on USDA-managed lands. To advance co-stewardship, JSO 3403 Section 5 further directs each agency to:

- Promote use of collaborative agreements or provisions in land management plans consistent with USDA’s obligations under existing law;
- Develop and implement, whenever possible, employee performance review standards that evaluate progress toward meeting the objectives of JSO 3403, including progress on developing new collaborative stewardship agreements and enhancing existing ones;
- Coordinate and cooperate on co-stewardship efforts and initiatives between the Departments;
- Use agreements to foster cooperation on protection of treaty, subsistence, and religious rights consistent with consensual policy-making referenced in EO 13175;¹² and
- Evaluate and update USDA manuals, handbooks, and other guidance documents for consistency with JSO 3403.

In considering co-stewardship opportunities, it is important to consider the equities of all tribal interests with regard to particular resource values and land management.

B. Inherent Federal Function

USDA employees implementing JSO 3403 must keep in mind that their status as federal employees carries a responsibility to act in the national public interest in accomplishing USDA’s mission and implicates specific requirements under federal law. This section discusses those

¹⁰ JSO 3403 lists the following databases that may be used to identify federal lands that may be subject to its co-stewardship requirements: the Tribal Treaty Database (TTD) (<https://treaties.okstate.edu/>); the Bureau of Indian Affairs (BIA) Tribal Land Locator Tool (<https://biamaps.doi.gov/indianlands/>); the Forest Service’s Tribal Connections Map Viewer (<https://www.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32>); and the Office of Native Hawaiian Relations Native Hawaiian Organization List (<https://www.doi.gov/hawaiian/NHOL>) and Homestead and Beneficiary List (<https://www.doi.gov/hawaiian/homestead-beneficiary-associations-list>).

¹¹ *Id.* § 5.

¹² Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

requirements in broad terms but is intended only as an introduction to possible limitations on USDA employees' activities and potential areas of concern.

1. OMB Circular A-76

Agencies must be careful to avoid any agreement or other arrangement that provides a Tribe with the authority to perform an inherently governmental activity. "Inherent governmental functions" are those "so intimately related to the public interest as to mandate performance only by Federal employees,"¹³ including activities that require the exercise of substantial discretion in applying federal authority or in making decisions for the federal government. In practical terms, the concept of "inherent governmental activity" means that, absent some other authority, Federal employees may not transfer official responsibility to other parties.¹⁴

The concept of "inherently governmental activity" sets a boundary on the functions a Tribe may perform in support of a cooperative agreement or other arrangement. Examples of inherently governmental activities that may not be delegated to a Tribe include but are not limited to:

- deciding whether to grant or deny an application for or administering a special use authorization or other type of written authorization for use of USDA-managed lands;
- administering federally owned improvements under the jurisdiction of USDA;
- deciding whether to sell or exchange USDA-managed land or grant property rights (*e.g.*, easements, rights-of-way).

Notwithstanding such limitations, significant latitude remains in the types of co-stewardship agreements or other arrangements that may appropriately support USDA operations without an inappropriate transfer of federal authority. For example, the inherently governmental activity limitation would not prohibit a Tribe from developing an exhibit on geological sites at a Forest Service National Monument for the Monument's visitor center.

2. Non-Delegation Doctrine

¹³ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIR. NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1983, rev. 1999).

¹⁴ Inherently governmental activities normally fall into two categories: (1) the exercise of sovereign government authority or (2) the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. These activities involve binding the United States to take or not to take some action by contract, policy, regulation, or otherwise; determining, protecting, and advancing the United States' economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; significantly affecting the life, liberty, or property of private persons; or exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible) including establishing policies or procedures for the collection, control, or disbursement of appropriated or other federal funds.

The Non-Delegation Doctrine is an important principle of constitutional and administrative law derived from Article I of the Constitution that likewise functions as a boundary or limit on co-stewardship. This doctrine prohibits Congress from delegating its legislative powers to other entities, be they administrative agencies, tribes, or private organizations. In the same manner, administrative agencies may not delegate the exercise of their authorities to tribes or private organizations. This doctrine likewise may function as an important limit on what may be considered in the realm of co-stewardship.

III. AUTHORITIES SUPPORTING CO-STEWARDSHIP OR TRIBAL SOVEREIGNTY

Each USDA agency has authority to enter into cooperative agreements, collaborative partnerships, and other similar arrangements with Tribes for various purposes. Some authorities may authorize funding for Tribes to perform particular activities while others may authorize Tribal participation without Federal funding or by using financial and other resources provided by a Tribe. This section lists some of the key authorities that may be available for these purposes.

A. Department-Wide

1. Authorities

i. NATIVE Act

The Native American Tourism and Improving Visitor Experience Act (NATIVE Act) requires that the “head of each agency that has recreational travel or tourism functions or complementary programs shall update the respective management plans and tourism strategies of the agency to include Indian tribes, tribal organizations, and Native Hawaiian organizations.”¹⁵ Key purposes of the Act are to “increase coordination and collaboration between Federal tourism assets to support Native American tourism . . . [and] enhance and improve self-determination and self-governance capabilities in the Native American community.”¹⁶ Although the NATIVE Act focuses on tourism, the Act may possibly be interpreted to authorize the Forest Service to undertake projects that support broader Tribal priorities in a co-stewardship context. The Act requires agencies to support Indian tribes “to identify and enhance or maintain traditions and cultural features that are important to sustain the distinctiveness of the local Native American community”¹⁷ may provide some flexibility for federal land managers in the context of recreation to support or facilitate Tribal traditional and cultural practices on federal lands.

2. Consultation/Coordination Policies

¹⁵ 25 U.S.C. § 4353(b) (2018).

¹⁶ 25 U.S.C. § 4351 (2018).

¹⁷ 25 U.S.C. § 4354(a)(2) (2018).

- i. Departmental Regulation (DR) 1340-007, *Policies on American Indians and Alaska Natives*¹⁸

This DR sets forth the USDA’s policy on government-to-government Tribal relations and provides policy and implementation guidance for EO 13175, “*Consultation and Coordination with Indian Tribal Governments*.”

- ii. DR 1350-002, *Tribal Consultation, Coordination, and Collaboration*¹⁹

This DR establishes USDA-wide guidance for tribal consultation, providing a baseline from which agencies develop their own supplemental tribal consultation policies for government-to-government consultation.

- iii. Plan of Action 270 Day Report on Tribal Consultation and Strengthening Nation-to-Nation Relationships²⁰

In response to President Biden’s January 26, 2021, Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, USDA’s Office of Tribal Relations (OTR) submitted a Consultation Action Plan on April 26, 2021. The document lists action items with updates on completed work and the status of each action item.

B. Forest Service

The Forest Service manages 193 million acres of national forests and grasslands in accordance with the agency’s Organic Administration Act of 1897, the Multiple-Use Sustained-Yield Act of 1960, the National Forest Management Act, and other federal statutes. Congress established the Forest Service in 1905 to "furnish a continuous supply of timber for the use and necessities of the people of the United States" and later directed the Forest Service to manage the National Forest System for multiple uses and benefits and for the sustained yield of renewable resources, *i.e.*, water, forage, wildlife, wood, and recreation.²¹

1. Authorities

- i. Tribal Forest Protection Act

¹⁸ U.S. DEP’T OF AGRIC., DEPARTMENTAL REGULATION 1340-007, POLICIES ON AMERICAN INDIANS AND ALASKA NATIVES (2008), *available at* <https://www.usda.gov/directives/dr-1340-007>.

¹⁹ U.S. DEP’T OF AGRIC., DEPARTMENTAL REGULATION 1350-002, TRIBAL CONSULTATION, COORDINATION, AND COLLABORATION (2013), *available at* <https://www.usda.gov/directives/dr-1350-002>.

²⁰ U.S. DEP’T OF AGRIC., PLAN OF ACTION 270 DAY REPORT: TRIBAL CONSULTATION AND STRENGTHENING NATION-TO-NATION RELATIONSHIPS (2021), *available at* <https://www.usda.gov/sites/default/files/documents/usda-consultation-plan-action-270-day-report.pdf>.

²¹ 16 U.S.C. § 475 (2018); 16 U.S.C. § 528 (2018).

The Tribal Forest Protection Act (TFPA) authorizes the Forest Service to enter into agreements with Tribes “to carry out . . . project[s] to protect Indian forest land or rangeland (including . . . project[s] to restore Federal land that borders on or is adjacent to Indian forest land or rangeland)” and “[that] poses a fire, disease, or other threat to . . . the Indian forest land or rangeland under the jurisdiction of the Indian tribe; or a tribal community; or is in need of land restoration activities.”²² The statute defines “Indian forest land or rangeland” as “land that . . . is held in trust by, or with a restriction against alienation by, the United States for an Indian tribe or a member of an Indian tribe,” and is “forest land . . . ; or . . . has a cover of grasses, brush, or any similar vegetation; or . . . formerly had a forest cover or vegetative cover that is capable of restoration.”²³ Covered projects must meet certain criteria, including that the Forest Service-managed lands involved must “border[] on or [be] adjacent to” “Indian forest land or rangeland under the jurisdiction of the Indian tribe” which “pose[] a fire, disease, or other threat to” those lands or a tribal community or be “in need of land restoration activities”; and “present[] or involve[] a feature or circumstance unique to that Indian tribe (including treaty rights or biological, archaeological, historical, or cultural circumstances).”²⁴ If the Forest Service denies a Tribe’s request to enter into an agreement, the TFPA requires the agency to provide the Tribe an explanation for its decision, and to propose consultation with the Tribe.²⁵

Projects proposed by a Tribe under the TFPA may be carried conducted under Good Neighbor agreements, stewardship agreements, participating agreements, Challenge Cost Share agreements, stewardship contracts, service contracts, or TFPA 638 demonstration project agreements (Public Law 115-335 Section 8703). TFPA 638 demonstration project authority is available when a Tribe and Forest Service administrative unit have negotiated an approved TFPA proposal, with the option to execute the work under the Indian Self-Determination and Education Assistance Act (ISDEAA) (Public Law No. 93-638).²⁶

ii. Good Neighbor Authority

The Forest Service’s Good Neighbor authority allows the agency to enter into cooperative agreements or contracts with Tribes, Alaska Native corporations (ANCs), or qualifying tribal organizations to carry out “similar and complementary forest, rangeland, and watershed restoration services . . . on Federal land, non-Federal land, and land owned by an Indian tribe.”²⁷ A Good Neighbor agreement can include “activities to treat insect- and disease-infected trees” or “reduce hazardous fuels,” or “any other activities to restore or improve forest, rangeland, and

²² 25 U.S.C. § 3115a(b)(1), (c)(2) (2018).

²³ *Id.* § 3115a(a)(2).

²⁴ *Id.* § 3115a(c).

²⁵ *Id.* § 3115a(d).

²⁶ *See* 25 U.S.C. § 3115b (2018); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 8703, 132 Stat. 4490 (2018).

²⁷ *See* 16 U.S.C. § 2113a(a)(1),(a)(5),(a)(6),(a)(7),(b)(1)(A) (2018). Note also that the Good Neighbor Authority adopts the definition of Indian tribe as defined in the Indian Self-Determination and Education Assistance Act at § 25 U.S.C. § 5304(e). *Id.* § 2113a(a)(7).

watershed health, including fish and wildlife habitat,” but generally excludes construction or repair of roads, parking areas, or public buildings or works.²⁸ Tribes are not currently eligible to retain proceeds from the sale of timber removed as part of a Good Neighbor agreement.²⁹

iii. Stewardship Contracting Authority

The Forest Service’s stewardship contracting authority allows the agency to enter, “via agreement or contract as appropriate, . . . into stewardship contracting projects with private persons or other public or private entities to perform services to achieve land management goals for . . . the public lands that meet local and rural community needs.”³⁰ The land management goals that can be pursued under this authority include “[r]oad and trail maintenance or obliteration to restore or maintain water quality,” improving “[s]oil productivity, habitat for wildlife and fisheries, or other resource values,” “[s]etting of prescribed fires to improve the composition, structure, condition, and health of stands or to improve wildlife habitat,” “[r]emoving vegetation or other activities to promote healthy forest stands, reduce fire hazards, or achieve other land management objectives,” “[w]atershed restoration and maintenance,” “[r]estoration and maintenance of wildlife and fish,” and “[c]ontrol of noxious and exotic weeds and reestablishing native plant species.”³¹ While matching funds are required for 20 percent or more of total project value excluding goods for services calculations, the match requirement can be waived if necessary, by the regional forester pursuant to the direction provided in EO 13175 and USDA DR 1350-001 Tribal Consultation (September 11, 2008).

iv. Wyden Amendment (Watershed Restoration and Enhancement Agreements)

The Wyden Amendment authorizes the Secretary of Agriculture to use Forest Service appropriations to enter into cooperative agreements with other federal agencies, tribal, state, and local governments, private and nonprofit entities, and landowners for the purpose of protection, restoration, and enhancement of fish and wildlife habitat and other resources, reduction of risk for natural disaster where public safety is threatened, or a combination of both.³² An important facet of the Wyden Amendment authority is that it allows the Forest Service to enter into cooperative agreements with willing partners and landowners for the protection, restoration and enhancement of fish and wildlife habitat and other resources on non-Forest Service lands. For example, using an agreement with a private landowner under the Wyden Amendment to include the private land in a project on National Forest System lands allows the agency to conduct prescribed fire operation more effectively and safely and also benefits the private landowner.

²⁸ *Id.* § 2113a(a)(4).

²⁹ *Id.* § 2113a(b)(2)(C).

³⁰ 16 U.S.C. § 6591c(b) (2018).

³¹ *Id.* § 6591c(c).

³² 16 U.S.C. § 1011a (2018).

Any project that directly or indirectly protects, enhances, or restores resources within a watershed and provides tangible benefits to achieving Forest Service objectives is allowable under the Wyden amendment. The agreements must provide for costs to be shared (either funds or in kind contributions) by the parties and must provide for a determination by the Forest Service that its expenditures under the agreements are in the public interest. Wyden Amendment allows for cross-boundary work, and watershed restoration and enhancement agreements may be added to participating, Challenge Cost-Share, Good Neighbor, and stewardship agreements, or executed as stand-alone participating agreements.

v. Service First

The purpose of the Service First authority is to improve customer service by authorizing DOI bureaus and USDA agencies to share facilities, services, and employees.³³ The Service First statute authorizes DOI bureaus and USDA agencies to conduct activities jointly or on behalf of one another, co-locate in federal offices or leased facilities, make reciprocal delegations of their respective authorities, duties and responsibilities, and transfer and reimburse funds on an annual basis, including transfers and reimbursements for multi-year projects. The Service First statute could be used to facilitate work with or on behalf of Tribes.

vi. Agreements Under the Department of the Interior and Related Agencies Appropriations Act of 1992 (Challenge Cost-Share Agreements)

This Act authorizes the Forest Service to cooperate with others in developing, planning, and implementing mutually beneficial projects that enhance Forest Service activities, where the cooperators provide matching funds or in-kind contributions.³⁴ No minimum cost share is provided, and thus waiver of the cost share is within the discretion of the Secretary. Cooperators may be public and private agencies, organizations, institutions, and individuals.

vii. Act of June 30, 1914 (Cooperative Funds Act)

This Act authorizes the Forest Service to retain funds received as contributions toward cooperative work in forest investigations or the protection, management, and improvement of the National Forest System.³⁵ The statute provides that payment for work undertaken by the Forest Service may be made from any Forest Service appropriation that is available for similar work, subject to certain conditions. Tribal contributions could allow a Forest Service project of interest to a Tribe to proceed sooner than appropriations might otherwise permit.

³³ 43 U.S.C. § 1703 (2018).

³⁴ The Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, title II, 105 Stat. 990, 1018 (1992); U.S. FOREST SERVICE, FSM 1580.12, GRANTS, COOPERATIVE AGREEMENTS, AND OTHER AGREEMENTS (2020). In July 2022, the Chief of the Forest Service provided direction on the field allowing for expanded waiver of matching requirements, including those applicable to Tribes.

³⁵ 16 U.S.C. § 498 (2018).

viii. Cooperative Funds and Deposits Act

The Cooperative Funds and Deposits Act authorizes the Forest Service to negotiate and enter into cooperative agreements, notwithstanding the Federal Grants and Cooperative Agreements Act, with public or private agencies, organizations, institutions, or persons to:

- Construct, operate, and maintain cooperative pollution abatement equipment and facilities, including sanitary landfills, water systems, and sewer systems;
- Engage in cooperative human resources and job training and development programs;
- Develop and publish cooperative environmental education and forest history materials; and
- Perform forestry protection, including fire protection, timber stand improvement, debris removal, and thinning of trees.³⁶

Agreements under this authority are predicated on a finding by the Forest Service that the public interest will be benefited and that mutual interest other than monetary considerations exists. In implementing these cooperative arrangements, the Forest Service is authorized to advance or reimburse funds to cooperators from any Forest Service appropriation available for similar kinds of work or by furnishing or sharing materials, supplies, facilities, or equipment without regard to the provisions of 31 U.S.C. § 3324(a) and (b), relating to the advance of public moneys.

ix. Infrastructure Investment and Jobs Act

The Infrastructure Investment and Jobs Act³⁷ provides specific funding for states and Tribes to conduct restoration and wildfire mitigation and risk reduction projects on federal land pursuant to Good Neighbor agreements or the TFPA, with additional funds provided solely for implementation of the TFPA. However, any appropriate IJA funds may be used for authorized activities in co-stewardship with Tribes.

x. Alaska National Interest Lands Conservation Act

The Alaska National Interest Lands Conservation Act (ANILCA) local hiring authority allows federal land management agencies to give selection preference to eligible local applicants for qualifying jobs with the USDA Forest Service. Section 809 of the Alaska National Interest Lands Conservation Act (ANILCA) authorizes the Secretary to “enter into cooperative agreements or otherwise cooperate with other Federal agencies, the State, [Alaska] Native Corporations, other appropriate persons and organizations, and, acting through the Secretary of State, other nations to effectuate the purposes and policies of” ANILCA.³⁸ Title VIII of

³⁶ 16 U.S.C. § 565a-1 (2018).

³⁷ The Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

³⁸ 16 U.S.C. § 3119 (2018).

ANILCA, in turn, addresses the management of subsistence use of federal lands in Alaska by rural residents, both Native and non-Native.³⁹

2. Consultation/Coordination Policies

i. Forest Service Planning Rule

The National Forest Management Act requires the Forest Service to promulgate a land management planning rule and to develop land management plans for all national forests and grasslands.⁴⁰ Land management planning provides an early opportunity for Tribes to engage in developing co-stewardship proposals for management of national forests and grasslands and to incorporate tribal knowledge, and the Forest Service’s Planning Rule guides revisions to Forest Service land management plans. The most recent version of the planning rule was promulgated in 2012.⁴¹ The 2012 Planning Rule requires the Forest Service to:

- “[a]s part of tribal participation and consultation . . . request information about native knowledge, land ethics, cultural issues, and sacred and culturally significant sites.”⁴²;
- “coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes [and] Alaska Native Corporations”⁴³;
- “review the planning and land use policies of federally recognized Indian Tribes . . . , Alaska Native Corporations [and] include consideration of . . . compatibility and interrelated impacts of these plans and policies . . . opportunities for the plan to address the impacts identified or to contribute to joint objectives; and . . . opportunities to resolve or reduce conflicts”⁴⁴; and
- “include plan components, including standards or guidelines, to provide for: . . . (ii) Protection of cultural and historic resources. (iii) Management of areas of tribal importance.”⁴⁵.

ii. Forest Service Tribal Relations Handbook on Consultation with Indian Tribes and Alaska Native Corporations

³⁹ See, e.g., *id.*; 16 U.S.C. § 3111(1) (2018) (declaring the congressional finding that “the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the [federal] lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence”).

⁴⁰ 16 U.S.C. § 1604 (2018).

⁴¹ 36 C.F.R. Part 219.

⁴² 36 C.F.R. § 219.4(a)(3).

⁴³ *Id.* § 219.4(b)(1).

⁴⁴ *Id.* § 219.4(b)(2).

⁴⁵ *Id.* § 219.10(b)(1).

This Forest Service Handbook includes direction for Forest Service employees on tribal consultation timelines and processes, establishment of consultation agreements, and monitoring and evaluation of consultation.⁴⁶

- iii. USDA Forest Service, National Resource Guide to American Indian and Alaska Native Relations (April 1997)

This guide helps Forest Service employees implement the federal government's and the Forest Service's American Indian and Alaska Native policy.⁴⁷

C. Natural Resources Conservation Service (NRCS)

1. Authorities⁴⁸

i. Agricultural Conservation Easement Program (ACEP)

ACEP protects the agricultural viability and related conservation values of eligible land by limiting nonagricultural uses that negatively affect agricultural uses and conservation values, protecting grazing uses and related conservation values by restoring or conserving eligible grazing land, and protecting and restoring and enhancing wetlands on eligible land.⁴⁹ ACEP has two enrollment components.⁵⁰ Under the first component, the Agricultural Land Easement (ALE) component, NRCS helps Indian tribes, state and local governments or non-governmental organizations protect working agricultural lands by providing financial assistance toward the purchase of conservation easements.⁵¹ The purpose of the Agricultural Land Easement component is to limit non-agricultural uses of the protected land. Under ACEP's second component, the Wetland Reserve Easement (WRE) component, NRCS provides financial and technical assistance directly to private landowners to restore, protect, and enhance wetlands through the purchase of Wetland Reserve Easements.⁵²

⁴⁶ U.S. FOREST SERVICE, FSH 1509.13, AMERICAN INDIAN AND ALASKA NATIVE RELATIONS HANDBOOK: CONSULTATION WITH INDIAN TRIBES AND ALASKA NATIVE CORPORATIONS (2016), *available at* <https://www.fs.usda.gov/spf/tribalrelations/documents/directives/FSH1509-13Chapter10-20160309.pdf>.

⁴⁷ U.S. FOREST SERVICE, FS-600, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS (1997), *available at* <https://www.fs.usda.gov/spf/tribalrelations/documents/publications/national-resource-guide-ver2.pdf>.

⁴⁸ Although these authorities are not limited or specific to Tribes, USDA has programs that may be used to accomplish goals of co-stewardship or utilized to protect or improve resources on Tribal lands.

⁴⁹ 16 U.S.C. § 3865 (2018).

⁵⁰ *Id.* § 3865d(b).

⁵¹ *Id.* § 3865b.

⁵² *Id.* § 3865c.

ii. Agricultural Management Assistance (AMA) Program

Through AMA, NRCS provides technical and financial assistance to producers in certain designated states (where participation in federal crop insurance has been low) to construct or improve watershed management structures or irrigation structures; plant trees for windbreaks or for water quality improvement; mitigate financial risk through production diversification or resource conservation, including soil erosion control, integrated pest management, or transition to organic farming.⁵³

iii. Conservation Innovation Grants (CIG)

CIG offers grants to governmental and nongovernmental organizations and persons for projects that involve producers who are eligible for EQIP and stimulate innovative approaches for environmental enhancement in conjunction with agricultural production, such as credit/market systems for pollution reduction and carbon sequestration practices, and that leverage EQIP funds with funds from State and local government and private organizations.⁵⁴

iv. Conservation Stewardship Program (CSP)

CSP provides financial and technical assistance to participants for the conservation, protection, and improvement of soil, water, and other related natural resources, and for any similar conservation purposes.⁵⁵

v. Conservation Technical Assistance (CTA) Program

Provides for the technical assistance for protection of public and private land resources against soil erosion and related resource damage.⁵⁶

vi. Emergency Watershed Program (EWP)

EWP provides technical and financial assistance, including purchase of floodplain easements, for emergency flood control measures to protect watersheds affected by natural disasters. Recovery projects begin with a local sponsor.⁵⁷

vii. Environmental Quality Incentives Program (EQIP)

⁵³ 7 U.S.C. § 1524(b) (2018).

⁵⁴ 16 U.S.C. § 3839aa-8 (West 2022).

⁵⁵ 16 U.S.C. §§ 3839aa-21 - 3839aa-24 (2018).

⁵⁶ 16 U.S.C. §§ 590a-590f, 590q (2018).

⁵⁷ 16 U.S.C. § 2203 (2018); 33 U.S.C. § 701b-1 (2018).

EQIP provides technical and financial assistance to farmers/ranchers to protect/improve soil, water, and related natural resources, including grazing lands, wetlands, and wildlife habitat.⁵⁸

viii. Healthy Forests Reserve Program (HFRP)

HFRP enrolls private lands through use of easements or 10-year cost-share agreements to promote recovery of threatened or endangered species, improve biodiversity, and enhance carbon sequestration. Indian tribes are eligible for HFRP and can enroll in 10-year cost-share agreements, 30-year contracts, 30-year easements and permanent easements.⁵⁹

ix. Regional Conservation Partnership Program (RCPP)

RCPP promotes the implementation of conservation activities through agreements with eligible partners, through conservation program contracts with producers, and easements with private landowners. RCPP helps implements conservation projects that may focus on water quality and quantity, soil erosion, wildlife habitat, drought mitigation and flood control or other regional priorities.⁶⁰

x. Voluntary Public Access and Habitat Incentives Program (VPA-HIP)

VPA-HIP is a competitive grant program that provides public access for wildlife-dependent recreation, including hunting or fishing, under programs implemented by State or Indian tribes.⁶¹

xi. Watershed Protection and Flood Prevention Program (WFPO)

WFPO authorizes the Secretary of Agriculture to provide technical and financial assistance to entities of state and local governments and tribes (project sponsors) to protect and restore watersheds up to 250,000 acres. This program provides for cooperation between the Federal government and the states and their political subdivisions to work together to prevent erosion; floodwater and sediment damage; to further the conservation development, use and disposal of water; and to further the conservation and proper use of land in authorized watersheds.⁶²

xii. Watershed Rehabilitation Program

The Watershed Rehabilitation Program helps project sponsors rehabilitate aging dams that are reaching the end of their design lives. Watershed and Flood Prevention (WFPO) and Watershed Rehab (REHAB) projects are sponsored by one or more local organizations.⁶³

⁵⁸ 16 U.S.C. § 3839aa (2018).

⁵⁹ 16 U.S.C. §§ 6571-6578 (2018).

⁶⁰ 16 U.S.C. § 3871 (2018).

⁶¹ 16 U.S.C. § 3839bb-5 (2018).

⁶² 16 U.S.C. §§ 1001-1009, 1012 (2018); 33 U.S.C. § 701b-1 (2018).

⁶³ 16 U.S.C. § 1012 (2018).

2. Consultation/Coordination Policies

i. Tribal Consultation - A Guide for NRCS Employees

This guide is intended to assist NRCS managers and staff whose duties include coordination and consultation of NRCS programs with American Indian and Alaska Native Sovereign Nations. The goal is to assure that Tribal governments, Tribal communities, and individual Tribal members have a sufficient opportunity for productive participation in planning and resource management decision-making.⁶⁴ This guide provides flexible suggestions for determining when, where, what kind, and how much consultation is needed.

D. Rural Development (RD)

USDA Rural Development does not have any specific Tribal co-stewardship programs but has program funding that may be used to protect or improve resources on tribal lands. Federally recognized Indian Tribes are eligible to competitively apply for many RD programs including Housing Programs, Community Facilities programs, Water and Environmental programs, and Rural Business and Economic Development programs. The following are examples of program authorities utilized by Tribes to achieve infrastructure goals.

1. Authorities

i. Native American Housing Enhancement Act of 2005

Title VI ((Civil Rights Act of 1964) and Title VIII (Civil Rights Act of 1968) requirements do not apply to actions under the Native American Housing and Self-Determination Act (NAHASDA), as amended, by federally recognized Indian tribes and their tribally designated housing entities (TDHE).⁶⁵ The Native American Housing Enhancement Act of 2005, Pub. L. 109-136, amended the Housing Act of 1949 and extended exemptions in NAHASDA from Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968 to federally-recognized Indian tribes and instrumentalities of a tribe who apply to participate in USDA housing loan programs.⁶⁶ Because housing programs operated by Tribes or their instrumentalities on reservations and other Indian areas are intended to serve the housing needs of Native Americans, the amendments to the Housing Act of 1949 specifically exempt the Tribes and their designated housing entities from these civil rights statutes in carrying out affordable housing activities under the Housing Act of 1949.

ii. ReConnect Loan and Grant Program

⁶⁴ NATURAL RES. CONSERVATION SERV., TRIBAL CONSULTATION: A GUIDE FOR NATURAL RES. CONSERVATION SERV. EMPLOYEES (2009), *available at* https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_021895.pdf.

⁶⁵ *See* 24 C.F.R. § 1000.12(d).

⁶⁶ *See* 42 U.S.C. § 1490t (2018).

The ReConnect Program provides loans, grants, and loan-grant combinations to bring high-speed internet to rural areas that lack sufficient access to broadband.⁶⁷ ReConnect Program funds can be used to fund the costs of construction, improvement, or acquisition of facilities and equipment needed to provide broadband service. Tribal applicants may request the following Substantially Underserved Trust Area (SUTA) considerations under the ReConnect Program: 1) Interest rates as low as 2 percent; 2) Extended repayment terms. The ReConnect Program may offer 100 percent grants without a matching requirement to Tribal applicants.

iii. Tribal College Initiatives Grant

Listed 1994 Land Grant Institutions (Tribal Colleges) are eligible recipients under 7 U.S.C. § 1926(a)(25) for funds to make capital improvements to their educational facilities and to purchase equipment.⁶⁸ Funds can be used by Tribal Colleges for infrastructure improvements, to purchase equipment and to develop essential community facilities.⁶⁹ Eligible community facilities projects have included: schools, education equipment, libraries, dorms, renovation and improvements, vehicles and major equipment, education and cultural projects.

iv. Section 502 Relending Pilot Program

USDA is partnering with Community Development Financial Institutions (CDFIs) that have extensive experience working in Native American communities in North and South Dakota. The Department will loan \$800,000 each to Mazaska Owecaso Otipit Financial and to Four Bands Community Fund to target the funding in persistent poverty counties in the two states.⁷⁰ The organizations are relending the money to eligible homebuyers for mortgages on South Dakota and some North Dakota Tribal trust lands.⁷¹ Mazaska Owecaso Otipit Financial and Four Bands Community Fund also will service the mortgage loans after they are made.⁷²

v. Community Facilities Loans and Grants

Community Facilities Programs offer direct loans, loan guarantees and grants to develop or improve essential public services and facilities in communities across rural America.⁷³ These amenities help increase the competitiveness of rural communities in attracting and retaining businesses that provide employment and services for their residents. Public bodies, non-profit organizations and federally recognized American Indian Tribes can use the funds to construct,

⁶⁷ 7 C.F.R. Part 1740.

⁶⁸ 7 C.F.R. § 1926(a)(25).

⁶⁹ 7 C.F.R. § 3570.62(a).

⁷⁰ Press Release, U.S. Dep't of Agric., USDA Announces Pilot Program to Increase Homeownership Opportunities on Native Lands (May 31, 2018), *available at* <https://www.usda.gov/media/press-releases/2018/05/31/usda-announces-pilot-program-increase-homeownership-opportunities>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ 7 C.F.R. § 1942, Subpart A (loans); 7 C.F.R. § 3570, Subpart A (grants).

expand or improve facilities that provide health care, education, public safety, and public services. Projects include fire and rescue stations, village and town halls, health care clinics, hospitals, adult and childcare centers, assisted living facilities, rehabilitation centers, public buildings, schools, libraries, and many other community-based initiatives. Financing may also cover the costs for land acquisition, professional fees, and purchase of equipment.

2. Consultation/Coordination Policies

i Rural Development Instruction 1970-H

Instruction 1970-H provides RD employees with guidance on how to consult with Tribes to comply with the National Historic Preservation Act (NHPA).⁷⁴

ii. Collaborating for Prosperity with American Indians and Alaska Natives Rural Development Programs for Tribes, Tribal Families, Children, and Communities (2019 Guide)⁷⁵

E. Food and Nutrition Service

1. Authorities

i. Food Distribution Program on Indian Reservations (FDPIR)

Section 4003(a) of the Agriculture Improvement Act of 2018 requires USDA to pay 80% of administration costs for FDPIR.⁷⁶ USDA must waive the match requirement if a Tribal government is financially burdened or unable to meet the match requirement. The Act adds regionally grown foods to the traditional foods purchase provision and requires USDA to purchase traditional foods cost-effectively. Section 4003(b) of the Agriculture Improvement Act of 2018 authorizes funding for demonstration projects for Tribal organizations to enter 638 contracts to procure traditional foods for FDPIR packages.

Supplemental Nutrition Assistance Program (SNAP) Section 4205 of the Agriculture Improvement Act of 2018 supports projects to increase the purchase of fruits and vegetables among low-income consumers participating in SNAP by providing incentives at the point of purchase (Gus Schumacher Nutrition Incentive Program).⁷⁷ Tribal agency grantees may use funds provided to the Tribe or Tribal organization to satisfy all or part of the non-Federal share.⁷⁸

⁷⁴ RURAL DEV. RD INSTRUCTION 1970-H, ENVIRONMENTAL: HISTORIC AND CULTURAL RESOURCES (2016), *available at* <https://www.rd.usda.gov/files/1970h.pdf>.

⁷⁵ RURAL DEV., RD-19004, COLLABORATING FOR PROSPERITY WITH AMERICAN INDIANS AND ALASKA NATIVES (2019), *available at* https://www.rd.usda.gov/files/508_RD_TribalReport_2019.pdf.

⁷⁶ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 4003(a), 132 Stat. 4490, 4624.

⁷⁷ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 4205, 132 Stat. 4490, 4656.

⁷⁸ 7 C.F.R. § 281.9.

In 2021, Senators Smith and Rounds introduced bipartisan legislation to amend the ISDEAA to give Tribes the ability to administer SNAP programs through 638 contracts (SNAP Tribal Food Sovereignty Act).⁷⁹

2. Consultation/Coordination Policies

- i. FNS relies on Departmental documents/policies.

F. Farm Service Agency

USDA Farm Service Agency does not have any specific Tribal co-stewardship programs but has programs funding that may be used to protect or improve resources on Tribal lands. Federally recognized Indian Tribes are eligible to competitively apply for many FSA programs. The following are some examples of program authorities utilized by Tribes to achieve infrastructure goals:

1. Authorities

- i. Tribal Land Acquisition Program (ITLAP)

ITLAP loans assist Native American Tribes or Tribal corporations with the acquisition of land interests within the Tribal reservation or in an Alaskan community as set forth in 7 CFR Part 770.⁸⁰ Loan funds may be used to acquire land, land interests and appurtenances which will be used for the benefit of the Tribe or its members, pay costs for loan closing, and refinance non-USDA debts the applicant incurred to purchase the land in certain situations.⁸¹

- ii. Highly Fractionated Indian Land Program (HFIL)

The Highly Fractionated Indian Land Loan Program (HFIL) provides a way for Tribes and Tribal members to obtain loans to purchase fractionated land interests through intermediary lenders.⁸² To be eligible for HFIL, an intermediary lender may be a bank, credit union or other financial or tribal institution approved by the Farm Service Agency (FSA) to participate in HFIL. Intermediary lenders must have knowledge and familiarity of working with Indian Country and experience working with Bureau of Indian Affairs. An ultimate recipient is a Native American Tribe, Tribal entity, or a member of either that receives a loan from an intermediary lender's HFIL revolving fund.

- iii. Farm Ownership (FO) Direct and Guaranteed Loan Programs

⁷⁹ SNAP Tribal Food Sovereignty Act, S. 2757, 117th Cong. (2021).

⁸⁰ 7 C.F.R. Part 770.

⁸¹ *Id.*

⁸² 7 C.F.R. § 769.

The FO direct and guaranteed loan program provides a way for qualifying Tribal members to obtain loans to purchase land, including land held in trust or having fractionated ownership interests.⁸³

2. Consultation/Coordination Policies

i. FSA Notice AO 1803 - AI/AN Outreach Responsibilities⁸⁴

This notice, last issued on January 18, 2022, educates FSA employees of responsibilities when working with Tribal governments, Tribal land grant colleges and universities, and citizens, and provides guidance on working with Tribes, NRCS, and RD to provide FSA presence at sub-offices on reservations as determined at the local level.⁸⁵

G. National Institute of Food and Agriculture

1. Authorities

i. New Beginnings for Tribal Students

Section 7120 of the Agriculture Improvement Act of 2018 (P.L. 115-334) amended the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (7 U.S.C. § 3221 *et seq.*) to add section 1450, 7 U.S.C. § 3222e, to authorize the New Beginning for Tribal Students (NBTS) competitive grants program. This legislation authorized the Secretary to make competitive grants to land-grant colleges and universities to provide support targeted at Tribal students.⁸⁶ Land-grant colleges and universities include 1862, 1890 and 1994 land-grant institutions. Tribal student is defined in this legislation as a student at a land-grant college or university that is a member of an Indian Tribe as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C 5304). The maximum amount allowable per state is \$500,000 per year.

ii. Tribal Equity Grants Program

Authority for this program is contained in the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. § 301 note) as amended by the Agricultural Research, Extension, and Education Reform Act of 1998 (7 U.S.C. § 7601 note).⁸⁷ Under this authority, appropriated funds are to be awarded to the 1994 institutions for education capacity building and funds are to be distributed equally among institutions that meet eligibility requirements. The Tribal Colleges Education

⁸³ 7 C.F.R. §§ 764, 762.

⁸⁴ Available at https://www.fsa.usda.gov/Internet/FSA_Notice/ao_1803.pdf.

⁸⁵ FARM SERV. AGENCY, NOTICE AO-1764, AMERICAN INDIAN ALASKA NATIVE (AI/AN) OUTREACH RESPONSIBILITIES (2020).

⁸⁶ 7 U.S.C. § 3222e (2018).

⁸⁷ Equity in Educational Land Grant Status Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (current version at 7 U.S.C. § 7601 note (2018)).

Equity Grants (TCEG) program is designed to help build Tribal education capacity in the food and agricultural sciences for Native Alaskan and American Indian students. TCEG teaching applications must demonstrably incorporate a Tribal leadership development component to equip students with technical and leadership abilities upon graduation.

iii. Tribal Extension Grant Capacity Program (TCEP-CA)

This program is authorized under Section 534(b) of the Equity in Educational Land-Grant Status Act of 1994 (7 U.S.C. § 301 note), as amended by the Agricultural Research, Extension, and Education Reform Act of 1998 (AREERA) (7 U.S.C. § 7601).⁸⁸ This section amends Section 3 of the Act of May 8, 1914 (Smith-Lever Act) (7 U.S.C. § 341 *et seq.*), as amended. Under this authority, appropriated funds are to be awarded to the 1994 Land-Grant Institutions (hereinafter referred to as 1994 Institutions) for extension work and funds are to be distributed based on a competitive application process. The purpose of the TCEP-CA is to give Tribal communities opportunities for enhanced Traditional Ecological Knowledge, agricultural productivity, community resilience, economic growth, and youth development by extending the reach of innovations in research and technology and enhancing informal, local educational programming.

iv. Tribal Colleges Research Grant Program

Funding from this program allows Tribal Colleges to address the questions that matter to these communities such as protecting reservation forests or monitoring water quality.⁸⁹ Projects may help a Tribe improve bison herd productivity, discover whether traditional plants can play a role in managing diabetes or control invasive species. The grant's partnership requirement ensures that other federal and Land-Grant research entities share resources and knowledge with Tribal Colleges. In addition, this grant places an emphasis on training students in science. There are three types of funding available through this grant. New Discovery supports sophisticated scientific inquiry that could be published in a peer-reviewed journal. Capacity level grants allow the 1994 Land-Grant to respond directly to a concern of their reservation. Student Inquiry funding allows a Tribal college student to build a research project and present the results under the guidance of a 1994 Land-Grant faculty member. The visiting scholar option allows the federal or Land-Grant partner to spend a sabbatical at the 1994 Land-Grant teaching or mentoring to build the Tribal college's research capacity. A 1994 Land-Grant faculty member may also receive a grant to study optimal ways to teach Native American students in sciences as they relate to health, conservation, and agriculture.

v. Federally Recognized Tribes Extension Program (FRTEP)

⁸⁸ Equity in Educational Land Grant Status Act of 1994, Pub. L. No. 103-382, § 534(b), 108 Stat. 3518 (current version at 7 U.S.C. § 7601 (2018)).

⁸⁹ 7 U.S.C. § 301 note (2018).

The Secretary of Agriculture, acting through the National Institute of Food and Agriculture (NIFA), is responsible for establishing appropriate extension education programs on Indian reservations and within Tribal jurisdictions.⁹⁰ This program was established under Section 3(d) of the Smith-Lever Act, Pub. L. No. 63-95, ch. 79, 38 Stat. 372 (1914). Section 7403 of the Food, Conservation, and Energy Act of 2008 (FCEA) amended section 3(d) of the Smith-Lever Act to require funds to be awarded competitively.⁹¹ The purpose and intent of this program is to establish an Extension presence and support Extension outreach on Federally Recognized Indian Reservations and Tribal jurisdictions of Federally Recognized Tribes. Priority will be given to projects that have been funded by FRTEP in the past to ensure continuity of service to Tribal and reservation communities if they are deemed to have merit by the review panel. This program seeks to continue the Land Grant mission of providing education and research-based knowledge to those who might not otherwise receive it.

2. Consultation/Coordination Policies

- i. NIFA relies on Departmental documents/policies.

IV. OTHER GUIDANCE AND AUTHORITIES

A. White House Guidance

1. EO 13007, *Indian Sacred Sites* (May 24, 1996)

EO 13007 instructs federal land managing agencies to accommodate access to, and ceremonial use of, Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites.⁹² Sacred sites are defined as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site."⁹³ As set forth in Section 1 of EO 13007:

Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2)

⁹⁰ 7 U.S.C. § 5930 (2018).

⁹¹ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 7403, 122 Stat. 1651, 1664 (2008).

⁹² EO 13,007, 61 Fed. Reg. 26,771 (1996).

⁹³ *Id.* at 26,771.

avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.⁹⁴

Section 2(a) of the EO requires agencies to develop procedures for reasonable notification of proposed actions or land management policies that may restrict access to or ceremonial use of, or adversely affect, sacred sites.⁹⁵

2. EO 13175, *Consultation and Coordination with Indian Tribal Governments* (Nov. 6, 2000)

This EO charges all executive departments and agencies with engaging in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications.⁹⁶ The EO sets forth the fundamental principles to be taken into consideration in policy development (Section 2) and policymaking criteria to which federal agencies “shall adhere, to the extent permitted by law . . . when formulating and implementing policies that have tribal implications” (Section 3).⁹⁷ Section 5 of the EO sets forth consultation process requirements.⁹⁸

3. EO 13352, *Facilitation of Cooperative Conservation* (Aug. 26, 2004)

As set forth in Section 1 of this EO, “[t]he purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.”

Section 3 of this EO requires USDA and other Departments to:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ EO 13,175, 65 Fed. Reg. 67,249 (2000).

⁹⁷ *Id.* at 67,249.

⁹⁸ *Id.* at 67,250-251.

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.⁹⁹

4. EO 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021)

This EO seeks to advance equity across the federal government by defining equity and underserved communities and describing the responsibility of the Domestic Policy Council regarding incorporation of “equity principles, policies, and approaches across the Federal Government. This will include efforts to remove systemic barriers to and provide equal access to opportunities and benefits, identify communities the Federal Government has underserved, and develop policies designed to advance equity for those communities.”¹⁰⁰ Methods of assessing equity and conducting an assessment are a focal point of the EO, as is the consideration of equity in allocating resources and making available benefits and opportunities associated with government programs.¹⁰¹ Section 8 requires agencies to “consult with members of communities that have been historically underrepresented in the Federal Government and underserved by, or subject to discrimination in, Federal policies and programs,” and section 9 establishes the “Equitable Data Working Group.”¹⁰²

5. EO 14008, Tackling the Climate Crisis at Home and Abroad, Justice40 Initiative (Jan. 27, 2021)

This lengthy EO sets forth a national blueprint for addressing climate change, recognizing that Tribal interests may be threatened and in some instances are disproportionately harmed.¹⁰³ Assistance to Tribes, engagement with tribes, and consideration of Tribal interests in addressing the risks and implications of climate change are specifically highlighted.¹⁰⁴

6. Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments (Apr. 29, 1994)

This Memorandum reaffirms the commitment of the federal government to operate within a government-to-government relationship with federally recognized American Indian and Alaska

⁹⁹ EO 13,352, 69 Fed. Reg. 52,989, 52,989 (2004).

¹⁰⁰ EO 13,985, 86 Fed. Reg. 7,009, 7,010 (2021).

¹⁰¹ *Id.*

¹⁰² *Id.* at 7,011-12.

¹⁰³ EO 14,008, 86 Fed. Reg. 7,619 (2021).

¹⁰⁴ *Id.*

Native Tribes, and to advance self-governance for such Tribes.¹⁰⁵ The Memorandum directs each executive department and agency, to the greatest extent practicable and to the extent permitted by law, to consult with Tribal governments prior to taking actions that have substantial direct effect on federally recognized Tribal governments.¹⁰⁶ In order to ensure that the rights of sovereign Tribal governments are fully respected, all such consultations are to be open and candid so that Tribal governments may evaluate for themselves the potential impact of relevant proposals.¹⁰⁷

7. Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021)

The Memorandum requires the head of each agency to prepare and submit to OMB a detailed plan of actions the agency will take to implement the policies and directives of EO 13175 and designate an appropriate agency official to coordinate implementation of the plan and preparation of progress reports.¹⁰⁸ The agency is also required to submit an annual progress report to OMB on the status of each action included in the agency's plan, together with any proposed updates to its plan.¹⁰⁹

V. CONCLUSION

USDA occupies a unique role in the federal government with respect to Native American communities as it administers programs concerning natural resources, food, and fiber that touch almost every aspect of life. As directed by JSO 3403 Section 1(d), this document provides a legal review of “current land, water, and wildlife treaty responsibilities and authorities that can support co-stewardship and Tribal stewardship.” This review documents the diverse authorities available to USDA to support Native American communities. This document does not purport to provide a thoroughly scoped Tribe-by-Tribe treaty analysis in the context of each of the USDA authorities to support co-stewardship and Tribal stewardship. Nor does the document purport to provide a thorough analysis of USDA's very limited authorities to support land transfer to Tribes.

¹⁰⁵ Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994).

¹⁰⁶ *Id.* at 22,952.

¹⁰⁷ *Id.*

¹⁰⁸ Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7,491 (2021).

¹⁰⁹ *Id.* at 7,491-492.