



# OFFICE OF THE INSPECTOR GENERAL

U.S. NUCLEAR REGULATORY COMMISSION  
DEFENSE NUCLEAR FACILITIES SAFETY BOARD

## Audit of NRC's Consultation Practices With Federally Recognized Native American Tribal Governments

OIG-18-A-10  
April 4, 2018



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**UNITED STATES**  
**NUCLEAR REGULATORY COMMISSION**  
WASHINGTON, D.C. 20555-0001

**OFFICE OF THE  
INSPECTOR GENERAL**

April 4, 2018

**MEMORANDUM TO:** Victor M. McCree  
Executive Director for Operations

**FROM:** Dr. Brett M. Baker */RA/*  
Assistant Inspector General for Audits

**SUBJECT:** AUDIT OF NRC'S CONSULTATION PRACTICES WITH  
FEDERALLY RECOGNIZED NATIVE AMERICAN TRIBAL  
GOVERNMENTS (OIG-18-A-10)

Attached is the Office of the Inspector General's (OIG) audit report titled *Audit of NRC's Consultation Practices With Federally Recognized Native American Tribal Governments*.

The report presents the results of the subject audit. Following the March 26, 2018, exit conference, agency staff indicated that they had no formal comments for inclusion in this report.

Please provide information on actions taken or planned on each of the recommendations within 30 days of the date of this memorandum. Actions taken or planned are subject to OIG followup as stated in Management Directive 6.1.

We appreciate the cooperation extended to us by members of your staff during the audit. If you have any questions or comments about our report, please contact me at (301) 415-5915 or Sherri Miotla, Team Leader, at (301) 415-5914.

Attachment: As stated



# Office of the Inspector General

U.S. Nuclear Regulatory Commission  
Defense Nuclear Facilities Safety Board

OIG-18-A-10  
April 4, 2018

## Results in Brief

### Why We Did This Review

The United States (U.S.) Federal Government has a unique legal and political relationship with Native American Tribes (Tribes) that arises from the U.S. Constitution. The Federal Government recognizes Tribes as domestic sovereign nations, and therefore, has acknowledged the inherent authority of Tribes to govern themselves.

The U.S. Nuclear Regulatory Commission (NRC) conducts outreach to keep Tribes informed about the agency's actions and plans. NRC is required, by the National Historic Preservation Act of 1966 (NHPA), to consult with Tribes that attach religious or cultural significance to properties affected by NRC actions.

The Federal, State, and Tribal Liaison Branch (FSTB) is responsible for helping to facilitate and coordinate any Tribal participation in relevant NRC activities.

The audit objective was to determine whether NRC fulfills its Tribal outreach and consultation responsibilities and requirements.

### *Audit of NRC's Consultation Practices With Federally Recognized Native American Tribal Governments*

#### What We Found

NRC fulfills its Tribal outreach and consultation responsibilities and requirements; however, opportunities for improvement exist. Specifically, NRC should (1) clearly define FSTB's roles and responsibilities, (2) update internal guidance to include FSTB when conducting Tribal outreach and consultations, (3) establish qualification requirements for FSTB and training requirements for other NRC staff, and (4) include sufficient resources to allow for necessary outreach and consultation.

NRC staff do not consistently coordinate with FSTB even though the agency is to use all available resources to make its programs run more effectively and efficiently. This occurs because NRC management does not provide sufficient attention to Tribal outreach and consultation practices. As a result, effective Tribal outreach and consultation are less likely to occur.

#### What We Recommend

This report makes five recommendations to (1) clearly define FSTB's role and responsibilities with regard to Tribal outreach and consultation, (2) update NRC guidance to include FSTB when conducting Tribal outreach and consultations, (3) create a qualification program for FSTB, (4) require all staff and management that may interact with Tribes to take Tribal relations training, and (5) include sufficient resources to allow for necessary outreach and consultation activities by FSTB staff.

Agency management stated their general agreement with the findings and recommendations in this report.

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## TABLE OF CONTENTS

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<u>ABBREVIATIONS AND ACRONYMS</u> .....	i
I. <u>BACKGROUND</u> .....	1
II. <u>OBJECTIVE</u> .....	8
III. <u>FINDING</u> .....	8
<u>Inconsistent Coordination Between NRC Staff and FSTB</u> .....	8
<u>Recommendations</u> .....	20
IV. <u>AGENCY COMMENTS</u> .....	21
<b>APPENDIXES</b>	
A. <u>EXECUTIVE ORDERS AND TREATIES</u> .....	22
B. <u>OBJECTIVE, SCOPE, AND METHODOLOGY</u> .....	24
<u>TO REPORT FRAUD, WASTE, OR ABUSE</u> .....	26
<u>COMMENTS AND SUGGESTIONS</u> .....	26

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## **ABBREVIATIONS AND ACRONYMS**

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ACHP	Advisory Council on Historic Preservation
Board	Atomic Licensing Safety Board
EPA	Environmental Protection Agency
FSTB	Federal, State, and Tribal Liaison Branch
FY	Fiscal Year
MD	Management Directive
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NMSS	Office of Nuclear Material Safety and Safeguards
NRC	Nuclear Regulatory Commission
OIG	Office of the Inspector General
U.S.	United States

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## I. BACKGROUND

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The U.S. Federal Government has a unique legal and political relationship with Tribes that arises from the U.S. Constitution. The Federal Government recognizes Tribes as domestic sovereign nations, and therefore, has acknowledged the inherent authority of Tribes to govern themselves. The Federal Government has a trust responsibility to federally recognized Tribes, which establishes fiduciary obligations to the Tribes, including duties to protect Tribal lands, and cultural and natural resources for the benefit of Tribes. Trust responsibility applies to all agencies that interact with Tribes, including the NRC. Over the years, the Federal Government has refined the obligation of agencies to interact with Tribes on a government-to-government basis in a series of laws and executive orders, all of which direct U.S. Federal agencies to engage in consultation with Tribes. In establishing a government-to-government relationship with federally recognized Tribal governments, NRC has acknowledged the status of Tribes as domestic, dependent sovereign nations, and as being distinct from the status of stakeholders, nongovernmental organizations, or members of the general public.

### **Federal Recognition**

As of December 31, 2017, there were 567 federally recognized Tribes in the United States. [See Figure 1.] NRC provided the Office of the Inspector General (OIG) a list of Tribes it consulted with over the past 5 years. NRC management stated these consultations begin when Tribes respond to NRC's correspondence and express their interest to continue communications. Of the 567 federally recognized Tribes in the United States, NRC staff stated that they consulted with approximately 35 Tribes during this time period. Of those 35 Tribes, OIG reached out to 25 and spoke with 19.<sup>1</sup>

Historically, Tribes have been granted recognition through treaties, by Congress, or through administrative decisions within the executive branch. The current process for Federal recognition is rigorous and requires the petitioning Tribe to satisfy several mandatory criteria, including historical and continuous American Indian identity in a distinct community. Each of

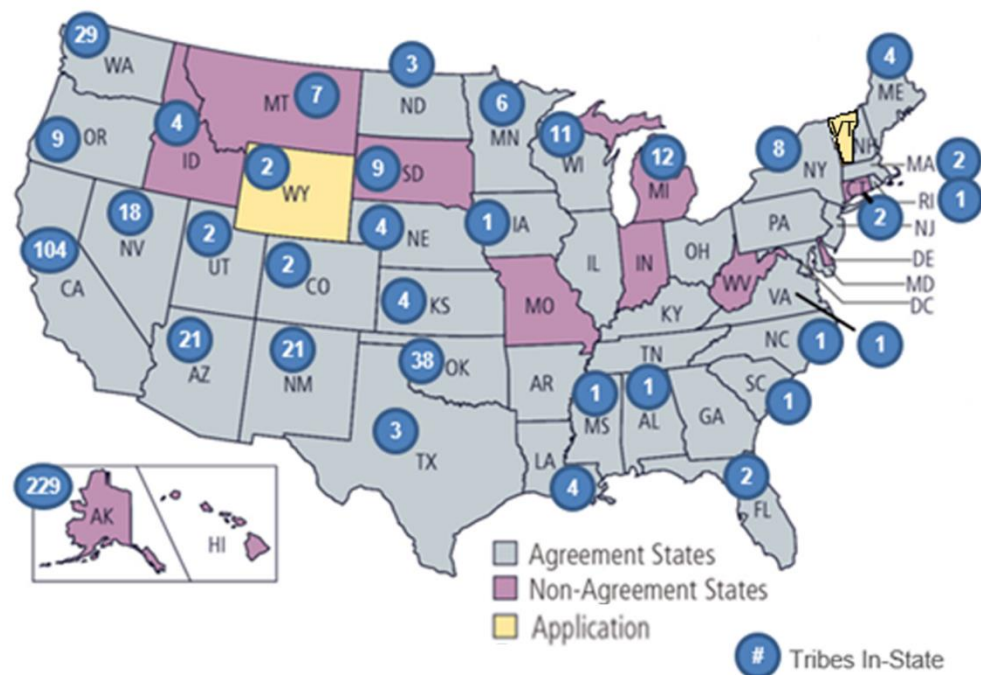
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<sup>1</sup> Six Tribes did not respond to OIG's interview requests.

the criteria requires anthropological, historical, and genealogical evidence. The majority of petitioners do not meet these strict standards. There are several hundred groups seeking official Federal recognition – a process that can take decades to complete.

Federal recognition is important for Tribes because it formally establishes a government-to-government relationship. Status as a sovereign entity carries with it significant privileges, including exemptions from State and local jurisdiction. Additionally, federally recognized Tribes are eligible to participate in Federal assistance programs, which can provide funding for vital community services. For a map of where federally recognized Tribes are located within the United States, see Figure 1.

Figure 1: Federally Recognized Tribal Locations as of December 31, 2017



Source: NRC. Tribe locations courtesy of “[An Introduction: Tribal Nations and the United States](#)” by the National Congress of American Indians.

**Program Office**

NRC’s Office of Nuclear Material Safety and Safeguards (NMSS) is the lead program office for Tribal outreach and consultation. Specifically, the Federal, State, and Tribal Liaison Branch (FSTB) within NMSS is responsible for the following activities:

- Building and maintaining relationships with Tribes.
- Facilitating government-to-government consultation with Tribes for programmatic issues and performing general outreach to Tribes.
- Providing appropriate training of NRC staff prior to their interactions with Tribal governments.
- Facilitating communications with Tribal contacts by maintaining a database of Tribal contacts and their contact information.
- Maintaining an external Tribal Web portal.
- Helping to facilitate and coordinate any Tribal participation in relevant NRC activities.<sup>2</sup>

NRC has budgeted 4 full-time equivalents for fiscal year (FY) 2018 and 3 full-time equivalents for FY 2019 for FSTB to carry out its Tribal responsibilities.

In addition to NMSS, other NRC program offices, such as the Office of Nuclear Reactor Regulation, the Office of New Reactors, and NRC's regional offices interact with Tribes.

### **NRC Guidance and Policy**

NRC has three primary guidance/policy documents<sup>3</sup> including the *Tribal Policy Statement* issued in January 2017, the *Tribal Protocol Manual* issued in August 2017, and Management Directive (MD) 5.1, *Intergovernmental Consultation*, issued in April 1993.

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<sup>2</sup> FSTB has staff with other responsibilities not related to Tribes, such as serving as the primary contact for policy matters between NRC and Federal agencies, as well as State and local governments. For the purpose of this audit report, when discussing FSTB, OIG is only referring to the section of the branch that is involved with Tribal matters.

<sup>3</sup> Project managers who lead environmental reviews in NMSS, the Office of Nuclear Reactor Regulation, and the Office of New Reactors also use NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs*, and LIC-203, Revision 3, *Procedural Guidance for Preparing Categorical Exclusions, Environmental Assessments, and Considering Environmental Issues*.



*NRC's Tribal Policy Statement*

1. NRC recognizes the Federal trust relationship with and will uphold its trust responsibility to Indian Tribes.
2. NRC recognizes and is committed to government-to-government relationship with Indian Tribes.
3. NRC will conduct outreach to Indian Tribes.
4. NRC will engage in timely consultation.
5. NRC will coordinate with other Federal agencies.
6. NRC will encourage participation by state-recognized Tribes.

*NRC's Tribal Policy Statement* sets forth six principles. These principles promote effective government-to-government interactions with federally recognized Tribes, and encourage and facilitate Tribal involvement in the areas that NRC has jurisdiction. It seeks to provide agencywide principles to achieve

consistency, but also encourages custom-tailored approaches to consultation and coordination that reflect the situational circumstances and the preference of each Tribal government.

*NRC's Tribal Protocol Manual* is a reference tool produced from multiple sources, including interviews with NRC staff and management, other Federal agencies' personnel, and Tribal representatives who are experienced in working with Tribes. NRC management and staff are to use this manual to develop and maintain government-to-government relationships with Tribal governments. The manual assists NRC management and staff in recognizing that Tribes are unique governmental entities and provides information that can be used to create a more open and productive working relationship with Tribal governments.

MD 5.1 is NRC's policy to ensure appropriate consultation occurs at the earliest possible stage between NRC and Tribes regarding major interagency agreements, organizational changes, rules and regulations, statements of policy, guides, and standards that may have a significant impact on Tribes. The guidance primarily discusses organizational responsibilities and delegations of authority.

### **Outreach Versus Consultation**

NRC's regulatory actions that have the potential to affect Tribal interests offer both NRC and Tribes an opportunity to initiate outreach and consultation with one another.

*Outreach* indicates NRC staff's efforts to inform Tribes about the agency's actions and plans. Outreach includes sharing information and encouraging Tribal governments to communicate their concerns and interests to NRC staff. NRC is to conduct outreach to keep Tribes informed about the agency's actions and plans related to its regulatory actions that have substantial, direct effects on one or more Tribes.

NRC conducts outreach to keep Tribes informed about the agency's actions and plans by

- Participating in national and regional Tribal conferences and summits hosted by Federal agencies, Tribal governments, and Tribal organizations, as appropriate.
- Encouraging Tribal governments to communicate their preferences to NRC staff.
- Seeking to provide information about opportunities for Tribal participation in NRC meetings and advisory committees, as appropriate.
- Providing grants to Tribal universities and colleges.

*Consultation* means efforts to conduct meaningful and timely discussions between NRC and Tribal governments on NRC's regulatory actions that have substantial, direct effects on one or more Tribes, and those regulatory actions for which Tribal consultation is required under Federal statute.<sup>4</sup> Consultation

allows Tribes the opportunity to provide input on regulatory actions with Tribal implications and is different from outreach and public comment periods. NRC may consult with Tribes over any number of issues that could potentially affect Tribal lands. For example, in the past NRC has consulted with various Tribes regarding power reactor inspections,

Photo: Former NRC Senior Leadership Visiting the Standing Rock Sioux Tribe



Source: NRC

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<sup>4</sup> The *National Historic Preservation Act of 1966* (NHPA), as amended, was promulgated to coordinate public and private efforts to preserve significant historic and cultural resources.

power reactor license renewals, a proposed high level waste repository, and uranium mining and milling. The consultation process provides opportunities for appropriate Tribal officials to meet with NRC officials to achieve a mutual understanding between the Tribes and NRC of their respective interests and perspectives.

One significant difference between outreach and consultation is that consultation is a Federal requirement. The NHPA, specifically Section 106, requires Federal agencies to consult with Tribes that attach religious or cultural significance to properties affected by a Federal undertaking. The Tribes can provide information to help the Federal agency identify and evaluate historic properties, assess the effects of its undertakings on historic properties, and attempt to negotiate an outcome that will balance project needs and historic preservation values. In addition, the *National Environmental Policy Act of 1969* (NEPA)<sup>5</sup> is often associated with Tribal consultation even though NEPA does not have any consultation requirements. This happens because NHPA requirements are often fulfilled through the NEPA process. In addition to Federal statutes, there are several executive orders and treaties pertaining to Tribes. For more information, see Appendix A.

### Consultation Process

An applicant or licensee seeking NRC approval for a new license, or for a license renewal, will typically send NRC an application. Depending on the project, the application will be assigned to the appropriate NRC project manager.<sup>6</sup> While reviewing the application, one of the project manager's duties is to identify Tribes that could potentially be affected by the project. In identifying these Tribes, project managers may use several different resources such as FSTB and other NRC branches, outside Federal agencies such as the Bureau of Indian Affairs or the Advisory Council on Historic Preservation (ACHP), or State Historic Preservation Officers.<sup>7</sup> Project managers may also do their own research and look through

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<sup>5</sup> NEPA establishes a broad national framework for protecting the environment. There are no requirements for Tribal outreach or consultation in NEPA.

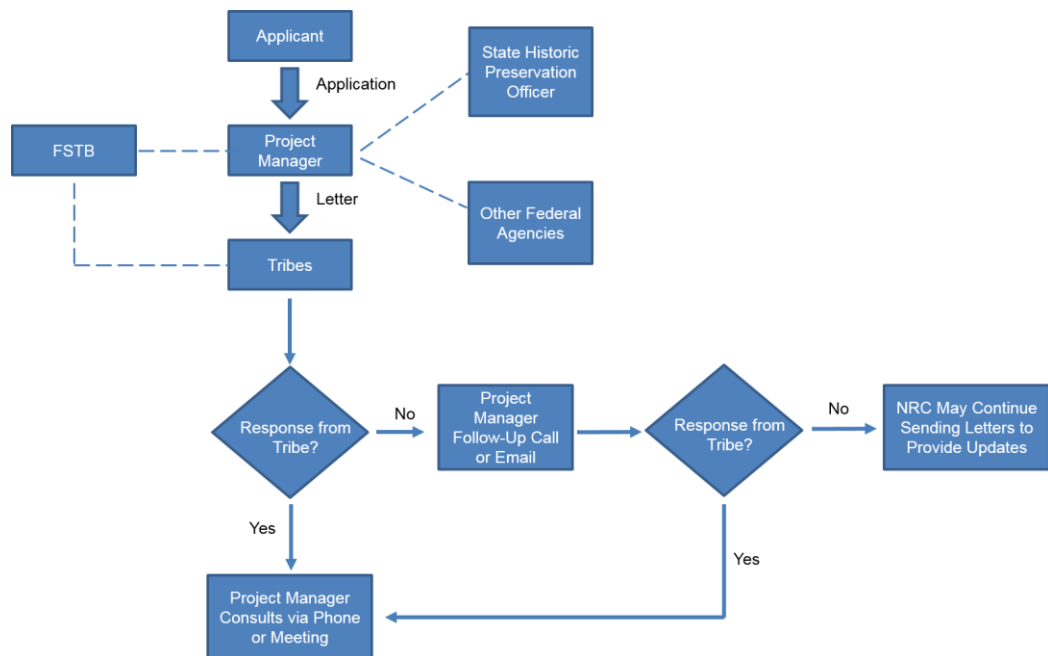
<sup>6</sup> In the Office of Nuclear Reactor Regulation, technical reviewers—as opposed to project managers—are responsible for conducting Section 106 consultations.

<sup>7</sup> State Historic Preservation Officers are designated by the Governor of their respective State and are responsible for administering the National Historic Preservation program at the State level. State Historic Preservation Officers consult with Federal agencies during NHPA Section 106 reviews.

different databases of Tribal territories. It is the project manager's discretion in deciding which resources to use to identify any affected Tribes.

Once the project manager identifies which Tribes could be affected by the project, he/she will send those Tribes a letter informing them of the upcoming project and asking the Tribes if they have any interest in a consultation. In collaboration with the project manager, FSTB may be asked to get involved and help oversee the relationship aspect of the Tribal consultation. However, current NRC requirements do not necessitate the inclusion of FSTB. Consultation officially begins after a Tribe affirmatively responds to NRC's invitation. See Figure 2 for a simplified version of the steps to initiate a formal consultation.

Figure 2: NRC's Steps to Initiate a Formal Consultation



Source: OIG generated

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## II. OBJECTIVE

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The audit objective was to determine whether NRC fulfills its Tribal outreach and consultation responsibilities and requirements. See Appendix B for information on the audit scope and methodology.

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## III. FINDING

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NRC fulfills its Tribal outreach and consultation responsibilities and requirements; however, opportunities for improvement exist. Specifically, NRC should

- Clearly define FSTB's roles and responsibilities.
- Update internal guidance to include FSTB when conducting Tribal outreach and consultations.
- Establish qualification requirements for FSTB and training requirements for other NRC staff.
- Include sufficient resources to allow for necessary outreach and consultation.

### **Inconsistent Coordination Between NRC Staff and FSTB**

NRC staff<sup>8</sup> do not consistently coordinate with FSTB even though the agency is to use all available resources to make its programs run more effectively and efficiently. This occurs because NRC management does not provide sufficient attention to Tribal outreach and consultation practices. As a result, effective Tribal outreach and consultation are less likely to occur.

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<sup>8</sup> For the purpose of this audit report, "NRC staff" refers to all staff aside from FSTB.

## What Is Required

### Agencies Should Use All Available Resources to Make Programs Run More Effectively and Efficiently

Project Aim states that NRC's goal is to improve agency processes by streamlining, standardizing, and clarifying roles and responsibilities. Project Aim seeks to transform NRC in order to increase efficiency and effectiveness and states that NRC's processes must use resources more wisely.

Launched in 2014, Project Aim is an NRC initiative with the goal to transform the agency to improve its effectiveness, efficiency, and agility. Specifically, Project Aim is looking to change NRC in four broad areas:

- 1) Right-sizing the agency;
- 2) Streamlining agency processes;
- 3) Making decisions in a more timely and effective manner; and
- 4) Establishing clearer agencywide priorities.

The *Government Accountability Office's Standards for Internal Control in the Federal Government* states agency management should consider how units interact in order to fulfill their overall responsibilities, while MD 5.1 states it is the organizational responsibility of NRC offices and regions to review activities that require Tribal consultation with the Office of State Programs.<sup>9</sup>

## What We Found

### Agency Staff Do Not Consistently Coordinate With FSTB

Although FSTB is the primary group within NRC responsible for interfacing with Tribes, NRC staff often do not involve FSTB when they reach out to Tribes for consultation purposes.

<sup>9</sup> What was previously known as the Office of State Programs is now divided into the following two NRC branches: the Agreement State branch and FSTB.

### Staff Concerns

One of the common concerns NRC staff consistently raised to OIG was uncertainty over FSTB's roles and responsibilities. Some of the responses from NRC project managers include

- FSTB has more of a role in consultation.
- FSTB focuses on visiting Tribes through general outreach.
- Staff use FSTB only as a facilitator with Tribes.
- Staff use FSTB only to find out which Tribes to contact when a new project arises.
- It is unclear whether FSTB does NHPA Section 106 consultations, or just government-to-government outreach.

Another issue for some project managers was the potential for creating unnecessary delays by including FSTB in the consultation process. Project managers were concerned about FSTB adding unnecessary work, and including FSTB in the consultation would just slow the process down. One project manager summarized these concerns by stating that it can be time consuming to explain things about the project to FSTB.

Aside from not understanding FSTB's role and FSTB causing potential delays, some project managers questioned if FSTB could provide meaningful assistance. For example, one project manager said FSTB was unable to assist her when she had specific Tribal questions. Another project manager said she did not work with FSTB as she believed she had more experience directly working with Tribes than FSTB staff. Thus, some project managers elected not to reach out to FSTB given their concerns with the information and insight FSTB could provide.

## Project Managers Have Limited Knowledge of Tribes

Photo: Standing Rock Sioux Horse Mask



Source: Photo taken by OIG

While some project managers expressed apprehension with FSTB's knowledge or experience, others admitted they, too, have limited knowledge of Tribes. NRC's project managers are primarily engineers who have backgrounds in areas such as nuclear engineering, electrical engineering, and health physics. They

generally are not experts on Tribes, cultural land resources, or archaeology.<sup>10</sup> Project managers primarily interact with Tribes because of the requirements set forth in Section 106 of NHPA.

Without knowledge of Tribal history, project managers may not identify and contact the correct Tribes for consultation. As one project manager said, "Identifying Tribes is more complex than it sounds." To know which Tribes could be affected by a potential licensing action can be a difficult task. For example, NRC staff are not only required to look at a Tribe's current geographical location, but they must also consider the Tribe's ancestral territory.

A Tribal representative stated that NRC project managers have no understanding of her Tribe's ancestral territory as they have never personally contacted her. She added that sending out generic letters does not work. The representative provided OIG a map<sup>11</sup> of her Tribe's ancestral territory and said that was the only source NRC should refer to—not any online databases. The Tribal representative questioned if NRC did not contact her when it should have on other projects since it did not have her ancestral territory map. She opined that the people who should

<sup>10</sup> One NRC office employs a project manager who is an archaeologist. NRC may also hire contractors with knowledge of Tribes, cultural land resources, or archaeology.

<sup>11</sup> OIG later confirmed NRC did not possess the map. After this confirmation, OIG provided FSTB staff with the map.



be reaching out to Tribes should be staff who are responsible for and understand Tribes, not project managers.

### FSTB May Reach Out to Tribes Earlier

When NRC's project managers consult with Tribes, the project managers cannot officially begin the Tribal consultation process until the applicant/licensee formally submits its application to NRC.<sup>12</sup> This practice may hinder NRC from effectively consulting with Tribes since project managers cannot reach out to Tribes and inform them of a project prior to receiving an application. This is a common Tribal complaint as applicants/licensees sometimes conduct studies and fieldwork for years before formally submitting an application. Therefore, Tribes do not feel they are included in the decisionmaking process until much later. Meanwhile, FSTB may conduct outreach with Tribes any time it wishes under the *Tribal Policy Statement*.<sup>13</sup> Thus, FSTB does not need to wait for the submittal of an application. By allowing FSTB staff to do more outreach under the *Tribal Policy Statement*, NRC can keep Tribes informed about its actions and plans that have substantial, direct effects on one or more Tribes. Therefore, Tribes could be engaged much sooner – even months or years prior to the receipt of an application.

### FSTB Should Be NRC's Tribal Experts

Though there have been instances where project managers did not receive the assistance they were looking for, FSTB is the only branch within NRC possessing the primary responsibility to work with Tribes. FSTB staff have been referred to by some as the "Tribal experts within the agency." As such, there have also been several instances where NRC staff have successfully coordinated with FSTB. For example, in 2017, members of FSTB coordinated with a senior resident inspector to conduct meetings and training for the Catawba Nation located near four nuclear power plants. FSTB staff also worked with NRC staff in 2015 to provide training to five different Tribal colleges. Numerous staff have also

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<sup>12</sup> This occurs because the billable hours associated with NRC project managers' work are specifically tied to the projects they work on, and until an applicant/licensee formally submits an application, there is no project.

<sup>13</sup> This occurs because FSTB does not perform work directly related to requests made by applicants/licensees (e.g., new license application or license renewal). Their work falls under general "Tribal outreach."

commented how invaluable FSTB can be, especially in identifying which Tribes to contact when an application is submitted.

However, as some FSTB staff noted, they cannot help project managers if the project managers do not contact FSTB. An FSTB staffer said FSTB almost discovers projects "by chance," and the way they hear of Tribal outreach issues is really "haphazard." Another opined that some branches are "protective" of their work and do not want any "outside interference," suggesting that NRC offices and divisions can be "siloes"<sup>14</sup>. Accordingly, FSTB is limited in its ability to provide its Tribal expertise to staff. This also prevents FSTB from taking on some of the project managers' workloads as Tribal coordination can take a considerable amount of time during the application process.

The Environmental Protection Agency (EPA) is known as the "gold standard" in working with Tribes according to one FSTB staffer. During an OIG interview with a senior EPA Tribal affairs official, the official opined that FSTB must be an active resource as opposed to a passive one. She said if NRC's project managers included FSTB staff, the branch could act as the coordinator and keep track of Tribal interactions and better address some of the Tribal consultation concerns.

### Tribal Concerns

Several Tribal representatives said that Tribes do not feel that NRC treats them as sovereign nations or upholds its trust responsibility and government-to-government relationship. Tribes have also commented that they prefer working with one NRC primary point of contact and to meet with NRC on a face-to-face basis, when practicable.

For example, a Tribal representative in South Dakota said NRC has misconstrued the government-to-government process. He said NRC has never come to his Tribal government meetings and that, in his view, NRC only held informational meetings with the Tribe. He also noted NRC conducted conference calls and considered the calls consultations. The Tribal representative said he did not agree with NRC's approach of using phone calls as consultations. He said no real consultation meetings ever

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<sup>14</sup> "Silo" refers to an organizational behavior that occurs when several departments or groups do not routinely coordinate or share information with others in the same organization working on related activities.

took place with NRC because NRC never met in-person with his Tribe. The representative stated the NRC project manager wanted only to move forward with the project. In his opinion, NRC's consultation phone calls are simply a way for NRC to say it complies with Section 106 of NHPA.

As previously mentioned, NRC's current consultation process consists of project managers identifying potential Tribes that may be impacted by an application or licensing action. The project manager will then send out letters to gauge a Tribe's interest in a consultation. If the Tribe(s) do not respond, the project manager may proceed with the application or licensing action as NRC is not required to wait a specified period of time for Tribal responses. Tribes are often unhappy with this process as they say they can be inundated with mail from numerous Federal agencies, and it can be very difficult to respond quickly to agencies.

## ***Why This Occurred***

### **NRC Management Does Not Provide Sufficient Attention to Tribal Outreach or Consultation Practices**

NRC management indicated that Tribal outreach and consultation are important; however, there is inadequate management attention to NRC's Tribal outreach and consultation practices.

#### Guidance

FSTB's roles and responsibilities are not formalized in written agency guidance. The guidance that currently addresses Tribal consultations, MD 5.1, does not mention FSTB by name. The MD was issued 25 years ago prior to the branch's creation.<sup>15</sup> Additionally, MD 9.15, *Organizations and Functions, Office of State and Tribal Programs*, has not been revised in nearly 14 years. It also does not identify FSTB, but rather refers to a defunct program in what is now part of NMSS. Aside from a short description on NRC's public Web site, there are no other guidance documents that clearly describe FSTB's role in relation to Tribal outreach and consultation.

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<sup>15</sup> NRC staff is currently updating MD 5.1.

Likewise, there is a lack of detailed staff guidance instructing how to integrate FSTB into the process and how to consult with Tribes. In fact, there is no clear agency guidance stating that NRC staff should incorporate FSTB into the Tribal consultation process. Staff claim there is still a lot of confusion because of the lack of clear agencywide policies and procedures. For example, several project managers stated that Tribes are often non-responsive to NRC's outreach, so they are not always clear on how to proceed. Project managers' questions include

- How many contact attempts should be made before proceeding with the licensing action?<sup>16</sup>
- How much time should be allotted to Tribes if more time is needed to complete a review?
- What level of NRC management should be included in consultations?
- How should Tribal concerns be addressed when NRC has yet to receive an application?

In addition to unclear guidance, various NRC organizations have created their own respective guidance, which could lead to inconsistencies in how staff consult with Tribes or integrate FSTB into the process. FSTB is currently trying to work with other NRC divisions to update its guidance to implement the principles of the *Tribal Policy Statement*. However, this will not necessarily address how to integrate FSTB into their processes since it is not required.

### Training

While NRC offers an on-line training course on Tribal relations,<sup>17</sup> NRC management and staff who may possibly interact with Tribes are not required to take the course. In April 2016, there was a one-time requirement for approximately 138 NRC employees to take the training. However, the list of required trainees did not include the FSTB branch chief or the division director at that time. Records also indicate that, while on the list, some senior managers did not complete the training.

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<sup>16</sup> Another EPA practice is to give Tribes a specified amount of time to respond to letters. In those letters are a timeline and an action plan. In addition to the letters, EPA created a LISTSERV where they also try to send all Tribal environmental directors a courtesy email that the agency will be consulting with their Tribal leadership.

<sup>17</sup> *Cultural Sensitivity Training: Engaging Native Americans in the NRC's Mission*.

Moreover, since that time, there has been no requirement for NRC employees to take the training even though there have been numerous changes in NRC staff and management involved with Tribes. Meanwhile, EPA requires all agency employees—including senior management—to take Tribal sensitivity training biennially.

Although FSTB staff have taken various training courses related to Tribal interactions such as NEPA and NHPA, they are not required to take any specific training or to be qualified in any particular areas. Yet, FSTB is the only branch within NRC whose primary responsibility is to work with Tribes. Several project managers expressed concern that FSTB staff are not fully qualified and may not be able to successfully support projects that affect Tribes. As such, FSTB staff's credibility is in question.

Succession planning is also important going forward as FSTB experiences staff turnover. Thus, a qualification program for new staff becomes even more important.

### Travel Budget

One reason FSTB's role may be unclear to NRC staff is that FSTB staff only occasionally travel to visit Tribes. In calendar years 2016 and 2017, FSTB made a total of 9 trips to visit Tribal representatives or attend Tribal conferences. FSTB staff attributed the limited travel to prioritization and budgetary concerns. FSTB shares their travel and training budget with the Agreement State Program Branch. The general feeling among FSTB staff is that the Agreement State Program Branch takes precedence over FSTB. According to an FSTB staffer, Tribal outreach is "ad hoc" and seems to be a lower priority. FSTB's travel expenditures, per the branch's document posted on NRC's Intranet, were estimated at \$2,975 for FY16 and \$14,617 for FY17.

OIG reviewed NMSS' FY 2018 and 2019 budget requests and noted that there was no funding allocated for FSTB travel in both years. When OIG questioned a senior NMSS manager about the lack of funds for Tribal outreach, the manager replied that outreach is not a significant resource expenditure and that there should be enough funding for it. The manager planned on following up with other NMSS management on the misunderstanding over the inadequate funding.

## ***Why This Is Important***

### **Effective Tribal Outreach and Consultation are Less Likely to Occur**

Without proper management attention, there is a decreased likelihood of NRC engaging in effective Tribal outreach and consultation. This could lead to more adversarial relationships with Tribes.

Tribes have stated that Federal agencies are inconsistent in the degree to which each agency is aware of, and implements, its responsibilities to engage with Tribes as sovereign nations.<sup>18</sup> Even where Federal responsibilities are explicit in law, regulation, or policy, Tribes asserted that Federal agencies often fail to fully implement them. Tribes further remarked that even the best written agency Tribal consultation policies are often poorly implemented. Tribes noted that often agencies neither treat Tribes as sovereigns nor afford Tribes the respect they would any other governmental entity. Tribes emphasized that they need to be consulted sooner, Federal staff need better training prior to working with Tribes, and consultation should be more consistent.

While these comments pointed toward the Federal Government in general, Tribes indicated to OIG that these views generally apply to NRC as well.

### **Greater Potential for Lawsuits Without Effective Communication**

NRC is currently in the midst of a Tribal lawsuit.<sup>19</sup> In 2009, a company filed an application for a uranium recovery facility in an area of Tribal interest, and in 2010, a Tribe challenged the license application. The Atomic Licensing Safety Board<sup>20</sup> (Board) granted a hearing in 2010 and admitted 9 contentions by the Tribe in 2013. The Board eventually resolved seven contentions in favor of the applicant and NRC staff, but found two deficiencies, including one that stated NRC staff's consultation

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<sup>18</sup> Department of the Army, Department of the Interior, and Department of Justice: [Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions](#), 2017.

<sup>19</sup> *Oglala Sioux Tribe v. NRC*, D.C. Circ. 17-1059.

<sup>20</sup> The Board is NRC's independent body charged with conducting adjudicatory hearings and deciding legal challenges to the agency's licensing and enforcement actions.

with the Tribe was insufficient to comply with NHPA obligations. As of February 2018, the Board has determined NRC staff's NHPA obligations have been satisfied but the case remains open on a NEPA issue concerning the impacts to Tribal resources. Meanwhile, another potential lawsuit regarding a different facility is pending and is currently under review by the Board.

While there are no assurances that effective Tribal outreach and consultation would prevent lawsuits, there is a higher probability that NRC could avoid Tribal lawsuits with productive communications and strong relationships with Tribes. Additionally, lawsuits negatively affect applicants due to the associated project delays and additional costs. Therefore, ensuring that NRC conducts proper Tribal outreach and establishes relationships with Tribes is vitally important.

Photo: Oglala Sioux Tribal Members Protesting a Uranium Recovery License Renewal



Source: NRC

### Lack of Formalized Knowledge Management

Knowledge management and transfer could be negatively affected as NRC staff and management change on a fairly regular basis. Likewise, Tribal Historic Preservation Officers and Tribal Chiefs can also frequently

change. As a result, it can be very difficult to maintain Tribal relationships, keep accurate Tribal contact records, and pass along the necessary knowledge to NRC staff to ensure effective communication. A project manager said for one consultation, her group was sending out letters to the wrong contact (the previous Tribal chief). She added that her group essentially relies on "institutional knowledge" and this knowledge should be formally captured.

### Conclusion

FSTB staff is responsible for building and maintaining Tribal relationships and could greatly assist in Tribal outreach and the consultation process. FSTB could potentially act in several different capacities such as

- Conducting the initial outreach.
- Establishing the Tribal trust relationship.
- Serving as the primary point-of-contact and liaison between Tribes and NRC staff (where appropriate).
- Educating Tribes about NRC and what it does and does not have authority over.
- Maintaining agencywide Tribal records.

However, none of this can be accomplished unless FSTB's role is clearly defined, FSTB is able to visit Tribes, and its staff is properly trained. Additionally, NRC staff must have clear guidance on how to integrate FSTB into the consultation process.

While there are areas for improvement, NRC has completed many successful activities in recent years related to Tribal outreach and consultation. NRC has excellent working relationships with certain Tribes such as Prairie Island Indian Community, Catawba Nation, and Seneca Nation. FSTB leads an internal Tribal working group that includes representatives from several different NRC offices and the Regions. FSTB, in coordination with staff from other NRC offices, continues to update NRC's *Tribal Protocol Manual* and completed, in 2017, NRC's *Tribal Policy Statement*. FSTB created an online mapping system to help identify Tribes more easily. NRC staff continue to add information to a new Tribal Toolbox public Web site (<https://Tribal.nrc.gov>) which should improve information sharing with Tribes.



NRC has met its statutory and regulatory requirements and obligations regarding Tribal outreach and consultation. However, it is important that NRC establish and improve on building strong relationships with Tribes by conducting more outreach and periodic face-to-face meetings. According to Tribal members, Federal policies, broken treaties, and cultural insensitivities displayed by the Federal Government have caused Tribes to generally mistrust Federal agencies. By conducting effective outreach and consultation with appropriate management attention, NRC can begin cultivating more positive working relationships with Tribes across the Nation.

### **Recommendations**

OIG recommends that the Executive Director for Operations

1. Update MD 5.1 to include FSTB when working with Tribes. The guidance should also clearly define FSTB's role and responsibilities with regard to Tribal outreach and consultation.
2. Update NRC office procedures to include more specific direction on how to coordinate with FSTB and how to work with Tribes.
3. Require all staff and management that may interact with Tribes to take Tribal relations training, as well as any other relevant training courses related to Tribes.
4. Develop and implement a qualification program that assures the minimum level of skills and knowledge required for each FSTB staff member to effectively interact with Tribes and other NRC staff.
5. Include sufficient resources to allow for necessary outreach and consultation activities by FSTB staff. This should be done, in part, by tracking FSTB travel expenditures to help better inform future travel budgets.

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## **IV. AGENCY COMMENTS**

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An exit conference was held with the agency on March 26, 2018. Prior to this meeting, after reviewing a discussion draft, agency management provided comments that have been incorporated into this report, as appropriate. Agency management then provided additional comments at the exit conference which have also been incorporated into this report, as appropriate. As a result, agency management stated their general agreement with the finding and recommendations in this report and opted not to provide formal comments for inclusion in this report.

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## EXECUTIVE ORDERS AND TREATIES

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### Executive Order 13175

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" was issued November 6, 2000, with the purpose of establishing regular and meaningful consultation and collaboration with Tribal officials to strengthen the United States government-to-government relationships with Tribes. As an independent regulatory agency, NRC is not required to implement Executive Order 13175. However, the Commission has adopted agency practices that ensure consultation and cooperation with Tribal governments, fully consistent with Executive Order 13175.

### Treaties

A treaty is a formal, written contract that defines the terms of an agreement between two sovereign nations. The following treaties illustrate some of the agreements between the U.S. Government and Tribes from 1778 to 1868:

- The Treaty with the Delawares in 1778 was the first historically significant treaty discussed and predates the U.S. Constitution. This treaty is generally considered the first official treaty between the United States and a Tribe. The treaty memorialized the parties' agreement to grant forgiveness, perpetuate friendship, acknowledge allegiance by the Delaware Nation during time of war, and provide free passage for U.S. troops through Delaware lands.
- The Treaty of New Echota established terms under which the entire Cherokee Nation was expected to move to westward Indian Territories. Although the Cherokee National Council did not approve the treaty, it was ratified by the U.S. Senate and became the legal basis for the forcible removal, known as the "Trail of Tears." Under the command of General Winfield Scott, some 7,000

U.S. soldiers marched the Indians more than 1,200 miles to Indian Territory in Oklahoma.

- The Treaty of Fort Laramie sought to obtain peace among the Plains Tribes to enable settlers to move west. It attempted to assign specific, defined territories to specific Tribal groups (e.g., Lakota, Dakota) among the Sioux Nation and establish safe passage for travelers, railroad workers, and settlers through the Plains and the Black Hills area. This treaty designated over 60 million acres as the Sioux reservation. However, due to a series of wars, treaties, the discovery of gold, and the construction of the first continental railroad, the Sioux lands dwindled down to less than 10 percent of that amount. This was the last treaty signed between the Federal Government and a Tribe and is still invoked by Tribes when territorial land issues arise.

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## OBJECTIVE, SCOPE, AND METHODOLOGY

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### Objective

The audit objective was to determine whether NRC fulfills its Tribal outreach and consultation responsibilities and requirements.

### Scope

This audit focused on NRC's outreach and consultation activities with federally recognized Tribes. We conducted this performance audit at NRC headquarters (Rockville, Maryland) and various Tribal sites from August 2017 to January 2018. Internal controls related to the audit objective were reviewed and analyzed.

### Methodology

OIG reviewed relevant Federal statutes, such as NEPA and NHPA, and NRC guidance and policy, namely the *Tribal Policy Statement*, the *Tribal Protocol Manual*, and MD 5.1.

OIG interviewed NRC staff and management to gain an understanding of roles, responsibilities, and processes related to Tribal outreach and consultation. Auditors interviewed staff from NMSS, the Office of New Reactors, the Office of Nuclear Reactor Regulation, the Office of the General Counsel, the Office of Nuclear Security and Incident Response, the Office of Small Business and Civil Rights, and Regions I, II, III, and IV. OIG spoke with other Federal agencies, EPA and ACHP, to learn about potential best practices for outreach and consultation.

NRC provided OIG a list of Tribes it has consulted with over the past 5 years. Of the 567 federally recognized Tribes in the U.S., NRC consulted with approximately 35 Tribes during this time period. Of those 35 Tribes, OIG reached out to 25 of them and spoke with 19. OIG also visited five Tribes located in North Dakota, South Dakota, Wyoming, and Oklahoma.

Additionally, OIG gained background information for this audit by taking a tour of the National Museum of the American Indian in Washington, District of Columbia, and attending a luncheon held by NRC's Native American Advisory Committee.

Throughout the audit, auditors considered the possibility of fraud, waste, or abuse in the program.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The audit was conducted by Sherri Miotla, Team Leader; Michael Blair, Audit Manager; Avinash Jaigobind, Audit Manager; Janelle Wiggs, Auditor; George Gusack, Auditor; and John Thorp, Senior Technical Advisor.

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## TO REPORT FRAUD, WASTE, OR ABUSE

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Office of the Inspector General  
Hotline Program  
Mail Stop O5-E13  
11555 Rockville Pike  
Rockville, MD 20852

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## COMMENTS AND SUGGESTIONS

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If you wish to provide comments on this report, please email OIG using this [link](#).

In addition, if you have suggestions for future OIG audits, please provide them using this [link](#).